

## Stevensville Special Town Council Meeting Minutes

for **MONDAY, OCTOBER 23, 2023, 6:00 PM 206 Buck Street, Town Hall**

1. Call to Order and Roll Call

Mayor Gibson called the meeting to order. Councilmembers Barker, Brown, Lowell and Michalson were all present.

2. Pledge of Allegiance

3. Public Comments (Public comment from citizens on items that are not on the agenda)

NONE

4. New Business

a. Informational: Update on the Town of Stevensville's Water Rights

Mayor Gibson: it has been a pleasure on working with Ross Miller over the past two years.

Ross Miller, Water Rights Attorney: Slight recap, you have the order from the water court in front of you denying our motion to amend the place of use for Well #1. The reason that we filed that motion is because very recently the town of Belgrade filed a motion to amend their water right and it was granted. We were the first town that I am aware of that used Belgrade as an example and precedence to file a motion to amend the place of use in water court. The difference between our motion and Belgrade's motion was. The reason that we were in front of the water court is what we call a pre-1973 water right meaning that it was a water right that was created and established prior to June 30, 1973, and that is a key date in Montana water law. That is the date that the 1972 constitution was enacted. The state constitution protects what we call pre-1973 water rights and they are under the jurisdiction of the water court. Any water rights after 1973 are under the jurisdiction of DNRC. And that is why we were in front of the water court because of Well #1 is a pre-1973 water right. So, the reason that I am talking about that is the difference about our facts of Well #1 and Belgrade's facts on their successful amendment is that Belgrade had planning documents and growth policy documents dating back to the early 1970's. that established and documented Belgrade's intention to grow their place of use. The court leaned heavily on that when they made their decision. The town did not have that type of documents or growth policies in documented form. Our earliest circa 2000 we had some planning action in the 1990's the court relied on that to deny our motion. This is a new area of law, and the pendulum is swinging back and forth a bit. The water court trying to put some side boards on what municipalities can do pre-1973 rights and what I am leading on this is that they want to see evidence that pre-dates June 30, 1973, and shows intention to grow and we just did not have that. Like I said, our documents were circa 2000 and those were the documents that we had. You kind of unfortunately when you are dealing with law that is established by case law you are kind of feeling out as you go. We could, the question before you tonight is whether or not to appeal that decision to the state supreme court, it is appealable and the date of order of denying is September 25<sup>th</sup> so we would have to file tomorrow or at the latest day after tomorrow. That is not filing the whole appeal or the briefing and all of that that goes along with that, it is just the

appeal of the notice to the court. How do you make that decision to appeal or not appeal and that is why I have put down the costs in the email in front of you tonight. The cost to appeal is right around \$40,000 and that would do it if the supreme court did not request oral argument and you do not know when file an appeal if you are going to get oral argument. You can request oral argument and the supreme court can deny it but even if you do not request oral argument the supreme court could ask for it. And that takes a bit of work to prepare for it and if the supreme court ordered oral argument that is another \$15,000-\$16,000. So those are the costs that it would take to handle an appeal, in terms of. It is darn near impossible to know if you are going to win on an appeal. I can tell you that this order denying was ordered by the chief judge of the water court Russ McElyea. He has a very strong track record in front of the supreme court he does not get overturned very often. The supreme court, this is my opinion, the supreme court looks very heavily to Judge McElyea in establishing Montana water law and they look at him as a very good judge. Our argument to do the appeal would be the states doctrine of municipal growth. When we filed this motion to amend, I felt strongly that we fell into that growing communities doctrine in Montana, it is for municipalities that file on water rights pre-1973 water rights and when they file those water rights it is basically that they are allowed to file n projected future growth, we felt that we , and part of future growth is geographic growth. We felt that we were part of that growth doctrine. It is strict case law, new law that came about in 2017 and that was in Helena. We are feeling it out as we go. I do not think that it would unrealistic to file an appeal, I wouldn't give it a strong chance of succeeding. The money that it would take to do that appeal what are some of the other options. The town does have some other options, Well 1 water right, it is interesting that all pre-1973 water rights the town failed to claim them in 1982 when it was required to claim pre-1973 rights. The town filed a late claim on those water rights in the 1990's, there was a bill in the legislature on late claims, but by doing that the town lost their priority date, all pre-1973 water rights have an effective date of July 1, 1973. In that time period between 1982 and 1986 the town failed to file the claim and then filed a late claim just to cover its bases, the town figured out this error, on those water rights, the same water rights that we filed for in water court the town also has a permit that was filed with DNRC in 1984. With this denial it might make it more attractive to file a change of use with DNRC. We are holding on to both of them until we get an expanded place of use from one of them. The town could file a change of use permit with DNRC on its permit and avoid the water court. Another attractive water right that the town has is the Burnt Fork surface water right. And the reason that those are attractive even though it was filed late, the water right itself has a July 1, 1973, priority date those old Burnt Fork rights are part of the old Fort Owen rights, and they are actually the oldest water rights in the state of Montana. 1852 priority date. All those old Fort Owen water rights are subject to a change agreement on the Supply ditch which you are actually given the priority date of the supply ditch water which is 1880's water. That water right because it is subject to the change agreement will get you back into an 1880's water right and that is a very attractive water right. If you are working with a limited amount of money as I am sure the town is. Instead of doing an appeal, it is not like you are out of luck, it is not like that, there are other options.

Mayor Gibson: in your opinion, the chances of winning the appeal are slim.

Ross Miller: less than 50/50, I mean again this stuff is impossible I would say somewhere in the 10-20%. If nothing else, you look at how many cases Judge McElyea overturned on.

Mayor Gibson: you and I talked about DNRC, is it a quicker route.

Ross Miller: one of the reasons that we went this route is because it was going to be our quickest route. DNRC is pretty slow, there is a new statute that has been passed in the last session that has forced DNRC to speed up their process. And I have not filed an application yet. I think that the effective date is the end of October. It is supposed to be faster, in the past the fastest with DNRC was 18 months.

Councilmember Michalson: if you deny the supreme court and then go with option one which is DNRC, number two being Burnt Fork, what is the cost. Are they both about the same, do you think.

Ross Miller: at some point you want to do them both but at this time the cheapest, lowest cost would be the change order permit some one water right. DNRC is ground water, and it is a deep ground water, Well #1 is deep water. Burnt Fork water is surface water, Well 1 water is deep ground water rights. We would have to do a whole other step and then have to change it to a mitigation water right and use that for a new water right permit. That is the two steps. Your Well #1 water is already deep water so it would just be one step.

Mayor Gibson:

b. Discussion/Decision: To Appeal or not Appeal the State of Montana Water Court Decision on the Towns Water Rights

Mayor Gibson: I would ask for a motion to file an appeal or go with another option.

Councilmember Lowell: I make a motion to not appeal the state of Montana water court decision.

Councilmember Michalson: can we amend that and do an option.

Mayor Gibson: we can do a motion to deny the appeal.

Councilmember Michalson: deny the appeal and go with option one that is DNRC.

Mayor Gibson: you want to make a motion to deny the appeal.

Councilmember Lowell: motion to not appeal the State of Montana water court decision and go with option one.

Councilmember Michalson: 2<sup>nd</sup>.

Mayor Gibson: with that we will with public comment.

#### PUBLIC COMMENT

Marilynn Wolff: my question is the cost with DNRC the same or less with the supreme court.

Ross Miller: that is a good questions. About the same, I put the costs together and thinking aloud a bit, the appeal would be strictly lawyer work whereas the change application on Well #1 we would have to bring in a hydrology consultant to do a change application with DNRC would be to show that there is no adverse effect to other water users and that would take some ground work

science work that I would have to use as an expert witness to support that. A little bit less lawyer work and then add some ground water science work, which we already used a firm on this amendment. We had to do some ground water science to determine the corner depression and then notify all the people in that area.

Mayor Gibson: we are halfway through this year's budget. We have had these discussion before about Well #1 so that is nothing new, the cost would be spread out over time.

Mayor Gibson: motion and a 2<sup>nd</sup>. Motion is to not appeal and go with option one. further discussion. Seeing none, Jenelle please take the vote.

Councilmember Barker: aye.

Councilmember Brown: aye.

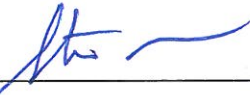
Councilmember Lowell: aye.

Councilmember Michalson: aye.

Mayor Gibson: passes 4-0 thank you Mr. miller.

5. Adjournment

APPROVE:



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Steve Gibson, Mayor

ATTEST:



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Jenelle S. Berthoud, Town Clerk