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MEMORANDUM

To: Flathead County Planning Board
From: Katherine P. Maxwell
Date: March 26, 2008
Subject: North Shore Flood Easements

Introduction

The Planning Department report on the proposed North Shore Ranch development raises significant concerns as to the impact of the development on public health and safety. Among those concerns is the possibility of the area being subject to flooding. Flooding could happen in the event of extreme rainfall (such as occurred in 1933, 1948, 1950, 1964 and 1972), a failure of Hungry Horse dam, or in an earthquake.

The Planning Department report finds that Kerr Dam is mandated by the terms of its license to not allow Flathead Lake to go higher than 2893'. However, Montana Power Company (and its successors, including PPL) have the absolute right to allow the lake level to go considerably higher than 2893.' In fact, they have the right to flood the land upon which the developer plans to build 290 residences. PPL *et al* own easements giving them the right to flood the entirety of the north shore property, in perpetuity. Thus, whatever the license says about the

maximum level of Flathead Lake, the level can be whatever the power company wants or needs it to be. In this Memorandum I will address the existence of the easements, the Court's interpretation of the easements, and finally, the implications of flood easements for the proposed North Shore Ranch development.

The Flood Easements

During the early years of the operation of Kerr Dam, Montana Power (or its predecessor, Rocky Mountain Power Company) obtained flood easements from the owners of real property on the shoreline of Flathead Lake and the Flathead River. The dam's operator was required by the terms of its Federal Power Commission (now Federal Energy Regulatory Commission) license to obtain easements on all lands impacted by the operation of the dam. Easements were obtained by RMPC and MPC over all the land included in the proposed North Shore Ranch development. The easements were obtained from the predecessors in title at different times, but the wording of the easements is similar. Attached as Exhibits A through E are copies of the five easements encumbering the property owned or being purchased by Kleinhans Farms, LLC, obtained from the records of Flathead County.

The preamble to the grant of easement in Exhibits A, B, C and D notes that:

“Whereas, in many years during the natural high water season the elevation of the natural water of Flathead Lake has exceeded 2893 feet, USGS datum and in future years the elevation of the natural high water of Flathead Lake may exceed 2893 feet...”

The actual grant of easement in Exhibits A, B, C and D grants to MPC:

“the perpetual right and easement for flooding, subirrigating, draining or otherwise affecting with the waters of Flathead Lake, and its tributaries, all or any part of the hereinafter described lands which will or may be affected by the regulation and control of the waters of Flathead Lake by the construction,

maintenance and operation of said dam and hydroelectric development in the Flathead River below said lake...”

The grant of easement in Exhibits E is worded slightly differently:

“the perpetual right and easement for flooding, subirrigating, draining or otherwise affecting with the waters of Flathead Lake, and its tributaries, all or any part of the hereinafter described lands which will or may be affected by the regulation and control of the waters of Flathead Lake by the construction, maintenance and operation of said dam and hydroelectric development in the Flathead River below said lake, which dam is designed to control and regulate at varying elevations, not exceeding a maximum controlled water level of 2893 feet, USGS datum...”

Thus, all of North Shore Ranch is subject to the right of Montana Power (and its current successor PPL) to “flood, subirrigate, drain or otherwise affect the waters of Flathead Lake.” Easement “E” has additional language stating that Kerr Dam is designed to control and regulate the lake level to a maximum of 2,893 feet.

The *Mattson* Decision

As noted already, MPC obtained easements in substantially the same form from all the landowners around the shoreline of Flathead Lake. On November 8, 1999 a group of the landowners filed an action in Flathead County District Court, on behalf of themselves and a class of similarly situated landowners, against MPC. The Plaintiffs alleged that MPC owned, operated and managed Kerr Dam in a manner that resulted in continuous erosion, property damage and loss of shoreline on the lakefront and riverfront properties. Shortly after the suit was filed, MPC sold its interest in Kerr Dam to PP&L Global, Inc., which assigned its interest to its subsidiary PPL Montana, LLC. PPL was added as an additional defendant. MPC then underwent a series of corporate changes, resulting in the addition of three additional defendants: Touch America Holdings, Inc, Montana Power LLC, a/k/a/ NorthWestern Energy LLC, and