



COUNTY WATER DISTRICT OF BILLINGS HEIGHTS

Board of Directors Meeting Minutes

April 13, 2022 at 6:00 PM

Board Room, County Water District of Billings Heights 1540 Popelka Dr.

The meeting is open to any interested member of the public. Agendas are prepared for the meetings; agendas may be requested from the General Manager Peyton Brookshire, peyton@heightswaterdistrict.com and are available at <https://heightswaterdistrict.com/agendas-and-minutes/> and <https://www.yellowstonecountynews.com/county-water-district-of-billings-heights/>.

CALL MEETING TO ORDER: President Ming Cabrera called the meeting to order at 6:00 pm. President Cabrera thanked the people in attendance as rate payers and residents to take a look at the Settlement of the lawsuit. The attorney will talk about the settlement, then we will make a motion to begin discussion, the Board will discuss and then we will allow for public comments no longer than 2 minutes per person.

PRESIDENT'S REMARKS: Ming Cabrera

During the course of the meeting the Public may be heard before a vote is cast by the Board. The President will acknowledge the Public once the motion has been made and discussed by the Board for their input. The President will recognize speakers who raise their hand. Once recognized, the speaker should move to the side of the board table so comments can be heard, identify themselves by name, and limit their comments to two minutes. Each speaker will have one opportunity to speak on any agenda item.

WELCOME AND INTRODUCTIONS

Board Members Present Ming Cabrera, David Graves, Dennis Cook, Laura Drager, Pam Ellis, Jeff Engel, Brandon Hurst

Staff Members Present Peyton Brookshire, Josh Simpson, Dianne Crees, Mark Noennig (Hendrickson Law Firm)

Also Present John Collins, Butch Bailey, Kelly Brookshire, Jim Brown, Tim Chamberlain, Carolyn Collins, Jennifer Duray, Louis Engels, Frank Ewalt, Sharra Felley, Lyle and Debbie Fogle, Donald Howe, JW Keropple, Chris Kukulski, Mike Macki, Timothy Nava, Victor Nava, Jennifer Owen, Evelyn Pyburn, Rob Romsa, Stephanie Romsa, Melissa Smith, William Thompson, Brad Warneke, Melissa Wright, Tom Zurbuchen

PUBLIC HEARING Settlement Agreement with the City of Billings

The legal committee of David Graves, Laura Drager and Pam Ellis recommended approval of the Final Settlement Agreement.

Laura Drager made the motion: Having conducted a public hearing, considered written and spoken public testimony, I move to approve SETTLEMENT AGREEMENT between THE CITY OF BILLINGS (the "City") and THE COUNTY WATER DISTRICT OF BILLINGS HEIGHTS (the "District") with the SETTLEMENT AMOUNT: \$2,936,251.80 (Two Million, Nine Hundred Thirty-Six Thousand, Two Hundred Fifty-One Dollars and 80 cents) and to direct the District to pay the full amount within thirty (30) days after the approval of this Settlement Agreement and Release by the later of the City of Billings City Council and the Board of Directors of the County Water District of Billings Heights. Seconded by David Graves

VOTING IN FAVOR OF THE MOTION: Ming Cabrera, Laura Drager, Pam Ellis, David Graves

VOTING IN OPPOSITION OF THE MOTION: Dennis Cook, Jeff Engel, Brandon Hurst

MOTION CARRIED The bill will be paid.

Background from Mark Noennig, Attorney Representing the District in the Dispute Resolution The issue the Board purchases its water from the City of Billings through a long term agreement. There was evidence that there was a mistake made in the calculation of converting cubic feet to gallons. Therefore, the CWD was underbilled roughly \$3 million. There was a lawsuit filed seeking the amount owed and interest. This lawsuit proceeded to the point where Mark Noennig was retained. He was not involved originally; his charge was to try to get this case settled on the basis of payment of the amount, principal allegedly owed without interest and an agreement to meet with the city to discuss, but not be bound to discuss, a proposal to amend the long term agreement between the city and the CWDBH. The issues were four: 1) the principal amount allegedly owed but not originally billed; under the UCC we could have lopped off an amount that exceeded the 4 year Statute of Limitations; but the city claimed there is also an amount for an account stated and that is a 5 yr. Statute of Limitations. The fact that it wasn't billed doesn't have any great legal support for defending the claim; those arguments have not found favor in the court; 2) interest charge was 1 ½% per month; the total bill was about \$5.2 million recently. The defense is that compounding interest may not be allowed; there is an agreement that 1.5% a month is appropriate because it is listed in the schedules that is part of the contract; if you pencil that out, (simple interest 10% is the minimum amount); 1.5% over 3 years pencils out to a minimum interest charge of \$1.6 million and this is a longer period than 3 years. The liability for interest is somewhere between \$750,000 and \$2.2 million. There are significant legal arguments for the recovery of that interest; 3) Franchise Fee: the District counter claimed against the city for what they claimed were illegal franchise fees because they were arguably illegal sales taxes. In our settlement discussions, the city took the position that the amount was \$35,000 based on the statute of limitations. There was a tolling agreement which means there could be an argument that the amount allegedly owed was as much as \$172,000. There have been 2 court decisions ruling that those franchise fees are not collectible because there was no formal protest at the time the water was delivered and there was no preceding taken in front of the city council to challenge the fees. 4) Permit Fees: there was a challenge to the city's right to charge the CWD for right of way use.

Settlement Agreement The terms are the full bill would be paid less about \$34,000 in interest that would have been accrued if the payment had been made over a 3 year period; that was negotiated by the legal team representing the Board. No interest. On the counter claims, dismissal of the claim for franchise fees. The permit fee issue it was agreed not to be decided; it will be discussed at a future date. Finally, there is a provision that says "the parties will meet to discuss the terms of the contract with no legal obligation to change it."

Having analyzed the liability and the exposure in this case, he recommends that it is in the best interest of the District and the Board to enter into the Settlement. The attorney fees in order to litigate it to get the point where you find out how much exposure is going to be significant. Mark Noennig would not litigate the case. At least tens of thousands of dollars to litigate. A big advantage to settle the case is to limit the attorney fees.

Arguments raised at the prior meeting are that the city is not out any money because they have already increased their rates to cover the payment. The \$3 million was included in an account receivable that is already on the books; no additional fees were charged to Billings ratepayers. Second, there was an argument that this money should be sent back to the ratepayers and that it could be used for things like an amphitheater at Coulson Park. The statute limits the cost to the expense of providing the service.

Ming Cabrera asked Mark Noennig how much liability the District has if we do not accept the Settlement Agreement. It depends on how much principal is proved and how much interest is proved. He estimated \$4 million at least plus attorney fees. Could be more. The interest continues to run.

Ming Cabrera noted that over \$200,000 has been spent in attorney fees on this matter including the fees paid by both the city and the District. His opinion is to pay the bill with no interest and move on.

Laura Drager confirmed that the District would not raise water rates to pay the bill. The money was collected at the time we sold the water to the ratepayers and has been deposited into investment accounts. Our auditors at that time recognized that there was additional income in each of the years that are in dispute. We have the funds to pay this debt to the city with the money we have in our investment account.

DISCUSSION BY THE BOARD

Dennis Cook the billing error was admitted by the city but there seems to be no acceptance of responsibility in the Agreement. There was a wrong committed. The error exists and the city needs to own up to their mistake. The right of way fees that Mr. Noennig still leaves the District open to future litigation. Our water purchase agreement is left in limbo and puts the District at risk to address some of the behavior that has been demonstrated in the past to just revamp the contract.

Ming Cabrera noted that Dennis Cook was out of order. We are discussing the Settlement Agreement.

Dennis Cook said those are unresolved issues in his mind. There are questions on the conversion rate. Needs further discussion. There is a pending lawsuit.

Ming Cabrera noted Dennis was out of order.

Dennis Cook commented in illegal meetings is another unresolved issue.

Ming Cabrera noted Dennis was out of order.

Dennis Cook said the settlement does not issues that have been unresolved. With that in mind, he cannot support the settlement agreement in its present form.

Brandon Hurst echoed what Dennis Cook said. Our previous attorneys did believe we may win or get it adjusted to a lower amount.

Laura Drager pointed out that the District currently has a contract with the City of Billings. In the contract it says that we will purchase water and we will pay for water that we distribute to the ratepayers of the District. The city says that they are willing to provide water as long as we pay our bill. The District is currently in breach of the contract. So when we look at risk vs reward, we are risking the current contract that we have. The current contract is very favorable to the District. Putting that contract in jeopardy is not something we should be doing. We received the water, we distributed, our ratepayers received the water. In our discussion with the city, we acknowledged that we have done some things wrong, the city has done some things wrong. At this point, there is nobody, Brandon included, that was here when this took place. We are starting fresh from here and need to move forward. On the April 8th bill, there is \$2,125,823.07 interest billed. That is a risk to the ratepayers. If we go to court, not only will we pay ridiculous money to the attorneys, there is a real risk we will have to pay the interest charges. Her recommendation to the Board and to the city that we move forward with this settlement, reduce our risk, and move forward.

David Graves said the city is waiving the interest. In our meetings, they acknowledged that they made a mistake. We made mistakes because we knew we were making 1/3 of our journal budget with the fees collected. All they want is for us to pay for the water we drank and watered our lawns with and showered with. The city is doing us a favor. We owe them this and we have a contract with them.

Jeff Engel agrees with a lot of what Dennis and Brandon have said. There is a pending lawsuit and I do believe that the outcome of that lawsuit could affect what happens here tonight.

Ming Cabrera noted that three members of this Board and one community member have sued the District and have said that we are an illegal board when 4 members is a quorum and authorized by statute to conduct business. David Graves said it best. Both sides made mistakes. 40% of the water wasn't billed and the District claims they didn't see the error. No interest, no more attorney fees. The money is available; no one will see an increase in their rates.

Pam Ellis state law controls both the city and the District in setting rates. The city can only charge for the cost of producing the water. The District can only charge ratepayers for the wholesale cost of water plus operation and maintenance expenses. There seems to be a perception that if we don't pay back to the city, the District can

just keep the money. 40-50% of the District cost is the cost of wholesale water. If we don't have an expenditure for wholesale water, we cannot bill the ratepayers for water we didn't purchase.

The minutes reflect that the plaintiffs for the franchise lawsuit approached the Board multiple times and requested that join the lawsuit. The recommendation from the General Manager was that the city is our partner; we should not to bite the hand that feeds us. That was excellent advice; we should have followed it. The right of way fees in the counter claim are \$250,000.

The actual right of way fees paid are \$5000 per year; \$20,000 total. The District cannot litigate for \$5000. If there is an issue, our attorney can review it and have a discussion with the city. For \$5000, we cannot afford to litigate. We were told in August by an attorney that we interviewed that we have significant risk and he recommended that we settle with the city. Unfortunately, we hired an attorney at that point that wasn't real competent with business law; we are really fortunate to have Mark Noennig who is much more efficient at researching the law and giving sound advice. The city made some errors, we made some errors. We are partners. Let's move on.

Ming Cabrera said he ran on a platform to settle the fee dispute with the city. Let's settle and then talk about the other issues.

PUBLIC COMMENTS

Tim Chamberlain It is obvious that the Board has done due diligence both pro and opposed. It appears absolutely clear that we should pay the city. The city never went broke when we didn't get the money. They are doing just fine with the money they already collected and spent. They don't need another \$3 million from us. That seems punitive.

Pam Ellis The city is building a lot of infrastructure, residents who are not in the District have been paying increased water rates to pay for approved capital expenditures including development of the west end water plant and reservoir. The \$2.95 million is included in the funding for capital outlays. The city does not have extra money.

Jennifer Duray, the City of Billings Assistant Works Director confirmed that the city has large amounts of cash right now to pay for capital improvements. They would eventually have to raise rates if the \$2.95 million was not paid.

Tom Zurbuchen urged the District not to accept the Settlement. None of the bills are calculated correctly. The city is giving us an extra .4 of a gallon for every unit converted. The city is going to come back in the future and ask for that money too. The city now bills by 1000 gallon units since July 2021; there is no longer a conversion.

Ming Cabrera This is not the city vs Billings Heights. We are part of the city. We are neighbors, we work together. We are suing ourselves. That doesn't make sense to me.

Frank Ewalt We have paid for the water; we have used the water. The conversion factor Tom mentioned does not pencil out to 40%. The first month, you may let it go. The second month, the District should have contacted the Public Works Director.

John Collins We used the water; we should pay for it. It is that simple.

Laura Drager It has been questioned why the District didn't recognize or identify what we were collecting.

Dianne Crees 1) we bill in gallons; they bill in cubic feet; 2) we read meters at different times; 3) we started a 3 tier water system at that time—we didn't know what to expect; 4) we were in a major building expanding Alexander Rd and building the reservoir; 5) we trusted the bills from the city

Stephanie Romsa If you are in a contract to pay a specific price, there should be an obligation to understand what that price is and understand what you have to pay. What internal controls are you putting into place now that would correct this if it ever arises in the future.

Pam Ellis 1) In the past, the District did not follow open meeting laws. The Board would walk into a meeting and there would be 20-30 pages of financial information to review and approve. Meetings lasted 11-30 minutes. Financial documents were approved without any consideration. Now those documents are available to the Board and Public at least 48 hours prior to the meeting, ideally by the close of business on the Friday before the meeting. We have a Finance Committee which includes Laura Drager and Pam Ellis. We pay close attention. 2) Typical of water districts in Montana, there is a billing program and an accounting program. The billing system does not integrate directly into the accounting software which limits a thorough audit. One of the things on the agenda for tonight is purchasing Black Mountain accounting software which is expensive but a number of references consider the expense worthwhile ; the software would allow more accurate audits. 3) State law does not require the District to have a budget. Our income is \$4-\$5 million per year and we have never had a budget. That will end this year; we will have a budget. The District has had poor financial management both on the part of the past Board and management. We are working hard to catch up. That is exactly what the problem is. This problem should never have happened.

Ming Cabrera noted that the bylaws had not been written in 64 years when the District was incorporated under statute. The District adopted new bylaws this year. He is happy to see so many people here and be involved.

City Manager Chris Kukulski The city manager and some staff met with the Board Chair and General Manager shortly after Mr. Kukulski began working. The city fully acknowledged it was a calculation error at the very first meeting. At a failed mediation, we acknowledged the error and said they would not charge interest. The response was a flat out, "you were idiots not to charge so you should pay the penalty." He wants the record to reflect that the city from the first days acknowledged the city had an error though they don't know exactly where. The city was also purchasing and implementing new software. At the end of the day, as we continue to pay attorneys to this point. At what point do we stop paying attorneys to depose each other to figure out who discovered first the underpayment and continue to fight about this for years. That was the city's goal initially and that is our goal tonight. We are building a community here and most likely these two entities are going to be in a relationship beyond the lifetimes of anyone in this room. Thank you for your consideration tonight.

Ming Cabrera has seen the city vs Billings Heights fight going on for 40 years. We've got to stop it. We need to work together. He is as guilty as anyone else. The only thing this District does is buy and sell water. We don't produce the water; we don't provide sewer. We have the money put aside. We have always had the money put aside.

Peyton Brookshire, General Manager The readings were consistent with the cubic feet. The District did not catch that the conversion was incorrect.

Mark Noennig The question of where in the Settlement Agreement that says the conversion issue is settled

2. No Admission of Liability It is understood that the above-mentioned sum is accepted as the sole consideration for full satisfaction and accord to compromise a disputed claim, and that neither the payment of the sum by Releasee nor the negotiations for settlement shall be considered as an admission of liability by either Party. The claims reserved and not released remain disputed and not admitted by the opposing party,

3. Stipulation for Dismissal "The Releasor's complaint against the Releasee with respect to amounts owed to the Releasor for water purchased by the Releasee between February 27, 2015 and December 15, 2017, shall be dismissed, with prejudice;

The answer is: That's where it says it, right there. If this agreement is approved, that is how much the District needs to pay; it doesn't matter how it is calculated. The city cannot come back to collect on fees before the stated dates because of the Statute of Limitations.

Bill Thompson Does a lot of building in Emma Jean. If we used the water, we should pay the water.

Peyton Brookshire said income beyond what was required for Operations and Maintenance went into reserves which is invested.

Pam Ellis clarified that if NW Energy made a billing error over 2 ½ years, NW Energy could only collect for 6 months. The District originally argued that they would only pay 6 months. The law specifically does not apply to municipal utilities. The District kept the \$2.95 million in cash until the tolling agreement expired in December 2020. The District understood it was likely to have to pay the disputed amount. The District always understood they had liability and might have to pay.

Laura Drager The District currently has \$9,301,275.18 in our investment accounts.

Ming Cabrera said we need reserves to pay for on-going capital improvement projects. We requested guidance from the auditor about the amount of reserves that are needed going forward.

Laura Drager reread the recommended motion for clarification.

AUDIT REPORT POSTPONED

Stefeni Freese will get the adjusted trial balance and adjustments to the Finance Committee and the bookkeeper and then a draft of the audit by this weekend. Stefeni Freese needed to work through any findings and write them up, so they won't affect the numbers; she had a family emergency that delayed the completion. We will post the draft audit when received. Stefeni Freese will attend the May meeting.

Stefeni Freese | CPA, Business Unit Director, Shareholder

PUBLIC COMMENT on "NON-PUBLIC HEARING" Agenda Items

ADJOURNMENT 5 minutes

- A. Any member of the Public may be heard on any subject that is not on the Agenda.
- B. The board will not take action on these items at this time but may choose to add an item to the next meeting's Agenda for discussion.

Ming Cabrera noted that 3 members of the Board: Dennis Cook, Jeff Engel and Brandon Hurst have not attended a meeting in person since October, 2021 (5 months). They said that they didn't have to come to the meetings because they have an attorney. There has to be an end to this. It should be known to the ratepayers that they are not attending and not participating as Board members.

Tom Zurbuchen They have participated via Zoom when available.

Dennis Cook said the legal counsel has advised that we not attend the meetings. But we have attended by Zoom.

Ming Cabrera talked with legal counsel who spoke with their attorney. Attorney Tyler T. Dugger told the District attorney Justin Stark representing in the lawsuit filed by Dennis Cook, Jeff Engel, Brandon Hurst and Tom Zurbuchen that he had not advised the plaintiff's not to attend meetings.

Laura Drager noted that the recommendation made or not made by Tyler Dugger is hearsay.

Mike Macki asked when is the next Board election. Ming Cabrera said the next election is 2023. Laura Drager did not have the information for when the appointed Board members terms expired.

Don Howe recommends the Board invests in a speaker system for public meetings so everyone can hear what is being said. Tonight he has been less than informed because he trouble had hearing.

Ming Cabrera reiterated that it is important that all Board members attend the meetings and participate.

CONSENT AGENDA

- 12. Payables April 13
- 13. March Prepaid bills for approval
- 14. Profit and Loss Statement – March 2021 and March 2022

15. Minutes March 16,2022
16. March Stifel Statement
17. FIB Gross Income March
18. FIB O&M March
19. FIB Payroll March No checks
20. FIB Savings March Quarterly Statement
21. March Stats Billing software
22. CWD March Check Register

Pam Ellis had two questions based on the Profit and Loss Statement, March 2021-March 2022.

Why are we showing a \$10,000 Labor Bonus. That is for the entire year, giving \$7000 Worker's Compensation refunds over 2 years as bonuses, Josh's 5 year anniversary and bonus.

Our Expenses March to March are about \$1.8 million; our income was \$1.3 million. We spent \$500,000 more than our income. What is the explanation for that? Peyton Brookshire said the District purchased the Chlorination equipment for about \$180,000. Peyton did not recall the profit being that different. Do you Dianne? Expenses were not shown. Agreed to follow up later.

Laura Drager made a motion to approve the Consent Agenda. Seconded by David Graves. Unanimous approval.

GENERAL MANAGER REPORT - Peyton Brookshire

23. April General Manager's Report
 - a. Jenn Burnside got a call from AK about a \$15,000 check issued on our account. The bank confirmed that the account had the funds. She has stopped \$78,000 in checks in 1 ½ weeks. The bank put the accounts on "positive pay" which will cost the District \$50 per month beginning in July. A suggestion was made to change the bank accounts. The bank said that more often than not, the once the District has been hit with fraudulent checks, more often than not a year or two later it would happen to us again. They recommend keeping the positive pay on the account to keep us safe.

Tom Zurbuchen asked how the problem arose.

Laura Drager pointed out that when she reviewed the Board packet that was posted on the website and the Yellowstone County News, she met with Suzie, Dianne and Peyton. We had an image of the check. The fraudulent checks have signatures. We have internally made changes about what information is shared publicly, we are not putting the checks with the invoices so those checks are not included with the invoices.
24. Sartorie Annexation Application This will be a private system. The annexation has been hydraulically modelled and approved. The annexation fee has been paid.

Pam Ellis made the motion: having conducted a public hearing, considered written and spoken public testimony, I move that the Board approve Sartorie Annexation of Tract 2B-2A-1 of Amended Tracts of Corrected Certificate of Survey No. 840, Fifth Amended and President Cabrera sign Resolution 012-22 Authorizing the Annexation. Seconded by Laura Drager. Unanimous approval.

Resolution 012-22 to Authorize SARTORIE ANNEXATION 2.792 Acres 121619.52, Sqft. \$28,337.35.
- 25.. Annexation petition for 2207 Bench Boulevard. .723 Acres 31885.92 Sq Ft buy in is \$7,429.42

Laura Drager made the motion having conducted a public hearing, considered written and spoken public testimony, I move that the Board approve Annexation petition for 2207 Bench Boulevard..723 Acres 31885.92 Sq Ft buy in is \$7,429.42 and authorize President Cabrera to sign Resolution 013-22. Seconded by David Graves. Unanimous approval.

26. The TIMELINE FOR THE CHLORINATION PROJECT @ the Oxbow tank was pushed back due to the weather. The end date is projected to be completed by the end of July. We have all the needed equipment. \$500,000 project. Pam Ellis noted that the we purchase chlorinated water from the city. In the winter, there is reduced water consumption; the chlorination level of the water drops below acceptable levels in the winter.
27. CIP UPDATE Received from Interstate Engineering on the day of the meeting. Peyton will forward the update to the Board. Interstate Engineering will meet with the Board in May.
28. VALVE REPLACEMENT: The CIP has identified 23 different valves. Makes repair and flushing easier. Peyton has received 2 bids for valves; he is waiting on a third bid. The lowest bid to date is NW Pipe. The third company may not have the valves in stock. May agenda. Josh Simpson said the staff could install about a valve a day depending on where they are installed.
29. CHANGE SIGNATURES ON THE OPERATIONS AND MAINTENANCE FUND
David Graves made a motion to remove authority for signatures on the First Interstate accounts. Add Peyton Brookshire, Josh Simpson, Jenn Burnside and Suzie McKethen. Seconded by Ming Cabrera. Friendly amendment by Pam Ellis that President Cabrera sign a letter confirming that this action was approved. APPROVED Unanimously.
30. EMAIL FROM JENNIFER DURAY Jennifer will meet with the rate consultant for the City of Billings the week of April 18th. Jennifer will have a good idea of when the new wholesale water rate will be calculated and to the District. Pam Ellis noted that the council generally approves rate increases at the end of May. The District will have to estimate the increased cost of wholesale water until the city confirms.
31. NOT DISCUSSED; Peyton said he would be prepared to bring a recommendation to the Board in May. We are looking at the GOVERNMENT AND ACCOUNTING SOFTWARE OFFERED BY BLACK MOUNTAIN which is the software we use for utility billing and service orders to consolidate and streamline all the processes from budget to payroll and everything in between. This will get rid of QuickBooks and enable more people to have access to any information in the day to day operation. We will have a demo with black mountain and then assess. Quote is attached.

OLD BUSINESS

32. Update: Recording Secretary and Board Secretary (see attachments--Background)

Ming Cabrera noted that this was tabled at the last meeting. We are waiting for Municode to be updated and for a decision on implementation of the Black Mountain software and the development of a budget.

David Graves made a motion to table the discussion until May. Seconded by Laura Drager. Approved unanimously.

NEW BUSINESS NONE

FINANCE COMMITTEE REPORT: Laura Drager
County Water District Billings Heights
Treasurer's Summary Report as of