



COUNTY WATER DISTRICT OF BILLINGS HEIGHTS

Board of Directors Meeting REVISED Minutes

March 16, 2022 at 6:00 PM

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

REVISED AGENDA Monday, March 14, 2021

The meeting is open to any interested member of the public. Agendas and Agenda Packets 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/> and <https://www.yellowstonecountynews.com/category/features/>. Supplemental documents are linked in the Agenda Packet.

Join Zoom Meeting <https://us02web.zoom.us/j/89318236922> Meeting ID: 893 1823 6922

CALL MEETING TO ORDER: President Ming Cabrera at 6:00 pm

WELCOME AND INTRODUCTIONS President Ming Cabrera noted that the city appointed Jeff Engel to the Board; Yellowstone County appointed Pam Ellis. The minutes of the June Board meeting record the additions as well as three elected members: Ming Cabrera, Dennis Cook and Laura Drager. President Cabrera also reiterated the statement that Board members should be present in person if they are in town.

BOARD MEMBERS PRESENT: IN PERSON Ming Cabrera, Laura Drager, Pam Ellis, David Graves, Pam Ellis

ON ZOOM Brandon Hurst Dennis Cook was not visible on screen and did not participate

STAFF PRESENT: Peyton Brookshire, Josh Simpson, Dianne Crees and Attorney Mark Noennig

GUESTS: Kelly Brookshire, Evelyn Pyburn, Tom Zurbuchen,

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.

LEGAL COMMITTEE REPORT (see report and attachments)

1. Background The City of Billings calculated the unpaid bill at \$2,970,599.35 and had offered to let the District repay the balance over a three year period. The legal committee negotiated that the District discount the amount possible to earn if the District invested in CD's during this period ($\$2,970,599.35 - \$34,347.55 = \$2,936,251.80$). The District turned down requests to join the Franchise lawsuit multiple times as reflected in the Minutes (October 11, 2017, June 13, 2018, January 9, 2019).

The city's liability to the District for the franchise fees was limited to \$35,000 due to the statute of limitations and the date the District gave notice to the City when filing a counter lawsuit (January 7, 2021). The second counter claim of right-of-way fees are about \$5000 annually and the committee's recommendation is that any dispute could be resolved through discussion, not litigation.

Evidence does not exist to draw a clear conclusion on who made the error, the software vender or a city employee. This was made more difficult by the timeline. The error wasn't discovered until way

past the contract liability limitations with the vender. Added to this is the simple fact that the HWD did receive, and sell the water.

The council is scheduled to approve the agreement March 28.

Attorney Mark Noennig summarized the Settlement Agreement. The agreement is to pay the bill less about \$34,000 in interest that is saved as a result of what we would have saved had we paid it over a 3 year period. The District came out ahead there on the settlement in his view. The franchise fees agreed to dismiss that claim with prejudice meaning it is a “done deal” which offsets the amount the city agreed to deduct. The District court has recently held that the franchise fee was not collectible in another case based upon two observations 1) the Universal Commercial Code applies to this transaction; 2) there wasn’t sufficient protest under UCC when the bill was sent out. The City is no longer collecting franchise fees. The permit fees: the District’s position was that the City could not charge the District for right-of-way fees (each are a governmental body). We agreed not to agreed. It is subject to discussion and subject to further litigation if necessary. He is not speaking on behalf of the Board; he is speaking on behalf of an attorney hired to do a specific job. Nothing that he says should be used for legalities—he is just giving his input. He recommends that is likely in the best of the interests of the Board to settle. 1) The Liability It appears that the evidence will show that the city made a mistake; there is a contract that provides the means by which the price for that water is determined. The water was provided; the bill was apparently an error. The city took awhile to find the error. To his knowledge, there is no evidence that there was any intention on the part of the City or anyone else to misrepresent. Strongly supportable legal conclusion that the District would be responsible for that bill. Two other issues that are really important. Interest The city has added in enough interest to say the bill is \$5.2 million. That may not be necessarily supportable. The law based on statute and case history, if there is a contract and there is amount owed under the contract, the statute says 10% simple interest is accrued on that bill until it is paid. The city is charging probably in excess of that and probably compounded. 10% interest on \$3 million for several years, the District is responsible for plus or minus \$1 million in interest. The “consideration” settlement is primarily that the city doesn’t pursue that claim for \$1 million in interest which they may have a legally supportable basis to recover; that is not a conclusive decision. Conclusion: the principal amount is likely to be recovered; the interest too. The franchise fee is probably not winnable but it is set off against the reduction negotiated by the legal committee. Another big consideration is attorney’s fees: if this case is not settled and is litigated, people say attorneys would be the only happy people. He would not be happy because he does not want to litigate this case. The District would spend tens of thousands of dollars in attorney fees in addition to exposure to interest and the principal amount and not much success on the franchise fees or the right-of-way fees. The contract negotiation: we got that paragraph in the settlement agreement to say the parties will meet; no legal liability to do anything. That is within the spirit if not beyond what the charge was when the Resolution was passed.

Ming Cabrera asked “who made the mistake.” That question was answered by Pam Ellis who referenced Chris Kukulski’s response in the agenda: “Evidence does not exist to draw a clear conclusion on who made the error, the software vender or a city employee. This was made more difficult by the timeline. The error wasn’t discovered until way past the contract liability limitations with the vender. Added to this is the simple fact that the HWD did receive, and sell the water”. No one knows who made the error in implementation of the new software. The calculation to convert from cubic feet which the city measured in to gallons which the District measures was in error. The District has a contract, the city provided the water. Duke Nieskens told the old board that he personally had recalculated the correct amount; he confirmed in mediation that is the correct amount that is unbilled.

David Graves said he thought Mark did a fine job and we protected our rights on the contract. We did not negotiate a new contract; we are just paying for the water we used in the this settlement. The city made a lot of sacrifices.

President Cabrera asked for a motion. Pam Ellis read the recommended motion.

Recommended 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. At a later date, The Parties through their respective representatives, shall meet to begin addressing issues with the existing Water Purchase Agreement with a goal of drafting a new Water Purchase Agreement that may be acceptable to both the City of Billings and the County Water District of Billings.

President Cabrera said if there is a second we can have a discussion and public comment (no second). Public comment needs to be done now or in the future. He spoke with city manager Chris Kukulski. Laura Drager advised that the Treasury Bills are maturing at the end of March.

Laura Drager echoed David’s sentiment. Mark Noennig did a great job representing the District. The city is going to write off about \$2 million in interest. Pam is the one that insisted that the city deduct the interest which we could have earned if we had paid the principal back over time. She believes this is a good deal for the rate-payers, for the District. This is an opportunity to put this to bed so we can move forward with planning for the future.

Pam Ellis noted that the city has it on the agenda for March 28, 2022. Ming Cabrera asked Mark Noennig if we needed to have a separate meeting and he said no. This was discussed November 15, November 29, December 15, and January 19 and the agenda and notice for this meeting. It was noted in the minutes, the Yellowstone County News has written multiple articles. The bulk of people that she talks to are upset that they were billed for the water and we did not return the money to rate-payers or pay the city. I am supported of approving the settlement offer.

Brandon Hurst wants to have the proper public notice. This is 30% of our reserves. Ming Cabrera asked if he wanted to make a substitute motion. Brandon reiterated that he would like to have a public meeting. Ming Cabrera said, FYI, this is a public meeting. Please amend the motion so that we can table it for the April meeting and a public meeting. Peyton Brookshire has said it would cost about \$2000 to send a notice to all rate-payers.

Ming Cabrera asked to table the decision until the April meeting. Treasuries mature at the end of March. Chris Kukulski was fine if we pay them after the April meeting. That way the rate-payers would be informed and we need to make sure it is done right. This is a huge chunk of money.

Mark Noennig said his input was that if you have sufficient notice and the issue is on the agenda, you can make the decision.

David Graves agrees with Brandon and Ming. He would like to see what the city does on March 28th. We can have the public hearing and the vote on April 13th and we would be able to pay the bill by the end of April.

Pam Ellis made a friendly amendment. It is much less expensive to send a postcard. Should come out closer to the \$1600 that we spend each month to pay the bills. We can post the Settlement agreement, the lawsuit and the counter-claim on the website. If people are going to speak to the Settlement, they should have an opportunity to be fully informed.

Ming Cabrera said we can use the Yellowstone County News, the Heights Task Force to show that we are looking at a settlement.

Brandon Hurst accepted the friendly amendment. Ming Cabrera suggested that the Public Hearing be done at 6:00 pm at the April 13, 2022 meeting.

MOTION Ming Cabrera summarized the amended motion with the friendly amendment to send a post-card to all rate-payers that a public meeting to vote on the Settlement Agreement would be held on April 13 @ 6:00 pm; the District will send postcard notices to all ratepayers. Ming Cabrera will sign the postcard. We can call Billings Gazette and Ming will send letters to the editor.

Mark Noennig said the notice needs to include the issue and when and where it will be heard.

PUBLIC COMMENT Tom Zurbuchen read the Settlement Agreement. He didn't like it. Does not believe it is fair to the ratepayers of the District or to the ratepayers of the city's water utility. He did not believe that the city could use the money to build an amphitheater at Coulson Park; all of this money needs to go to the water utility.

Laura Drager did some research. Public Works is an enterprise fee. The money will go into the Public Works enterprise fund—this money cannot be used for any other purpose. Maybe able to ask that a portion of the money be used to offset infrastructure development for the Inner Belt Loop. \$2,171,170.62 is the interest that had accrued in March; interests increases by about \$75,000 per month.

Peyton Brookshire believes there are still unanswered questions. The city is not accepting any liability for their error. We didn't get a rate freeze for 3 years and we are giving up 30% of our reserves. He does not like the way it is written. The city wants control. The District is not taxing the city's system.

Mark Noennig doesn't know how this settlement agreement would include a refund for franchise fees. The District court said what is paid was paid. He is not aware of any legal basis for concluding that there is no interest that is accruing on a debt when the amount has been determined unless there is a different specific agreement in writing. If there is a determination that an amount is owed, it accrues interest at a minimum of 10% per annum simple interest. He is not aware of a defense to the statute that the interest is not owed. This has been true since 1895. Mark Noennig summarized that if we save \$1 million in interest expense, that is hard to walk away from. If you end up paying attorney's fees, the interest and \$3 million in unpaid fees—how do you explain that to the ratepayers?

Ming Cabrera said that was one of the reasons he was elected because people were fed up with the District refusing to settle.

David Graves said we are not giving away 1/3 of our reserves. The District made money on our CD's and Treasury bonds. If the city had billed correctly, we would not have any interest; the District has benefited. Laura Drager added that the ratepayers have benefited as well.

David Graves called for the question.

VOTE ON THE QUESTION: Unanimous support

VOTE ON THE MOTION: Unanimous support.

Attachments:

Final Settlement Agreement City and Heights Water District

Resolution 007-22 Resolve Fee Dispute with the City of Billings

Decision and Order Re City of Billings' Motion for Partial Summary Judgment (franchise lawsuit)

YCN ♦ February 25, 2022 ♦ Proposed Water Rate Increases Postponed; Water District Nears Agreement with City

NEW BUSINESS

2. Board Secretary and Recording Secretary (see attachments Appointment of Administrative Personnel; Jeff Weldon Memo to Board 2021.09.98, Contract for Outside Services Suzie McKethen 2009.12.11, Draft CWDBH Board Secretary Job Description and Evaluation, 2022.02 CWD staffing comparison)

MOTION Ming Cabrera made a motion to hire a Recording and Board Secretary to take minutes and prepare the agenda. Seconded by David Graves.

Pam Ellis commented that the District spent \$8200 to purchase the Municode software for Agenda management and a new website. She spent 7 ½ hours training to use the software. For 14 years, the current District staff prepared the agendas and minutes. Preparing the agenda takes the bulk of the time. Preparing the agenda and minutes was done by Suzie McKethen on paid time; she received \$150 per month additional compensation for attending Board meetings. The District is currently hiring a finance clerk. She said she considered it completely irresponsible to hire a fifth person to work in the office. She contacted all the Districts that are larger in Montana and compared the staff with the annual income. All the other districts produce the water, most treat sewer, all have sewer lines (Lockwood sewage is treated at the Billings plant; Flathead Co. W/S don't treat wastewater, just collect and pump to Kalispell. We are the only districts that only redistributes the water. We have adequate staff in the office by comparison. We do not have a budget. We know the cost of wholesale water will increase somewhere in the range of 40-50% in FY2024. What we need to do first is develop the budget which we should be able to do when we receive the audit, we need to work with Josh Jabalara, we need to have a current job description, and we need to see if the work can be completed by the current staff as it was for the prior 14 years before we spend more money.

Ming Cabrera asked Peyton how many hours per month would it require for someone to prepare an agenda? Peyton Brookshire said the information that is going in now is quite different than what we have done in the past and different than what Lockwood does. His estimate was 4 hours tops. (Ming calculated 4 hours x \$15 per hour = \$60). Ming Cabrera asked if someone could add preparation of the agenda and minutes to the job description so the individual could complete the documents in time. Peyton Brookshire said he would talk to staff if they could do the work.

Pam Ellis noted that the documents included in the agenda are the documents that used to be sitting on the table when the Board walked in the door. That is not legal. Whatever action the Board takes, the information should be available to the Board members so they can adequately prepare for the meeting. The information must be available to the public 48 hours in advance of the meeting. At the beginning, using Municode would take significantly more than 4 hours because of the required time to learn a new software program. Pam Ellis sent the training links to Peyton Brookshire and invited him to participate; she did not have response. Our contract allows for one training period; we may need to pay additional money to train another person.

Ming Cabrera said the cost of photocopying the packet would run about \$500 per month. Using Municode makes it possible to make the documents available without this expenditure. Ming Cabrera called Zee Creative and did not get a return phone call. Peyton Brookshire had left a ½ page document on the Board table but it was not responsive to the RFP approved by the Board.

Ming Cabrera said he would like to table this decision until we get a budget and until we understand Municode a little bit better. Pam Ellis noted that the minutes have been really long because there has been no way for the public to see the documents. When you are posting the agenda packet with all the documents, the minutes can be shorter because the public can refer to the source documents in the agenda. Ming Cabrera said the public can all refer back to the audio recordings. We need to set up a

You Tube channel to post the zoom and/or audio recordings. When there is a question about the accuracy of the minutes, we can refer back to the recording of the meeting.

Laura Drager thought it was unfair for the Board to spring it on Peyton without giving him the opportunity.

MOTION Ming amended his original motion to table the discussion. The amended motion was approved by David Graves. Ming Cabrera had discussed it with Peyton before the meeting so he did have some time to think about the ideas discussed.

PUBLIC COMMENT: None

VOTE: Unanimous

PUBLIC COMMENT on "NON-PUBLIC HEARING" Agenda Items

- 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.

No public comments

CONSENT AGENDA

- 3. Minutes February 16, 2022
- 4. March Prepaid bills for approval
- 5. March Bills for Approval
- 6. February Bank Statements: First Interstate Bank
- 7. February Stifel Statement (see attached)
- 8. Profit and Loss Statement – February 2021 and February 2022

MOTION David Graves made the motion to accept the consent agenda. Seconded by Laura Drager.

DISCUSSION Laura Drager noted there was an error on page 41 and let Pam Ellis know. Suzie McKethen corrected the error in the minutes printed for the record book, it will be corrected for the minutes we post on the website and send to the County. Peyton Brookshire posted the corrected information to the District website.

David Graves called the question. Unanimous approval

VOTE ON THE MOTION: Unanimous approval

GENERAL MANAGER REPORT - Peyton Brookshire

- 9. See attached March Manager Packet
- 10. See Attachments Ordinance 001-22 ORDINANCE OF THE COUNTY WATER DISTRICT OF BILLINGS HEIGHTS CONFIRMING and RATIFYING ANNEXATIONS OF PROPERTIES INTO THE DISTRICT and Certification of Ordinance 001-22.

Pam Ellis made the motion: having conducted a public hearing, considered written and spoken public testimony, I move that the Board approve Ordinance 001-22 confirming and ratifying annexations of properties into the District and Certification of Ordinance 001-22 addressed to Christi Jacobsen, Montana Secretary of State and Jeff Martin, Yellowstone County Clerk and Recorder. SECONDED BY Laura Drager. Unanimous approval.

11. Annexation Application and Resolution 008-22 or Ordinance 002-22 Annexation for Barrett Road Development, Total \$109,309.85. (See Attached)
12. Resolution 009-22 or Ordinance 003-22 Annexation for High Sierra 21st filing. 10.454 acres for total of \$105,910.15
13. Annexation Application and Resolution 010-22 or Ordinance 004-22 Annexation for E1228 Rawhide Strip 1.13 Acres \$11,469.91 Attached
14. Laura Drager made the motion: having conducted a public hearing, considered written and spoken public testimony, and the recommendation from staff, I move the District approve Annexation for Barrett Road Development. 10.77 acres Total for annexation is \$109,309.85. SDF fee to be determined by modeling currently underway; Annexation for High Sierra 21st filing. 10.454 acres for total of \$105,910.15; Annexation for Ed McCullough for 1228 Rawhide Strip 1.13 Acres \$11,469.91 and approve Resolutions 008-22, 009-22 and 010-22 . Seconded by Pam Ellis. Approved Unanimously
15. Authorization to Establish and Maintain Security Account at Stifel Investments (see attachment)
Laura Drager made the motion: having conducted a public hearing, considered written and spoken public testimony, I move that the District approve Resolution 011-22 to Authorize the establishment and maintenance of Security Accounts at Stifel Investments and authorize the following individuals to act on behalf of the Entity named herein: Ming Cabrera, President; David Graves, Vice President, Laura Drager, Treasurer, and Peyton Brookshire, General Manager. SECONDED by David Graves. Unanimous approval.

OLD BUSINESS

16. Update on the West End Water Plant Jennifer Duray told the legal committee on Monday, February 7 that the rate increase would probably not occur in FY23. She also said the projected increase would be higher than 30.6% based on completion of additional infrastructure. Laura attended the same meeting and heard Jennifer's statement. The rate increase the District will be charged is not known and the rate increase for July 2022 is off the table. At the February 16, 2022 Laura Drager moved to table actions Raftelis recommended until we have a written response from the City of Billings. Seconded by Pam Ellis. and approved unanimously.

Frank Ewalt responded to a question from Pam Ellis. There are multiple things coming into play. They city has applied for grant money, costs have increased beyond projections.

Attached are the emails received through a Public Information Request that gives some additional information and information from the City of Billings.

Jennifer Duray's email to council dated October 20, 2021 states, "Public Works' recommendation is to submit for the BRIC grant again and delay the intake and plant until the next round of grant selections are announced next July." The city did apply for the BRIC grant for the west end water plant. This appears to be written evidence from October 2021 that the city will not increase wholesale water rates to the District for FY 2023.

FINANCE COMMITTEE REPORT: Laura Drager

17. Yellowstone County Bank CD Maturity and Roll-over (see attached) The Yellowstone Bank CD matured; Laura Drager recommended to Peyton Brookshire to roll it over into a 5 year CD.
18. March Treasurer's Report

	31-Jan-22	28-Feb-22
Meters		
Previous total meter count	5881	5839
Residential	5440	5491
Commercial	399	346
New Residential	4	3
Total # Meters	5839	5837
Checking		
FIB Gross Income Account	\$ 952,485.57	\$ 960,580.57
FIB Operational & Maintenance	\$ 42,232.02	\$ 7,501.22
FIB Payroll Account	\$ 3,918.96	\$ 1,894.21
Total Checking	\$ 998,636.55	\$ 969,976.00
Investments		
Stifel - Cash & Equivalent	\$ 262,785.81	\$ 1,526,572.32
Stifel - Fixed Income CD's	\$ 8,612,724.64	\$ 7,327,654.60
Total Stifel Investments	\$ 8,875,510.45	\$ 8,854,226.92
First Interstate Bank Savings	\$ 250,935.48	\$ 250,937.40
Yellowstone Bank Reserve CD	\$ 205,267.50	\$ 219,584.53
Total Investments	\$ 9,080,777.95	\$ 9,073,811.45
Total Cash Position	\$ 10,079,414.50	\$ 10,043,787.45

SAFETY COMMITTEE REPORT: Jeff Engel

Josh Simpson gave the Safety Report requested by Jeff Engel. He provided copies of the Service Line Repair Work Order, the Main Line Repair Work Order, The Daily Trench Log and a blank copy of the County Water District Weekly Safety Meeting. All reports are maintained. Clay will provide a quarterly report to the Board in June.

BYLAWS AND GOVERNANCE COMMITTEE REPORT: Pam Ellis

- The colors and layout for the website were approved by Pam Ellis, Ming Cabrera and Peyton Brookshire. Municode is currently uploading the documents from DropBox for the website including agendas, minutes, policies, resolutions, ordinances, etc. There is the ability to have some sections on the website private. Currently that includes the videos and instructions for using the agenda and minute management software. The Board will be able to log on directly and vote on line so that all votes are accurately recorded. Municode will provide a brief training at a board meeting. Currently each Board members email address has been uploaded to the website and into the meeting management software. The projected completion is May 2022 but may be sooner. The website will allow us to post complete agendas, minutes and audio recordings. To post the audio recordings we will need to establish a You Tube channel in order to link the recordings.

The software will allow all supplemental documents to be linked directly in the agenda. We should not have to print agendas and documents for board members unless requested individually. This will also

mean that minutes can be more concise because the source documents referenced are linked within the publicly available agenda.

ANNOUNCEMENTS

The April County Water Board Meeting will be the second Wednesday, April 13, @ 6:00 pm Laura Drager and Dennis Cook were attending a meeting out of town on the third Wednesday of April.

ITEMS TO BE CONSIDERED AT FUTURE BOARD MEETINGS

Note: No action can be taken on items that were not on the agenda.

..Begin working with Josh Jabalara on a rate study and review of fees charged to developers; the recommendation is that it is preferable to increase rates gradually when possible

..Steffeni Freese, the lead auditor from Anderson ZurMuehlen will meet attend our Board Meeting in April and be available to answer questions. The audit will be posted on the District website and at the Yellowstone County News when it is received so the public had adequate time to read.

..Genny Garrick, the Agenda and Board Management trainer from Municode will attend the May meeting to help the Board learn to use the software to vote. She will prepare a video for members to review prior to the meeting.

..Clay will provide a Quarterly Safety Report to the Board in June 2022.

..Recording Secretary and Board Secretary

The meeting was adjourned at 7:56 pm.

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Attest: /s/  Attest: [s/ 

Board President, Ming Cabrera

Recording Secretary, Pam Ellis