

October 11, 2017 Duke was contacted by a customer at Cherry Creek Development. There is a citizen group who would like to do a class action lawsuit against the City of Billings over the franchise fees the City charges. The customer wanted to know if the District would be interested in joining the class action suit. The District does not want to get involved because it would not be in our customer's best interest to bite the hand that feeds us, so to speak.

June 13, 2018 • The City of Billings dropped the franchise fee of 4% which will be effective on the July billing. Duke stated this would be a savings of approximately \$57,000 annually. If we were to pass this cost savings on to our customers, it would amount to \$.80 a month. The other option would be to put it towards infrastructure i.e.: SRF loans.

August 8, 2018 Meeting

Duke received a call from Jennifer Drury, Finance Manager with the City of Billings. The City made an error on our water bill that they corrected January 2018. When converting gallons to CCF (100 cubic feet) the conversion should be .13368. Their billing program only calculated out .1336. The City researched it further, and found the error happened when the City converted to a new billing system February 2015. The City is asking the District to pay the back amount owed of \$2,601,752.19. Bud Dunham made a motion that the board is in favor of not paying any charges from the City of Billings that were incurred prior to the calculation being corrected by the City of Billings. Jim Miller seconded. Motion carried 6-0.

September 12, 2018

Duke handed out a letter from the City of Billings Attorney, Brent Brooks regarding the City Public Utilities Department underbilling the District for three years due to a conversion the City of Billings did with their billing system. The letter stated that the City has an 8-year statutory period to bring collection action for the undercharged amount. In order to avoid litigation, the City would like the District to reconsider their position on paying the undercharged amount. The District received the water bill from the City, who had also added on \$39,026.28 in late fee. Duke contacted our lawyer, Randy Nelson. Randy advised that given the legal costs to go to court with the City, it is in our best judgement to negotiate. The board discussed it being a "billing error" and not a "collection issue". The Board would like to meet with Randy Nelson. Duke will schedule a meeting, and let the board members know the date and time if they would like to attend.

October 10, 2018

Duke and Wynn met with Dave Mumford and Jennifer Drury with the City of Billings to discuss negotiations on the City of Billings billing error. The take away from that meeting was the City expects payment in full, but would allow the District to pay in installments. Duke handed out information from the Administrative Rules of Montana (ARM); some emails between Duke and Attorney Randy Nelson; and Randy's proposed letter to the City of Billings. The Board discussed options for the District. Donna Dinsmore made a motion to approve Randy Nelson's letter to be sent to the City of Billings Attorney, Brett Brooks regarding the ARM stipulation being only six months of back billing may be collected for billing errors. Jim Miller seconded. Motion passed 4-0.

November 14, 2018

Duke handed out a letter our attorney, Randy Nelson sent to the City of Billings regarding the billing error the City made. No update at this time.

December 12, 2018

Duke and Wynn are scheduled to meet with the City of Billings on December 13 at 1:00 p.m

January 9, 2019

Duke was contacted again by the people who are bringing a Class Action lawsuit against the City of Billing regarding the franchise fees. They would like a plaintiff who is a bulk rate customer of the City’s, which we are the only one. We are not interested in joining the lawsuit. (franchise lawsuit)

Update on the City of Billings meeting Duke and Wynn attended December 13. The City is maintaining that they are owed the money, and would allow us to make payments over three years. Our belief is that it was a billing error made by the City, and we would be willing to pay 6 months. We paid what the City billed. Our attorney, Randy Nelson, is waiting for the City Attorney, Brett Brooks to contact him. Randy is saying for us to do nothing, and these cases typically take a long time to resolve. (lawsuit with COB)

February 13, 2019

Update on the City of Billings billing issue. Our attorney, Randy Nelson requested information from our auditors, Summers, McNea; and from Interstate Engineering to show the financial stress for future development on our District. Duke also visited with Kristen Omvig, who was our attorney when she worked with Crowley, Fleck. She has since relocated to Kalispell, MT. Duke said she was open to representing the District if, and when, we might need it

March 13, 2019

City Council members, Roy Neese and Frank Ewalt stopped by for an impromptu meeting. The reason for their dropping by our board meeting was in regards to the City of Billings Public Works billing error from February 2015. The City Attorney had sent the District’s Attorney, Randy Nelson a letter on January 14, 2018 (which should have been dated 2019). The District had not replied to that letter due to gathering information from our auditor and engineering firms. The City fully acknowledges that a mistake was made, but expects the District to pay for the mistake because we received the water. There was quite a bit of discussion. (lawsuit COB)

The Board had a lengthy discussion regarding the City’s impromptu attendance of the Board meeting. Duke and Wynn have an appointment with our attorney, Randy Nelson on Thursday, March 14. (lawsuit COB NOTE the lengthy discussion happened when the city administrator and council members had left the meeting)

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March 18, 2019

Brent Brooks
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EMAIL TRANSMISSION

RE: County Water District of Billings Heights ("CWDBH")

Dear Brent:

I apologize for the delay in getting back to you and Stacey. The Board was unable to meet about this matter because of travel schedules. The delay is not the result of a failure to regard this matter as a priority.

Our clients share a common goal of providing the best water service possible to the taxpayers and citizens whom they serve. You and I have recognized that, particularly with government entities, those served by the entities are never benefitted by litigation. The CWDBH and its Board understand this well. Toward that end, the CWDBH has and continues to negotiate with the City in the utmost good faith, despite its strong conviction that it is not financially liable for the City's alleged error. In keeping with our mutual belief that litigation is to be avoided if at all possible, you and I have left our clients free to negotiate directly with each other. That probably has to change now.

The CWDBH Board met on March 13, 2019. The City Manager and two council members came to the meeting without the courtesy of any advance notice. The City Manager began by stating the false and insulting accusation that members of the CWDBH knew of the City's alleged error and said nothing, in hopes of taking advantage of the situation. We would have expected more of a public official at this level than to make unsupported reckless allegations that impugn the character of the CWDBH members. It is simply not true. He is lucky that his actions did not result in a permanent end to any dialog on the dispute. If this matter is negotiated to a resolution, it will be in spite of, and not because of, the grandstanding actions of the City Manager.

The CWDBH's delay in responding was in part because it was waiting on a financial analysis from its accountants. As you know, the CWDBH was unaware of the alleged underbilling by the City, and understandably continued to budget, make financial decisions, and plan based on its real-time financial picture. CWDBH's accountants predict a serious financial impact upon

the entity if it is forced to reverse the results of the last two years and make a \$2.6 million payment to the City. In fact, the accountants estimate a financial impact in excess of half the amount demanded by the City. To date, the City asks for "responsible" action by the CWDBH, but the City's demands take no responsibility for the financial impact of now demanding a \$2.6 million payment. Responsibility is a two-way street, one hopes.

Notwithstanding the City Manager's behavior, which won't be tolerated again, the CWDBH recognizes that its successful partnership with the City of Billings Water Department is of paramount importance to the customers both entities serve, and the Board will continue to be guided by this priority. In order to best serve its customers, and to offer the most responsible action possible, the CWDBH voluntarily set aside the strength of its legal position and offered the City to pay half of the amount demanded \$1.3 million. While suffering the gaslighting by the City Manager about responsibility, the City officials take no responsibility for the harm upon the CWDBH; they rejected the offer. The City's demand to recoup the entirety of the alleged amount due without an offset for the amount of harm inflicted on the CWDBH is rather hypocritical, to put it kindly.

The CWDBH's offer is a generous, good faith offer that reflects the Board's desire to work with the City, and put both entities' customers first. The City's demand offers no accounting for its responsibility. My hope is that you will step in and help the misguided City officials understand the error of their ways.

This offer expires in 60 days.

Kind Regards,



Randall G. Nelson

RGN/kma

c: Duke Nieskens

July 12, 2019



CITY OF BILLINGS

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July 12, 2019

Randall G. Nelson
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RE: Breach of Contract Dispute with County Water District of Billings Heights and Tolling Agreement

Dear Randy:

Per my previous correspondence, the City maintains that the County Water District of Billings Heights is in breach of its Water Service Agreement with the City for its refusal to pay the currently billed and past due amount for undercharged water usage between the dates of 2/27/2015 and 12/15/2017; this amount is \$2,970,599-35.

The City's Public Works Director has offered to forfeit accruing interest on this balance past due and to accept time payments for the period of undercharges (approximately 34 months). Your client has offered to pay the City \$1.3 million dollars.

To date, the parties have engaged in informal discussions to settle this matter without their respective attorneys' presence. Would your client be willing to enter into the enclosed Tolling Agreement in order to continue informal discussion with counsel present or formal mediation?

Very truly yours,



Brent Brooks
City Attorney

Cc: Chris Kukulski, Acting City Administrator
David Mumford, Public Works Director
Jennifer Duray, Deputy Public Works Director
enclosure

December 31, 2020. Tolling agreement expired

1. The Parties express their intention that this Agreement shall be interpreted broadly to toll the running of all statutes of limitation and defenses from the date of this Agreement through December 31, 2020.

May 8, 2019 Duke was contacted by another attorney in regards to the class action suit against the City of Billings regarding the franchise fees. These attorneys would like to see the District become a plaintiff. Duke contacted the District's Attorney, Randy Nelson, who said no.

January 13, 2021 The District was served papers by the City of Billings regarding the lawsuit. Our attorney was working on a response. We will be going to trial. Wynn mentioned that a lawsuit will not just open up the billing error by the City of Billings, but the City of Billings would like to open up the existing contract between the District and the City. The District has maintained that the lawsuit is only about the billing error by the City. One of the items the board needs to discuss is the possibility of a counter-suit for the twenty-six (26) years of franchise fees illegally assessed which totals \$1.25 million (without interest), as well as the street permit fees being charged illegally because the District is a quasi-government entity. The permit fees are approximately \$250,000. The District attorney, Randy Nelson is working on the counter suit, but needs approval from the Board to proceed. Steve Blood made a motion to approve the back franchise and street permit fees in a counter suit with the City of Billings. Jon Muessig seconded. Motion carried 6-0.

September 8, 2021 Legal Dispute with the City of Billings: re fees Roberta "Bobbi" Berkhof is an experienced litigator who has been assigned to represent the District in this matter. She is meeting with Duke and Peyton this week to discuss the specifics of the case. There was general consensus that the Board is not happy with the slow pace of working toward resolution and the lack of communication with the Board. Jeff Engel suggested that the "squeaky wheel" gets the attention. Laura Drager noted that the Board controls the purse strings; the legal memos need to be received in a timely manner and more effort needs to be evident in addressing the concerns raised. The Board will expect a summary memo from Bobbi Berkhof prior to the October meeting.

Brandon Hurst asked about accepting renegotiation of the existing contract. The Board agreed by consensus at the August 19th meeting that this would be two separate discussions and agreements. Pam Ellis commented that the CWDBH had opened the contract up by failing to pay for the water received from the city as specified in the contract.

October 20, 2021 Lawsuit with the City

1. Due to Dennis's recent health issue, the legal committee meeting scheduled for last week was cancelled. The meeting was rescheduled for Monday, October 18th. There are a few informational items that we requested Roberta Berkhof to obtain. With that information, the committee is planning to present the Board with a recommendation for action
2. The committee is working to come to conclusion on a number of concerns. The City's demand is for \$2,970,599.35. However, there are concerns related to past charges from the City that could result in a substantial adjustment to the amount owed the City.
3. On or about September 22, 2021, the Board of Directors selected 3 Board members to represent the Board at informal discussions with the City related to the lawsuit. Our first meeting was on September 30, 2021. There were attorneys for both parties present. It was a productive

meeting that was very helpful in determining the issues and discussing the various positions taken by the City. After a lengthy discussion, and in order to save the District additional attorney's fees, it was collectively decided to continue these meetings informally, without attorneys present. Another meeting is tentatively scheduled for October 29th. The committee will continue to work toward resolution. If the informal meetings are no longer productive, a third-party mediator is available to help negotiate a settlement.

4. It was discussed at length the need to not circumvent the process of collecting the information and determining the best results for the District by the legal committee; the Board of Directors will be given the opportunity to vote on any recommendations the legal committee presents. There is a fine line between the District's legal position and the public's right to know. Discussions that publicly discuss particular issues and legal strategies have the potential to compromise the District's legal position. The committee will do its work and make a recommendation regarding the lawsuit to the Board at the appropriate time. Our current recommendation is to have the legal committee continue on the same path, working toward a negotiated settlement with the City of Billings.

5. The initial meeting with the City of Billings included: Dennis Cook, Brandon Hurst, Jeff Engel, Bobbi Berkhoff (Felt, Martin, Frazier & Weldon, P.C) and Chris Kukulski (city manager), Jennifer Duray (Deputy Director of Public Works), Roy Neese (Ward 2 Council member) and Gina Dahl (City of Billings City Attorney). Jeff felt they made good headway. The next meeting schedule for Friday, October 29 @ 4:00 pm will be even more informal; no attorneys will be present. Jeff Engel stressed the city called and invited representatives of the County Water District board to meet informally.

Dennis Cook said the board needs to know that the city initiated and that's where we're at. We're working through it and we feel a lot better from where we were to where we are now. Jeff has done a great job as far as being our liaison and Brandon too. I think we're closer than ever to making an agreement that will be beneficial to both parties. They initiated the call and said let's get together, let's figure this out. To me that is very encouraging, it shows a willingness on both sides to get something done.

Ming Cabrera expressed concern with our legal representative, Bobbi Berkhoff, because she sent us a letter that cautions against discussion by the full board because it limits her ability to negotiate. As far as I'm concerned, let's get this darn thing done and get the attorneys out of the room. Any attorney wants to stay in there for another 4 months and get paid. But if the city is willing to talk, let's do that and get the attorneys out of the room and have this bill done. From the reading I have done, there is a bill for \$2,970,599.35. Obviously someone has had a number and they are willing to defer all the finance charges and back charges. But the attorneys are going to eat us alive if you continue with their helping with the negotiations to get this done. We have some CD's that will be due in the future and we need to consider to get this thing done. Thank you Dennis, Jeff and Brandon for getting this thing moving. But I am not going to listen to our attorney because we listened to that other attorney for a year and a half and he just kept writing the bills. Same with Swimley and Tommy Towe. Let's get back to business.

Laura Drager noted that from the documentation she has seen, it looks like the amount the city is asking for is \$2,970,599.35 and that is for the water that we received and sold to our customers. In previous board meeting we had discussions where we were directing our legal liaison committee to discuss with the city or whoever that we want to get the bill paid, we don't want to

pay any service charges and we don't want to bring into play any discussion regarding contract, rates. We just want to focus on that one thing and get that taken care of. Can you tell me in your meeting that you had, was that the case? Was it just discussing that or were other things brought into the discussion?

Jeff Engel said there were some other things on the table but I don't know that we can discuss them. This is one of the things that are really hard to deal with. Let me back up a step here. The attorney Bobbi Berkhoff is one of ones that is on board with us here to give us rein and let us do our thing by ourselves. She is not pushing the issue of being in all those meetings. She is supporting us in that decision to have these informal meetings with the city and she is looking at it strictly from a cost standpoint. I just wanted to clarify that. There is a fine line between the district's legal position and the public's right to know. They strongly encouraged us to try to keep it quiet until we have something to present to the board. At this point in time, we don't have anything formal to present to the board.

Pam Ellis stated that that essentially violates MT Open Meeting laws and she is offended. Jeff Engel said that Jeff Weldon disagrees with that. If we bring everything that we've discussed to the table, it becomes public knowledge and it affects our ability to negotiate.

Pam Ellis said she was not clear why we were negotiating. The number has been the same for the last 2 ½ years. The number has not changed by a penny. The city was demanding that we change the contract and they are now saying they will accept the payment.

Jeff Engel said the contract is not an issue at this point. In our last meeting, Chris Kukulski said the city would address the contract as a separate issue. They agreed to that right off the bat; we didn't have to press that issue at all. So those two items are separated.

Dennis Cook said there is a definite willingness to look at both sides and to try to come to some resolve. We're as close as we're ever going to be. If it looks like there are underlying circumstances that we could come to some agreement on and actually save the district some money, those are things that are still being talked about. All we're asking for the board here is some patience to let us follow through and see what can happen. The worst scenario is the number stays the same; we don't know that. We don't know that it is going to stay the same because that is part of our back and forth. So we have to just take these meetings initiated by the city. They are willing to listen. To me, that is a situation where I believe it could be a winning for us as we move forward. And all the facts and details that are being talked about between us, they don't want their attorney there and our attorney will not be there. This meeting coming up will just be ourselves; it will be that informal. Dennis believes there is light at the end of the tunnel. I am asking the board for your confidence and trust that we can at least talk to them, follow it a little further along, and see if it is going to develop into something that is going to benefit our ratepayers and be a decision that will come out where both parties can hold their head high and get on with what we are supposed to be doing.

Pam Ellis said she would like to point out because she was in the mediation meeting and the January 13th, 2021 board meeting. The minutes of January 13th say that the board approved filing a counter claim for \$250,000 based on the permit fees. That meeting was January 13th based on the City of Billings resolution passed on January 7th 2021. Pam Ellis does not recall approval of that counter claim being discussed by the board; she doesn't believe that 6 days later the district was able to compute. Pam thinks it was added to the minutes because the Amended

Answer, Counter Claim and Jury Trial Demand filed by Randy Nelson was filed on February 8, 2021 before the February board meeting. There has been more than \$250,000 spent on lawyers (between the City of Billings and the CWDBH). The other issue in the complaint is the franchise lawsuit. The ratepayers are already represented by Matthew Monforton. For the franchise lawsuit, if there is a payment you have to assess the ratepayers the payment, hire an attorney to distribute it, and that benefits the ratepayers not at all (Note: The district did not return the \$57,000 annual franchise fee reduction made by the City of Billings in 2017 and rejected requests from the Franchise fee plaintiffs on October 11, 2017 and January 9, 2019. The October 11, 2017 record “The District does not want to get involved because it would not be in our customer’s best interest to bite the hand that feeds us, so to speak.”)

Pam Ellis said she believes there are some real problems with the complaint that was filed by Randy Nelson in February 2021 and she hopes we don’t pursue that. \$250,000, if that is an issue it can be dealt with informally. But it shouldn’t be an issue in resolving the fee dispute with the city.

Dennis Cook said those complaints were only part of it. I want to make sure we’re clear on that. There are bits and pieces to the whole back and forth that are going on in this smaller group. That is what we are working through. We are asking again to let us meet with them to see if they really mean what they say because like I say, they are the ones that called it. We are willing to listen to them, put our offer on the table, they put their offer on the table, and we will see where we are at.

Laura Drager asked for clarification about the October 29 meeting. Who will be participating? Our legal committee, who from the city?

Jeff Engel said it would be Chris Kukulski, Public Works Assistant Director Jennifer Duray and Council member Roy Neese. Brandon Hurst explained that there is no cost to the ratepayers for the meeting; it is the least we can do. Trust us as a committee to do that. Brandon stated that he was at the mediation and nothing came from it and it wasn’t our fault. We haven’t had a real negotiation with the city ever. Two council members and the city manager came to the board and started accusing us of things, that the engineers were lying and that kind of stuff. So we never really had a real negotiation, an honest negotiation.

Ming Cabrera asked if the committee anticipated coming to a consensus on October 29th. To settle this as soon as possible, can we set another board meeting to get this thing settled and out the door. Jeff Engel said it really depends on what is accomplished October 29th. Agreed to leave it up to the committee to think about it; let’s get it done.

Jeff Engel said he didn’t think we are into having a lot of meetings and I don’t think the city is either. I think everybody is focused on getting to the subject to try to get this thing solved. And that was one of the reasons the suggestion was made to leave the attorneys out of it and just cut right to it.

Pam Ellis said that what killed the mediation from her perspective was when the city demanded changes to the contract. People who had been on the board may have known, but as a relatively new member she was stunned.

Dennis Cook said, “well, that is our ask”. Have trust and confidence in us to let us move ahead and see what we can get accomplished here. Jeff Engel agreed.

November 17, 2021 (Notes of the meeting—no action was taken) In attendance: Board members: David Graves, Ming Cabrera, Pam Ellis; City Manager Chris Kukulski, Assistant Public Works Director Jennifer Duray, and Ward 2 Council member Roy Neese

Legal Liaison Report – Jeff Engel (from the Agenda)

The legal committee has conducted 2 informal meetings with City officials to negotiate a settlement for the lawsuit with the City. No attorneys were present. The first meeting was essentially a meet and greet; the atmosphere was good and the meeting was productive in that both parties were able to determine the basics of each other's position. The second meeting was more productive in that the subject matter became more specific related to demands; the meeting became less productive in that there was obvious disagreement as to which issues are included in the lawsuit and which issues are not,

The City has agreed to separate the contract negotiations from the lawsuit settlement. Other issues, and whether they should be included as a part of the lawsuit, are still on the table and are being rigorously debated. The committee is currently waiting for the City to provide some additional information to better clarify at least one issue.

There is some disagreement amongst some Board members and the legal committee as to how information regarding the lawsuit is being handled; apparently some Board members feel the need to know what is going on in detail; understandable but legal counsel has advised the legal committee to not share discussions that take place behind closed doors in order to avoid compromising the negotiations. Legal advice indicates there is a fine line between closed door negotiations and the public's right to know; negotiations being very difficult to conduct when information is being dispersed and received from multiple sources outside the negotiating team.

Knowing the full Board will be voting on any proposed settlement, a recommendation will be arrived at by the legal committee and shared with the full Board at the appropriate time; the public's right to know will be addressed at the same time.

The legal committee is following Board guidelines regarding committee structure as there are a lot of other issues the Board of Directors are addressing currently. The committee structure enables smaller working groups to dissect specific topics thoroughly without involving everyone on the Board of Directors. All committees are responsible to the Board to make recommendations based on good quality research and intent. If the Board would like to reconsider the legal advice it is receiving and approach the lawsuit negotiations in a different manner, it can direct the legal committee accordingly. It is advisable that counsel be apprised ahead of time of any proposed changes to the legal committee's approach to the City lawsuit.

Notes from the meeting Ming Cabrera noted in moving forward to discuss resolution of the fee dispute with the City of Billings, this has caused a split with the Board members themselves. This is why we don't have the full seven here.

How old is this bill at this point? Jennifer Duray said it is 4 years old. Ming noted that we wanted to get the dispute resolved and over with.

Pam Ellis noted that in August we met with Jeff Weldon in an open session and I thought it was clear that what the board wanted was to resolve the fee dispute, pay what was owed for the water. We collected the money from the ratepayers, we have the money. It was held in cash up until the tolling agreement expired and then it was put in CD's. Some of the CD's are earning 3 hundredths of a percent so essentially worthless. We wanted the bill paid. We did not want to deal with the contract issue. Roy and Pam talked about it and Roy talked with Chris. The issue with not wanting to deal with the contract have to do with what Scott and David said. We need to get our rates rationalized, we need to get development working, it is not a priority. We understand where the city is coming from, but we have so many things on our plate including some quite unhelpful behavior on the part of some individuals. That is what the board directed. In October, three board members (Ming, Laura and Pam) repeated the direction from August. We were told things were going fine, things with the city are going great. Evelyn reported it. When I talked with Roy, Evelyn said the reporting is not even in the ball park. Dennis Cook and Jeff Engel had come to the meeting with a list of 11 items. Evelyn's reporting was correct—she reported what happened at the October meeting. What we had said to other board members was that we wanted to invited the city in so we could have the discussion because there was a difference of opinion between what the members of the legal committee (Dennis Cook, Jeff Engel and Brandon Hurst). Other board members would not speak to the other board members. Jeff Engel said he would only speak if Dennis Cook gave him permission; a lack of the concept of boardmanship,.

Dave Graves said we need to add more. Four of us want to pay the bill in full (\$2.95 million). We voted and that is why it is on the agenda that was out last Friday. They knew we wanted to pay that bill. We want to get things done so we can move on with other things. Because we do need to hire a new General Manager. So pretty much there would have been six of us. When they saw what we had submitted in the agenda, all of a sudden we weren't having a meeting. I can show you the text on the phone and things like that. So we still had four board members and they knew exactly what we were going on with. And they did their best to stop us. We don't know what is going on with the negotiations with the city other than they led us to believe that you walked away. We walked away and would not agree to meet again until January. We have so much stuff on the agenda that we need to get this stuff done. We drank the water, we showered with it, we watered our lawns. We owe the city that money because we are part of the city. The amazing part when we were getting underbilled by the city, our water rates didn't go down. They stayed the same.

We can't be angry at the city. They made a mistake, they admitted it, we drank it. We need to pay the bill. That is what we wanted to do and we were shut down. And people were attacked on the board. They tried to force people to resign and different things. You can shake your head Suzie, but I read the stuff about certain things. That is not how you operate. Dave was appointed because somebody dropped out. Laura and Ming and Dennis were elected; the first election since 56?

Pam Ellis said Laura has been in her house 45 years and there was never an election she recalls in 45 years. I have been in my house 21 years and there has not been an election.

Ming noted that the remaining 4 board members have no idea what is going on in regard to the negotiations whatsoever. We have been completely put in the dark. We were told to keep our mouth shut and the committee would come back later. But there was clear direction that we wanted to have this completed. We want it done so we can get a contract, we can get a rate study, we can get things done for the Heights. We can approve the health care plan for the staff; the plan has to be signed by November 30th. That's what is on the table right now because people didn't want to show up because they are so mad because they felt that we were interfering with the discussion. We are all members of the board. We have been open about everything else, but when it came to do with the discussion with the city, the remaining 4 board members had no say whatsoever. So that's is where the point of this is going.

Suzie McKethen said the district didn't know about the underbilling for two years.

Dianne Crees said there are reasons we honestly did not know we were being undercharged. #1 because we bill in gallons; they bill in cubic feet. #2 we were reading meters at different times of the month so our usage would never be the same as the city; #3 we changed to a 3 tier conservation billing system at the same time so we did not know how that was going to impact our income from water sales; #4 we were under major construction at that time on Alexander Road and building a reservoir so a lot of our energy was going to that; #5 we believe they had capable people doing their jobs; we never checked the water bill. They sent us a bill and we paid us. So I would like to know how they didn't know they were underbilling and why it took so long and what the city's responsibility is.

Dave asked why the district didn't know our reserves were growing. Dianne said the district didn't know it because they changed the way they billed.

Chris Kukulski, city administrator, said those are fair questions. Chris said his approach is exactly as David Graves approached it. He was 30-60 days on the job; when he was notified of the problem, the city scheduled a meeting with the Board President and his approach was the city has made a mistake, they take full responsibility for the mistake, but we are long term partners. The offer Chris made at that first meeting and has now consistently made it for now three years, has been that the district should not have to pay penalties and interest. Back then we would have allowed the district to pay it back over the same time period it took the city to figure out the error. That was the approach we started in late 2018 and early 2019. What I was told consistently was "shame on you, you fool." Chris said that he looked at this as partners again, long term partners. Most of your customers are city residents, if I walked away from the till with extra money, that is wrong. If I overbilled you and it was determined through a calculation that we had overbilled, I better expect them to say, "hold it, you owe us a refund." So we approached it that way and that started in the very first conversation.

Second, the offer, the same approach, was made numerous times including at meetings and over the last few months with the group that is negotiating on behalf of the board. The goal this evening—we don't want to get in the middle of all that is going on here. I realize that there is nothing that the city benefits from that. We easily could be pointed at and perceived as the bad guy. So I don't want to be here and become the scapegoat for something unnecessary. But I also

wanted to be here to say these same things. We have always made the offer that we would accept the payment in full, assuming that we would both agree on how much water went through the meter. If we agree on how much water went through the meter, there was nothing really to debate. That really was our goal, is our goal, continues to be our goal. Jennifer could explain much better why didn't we catch it? We have made that point at the discussions about why it did take us so long to figure out what was going on.

Did we have a water main break or leaks somewhere? The gallons vs cubic feet certainly added to it. His main point was that he didn't want anybody to leave tonight with the city not showing up and false information to be claimed that the city has not consistently asked that the water that was used to be paid for. So that then we can move onto other issues. Because honestly building this city in a healthy way in all of its borders is a bigger priority to me long term than this dispute.

Ming clarified that no interest or penalties have been added to the amount owed. Chris responded that the late fees have been added to the bill but the offer to resolve it has been consistently that those penalties or late fees were gone.

Chris said that the first negotiations just a few months ago with the team. We have never met the third person of the team. Two very consistently Jeff and Dennis have met 3 times. There was illness in the middle there or we would have met more. We have consistently met with them. We agreed at the first meeting that we will deal with the contract separately. The contract is a huge issue to the city if we can first resolve that and that was what was communicated. If we have 3 or 4 separate issues going on here, the board counter-claimed about franchise fee, cut fees in street right of ways. We can deal with those issues separately. Dennis has been very clear that he wants to deal with them separately.

Pam Ellis noted that the attorneys were really mad that the other board members tried to get information. Dennis told us in October that the worst case scenario was that we would pay the full bill, the worst case scenario. Pam's understanding is that the attorneys thought they had a proposal for a lower amount and that we would save people money. Pam is offended because she is someone who pays her bills. It offends her that the district refuses to pay their bill. That is not something that is desirable to me.

Dave Goodridge said as a concerned citizen, he would put on the table that you don't have a quorum and your board is clearly dysfunctional to a degree, a board of directors is always a steward of the programs they are a board for.

And if this board is as dysfunctional as he is hearing, this is all a waste of time.

Pam Ellis said it actually isn't a waste of time. We need information. The law requires that you have the discussion in open session.

Dave responded that is fine, but "you have bigger fish to fry" right now.

Chris Kukulski agreed. We had various conversations. Jeff Engel is the city's appointee. I have talked to Jeff several times in the past 24 hours and whether to be here. My purpose to be here

was just to share that information and frankly leave because I don't want to get caught up and be perceived that we are trying to do anything other than the offer.

Ming Cabrera agreed that that is all we are asking. Whether that is a foolish negotiation strategy or not as Tom says here, this has not been about negotiating the best settlement for the district. This has been about resolving this in a fair way because Lord willing, we are going to be working together for decades, for a century. We are your water supplier, and you serve 10's of thousands of our citizens.

David Graves said the point is it is foolish for you to hire lawyers and us to hire lawyers when we live in the city and drink the water. Why are we doing this?

Pam Ellis noted that district ratepayers are paying for the lawyers on both sides of the dispute.

Ming reiterated that this situation was created because they felt there was interference but we were never given any information whatsoever. That's where the problem is.

Pam asked what the rationale was for walking out of the meeting and not wanting to meet again until January? Chris said that things did get a little bit heated and they got a little heated over the fact that from his perspective, Dennis communicated pretty clearly, he wasn't going to give us any credit in the negotiation for the fact that we had said all along we would not charge penalties and interest. So when Dennis made that point, the negotiations went from there down. Dennis was pretty firm they were going to negotiate from the amount owed down. And so we decided that rather than have it really dissolve, we stepped away, I would say amicably. Nobody stormed out the door. But I think it might have been December 1, I said, guys, I really think please reach back by December 1 to see if we can get this thing resolved. By this time, the tempers were there and the comments were we are just not going to talk about this again until next year. Chris felt that was not going to be helpful in his opinion. He left it open hoping we could have that meeting; no meeting has been set. As of this moment, there are no additional discussions scheduled to take place between the Heights Water District negotiators and three representatives from the city.

Roy Neese said he would add to that. Just to make it clear in the negotiations because there was not offer from the district, we made it clear that every offer we had made prior was off the table and we were starting over again when we meet the next time. All offers are off the table if the district choses to come back to the table. We are starting with everything and then we can negotiate down from there. Because we already had talked about the original offer subject to council approval.

Chris clarified that he is the administrator, he makes recommendations to the council. At the end of the day, the council has to vote to approve. He does not see any opposition and he would anticipate strong support if we can get this resolved. If we keep paying lawyers on both sides, eventually people start digging in and aren't willing to make offers on either side. That is where I believe we still stand today if we can get this thing off our books on both sides and get on frankly with for us, our big issue, is the contract.

Chris has not been secret that the contract is an issue. We work in a public agency. There are thousands of customers that the district has that keep getting added outside the city limits. They are not required to follow the land use planning rules, they are not helping to pay for streets, parks and police and fire. And of that has created another nightmare, in my opinion, for our community to deal with. And when that new interchange opens, Chris wants both to be ready. The city is the sewer. The district is the water. To have this done right. And the way we are going right now, it is not going to be done right. It will be another disaster that has to get fixed later.

Ming said we will end the discussion at this point. The city has been here discussing but they are not talking about what the negotiations were. We need to move forward; we need to do that.

Dianne did not get an answer about why it took so long and what even happened in the first place.

Jennifer Duray said the city did a conversion back in 2015. We went on line with the new conversion. The Heights has a gallon meter; the only one in our system. There was an incorrect conversion factor put in to the system so it was not converting right. Somebody missed a decimal. We don't know. We are not here to place blame or accuse you of knowing that this happened. We don't know who caused the error on the city's side. We have people we are retired now that were there. Could have been the vendor. Could have been the programmer. Why it took so long? The Heights Water District is approximately 11% of our revenue so we didn't notice a huge revenue change from the misbilling that we were doing for awhile. What we noticed, because we do audit our water and we are noticing our production of water and what we were billing was different. That is when we started looking for leaks. And that takes a long time. We finally narrowed it down to the Heights Water District.

David Graves asked, "didn't that happen in other cities." He tried to look it up and said other cities had problems with new meters and new systems. Down the road they found out there was a mistake in what they were being billed for.

Chris said it certainly is not uncommon in a system. The first thing you look for is how much water is leaking out of the system? Most would probably be shocked at how much water leaks out of the system but it does. The city of Billings literally had 500 miles of pipes in the system. For the longest time, we were looking for a leak in the system that they were not seeing. Unfortunately this is the first time we have had a calculation error or this magnitude. But it is not shocking with the one and only meter being that way.

Jennifer noted that the city has changed how they bill from cubic feet to gallons; the meters still measure cubic feet.

Chris says errors happen, nobody wants them to happen. Utilities are critically important if you are going to have equity billing to make sure you are measuring every drop you can and fairly charging the people who use it. And that is our goal here, period, is to do that. That is why in that first meeting we took full responsibility that the city is the one that messed up the formula

(or the firm we hired). We did not blame the Heights for that. But it did start to get ugly quick when the approach was “shame on you, you fool”. What was shoved back at me was that if the city is that stupid, then the city should pay for this. We believe that sooner or later we could get a resolution; we just have not been able to get there. I sure hope in the near term we can so we can move on with the other bigger issues: development. Chris works with Dave Goodridge on many different projects in town. He sincerely cares about this community as a whole and its success. So we probably better leave before I say too many things.

David Graves said he appreciates the city representatives coming. Because you have the best interests of the citizens of Billings. We are trying to take care of the ratepayers here in our water district. I appreciate you guys being here, and gal. Everybody.

November 29, 2021 (REVISED) Mark Noennig HENDRICKSON LAW FIRM, P.C. 208 North Broadway, Suite 324 Billings, Montana <http://hendricksonlawmt.com/attorneys/mark-e-noennig/> Mark Noennig introduced himself. He grew up in Billings, attended Billings Senior, MSU degree in engineering. Had his own engineering firm designing oil refineries. Got his law degree at University of Montana and has been practicing law with Hendrickson Law Firm since 1978. He does a little bit of everything. More important is what he does not do. He does not do criminal defense, personal injuries, worker’s compensation, or divorce. Does a lot of real estate work and commercial work. Spent 8 sessions in the legislature, 3 sessions of which he was chairman of the Local Government Committee. He was asked to give some competent advice and I restricted my participation to procedural matters, contract matters and review of the bylaws. Finally I agreed that if the board had a position to take in litigation, that I would be willing to put in an appearance on behalf of the board so we can get this settled in a timely manner for a reasonable amount that the board directs. Mark submitted the firm’s standard proposed Attorney-Client agreement. I have incurred some time getting ready for the meeting which I would include. His rate is \$275 per hour. My goal is not to spend extra time for which I can try to bill; that’s never been my policy. It certainly is not now since I am recovering from five spine surgeries and old age. But I work 60% of the time. Mark Noennig did represent Tom Zurbuchen previously in a matter that had nothing to do with this board and he does not perceive as a conflict of interest.

Ming Cabrera wanted clarification that he is willing to work with all seven board members. Mark said he would work for this board. Don’t want to get involved in disputes among the board members. It’s one thing to have votes that differ. It’s another thing to have personal attacks. There has been a challenge to the seating of some of the board members. I don’t want to be involved in those issues.

Ming Cabrera said our first goal was to approve bylaws. We got that done.

The second was to settle with the city.

Mark Noennig said it is a delicate balance in litigation with a public entity because as you all know everything the board does or discusses is open to the public. That is the way it should be and that is the way it is. It is not unusual that a committee of less than a quorum is appointed to negotiate a settlement of a case. The committee has to make a recommendation to the full board

and the full board has to approve or disapprove it. Negotiation is a delicate thing. He is an arbitrator for the American Mediation Association. To the extent that you vote on an outcome and put it on the public record, you limit your options. I am not finding fault with where you are in this case. I have not sat down and reviewed all the pleadings. Jeff Weldon has offered to sit down with me and give me everything. So if you appoint me, that's one thing I think is worth my spending the time to do. I just want to make those disclaimers.

Laura Drager commented about the November 18, 2021 testimony that Peyton gave in front of the Local Government Interim Committee in Helena, he stated that 80% of the County Water District is in the City of Billings. What that means is that 80% of the people that are paying for Heights water are paying for two sets of attorneys: the attorney for the city and the attorney for the County Water District to fight each other. That seems absolutely asinine to pay money for both sides because she lives in the city of Billings. As a Board, we discussed paying the city for the water. We have a contract. Sure, they made a billing error. We sold the water to our ratepayers and all seven of us agreed. In May we talked about it. In August we talked about it. September we talked about it. October we talked about it. All seven members of the board were in agreement. Then we find out that there is a stalemate. We just want to get this taken care of so we can move forward. This has been going on for over four years.

An audience member said, "so you're talking about a lawsuit that is pending right now?" What is that lawsuit about?

Pam Ellis said the city failed to bill \$2.95 million. The ratepayers of the District were billed for the water and collected the money. They kept it in cash up until December 2020 knowing full well that they may have to pay the bill. There was a tolling agreement that was signed by both sides that said the city would accept payment in full of the \$2.95 million without late fees or additional penalties. Late fees are 1 ½% per month.

Laura Drager said the late fees increase by \$71,000 per month; the city filed suit in December 2020.

Pam Ellis said that when the tolling agreement expired (which she did not know about at the time even though she was on the Board; she had asked for copies of the documents but was told by Duke Nieskens that that would require a vote of the Board. That is not legal—Board members need to have equal access to information).

When the tolling agreement expired, the City filed a lawsuit against the District for the \$2.95 million plus more than \$5 million in late fees. Duke told us multiple times in the board room that he personally had computed the amount owed. That's true. The city not only failed to bill for almost 3 years, but when they figured out the problem was with the billing to the District and not a leak somewhere in the system, they computed the wrong amount. When we were in mediation and the mediator asked if there was any dispute over the amount owed, Duke said no. Her big concern is that we don't have a legal foot to stand on and ratepayers are at risk. If we are in court—we owe the money and the city charges late fees.

Laura Drager pointed out that the city lawsuit quotes the state code that says they are allowed to charge us late fees.

Question from the audience: they failed to bill us. So is there no legal standing—since they didn't bill us, why would we have to pay the late fees?

Attorney Mark Noennig said it is like if your water company forgot to send you a bill, you still owe the money. Laura Drager said we have all said we are not willing to pay late fees. Mark Noennig said he has not reviewed all the documents. There is a counter claim.

Pam Ellis said part of the counter claim is for the franchise lawsuit. When the city stopped charging franchise fees, the district did not stop charging rate payers and lower the rates.

The other issue is a right of way dispute which the district disputed in 2020. The city responded with the legal rationale. Apparently the District said we are not going to pay the right of way fees (cost of opening up the road to repair a water pipe). The city responded with a letter about their legal authority. The District did not respond and continued to pay the right of way fees. Those are very small fees. The city has said they are more than willing to talk to us about the fees and if we can prove legally that the city cannot charge the fees but their attorney says they can charge. Pam believes it is not worth litigating over that issue. The once you are in court, you have to live with whatever the judge says.

A guest said that should be the position of all of us. Ming Cabrera said the city already agreed that they would not charge us late fees. The money is owed. Rather than running up more lawyer fees for the next four months, enough.

Dave Graves noted that at the November 17th meeting the city administrator sat back in the corner and he said he would make the recommendation that we just pay the principal, not late fees, no interest.

Question: why was that not done? Because the three board members would not follow the direction of the board. Dave Graves and Ming Cabrera repeated that we wanted the bill paid, we wanted the lawsuit dropped.

Laura Drager asked to bring us back to our agenda.

Laura Drager made the motion: Having conducted a public hearing, considered written and spoken public testimony, I move to approve Resolution 006-21 to Authorize Engagement of Mark Noennig, HENDRICKSON LAW FIRM, P.C. 208 NORTH BROADWAY, SUITE 324 P.O. BOX 2502 BILLINGS, MT 59103-2502 as Counsel for meeting protocol and bylaws, settlement of pending litigation with the City of Billings, and preparation of contracts for general and interim managers. (1c)

The motion was seconded by Dave Graves.

Frank Ewalt asked if this attorney was going to represent the board or the administrator. Several members responded: the board.

Ming Cabrera and Dave Graves thanked Frank Ewalt. Ming asked the question to make sure he is going to represent all seven members of this board. So then we have open communication at all times with the public and the seven board members. Not three, not one, but seven board members.

Mark Noennig said he has not looked at the case as he told us. It is difficult to strategize in an open meeting. Pam Ellis said the other issue is that we did not expect Jeff Weldon and Bobbi

Berkhoff to be doing something that is in opposition to what the majority of the Board wants and that is what they were doing. Attorneys have a responsibility to communicate with their clients. Jeff Weldon communicated and did something completely different.

Dave Graves said his gal from Great Falls—we were led to believe she was moving down here.

Pam Ellis said Bobbi Berkhoff introduced herself as the new hire for Felt Martin. When she called and asked Pam to get information for her, Pam told her she would be happy to meet her at the office. Roberta's response was that she was in Great Falls and not moving to Billings. We paid her to drive down to Billings and meet with the city. That is hugely expensive.

Tom Zurbuchen said Pam said the franchise fee is covered in existing lawsuit. That is incorrect, this District has been excluded from both franchise fee lawsuits. Plaintiffs would receive \$0 from the City from the franchise fee; they have been excluded from day 1.

Pam Ellis said there are two indications in the minutes that plaintiffs came to the Board and asked them to join the lawsuit. Duke Nieskens recommended that the District not join the suit because "we would be biting the hand that feeds us." If you watched the city council when they discussed the lawsuit in open session in December 2020, Gina Dahl figures the liability was \$50,000.

The motion: to hire Mark Noennig as Counsel for meeting protocol and bylaws, settlement of pending litigation with the City of Billings, and preparation of contracts for general and interim managers was approved unanimously.

Laura Drager made the following motion: Having conducted a public hearing, considered written and spoken public testimony, I move to approving Resolution 007-21 to Direct Mark Noennig, Counsel for meeting protocol and bylaws, settlement of pending litigation with the City of Billings, and preparation of contracts for general and interim managers, to prepare a settlement agreement in cooperation with representatives from the City of Billings to settle the fee dispute for the amount due for unbilled water provided to the District TOTAL: \$2,970,599.35 with no additional late fees or penalties, pending a review of the court records and discussion with prior counsel. The settlement agreement will include an agreement to renegotiate the contract in 2022 when the new General Manager has been hired and may include resolution of the right-of-way issues and other issues identified by either party.1d) (p14)

Seconded by Ming Cabrera.

DISCUSSION Pam Ellis asked Mark Noennig that the resolution states that we want to pay the bill in full and includes pending a review of the court and discussion with prior counsel. Does that give you enough flexibility?

Mark Noennig responded, "I think so, and there is some other language in here too." He wants to make sure the city does what they told you they were going to do. These other issues cannot just be automatically be separated out at our request. If there is a lawsuit pending, they have to be dismissed without prejudice or resolved or something. I'm not trying to draw this out, I'm just saying this has to be dealt with. And I think this gives me enough flexibility to be able to do that.

Tom Zurbuchen said he thought he had seen, I thought they said they were going to negotiate a new contract with the City after a new administrator had been hired. Why would we open a

contract just because we have a new General Manager when our contract is not scheduled to be reopened?

Pam Ellis said that the city will not settle unless we renegotiate the contract. You are absolutely correct Tom, had we paid the bill. The contract totally benefits the District and they had no ability to open it. When we didn't pay the bill, we broke the contract.

Laura Drager said the city agreed to separate the lawsuit for the money owed for the water from any contract renegotiations. It will be legally binding when a settlement agreement is signed.

Mark Noennig said an agreement to renegotiate is pretty open ended. It is not enforceable, but perhaps you have to negotiate in good faith. There is a limit to what you can force people to do when there is a lawsuit pending.

Pam read what Chris Kukulski told us on November 17, 2021:

Chris has not been secret that the contract is an issue. We work in a public agency. There are thousands of customers that the district has that keep getting added outside the city limits. They are not required to follow the land use planning rules, they are not helping to pay for streets, parks and police and fire.

And that has created another nightmare, in my opinion, for our community to deal with. And when that new interchange opens, Chris wants both to be ready. The city is the sewer. The district is the water. To have this done right.

And the way we are going right now, it is not going to be done right. It will be another disaster that has to get fixed later.

Pam noted that Chris has passionate feelings about this issue. She lives in the county. I've gotten questions from council members, "are you willing to be absorbed in the city. The city doesn't provide any benefits. Our lift system for the septic was very expensive. The city doesn't put any money into the parks in the Heights. But he has a legitimate point. The standards are different and it does create problems down the road when property is annexed. Part of this is a conflict between the city and the county and has nothing to do with the County Water District. She has great confidence in Mark Noennig and she feels that we will be able to resolve the problems.

Tom Zurbuchen urged the District to try to negotiate a settlement without opening the contract. We know what the city wants. They want to approve or disapprove of any future annexation. They want the right to have a system development fee that goes to the city for the water treatment plant. They want to raise our rights for development and this is one thing you four board members scream about is the cost of development. The city wants to put a line to serve out by the bypass—that goes through our existing district.

Pam Ellis said that is not a true statement Tom. I have attended the Bypass meetings and it clearly shows on the Bypass map that that area is served by the County Water District. Chris did introduce that concept when the area was originally included in the area for annexation. He has no ability to do that.

Ming Cabrera said all we are asking at this point is that we separate the contract from what we owe the city and then we negotiate the contract.

A guest said the city has the option to charge whatever the hell they want and they don't care about nothing but what their agenda is and we want to prevent that.

Laura Drager called the question to approve Resolution 007-21 to Direct Mark Noennig, to prepare a settlement agreement in cooperation with representatives from the City of Billings to settle the fee dispute for the amount due for unbilled water provided to the District TOTAL: \$2,970,599.35 with no additional late fees or penalties, pending a review of the court records and discussion with prior counsel. The settlement agreement will include an agreement to renegotiate the contract in 2022 when the new General Manager has been hired and may include resolution of the right-of-way issues and other issues identified by either party. Approved unanimously.

Ming Cabrera would like to make a motion that we do a straw vote and we tally a vote so that the three other votes can be part of the negotiation and we are not excluding.

Pam Ellis said they cannot vote, they are not here. Dave Graves he is going to contact them and ask who they want on the legal committee. Pam Ellis said no, your votes have to be taken publicly. That is what screwed it up the last time. Dennis Cook called everybody 1 by 1, that was an illegal serial meeting. Then there was no evidence.

Mark Noennig said you could conduct a straw poll and then have a special meeting. The president is saying he would like to have input from them before. You can do that, but you will have to have another meeting. Otherwise you could authorize the president to take those votes and appoint the committee.

Pam Ellis said we have already done that. The committee that was appointed is not the committee that was recommended.

Ming Cabrera nominated Jeff Engel to be on the legal committee. Dave Graves made a motion to table this to the December meeting and have an interim committee to meet with Mark until December 15th.

Mark Noennig clarified that we were discussing appointing a temporary committee. He has not read enough to understand the contract and the dispute. He said it would be nice if he had someone to work with with the authority of the board. Ming Cabrera said he could be the authority at this point.

Ming asked Pam Ellis how she felt. Pam said she is the one who has all the files. She worked with Roberta Berkhoff about how to move forward.

Mark Noennig said the motion pending is whether to replace that committee. Pam Ellis said we need to replace the committee; the last meeting blew up.

Tom Zurbuchen said you can put anybody on the committee you want. You could put Tom Zurbuchen on as a citizen. You can put Larry Brewster on.

Ming Cabrera asked how we wanted to proceed. Pam Ellis reminded Ming that originally he had talked about appointing Laura, Pam and David so I think we should go with that. Ming could not attend because then we would have a quorum. Ming originally said he did not want to attend.

Laura Drager made the motion to appoint David Graves, Pam Ellis and Jeff Engel because Jeff is also legal liaison.

Pam Ellis seconded the motion. David Graves withdrew his motion to table the appointments. Ming Cabrera said that is a good compromise. Approved unanimously.

December 15, 2021 Members of the public who did attend the November 29th meeting may comment on any of the board actions for November 29th, preferably no repeating the comments made by that individual on November 29th. The Board will approve by unanimous consent any items not receiving public comment. The board will vote again on any items receiving public comment. Each member of the public may comment once on any given item. This is a seven member board. Four members are present, three are absent. One had an excuse; the two others Jeff Engel and Brandon Hurst are supposed to be here and are not present. Dennis Cook had surgery and he has an excuse at this time.

The reason we are going to do this in this order is because we have to recertify many things because there was a lawsuit against us in regards to our meeting. We were summoned to answer the complaint and this action was filed by the Office of the Court. Jeff Engel, Dennis Cook, Brandon Hurst and Tom Zurbuchen plaintiffs vs the County Water District of Billings Heights sent a summons saying more or less that the meeting was illegal for November 29th. Attorney Mark Noennig commented that we do not concede that the meeting was illegal. We are doing that this is over so that the public can see the actions once again and we can recertify all the actions.

4. APPROVAL OF CONTRACT FOR ATTORNEY MARK NOENNIG No Public Comment

1. Laura Drager made the motion: Having conducted a public hearing, considered written and spoken public testimony, I move to approve Resolution 006-21 to Authorize Engagement of Mark Noennig, HENDRICKSON LAW FIRM, P.C.208 NORTH BROADWAY, SUITE 324 P.O. BOX 2502 BILLINGS, MT 59103-2502 as Counsel for meeting protocol and bylaws, settlement of pending litigation with the City of Billings, and preparation of contracts for general and interim managers.

2. Seconded by David Graves.

3. MOTION to hire Mark Noennig as Counsel for meeting protocol and bylaws, settlement of pending litigation with the City of Billings, and preparation of contracts for general and interim managers was approved unanimously.

5. APPROVAL OF BOARD DIRECTION FOR RESOLVING THE FEE DISPUTE WITH THE CITY OF BILLINGS No Public Comment

• Laura Drager made the motion: Having conducted a public hearing, considered written and spoken public testimony, I move to approving Resolution 007-21 to Direct Mark Noennig, Counsel for meeting protocol and bylaws, settlement of pending litigation with the City of Billings, and preparation of contracts for general and interim managers, to prepare a settlement agreement in cooperation with representatives from the City of Billings to settle the fee dispute for the amount due for unbilled water provided to the District TOTAL: \$2,970,599.35 with no additional late fees or penalties, pending a review of the court records and discussion with prior

counsel. The settlement agreement will include an agreement to renegotiate the contract in 2022 when the new General Manager has been hired and may include resolution of the right-of-way issues and other issues identified by either party.

- Seconded by Ming Cabrera.
- Laura Drager called the question to approve Resolution 007-21 to Direct Mark Noennig, to prepare a settlement agreement in cooperation with representatives from the City of Billings to settle the fee dispute for the amount due for unbilled water provided to the District TOTAL: \$2,970,599.35 with no additional late fees or penalties, pending a review of the court records and discussion with prior counsel. The settlement agreement will include an agreement to renegotiate the contract in 2022 when the new General Manager has been hired and may include resolution of the right-of-way issues and other issues identified by either party. Approved unanimously.

6. APPROVAL OF A NEW LEGAL COMMITTEE TO MEET WITH LEGAL COUNSEL MARK NOENNIG

Kelly Brookshire said she doesn't understand why you would change the legal committee because you don't agree with the other legal committee? They don't agree with you.

David Graves responded, first of all, they didn't represent us correctly. (Kelly Brookshire interrupted—David responded, you have to let me finish, I didn't interrupt you). Dennis called us all and did a straw vote on what we wanted to do with the city and who we wanted on the legal committee. He didn't go with what we recommended. He chose his own people and then they went from there. Dennis was told what to do by the majority of the Board to do with the fee dispute with the city. Water that we drank, watered our lawns with and showered with. We owe the city for that. We all agreed to that. But Dennis didn't go along with us and he appointed his own legal committee.

Ming Cabrera said if you look at the straw vote, he had 5 votes for Jeff Engel. Four of us voted for Pam Ellis. He had three for Brandon Hurst. None of us voted for Brandon Hurst. None of us voted for Jeff Engel. When you have seven people on a board and he just appoints his own people, that's what the problem was. He appointed his own people. Dennis is just like everybody else on the board—we each just have one vote. Let me remind everybody here, this public utility has assets every month of \$400,000; \$5,000,000 per year from the ratepayers every year. We need to make sure that we are a public utility, not a private utility. That has been hard for people to understand. As a public utility, voted in by the public. We have to be open with all records to the public. Not what they have done for 58 years, they haven't even changed the charter for that period of time 58 years.

Pam Ellis clarified 63 years, 63 years without bylaws.

- Laura Drager made the motion to appoint David Graves, Pam Ellis and Jeff Engel
- Pam Ellis seconded the motion.
- Motion to Approve a New Legal Committee approved unanimously.

Peyton Brookshire clarified difference between a public hearing vs a public meeting. For a public hearing, you would have to send a notice out to every ratepayer in the Heights.

After all decisions were reviewed and public comments received, the Board votes separate on each item receiving public comment or question:

- Laura Drager made the motion Having conducted a public hearing, considered written and spoken public testimony, I move to appoint David Graves, Pam Ellis and Jeff Engel
- Pam Ellis seconded the motion.
- Motion to Approve a New Legal Committee approved unanimously.

February 16, 2022 LEGAL COMMITTEE: Pam Ellis, David Graves, Laura Drager

The committee and Larry Brewster met with Mark Noennig and Justin Stark on December 22. The committee met with Chris Kukulski, Debi Meling, Gina Dahl and Jennifer Duray with Mark Noenning on February 7, 2022. Doug James drafted an initial settlement agreement; Mark Noennig suggested edits.

Bud Bailey asked why the District was discussing the contract with the City. The contract requires review and it also required by Universal Commercial Code. The contract does not exist in perpetuity.

March 16, 2022 (to be approved at the April 13, 2022 Board meeting)

LEGAL COMMITTEE REPORT (see report and attachments)

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