



FORT SMITH WATER & SEWER DISTRICT
Meeting Minutes-Friday, October 27, 2023 @ 1:00pm

-OPENING – ROLL CALL- Alan Shaw called the meeting to order @ 1:00 pm on October 27, 2023. The meeting was via phone conference; call in number was 1-872-240-3212, Access Code: 228-756-429; Board members attending: Alan Shaw, Katie Steele, Tom Becker, Jim Hyde, and Steve Saville; Employees attending: Sandy Kust, Josh McCraw, and Todd Query; Public attending: Paul Fitzgerald, Jeff Buszman, and Dennis Fischer;

-APPROVAL SEPTEMBER 15, 2023 MEETING MINUTES- Motion by Mr. Saville, 2nd by Ms. Steele to approve the September 15, 2023 minutes as printed; motion carried unanimously;

-BILLS/BOOKKEEPERS REPORT- Mr. Becker presented the treasurers report and stated the income for the month: \$25,822.13; expenses for the month: \$16,551.61; total in checking account is: \$63,899.56; total in CDARS CD: \$29,976.00. Mr. Becker stated the bill for TWEnterprises in the amount of \$1,490.34 in for maintenance on the generators and this is a yearly bill and the following bills would be presented for reimbursement: Lee Enterprises in the amount of \$1,284.45 and Moulton Bellingham in the amount of \$1,082.00. Motion by Mr. Becker to pay the bills, 2nd by Dr. Shaw, motion carried unanimously;

-DELINQUENT REPORT- Currently there are 6 accounts that are past due, totaling \$1,931.02; the water is turned off on 4 accounts and 2 accounts have been sent delinquency letters for turn off of services on November 27, 2023 if not paid by this date;

-FORT SMITH COMMUNITY FOUNDATION-ALAN SHAW PRESENTING- Dr. Shaw continues to seek funding with foundation granting agencies for the wastewater project, currently he has applied to two (2) foundation granting agencies, one is Tretcy and the other is Columbia Sports. Dr. Shaw stated he has received many negative responses only due to the fact that these grants are not in line with the Districts wastewater project;

-WASTEWATER PROJECT

1. WASTEWATER CONSTRUCTION PROJECT UPDATE: Dr. Shaw stated Chris Hayes, RPA Engineering, held the contractor's pre-construction meeting on October 18th, to go over the wastewater project details, timelines, tribal representation and answer any questions from contractors. Dr. Shaw stated the contractors were very responsive, professional and ready to get started. The construction started on the wastewater project on October 23, 2023 and the project inspector is Chris Bedza, RPA Engineering and all questions and concerns must go directly through the project inspector on site. The 1 acre of land the District owns is being used for staging and storage of supplies and a sewer tap will be put in during construction and after the project is completed this land would go up for sale.

Dr. Shaw stated the MDES grant that Trish, RPA Engineering, is complete for the wastewater lagoon restoration project and hoping to turn in application in November of 2023, is successful the grant should be awarded in spring of 2024. Dr. Shaw continues to represent the District on the monthly phone calls with the funding agencies, engineering firm and bond attorney.

2. CHANGE OF MONTHLY MEETINGS DURING CONSTRUCTION

PROJECT: Monthly meetings will be changed to the 3rd Friday of the month during the construction in order to get the drawdowns for pay applications approved and payment to contractors in time.

3. ADOPT RESOLUTION OF INTENT (WASTEWATER SPECIAL ASSESSMENT): Dr. Shaw made a motion to adopt the Resolution of Intent #10-27-23 for the Wastewater Special Assessment, 2nd by Ms. Steele, motion carried unanimously;

Exhibit A, lists 229 benefited lots which is anticipated to total: \$12,048.04 per lot for a 30-year term and \$612 is the anticipated yearly assessment to be paid either yearly or semi-annually, the notice of proposed levy of special assessments will be published in the Big Horn County News on November 2 and 9, 2023, a copy of this notice will be mailed to all land owners to be assessed on November 2, 2023. The notice describes the improvements for the wastewater, project costs, funding that has been awarded, anticipated cost per benefited lot, timeline for 30-day protest period, instructions on how to protest, contact information and date of public hearing. The protest period ends at 5pm on December 5, 2023 and a public hearing will be conducted on December 8, 2023 to pass upon all valid protest to the proposed levy of special assessments which were submitted prior to the conclusion of the protest period.

A copy of Resolution of Intent 10-27-23 (Wastewater Special Assessment), Exhibit A and Notice of proposed levy of special assessment are included at the end of the meeting minutes and on record with district files.

-RESOLUTION OF PARTICIPATION FEES/WATER

Mr. Saville presented Resolution 10-27-23-2 (Resolution of Participation Fees for the water system) and made a motion to approve Resolution 10-27-23-2, 2nd by Dr. Shaw, discussion took place regarding whether or not the fees being charged is enough and if additional fees such as short-lived assets and bond reserve should be added into these fees as existing customers have been paying these fees since the inception of the water project. Mr. Hyde and Mr. Becker stated the calculations in the resolution are not fair to existing customers as the fees does not include any previous fees already paid by current customers: such as equity, past expenses, and interest paid towards the loan. Mr. Hyde and Mr. Becker also stated the square footage calculations are not fair as currently if property is annexed into the District the cost per square foot would decrease due to square footage being added, resulting in annexed property would pay less per square foot than current customers are paying.

Mr. Hyde also read an overview of Impact Fee Methodology from the City of Bozeman which states: “The original cost-plus interest method includes the actual cost of the asset plus ten (10) years’ worth of interest. This calculation is done to reflect the fact that existing customers have provided for excess capacity in the system and hence need to be reimbursed for not only their initial investment, but also the “carrying cost” on the investment. The reimbursement to existing customers is accomplished by the fact that without an impact fee, rates would otherwise be higher than they would be without impact fees”.

Mr. Hyde and Mr. Becker do not believe the resolution that is being presented is charging enough in the fees and in agreement that the initial square footage should be used as well as paying equity, past expenses, and interest on loan.

Ms. Steele stated the annexed property would be paid up front and put towards the bond and this reduce the cost for everyone as they would not be paying on loan for as many years, and we know it will not reduce the yearly cost, but will reduce the amount of years to pay on the loan.

Mr. Becker stated the board is putting the cart before the horse as he does not even know if annexation will take place due to the validity of the annexation process and ordinance.

Ms. Steele stated the board needs to move forward with a decision instead of continuing to put this off as it has been on agenda a long time and this board should not leave for another board to deal with.

Dr. Shaw stated the document needs to be modified and could be put on the agenda for the November meeting which will give Mr. Saville time to review the document and revisit the fees. Steve will review the document and revisit the fees.

Dr. Shaw made a motion to table Resolution 10-27-23-2, 2nd by Mr. Becker, with Dr. Shaw, Mr. Becker and Mr. Hyde voting yes to pass motion and with Mr. Saville and Ms. Steele voting no on the motion. Motion carried 3-2

-RESOLUTION OF INTENT TO RAISE WATER & SEWER RATES: Motion made by Mr. Becker to adopt Resolution 10-27-23-3 (Resolution of Intent to raise water & sewer rates), 2nd by Dr. Shaw. Mr. Becker stated there are currently 234 EDU's and that he went through the 2024 budget to determine a base rate and variable usage rate for both water & sewer and came up with the following base rates and usage rates:

Water Base Rate Charge (based on Equivalent Dwelling Units, EDU, size of meter)

¾" Meter: Water base rate: \$21.00

1" Meter: Water base rate: \$37.59

1.5" Meter: Water base rate: \$ 84.00

Water Usage Rate for ¾", 1", and 1.5" Meters

0-10,000 Gallons per month **\$ 1.50/1,000 gallons**

10,001-20,000 Gallons per month **\$ 3.50/1,000 gallons**

20,001 and over per month **\$8.50/1,000 gallons**

Sewer Base Rate Charge (based on size of water meter)

Sewer base rate (¾" meter): \$37.00

Sewer base rate (1" meter): \$66.23

Sewer base rate (1.5" meter): \$148.00

Sewer Usage Rate

0 gallons and over per month **\$3.50 /1,000 gallons**

Mr. Becker also stated the larger users will pay more and this rate structure is fair and equitable to all customers. This resolution will need to be sent out to customers for review and the board will need to hold a public hearing. Mr. Shaw stated Tom has been working on the rate structure for more than a year and this resolution will answer a lot of questions for those customers stating commercial customers are not paying their fair share. Mr. Becker stated the rates could go down if more customers start participating as having customers come off the system effects not only the O&M but also the cost for the Special Assessment. Ms. Steele had 2 edits to the resolution, the word termination needs to be changed to suspension in the two places termination is listed. After discussion the amended

Resolution 10-27-23-3 was voted on and carried unanimously. The board will decide on a public hearing date at the November meeting. Copy of this Resolution is located at the end of these meeting minutes and on record with the District files.

-OPERATOR REPORT- Josh stated a customer sent a letter asking for forgiveness on amount of bill due to having a cloth hose hooked up with a sprayer on the end and the cloth hose coming apart resulting a water running overnight, a neighbor saw the leak and turned the water off. This customer always pays bill on time. Motion by Mr. Becker to charge for usage in the amount 6,290 gallons which is normal usage for this customer, 2nd by Dr. Shaw, motion carried unanimously. Sandy will adjust the bill to reflect the base rate and usage for 6,290 gallons. Josh stated construction has started and seems to be moving along quickly.

Dr. Shaw asked Todd Query if he is taking another job this winter and if he is still planning on being the backup for Josh and if he is still planning on getting certified. Todd stated he is not sure about the job yet, but will keep the board informed if he takes the job, but did say he is planning on getting his certifications this spring.

-ANNEXATION OF PROPERTY INTO THE DISTRICT-RESULTS FROM PETITION-

Mr. Becker in charge of the tabulation of petitions received regarding the ordinance for annexation of property into the District, in which the qualified electors had 30 days to petition for an election on a petition for annexation. Mr. Becker followed the procedures and documentation laid out in the opinion memorandum from the County Attorney and stated there were 297 qualified electors and only 69 qualified petitions or 21.8% calling for an election, which is not the over 40% required for the District to hold an election and annexation has been approved. Mr. Becker stated all petitions are on file with the District records.

Dr. Shaw stated numerous customers are concerned that Mr. Buszman has never been present to explain his project or to answer questions. Mr. Buszman has stated he would conduct a zoom call and have it available to the public to review proposed subdivision and answer questions after the board meeting in November and a letter will be send out with the billing letting property owners know of the presentation.

Ms. Steele stated Mr. Buszman is under no obligation to do the presentation and he has followed all policies and procedures that the district asked, and if he wants to move forward with this then it is entirely on his own with no district involvement, as far as Ms. Steele is concerned the annexed property has been approved. Ms. Steele also said the District received a wonderful document from the County Attorney which is included below and also stated the policy manual needs to be updated to reflect the MCA codes accurately, which she is willing to work on.

Opinion Memorandum:



Big Horn County Attorney's Office

P.O. Box 908, Hardin, MT 59034

Phone: (406) 665-9720

OPINION MEMORANDUM

To: Fort Smith Water & Sewer District

Re: Statutory Election Requirements

Date: October 25, 2023

The Fort Smith Water and Sewer District Board of Directors (“Board”) has requested an opinion from the Big Horn County Attorney’s Office regarding its duties when conducting an election. The Board has not requested that Big Horn County (“County”) conduct an election for the Fort Smith Water and Sewer District (“District”).

Pursuant to MCA § 7-4-2711(2)(a), a county attorney shall “give, when required and without fee, an opinion in writing to the county, district and town officers on matters relating to the duties of their respective offices.” This Opinion Memorandum is limited and shall address the duties of the Board, as to the statutory requirements for conducting an election. However, the County Attorney’s Office will not provide advice in this Opinion Memorandum on internal Board matters, such as interpretation of District By-Laws or regulations.

QUESTIONS PRESENTED

1. Who is entitled to vote in elections held by the Fort Smith Water and Sewer District?
2. When must the District hold an election on a petition to annex property?
3. How must ballots be distributed?

ANALYSIS

I. General Qualifications for Voting in Montana.

An individual is qualified to vote in general elections, if they meet the following requirements:

- (a) Registered as required by law;
- (b) 18 years of age or older;
- (c) A resident of the state of Montana and of the county in which the person offers to vote for at least thirty days, except as provided in 13-2-514; and (d) A citizen of the United States.¹

The statute excludes individuals who have been convicted of a felony and are incarcerated and individuals who have been adjudicated to be of unsound mind.²

II. Qualifications to Vote in County Water and/or Sewer District Elections.

¹ MCA § 13-1-111(1).

² MCA § 13-1-111(2)-(3).

The qualifications for voting in a District election differ from the qualifications required for voting in a County election. The provisions of Title 13, chapter 1, part 5, of the Montana Code Annotated govern all district elections provided for under Title Seven, chapter 13, parts 22 and 23-County Water and/or Sewer Districts.³ An individual is qualified to vote if they first meet the requirements of MCA 13-1-111 (above), excluding the requirements of 13-1-111(1)(a) which is to be registered as required by law and 1(c) which is to be a resident of the state of Montana and county in which the individual seeks to vote.⁴ Therefore, an individual must be 18 years of age or older, a citizen of the United States, not an incarcerated felon, and not adjudicated to be of unsound mind.

If an individual meets those requirements, the Board would next determine whether the individual meets one of the requirements of MCA § 7-13-2212(a)-(d), which are:

- (a) A resident of the proposed or existing district;
- (b) An owner of taxable real property within the boundaries of the proposed or existing district or, if the property is owned by more than one person, an agent designated by the owners;
- (c) An individual listed in MCA § 13-1-506 representing a corporation or company that owns taxable real property within the boundaries of the proposed or existing district; or
- (d) A designated agent for a property held in trust within the boundaries of the proposed or existing district.⁵

Anyone who is at least eighteen years of age, a U.S. citizen, and resides within the District is a qualified elector and may vote in a District election. While all District residents (who meet the age and citizenship requirements) qualify to vote under (a), only one agent qualifies to vote per property under (b), (c), and (d).

For example, if a husband and wife own a piece of property in the District, they would both be qualified electors if they live on the property (under (a)). If they do not reside or live in the district, an agent (presumably one of them) would be a qualified elector (under (b)). If three people own a property and all reside in the District, all three would be qualified voters (under (a)). If the same three people own a property and reside outside of the District, they would need to appoint one agent to vote (under (b)).

While not specifically articulated, the language in (b), (c), and (d) address multiple owners of “a property” or “the property”, suggesting that voting based on ownership is on a per tract or property basis. Since each tract is considered separately, a person or corporation who owns multiple properties will likely have more than one vote.

Under Montana law, assessments in a special district shall be determined for each lot, tract, or parcel. “To defray the cost of making or acquiring any of the improvements provided for in this part, including incidental expenses, the board of county commissioners shall assess the entire cost of the improvements against benefited lots, tracts, or parcels of land in the district, based on

³ MCA § 7-13-2222.

⁴ MCA § 7-13-2212(1).

⁵ MCA § 7-13-2212(1).

the benefits received.”⁶ After new property is annexed, the District shall recalculate the total number of lots, tracts, or parcels, pursuant to MCA § 7-12-2151(4).

Similarly, in MCA 7-13-2325, the individuals qualified to vote on bond indebtedness are registered electors owning OR residing upon real property in the district. That means that someone can qualify under either category. The statute does not state owning AND residing. **III. Resident of the District.**

While residence is not defined in the County Sewer and Water District parts of the MCA, the general rules for determining residency for voting purposes are specified in MCA § 13-1112. There are additional rules, but in general the statute states “the residence of an individual is where the individual's habitation is fixed and to which, whenever the individual is absent, the individual has the intention of returning.” If a renter is applying for a driver’s license, the DMV will accept a lease agreement, utility bill, or other documentation to establish residence. While not required to vote in a District election, registration to vote with an address in the District for general elections would demonstrate a residence in the District.

IV. Petition or Application for Annexation Election Requirements.

The requirements for approval of a petition for annexation of land into a water and/or sewer district are set forth in MCA § 7-13-2341. As provided in Subsection (2), a petition may be approved if it is granted by an ordinance of the board of directors and approved by the qualified electors in an election.⁷

Subsection (5) of the statute provides a different procedure for approval of a Petition (referred to as an Application in the District regulations) for annexation of property, providing:

If the board of directors determines that a district has a water facility or a sewer facility with a capacity greater than required to meet the needs of the current district, it may by ordinance, on petition of contiguous property owners and with the written consent of all property owners to whom the service is to be extended, expand the district to include land, to the extent of excess capacity, without complying with subsections (1) and (2). However, if the board determines that an election should be held or if 40% or more of the qualified electors petition for an election, compliance with subsections (1) and (2) is required.⁸

The major difference between the procedure lined out in Subsections 1-4 and the procedure lined out in Subsection 5 is a determination by the board of directors that the water and/or sewer facility has a greater capacity than needed to meet the needs of the current district. If that determination has been made, a board of directors may choose not to submit a petition (approved by ordinance of the board of directors) to the qualified electors in an election. However, if forty percent of the qualified electors petition for an election on a petition for annexation, the board of directors is required to hold an election.⁹

⁶ MCA § 7-12-2151.

⁷ See MCA § 7-13-2341(1)-(4).

⁸ MCA § 7-13-2341(5).

⁹ *Id.*

V. Requirements for Approving Petitions for Annexation.

The statute governing elections for adding land to the district do not provide a percentage threshold that must be met to approve addition of land in an election.¹⁰ MCA § 7-13-2341 does provide that additional land may be added to a district at any time upon under the provisions of part 22, upon petition presented in the manner provided in part 22 and part 23.¹¹ Part 22 contains a general provision on voting, which states “in case less than a majority of the votes cast are in favor of said proposition, the organization fails but without prejudice to renewing proceedings at any time in the future.”¹² Therefore, absent a specific requirement in the statute addressing addition of property, the general statute requiring majority approval would govern.

VI. Requirements for Approving Propositions for Bond Indebtedness.

There is a specific method for determining whether the Board shall determine whether a bond proposition has passed, as opposed to a simple majority of the votes cast.¹³ First, the Board shall determine the percentage of qualified electors who voted in the bond election. If at least forty percent or more of the qualified electors voted, the bond proposition will be approved and adopted if a majority of the votes cast were in favor of the bond proposition.¹⁴ If between thirty to forty percent of the qualified electors voted, the bond proposition will be approved and adopted if at least sixty percent of the votes were cast approval. If thirty percent or less of the qualified electors voted, the bond proposition must be rejected.¹⁵

VII. Ballot Requirements.

Under Montanan law, the provisions of Title 13, chapter 1, part 5, govern all special purpose district elections provided for under parts 22 and 23.¹⁶ Ballots must be provided as follows:

- (1) Pursuant to MCA § 13-13-205, ballots for a special purpose district election must be available for absentee voting at least 20 days before election day if the election is not conducted by mail.
- (2) Pursuant to MCA § 13-19-207, ballots must be mailed no sooner than the 20th day and no later than the 15th day before election day if the election is conducted by mail.¹⁷

¹⁰ *Id.*

¹¹ MCA § 7-13-2341(1).

¹² MCA § 7-13-2213.

¹³ *See* MCA § 7-13-2328.

¹⁴ MCA § 7-13-2328(1)(b).

¹⁵ MCA § 7-13-2328(1)(c-d).

¹⁶ MCA § 7-13-2222.

¹⁷ MCA § 13-1-503.

Voted ballots must be received before 8:00 PM on election day to be counted.¹⁸

CONCLUSION

Montana law provides specific requirements for the annexation of property into a water and/or sewer district. It also specifies how elections must be conducted. The qualifications to vote in a water and/or sewer special district election are different than the qualifications to vote in a general election in Montana. There is also a distinction between residents and non-residents.

To be a qualified elector, someone must be at least eighteen years of age, a citizen of the U.S., not an incarcerated felon, not adjudged incompetent, and either a resident or owner of property within the district. Property owners who do not reside in the district are still eligible to vote, but are restricted to one vote per property. If a determination has been made that the District has a water and sewer facility with greater capacity than needed, the Board may elect to hold an election on a petition for annexation, but is required if forty percent or more of the qualified electors request an election on the petition.

¹ MCA § 13-19-106(5)(b).

SEWER TAPS: Ms. Steele stated she visited with Chris Hayes, RPA Engineering, and he used google earth to determine the number dwellings and these dwelling would get sewer taps, Chris did not walk around Fort Smith with Josh to determine who had a tap and who did not. Chris stated it was not a good idea to put a tap on property that isn't being used as it could cause leaks and also in the future the tap may not be able to be found. Ms. Steele stated a change order would have to be put in for these extra taps, and would the District pay for an extra tap or would the customer be charged for an extra tap, the fee for an extra tap during construction is approximately \$500.00 per tap, and extra taps were not factored in with the cost of the project.

Mr. Becker stated the project was set up to only reconnect taps that have a dwelling and if property owners want extra taps, then that customer has to pay for the tap and then start paying a monthly base rate. Mr. Hyde asked how would a customer be charged if they have an extra tap and hook a trailer into the sewer but do not have water so they run a hose from a house over to trailer, therefore not getting charged for a sewer fee? Dr. Shaw stated a couple customers want grandfathered in and have all taps on properties put in during the construction as it will not cost the customers any money if done during construction, but if put in later the customer would have to pay for all connections costs.

Mr. Saville stated there is no quicker way to upset people than to take away a service that they have had, and how do they pay for it and if the threshold is they had to have a structure to get a tap, then paying the \$500 is a fair charge for an extra tap, but how will the fee be collected? Mr. Hyde stated every lot in Fort Smith/Yellowtail got a sewer connection when original system was put in and if owners want a tap on an empty lot, then they should pay for it as the new wastewater project is only reconnecting sewer that has a dwelling. Ms. Steele asked how customers will be charged if they connect at a later date and Dr. Shaw stated the cost would be borne entirely by the property owner.

Dr. Shaw will contact Chris Hayes and let him know to only reconnect taps that are currently connected to a dwelling and if a dwelling is not on property, then a tap will not be put in.

-POLICY FOR MULTIPLE HOOKUPS ON 1 PROPERTY POLICY- Ms. Steele stated if people are changing their property they are supposed to inform the board, and there is currently not a policy in the Policy Manual addressing multi hookups on 1 property, however there is a table in the manual that is used to determine the size of connection for the water line/meter, it is 6.2 requirements

for metering facilities but at the time of the meeting she did not understand how it works. Sandy has information from MT DEQ regarding cross connections and she will send this to Jim for his review.

-NOVEMBER 17, 2023 NEXT MONTHLY BOARD MEETING @ 1 PM

-PUBLIC COMMENTS- Dennis Fischer commented on the impact fees and stated people coming into the district need to pay fees for the bond reserve as well as short- and long-term asset funds as current customer have been paying since the inception of project and these fees must be considered with the impact fees and as current customers must be compensated for these fees as well as a square footage charge.

Dennis Fischer comment on multiple sewer taps and water taps: Dennis stated this is in the MT DEQ ARMS codes and someone needs to reach out to MT DEQ for guidance on cross contamination and how they handle trailer courts.

Dennis stated he is glad to see the board is paying attention and using the policy manual and that the board has reached out to the county attorney to weigh in on the procedures for annexation.

Dennis referenced 5.4 of the policy manual which states that capacity has to exist before annexing property into the District and the board passed an ordinance to add property to the district, stating capacity exists and capacity does not exist and the present system is not adequate, 5.4 in the policy manual states excess capacity must exist and excess capacity does not exist on the wastewater system, and therefore an ordinance should have not be passed.

Dr. Shaw said the ordinance was passed stating the final approval of this request however, is contingent upon completion of and verified functionality of the new sewer system.

Dennis commented on the #'s that Tom used when determining the percent of petitions received requesting an election for the annexation as Dennis and a group received a list of property owners in the district from County Treasurer that was matched up property showing less than 200- 180 different owners, Dennis went on to say the properties is not 299 as Tom said it was. Dennis stated he would sit down with Tom to review the property owners and determine the correct number of property owners and percentage of petitions received. Dr. Shaw stated Tom has spent numerous hours putting this together and he is not going to volunteer Tom to spend more time on this petition.

Katie Steele suggested that Dennis review the copy from attorney on the opinion of memorandum to show that Tom followed the procedures properly.

Dennis also stated the board is violating the open meetings law and that floor must be opened up to the public for comment before any vote can happen. Dennis suggested the board look into the open meeting laws listed in the MCA and stated again the board is not following the open meeting laws.

-ADJOURN MEETING- Meeting adjourned at 3:07 PM