

Doug James
Jordan W. FitzGerald
MOULTON BELLINGHAM PC
27 North 27th Street, Suite 1900
P. O. Box 2559
Billings, Montana 59103-2559
Telephone: (406) 248-7731
Doug.James@moultonbellingham.com
Jordan.FitzGerald@moultonbellingham.com

Attorneys for Plaintiff & Counter-Defendant City of Billings

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

CITY OF BILLINGS, a Montana municipal
corporation,

Plaintiff & Counter-Defendant,

-v-

COUNTY WATER DISTRICT OF BILLINGS
HEIGHTS, a Montana local government unit,

Defendant & Counterclaimant.

Cause No. DV 20-1653

Judge Rod Souza

**CITY OF BILLINGS' ANSWER TO
DEFENDANT'S COUNTERCLAIM**

Plaintiff & Counter-Defendant City of Billings (the "City") answers the Counterclaim by County Water District of Billings Heights (the "District") as follows:

COUNT I – NEGLIGENCE

1. Admits the allegations of Paragraph 1.
2. The allegations of Paragraph 2 are legal conclusions, which do not require an admission or denial. To the extent any response is required, the City denies the same.
3. To the extent the allegations of Paragraph 3 are legal conclusions, neither an admission nor denial is required. The City denies it has charged a different rate to the District, as the City is seeking to recover the full amount of the municipal water rate

established in the parties' wholesale water supply and purchase agreement, dated December 14, 1998 (the "Agreement"). (See Compl. Ex. A.) The City further denies the District has or will suffer harm from being required to pay the full contract price for municipal water it already received from the City and sold to its customers. Instead, the City asserts that, without a corresponding change in the District customers' consumption during the underbilling period, the District benefited financially by fully charging its customers for municipal water which the District paid a significantly reduced cost during the underbilling period, especially as the District was equipped with its own meter enabling it to quantify the amount of municipal water being sold to the District. To the extent any further response to Paragraph 3 is required, the City denies the same.

4. Denies the allegations of Paragraph 4.

5. Denies the allegations of Paragraph 5.

COUNT II – COLLECTION & DECLARATORY JUDGMENT

6. To the extent the allegations of Paragraph 6 are legal conclusions, neither an admission nor denial is required. The City asserts that it ceased imposing the alleged franchise fees as of July 1, 2018. To the extent any further response to Paragraph 6 is required, the City denies the same as stated.

7. The City does not have knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7, including but not limited to the unidentified "adverse ruling before the Montana Supreme Court," and accordingly leaves the District to its proof. The City asserts that it is unaware of any ruling by the Montana Supreme Court that specifically orders the City to return the alleged funds collected from the District.

8. The allegations of Paragraph 8 are legal conclusions, which do not require an admission or denial. To the extent any response is required, the City denies the same.

9. The allegations of Paragraph 9 are legal conclusions, which do not require an admission or denial. To the extent any response is required, the City denies the same.

10. To the extent the allegations of Paragraph 10 are legal conclusions, neither an admission nor denial is required. To the extent any further response to Paragraph 10 is required, the City denies the same as stated.

AFFIRMATIVE DEFENSES

1. The City denies each and every allegation of the District's Counterclaim not specifically admitted hereinabove, including any allegations contained in the District's prayer for relief.

2. The District's Counterclaim fails to state a claim upon which relief may be granted.

3. The City of Billings, as a self-governing municipality, has the authority under the Montana Constitution and state law to design its own utility rate systems and establish the cost of water. The legislature has given the City the exclusive authority to regulate, establish, and change municipal utility rates. *Lechner v. City of Billings*, 244 Mont. 195, 203, 797 P.2d 191, 196 (1990).

4. The District's claims are barred by the applicable statutes of limitations, including but not limited to Mont. Code Ann. § 30-2-725 and/or § 27-2-204. The purported damages for which the District seeks recovery against the City are impeded, barred, or abated by the statutes of limitations.

5. The Agreement between the City and the District is a contract for the sale of goods, and, therefore, is governed by the Uniform Commercial Code—Sales, Mont. Code Ann. § 30-2-101 *et seq.*

6. The District's claims are barred under Mont. Code Ann. § 30-2-607 due to its acceptance of and failure to reject the water delivered by the City.

7. The District's claims are further barred under Mont. Code Ann. § 30-2-607 by the District's failure to provide notice to the City of any breach regarding the water that the City delivered to the District between February 2015 and December 2017.

8. The District materially breached the Agreement, which precludes its claims, in whole or in part.

9. The District is a non-owner customer of the City. The District has no right to municipal water service except through the written Agreement between the City and the District. The City has no duty or obligation to the District outside of the Agreement.

10. The City's actions, as relating to the District's counterclaim for negligence, were expressly authorized and allowed under Montana law, including but not limited to Mont. Code Ann. § 7-13-4304, which requires the City to collect municipal water rates and charges commensurate with the "services provided and benefits received," and that the rates and charges be "as nearly as possible equitable in proportion to the services and benefits rendered."

11. The District's claims are precluded, in whole or in part, by Mont. Code Ann. § 7-13-4305, which requires municipal water users to "pay the full and established rates."

12. The District's negligence claim fails to the extent it relies upon the terms of the Agreement.

13. The City owed no recognized legal duty to the District under the facts of this case relating to its counterclaim for negligence.

14. If any recognized legal duty did exist, the City was not negligent, and its actions conformed with the standard of care applicable to the facts of this case.

15. The District was guilty of comparative negligence so any damages recoverable in this action are either precluded or diminished in proportion to the amount of negligence attributable to it, in accordance with Montana law.

16. Any damages sustained by the District were not proximately or legally caused by an act or omission of the City, but rather were the proximate or legal result of the acts or omissions of the District's own conduct, negligence and fault, and/or the conduct, negligence and fault of others, and are barred or should be reduced accordingly.

17. If liability is assessed in any respect, then the fault of all parties, joined and unjoined, including that of the District, must be evaluated and liability apportioned among all persons and entities proportionate to their respective fault.

18. The damages sustained by the District, if any, were the result in full or in part of intervening acts or omissions, which break any chain of causation that may have existed and prevent the City from being found liable in this action.

19. The relationship between the City and those who have contracted for water services, including the District, is beneficial to both parties, and there is no express statutory limitation on the right of municipalities to generate income from contractual agreements.

20. The franchise fees at issue in the District's counterclaim were adopted by the Billings City Council in 1992 and were included in the cost of water from the City

through June 30, 2018. The City stopped charging franchise fees effective July 1, 2018. The total amount of franchise fees paid by the District between January 1, 2017 and June 30, 2018 was \$\$87,352.70.

21. Pursuant to Mont. Code Ann. § 2-9-103, the City is not civilly liable in any action if any duly promulgated rule or ordinance is declared invalid, and the District's claims and alleged damages may be limited, precluded, and/or barred thereby.

22. The City has legislative immunity for legislative acts and omissions pursuant to Mont. Code Ann. § 2-9-111. The action of the Billings City Council adopting franchise fees and incorporating the franchise fees into the cost of water from the City was a legislative act for which the City has immunity.

23. The City has immunity from suit for certain actions by elected City Council pursuant to Mont. Code Ann. § 2-9-114.

24. At all times, the City acted in good faith and in accordance with reasonable commercial standards.

25. The District failed to assert its rights in a timely fashion, which delays of such duration and character as to render the enforcement of the rights inequitable, and accordingly, the District is guilty of laches and its claims are barred, in whole or in part.

26. The District's claims are barred by the doctrines of waiver and/or estoppel.

27. In order to not waive this defense, and in the event that facts develop to support it, the District's claims are barred by the doctrines of res judicata (claim preclusion) and/or collateral estoppel (issue preclusion).

28. The District's claims are barred by the doctrine of unclean hands.

29. In order to not waive this defense, and in the event that facts develop to support it, the District has failed to join an indispensable party under Rule 19 of the Montana Rules of Civil Procedure.

30. A person who consents to an act is not wronged by it. Mont. Code Ann. § 1-3-206.

31. Acquiescence in error takes away the right of objecting to it. Mont. Code Ann. § 1-3-207.

32. A person who takes the benefit shall bear the burden. Mont. Code Ann. § 1-3-212.

33. The law helps the vigilant before those who sleep on their rights. Mont. Code Ann. § 1-3-218.

34. The District has suffered no damages.

35. Any liability that the City may have for damages in tort are limited pursuant to Mont. Code Ann. § 2-9-108.

36. The District's claims may be barred or limited due to failure to mitigate damages, if any.

37. The District failed to exhaust its remedies with the City before filing suit. The District failed to request a review of the City's actions pursuant to Section 26-103, Billings Montana City Code. Furthermore, the District waived its right to appeal the rate decisions of the Billings Council pursuant to Montana Code Annotated Section 69-7-113.

38. The District is not entitled to the recovery of attorney fees in this case. The Agreement between the City and the District does not contain any provision that would entitle either party to recover attorney fees and costs from the other party.

39. The City expressly reserves the right to amend and/or supplement its Answer, affirmative defenses, and all other pleadings. The City raises each and every defense (at law, in equity, or otherwise) available under all federal and state statutes, laws, rules, regulations and other creations, including common law. The City has insufficient knowledge or information on which to form a belief as to whether there may be additional affirmative defenses available to it and therefore reserves the right to assert such additional defenses based upon subsequently acquired knowledge or information that becomes available through discovery or otherwise.

DATED this 25th day of January, 2021.

MOULTON BELLINGHAM PC

By 

Doug James

Jordan W. FitzGerald

27 North 27th Street, Suite 1900

P. O. Box 2559

Billings, Montana 59103-2559

*Attorneys for Plaintiff & Counter-
Defendant City of Billings*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was duly served upon the following persons and counsel of record by depositing the same, postage prepaid, in the United States mail this 25th day of January, 2021:

Randall G. Nelson
Thomas C. Bancroft
NELSON LAW FIRM, P.C.
2619 St. Johns Avenue, Suite E
Billings, MT 59102
Attorneys for Defendant & Counterclaimant

By: 

Doug James

Jordan W. FitzGerald