CITY OF RAPID CITY

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MEMORANDUM

TO: Mayor and City Council

FROM: Joel P. Landeen, City Attorney

DATE: 6-14-12

RE: Update on Major Active Litigation

There are currently five active lawsuits that I would characterize as major pending litigation. Of this litigation, the City is the Plaintiff in two of the cases. It is unique for the City to be a Plaintiff in two major cases. Unlike most litigation the City is involved in, these two cases are not covered by insurance and the City is responsible for paying the attorney's fees. To facilitate awareness of these matters, the Mayor has requested that I provide the City Council and the Community with an update on the status of these legal actions.

Lamar Advertising of South Dakota v. City of Rapid City (Lawsuit on the initiated ordinances)

This case arises out of the initiated ordinances regulating off-premises signage which were approved by the City's voters in the summer of 2011. This case was initiated by Lamar in 2011. The case is being handled by Verne Goodsell with the law firm of Goodsell & Quinn. Lamar has alleged several causes of action. The first count alleges that the provisions of the initiated ordinance which require that sign credits expire after 20 years, the increased minimum distance between billboards, and the ban on digital billboards constitutes a regulatory taking without compensation in violation of the U.S. Constitution. The second count asserts a cause of action under Title 42 of the United States Code Section 1983 alleging that the City has deprived them of their constitutional rights. The third count requests a declaratory judgment that the initiated ordinances constitute a regulatory taking. The fourth count requests a declaratory judgment that the expiration of the sign credits which have been previously issued after 20 years constitutes the removal of outdoor advertising through an amortization schedule in violation of SDCL 31-29-75. The fifth count requests a declaratory judgment that the initiated ordinances have violated the provision of the Federal Highway Beautification Act which requires that the owners of outdoor

advertising be paid just compensation for the removal of signs. The sixth count alleges that the initiated ordinances constitute a violation of Lamar's right to equal protection of the laws under the U.S. Constitution. The seventh count alleges that the initiated ordinances violate Lamar's constitutional right to freedom of speech under the U.S. Constitution. The eighth count alleges a second cause of action under Section 1983, based on Lamar's claim that its free speech rights have been violated. The ninth count alleges that the initiated ordinances violate Lamar's equal protection rights under the South Dakota Constitution. The tenth count alleges that Lamar's rights to freedom of speech under the South Dakota Constitution have been violated. The eleventh count alleges that the regulations contained in the initiated ordinances constitute a ban on outdoor advertising in violation of SDCL 31-29-69. Lamar is seeking to have the City prevented from enforcing the regulations contained in the initiated ordinances, compensation for the property it has alleged was taken, damages for the alleged violations of its constitutional rights and attorney's fees. The case is currently in the discovery phase. Production of documents is nearly complete. The next step is identifying expert witnesses. There is a hearing scheduled on pretrial motions in early August. There is no trial date at this time. The City's deductible is $75,000. The attorney fees are being paid by the City's insurer at this time under a reservation of rights.

Lamar of South Dakota v. Rapid City (Lamar's appeal of its denial to convert 6 static billboard faces to digital faces)

Just prior to the election at which the initiated ordinances mentioned above were approved, Lamar made application for sign permits to convert 6 static billboard faces to digital faces. The initiated ordinances had a provision which would ban digital faces on billboards. The applications were denied because Lamar had failed to obtain a conditional use permit for the billboards prior to applying for the sign building permits. Billboards are a conditional use in all zoning districts where they are allowed and require specific authorization. Lamar appealed the determination that it was required to get conditional use approval prior to issuance of a sign building permit to the City's Zoning Board of Adjustment. The board of adjustment agreed with City staff and denied Lamar's appeal. Lamar then appealed the decision of the board of adjustment to the Circuit Court. The Circuit Court upheld the City's denial of Lamar's appeal. Lamar has now appealed to the South Dakota Supreme Court. The briefing is completed and we await the Supreme Court's decision. This case is being handled internally so no additional attorney's fees have been incurred.

City of Rapid City v. Doyle Estes and Big Sky LLC:

This case involves the condition of the public improvements which were constructed by various corporations owned, or managed, by Doyle Estes in conjunction with the approval of the plats for Big Sky Subdivision. The streets in Big Sky have major settlement issues which need to be resolved. The City initiated this lawsuit in 2008. The Case is being handled by John Nooney with the law firm of Nooney, Solay & Van Norman. The developer claimed that its obligations to build the infrastructure to the City's standards was relieved by the City with a surety which secured completion of the public improvements. The Circuit Court ruled in favor of the developer. The City appealed to the South Dakota Supreme Court. The South Dakota Supreme Court reversed the Circuit Court's ruling and remanded the case back for further proceedings.

Since being remanded, additional parties have been added by Big Sky. One of the new defendants, Rapid Construction, has filed a Motion to Dismiss or in the alternative for Summary Judgment. There is a hearing scheduled on Rapid Construction's motion. Once that motion is resolved, discovery will continue. The City has currently expended $63,995.23 prosecuting this case. The majority of this cost was to pay for the successful appeal to the South Dakota Supreme Court. The funding source is the City's general funds/unencumbered cash.

City of Rapid City v. Highmark Inc and Northwest Pipe:

This case is based on a water transmission main which was installed between the new Jackson Springs Water Treatment Plant and Canyon Lake Park. Highmark was the general contractor who was awarded the bid to install the pipe. Northwest Pipe, a corporation from Oregon, manufactured the pipe to be installed. The pipe was manufactured with a liner to prevent it from corroding in order to ensure that it lasted for many years. The specifications for the pipe had a minimum adhesion requirement for the lining. The pipes initially passed the adhesion test performed at the factory, but a significant number failed follow up tests which were conducted when the pipe reached the work site. The failure to meet the adhesion requirements significantly delayed the project. Furthermore, the contractor had already installed pipe which fails to meet minimum specifications and must be addressed. The City has retained enough in liquidated damages to cover the additional out of pocket costs incurred by the failure of the pipe and to install an active protection system which will ensure that the pipe which was installed meets its intended design life. Earlier this year, Highmark filed a lawsuit against the City in state court seeking recovery of the amounts owed under its contract. Highmark had previously filed a lawsuit against Northwest Pipe in Federal Court. The City has filed its answer, a counter-claim against Highmark, and third party complaint against Northwest Pipe. The next step is for Northwest Pipe to file its answer and any claims that it may have against the parties. Once all the pleadings have been filed, we will begin the discovery process. We are also working on setting up a meeting of the parties to discuss the issues raised in the complaint in the hopes of resolving this matter without a trial. This case is being handled internally so no additional attorney fees have been incurred at this time.

City of Rapid City v. Fish Garbage Service Inc.:

This case was initiated by the City in December of 2009 to recover dumping fees which the City believes were lost when the defendants engaged in a scheme to misidentify loads being dumped at the City's landfill as loads which were subject to no fee, or a reduced fee, when in fact they were actually loads which were subject to a much higher dumping fee. The Case is being handled by John Nooney with the law firm of Nooney, Solay & Van Norman. This case is still in the discovery process. John Nooney's office has received and reviewed hundreds of thousands of documents. The documents they are collecting are the scale tickets from the landfill, the duplicate tickets from Fish's records and Fish's billing information. Through this process they have identified all of the loads which were dumped for free or for a reduced amount. In preparation for trial, the staff at Nooney's office is currently linking together the scale tickets with the billing records. Most recently, they received approximately 235,000 billing documents from Fish. Of the documents produced by Fish, only 300 billing records for the approximately 9,000 reduced fee tickets Nooney's office has identified so far were provided. Mr. Nooney has

filed a Motion to Compel in order to obtain the billing records for the remaining reduced fee loads which Fish has yet to provide. A hearing is scheduled on the Motion to Compel for June 28th. Since the Motion to Compel was filed, the defendants have filed a motion requesting to amend their answers to assert a cause of action against the City, Mayor Kooiker, Jerry Wright, John Leahy and Lt. Peter Ragnone of the RCPD pursuant to 42 U.S.C §1983 alleging that the City and these individuals illegally violated their constitutional rights. The defendants will likely be allowed to amend their pleadings and assert their claims. The evidence complied up to this point supports the continuation of the lawsuit. John Nooney is prosecuting this case very differently from the manner in which the criminal case was prosecuted. As you can see from the number of documents being processed, he is focusing on developing the extensive record of scale tickets and billing to prove the City's claims. The documentary evidence of what occurred was not developed in this manner during the criminal case. While the sole focus of the criminal case was alternative cover, in the civil case they are looking at multiple classifications of reduced or free loads which were dumped at the landfill. If the case were not going to be tried differently, there would be no reason to proceed. Once the discovery issues are resolved, the next step will be to identify expert witnesses. There is a tentative trial date for the beginning of December. If the defendants are allowed to amend their pleadings it is likely that the trial date will be pushed back. The City has currently expended $241,281.23 on prosecuting this case. The vast majority of this cost has been expended on collecting and processing the massive amount of documentation which has been assembled in order to prove at trial what trash was collected by Fish, who it was collected from, what kind of trash the driver declared was in the load when it was dumped, what the Fish's paid to dump the load and what they billed their clients for the load. An additional $29,000 has been paid by the City to Jerry Johnson with the law firm of Banks, Johnson, Kappelman & Becker to defend Jerry Wright, John Leahy, Darrell Bishop and Linda Hansen as employees of the landfill against claims previously asserted by defendant Randy Meidinger. The benefit of the Fish's most recent filing is that it will trigger the City's insurance coverage and the City's insurer will start contributing to the legal costs in the case. The City is currently in discussions with the insurer about how the costs will be split moving forward and if there will be any compensation for the funds which the City has already expended in building its case. The City's deductible on this claim is $100,000. The funding source is the Landfill Enterprise Fund.

Rupert v. Rapid City:

This case was brought by the Ruperts in 2009 alleging that the magnesium chloride solution the City used to deice the streets during snow events killed approximately 40 trees on their property. The case is being handles by Tim Becker with the law firm of Banks, Johnson, Kappelman & Becker. The Rupert's claims were tried to a jury in October of 2011. The jury awarded the Ruperts damages of $126,530. The City has appealed this case to the South Dakota Supreme Court. Some of the issues on appeal are: whether the trial court properly granted partial summary judgment in favor of the Ruperts on their claim of inverse condemnation, whether the trial court improperly prevented the jury from hearing the City's evidence of the before and after value of the Rupert's property, whether the trial court erred in excluding evidence of the fair market value of the Rupert's property, whether the trial court erred in allowing the testimony of the Rupert's expert witness and whether the jury instructions on the damages issues were in error. The trial transcripts were recently provided to the trial counsel and briefing has begun. It will take

approximately three months to brief. After that it is up to the Supreme Court. It will take a minimum of several months for an opinion to be issued. It may take longer if oral arguments are scheduled. If the Supreme Court finds in the City's favor on any of the issues, the case will likely be sent back to the Circuit Court for additional proceedings. The City's deductible is $100,000. The deductible has been reached through payment of attorney's fees. All current attorney's fees and the judgment, if upheld, are the responsibility of the insurer. The funding source is the City's Liability Fund.