MEMORANDUM

TO: File
FROM: Catherine A. Laughner
DATE: November 7, 2013
Re: Present and Reasonably Anticipated Future Use of the Former Missoula White Pine Sash Company Site, Missoula, Montana

I. INTRODUCTION

The final cleanup action for remediating the former Missoula White Pine Sash Company site in Missoula, Montana has not been determined. When the Department of Environmental Quality (Department) selects the remedial action, the applicable statute, Mont. Code Ann. § 75-10-721(2)(c), mandates consideration of present and reasonably anticipated future uses. Institutional controls, risk, effectiveness, technology, cost, and community acceptance, are also to be taken into account.

The focus of this Memorandum is on understanding the present and reasonably anticipated future use of the former Missoula White Pine Sash (MWPS) Site. Regulatory oversight of investigations and cleanup activities began around 1994 and therefore a large volume of information exists concerning the historical and present use. There is considerable information relevant to the anticipated future use as well. “Reasonably anticipated future use,”
defined at Mont. Code Ann. § 75-10-701(18), means likely future land or resource uses that take into consideration:

(a) local land and resource use regulations, ordinances, restrictions, or covenants;
(b) historical and anticipated uses of the facility;
(c) patterns of development in the immediate area; and,
(d) relevant indications of anticipated land use from the owner of the facility and local planning officials.

This Memorandum provides a chronology of facts and developments concerning use of the property and includes background documents as Exhibits. It also discusses Orr v. State, 324 Mont. 391 (2004), a Montana Supreme Court opinion that is worth noting in this context for its conclusions. This Memorandum is intended to assist all involved in the MWPS remediation and the final selection of the remedy. The recent appointment of a new Department Director, a new Remediation Division Administrator, and a new Site Project Officer has prompted the desire to make known the facts pertinent to upcoming decisions concerning the future of MWPS.

II. BACKGROUND

A. Property Description and Use

The Missoula White Pine Sash (MWPS) property (“Property”) consists of approximately 42 acres located on the west side of North Scott Street in Missoula. Currently the Property is used for vehicle maintenance, gravel and sand stockpiles, equipment parking, city engineering offices, police car parking, a beverage warehouse and distribution center, manufacturing, and a small park. A portion of the Property is unused. The Property has been used by industry starting in the late 1880s when a lumber mill was constructed by the Missoula Lumber Company. By 1904, Missoula Lumber Company had become the Largey Lumber Company. In 1919, Huttig Sash and Door Company of St. Louis established a joint venture with Spokane-based White Pine
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Sash Company to purchase the Largey Lumber Company and establish the Missoula White Pine
Sash Company (MWPSC). From the 1920s until the 1990s, the MWPSC operated a sawmill and
precision milling operation manufacturing wood windows and doors. At one time, their
operation included three ponds, a teepee burner, a water tower, and a variety of buildings across
the 42 acres. At its peak, the company employed more than 200 workers.

Pentachlorophenol (PCP), a compound used in wood processing, was discovered in the soil
and groundwater beneath the Property in 1991. MWPSC and Huttig Building Products (Huttig) the
Property owner and owner of MWPSC, began remedial investigation activities, which continued
under the direction and supervision of the Department in 1995. This investigation was completed in
June 1998, and supplemental investigations were conducted and completed in 2012. A Baseline
Risk Assessment was completed in October 2001 and amended in 2012. The fate-and-transport
evaluation was completed in 2003 and amended in 2011. Several interim remedial measures,
including fencing, hotspot removal, soil vapor extraction, and total-fluid recovery, have been
completed.

In December 1996, MWPSC closed and the Property was put up for sale. In March 1999,
Huttig sold 12 acres to WWW Investments, LLC (WWW) and 30 acres to Scott Street Partners,
LLP (Scott Street Partners). When the Property was conveyed, Huttig restricted the deeds for the
entire 42 acres to prohibit residential uses and other activities. In 2000, the City of Missoula
purchased 13.5 acres from WWW and Scott Street Partners as part of a plan to move the City
maintenance shops to the north Scott Street property.

Adjoining the Property to the north for many years was Clawson Manufacturing, which
manufactured windows and doors, with many components coming from MWPSC. Clawson filed
for bankruptcy in 2010 and closed their facility. In 2013, the Clawson property was leased for
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use as a processing facility for extraction of chemicals from cedar wood chips. Immediately west of the MWPS Property, BFI (currently Republic Services), has operated a solid-waste handling facility beginning in 1970. To the south and west of the MWPS property is the Missoula railyard, operated since the late 1880s, and operated since 1987 by Montana Rail Link. East of the Property is Scott Street, and east of Scott Street is a residential neighborhood. Exhibit 1 shows an overview of these areas.

B. Property Restrictions

1. Deeds

Even though the Property has never been residential, a prohibition against residential use was formally and legally placed on the Property in March 1999 when Huttig sold it to Buyers, WWW and Scott Street Partners. These restrictions are in the factual record, recorded in Missoula County at Book 97 Page 227, Book 142 Page 521, and they are what the buyers and seller bargained for 15 years ago in the purchase and sale agreement. These restrictions were placed on the grant deeds pursuant to Montana property law found in Title 70, specifically Mont Code Ann. § 70-17-203. This section of the Montana code allows for covenants to run with the land if made with a grant or conveyance: “[E]very covenant contained in a grant of an estate in real property that is made for the direct benefit of the property or some part of the property then in existence runs with the land.” Regardless of Remedial Actions selected and implemented, it was anticipated that some level of hazardous material could remain in the groundwater and/or soil beneath the Property. The restrictions benefit the 42-acre Property: they reduce or minimize potential risk to human health and the environment, while putting the Property
to economic use or other benefits, yet they allow access for remedial actions, if necessary. Both the WWW Deed and the Scott Street Parcel Deed state:

**Restrictive Covenants.** The use of the Property shall be subject to the following restrictive covenants:

- The property owner shall not take any actions which interfere with implementation of any Remedial Action or other remedial efforts currently being conducted, or hereafter conducted, on or about the Property.
- No portion of the Property shall be used in any manner for residential purposes or for any type of human residential habitation, whether permanent or temporary. If Grantee is able to obtain the consent of the Government to lift this restriction on human residential habitation, Grantor agrees to remove such restriction from the Property at no cost to Grantor.
- Except as hereinafter provided, the drilling or digging, of new water wells shall be prohibited. However, the foregoing restriction shall not prohibit or limit the right of access to and use of existing monitoring or recovery wells and construction of new monitoring or recovery wells which are necessary or advisable as a part of a Remedial Action.

Additional restrictions were placed on the Treating Area on the WWW Deed:

- There shall be no construction or location of buildings, mobile homes, billboards or other structures (except maintenance and repair of existing structures) upon or beneath the Treating Area except (A) as required by the Remedial Action or (B) in conjunction with activities which are permitted by applicable federal, State and local laws and ordinances and the easements and covenants.
- There shall be no filling, excavating, or removing of soil, sand, gravel, rock or other materials upon or beneath the Treating Area, except as a part of a Remedial Action.
- Dumping, disposal, storage, releasing, discharging or placement on the ground of ashes, trash, garbage or other materials shall be prohibited upon or beneath the Treating Area, except as a part of a Remedial Action.

The Buyers signed the Deeds, agreeing that the restrictions can be enforced by Huttig, the State of Montana, and USEPA. Copies of the two Deeds are enclosed as Exhibit 2.
Montana law provides an alternative way a property owner can restrict use without conveying the property. Restrictions can be placed on the property under Mont. Code Ann. § 75-10-727, without a conveyance, if the conditions in that section of the Code are met and the property owner has the approval of the Department. In March 1999, Huttig was able to legally and effectively restrict use pursuant to Mont. Code Ann. § 70-17-203, and it was not necessary to obtain Department approval for the deed restrictions on the Property because (1) a conveyance occurred; and, (2) the buyers signed the Deeds, agreeing to ways the restrictions can be enforced. However, if the Remedial Action requires new or different use restrictions to be placed on the Property and there is no conveyance, the property owner may request Department approval to implement institutional controls under Mont. Code Ann. § 75-10-727.

2. Zoning

Zoning on the Property is mixed, but industrial use is allowed on the entire 42 acres, except for the three-acre park set aside as open space (Zone P-1). The city maintenance facility is a CMF Special District zoning district. The parcels not owned by the City are zoned M1R, which is light industrial-residential.

C. Use of the Property and the Adjacent Areas

The historical use of the Property has been commercial or industrial since the 1880s. For the majority of that time, the Property operated as a sawmill and precision-milling operation manufacturing wood windows and doors with three ponds, a teepee burner, a water tower, and a variety of buildings across the 42 acres. Use of the properties to the north, south, and west, of the Property are also industrial. The east border of the Property is Scott Street, a busy north-south road. To the north is a processing facility for the extraction of chemicals from cedar wood chips.
Previously, Clawson Manufacturing used that property for manufacturing windows and doors, with many components coming from MWPSC. Republic Services operates a solid-waste handling facility west of the Property. Its predecessor, BFI, operated there since 1970. To the south and west of the Property is the Missoula railyard, operated since the late 1880s and currently operated by Montana Rail Link.

Currently, the Property is used for vehicle maintenance, gravel and sand stockpiles, equipment parking, city engineering offices, police car parking, a beverage warehouse and distribution center, manufacturing, and a small park. A portion of the Property is unused. Noise, diesel exhaust, airborne dust, and other potential emissions blowing around from the heavy truck traffic at the City Maintenance Facility, warehouses, and nearby railyard are routine. A recent annotated aerial photograph of the area is attached as Exhibit 3.

D. Patterns of Development in the Immediate Area

As described above, there has been no other development in the area of the Property other than industrial with some limited commercial, *i.e.*, warehouse, police parking. The pattern of development of the area between Scott Street and Reserve Street north of the railyard and railroad tracks has been industrial and commercial. Much of the Property is covered by large buildings. The portion owned by Scott Street Partners, without buildings, will be developed consistent with this pattern due to the proximity of the railroad. The portion owned by Scott Street Partners is highly desirable for commercial use due to its size, rail access, and proximity to the interstate and the city center. (*See Exhibit 4.*) In the past 14 years, there has only been one inquiry of developing housing the portion now owned by Scott Street Partners, and that interest was short-lived. More than 100 other inquiries received by Scott Street Partners have been for
commercial uses. (See Sept. 26, 2013 email from current property owner, M. Stevenson of Scott Street Partners, attached as Exhibit 5.)

Historically, housing east of Scott Street accommodated workers employed by White Pine Sash, Clawson Manufacturing, or the railroad. White Pine Sash at one time employed more than 200 workers, and the area east of Scott Street was a convenient location. Now that White Pine Sash and Clawson Manufacturing are out of business, there are far fewer workers on the Property, and employees desiring housing close to their workplace are limited. In fact, there are several houses that are for sale or vacant in the area east of Scott Street. This is an indication that there is little desire or need to live by the Property. Moreover, in recent decades there is no longer a need to live close to work because most workers are mobile and own a car or truck. Additionally, most people do not desire to live in the proximity of the railyard due to the noise and problems associated with the transient population. It is reasonable to anticipate that the pattern of development in the immediate area of the Property will remain industrial and/or commercial.

E. Indications of Anticipated Land Use

The current owners of the Property and the City of Missoula Planning Department have all expressed a desire that the Property will continue to be industrial or commercial.

1. Current Owners

In response to the Department’s January 5, 2011 letter asking about anticipated use, all of the current property owners stated they see their property used in the future as commercial or industrial (other than the small park). WWW, which warehouses and distributes beverages, stated in its February 3, 2011 email response, “[W]e believe the property will continue to be used as it is for the foreseeable future.” Scott Street Partners responded on January 13, 2011, that it
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“anticipates the development of the 19.2 acres we own at Missoula Whitepine to coincide with the past 100 years of property use as industrial or commercial utilization. We believe this to be the highest and best use of our property.” The Missoula Office of Planning and Grants wrote on January 31, 2011, “[f]or the eastern portion of the property, for the foreseeable future, the City anticipates use only as a City park and open space . . . . For this western portion of the property, for the foreseeable future, the City anticipates use only as a site for the City maintenance shops and offices.” Copies of the Department’s January 5, 2011 letter, and the property owners’ responses are included in Exhibit 6.

2. Local Planning

The Joint Northside/Westside Neighborhood Plan, updated in 2008 (“Neighborhood Plan”) describes the future plan for the area that includes MWPS as light industrial development. The Plan is attached as Exhibit 7. Page 2B-4 of the Neighborhood Plan provides, “Light industrial uses are most intense west of Scott Street, on both sides of the tracks. East of Scott Street, the industrial uses are generally less intense, with a few exceptions. Small shops, mini-storage units, Ozzie’s Oil and Refinery, Bitterroot Gymnastics, offices, and construction companies are some of the businesses in the vicinity. These uses have the ability to blend with the adjacent residential areas.”

The Neighborhood Plan also recognizes the importance of the railway in the vicinity of MWPS as drawing light industrial users to the area. Page 2B-5 states:

Scott Street, as the edge of the abutting industrial neighborhood, is a main truck route running through a residential area south of the tracks; it is also the major road for residents to access their homes on the Northside. The location of light industrial uses along the railway corridor of the Plan area is important because it is compatible with the adjacent industrial neighborhood. Industrial development in the northern portion of the Plan area will be felt through the nearby residential areas.
The Neighborhood Plan refers to the Property, located west of Scott Street in the Northside Neighborhood, as a site of light industrial development. The Neighborhood Plan does not include residential development as a potential use of the Property. The Neighborhood Plan is the governing document for zoning changes in the area. Therefore, any changes to zoning in the area must be in substantial compliance with the Neighborhood Plan, which, as mentioned above, specifies light industrial uses for the Property.

The statements of the current owners, the local community planning documents, actions by the City to rezone its property, and the deed restrictions accepted by buyers when bargaining with Huttig, all indicate that the anticipated future use of the Property is commercial/industrial.

III. FUTURE ANTICIPATED USE IS COMMERCIAL OR INDUSTRIAL

A. Application of the Statute Leads to Zoning for Commercial or Industrial Use

Reasonably anticipated future use, defined at Mont. Code Ann. § 75-10-701(18), means likely future land or resource uses that take into consideration:

(a) local land and resource use regulations, ordinances, restrictions, or covenants;
(b) historical and anticipated uses of the facility;
(c) patterns of development in the immediate in the immediate area;
(d) relevant indication of land use for the owner of the facility and local planning officials.

The properties that make up the MWPS Site are zoned for commercial/industrial use (except parcels owned by WWW and Scott Street Partners are M1R, light industrial-residential). The entire Property has historically been used for commercial/industrial purposes. Development in the general area is for commercial/industrial use, and there is unlikely to be additional residential use in the vicinity of the MWPS Site. There has only
been one inquiry for residential development in the past 14 years, and housing already present in the neighborhood east of Scott Street is for sale/available. (See Exhibit 5.) The Department contacted WWW, Scott Street Partners, and the City of Missoula and asked them to provide information on their anticipated land use and each indicated their property was expected to remain as commercial/industrial use. (See Exhibit 6.)

Proximity to the railyard and spur is desirable to industrial/commercial use. (See Exhibit 4.) Local planning officials have developed a Joint Northside/Westside Neighborhood Plan which describes the future use of the area as light industrial development. (See Exhibit 7.) Deed restrictions recorded in 1999 prohibit residential use (See Exhibit 2.) Additional restrictive covenants limiting the future use and zoning changes may be proposed. Through this assessment, the only reasonable conclusion is that future use is reasonably anticipated to be commercial/industrial.

B. Any Other Determination Would be Arbitrary and Capricious

The above discussion of the reasonably anticipated future uses is almost identical to that conducted by the Department on the KRY facility located in Kalispell, MT (ROD excerpt attached as Exhibit 8). The evaluation of the MWPS Property is identical to the KRY facility considering the four factors in MCA § 75-10-701(18), and the Department determined that the reasonably anticipated future use of the KRY property was commercial. To determine otherwise at the MWPS Site would be arbitrary and capricious.

C. Application of Residential Cleanup Standards Will Lead Subsequent Users to Conclude the Department Endorses Residential Use

In addition to the above reasons, which support the conclusion that the future use of the Property will be commercial or industrial, it would be unreasonable for the Department to
designate the future use as residential considering the Montana Supreme Court’s decision in *Orr v. State*, 324 Mont. 391 (attached as Exhibit 9). Despite strenuous objection by the State, the Supreme Court in *Orr* concluded that involvement by the Board of Health (the Department’s predecessor) with the Libby mine led the mine workers to believe they were working in a safe environment. Citing *Nelson v. Driscoll*, 983 P.2d 972 (1999), the Montana Supreme Court held, “[i]n Montana, reliance occurs when one is ‘rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed.’” *Orr*, 324 Mont. at 407. As a result of the Court’s ruling, the miners were permitted to bring suit against the State.

The Property has been industrial for over 100 years. The Department has involved itself with investigation and remedial actions on the Property for over 20 years. This involvement is similar to the conduct of the Board of Health in *Orr*. Subsequent users of this 100-year-old industrial property may rely on the Department’s assessment of reasonably anticipated future use.

Despite the obvious facts discussed above that the Property’s future use will be commercial or industrial, if the Department makes a determination that future use includes residential, subsequent users will rely on that determination and believe the Department endorses residential use. Just like the Libby miners in *Orr*, the Department’s determination now may result in reliance by those using the Property in the future that their use of the Property for any purpose is safe. On the other hand, if the Property continues to serve as commercial or industrial and is designated commercial or industrial, there will be no potential for misunderstanding and no resulting unnecessary risk to subsequent users.

Although it is expected that, after 20 years of oversight by the Department and investigations and remedial actions completed by Huttig, there would be no surprises on the
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Property, despite best efforts, such situations can occur. This is illustrated by issues that have recently surfaced in other properties around the State. A couple of examples are the methane problems in the Bridger Creek subdivision that the City of Bozeman is currently addressing and the Helena Armory building lead contamination. (See news articles in Exhibit 10.)

IV. CONCLUSION

The present use of the Property is commercial and industrial, and application of Mont. Code Ann. §75-10-701(18), to the facts supports the determination that the future use of the Property will also be industrial or commercial, just as it has been for the past 100 years. Any other determination by the Department would be arbitrary and capricious, unreasonable, and invite unnecessary risk.
Exhibit 1
Aerial Photograph of MWPS Property
Current Uses of Surrounding Properties
Scott Street Partners

Former MWPS Property

Residential Area

Montana Rail Link

Shop and Rail Yard

Clawson Mfg.

Catholic Cemetery

City Cemetery

City Gravel Pit

Warehouses and Offices

Hinton Concrete Precast Plant

Republic Services Waste Handling

City of Missoula Maintenance Facility

City Park

Mountain Line Depot and Warehouse
Exhibit 2
Copies of Deeds
GRANT DEED

FOR VALUABLE CONSIDERATION, the receipt of which is acknowledged, the undersigned, HUTTIG SASH & DOOR COMPANY, a Delaware corporation, of 14500 South Outer Forty Road, Chesterfield, Missouri 63017 (hereinafter “Grantor”), hereby grants unto WWW INVESTMENTS LLC, of 1200 Shakespeare, Missoula, Montana 59802 (hereinafter “Grantee”), real property in Missoula County, Montana described in Exhibit A, attached hereto and by this reference made a part hereof as though set forth fully at this place (hereinafter, the “Property”).

TO HAVE AND TO HOLD unto Grantee, the survivor thereof, and to their heirs and assigns, forever, SUBJECT TO THE FOLLOWING:

A. All reservations and exceptions of record and in patents from the United States or the State of Montana;

B. All existing easements, rights-of-way and restrictions;

C. Taxes and assessments for the year 1999 and subsequent years;

D. All prior conveyances, leases or transfers of any interest in minerals, including oil, gas and other hydrocarbons;

E. All Building, use, zoning, sanitary, and environmental restrictions, and;

F. The Property is subject to reservations, easements and restrictions which are more particularly set forth below.

EXCEPT with reference to the items referred to in paragraphs A to F, inclusive, this deed is given with the covenants expressed in Mont. Code Ann. § 70-20-304.

Grantor warrants title only for the period of its possession of the property.

Grantee has agreed to take the Property subject to certain negative easements and restrictive covenants as more particularly set forth below.

A. Defined Terms.

For purposes of this Grant Deed, the following capitalized terms shall have the meanings ascribed to them below.

Agency Letter shall mean a letter from the Montana Department of Environmental Quality stating that no further active remediation with respect to the hazardous substance
contamination at, on, above, or under the Property or emanating therefrom is required.

**Environmental Conditions** shall mean any condition, quality, quantity or other state of the land, subsurface strata, air, surface water, groundwater, wildlife, biota, or Hazardous Materials, including without limitation any condition, circumstance, quality, quantity or other state of the land, subsurface strata, air, surface water, groundwater, wildlife, biota, Hazardous Materials arising out of, related to or resulting from the Release or threatened Release, generation, transport, handling, treatment, storage, disposal, management, presence of or exposure to any Hazardous Materials, or other operations by Grantor, their predecessors in interest or others.

**Environmental Laws** shall mean any past, present or future federal, state or local laws, regulations, ordinances, permits, approvals or authorizations pertaining to natural resources, Environmental Conditions, protection of human health, welfare or the environment, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, as amended (42 U.S.C. §§ 9601 et seq.) (“CERCLA”); the Clean Air Act (42 U.S.C. §§ 7401 et seq.); the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 et seq.); the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.) (“RCRA”); the Safe Drinking Water Act (42 U.S.C. §§ 300(f) et seq.); the Comprehensive Environmental Cleanup and Responsibility Act, as amended (Mont. Code Ann. §§ 75-10-701 et seq.) (“CECRA”); the Montana Water Quality Act (Mont. Code Ann. §§ 75-5-101 et seq.); the Clean Air Act of Montana (Mont. Code Ann. §§ 75-2-101, et seq.); all as amended and as may change from time to time; and any provisions or theories of common law providing for any cause of action, remedy or right of recovery with respect to, arising from, or related to Environmental Conditions, as any such provisions or theories may change from time to time.

**Government** shall mean the United States Environmental Protection Agency or the State of Montana, or either of them, if appropriate, or other governmental authority.

**Hazardous Materials** shall mean any substance (i) the presence of which requires investigation or remediation under any federal, state or local statute, regulation, ordinance, order, action, policy or common law; or (ii) which is defined as a "hazardous waste," "hazardous substance," pollutant or contaminant under any federal, State or local statute, regulation, rule or ordinance or amendments thereto including, without limitation, CERCLA and/or RCRA; or (iii) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or hazardous; or (iv) the presence of which causes or threatens to cause a nuisance or poses or threatens to pose a threat to human health, safety or the environment; or (v) without limitation which contains gasoline diesel fuel or other petroleum hydrocarbons; or which contains polychlorinated biphenyls, asbestos or urea formaldehyde foam insulation.

**Release** shall mean any spilling, leaking, pumping, pouring, emitting, leaching, emptying, discharging, injecting, escaping, dumping, burying, disposal or emanation whatsoever.

**Remedial Action** shall mean any response, removal, or remedial action within the meaning of those terms under CECRA, Mont. Code Ann. § 75-10-701(19), regardless of whether such actions are undertaken pursuant to CECRA authority, and any reclamation, restoration, or
rehabilitation actions undertaken pursuant to or required by any Environmental Laws.

State shall mean the State of Montana.

Successor in Interest and Assigns shall mean any person or entity who is granted, acquires, or receives right, title or interest, including through sale or lease, to the Property, or any portion thereof subsequent to the execution of this Grant Deed.

Treated Area shall mean the real property in Missoula County, Montana described in Exhibit B, attached hereto and by this reference made a part hereof as though set forth fully at this place.

B. Property Disclosures. Grantor hereby makes the following disclosures to Grantee and Grantee hereby acknowledges receipt of such disclosures and any documents more particularly described below concerning the Environmental Conditions of the Property and the existence of any easements, restrictive covenants or other title matters burdening the Property:

1. Grantor and others have performed investigations or evaluations under CECRA at the Property which have been fully disclosed to Grantee. A copy of: In the matter of: The Investigation of the Environmental Conditions at and Emanating from the Missoula White Pine Sash Company Site, Missoula, Montana -- Remedial Investigation/ Feasibility Study Unilateral Administrative Order -- Docket Number 95-001, dated March 17, 1995 has been delivered to the Grantee. In addition, a copy of the results to date of the investigations are contained in the Missoula White Pine Sash Final Draft Remedial Investigation Report (January 1998), which discloses the presence of Hazardous Materials including petroleum, pentachlorophenol and dioxins in the soils and groundwater beneath portions of the Property and this document has also been delivered to the Grantee.

2. The Government is evaluating the Property and possible Remedial Action. Grantor hereby discloses that the final remedy is unknown at this time.

3. Grantor discloses that the Property has been used as industrial or commercial property.

4. Other documents that are not identified above, including, but not limited to, those in the Montana Department of Environmental Quality’s files for the site, the United States Environmental Protection Agency’s files, the Missoula County files, the City of Missoula files, Crane Co. files, and Huttig Sash & Door Company files may exist with respect to the Property. Grantor is not aware of any such documents, but to the extent that any other documents exist, Grantee assumes the responsibility to perform the appropriate due diligence to identify, review, analyze, and form its own opinions with respect to all documents and records.
C. **Easements or Covenants.**

1. **Purpose.** The Property and other adjacent lands are the subject of a remedial investigation/feasibility study being conducted by the Grantor under CECRA. It is anticipated that the final remedial investigation/feasibility study will address soil and groundwater containing pentachlorophenol, dioxin, and petroleum products formerly used at the Property. Hazardous Materials have been detected in soils in the Treating Area and in the groundwater underlying certain areas of the Property. It is anticipated that the Remedial Action will not remove all impacted soil or groundwater in the Property or Treating Area, and certain levels of Hazardous Materials are expected to remain at the Property and in the Treating Area indefinitely. Accordingly, the easements or restrictions on the future uses of the Property and Treating Area are necessary.

2. **Easements and Covenants.** The following Easements or Covenants shall burden the Property and are intended to be and shall be construed as Easements or Covenants of Grantee and its Successors in Interest and Assigns which run with the land:

   a. **Agreement.**

      (i) The Remedial Action performed by or for Grantor at the Property shall be reasonably necessary to comply with Environmental Laws and/or to comply with instructions, orders or agreements with the Government and/or to protect from harm persons or property. The Remedial Action shall be no more intrusive than is reasonably necessary or appropriate to fulfill such objectives. Grantor shall not be liable to Grantee or its Successors in Interest and Assigns for damages, directly or indirectly, for any disruption or inconvenience or other loss, or diminution in value, or expense of any kind caused by or resulting from the condition of the property or the performance of such Remedial Action, including, without limitation, damage to the Property, or claims with respect to business interruption or interference with the use of the Property by or activities of the Grantee, its Successors in Interest and Assigns, tenants, transferees, licensees or invitees. Grantor shall be liable to Grantee for any damage to structures or improvements on the Property caused by or resulting from the performance of such Remedial Action.

      (ii) Grantee expressly agrees to authorize the Government access to the Property for purposes of overseeing the implementation of the Remedial Action, including the taking of water, soil or other samples from upon or beneath the Property; conducting investigations relating to soil and groundwater contamination upon, beneath, or near the Property; and observing and monitoring the progress of the work performed at the Property by Grantor.

      (iii) Grantee agrees to cooperate with Grantor in the performance of all Remedial Action authorized hereunder so as to minimize the time and expense to Grantor, including the grant of access to on-site utilities (e.g., electricity, sewer.
and water), to the extent required for such Remedial Action. Grantee’s cooperation shall not be construed to impose any financial burden or obligation on Grantee.

(iv) Grantor and Grantee agree to subject the Property to such restrictions, easements, and/or other institutional controls as may be reasonably required by the Government as a condition to the issuance of an Agency Letter. Further, the parties agree to cooperate in removing such restrictions, easements, or other institutional controls from the property by recording appropriate releases when so authorized by the Government.

(v) Prior to the Grantor’s receipt of an Agency Letter or a governmental determination of no further action, Grantee shall construct no improvements to, upon or beneath the Property, which will or may obstruct or impede the Remedial Action, without the prior written consent of Grantor, which consent shall not be unreasonably withheld.

(vi) The Property owner will not object to the petition, creation, formation, or granting of a controlled groundwater area closed for any appropriation of groundwater and/or the installation, drilling, construction or development of new wells to effectuate the taking of groundwater.

b. **Restrictive Covenants.** The use of the Property shall be subject to the following restrictive covenants:

(i) The Property owner shall not take any actions which interfere with implementation of any Remedial Action or other remedial efforts currently being conducted, or hereafter conducted, on or about the Property or Treating Area.

(ii) No portion of the Property shall be used in any manner for residential purposes or for any type of human residential habitation, whether permanent or temporary. If Grantee is able to obtain the consent of the Government to lift this restriction on human residential habitation, Grantor agrees to remove such restriction from the Property at no cost to Grantor.

(iii) There shall be no construction or location of buildings, mobile homes, billboards or other structures (except maintenance and repair of existing structures) upon or beneath the Treating Area except (A) as required by the Remedial Action or (B) in conjunction with activities which are permitted by applicable federal, State and local laws and ordinances and these easements and covenants.

(iv) There shall be no filling, excavating, or removing of soil, sand, gravel, rock or other materials upon or beneath the Treating Area, except as a part of a Remedial Action.
(v) Dumping, disposal, storage, releasing, discharging or placement on the ground of ashes, trash, garbage or other materials shall be prohibited upon or beneath the Treating Area, except as a part of a Remedial Action.

(vi) Except as hereinafter provided, the drilling or digging, of new water wells shall be prohibited. However, the foregoing restriction shall not prohibit or limit the right of access to and use of existing monitoring or recovery wells and construction of new monitoring or recovery wells which are necessary or advisable as a part of a Remedial Action.

(vii) No food crop of any kind may be grown on or harvested from the Treating Area. No portion of the Property may be used for any vegetable garden, orchard, pasture, or any food chain plants (including plants normally consumed by humans or used as feed for animals whose products or meat are normally consumed by humans.) No growth shall be permitted on the Treating Area of any plant which could reasonably be expected to be used by humans as a food source, including, for example, fruit-bearing trees, such as apple, cherry, choke-cherry or other fruit or berry trees, or which could reasonably be expected to be used as a food source for any food chain animal, including, for example, grain or hay.

c. Reservations.

(i) Grantor hereby reserves an irrevocable right and easement to enter upon and use the Property to conduct such environmental assessments, inspections, investigations, remediation, Remedial Action, monitoring and related activities, including, without limitation, soil and groundwater testing and remediation, and installation, operation and maintenance of all monitoring and recovery wells, treatment systems and equipment utilized in connection therewith as are deemed necessary by Grantor in its sole discretion. The foregoing right and easement shall benefit Grantor, its agents, contractors, consultants, employees, representatives, successors and assigns, and the Government, and all other federal, State or local environmental agencies or departments.

(ii) Grantor reserves the right to take water, soil, minerals, wood, and other things from upon or beneath the Property as reasonably necessary for the purpose of conducting the Remedial Action.

(iii) Grantor reserves an easement and right-of-way to continue to use and access that portion of the building described in Exhibit C, attached hereto and by this reference made a part hereof as though set forth fully at this place, for the purpose of Remedial Action.

3. Benefitted Properties. The Covenants shall be for the benefit of the Grantor and the properties described below, their current owners, and their Successors in Interest and Assigns.
4. **Benefits to Benefitted Properties.** Grantor and Grantee acknowledge that the benefits to the Benefitted Properties by reason of the Covenants include without limitation the following:

   a. The reduction or minimization of potential risk to human health and the environment from the release of Hazardous Materials from the Property and Treating Area on, or in the vicinity of, the Benefitted Properties; and

   b. The maintenance, use and potential development of the Property and Treating Area in such a manner as to allow economic and other benefits to accrue while protecting human health and the environment.

D. **Transfers of Property.** If Grantee transfers or conveys all or any part of its interest in the Property or any interest in the Property to a third party, then Grantee shall be required to include in its transfer or conveyance documents to such third party the foregoing Obligations, Covenants, and Reservations. Grantee shall have the right to enforce against such third party each and every Obligation, Covenant, and Reservation with respect to the Property which has been transferred to such third party. No grant, transfer, lease, or conveyance of title, easement or other form of conveyance or transfer of any interest in all or any portion of the Property shall be made or effected without a provision restricting the use of the Property set forth herein and all such conveyances of title, grants, leases, transfers or conveyance of any interest in all or any of the Property shall contain the restrictions set forth in this section except that each subsequent transferee’s name shall be substituted in each subsequent document as the person or entity to be charged with compliance herewith.

E. **Enforcement Rights - Covenants.**

1. **Enforcement of Covenants.** Grantor and Grantee hereby agree that each Covenant or other provision set forth above is intended to and shall be a covenant running with the land and shall be binding upon any and all persons or entities who acquire any interest or interests in any or all of the Property, including without limitation all Successors in Interest and Assigns of Grantee.

2. **Parties Eligible to Enforce Covenants.** Each of the Covenants set forth in this Grant Deed shall be enforceable in perpetuity as follows:

   a. **In Contract.** Grantor shall be entitled to enforce the provisions of the Covenants against Grantee pursuant to the terms and conditions of the Grant Deed. Grantor and Grantee hereby specifically agree that the remedy of “specific performance” shall be available to Grantor in such proceedings.

   b. **Government.** The Government shall be entitled to enforce the Covenants as intended beneficiaries thereof. Grantor and Grantee hereby specifically agree that the
remedy of “specific performance” shall be available to the Government in such proceedings.

F. Modification of Reservations and Covenants.

The reservations or covenants may be modified from time to time as follows:

1. **Required Approval.** Any proposed modification must be approved in writing by the Government, Grantor and Grantee, or if other than Grantee, the current owner of the property burdened by the Reservation or Covenant to be modified. Such written approval by Government, Grantor and Grantee or the current property owner may be evidenced by execution of the instrument created to amend the Reservations or Covenants.

2. **Recordation of Modification.** In order to be effective, any modification of the Reservations or Covenants must be (i) in writing, (ii) approved by each of the persons described in paragraph 1., above, with such signature duly notarized (to the extent required by Montana law), and (iii) duly recorded in the Missoula County real property records.

Any modification which complies with the foregoing requirements shall be deemed duly created and enforceable, from and after the effective date thereof to the same extent as the original Reservations or Covenants. For purposes of these provisions, a modification of the Reservations or Covenants may include (i) the imposition of new Easements or Covenants or (ii) the termination of all or part of the existing Reservations, Easements or Covenants.

**IN WITNESS WHEREOF,** the Grantor, pursuant to a resolution of its Board of Directors, and the Grantee, pursuant to a resolution of its members, have caused their respective corporate names to be hereunto subscribed by their authorized officers on this _____ day of _________________, 1999.

**HUTTIG SASH & DOOR COMPANY**

By: ____________________________

Its: ____________________________

**WWW INVESTMENTS, LLC**

By: ____________________________

Its: ____________________________


STATE OF MISSOURI )

County of ST. LOUIS )

On this 31st day of MARCH, 1999, before me, the undersigned, a Notary Public in and for the State of MISSOURI, personally appeared GREGORY LAMBERT, known to me to be the CFO of Huttig Sash & Door Company, and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same on behalf of Huttig Sash & Door Company.

In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written.

Mary Ann Morcom
NOTARY PUBLIC FOR THE STATE OF MISSOURI
Residing at: ST. LOUIS, MO
My commission expires: 7-31-2001

STATE OF MONTANA )

County of MISSOURI )

On this 26th day of MARCH, 1999, before me, the undersigned, a Notary Public in and for the State of MONTANA, personally appeared HARRY B. WATSON, known to me to be the a member of WWW INVESTMENTS, LLC, and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same on behalf of WWW INVESTMENTS, LLC.

In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written.

(Notarial Seal)

NOTARY PUBLIC FOR THE STATE OF MONTANA
Residing at: MISSOULA, MT
My commission expires: 4-27-2003
EXHIBIT "A"

Lots 1, 2 and 3 in Block 50, all of Block 49 and Tracts 28 and 29 of SCHOOL ADDITION, a platted subdivision in the city of Missoula, Missoula County, Montana, according to the official recorded plat thereof.

TOGETHER WITH that portion of vacated Cooley Street, Shakespeare Street and Hawthorne Street which lies adjacent and contiguous to subject properties and all of vacated Turner Street.

ALSO TOGETHER WITH the vacated alley Block 49.

EXCEPTING THEREFROM that part conveyed by Missoula Lumber Company on April 23rd, 1917 and also April 16, 1917 to Northern Pacific Railway Company, which said deeds were recorded in Book 85 of Deeds at Page 61 and in Book 85 Deeds at Page 63, Missoula County records.

EXCEPTING THEREFROM all that part of Tract No. 29 of Supplemental Plat of the School Addition to the City of Missoula, Missoula County, Montana, lying South of the Northern Pacific Railway Company right-of-way, according to the official plat of said Addition now on file and of record in the office of the County Clerk and Recorder of Missoula County, Montana.

TOGETHER with all interest of Seller in vacated streets and alleys adjacent thereto, all easements and other appurtenances thereto, and all improvements thereon. All permanently installed structures, buildings, fixtures and fittings that are attached to the property are included in the purchase price, such as electrical, plumbing and heating fixtures, wood stoves, built-in appliances, screens, storm doors, storm windows, air cooler or conditioner, heating and ventilation systems, garage door openers and controls, and trees, shrubs and asphalt attached to the above described real property and attached buildings or structures.

DEED REFERENCE: Book 97 Page 227
Exhibit B - Missoula White Pine Sash Co. Facility

Approx. scale: 1" = 66 feet

Possible locations for future groundwater recovery/treatment building. Approximate building size would be 30 feet wide x 50 feet long.
GRANT DEED

FOR VALUABLE CONSIDERATION, the receipt of which is acknowledged, the undersigned, HUTTIG SASH & DOOR COMPANY, a Delaware corporation, of 14500 South Outer Forty Road, Chesterfield, Missouri 63017 (hereinafter “Grantor”), hereby grants unto SCOTT STREET LLP, of 950 Mellot Lane, Missoula, Montana 59808 (hereinafter “Grantee”), real property in Missoula County, Montana described in Exhibit A, attached hereto and by this reference made a part hereof as though set forth fully at this place (hereinafter, the “Property”).

TO HAVE AND TO HOLD unto Grantee, the survivor thereof, and to their heirs and assigns, forever, SUBJECT TO THE FOLLOWING:

A. All reservations and exceptions of record and in patents from the United States or the State of Montana;

B. All existing easements, rights-of-way and restrictions;

C. Taxes and assessments for the year 1999 and subsequent years;

D. All prior conveyances, leases or transfers of any interest in minerals, including oil, gas and other hydrocarbons;

E. All Building, use, zoning, sanitary, and environmental restrictions, and;

F. The Property is subject to reservations, easements and restrictions which are more particularly set forth below.

EXCEPT with reference to the items referred to in paragraphs A to F, inclusive, this deed is given with the covenants expressed in Mont. Code Ann. § 70-20-304.

Grantor warrants title only for the period of its possession of the property.

Grantee has agreed to take the Property subject to certain negative easements and restrictive covenants as more particularly set forth below.

A. Defined Terms.

For purposes of this Grant Deed, the following capitalized terms shall have the meanings ascribed to them below.

Agency Letter shall mean a letter from the Montana Department of Environmental Quality stating that no further active remediation with respect to the hazardous substance contamination at, on, above, or under the Property or emanating therefrom is required.

Environmental Conditions shall mean any condition, quality, quantity or other state of the land, subsurface strata, air, surface water, groundwater, wildlife, biota, or Hazardous Materials,
including without limitation any condition, circumstance, quality, quantity or other state of the land, subsurface strata, air, surface water, groundwater, wildlife, biota, Hazardous Materials arising out of, related to or resulting from the Release or threatened Release, generation, transport, handling, treatment, storage, disposal, management, presence of or exposure to any Hazardous Materials, or other operations by Grantor, their predecessors in interest or others.

**Environmental Laws** shall mean any past, present or future federal, state or local laws, regulations, ordinances, permits, approvals or authorizations pertaining to natural resources, Environmental Conditions, protection of human health, welfare or the environment, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, as amended (42 U.S.C. §§ 9601 et seq.) ("CERCLA"); the Clean Air Act (42 U.S.C. §§ 7401 et seq.); the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 et seq.); the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.) ("RCRA"); the Safe Drinking Water Act (42 U.S.C. §§ 300(f) et seq.); the Comprehensive Environmental Cleanup and Responsibility Act, as amended (Mont. Code Ann. §§ 75-10-701 et seq.) ("CECRA"); the Montana Water Quality Act (Mont. Code Ann. §§ 75-5-101 et seq.); the Clean Air Act of Montana (Mont. Code Ann. §§ 75-2-101, et seq.); all as amended and as may change from time to time; and any provisions or theories of common law providing for any cause of action, remedy or right of recovery with respect to, arising from, or related to Environmental Conditions, as any such provisions or theories may change from time to time.

**Government** shall mean the United States Environmental Protection Agency or the State of Montana, or either of them, if appropriate, or other governmental authority.

**Hazardous Materials** shall mean any substance (i) the presence of which requires investigation or remediation under any federal, state or local statute, regulation, ordinance, order, action, policy or common law; or (ii) which is defined as a "hazardous waste," "hazardous substance," pollutant or contaminant under any federal, State or local statute, regulation, rule or ordinance or amendments thereto including, without limitation, CERCLA and/or RCRA; or (iii) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or hazardous; or (iv) the presence of which causes or threatens to cause a nuisance or poses or threatens to pose a threat to human health, safety or the environment; or (v) without limitation which contains gasoline diesel fuel or other petroleum hydrocarbons; or which contains polychlorinated biphenyls, asbestos or urea formaldehyde foam insulation.

**Release** shall mean any spilling, leaking, pumping, pouring, emitting, leaching, emptying, discharging, injecting, escaping, dumping, burying, disposal or emanation whatsoever.

**Remedial Action** shall mean any response, removal, or remedial action within the meaning of those terms under CECRA, Mont. Code Ann. § 75-10-701(19), regardless of whether such actions are undertaken pursuant to CECRA authority, and any reclamation, restoration, or rehabilitation actions undertaken pursuant to or required by any Environmental Laws.

**State** shall mean the State of Montana.
Successor in Interest and Assigns shall mean any person or entity who is granted, acquires, or receives right, title or interest, including through sale or lease, to the Property, or any portion thereof subsequent to the execution of this Grant Deed.

B. Property Disclosures. Grantor hereby makes the following disclosures to Grantee and Grantee hereby acknowledges receipt of such disclosures and any documents more particularly described below concerning the Environmental Conditions of the Property and the existence of any easements, restrictive covenants or other title matters burdening the Property:

1. Grantor and others have performed investigations or evaluations under CECRA at the Property which have been fully disclosed to Grantee. A copy of: In the matter of: The Investigation of the Environmental Conditions at and Emanating from the Missoula White Pine Sash Company Site, Missoula, Montana -- Remedial Investigation/ Feasibility Study Unilateral Administrative Order -- Docket Number 95-001, dated March 17, 1995 has been delivered to the Grantee. In addition, a copy of the results to date of the investigations are contained in the Missoula White Pine Sash Final Draft Remedial Investigation Report (January 1998), and May 12, 1998 summary of surface soil sampling for the Missoula White Pine Sash Company’s site northern property, which discloses the presence of Hazardous Materials including petroleum, pentachlorophenol and dioxins in the soils and groundwater beneath portions of the Property and this document has also been delivered to the Grantee.

2. The Government is evaluating the Property and possible Remedial Action. Grantor hereby discloses that the final remedy is unknown at this time.

3. Grantor discloses that the Property has been used as industrial or commercial property.

4. Other documents that are not identified above, including, but not limited to, those in the Montana Department of Environmental Quality’s files for the site, the United States Environmental Protection Agency’s files, the Missoula County files, the City of Missoula files, Crane Co. files, and Huttig Sash & Door Company files may exist with respect to the Property. Grantor is not aware of any such documents, but to the extent that any other documents exist, Grantee assumes the responsibility to perform the appropriate due diligence to identify, review, analyze, and form its own opinions with respect to all documents and records.
C. Easements or Covenants.

1. Purpose. The Property and other adjacent lands are the subject of a remedial investigation/feasibility study being conducted by the Grantor under CECRA. It is anticipated that the final remedial investigation/feasibility study will address soil and groundwater containing pentachlorophenol, dioxin, and petroleum products formerly used at the Property. Hazardous Materials have been detected in soils and in the groundwater underlying certain areas of the Property. It is anticipated that the Remedial Action will not remove all impacted soil or groundwater in the Property, and certain levels of Hazardous Materials are expected to remain at the Property indefinitely. Accordingly, the easements or restrictions on the future uses of the Property are necessary.

2. Easements and Covenants. The following Easements or Covenants shall burden the Property and are intended to be and shall be construed as Easements or Covenants of Grantee and its Successors in Interest and Assigns which run with the land:

   a. Agreement.

      (i) The Remedial Action performed by or for Grantor at the Property shall be reasonably necessary to comply with Environmental Laws and/or to comply with instructions, orders or agreements with the Government and/or to protect from harm persons or property. The Remedial Action shall be no more intrusive than is reasonably necessary or appropriate to fulfill such objectives. Grantor shall not be liable to Grantee or its Successors in Interest and Assigns for damages, directly or indirectly, for any disruption or inconvenience or other loss, or diminution in value, or expense of any kind caused by or resulting from the condition of the property or the performance of such Remedial Action, including, without limitation, damage to the Property, or claims with respect to business interruption or interference with the use of the Property by or activities of the Grantee, its Successors in Interest and Assigns, tenants, transferees, licensees or invitees. Grantor shall be liable to Grantee for any damage to structures or improvements on the Property caused by or resulting from the performance of such Remedial Action.

      (ii) Grantee expressly agrees to authorize the Government access to the Property for purposes of overseeing the implementation of the Remedial Action, including the taking of water, soil or other samples from upon or beneath the Property; conducting investigations relating to soil and groundwater contamination upon, beneath, or near the Property; and observing and monitoring the progress of the work performed at the Property by Grantor.

      (iii) Grantee agrees to cooperate with Grantor in the performance of all Remedial Action authorized hereunder so as to minimize the time and expense to Grantor, including the grant of access to on-site utilities (e.g., electricity, sewer and water), to the extent required for such Remedial Action. Grantee's
cooperation shall not be construed to impose any financial burden or obligation on Grantee.

(iv) Grantor and Grantee agree to subject the Property to such restrictions, easements, and/or other institutional controls as may be reasonably required by the Government as a condition to the issuance of an Agency Letter. Further, the parties agree to cooperate in removing such restrictions, easements, or other institutional controls from the property by recording appropriate releases when so authorized by the Government.

(v) Prior to the Grantor's receipt of an Agency Letter or a governmental determination of no further action, Grantee shall construct no improvements to, upon or beneath the Property, which will or may obstruct or impede the Remedial Action, without the prior written consent of Grantor, which consent shall not be unreasonably withheld.

(vi) The Property owner will not object to the petition, creation, formation, or granting of a controlled groundwater area closed for any appropriation of groundwater and/or the installation, drilling, construction or development of new wells to effectuate the taking of groundwater.

b. **Restrictive Covenants.** The use of the Property shall be subject to the following restrictive covenants:

(i) The Property owner shall not take any actions which interfere with implementation of any Remedial Action or other remedial efforts currently being conducted, or hereafter conducted, on or about the Property.

(ii) No portion of the Property shall be used in any manner for residential purposes or for any type of human residential habitation, whether permanent or temporary. If Grantee is able to obtain the consent of the Government to lift this restriction on human residential habitation, Grantor agrees to remove such restriction from the Property at no cost to Grantor.

(iii) Except as hereinafter provided, the drilling or digging, of new water wells shall be prohibited. However, the foregoing restriction shall not prohibit or limit the right of access to and use of existing monitoring or recovery wells and construction of new monitoring or recovery wells which are necessary or advisable as a part of a Remedial Action.

c. **Reservations.**

(i) Grantor hereby reserves an irrevocable right and easement to enter upon and use the Property to conduct such environmental assessments, inspections, investigations, remediation, Remedial Action, monitoring and related
activities, including, without limitation, soil and groundwater testing and 
remediation, and installation, operation and maintenance of all monitoring and 
recovery wells, treatment systems and equipment utilized in connection therewith 
as are deemed necessary by Grantor in its sole discretion. The foregoing right and 
easement shall benefit Grantor, its agents, contractors, consultants, employees, 
representatives, successors and assigns, and the Government, and all other federal, 
State or local environmental agencies or departments.

(ii) Grantor reserves the right to take water, soil, minerals, wood, and 
other things from upon or beneath the Property as reasonably necessary for the 
purpose of conducting the Remedial Action.

3. **Benefitted Properties.** The Covenants shall be for the benefit of the Grantor and 
the properties described below, their current owners, and their Successors in Interest and Assigns.

4. **Benefits to Benefitted Properties.** Grantor and Grantee acknowledge that the 
benefits to the Benefitted Properties by reason of the Covenants include without limitation the 
following:

   a. The reduction or minimization of potential risk to human health and the 
environment from the release of Hazardous Materials from the Property on, or in the 
vicinity of, the Benefitted Properties; and

   b. The maintenance, use and potential development of the Property in such a 
manner as to allow economic and other benefits to accrue while protecting human health 
and the environment.

D. **Transfers of Property.** If Grantee transfers or conveys all or any part of its interest in the 
Property or any interest in the Property to a third party, then Grantee shall be required to include 
in its transfer or conveyance documents to such third party the foregoing Obligations, Covenants, 
and Reservations. Grantee shall have the right to enforce against such third party each and every 
Obligation, Covenant, and Reservation with respect to the Property which has been transferred to 
such third party. No grant, transfer, lease, or conveyance of title, easement or other form of 
conveyance or transfer of any interest in all or any portion of the Property shall be made or 
effected without a provision restricting the use of the Property set forth herein and all such 
conveyances of title, grants, leases, transfers or conveyance of any interest in all or any of the 
Property shall contain the restrictions set forth in this section except that each subsequent 
transferee’s name shall be substituted in each subsequent document as the person or entity to be 
charged with compliance herewith.

E. **Enforcement Rights - Covenants.**

1. **Enforcement of Covenants.** Grantor and Grantee hereby agree that each Covenant 
or other provision set forth above is intended to and shall be a covenant running with the land 
and shall be binding upon any and all persons or entities who acquire any interest or interests in
any or all of the Property, including without limitation all Successors in Interest and Assigns of Grantee.

2. **Parties Eligible to Enforce Covenants.** Each of the Covenants set forth in this Grant Deed shall be enforceable in perpetuity as follows:

   a. **In Contract.** Grantor shall be entitled to enforce the provisions of the Covenants against Grantee pursuant to the terms and conditions of the Grant Deed. Grantor and Grantee hereby specifically agree that the remedy of “specific performance” shall be available to Grantor in such proceedings.

   b. **Government.** The Government shall be entitled to enforce the Covenants as intended beneficiaries thereof. Grantor and Grantee hereby specifically agree that the remedy of “specific performance” shall be available to the Government in such proceedings.

F. **Modification of Reservations and Covenants.**

The reservations or covenants may be modified from time to time as follows:

1. **Required Approval.** Any proposed modification must be approved in writing by the Government, Grantor and Grantee, or if other than Grantee, the current owner of the property burdened by the Reservation or Covenant to be modified. Such written approval by Government, Grantor and Grantee or the current property owner may be evidenced by execution of the instrument created to amend the Reservations or Covenants.

2. **Recordation of Modification.** In order to be effective, any modification of the Reservations or Covenants must be (i) in writing, (ii) approved by each of the persons described in paragraph 1., above, with such signature duly notarized (to the extent required by Montana law), and (iii) duly recorded in the Missoula County real property records.

Any modification which complies with the foregoing requirements shall be deemed duly created and enforceable, from and after the effective date thereof to the same extent as the original Reservations or Covenants. For purposes of these provisions, a modification of the Reservations or Covenants may include (i) the imposition of new Easements or Covenants or (ii) the termination of all or part of the existing Reservations, Easements or Covenants.

**IN WITNESS WHEREOF,** the Grantor, pursuant to a resolution of its Board of Directors, and the Grantee, pursuant to a resolution of its members, have caused their respective corporate names to be hereunto subscribed by their authorized officers on this _____ day of _____________, 1999.

**HUTTIG SASH & DOOR COMPANY**
SCOTT STREET, LLP

By: ___________________________  
Its: ___________________________  

STATE OF MISSOURI  
County of MISSOURI  

On this 26 day of March, 1999, before me, the undersigned, a Notary Public in and for the State of MISSOURI, personally appeared Michael S. Sargsyan, known to me to be the President of Huttig Sash & Door Company, and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same on behalf of Huttig Sash & Door Company.

In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written.

Mary Ann Motcon  
NOTARY PUBLIC FOR THE STATE OF MISSOURI  
Residing at: ST. LOUIS COUNTY, MO  
My commission expires: 7-31-2001

By: ___________________________  
Its: ___________________________  

STATE OF MISSOURI  
County of MISSOURI  

On this 26 day of March, 1999, before me, the undersigned, a Notary Public in and for the State of MISSOURI, personally appeared Michael S. Sargsyan, known to me to be the President of SCOTT STREET, LLP, and the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same on behalf of SCOTT STREET, LLP.
In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written.

[Signature]

NOTARY PUBLIC FOR THE STATE OF Missouri

(Notarial Seal)

Residing at: Missouri, Missouri

My commission expires: 6-27-2017
EXHIBIT "A"

Tracts 25, 26, 27, 30, 31 and 32 of SCHOOL ADDITION, a platted subdivision in the city of Missoula, Missoula County, Montana, according to the official recorded plat thereof.

TOGETHER WITH that portion of vacated Palmer Street, Charlo Street, and Shakespeare Street which lies adjacent and contiguous to subject properties.

EXCEPTING THEREFROM a tract of land 200 feet wide in an Easterly and Westerly direction and 142 feet deep in a Northerly and Southerly direction in the Northwest corner of Tract 25 of School Addition to the city of Missoula, Montana, according to the official map or plat thereof now on file and of record in the office of the County Clerk and Recorder of Missoula County, Montana, being part of Section 16 of Township 13 North, Range 19 West, M.P.M., which said tract of land is more particularly described as follows: Beginning at the Northwest corner of said Tract 25 and running thence East along the South line of Rogers Street, a distance of 200 feet, thence South and at right angles to the South line of Rogers Street, a distance of 142 feet, thence West at right angles to the last described course a distance of 200 feet to the East line of Shakespeare Street. Thence North 142 feet along the East line of Shakespeare Street to the point of beginning.

EXCEPTING THEREFROM a tract of land 40 feet wide in an Easterly and Westerly direction and 142 feet deep in a Northerly and Southerly direction in Tract 25 of School Addition to the City of Missoula, Montana, according to the official map or plat thereof now on file and of record in the office of the County Clerk and Recorder of Missoula County, Montana, being part of Section 16 of Township 13 North, Range 19 West, M.P.M., which said tract is contiguous on the Easterly side to a tract 200 feet by 142 feet heretofore granted by party of the first part to parties of the second part and which said tract herein granted is more particularly described as follows: Beginning at a point which 200 feet Easterly from the Northwest corner of said Tract 25 and running thence East along the South line of Rodgers Street a distance of 40 feet; thence South and at right angles to the South line of Rodgers Street a distance of 142 feet; thence West at right angles to the last described course a distance of 40 feet to the Easterly line of the tract heretofore conveyed; thence North 142 feet to the South line of Rodgers Street, the point of beginning.

EXCEPTING THEREFROM Portion ‘A’ of the School Addition Tracts 24, 25, 32 and 33 - an Amended Subdivision Plat for the Purpose of Relocation of Common Boundaries and Aggregation of Lots in the North
one-half of Section 16, Township 13 North, Range 19 West, Principal Meridian, Montana, Missoula County, Montana, being more particularly described as follows:

A parcel of land being a portion of "Supplemental Plat of the School Addition to the City of Missoula, Montana", Tract 25 and 32 and portions of vacated Rodgers Street and vacated Shakespeare Street, City of Missoula, Missoula County, Montana; located in Section 16, Township 13 North, Range 19 West, Principal Meridian, Montana, Missoula County, Montana, being further described as follows:

Beginning at the intersection of vacated Rodgers Street and the West right-of-way of Scott Street; thence S.00°05'30"W., 187.30 feet along said right-of-way and East boundary of "Supplement Plat of the School Addition to the city of Missoula Montana", Tract 25; thence N.89°55'14"W., 1272.24 feet; thence N.00°00'00"E., 147.84 feet to the South right-of-way of Rodgers Street; thence the next three courses along said right-of-way, S.89°57'03"E., 171.07 feet; thence N.00°18'13"E., 14.80 feet; thence along a non-tangent curve to the left, whose center bears N.01°53'31"E., having a radius of 315.00 feet, an arc length of 137.18 feet; thence S.89°56'26"E., 248.27 feet; thence S.89°51'53"E., 40.00 feet; thence S.00°09'46"W., 182.00 feet; thence S.89°51'53"E., 240.00 feet; thence N.00°09'46"E., 182.00 feet; thence S.89°51'53"E., 439.34 feet to the point of beginning.

TOGETHER with all interest of Seller in vacated streets and alleys adjacent thereto, all easements and other appurtenances thereto, and all improvements thereon. All permanently installed structures, buildings, fixtures and fittings that are attached to the property are included in the purchase price, such as electrical, plumbing and heating fixtures, wood stoves, built-in appliances, screens, storm doors, storm windows, air cooler or conditioner, heating and ventilation systems, garage door openers and controls, and trees, shrubs and asphalt attached to the above described real property and attached buildings or structures.

DEED REFERENCE: Book 97 Page 227
Book 142 Page 521
Exhibit 3
Aerial Photograph of MWPS Property
Surrounding Industrial Uses
Exhibit 4

Letter from Bob Zimorino re: highest and best use
Letter from James Grunke re: highest and best use
November 7, 2013

Scott Graham, Project Officer  
Montana Department of Environmental Quality  
P. O. Box 200901  
Helena, Montana 59620-0901  

RE: Scott Street Property/Scott Street Partners – Missoula Montana  

Dear Mr. Graham:

The Missoula Economic Partnership (MEP) serves as the principal economic development organization of the City of Missoula and Missoula County. MEP is a broad, collaborative effort of business and government investors, all of whom share a vision of a vibrant, growing and diversified regional economy in Western Montana.

Further development and expansion of manufacturing is one of the key industry sectors that is a “best-fit” for our community. One of the difficulties this area is faced with, is the lack of ready to use industrial land. It is my opinion that the Scott Street Property, with both its historical industrial use – and the fact that is one of the largest parcels of land within the Missoula City limits that has rail access – that the best use for redevelopment would be for commercial/industrial use.

In addition, this area is being considered for inclusion in an Urban Renewal District by the City of Missoula to further incent infrastructure development to support industrial/commercial development. I fully support a Record of Decision that gets the property cleaned up and back into production.

Sincerely,

James W. Grunke  
President/CEO
Bryan,

I've been a commercial realtor in Missoula for 6 years with the largest real estate brokerage firm in Western Montana. I sell Commercial and Residential real estate as well as land. My main focus is in Commercial and Industrial Real Estate.

As per our discussion this morning, there are 18 sites with 5 acres or more currently listed on the Missoula Multiple Listing Service. Of those 18 sites, 17 are located west of Reserve Street and one is between Russell and Reserve St. Of the 18 sites listed, only 2 of them boast Railroad frontage and none of them have an actual spur. There is a 51-acre parcel that I am aware of behind the old Real Log Homes site that would also border the railroad. I am not sure why it didn’t show up on the MLS but I do know the realtors that have it listed.

There are no commercial pieces of land greater than 10 acres for sale within the city limits. There are 2 sites that have railroad spurs already in operation. One on the corner of Johnson and South and the other in the current home of Pacific Steel and Recycling. The latter won’t be available until such a time as Pacific Steel and Recycling moves to their new location west of town. Neither parcel is over 7 acres.
There are a couple of over 10-acre lots that are accessible to rail service but both are owned by Roseburg Inc. I called them a couple of years ago to see if they would sell one and was told “Roseburg doesn’t sell property, we buy it.”

This makes the 19-acre Scott Street property we discussed a very desirable piece of land for commercial development with an increased value based on these three factors: size, access to rail, and location - near the city center as well as good access to the interstate.

This property has a long commercial/industrial history and is bordered on three sides by commercial/industrial land. I don't know of anybody who has looked at this property for residential use. It is very unique in Missoula due to the factors I listed above; it's highest, best, and most likely future use is clearly as commercial/light industrial development that is compatible with surrounding properties, including the neighborhood across the street.

Thank you for the inquiry.

Bob Zimorino
Commercial Sales Associate
Lambros ERA Real Estate
Exhibit 5

Email from M. Stevenson regarding history of inquiries for purchase of the Scott Street Property
Scott Street Property - history of inquiries

MICHAEL S MICHELLE STEVENSON <mstevenson22@msn.com>  
To: Bryan Douglass <bryan@douglassmt.com>  
Wed, Oct 16, 2013 at 4:53 PM

Bryan -

Scott Street Partners, LLP (SSP) has had only one serious inquiry to develop housing on our 19.2-acre property on north Scott Street in the 15 years that we have owned it - the proposal by the Sparrow Group in 2003-2004 that failed. All of the 100 or so other inquiries that we have received have been nonresidential in nature. These inquiries have involved proposed uses such as warehousing, roofing companies, trucking terminals, container offloading and transfer, indoor soccer arena, indoor tennis club with sports center, pharmaceutical manufacturing, outdoor and indoor storage facility, and telecommunication switching/equipment facility. We also know the city, through its business development group, has received additional inquiries for commercial uses. So overall, the ratio of inquiries for commercial use to those for residential use has been at least 100 to 1.

The easement for rail access that we have, combined with such a large, undeveloped parcel, is specifically what appeals to many of the industrial inquiries we receive. According to James Grunke, the head of the Missoula Economic Partnership, we are the only large, vacant property with rail access within Missoula city limits.

Unfortunately, over the years the pattern for inquiries has been pretty typical. We get an inquiry from a party with a need for commercial space, we explain that we don’t know when the property can be used because we cannot predict DEQ’s schedule for completing the cleanup, and they go away. It is especially frustrating now that the cleanup levels have recently changed such that the property now meets commercial cleanup levels as is - only the fly ash and methane issues remain, and those should be simple and quick to resolve. I am confident we would find a commercial purchaser in short order if the property were available on the market.

Mike Stevenson
Scott Street Partners, LLP
Exhibit 6
January 5, 2011 DEQ letter to landowners and Replies from landowners
January 5, 2011

Mike Stevenson
For Scott Street, LLP
950 Mellot Lane
Missoula, MT 59808-9075

Steve King
Public Works Director
City of Missoula
435 Ryman St.
Missoula, MT 59802

Clawson Manufacturing Co., Inc.
Eugene H. Clawson, Jr.
1225 Rodgers Street
Missoula, MT 59808

Harry and Bill Watkins
WWW, LLC
1301 Scott Street
Missoula, MT 59802

Re: Missoula White Pine Sash Facility, Missoula, Montana

Dear Facility Landowners:

The Montana Department of Environmental Quality (DEQ) is in the process of developing the proposed plan for the above-referenced facility. As part of this process, DEQ will determine the reasonably anticipated future uses of the property within the facility. Two of the things DEQ considers in making this determination are the “indications of anticipated land use from the owner” and “patterns of development in the immediate area.” See § 75-10-701(18), MCA.

DEQ would appreciate hearing from you by February 1, 2011 regarding how you anticipate using your property in the future. You may reach me at cowen@mt.gov or 406-841-5068.

Sincerely,

Colleen Owen
Environmental Specialist
Montana Department of Environmental Quality

cc: Cynthia Brooks, DEQ Legal
Jon Harvala, Missoula Valley Water Quality District
John Adams, Missoula Office of Planning and Grants
Bob Oaks, NMCDC
Don Hake, Huttig Building Products, Inc.
January 31, 2011

Colleen Owen
Environmental Specialist
Montana Department of Environmental Quality
1520 East 6th Avenue
Helena, MT 59620

Dear Ms. Owen:

In a letter dated January 5, 2011, you stated that the Montana Department of Environmental Quality (DEQ) is developing a proposed plan for the former Missoula White Pine Sash Facility, and you requested that the City of Missoula provide information regarding anticipated uses of the City property at the former Missoula White Pine Sash Facility. Additionally, in developing this plan DEQ considers “patterns of development in the immediate area” and “indications of anticipated land use from ... local planning officials.” This letter comprises the City of Missoula’s response as a property owner at the site; additionally, in my capacity as chief municipal planning official I will provide information regarding patterns of development in the immediate area and anticipated future land uses.

**Anticipated future uses of City-owned property**

The City of Missoula owns approximately 14 acres of the White Pine Sash campus. The eastern portion of the City’s property (SCOTT STREET LOTS, S16, T13 N, R19 W, BLOCK XXX, Lot 001, SCOTT LOTS SCOTT STREET LOTS-LOT 1), zoned OP1 (as depicted in Attachment 1, and described in Attachment 2), has, should it receive a “letter of no further action” from DEQ, been cleaned to residential standards and is under development as a City park. Attachment 3 shows a plan for future development of this park. The OP1 zoning designation is “primarily intended to preserve open space and sensitive natural resource areas,” and it precludes both residential and commercial development while permitting primarily park and recreation uses. The City has invested heavily in development of the park, and has obtained both the land and cash donations for park development from adjacent landowners on the premise that this property continue as a park. For this eastern portion of the property, for the foreseeable future, the City anticipates use only as a City park and open space.

The western portion of the City’s property, (SCOTT STREET LOTS, S16, T13 N, R19 W, BLOCK XXX, Lot 002, SCOTT LOTS SCOTT STREET LOTS-LOT 2; WATKINS LOTS, S16, T13 N, R19 W, BLOCK XXX, Lot 001; WATKINS WATKINS LOTS-LOT 1) zoned City Maintenance Special District (see Attachment 4), has, upon receipt of a letter of no further action from DEQ, been cleaned to commercial standards. This portion of the property includes the City Public Works Department maintenance shops; a small office building for said department; and a large shed for road sand. Funding permitting, the City will replace the existing maintenance shops structure with new structures better designed for this purpose. For this western portion of the property, for the foreseeable future, the City anticipates use only as a site for the City maintenance shops and offices.
**Patterns of development**

To the east, White Pine Sash is bordered by a principally residential neighborhood of workforce housing which encompasses the Northside Missoula Railroad Historic District.

To the south, White Pine Sash is bordered by the Montana Rail Link switchyards.

To the west and to the north, development near White Pine Sash includes two cemeteries; light industrial and commercial development; an apartment building complex; and a number of parcels that are undeveloped. In general, these properties are zoned either M1R-2 or OP3. The OP3 zoning designation, as described in Attachment 5, is designed to accommodate open space and civic institutions. More specifically, adjacent to White Pine Sash to the west are light industrial properties owned by Montana Rail Link and Allied Waste. Catty-corner to White Pine Sash is a commercial complex housing Bee Alert, the Ballet Arts Academy, Roadway Express, and other small businesses. Adjacent to White Pine Sash to the north is an undeveloped property zoned OP3 and owned by the City of Missoula; an undeveloped property zoned M1R-2; and property zoned M1R-2 that is owned by the Resurrection Cemetery Association of Helena, which is under development as a cemetery.

The area to the east of White Pine Sash is immutably residential. The area to the south is, for the foreseeable future, immutably a railroad right of way. The multiplicity of owners and the relatively open zoning for the area to the north and west of White Pine Sash area make it difficult to predict how the area will develop in the future (excluding the cemeteries). The area is close enough to Downtown, neighborhood attractions of the Northside, and north hills recreational opportunities to be attractive to residential development (witness the River Rock Apartments at 1210 Otis Street), while its undeveloped nature with good road access could make it attractive to light industrial uses. It is most likely that the area to the north and west of White Pine Sash will see a mix of development in the future, including residential, commercial, light industrial, and civic uses.

**Future uses anticipated by local planning officials**

The entirety of the White Pine Sash campus that is not owned by the City of Missoula is zoned M1R-2 (see Attachment 5). This zone is designed to accommodate limited manufacturing, warehousing, wholesale, and industrial uses, and residential development. M1R-2 permits residential development; public and civic uses (e.g., day care facilities, medical facilities, schools, and parks); and a wide range of commercial and light industrial uses.

Since closure of the White Pine Sash facility, in addition to the existing light industrial uses at Clawson Manufacturing and Zip Beverage, the most nearly-realized proposal for future uses was a 2004 attempt by Sparrow Group to develop the Scott Street Partners property (SCOTT STREET LOTS, S16, T13 N, R19 W, BLOCK XXX, LOT 003, SCOTT LOTS SCOTT STREET LOTS-LOT 3) for residential use. Sparrow submitted an Interim Remedial Action Work Plan for the northern portion of White Pine Sash, and submitted a request to the office of Planning and Grants for subdivision for 95 single family homes and 160 multi-family units. The City of Missoula applied to the U.S.
Department of Housing and Urban Development for a $1.8 million Section 108 Loan Guarantee to provide housing for low- and moderate-income homebuyers within “Sparrow Communities.”

In 2008, Scott Street Partners initiated a request that its portion of White Pine Sash be rezoned to prohibit residential uses. Amid neighborhood opposition and concern about the consequences of such a rezone, that request was never acted upon by the City. I am unable to anticipate whether that request will be revived.

As stated previously, the only foreseeable future uses of the City property are current uses: a park for the eastern portion of the City-owned property and City office and maintenance shops facilities for the balance. Likewise, it is difficult to imagine that the Zip Beverage property (WATKINS LOTS, S16, T13 N, R19 W, BLOCK XXX, Lot 002, WATKINS LOT 2 OF WATKINS ADDITION)—bounded by the City maintenance shops, the switching yard, and the Scott Street Bridge—would ever be developed for residential use. Instead, it is most likely that the Zip property will continue to be used in a light industrial and/or commercial capacity. Accordingly, the City believes that DEQ should establish cleanup levels on this portion of the property that permit the safe continuance of this type of use.

The most likely future use for the northern portion of White Pine Sash (that owned by Scott Street Partners and Clawson) is less certain. However, the property:

1) Is adjacent to a park and a residential neighborhood;
2) Is convenient to Downtown and the Northside;
3) Is flanked to the north by recent residential development; and
4) Has been the subject of earnest residential development efforts.

This leads me to conclude that residential use is one of the most valuable and most viable potential future uses of the northern portion of White Pine Sash. Accordingly, the City believes that DEQ should establish cleanup levels on the northern portion of the property that would permit such development in the future, and guarantee the health and safety of potential future residents.

Thank you very much for your consideration of these comments. If I can provide any further information, please do not hesitate to contact me.

Best regards,

Mike Barton
Director
Missoula Office of Planning & Grants

cc: John Engen, Mayor
    Steve King, Public Works

John Adams, Office of Planning and Grants
Colleen,

In response to your letter of January 5, 2011 where you are trying to determine the "reasonably anticipated future use of our property", we believe the property will continue to be used as is for the foreseeable future. Of course we cannot predict the future and there is a lot of consolidation going on in our industry. It is certainly possible that the economic situation changes to the extent that Zip Beverage is acquired by another entity that does not require the use of this building, but from what we know at this point in time we do not anticipate that happening. In fact, with the additions we have drafted we think this facility could satisfy our needs for 15-20 more years. Although there are currently no need or plans to move forward on the expansions we would like to get the approvals necessary so we can proceed with construction when necessary.

Let me know if you need anything else from us or if you have any questions or comments.

Harry
Owen, Colleen

From: MICHAEL S MICHELLE STEVENSON [mstevenson22@msn.com]  
Sent: Thursday, January 13, 2011 1:38 PM  
To: Owen, Colleen  
Subject: Missoula Whitepine Sash Facility

Colleen

Scott Street Partners (SSLLP) anticipates the development of the 19.2 acres we own at Missoula Whitepine to coincide with the past 100 years of property use as industrial or commercial utilization. We believe this to be the highest and best use of our property. These uses would also parallel our ongoing attempt to rezone the property from D zoning to I zoning (Missoula County designation) thereby eliminating the residential component and maintaining the industrial and commercial components, meet the property's deed covenant restriction of no residential development and follow the pattern of development from Scott Street going west to Reserve Street north of the railyard/railtracks of industrial and commercial development.

If you have any further questions regarding our anticipated development of the Missoula Whitepine Sash property SSLLP owns please feel free to contact us.

Regards,

Scott Street LLP

Mike Stevenson 406 549-0346 home 406 240-3108 cell email mstevenson22@msn.com PO Box 17706 Missoula, MT 59808
Joint Northside/Westside Neighborhood Plan
Section 2B
(remainder of Plan is available on City of Missoula Website)
Chapter 2: Section B

COMMERCIAL AND INDUSTRIAL LAND USE

1. Goal Summary

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<th>Goal</th>
<th>Summary</th>
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<td>D</td>
<td>Allow continued traditional light industrial land use along the rail line and in existing industrial land use areas.</td>
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<tr>
<td>E</td>
<td>Develop more opportunities for neighborhood services and conveniences along the main commercial corridors and in selected commercial activity centers.</td>
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<td>F</td>
<td>Encourage innovative commercial and industrial uses and building designs that are compatible with the surrounding neighborhoods and which support a healthy neighborhood environment.</td>
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2. Commercial and Industrial Land Use: History

Most of the early commercial and industrial activity in the area took place in the hub surrounding the original Northern Pacific Railway Depot at the north end of Harris Street (Orange Street). In the 1890’s, businesses in the North First Street area included hotels and boarding houses, a grocery store, the North Missoula Bakery, Urlin’s lumber yard, and two steam laundries. A few blocks to the east, Northern Pacific Railway (NP) erected a cluster of section houses, water tanks, and repair shops. Industrial uses filled in the lots along the rail lines and at the edges of the new residential areas. Businesses and services scattered north of the tracks into the growing residential blocks. They included the Missoula Bottling Works, the Northern Pacific Beneficial Hospital, and the Garden City Brewing Company.

When Northern Pacific Railway moved the passenger depot to North Higgins Avenue in 1899, solid brick warehouses were constructed in the area of the old depot to serve the growing wholesale grocery and produce business. The Lindsay Fruit Company Building (later Pacific Fruit), the Day Produce Building, and the Ryan Fruit Company Building, all built between 1909 and 1917, reflected the commercial growth in this era. In the 1920’s, NP constructed a large roundhouse at the east end of the neighborhood; this area is now the partly abandoned Burlington Northern Railroad yard.

The construction of the Burlington Northern Railroad (BN) southbound rail line to the Bitterroot in 1889, the Bitterroot Railroad Spur Line, inspired a commercial development corridor through the Westside. The Sanborn Fire Insurance Company maps, from 1902 through 1921, documented a bewildering variety of warehouses and small industry in the area, with the Missoula Mercantile Company emerging as the primary landowner. From 1910 to 1912, the Missoula Mercantile doubled its trade volume and Northern Pacific Railway increased its freight volume four-fold. By 1921, the Missoula Mercantile had warehouses along the spur line for a variety of commodities: hardware, furniture, lumber, cold storage, grain, and groceries. In 1928, it renovated some hay storage warehouses to build the grain elevator and warehouse that still stand high above the neighborhoods. Other businesses located along the spur line during the 1920’s and 1930’s included the Missoula Iron Works, the Great Western Seed Company, the
Community Creamery on Nora and Spruce Streets, and a "Soft Drink, Grocery, and Beer Warehouse" on the site now occupied by Ozzie's Oil Company.

After Urlin's short-lived lumber mill burnt in 1885, several other lumber mills and lumber yards set up operations throughout the neighborhoods. The Big Blackfoot Milling Company Lumber Yard, on the Westside at Toole Avenue and Owen Street, occupied the site now adjacent to the Owen/Grand Street Pedestrian Bridge. This site later housed Ross Lumber until it became Intermountain Lumber. The Morin Lumber Company was located at the north end of Shakespeare Street off Stoddard Street. At the junction of Scott Street and the BN railroad tracks, Missoula Lumber, founded in the 1880s, became Largey Lumber, which became the White Pine Sash Company in 1917.

A history of commercial and industrial land use in the area would not be complete without noting the many small businesses that have traditionally operated throughout the neighborhoods: corner grocery stores, auto repair shops, upholstery and carpet cleaners, taxidermy shops, barber shops, cider and vinegar works. The neighborhoods have always supported a diversity of small businesses operating out of people's homes, neighbors serving neighbors. Although most of the small corner groceries are gone, the neighborhoods continue to support many "back alley" businesses that often contribute character and vitality.

By 1930, most of the commercial and industrial land in the core of the neighborhoods had been developed. In subsequent decades, growth concentrated along the fringes of the neighborhoods, especially on the Westside. As the age of the automobile dawned in Missoula, entrepreneurs along West Broadway developed a strip of auto-related businesses and motels. However, the automobile age also had its downside; the construction of the federal interstate highway system (I-90) in the 1960’s significantly altered traditional residential and commercial land use patterns. The Garden City Brewing Company fell in the path of the Interstate, as did acres of market gardens and orchards along the base of the North Hills. Neighborhood businesses that had depended on rail commerce, such as the grocery and fruit warehouses, declined in the face of competition from the interstate trucking industry as well as the rise of “supermarkets” and consolidated grocers.

From 1960 to 1990, the neighborhoods experienced much new construction of commercial and industrial structures in the area and significant turnover in the older buildings. New warehouses and industries were built along the rail corridor west of Scott Street, while the turn-of-the-century warehouses became the headquarters for light industrial businesses (e.g., Sun Mountain Sports) and small retail shops (e.g., The Warehouse Mall). This adaptive reuse of historic structures is characteristic of the neighborhoods. As some businesses rehabilitated the older buildings, a cluster of new structures developed at the Orange Street I-90 interchange. In 1991, neighbors protested a potential casino at the site and supported the development of a new mini-mall that now provides neighborhood services (laundry, video store, Ole’s convenience store/gas station, fast food outlet).
3. Commercial and Industrial Land Use: Existing Conditions

There are two (2) distinct commercial areas: a mixed-use corridor and an industrial corridor along the railroad tracks, with scattered pockets of small retail and light industrial activity in the neighborhoods. Those identifiable areas include North Orange Street, West Broadway, North Russell Street, Toole/Scott/Spruce Streets and Worden Street. Approximately two hundred (200) businesses, both commercial and industrial, exist in the Plan area. Numerous other businesses exist as home occupations.

**North Orange Street**: North Orange Street is primarily a commercial area serving both neighborhood residents and I-90 travelers. Businesses in this area have identified a preference for hiring employees from the neighborhoods.

**West Broadway (from North Orange Street to Russell Street)**: This area serves many people from inside and outside the neighborhoods and is occupied by a variety of commercial and residential uses. Over the past ten (10) years the number of uses along West Broadway has remained constant while the type of uses has shifted. Ten (10) years ago, approximately seventy-one (71) uses existed along West Broadway according to the Polk City Directory.\(^1\) Of those uses, twenty (20) were automobile-oriented, including motels, gas stations, and automobile-service businesses. There were approximately sixteen (16) residences, sixteen (16) restaurant and entertainment uses, and eleven (11) retail and personal service businesses. Other businesses included professional offices and two (2) non-profit agencies: the YWCA and Girl Scouts.

In contrast, by 1998, there were seventeen (17) automobile-oriented uses, nineteen (19) residential uses, ten (10) restaurant/entertainment uses, and twelve (12) retail/personal service uses. Since then, more non-profit entities have located along the south side of West Broadway. Three (3) of those non-profits are also residential facilities: Missoula Youth Homes, Eagle Watch Estates ASI, and The Bridge Apartments. Blue Mountain Clinic, the YWCA Women in Transition program, and Family Food and Resource Center are service-oriented non-profits located there.\(^2\)

From 1989 to 1998, decreases in all major types of uses occurred except housing. It is important to note what has been lost and what has been added. Due to the demolition of existing buildings, many neighborhood services have been lost. In recent years, almost entire blocks have been demolished to make way for parking lots. Deteriorating buildings on the south side of West Broadway were demolished to make way for improved pedestrian access. Service-related businesses that have been lost include a plumbing/building supply store, an appliance shop, a barber shop, retail shops, restaurants, laundry facilities, professional offices, and hardware suppliers. The historic St. Patrick Hospital Broadway Building has been demolished to make way for more modern medical facilities. Only a few historic remnants of West Broadway still exist, such as the existing City Street Maintenance Building. This facility should be preserved and if, in the future, City Street Facilities vacate the building; adaptive reuse is recommended. Businesses new to the area over the last nine (9) years include a computer business, an automobile paint store, a veterinary clinic, and other office and professional facilities.

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\(^1\) Polk City Directory is a directory which lists and describes street addresses. It has been printed yearly for nearly one hundred thirty (130) years. It is organized in several different ways including alphabetically, by street address or use. Polk City Directory is printed by R.L. Polk and Co.; copyright 1989 (for 1989 information).

\(^2\) Polk City Directory; copyright 1998 (for 1998 information).
The recent construction of Missoula Youth Homes, Eagle Watch Estates, the new Bridge Apartments, (Mental Health Housing) and the California Street Footbridge, signifies that this area is evolving from heavy commercial and light industrial uses toward a “city center” mixture of uses.

West Broadway business owners are concerned about the impact of land use related issues, especially transportation problems, on their profitability. Parking, ingress and egress, and the lack of a continuous sidewalk system are problems. Business owners worry that the difficulty of access along West Broadway may drive some of their customers elsewhere.

**North Russell Street:** North Russell Street has a variety of zoning districts including residential (R-II, R-IV, and R-VI), commercial (C and C-II), and industrial/residential (D). The northern end of this area permits light industrial use, but includes new multi-family residential developments. Travois Village, located at the north end of North Russell Street, is a good example of a well-designed and well-maintained mobile home park. Overall, an increase of residential users in the area has occurred over the past few years, which could lead to an increase in need for residential services.

**Toole/Scott/Spruce Streets:** The Toole Avenue Market is a neighborhood anchor business separate from either of the primary commercial districts. In the vicinity of the Toole Avenue Market, Meadow Gold Dairies and Montana Recycle Now (owned and operated by Browning Ferris Industries) are located along West Spruce Street, and several old warehouses in the area have been converted to small retail shops.

**Worden Street:** Commercial zoning is still in place along Worden Street on the Northside, although many of the commercial buildings have since been converted to residential uses.

In addition to the areas where commercial activity is concentrated, many small businesses are interspersed in the neighborhoods. Some of these businesses are non-conforming uses that predate the adoption of residential zoning, while others are home-based occupations. Residents also trade skills, labor, and services.

The “D” (Industrial/Residential) Zoning District has been a significant defining factor in terms of neighborhood character. Located along the railroad corridor, it has historically been the economic artery of the community. The industrial corridor is home to several trucking and freight companies, distributors, an oil recycling facility, manufacturing companies, storage businesses, and even residential uses. Different types of industrial uses exist in different parts of the Plan area, yet all are permitted under the umbrella of the “D” zoning district. Light industrial uses are most intense west of Scott Street, on both sides of the tracks. East of Scott Street, the industrial uses are generally less intense, with a few exceptions. Small shops, mini-storage units, Ozzie’s Oil and Refinery, Bitterroot Gymnastics, offices, and construction companies are some of the businesses in the vicinity. These uses have the ability to blend with the adjacent residential areas.

East of North Orange Street, land use is currently designated as Light Industrial, yet the area provides some of the most intact historical warehouse and commercial facilities in the community. This area is also part of the Northside Missoula Railroad Historic District. Along North First Street in the Historic District, railroad-era brick warehouses, converted to commercial uses, sit across the street from Victorian homes.
Heavy Industrial land use was originally designated for most of the Northside west of Scott Street. One of the existing heavy industrial uses in the area is Louisiana Pacific Corporation (LP) whose main facilities and operations are to the west of the Plan area. Louisiana Pacific has had a long history of manufacturing operations in the area, with many of their employees living in the neighborhoods. LP purchased the facilities from Evans Products sometime in the 1970’s. The main premise of their operation is utilizing the waste products from other wood industries as the raw product for manufacturing particleboard. They have made numerous improvements to the facilities and work within the standards set by the Montana Department of Environmental Quality. In 1998, LP constructed a man-made berm along the northeast side of their property to screen the property from the Interstate and to help reduce the amount of airborne particulates blowing into the neighborhood. Designating land near their facilities as Heavy Industrial provides a buffer between their facility and future development pressures from the southeast.

In the past, locating warehouse and freight facilities adjacent to the rail line was accommodated by the use of rail spurs. With the creation of the interstate highway systems and the increase in truck transportation, use of rail spurs declined. Over the past ten (10) years, however, a steady number of businesses have continued to use the rail spurs in the area. According to Montana Rail Link (MRL), four (4) businesses currently use rail spurs and most of those businesses are on the north side of the tracks, west of Scott Street. There is potential for more industrial operations to use the rail line through an existing rail spur which runs north of the City Cemetery land and serves MRL property.

Several non-industrial businesses operate out of converted industrial buildings along the railroad corridor, including an old grain elevator. These businesses include a travel agency, several environmental non-profit organizations, a cabinet shop, and a taxidermist, among others. This adaptive reuse of old buildings on the Northside and Westside is a desirable characteristic of these neighborhoods.

An adjacent industrial neighborhood to the west, which overlaps with the Northside neighborhood, relies heavily on the railway corridor, rail spurs, truck routes, and adjacent businesses. Elements which these two neighborhoods have in common include transportation, economic development, land use recommendations, and environmental impacts. Scott Street, as the edge of the abutting industrial neighborhood, is a main truck route running through a residential area south of the tracks; it is also the major road for residents to access their homes on the Northside. The location of light industrial uses along the railway corridor of the Plan area is important because it is compatible with the adjacent industrial neighborhood. Industrial development in the northern portion of the Plan area will be felt through the nearby residential areas.
4. Commercial and Industrial Land Use: Neighbors’ Vision

In crafting a vision for the future, the neighbors recognize the historic importance of commercial and light industrial activity in the neighborhoods. The neighbors support the existing businesses and would like to see them continue to exist and thrive. Further more, the neighbors would like to encourage existing neighborhood businesses to expand to serve nearby neighborhood clientele and provide needed neighborhood services. The neighborhood, however, recommends compatible design in commercial and industrial development that draws the business into the neighborhoods.

The neighbors would like to see commercial land use shift back to historic patterns that would include the development of small neighborhood shops, bakeries, and other services that would meet neighborhood needs and that integrate into the residential setting. Specific areas in the neighborhoods lend themselves to development as small, mixed-use districts, with commercial and residential uses combined. North First Street and Worden Street are two such areas, and have been identified as “activity centers” for the neighborhoods. Worden Street retains its “C” Commercial zoning, and has historically had two neighborhood grocery stores - Shaffer’s Market and Llewlyn’s. Worden and North First Streets could be developed as pedestrian-oriented neighborhood service streets. The neighbors also support the continued existence of small live/work businesses and alley businesses.

The neighbors have clear visions for preferred development in the various “activity centers” located throughout the neighborhoods, especially along key corridors like West Broadway and North Orange Street. Land uses along these main commercial corridors can either detract from or support the neighborhoods. The “activity center” vision for these areas share a common desire for accessible neighborhood services and commercial design that encourages non-motorized traffic as well as automobiles. In other parts of the neighborhoods, “activity centers” vision suggest potential uses for abandoned or underused parts of the neighborhoods, such as the Burlington Northern Railroad yard off North Second Street and the White Pine Sash land. The desire for the underused areas is to plan them with the adjacent neighborhood in mind and with developments that are models for the future.

An Historic Mixed-Use designation is proposed for the area inside the Northside Missoula Railroad Historic District and the potential Westside Historic District.” It more accurately reflects past, current, and potential future uses. (See the Land Use Map Update and Appendix D, Activity Center Guidelines #1 and #8.)

Land use north of the City Cemetery is recommended to transition from light industrial, to heavy industrial. Performance standards should be developed to help ensure an appropriate transition to nearby residential areas and to provide better streetscape development. Truck traffic in the entire area north of the tracks should primarily utilize Raser Drive to enter and exit the area. Views from the interstate into this area should reveal well-kept grounds and buffered storage/service areas. Light Industrial designations in other areas should better reflect existing uses. Distinctions have been made in the Land Use Plan Update between existing uses that are primarily cottage industry and light industry.
5. Commercial and Industrial Land Use: Goals and Action Items

| Goal D: | Allow continued traditional light industrial land use along the rail line and in existing industrial land use areas.  
Supporting Links: Chapter 1, adaptive re-use of historic structures; Chapter 2, Section C, interface, Section D, zoning; Chapter 3, neighborhood economy, reinvestment; Chapter 7, Section A, environmental health; Appendix D, Activity Center Design Guidelines. |
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<tr>
<td>Action #1:</td>
<td>Encourage commercial re-use and remodel of historic commercial/industrial buildings by providing incentives. Actively seek new businesses to fill abandoned buildings and maintain use (e.g. small welding shop becomes community pottery studio; White Pine Sash buildings are reused to house expanding neighborhood shipping business). (NMCDC, MCDC)</td>
</tr>
<tr>
<td>Action #2:</td>
<td>Industrial businesses north of the railroad should route the majority of truck traffic west, along Raser Drive.</td>
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| Goal E: | Develop more opportunities for neighborhood services and conveniences along the main commercial corridors and in selected commercial activity centers.  
Supporting Links: Chapter 1, neighborhood character; Chapter 2, Section A, live/work; Chapter 3, neighborhood economy, reinvestment, business start-up; Chapter 4, business access; Appendix D, Activity Center Design Guidelines. |
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<td>Action #1:</td>
<td>Encourage live/work mixed-use sites by reducing the required parking for businesses with on-site residential facilities (e.g., housing above retail). Document existing enterprises and establish a list of desired live/work commercial activities, defined by levels of acceptable noise, parking generation, and health and safety concerns. (MCDC)</td>
</tr>
<tr>
<td>Action #2:</td>
<td>Support land use that will provide neighborhood residents with easy access to basic services (e.g., small grocery, auto repair, coffee shops). Focus development in identified activity centers. Ensure that existing zoning will allow for these uses and include any needed changes in a zoning overlay or other zoning tools.</td>
</tr>
<tr>
<td>Action #3:</td>
<td>Support the development of business on main commercial corridors (West Broadway, North Orange Street) that will provide adequate access for automobiles while meeting the needs of neighborhood residents.</td>
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</table>
Goal F: Encourage innovative commercial and industrial uses and building design that are compatible with the surrounding neighborhoods and which support a healthy neighborhood environment.

**Supporting Links:** Chapter 1, adaptive re-use, building rehabilitation; Chapter 3, environmentally friendly business; Chapter 7, Section A, environmental health, community ordinance; Appendix C, Neighborhood Essentials Design Guidelines; Appendix D, Activity Center Design Guidelines.

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<tr>
<th>Action #1:</th>
<th>Implement Neighborhood Essentials Design Guidelines for new or substantially improved commercial development through a proposed overlay zone or other zoning tools. Ensure compatibility with neighborhood character and goals and recommend that new development be “neighborhood-friendly” in design (e.g. entrances on street; pedestrian accessible; landscaping; parking in rear or reduced parking).</th>
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<tr>
<td>Action #2:</td>
<td>Continue the current informal design review process for new commercial and industrial development projects, through which the Planning Office refers projects to the neighborhood associations and Northside/Westside Neighborhood Council for review, to encourage new business development to consider neighborhood needs when determining potential uses, site development and design.</td>
</tr>
<tr>
<td>Action #3:</td>
<td>Investigate brownfields (White Pine Sash) potential for small business and light industrial uses and include preferred uses in future overlay zoning. Continue work with owners to create joint vision. Encourage master planning of the site with an open house workshop for neighborhood input into the property owner’s utilization of property.</td>
</tr>
<tr>
<td>Action #4:</td>
<td>Promote in-fill development of underutilized spaces as “walkable mixed-use” developments when considering commercial development plans.</td>
</tr>
<tr>
<td>Action #5:</td>
<td>Along West Broadway, recommend a minimum Floor Area Ratio (FAR), proportion of ground floor square footage to total parcel square footage to ensure build out.</td>
</tr>
</tbody>
</table>
Exhibit 8
Excerpt from KRY Record of Decision
Dioxin/furan partitioning properties indicate this chemical is highly sorbed to aquifer organic carbon. Plume attenuation modeling results indicate that a time frame on the order of centuries is required for plume concentrations to decrease to cleanup levels when the source concentrations are treated to water quality standards by in-situ technologies. These results indicate that a proposed remediation method needs to consider the entire dioxin/furan plume as the source area.

The predicted time for the free product containing PCP to dissolve, assuming no remediation of the source material, ranged from 14 to over 100 years, depending on the modeled hydraulic conductivity of the aquifer. It should be noted that these results reflect a screening-level analysis. However, the modeling results demonstrate that the free product represents a potential long-term source of groundwater contamination, and indicate that highly effective free product remediation is required to achieve groundwater quality targets in a reasonable time frame. The modeling indicates that incomplete remediation of free product will result in an extended time period necessary for Montana’s water quality standards to be achieved.

Fate and transport modeling was performed to evaluate the importance of chemical leaching from the vadose zone and the impact of that on predicted remediation time frames. Modeling results indicated that the PCP contamination present in the aquifer provides the primary source of the dissolved PCP plume. Sources of PCP contamination include free product containing PCP and PCP sorbed to aquifer organic carbon. However, model results indicated that PCP present in the vadose zone will also impact groundwater quality over an extended time frame if vadose zone PCP concentrations are not reduced.

6.0 CURRENT AND POTENTIAL FUTURE LAND AND WATER USES

6.1 LAND USES

The KRY Site is located on the northeastern edge but outside the city limits of the City of Kalispell in the community of Evergreen in Flathead County, Montana (Figure 1). The area is zoned a mixture of heavy industrial, business, and residential according to the Flathead County Planning Department (Flathead 2006a) (Figure 3). Land use near the KRY Site includes a mix of residential, commercial, industrial, and open space. Examples of commercial and light-industrial businesses in the area include lumber processing, open-cut gravel mining, recycling, retail stores, storage, and a motel. There are approximately 89 residential properties adjacent to or within the KRY Site (DEQ and TtEMI 2008b).

While a large portion of the KRY Site is vacant, there are some portions that are actively operated. Lumber processing and stone-cutting operations exist on the western portion of the KRY Site, and a retail store is located on the southeastern portion (DEQ and TtEMI 2008b). In addition, various entities have expressed a desire to use some of the properties for commercial use (DEQ 2008a).

DEQ determined reasonably anticipated future use by assessing the four statutory factors outlined in Section 75-10-701 (18), MCA: 1) local land and resource use regulations, ordinances, restriction, or covenants; 2) historical and anticipated uses of the facility; 3) patterns of
development in the immediate area; and 4) relevant indications of anticipated land use from the owner of the facility and local planning officials. The properties that make up the KRY Site are zoned for commercial/industrial use (with the exception of the residential area, which is likely to remain residential) and have historically been used for commercial/industrial purposes (Flathead 2006a). However, the current zoning does allow some limited residential use (Flathead 2006b). Development in the general area is for commercial/industrial use, and due to the availability of residential building sites in other areas of the Flathead Valley, there is unlikely to be additional residential development in the vicinity of the KRY Site. DEQ contacted BNSF, DNRC, JTL, Inc., Kalispell Partners, Klingler Lumber Company, Montana Mokko, Stillwater Forest Products, and Swank Enterprises and asked them to provide information on their anticipated land use and each indicated their property was expected to remain as commercial/industrial use (DEQ 2007i). Local planning officials have also expressed interest in using various portions of the KRY Site for commercial use. Through this assessment, DEQ has determined that the reasonably anticipated future use of the areas of the KRY Site not already developed for residential use is commercial/industrial. Restrictive covenants limiting the future use of these portions of the KRY Site to commercial/industrial are required as part of the remedy. Additional zoning changes for the properties that make up the KRY Site may also be proposed.

6.2 GROUNDWATER AND SURFACE WATER USES

A well inventory was prepared by DEQ contractors to identify monitoring wells, domestic wells, and public water supply wells in the vicinity of the KRY Site. A one-half-mile area around the properties used for historical operations was examined. The well inventory for this defined area located 179 wells, including several wells located within the historical operation properties. A comprehensive well inventory for all monitoring wells, residential wells, industrial wells, and public water supply wells at the KRY Site and within the half-mile buffer is provided on Table B-1 in Appendix B of the Data Summary Report (TtEMI 2005).

Seven public water supply wells were identified in the well inventory. However, upon further discussion with personnel at the Evergreen Water and Sewer District, only four of the seven wells were located near the KRY Site. The Evergreen Water and Sewer District operates two wells located just northeast of the KRY Site on Flathead County shop property (Figure 5). One well was installed in 1967, is reportedly 85 feet deep, and has a water right for 2,000 gallons per minute (gpm). The second well was installed in 1975, is reportedly 143 feet deep, and has a water right for 3,000 gpm. Both wells are currently in operation (DEQ and TtEMI 2008a). DEQ’s website provides information on public water supplies including operator information, water quality analyses (arsenic, radiums combined, gross alpha, inorganics, nitrate/nitrite, synthetic organic chemicals [SOCs], and VOCs), sample collection dates, and violation dates (if any). Evergreen Water and Sewer District supply wells are sampled at the entry point, not individually. No organic COCs have been detected in samples from these wells and other detected constituents have been reported below drinking water standards. Two other public water supply wells are located south of the KRY Site and south of the gravel pit: 1) the Conrad Athletic Complex well (also listed as the Conrad Cemetery well) and 2) the Greenwood Corporation RV and Mobile Home Park Well #1. The Conrad well is reportedly 391 feet deep and yields 1,500 gpm. It supplies irrigation water for use at the athletic complex. The Conrad well is routinely sampled for only nitrate/nitrite and coliform. No information regarding the installation or completion was found on the Greenwood Corporation well. No organic COCs
Exhibit 9
Orr v. State
106 P.3d 100, 20 O.S.H. Cas. (BNA) 2112, 2004 MT 354

324 Mont. 391
Supreme Court of Montana.

Herbert R. ORR and Sandra G. Orr, et al., Plaintiffs and Appellants,
v.
STATE of Montana, a government entity, Defendant and Respondent.


Synopsis
Background: Miners, who suffered from asbestosis, and their families brought negligence action against State, claiming that State knew of the asbestos danger associated with working in vermiculite mine but failed to warn them. The District Court, Lewis and Clark County, Jeffrey M. Sherlock, J., granted State's motion to dismiss. Miners appealed.

Holdings: The Supreme Court, Patricia O. Cotter, J., held that:

[1] State owed miners a duty to inform them of the results of safety investigations under industrial hygiene statutes;

[2] State was not shielded from liability by public duty doctrine;

[3] Federal Metallic and Non-Metallic Mine Safety Act did not preempt State industrial hygiene law; and

[4] State was not protected from suit by sovereign immunity.

Reversed and remanded.

John Warner, J., dissented in an opinion joined by Karla M. Gray and Jim Rice, JJ.
State owed vermiculite miners a duty to inform them of the results of safety investigations of mine that indicated dangerous levels of asbestos under industrial hygiene statutes in effect at the time that required State to gather information regarding occupational health as it deemed proper for diffusion among and use by the people, even though statutes did not specifically refer to asbestos or mining; in accordance with the doctrine of the last antecedent for statutory interpretation, the words “as it may deem proper” modified the words preceding them rather than the words following them, and thus, the State had discretion under the statute to determine what information to gather in an investigation, but once the information was gathered, it had no discretion about whether to distribute it to the public. MCA 50–1–202(2).

7 Cases that cite this headnote

[6] Statutes

Relative and qualifying terms and provisions, and their relation to antecedents

Under the statutory interpretation doctrine of the “last antecedent” relative clauses in a statute must be construed to relate to the nearest antecedent that will make sense; qualifying words and phrases should be applied to words or phrases immediately preceding, unless an extension or inclusion of others more remote is clearly required by a consideration of the entire Act.

4 Cases that cite this headnote

[7] Labor and Employment

Dust and particulates

Under industrial hygiene statutes in effect at the time miners were working in vermiculite mine, State had a duty to correct asbestos conditions in mine that were hazardous to the health of miners; as a result of four inspections over a eight year period, which indicated dangerous levels of asbestos dust in mine, State was on notice that the asbestos dust in the mine was dangerous and that the mine owner was not making recommended improvements. R.C.M.1947, § 69–4202.

2 Cases that cite this headnote

[8] States

Nature of Act or Claim

By virtue of the special relationship between the State and vermiculite miners, the State was not shielded from liability by the public duty doctrine for its breach of duty to miners under industrial hygiene statutes that required State to protect miners from safety and health dangers at mine by warning them of asbestos dust danger, where the miners were part of the class of workers protected by the industrial hygiene statutes, the State repeatedly inspected mine to determine health and safety problems and repeatedly found dangerous levels of asbestos dust, and the miners relied on the State's inspections and lack of warnings to continue working in the mine. R.C.M.1947, §§ 69–105, 69–202(5), 69–4105(1), 69–4203(4), 69–4110(3).

7 Cases that cite this headnote


Nature and grounds of liability

A special relationship between a government agency and a plaintiff that gives rise to an exception to the public duty doctrine can be established: (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

4 Cases that cite this headnote


Nature and grounds of liability

Under the special relationship exception to the public duty doctrine, which applies when governmental actions reasonably induce
detrimental reliance by a member of the public, reliance occurs when one is rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed.

4 Cases that cite this headnote

[11] Labor and Employment  
⇒ Federal preemption  
States  
⇒ Mines and minerals  

[12] States  
⇒ Congressional intent  
Presumption against federal preemption can only be overcome by evidence of a clear and manifest intent of Congress to preempt state law.

[13] States  
⇒ Preemption in general  
State law may be superseded by federal law in three ways: (1) Congress may expressly include a preemption clause in the federal statute; (2) congressional intent may be implied where it is reasonable to conclude that Congress intended to occupy the field by such comprehensive regulation that there is no room for supplementary state regulation; or (3) federal law may preempt state law when the state and federal law actually conflict with one another.

[14] States  
⇒ Conflicting or conforming laws or regulations  
A conflict between state and federal law, which necessitates federal preemption, occurs when it is impossible to comply with both the federal and state law, or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[15] States  
⇒ Congressional intent  
Just as federal preemption will be found only in those situations where it is the clear and manifest purpose of Congress, it will not be found when there is a clear intent to the contrary.

[16] Statutes  
⇒ Plain Language; Plain, Ordinary, or Common Meaning  
When interpreting statutes, the Supreme Court will use the plain and ordinary meaning of a word. MCA 1–2–106.

2 Cases that cite this headnote

[17] States  
⇒ Statutory provisions; waiver of immunity  
Although miners were exposed to asbestos prior to the abrogation of State sovereign immunity from suits for injury to a person, their cause of action against the State for negligence, arising from State’s failure to warn miners about the dangerous levels of asbestos dust in mine in accordance with industrial hygiene statutes, did not accrue until their asbestosis manifested, which was after sovereign immunity had been abrogated, and thus, the State was not immune from suit. Const. Art. 2, § 18.

4 Cases that cite this headnote

Attorneys and Law Firms

**102** For Appellants: Jon L. Heberling (argued), McGarvey Heberling Sullivan & McGarvey, Kalispell, Montana.  
For Respondent: Dana L. Christensen (argued), Christensen Moore Cockrell Cummings & Axelberg, Kalispell, Montana;
Thomas G. Bowe, Assistant Attorney General, Helena, Montana.

For Amicus Curiae: Lawrence A. Anderson, Attorney at Law, Great Falls, Montana; Karl J. Englund, Attorney at Law, Missoula, Montana (for Montana Trial Lawyers Association).

Opinion

Justice PATRICIA O. COTTER delivered the Opinion of the Court.

¶ 1 The Plaintiffs/Appellants (hereinafter “the Miners”) include an on-site carpenter, seven former miners from Libby, Montana, and the wife of a former miner, all of whom have been diagnosed with asbestos disease.

**103** The Miners and their families have sued the State of Montana for negligence claiming that the State knew of the asbestos danger associated with working in the Libby vermiculite mine but failed to warn them, or protect them by requiring the mine owners to correct the unhealthful conditions. The District Court granted the State's Motion to Dismiss, concluding that the State had no legal duty to the Miners. The Miners appeal. We reverse and remand.

ISSUES

¶ 2 The Miners present the following restated issues on appeal:

1. Did the District Court err in ruling that the State had no statutory duties which ran to the Miners and their families?

2. Did the District Court err in ruling that the State did not have a duty of care to the Miners and their families by a special relationship under the public duty doctrine?

3. Did the District Court err in ruling that the State did not have a common law duty of care through foreseeability and an undertaking to provide industrial hygiene services for the benefit of the Libby mine workers and their families?

4. Can the doctrine of federal preemption provide a defense for the State in this case?

5. Does sovereign immunity insulate the State from the Miners' cause of action?

FACTUAL AND PROCEDURAL BACKGROUND


¶ 4 W.R. Grace Co. (Grace) purchased the existing Zonolite mine and mill in Libby, Montana (the Mine), in 1963. It owned and operated the Mine until 1990. The Mine extracted vermiculite from the ground and processed it using a procedure which generated substantial airborne dust containing tremolite asbestos. In 1956, when the State Board of Health (the Board or BOH) conducted an industrial hygiene study of the Mine, it was already well-known that asbestos dust was a toxic inhalant. During the 1956 Mine inspection, the State did not perform analysis on any dust samples to determine an accurate asbestos concentration. Relying on the Mine's records, however, it concluded that the maximum concentration of asbestos in the airborne dust would not “be greater than 25 to 30 mppcf.”

The State analyzed dust samples for asbestos concentration when it returned to the Mine in December 1958 and during subsequent inspections.

**104** ¶ 6 During each State inspection between 1956 and 1974, the State inspectors found unsanitary and unhealthful conditions. The State notified Zonolite, and later Grace, of the dangerous conditions after each inspection, explaining the seriousness of asbestosis and its likely fatal outcome, but did not inform the Mine workers, including the Miners, of the dangers. With the exception of identifying the hazardous conditions and telling the Mine's owners/managers to correct the problems, the State took no steps to ensure that the Mine's owners/managers responded in a manner that provided a safe working environment. Moreover, federal inspections between 1971 and 1975, in which State inspectors participated, revealed dangerous levels of asbestos dust in the Mine. The federal inspectors reported their findings to Grace, and provided copies of their reports to the State. The State did not notify the Miners or other Mine workers of the federal findings.

¶ 7 The Miners originally sued Grace for its failure to provide a safe working environment. Grace successfully avoided financial responsibility for these claims, however, by filing for protection under Chapter 11 of the federal bankruptcy laws in April 2001. The Miners *396 thereafter sued the State for its role in failing to protect them. They allege that the State negligently failed to warn them of the known dangers to all Mine workers and their families associated with working at the Mine, and that as a result of the State's negligence, the Miners have suffered grave injuries and damages.

¶ 8 The State countered that it did not owe a duty to the Miners, and without such a duty, there could be no finding of negligence. On this and several other grounds, it filed a Motion to Dismiss. Without reaching all of the grounds for dismissal presented by the State, the District Court agreed that the State owed no duty to the Miners and therefore granted the Motion to Dismiss. The Miners appeal. We reverse and remand.

**STANDARD OF REVIEW**

[1] [2] [3] [4] ¶ 9 We review de novo a district court's ruling on a motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P. *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, ¶ 8, 66 P.3d 316, ¶ 8 (citation omitted). "A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true." *Plouffe*, ¶ 8 (citation omitted). We will affirm the District Court's dismissal when we conclude that the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim. *Plouffe*, ¶ 8 (citation omitted). The determination of whether a complaint states a claim is a conclusion of law, and the District Court's conclusions of law are reviewed for correctness. *Plouffe*, ¶ 8 (citation omitted).

**DISCUSSION**

**Statutory Duty**

¶ 10 The first issue presented is whether the District Court erred in ruling that the State had no statutory duty which ran to the Miners and their families.

¶ 11 The Miners maintain that under the statutes empowering the State Board of Health and creating an Industrial Hygiene Division, the State had a mandatory duty to “make investigations” and “to disseminate information.” They claim the State made the investigations as required but failed to disseminate the critical information derived from the investigations.

¶ 12 The State argues that, for the following reasons, it had no *397 statutory duty to the Miners:

1. the industrial hygiene laws, relied upon by the Miners, granted the State certain powers but imposed no mandatory duties;

2. the industrial hygiene statutes did not expressly impose a duty upon the State to warn and protect the Miners;

3. an Attorney General Opinion issued in 1942 ruled that facility inspection reports were confidential and could not be disclosed to the public;

4. the industrial hygiene statutes restrict the State to reporting its inspection findings **105 only “to the industries concerned”**; and

5. protection of workers is the exclusive responsibility of an employer under Montana labor laws, and that the Miners’ theory of negligence would require “the State to foresee that Grace would not fulfill its legal obligations as landowner and employer.”
¶ 13 The District Court agreed with the State's arguments. It noted in its Order that none of the statutes relied upon by the Miners contained the words “mine,” “asbestos,” or “miners.” This indicated to the court that “[t]he statutes deal with a general state of industry in Montana and with no specific form of industry or type of worker. With such being the case, it is hard to argue that the statutes ... were designed to specifically provide a duty toward a certain type of industry or a certain type of worker.” We turn now to an examination of the State's public health statutes which are at the center of the District Court's decision.

¶ 14 The State Board of Health was created in 1907. Section 1474, RCM (1907). Until 1967, when the State Department of Health (the Department or DOH) was created, the BOH was responsible for the “general supervision of the interests and health and life of the citizens of the state.” Section 2448, RCM (1921); § 69–105, RCM (1947). As part of the BOH's “functions, powers and duties,” the legislature mandated that the Board “shall make sanitary investigations and inquiries regarding the causes of disease; ... causes of mortality, and the effects of localities, employments, conditions ... and circumstances affecting the health of the people,” among other things. The BOH was also charged to “gather such information in respect to all these matters as it may deem proper for diffusion among and use by the people....” See Sec. 2448, RCM (1921); § 69–105, RCM (1947)(as revised in 1961, Replacement, Vol. 4).

¶ 15 In 1939, Montana legislators created, within the BOH, the Industrial Hygiene Division (the Division). The legislature granted to the new Division, among other things, the power to:

*398 (1) make studies of industrial hygiene and occupational disease problems in Montana industries; ...

(3) make investigations of the sanitary conditions under which men and women work in the various industries of the State; ...

(5) report to the industries concerned the findings of such investigations and to work with such industries to remedy unsanitary conditions.

Sections 2(1), (3) and (5), Ch. 127, L.1939. Additionally, § 7 of the new law provided that:

every physician, hospital or clinic superintendent, ... having knowledge of a case of occupational disease shall ... report the same to the division of industrial hygiene of the State of Montana.... All such reports and all records and data of the division of industrial hygiene of the State of Montana pertaining to such diseases are hereby declared not to be public records or open to public inspection, and shall not be admissible as evidence in any action at law or in any hearing under the workmen's compensation act of the State of Montana.

¶ 16 In 1955, Montana lawmakers effectively eliminated the Industrial Hygiene Division by decreeing that the BOH “shall possess, exercise and administer all of the powers, functions and authority, and shall carry out, discharge and execute all of the duties, in the field of industrial hygiene” set forth in §§ 69–202–208, RCM (1947). Section 69–201, RCM (1947)(1961, Replacement, Vol.4). Sections 202 through 208 remained unchanged. As a result, the BOH became exclusively responsible for the State's programs for general public health and safety as well as occupational/industrial health and safety.

¶ 17 In 1967, the Montana legislature made further revisions to both the public health and industrial hygiene statutes. It created the DOH. Section 1, Ch. 197, L.1967. As a **106 result of the creation of the Department, the functions and duties formerly allocated to the Board were divided between the Board and the new Department. The DOH assumed the responsibility to “make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public.” *399 Section 69–4110(3), RCM (1947)(1969, 2d Replacement, Vol.4). Moreover, the DOH became responsible for administering the industrial hygiene program. Section 69–4105(1), RCM (1947)(1969, 2d Replacement, Vol.4). As a result, it was required to “investigate the conditions of work at any place of employment at any time,” and to “report the findings of investigations to the industry concerned and co-operate with the industry in preventing or correcting conditions which are hazardous to health.” Section 69–4203(3) and (4), RCM (1947)(1969, 2d Replacement, Vol.4).
¶ 18 In 1971, the industrial hygiene statutes underwent further revisions. The new statute was known as the Occupational Health Act (OHA) of Montana. Section 1, Ch. 316, L.1971; § 69–4206, RCM (1947)(Supp.1977). The declared policy and purpose of the OHA was:

(1) ... to achieve and maintain such conditions at the workplace as will protect human health and safety, and to the greatest degree practicable, foster the comfort and convenience of the workers at any workplace of this state and enhance their productivity and well-being.

(2) To these ends it is the purpose of this act to provide for a co-ordinated statewide program of abatement and control of occupational diseases....


¶ 19 The new Act mandated that, among other things, the BOH adopt rules implementing the Act, establish threshold limit values of airborne contaminants, and issue orders necessary to carry out the Act. Under the OHA, the Department was granted various “powers.” These included the requirement that the DOH enforce orders issued by the Board, prepare and develop a comprehensive plan for the prevention, abatement, and control of occupational diseases, and that the BOH adopt rules implementing the Act, establish threshold limit values of airborne contaminants, and issue orders necessary to carry out the Act. Under such circumstances, the Department also had the power to take enforcement actions and impose monetary penalties on violators of the OHA. Section 69–4215 and 69–4221, RCM (1947)(Supp.1977).

¶ 20 In addition, the OHA set out a specific “emergency procedure” to be implemented by the Department upon discovery of “a generalized hazard at a workplace” that “creates an emergency requiring immediate action to protect human health.” Section 69–4216(1), RCM (1947)(Supp.1977). Under such circumstances, the Department was required to order the persons causing or contributing to the hazard to “reduce or discontinue immediately the emissions creating the hazard.” Section 69–4216(1), RCM (1947)(Supp.1977). In the absence of a general condition creating an emergency, the Department was granted the discretion to order the persons responsible for “emissions from an operation ... causing imminent danger to human health” to reduce or discontinue such emissions immediately. Section 69–4216(2), RCM (1947)(Supp.1977).

¶ 21 In 1978, the OHA was renumbered and became § 50–70–101 et seq, MCA. The section that had formerly referenced “Powers” of the Department now described “Duties” of the Department. As had been the language in previous versions, the Department was instructed that it “shall” perform these duties, including the duty to “collect and disseminate information and conduct educational and training programs relating to the prevention and control of occupational diseases....” Section 50–70–105(7), MCA (1978). In 1999, this obligation became discretionary after the legislature changed the language from “shall” to the more permissive “may.” Section 50–70–105(7), MCA (1999).

[5] ¶ 22 The District Court concluded that none of the above-referenced statutes imposed a duty on the State to protect the Miners by warning them of the known dangers of working at the Libby Mine. The court, as noted above, found significance in the fact that none of these statutes specifically or expressly used the words “mine,” “asbestos” or “miners.” The court apparently concluded that because the statutes were not particular to vermiculite mines, they were not applicable to vermiculite mines. We disagree with this conclusion for several reasons. First, it cannot be disputed that vermiculite mining is “an industry.” If the failure of the legislature to describe every industry to which its law applies is followed to its logical conclusion, then the law would cover no industries whatsoever. This is an absurd interpretation. A well-established maxim of our jurisprudence is that “[a]n interpretation which gives effect is preferred to one which makes void.” Section 1–3–232, MCA.

¶ 23 Second, while it is true that the statutes in their various forms specified obligations running from the Board or Department to the industries themselves, the duty to gather information related to the effects upon workers or the public of conditions of employment “for diffusion among and use by the people” was never displaced or eliminated from the law. The State had the mandatory obligation from 1907 through 1999 to gather public health-related information and provide it to the people. Section 2448, RCM (1921); § 69–4110(3), RCM (1947); renumbered in 1969 to § 69–4110(3), RCM (1947); renumbered in 1978 to § 50–1–202(2), MCA. The legislature wrote this law broadly and chose not to limit it to specific industries, occupations or workers.

¶ 24 The dissent maintains that the Court establishes the existence of a duty “by incomplete references and misleading quotations from statutes of yesterday.” It specifically references our reliance on the phrase “for diffusion among
and use by the people," arguing that by “ripping [this] phrase” from the statute, the Court removed it from its context and from its meaning. The dissent neglects to note that in ¶ 14, when first describing this statute, we included the language deemed critical to the dissent’s analysis, i.e., the State BOH “shall gather such information in respect to all [statutorily-listed] matters as it may deem proper for diffusion among and use by the people....” Section 69–105, RCM (1947)(as revised in 1961, Replacement, Vol. 4). A close reading of this statute can result in different interpretations depending upon whether the words “as it may deem proper” are paired with the beginning of the sentence or the end of the sentence. As a result, the plain language of the statute is ambiguous and must undergo statutory construction. Sink v. School Dist.(1982), 199 Mont. 352, 649 P.2d 1263, 1267. (If possible, legislative intent must be inferred from the plain meaning of the words contained in statutes; only if there exists ambiguity in such wording should the court resort to the rules of statutory construction.)

¶ 25 Courts have developed many principles for interpreting statutes. Each principle is designed to give effect to the legislative will, to avoid an absurd result, to view the statute as a part of a whole statutory scheme and to forward the purpose of that scheme. See State v. Heath, 2004 MT 126, 321 Mont. 280, 90 P.3d 426. In the case before us, we conclude that the appropriate method of statutory construction is to apply the grammatical rule of the “last antecedent,” which has been adopted by this Court. “Under the doctrine of the ‘last antecedent’ relative clauses in a statute must be construed to relate to the nearest antecedent that will make sense; qualifying words and phrases should be applied to words or phrases immediately preceding, unless an extension or inclusion of others more remote is clearly required by a consideration of the entire Act.” State ex rel. Peck v. Anderson (1932), 92 Mont. 298, 13 P.2d 231; Butte–Silver Bow Local Govt. v. State (1989), 235 Mont. 398, 405, 768 P.2d 327, 331. Applying this rule here, we conclude that the words “as it may deem proper” are clearly intended to relate to the words preceding them rather than the words following them. As a result, we construe the statute to mean that the State had the discretion to determine what information to gather, but once that information was gathered, it had no discretion about whether to distribute it. We believe this construction forwards the purpose of the entire statutory scheme which was to create a State entity having “general supervision of the interests and health and life of the citizens of the state,” presumably for the protection of those citizens.

¶ 26 Finally, the District Court’s conclusion that the statutes do not apply to vermiculite miners is belied by its conclusion reached elsewhere that the industrial hygiene statutes obligated the State to report only to the industries concerned, and not their employees. Without belaboring the obvious, if the statutes are to be construed to protect the industries, then, by implication, they obviously apply to the Miners.

¶ 27 The District Court also placed great weight on Attorney General Bonner’s Opinion issued in 1942. The Attorney General was asked by the then-Secretary of the BOH whether the State’s reports of the workplace investigations should be furnished to anyone requesting them. Attorney General Bonner responded by quoting § 7 of Chapter 127 (See ¶ 15 above), and concluding that the BOH’s reports are “not public records nor are they open to public inspection. They are, therefore, confidential in character.” Both the State and District Court emphasize that for years, subsequent legislatures did not change this provision nor express their disagreement with Attorney General Bonner’s conclusion.

¶ 28 It is difficult to understand how the Attorney General then, and the State and the District Court in the instant litigation, could conclude that a prohibition against the publication of the medical records of a person with an occupational disease was tantamount to a *403 prohibition against dissemination of the results of a workplace investigation. The Secretary of the BOH sought an opinion on whether to furnish the results of workplace investigations to those requesting them; he did not ask if he could disseminate medical records. The Attorney General’s response to the Secretary’s inquiry was a non sequitur. Given the disparity between the opinion sought and the answer provided, it is somewhat bewildering that this Opinion was relied upon for years to justify the concealment of the results of workplace inspections.

¶ 29 It is apparent that § 7 of Chapter 127 was written to protect the confidentiality of a patient’s medical records, not to prohibit the State from disclosing information derived during workplace inspections. This interpretation is reinforced by the section title given when § 7 was codified and renumbered as § 69–207, RCM (1947)—“Duty of physicians and others to report cases—reports private records.” As we have frequently held, “[t]he title of an act is presumed to indicate the legislature’s intent.” Dept. of Rev. v. Puget Sound Power & Light, 179 Mont. 255, 263, 587 P.2d 1282, 1286. This presumption applies equally to titles of sections within
an act. As written in 1939 and revised to date, the section protects the privacy of a person diagnosed with occupational disease and prohibits health care workers from disclosing this person's medical records or anyone from using these private medical records as public documents. It balances the need of the State to know of such occupational disease diagnoses against the individual patient's right to privacy. Section 7 clearly does not, however, apply to or constrain the dissemination of the results of workplace inspections.

¶ 30 It seems clear that either Attorney General Bonner misinterpreted the question, or the BOH misconstrued the answer. The unfortunate result of their individual or combined failings was the State's decision to withhold from the workers at the Libby Mine investigation reports that revealed that they were being exposed to deadly toxins on a daily basis. Moreover, the language of the original § 7 interpreted by Attorney General Bonner was significantly revised by the legislature in 1967. The result of the legislative revision was to clarify § 7 in a manner that continued to prohibit health care workers from disclosing private medical records but that rendered Attorney General Bonner's Opinion moot.

[7] ¶ 31 We next address the State's argument that protection of workers is the exclusive responsibility of an employer under Montana labor laws, and that the Miners' theory of negligence would require "the State to foresee that Grace would not fulfill its legal obligations as landowner and employer." We conclude that the State's argument is disingenuous.

¶ 32 In August 1956, when the State inspected the Mine "to determine if any of the components of the operation ... were detrimental to the health of the employees," it discovered significant quantities of airborne dust. It knew that there was an unknown concentration of asbestos in the dust but did not analyze the dust to determine an exact asbestos content at that time. It did, however, using Zonolite's estimated concentrations of 25 to 30 mppcf, report to Zonolite the dangers and toxicity associated with breathing asbestos particles.

¶ 33 The State returned to the Mine in December 1958 to determine if the components of the Mine's operation identified in 1956 as detrimental to the Workers had been reduced or alleviated. During the inspection, it analyzed the asbestos content of the dust in several locations in the plant and discovered that the concentration of asbestos particles was significantly greater than the maximum allowable concentrations established by official federal public health agencies. In February 1959, a Zonolite employee was diagnosed with far advanced pulmonary tuberculosis and questionable asbestosis. He spent several days in the State Tuberculosis Sanitarium in November 1959 and died of asbestosis-related congestive heart failure in October 1961. Additionally, another Zonolite employee died in October 1961 of atherosclerosis and pulmonary fibrosis.

¶ 34 The State BOH inspected the Mine again in March 1962 and discovered that the Mine's environmental health had deteriorated significantly. Of twenty discrete dust samples, fifteen produced asbestos levels far in excess of the MACs. Two samples exceeded the allowable limits by more than seven times while nine other samples exceeded the limits by four to six times. The State Industrial Hygiene engineer even noted in his letter submitting the report to Zonolite that the State was "disappointed with the lack of progress made in dust control."

¶ 35 The State investigated the Mine again in April 1963. Of eight dust samples analyzed for asbestos content, all eight had asbestos concentrations from two to six times greater than the MACs. In early 1964, another Mine employee died from asbestosis-related congestive heart failure.

¶ 36 In sum, between 1956 and early 1964, the State inspected the plant four times; it received the death notices of three Mine employees from asbestos-related diseases, and had identified a deteriorating and increasingly dangerous workplace. Surely, the State would have noted in its 1958 and 1963 reports if Zonolite or Grace had posted warning signs to employees, provided safety equipment, arranged for medical monitoring, or established safety procedures to protect the employees from ever-increasing concentrations of asbestos in airborne dust.

¶ 37 The State argues that it could not foresee that the Mine owner would not fulfill its legal obligations as landowner and employer. This rings hollow in light of obvious and objective indications that neither Zonolite nor Grace was protecting its employees. Plainly, the State knew as a result of its inspections that the Mine's owner was doing nothing to protect the workers from the toxins in their midst. The question of whether the risks were foreseeable had been answered as early as 1956; the dangers to the workers were already clear and present by that time. In fact, the District Court specifically found:
[It] could be fairly said that since 1956, the state of Montana was on notice that the asbestos dust at the Libby mine was dangerous and that the mine owner was not making improvements as recommended by the State. Also, it appears that the record is bereft of any actions taken by the State to warn the miners or the Libby townspeople of their plight.

¶ 38 The State's argument that it owed no duty to the Miners ignores the State's statutory obligation to “make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public.” Section 69–4110(3), RCM (1947)(1969, 2d Replacement, Vol.4). More significantly, the State's argument that it had no duty to the Miners disregards the provisions of § 69–4202, RCM (1967–1971), which required the State to “correct or prevent conditions which are hazardous to health at any place of employment.” Obviously, hazards to health at a place of employment can only affect the people who work there. The provisions of this law bound the State to do something to correct or prevent workplace conditions known to be hazardous to health.

¶ 39 The statutory duties of the State thus ran to the public and to persons whose employment subjected them to health hazards. Had the legislature intended to limit the State's role to that of industry advisor, presumably it would have both expressed that intent and avoided declarations of duties to others. It did neither. We cannot “omit what has been inserted” into these statutes. Section 1–2–101, MCA.

¶ 40 Having concluded that the State had statutory duties to the public and to persons confronted with workplace health hazards, we turn **406 next to the question of whether application of the Public Duty Doctrine would preclude a finding of liability on the part of the State to the Miners.

The Public Duty Doctrine

[8] ¶ 41 The State argued, and the District Court agreed, that the principles of the Public Duty Doctrine (PDD) would preclude a finding of liability on the part of the State to the Miners. Citing Nelson v. Driscoll (1999), 295 Mont. 363, 983 P.2d 972, the court concluded that a duty to the public is a duty to no one in particular, and is thus not enforceable in a negligence action. While acknowledging that an exception to the PDD exists when there is a special relationship between the government agency and the plaintiffs giving rise to a special duty, the court concluded that no special relationship existed in this case. The Miners, on the other hand, contend that a special relationship did exist between them and the State, and that the Public Duty Doctrine would therefore not preclude a finding of liability on the part of the State.

[9] ¶ 42 As we explained in Nelson, a special relationship giving rise to a special duty can arise in one of four circumstances. Such a relationship can be established (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff. Nelson, ¶ 22.

¶ 43 The District Court concluded that no special relationship existed because: (1) the statutes were too general to protect a specific class of persons from a particular type of harm; (2) the government did not undertake a specific action to protect a person or property; and (3) the Miners could not establish that they detrimentally relied upon the government's inspections. We disagree with the District Court's conclusions.

¶ 44 The numerous statutes discussed above were intended to protect workers from occupational diseases. As we stated above, the lack of specificity in these statutes does not render them meaningless. The statutes were designed to protect men and women working in the various industries in Montana from occupational disease. Libby Miners are **111 undeniably members of this specific class of persons.

¶ 45 Secondly, the State repeatedly returned to this specific Mine, year **407 after year, for the express purpose of determining “if any of the components of the operation of [the Mine] were detrimental to the health of the employees.” And as the District Court expressly found, this question was answered in the affirmative. Such a recurring undertaking—at this place in particular—surely qualifies as a “specific action to protect a person” and creates a special relationship between the State and the Miners.

[10] ¶ 46 Lastly, the Miners presented affidavits indicating that they were concerned about the ambient dust, but had
concluded that the dust did not pose any health risks or danger. This conclusion was uniformly premised on the fact that the State had regularly inspected the Mine, but had never reported any danger to the Miners. Each Miner declared that they relied on these State inspections and the State's lack of warning to continue working at the Mine. In Montana, reliance occurs when one is "rightfully led to a course of conduct or action on the faith that the act or duty will be properly performed." Nelson, ¶ 36. The State's inspections "rightfully led" the Miners to believe that they were working in a safe environment.

¶ 47 Under these circumstances, we conclude that the State had a statutory duty under § 2(5), Ch. 127, L.1939, § 69–202(5), RCM (1947), § 69–4203(4), RCM (1947)(1969, 2d Replacement, Vol.4), § 69–105, RCM (1947), § 69–4105(1), RCM (1947)(1969, 2d Replacement, Vol.4), and §69–4110(3), RCM (1947)(1969, 2d Replacement, Vol.4) to protect the safety and health of the Miners by warning them of known dangers associated with their workplace. We also conclude that, by virtue of the special relationship between the State and the Miners, the State is not shielded by the application of the Public Duty Doctrine.

Common Law Duty
¶ 48 The Miners ask that we also determine whether the District Court erred in ruling that the State did not have a common law duty of care to them. Having determined that the State of Montana had a statutory duty to the Miners, it is unnecessary that we determine whether the State also had a common law duty.

Federal Preemption
[11] ¶ 49 The Miners also challenge the District Court's failure to rule on the applicability of the doctrine of federal preemption to this case. The State claimed federal preemption in the District Court and Miners moved for partial summary judgment to strike the preemption defense. However, the District Court dismissed the case without ruling on the issue. The Miners request on appeal that this Court establish whether the doctrine of federal preemption applies to this case. Because this issue will, in all likelihood, be raised again upon remand, in the interest of judicial economy and resolution of this case, we address it now.

[12] ¶ 50 Both the United States Supreme Court and this Court disfavor preemption. "Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action. In all preemption cases, ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Sleath v. West Mont Home Health Services, 2000 MT 381, ¶ 23, 304 Mont. 1, ¶ 23, 16 P.3d 1042, ¶ 23 (citing Medtronic, Inc. v. Lohr (1996), 518 U.S. 470, 485, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700, 715 and Cipollone v. Liggett Group, Inc. (1992), 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, 422). This presumption against preemption “can only be overcome by evidence of a ‘clear and manifest’ intent of Congress to preempt state law.” Sleath, ¶ 61 (citing Wisconsin Public Intervenor v. Mortier (1991), 501 U.S. 597, 610, 111 S.Ct. 2476, 2484, 115 L.Ed.2d 532, 546).

[13] [14] ¶ 51 As we stated in Favel v. American Renovation and Const. Co., 2002 MT 266, 312 Mont. 285, 59 P.3d 412, in determining whether a federal law preempts **112 a state law, including a common law cause of action, we look for evidence of Congressional intent to do so. As noted by the Miners, and explained in Favel, there are three ways in which state law may be superseded by federal law. First, Congress may expressly include a preemption clause in the federal statute. Such an express clause would make it clear that state law will not apply in the area governed by the federal statute. Second, congressional intent may be implied where it is reasonable to conclude that Congress intended to “occupy the field” by such comprehensive regulation that there is no room for supplementary state regulation. Lastly, federal law may preempt state law when the state and federal law actually conflict with one another. Such a conflict occurs when it is impossible to comply with both the federal and state law, or because “the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Favel, ¶ 40 (citing Hillsborough County v. Automated Medical Labs. (1985), 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714, 721; see also, Siuslaw Concrete Const. v. Wash., Dept. Of Transp. (9th Cir.1986), 784 F.2d 952, 955).

[15] ¶ 52 The Miners argue that prior to 1966 no federal statutory or regulatory scheme governing the Libby Mine existed. As a result there can be no federal preemption defense available to the State for its Mine-related activities prior to 1966. In 1966, Congress passed the Federal Metallic and Non–Metallic Mine Safety Act (the FMNMSA). In looking for Congressional intent vis-à-vis preemption, we note the following provision in the FMNMSA:
(a) Conflict with this chapter

No State or territorial law in effect upon the effective date of this chapter or which may become effective thereafter, shall be superseded by any provision of this chapter, except as to such State or territorial law is in conflict with this chapter, or with orders issued pursuant to this chapter.

30 U.S.C. § 738(a). This provision was carried forward to the Federal Mine, Safety and Health Amendments of 1977 that repealed the FMNMSA and consolidated non-coal mine safety with coal mine safety. 30 U.S.C. § 955(a). Just as preemption will be found only in those situations where it is “the clear and manifest purpose of Congress,” (Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459), it will not be found when there is a clear intent to the contrary. Because Congress affirmatively disclaimed any intention to preempt state law with the FMNMSA or the amendments, there is no need to further analyze this issue. We conclude the FMNMSA and its amendments do not preempt state law in this case.

Sovereign Immunity

¶ 53 Lastly, the Miners ask that we determine whether sovereign immunity applies to this case. While the District Court dismissed Miners' Complaint without addressing this issue, as with the issue of federal preemption above, it is appropriate that we resolve it prior to remand. To our knowledge, this is a matter of first impression for this Court. For background, a brief discussion of sovereign immunity is warranted.

¶ 54 Originally, sovereign immunity protected the early kings of England from suit in the King's Court. However, the doctrine evolved into protecting governmental entities from liability for the negligent acts of their officers and employees. It was adopted by this country's legal system during the nineteenth century. Barry L. Hjort, The Passing of Sovereign Immunity in Montana: The King is Dead! 34 Mont. L.Rev. 283 (1973). The first Montana case embracing sovereign immunity was Langford v. King (1868), 1 Mont. 33, 38, holding that citizens may not sue the territorial government absent the government's consent. The Montana Constitution of 1889 neither authorized nor prohibited sovereign immunity. Thus, Montana courts, *410 as did other courts throughout the country, struggled throughout the twentieth century to apply the doctrine with consistency and reason. Hjort at 289–93. In 1972, the Delegates to the Montana Constitutional Convention joined several other states in concluding that the doctrine was an anachronism. The Delegates inserted **113 Art. II, § 18, into the Declaration of Rights of the Montana Constitution. Article II, § 18:

State subject to suit. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973.

Article II, § 18 became effective on July 1, 1973. However, the last sentence of this Section was deleted in 1975, as a result of voter initiative. It is against this historical backdrop that the sovereign immunity issue in this case arises.

¶ 55 However, before presenting our analysis, we find it necessary to address remarks contained in the dissent. The dissent maintains, without citation to authority, that sovereign immunity is not merely a bar to suit but is actually a legal doctrine to the effect that the government owes no duty to its citizens. This is incorrect. Immunity is a matter of avoidance, an affirmative defense. Brown v. Ehlert (1992), 255 Mont. 140, 146, 841 P.2d 510, 514. The sovereign immunity defense does not mean that there is an absence of duty; rather, at the time that the immunity defense exists, the breach of duty is simply not actionable against the sovereign. The statutory scheme in effect in the 1960's is illustrative. Prior to the abrogation of sovereign immunity, § 40–4402, RCM, adopted in 1963, provided that an insurer for the state or its political subdivision who received a premium from the state for liability insurance, could not—in a suit against the state —“raise the defense of immunity from suit in any damage action brought against such insured or insurer [under certain circumstances] ... and if the verdict exceeds the limits of the applicable insurance, the court shall reduce the amount of such judgment or award to a sum equal to the applicable limit stated in the policy.” See Jacques v. The Montana National Guard (1982), 199 Mont. 493, 505–06, 649 P.2d 1319, 1326. If, as the dissent posits, sovereign immunity meant there was no duty owed by the State, then there would be no reason for the existence of this statute, because no cause of action, much less an adverse verdict, could have gone forward against the State under any circumstance.

¶ 56 The State argued that because all but one of the alleged negligent acts complained of by the Miners occurred before July 1, 1973, it should be immune from liability for those breaches of duty. The Miners *411 responded
that the sovereign immunity law in effect at the time the State's breach of duty occurred is irrelevant; the applicable sovereign immunity law is the one in effect at the time their tort claim accrued. They maintained that because the tort of negligence requires four elements—duty, breach of duty, causation and damages—their claim did not accrue until their “damages” became manifest in 1998, when they were medically diagnosed with asbestos-related illnesses. Therefore, they asserted that it is the sovereign immunity law in effect in 1998 that is applicable to their case.

¶ 57 The precise question of whether pre–1972 or post–1972 sovereign immunity law controls in this unique situation has not been squarely presented to or answered by this Court. The obvious reason for the absence of authority in this area is that, typically, the elements of a tort happen, and the cause of action accrues, at the same moment in time. A vehicle strikes a pedestrian, a man falls from a faulty scaffolding, a nursing home employee injures her back while lifting a patient—in each of these instances, the wrong occurs and the damage immediately results. Here, the wrongs occurred in the 1960's but the damages did not manifest until 20 years later. In other words, the elements of the tort did not occur simultaneously. At least one Montana case suggests that, when the elements of the tort are bisected by the abrogation of sovereign immunity, it will be the law in effect at the time the injury occurs that applies.

¶ 58 In Jacques, the defendant State of Montana appealed from a verdict entered in favor of Jacques and against the Montana National Guard and the State of Montana for injuries sustained by the plaintiff in an explosion that occurred in February of 1977. The Plaintiff, employed at the Anaconda Smelter, had his legs traumatically amputated when a large shell that a co-worker had found nearby exploded. According to the testimony, the shell had been left by the National Guard in an old firing range nearby, between the years 1956 and 1966. However, the shell remained on the ground undetonated until 1977. Thus, sovereign immunity was in full force and effect at the time that the tort or the wrong occurred, which was when the explosive shells were negligently left on the ground by the National Guard. The damage was not sustained by the plaintiff, however, until the explosion occurred five years after the abolition of sovereign immunity, in 1977.

¶ 59 The State in Jacques argued that the law in effect prior to the abrogation of sovereign immunity should control, thereby limiting its exposure to the applicable insurance limits in effect as of 1963. The Court, however, refused to do so, concluding that because sovereign immunity had been abolished in 1972, sovereign immunity, and statutes related to it, could not be raised as a defense. Thus, while the tortious breach of duty obviously occurred between 1956 and 1966, the court declined to apply the law in effect at the time of the wrong and instead applied the law in effect at the time the damage occurred.

¶ 60 Three courts from other jurisdictions have examined cases under the unusual circumstances presented here. We look to them for additional guidance. State v. Ford, 2001 MT 230, ¶ 22, 306 Mont. 517, ¶ 22, 39 P.3d 108, ¶ 22.

¶ 61 In March 1944, a military plane crashed just outside of Birmingham, Alabama. A 14–year old boy, Carnes, and his friends went to the crash scene shortly after the crash occurred. They also visited the scene several other times during the cleanup operations, during which time guards were posted. The boys were allowed to take “souvenirs” from the site. Unbeknownst to Carnes and his parents, he had salvaged an explosive device that, in February 1945, exploded and seriously injured him.

¶ 62 The trial court held that because the negligent act of the Government had occurred before January 1, 1945, the Government was immune and the court had no jurisdiction. The Tenth Circuit disagreed because the boy's cause of action accrued when his injury occurred, which was after January 1, 1945. The language of the court is helpful:

Actionable negligence consists of the violation of a duty to another with resulting injury to him. This is elementary and needs no citation of authorities to support it. The correct rule is well stated in Schmidt v. Merchants Despatch Transportation Company, 200[270] N.Y. 287, 200 N.E. 824, 827, 104 A.L.R. 450, where the court said: “We have said that ‘in actions of negligence damage is of the very gist and essence of the plaintiff's cause.’.... Though negligence may endanger the person or property of another, no actionable wrong is committed if the danger is averted. It is only the injury to person or property arising from negligence which constitutes an invasion of a personal right, protected by law, and, therefore, an actionable wrong.”

Appellant did not have a claim against the Government until he suffered injury upon which he could have predicated an action in court. It will be noted that the Act gives the court jurisdiction of actions on claims (10th
Carnes v. United States (10th Cir.1951), 186 F.2d 648, 650. See also Diminnie v. United States (6th Cir.1984), 728 F.2d 301 (Plaintiff's claims for assault, battery, false imprisonment, false arrest, and malicious prosecution all accrued at the time of his original arrest and indictment in 1973. Therefore, the Federal Bureau of Alcohol, Tobacco and Firearms was immune from suit because the FTCA had not yet been enacted.)

¶ 63 In Windham v. Florida Dept. of Transp. (1985), 476 So.2d 735, the First District Court of Appeals of Florida was asked to review a trial court's decision dismissing **115 the plaintiffs' complaint for damages and injuries arising from contaminated groundwater. According to the facts, in 1959, the Florida DOT hired a contractor to pave a section of Florida highway. The contractor used trichloroethylene (TCE) to clean his equipment and when he finished, he buried the drums of TCE in the ground without any attempt to safeguard against their leakage. At the time these drums were buried, the State of Florida enjoyed sovereign immunity.

¶ 64 In 1974, the Florida legislature passed a statute that waived sovereign immunity for “incidents occurring on or after” January 1, 1975.

¶ 65 In 1976, the Windhams bought the property adjacent to this unknown drum burial ground and drilled a well. For six years, they drank water from this well. They began experiencing various health problems and their first born child was born with a rare form of eye cancer requiring surgical removal of the infant's eye. In 1982, the environmental regulatory agency sampled their water and found the odorless, colorless, and tasteless TCE. The Windhams sued the State of Florida DOT for various torts, including negligence. Windham, 476 So.2d at 736.

¶ 66 The court concluded the State was immune from suit because the “negligent acts or omissions such as those alleged here, occurring prior to the statute's effective date, may not be utilized as the basis for a cause of action for injuries materializing after the effective date.” Windham, 476 So.2d at 739. The Florida court reached its conclusion by interpreting the language of the 1974 statute that waived sovereign immunity. It concluded that the term “incident” is defined as *414 “occurrence” or “happening,” and determined that the “incident” in the Windham case was the wrongful act causing the injury, not the actual injury itself. Windham, 476 So.2d at 739. Moreover, the Florida court concluded that interpreting “incidents occurring” as synonymous with “causes of action accruing” would be inconsistent with other provisions of the same state statute which specifically addressed accrual of actions. Windham, 476 So.2d at 739.

¶ 67 Justice Ervin wrote a strong dissent wherein he vociferously disagreed with the majority opinion that he said “bifurcates the traditional definition of negligence.” He stated, “the majority states that the duty and breach thereof ... can be separated from the actual injury sustained by plaintiff's minor child. This construction ... is at variance with common principles of tort law.... It is axiomatic that no cause of action can exist for negligence, even assuming the existence of the negligent act, where no damage can be proven.” Windham, 476 So.2d at 742.

[16] ¶ 68 These cases illustrate that courts first look to the precise language of the immunity waiver statute to determine when a governmental entity is immune from liability, and when it is not. This rule of statutory construction is familiar to this Court. “General rules of statutory construction require this Court to interpret the statutory language before us, without adding to, or subtracting from, it. Section 1–2–101, MCA. Words and phrases used in statutes of Montana are construed according to the context and the approved usage of the language. Section 1–2–106, MCA. Therefore, when interpreting statutes, this Court will use the plain and ordinary meaning of a word.” Carroll v. W.R. Grace & Co., (1992), 252 Mont. 485, 487, 830 P.2d 1253, 1254.

¶ 69 Montana, of course, did not waive immunity by statute but rather by constitutional provision. This distinction, however, does not change how we interpret the language. Looking closely at the language adopted by the Delegates, “[t]he state ... shall have no immunity from suit for injury to a person ....” we conclude that the critical phrase we must interpret is “suit for injury.” According to the Webster's Dictionary, a suit is “an action or process in a court for the recovery of a right or claim.” Black's Dictionary, 7th Edition, defines suit as “any proceeding by a party or parties against another in a court of law.” Certainly, under the common usage of the words, the Miners' claim qualifies as a “suit for injury.”
¶ 70 The State seeks to bifurcate its alleged negligent acts from any injuries they ostensibly caused. It maintains that because it was immune at the time it purportedly committed the acts, it retained that immunity from "suits for injury" regardless of when the suit or injury arose. We disagree and for the reasons stated below, conclude that the Delegates' choice of the phrase "suit for injury" incorporated the legal concept of "accrual."

¶ 71 More than one hundred years ago and prior to statehood, Montana codified the law relative to commencement of a civil action and a statute of limitations.

Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued, except where, in special cases, a different limitations is prescribed by statute. (Emphasis added).

Section 28, Laws of Montana, C.Civ.Proc. 1879. With minor language revisions and frequent renumbering, this statute remains essentially unchanged. See Sec. 470, MCA, C.Civ.Proc. 1895; § 6428, RCM (1907); § 9011, RCM (1921) and (1935); § 93–2401, RCM (1947); § 25–1–102, MCA (2003). “Cause of action” is defined by Black's Law Dictionary, 7th Edition, as “a group of operative facts giving rise to one or more bases for suing.” By the time of the Constitutional Convention in 1972, one hundred years of Montana jurisprudence stood for the proposition that a “suit for injury” could only be commenced upon an accrued cause of action. Thus, the State has no immunity for causes of action accruing after July 1, 1973. Next, we must determine when the Miners' cause of action accrued.

¶ 72 Usually, all of the elements of a negligence claim occur in rapid succession. A duty is breached and the plaintiff is immediately injured as a result. With asbestosis, the paradigm is far different. There is no dispute that asbestosis can take years to manifest. One person exposed to the toxins in the Libby Mine may become ill within months of exposure while another may remain symptom-free for decades. Some may never become ill at all. And so it was with these plaintiffs. The Miners in this case worked for the Mine anywhere from one year (Jacobson/1975–1976) to thirty-six years (Smith/1951–1987). Despite the differences in exposure, both men developed asbestosis. Mr. Smith was diagnosed in July 1998, and Mr. Jacobson was diagnosed in April 2000. Miner Graham worked for the Mine from 1962 until it closed in 1990. He died from mesothelioma in January 1998, not long after diagnosis. Although we make no finding here as to when the disease became manifest for each plaintiff, it does not appear from the record before us that any of the plaintiffs were symptomatic as early as 1973.

¶ 73 Prior to the adoption of the “discovery rule” in Montana and many other states, plaintiffs such as the Miners were precluded from bringing an action because the statute of limitations, formerly linked with the breach of duty element, would have expired. The “discovery rule” was adopted by the majority of states because it fairly allows injured plaintiffs to seek relief for long-dormant injuries caused by tortious conduct that occurred much earlier. Section 27–2–102, MCA.

¶ 74 In Montana, no cause of action, or suit, for negligence accrues until all elements of the claim exist. Section 27–2–102, MCA, provides:

(1) For the purposes of statutes relating to the time within which an action must be commenced:

(a) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;

(b) a claim or cause of action accrues upon discovery.

(3) The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if:

(a) the facts constituting the claim are by their nature concealed or self-concealing;

(b) a claim or cause of action accrues upon discovery.

¶ 75 This Court has long embraced the discovery rule. See, e.g., Johnson v. St. Patrick's Hospital (1966), 148 Mont. 125, 417 P.2d 469. We have applied the above-stated provisions of § 27–2–102, MCA, on numerous occasions. See Nelson v. Nelson, 2002 MT 151, 310 Mont. 329, 50 P.3d 139 (Cause of numerous bovine vaccine injection-related illnesses not discovered for several years after negligent injection; cause of action accrued upon discovery.) See also Gomez v. State, 1999 MT 67, 293 Mont. 531, 975 P.2d 1258; Hando v.
¶ 76 While Montana's statutory version of the discovery rule governs the time within which an action must be commenced, its provisions are nonetheless instructive on the question of when a Montana cause of action accrues. A cause of action accrues "when all elements of the claim ... exist or have occurred." Section 27–2–102(1)(a), MCA. The causes of action of the surviving Miners did not accrue until damage could be proven. And no damage could be proven until their injuries were manifest.

¶ 77 Two Pennsylvania cases support the proposition that the discovery rule as announced in the statute of limitations' context, should apply as well in a sovereign immunity analysis.

¶ 78 In Hench v. Carpenter (1985), 35 Pa.D. & C.3d 401, the Township's sewage officer committed a negligent act in 1976 at which time the Township did not enjoy sovereign immunity. Hench's injury from this negligent act was concealed for several years but eventually became manifest. When he sued the Township in August 1983, the Township argued that the two-year statute of limitations barred Hench's suit. Hench claimed that the two-year statute of limitations was tolled by the "discovery rule," and that his claim did not accrue until February 1983 when he discovered the injury and cause. The Township countered that by the time Hench's claim accrued under the discovery rule, the Township had enacted a sovereign immunity statute and was immune. Siding with the Township, the court agreed, stating:

Plaintiffs claim it is the breach of the duty which gives rise to the cause of action. Since this duty was breached on June 24, 1976, they argue governmental immunity should be applied as of this date. However, the effect of the discovery rule as applied to the statute of limitations, is to delay the accrual of a cause of action from the time of defendant's negligent conduct to when the injury becomes known or knowledgeable to the plaintiff [citation omitted]. Consequently, in this case if the discovery rule is applied for statute

of limitations purposes the cause of action accrued on February 3, 1983. This is logically the point in time when the governmental immunity defense should be applied.

Hench, 35 Pa.D. & C.3d at 405–06.

¶ 79 The court further opined that the plaintiffs cannot argue for statute of limitations purposes that their cause of action did not arise until six years after the Township's negligent act, but then argue for immunity purposes that the cause of action arose at the time of the Township's negligent act. Hench, 35 Pa.D. & C.3d at 405–06. See also Hurst v. East Hanover Township (1984), 33 Pa.D. & C.3d 157. This logic is both simple and compelling. It is inconsistent to apply the discovery rule to the accrual of a cause of action for statute of limitation purposes, but then discard it when conducting a sovereign immunity analysis.

¶ 80 For the foregoing reasons, we conclude that the long-standing rule in Montana that civil actions are to be commenced after a cause of action has accrued, should apply to our sovereign immunity analysis here. A "suit for injury" accrues once the elements of the cause of action have accrued. The elements of the causes of action before us did not accrue until well after sovereign immunity had been abrogated. Therefore, we conclude that the existence of sovereign immunity prior to July 1, 1973, does not insulate the State from the Miners' causes of action.

CONCLUSION

¶ 81 A final word about the dissent. It accuses this Court of creating a remedy out **118 of thin air. The accusation is off the mark. First, our decision here does not create a duty where none existed as the dissent argues; rather, it stands simply for the proposition that because the affirmative defense of immunity no longer existed at the time the Miners' causes of action accrued, it can present no bar to their causes of action. Second, this is a case with complex legal issues. The difficult questions presented by industry standards forty years old and the unusual delayed onset of the Miners' injuries advance novel questions of law. Had the issues here been simple, presumably the dissent would have said so quickly and with direct authority on point; it would not have required fifty-seven paragraphs to explain its disagreement with the majority. The simple truth is that the law attendant
to these facts is both untested and arguably susceptible to different interpretations. Contrary to the dissent's insistence, we have not handed the Plaintiffs a remedy—they still face the daunting task of establishing that the State breached its duty to them and in so doing, caused their damages and injuries. What we have concluded is that a fact finder must make these determinations.

¶ 82 Based upon the foregoing, we conclude the District Court erred in determining that the State had no legal duty to the Miners, and in dismissing the Miners' complaints. We therefore reverse the District Court's Order of Dismissal and remand for determination by the fact-finder of whether the State breached its duty to the Miners, and if so, whether such breach caused the damages claimed by them.

We Concur: JIM REGNIER, JAMES C. NELSON and W. WILLIAM LEAPHART, Justices.

Justice JOHN WARNER dissents.

¶ 83 I dissent from the Court's Opinion and its remand of this action to the District Court. A correct interpretation of the law requires the decision of the District Court to dismiss this suit be affirmed.

¶ 84 Virtually all of the Miners' claims arose before the adoption of the 1972 Montana Constitution which became effective July 1, 1973. Absent the Court's innovative re-definition of the doctrine of sovereign *419 immunity, this suit could not be maintained. Thus, I discuss this pivotal issue first, not last.

Sovereign Immunity

¶ 85 The Court concludes at ¶ 80 the doctrine of sovereign immunity does not bar Appellants' claims where the alleged breach of duty occurred prior to July 1, 1973. To reach this conclusion, the Court narrowly focuses on the words "suit for injury" contained in Article II, Section 18 of the 1972 Montana Constitution, and then equates this language to the "accrual" of an action. The result is that, because the Miners' claims for relief did not accrue until after the 1972 Constitution ended governmental immunity from suit, the doctrine of sovereign immunity does not apply.

¶ 86 The Court erroneously considers sovereign immunity as a simple bar to suits against the government. Thus, reasons the Court, a lawsuit that may "accrue" after the purported bar

is lifted, is allowed. Focusing on the damages element of tort, the Court does not even attempt to address the issue of duty, or lack thereof, in a sovereign immunity context. The Court ignores that, because of the nature of sovereign immunity, the State had no duty whatsoever to the plaintiffs and thus a tort by the State cannot be established no matter the date of the injury.

¶ 87 As opposed to being merely a bar to suit, sovereign immunity is a legal doctrine to the effect that actions or omissions of the government do not constitute a breach of duty owed to its citizens. Sovereign immunity arose out of necessity to ensure the political and economic stability of the government by insulating the public treasury from suits for monetary damages. It made no difference whether such suits were in equity, in contract or in tort. It was deemed better that the public coffers, and thus the stability of the government, not be compromised by having to pay for something that might be done by the government to a private citizen.

[S]hould any prince have so much weakness and ill nature ... the inconveniency of some particular mischiefs ... are well **119 recompensed by the peace of the public, and security of the government ... it being safer for the body, that some few private men should be sometimes in danger to suffer, than that the head of the republic should be easily, and upon slight occasions, exposed.

John Locke, Two Treatises of Government, Ch.18, (4th ed. 1764).

¶ 88 In feudal England the theory initially was that the king, being subject to no higher tribunal, and in that sense the ultimate maker of *420 law, was considered incapable of wrong. As the medieval period progressed, this theory evolved and the doctrine transformed into one holding that the king, that is, the government could do wrong, but this wrong was not recognized by the law. In Blackstone's terms, the doctrine of sovereign immunity was phrased:

The supposition of law therefore is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which
reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision. Blackstone, *Commentaries on the Laws of England*, vol.1, ch.7, 237–38 (1765).

¶ 89 In other words, even though the government might act unfairly, breach a contract or be negligent, in the eyes of our common law jurisprudence such was not a wrong that the law recognized. This is much different, and much more, than a bar to a particular lawsuit. The act or omission of the government simply was not wrong.

¶ 90 In the late-eighteenth century, the American colonists revolted and began the formation of their own government, without a monarch, and with a constitution. Thus, in the United States there was no “sovereign” per se to whom immunity could attach. While this may have been an opportune time to discard the doctrine, it remained firmly entrenched in the new nation.

¶ 91 Like most states, from its territorial days Montana did not allow itself to be subject to liability for breach of a contract or for any tort.

We hold, therefore, that unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it. There is no law of this Territory or act of Congress permitting it. There is, then, no legal power to enforce territorial contracts. In other words, there is no obligation to territorial contracts. They rest simply on the good faith of the Territory.

*Langford v. King* (1868), 1 Mont. 33, 38.

¶ 92 In Montana, the State had no obligation, that is, duty to its citizens. “Duty” and “right” are correlative terms; “where there is no duty there can be no right.” John Chipman Gray, *The Nature and Sources of the Law*, 8 (2d ed., MacMillan Co.1921). Thus, before the 1972 Constitution was adopted, a citizen had no right to seek damages against the State and the State had no correlative duty to its citizens. *See generally, Murphy v. State* (1991), 248 Mont. 82, 809 P.2d 16.

¶ 93 In step with the rise of the insurance age, the courts and legislatures of many states began to weaken sovereign immunity. In Montana, a citizen’s right to sue the State was enacted as *Article II, Section 18, of the 1972 Montana Constitution*. This provision became effective on July 1, 1973.

¶ 94 With the adoption of our new constitution, Montana citizens acquired a right to sue the State where none had existed before. This new right created the correlative duty which had not existed previously, and imposed for the first time on the Montana State Treasury an obligation to pay damages for a breach of a contract or for tortious conduct.

¶ 95 Now, this Court holds for the first time that if one of the elements of a tort occurs subsequent to the abrogation of sovereign immunity, this sequence of events somehow transmogrifies an act or omission that was not wrong into a breach of a duty that did not exist. By focusing on when the damage occurred, the Court forgets that at the time of the alleged breach of duty by the State, it owed no duty at all to the Miners. Sovereign immunity is not a bar to an action, it is a legal doctrine to the effect that the government had no duty to respond in damages to its citizens for its acts or omissions. When sovereign immunity was abolished, this changed, but by no stretch of logic or law can it be said that an act or omission done while the doctrine was in effect retroactively creates such a duty. I agree with Federal District Court Judge Molloy who, when faced with this same question, determined that “[m]easuring the accrual of sovereign immunity based on the discovery of damage is not a principled basis for determining the scope of sovereign immunity.” *Dickerman v. W.R. Grace*, CV–00–130–M–DWM, 4 (D.Mont.2000).

¶ 96 Without any support from the Constitutional Convention transcripts, the Court incorrectly concludes at ¶ 70 the delegates to the 1972 Constitutional Convention actually intended the State would not be immune from any claim for relief that matured, that is, accrued after July 1, 1973. However, the 1972 Constitutional Convention Bill Of Rights Committee made it clear that, while the doctrine of sovereign immunity was outdated and unfair, there was no intention to subject the State to claims that pre-dated the new *Article II, Section 18*.

The committee is well-aware that implementation of this provision could cause some difficulties if done without permitting affected agencies to upgrade their currently...
inadequate coverage. Accordingly, it is recommended that this provision not be retrospective in its application; that, in order to permit agencies time to obtain adequate insurance coverage as provided by legislative appropriation, it shall not be effective until June 1, 1553 [sic, 1973]; and that it shall be effective only as to causes of action arising after that date. The committee commends this provision to the convention with the belief that its adoption will insure that redress for wrongs will be administered on behalf of and against all parties, governmental as well as private.


¶ 97 Sovereign immunity was abrogated only because insurance was available. This Court cannot be, and is not, concerned with the question of whether the potential loss is insured. However, the discussion of insurance is highly relevant to determining the intent of the delegates concerning retroactive application of Article II, Section 18. It is crystal clear it was the intention of the drafters of the 1972 Constitution that anything which had previously occurred could not give rise to lawsuits. Montana was starting with a clean slate.

¶ 98 The Court also ignores the plain words of the Transition Schedule, § 3, of the 1972 Constitution which states:

Section 3. Prospective operation of declaration of rights.

Any rights, procedural or substantive, created for the first time by Article II shall be prospective and not retroactive.

¶ 99 There is no question the right of a citizen to sue the State of Montana was created by Article II, Section 18, of the 1972 Constitution. There also is no question this new right was prospective only.

¶ 100 Further, the Court ignores the Convention Note to Transition Schedule § 3, which was drafted by a committee of the delegates and presented to the populace to educate the voters as to what each section of the new constitution was intended to accomplish. Such note states the intention of the delegates:

Conference Notes:

Any new rights created in Article II take effect only after July 1, 1973. It does not create any right for past events.

¶ 101 This is an additional acknowledgment from the delegates themselves that a new right was created with the adoption of the new constitution. It was not intended that past events would give rise to subsequent obligations by the government.

¶ 102 Indeed, this Court has previously recognized the prospective application of “new rights” under Article II of the 1972 Montana Constitution in another context. In connection with the right to be free from sex discrimination, another new right which was created by Article II of the 1972 Constitution, this Court held in a domestic relations case:

Appellant cannot rely on rights arising under Article II, Section 4, 1972 Montana Constitution, for under the Transition Schedule Section 3 any “rights, procedural or substantive, created for the first time * * * shall be prospective and not retroactive.”


¶ 103 Both the right to be free from sex discrimination in Rogers, and the right to sue the State at issue in this case, were newly created rights in Article II. The result must be the same in this case as in Rogers. New rights, created for the first time by the 1972 Montana Constitution, are to be enforced prospectively only.

¶ 104 In my view, these expressions of the intentions of the delegates cannot be avoided by the Court's reference at ¶ 71 to an 1879 statute concerning periods of limitation. Nor can such intention be avoided by referring to the dissimilar law of other states or the Federal Tort Claims Act.

¶ 105 It cannot be doubted that abolishing sovereign immunity is the preferred approach in these modern times. However, that is not the question before us in this case. Sovereign immunity was the law in Montana from this Court's 1868 decision in Langford, until July 1, 1973, at which time it was abolished with regard to future acts. I suspect millions of people in this country know
about the tragic injuries to the Miners by now. I share the sympathy which necessarily must flow to them. But it is simply incorrect as a matter of law for this Court to redefine the doctrine of sovereign immunity, change it, or find a new way around it in an effort to provide a remedy. Since territorial days the people, the legislature, both of the constitutional conventions and this Court have consistently relied on sovereign immunity. Nothing that occurred, or failed to occur, prior to sovereign immunity's abolition on July 1, 1973, can properly subject the State to liability for money damages in tort.

Legal Duty

¶ 106 Notwithstanding the Court's erroneous conclusion that sovereign immunity does not defeat these Miners' claims against the State, the Court still needed to find a legal duty on the State's part in order to reach its desired conclusion that this suit is viable. It finds such duty by incomplete references and misleading quotations from statutes of yesteryear. By innovative surgery, the Court grafts together a variety of statutory duties and foists them upon the State. However, a careful consideration of these statutes reveals that the “duties” imposed by the Court did not exist at the time the statutes were enacted, but are created only by the Court's judicial alchemy.

¶ 107 The Court concludes that a duty to the Miners is established because the statutes it cites created a duty running from the State to the workers. First, the Court concludes at ¶ 22 that the various statutes applied to the vermiculite mining industry. This is correct. The statutes applied to all industries and the District Court did not rule otherwise. But translating the performance of a discretionary function and the dissemination of any results, as required by statute, into a statutory duty to warn is something else entirely. The Court specifically explains in ¶ 23 this duty exists because:

[T]he duty to gather information related to the effects upon workers or the public of conditions of employment “for diffusion among and use by the people” was never displaced or eliminated from the law. The State had the mandatory obligation from 1907 through 1999 to gather public health-related information and provide it to the people. Section 2448, RCM (1921); ¶ 69–105, RCM (1947); renumbered in 1969 to § 69–4110(3), RCM (1947); renumbered in 1978 to § 50–1–202, MCA.

¶ 108 However, an accurate analysis of the entirety of these cited statutory provisions reveals a far different story about this so-called “mandatory obligation.” Section 2, Ch. 110, L.1907, consisted of a long list of powers granted to the State Board of Health which were characterized by that statute as “general supervision” and “general oversight.” The particular phrase emphasized by the Court—“for diffusion among the people”—actually states, in its entirety:

[T]hey [the State Board of Health] shall gather such information in respect to all these matters as they may deem proper for diffusion among the people.... [Emphasis added.]

¶ 109 Ripping the phrase “for diffusion among the people” from the statute mid-phrase, the Court removes it from its context and from its meaning, magically turning it into a “mandatory obligation” which the Court insists existed from 1907 through 1999. To the contrary, an accurate reading of the statute demonstrates that the power of the Board to gather what information it, in its discretion, deemed proper and to diffuse such information “among the people” was completely discretionary with the Board—to be exercised “in respect to all matters as they deem proper.” No mandatory obligation was created, because the exercise of this power was completely discretionary.

¶ 110 This discretionary language stayed in the statute, see § 69–105, RCM (1947), until the entire section was repealed in 1967 by Section 223, Chapter 197, Laws of Montana 1967. At the same time, the language upon which the Court heavily relies, “for diffusion among the people,” was repealed, and did not exist in the law after 1967, although similar language was thereafter adopted, as discussed below. Thus, it is clear that these provisions, when studied in toto, merely bestowed discretionary options on the state agency, and mandated nothing.

¶ 111 In 1967, an entirely new statutory scheme was enacted, with language regarding the functions of the newly distinguished Board of Health and Department of Health. From these provisions, the Court cites and relies upon § 69–4110(3), RCM (1967), to support its conclusion that the State had a continuing duty to the workers. That statute provided:

69–4110. Functions, powers and duties of department.
With policy guidance of the state board, the department shall:
of any place of employment at any time. Section 69–4203(4), RCM, merely requires the department to “report the findings of investigations to the industry concerned and co-operate with the industry in preventing or correcting conditions which are hazardous to health.” (Emphasis added.) Section 69–4204(1), RCM, goes on to require the reporting of occupational diseases by health care providers and state employees within 11 days of discovery. Of importance, reports made “are neither public records nor open to public inspection.” Section 69–4204(2), RCM. Clearly, these specific statutes regarding occupational diseases require the reports generated by the investigation are to be given to the “industry concerned” and “are neither public records nor open to public inspection.” These specific statutes control as against the general statutes regarding the duties of the board. See § 1–2–102, MCA.

¶ 116 In 1971, the Legislature enacted Chapter 316, Laws of Montana 1971, which changed the law again and created the Occupational Health Act of Montana. This Act, in addition to the provisions cited by the Court, continued to provide that information collected by the Department concerning pollutants or operations are only for the confidential use of the Department and that only the owner or operator of an inspected premises can obtain a copy of the report on request. See §§ 50–70–109(1), –115(3), MCA. Importantly, the Occupational Health Act expressly provides that it does not:

[A]bridge, limit, impair, create, enlarge, or otherwise affect substantively or procedurally the right of a person to damage or other relief, or otherwise affect substantively or procedurally the right of a person to damage or other relief on account of injury to persons or property and to maintain an action or other appropriate proceeding.

Section 50–70–118(3), MCA. Thus, the expressed intention of the Legislature was not only that inspection reports were not to be disseminated, it was that the Act would not “create”
or “enlarge” any procedural or substantive right to seek damages. In determining the Act creates a special duty which exposes the State to liability, the Court abrogates this provision.

¶ 117 In addressing the duty issue, the District Court carefully analyzed the statutes at issue here and concluded, in part, as follows:

"Plaintiffs have pointed to a number of other statutes that have existed over the years that they feel impose a statutory duty enforceable by these Plaintiffs. However, the statutes do not specifically impose a duty on the State to protect employees from exposure from asbestos or to warn employees of the dangers of such exposure. These statutes are very general and apply to “various industries” all over the state and do not deal with any specific hazard to be detected and prevented by the State."

... *428 ... it is critical to note that none of these statutes are specific as to the danger or the industry being addressed. They all are very general.

It appears that these statutes, if they impose any duty at all, impose a directive to the Department of Health and its employees as to what their general duties are. There is nothing in any of these statutes that evidences a specific legislative concern with a particular industry or a particular type of worker. Thus, in short, the Court finds no statutory duty exists on which Plaintiffs may base their case.

¶ 118 The District Court's analysis is correct. These statutes do not even mention, let alone create, a duty owed by the State Department of Health to the workers of a particular industry. At best, these provisions constitute general directives to the agency itself, by which the agency is empowered to address public health problems with the industry involved. Unfortunately as it may have been, the State's actions of yesteryear were for the purpose of “working with the industry,” and not directed to, or communicated with, the workers. Therefore, these efforts did not create a duty imposed on the State of Montana to warn the Miners that their health was in danger because of the defalcations of their employer.

¶ 119 The Court acknowledges that the State agencies in question placed great weight on Attorney General Bonner's 1942 opinion in not disseminating information to the Miners. It then concludes that they were wrong in doing so. The Court's analysis concerning this Opinion and its use is also flawed. The various health agencies were justified in their reliance on it.

¶ 120 The Attorney General, as acknowledged by the Court at ¶ 27, concluded that the Board of Health's reports were confidential. Although not binding on this Court, an Attorney General's (“AG's”) Opinion in which the Legislature has acquiesced is persuasive and will be upheld unless palpably erroneous. See, e.g., Stewart v. Region II Child & Fam. Servs. (1990), 242 Mont. 88, 97, 788 P.2d 913, 919; State ex rel. Ebel v. Schye (1956), 130 Mont. 537, 541, 305 P.2d 350, 353; State ex rel. Barr v. District Court (1939), 108 Mont. 433, 436, 91 P.2d 399, 400. The Court is incorrect in its view that the AG's Opinion at issue in this case is palpably erroneous.

¶ 121 The issue before us, however, is not the correctness of the Opinion. The issue is the effect of that Opinion—acquiesced in by the Legislature—on those to whom it was directed at the time and for decades thereafter. It is one thing to conclude an AG's Opinion is erroneous. It is quite another to determine 62 years later that an Opinion was not binding at the time it was issued and, therefore, the persons who relied on it were wrong in doing so. While we have not directly addressed the issue, we indicated in O'Shaughnessy v. Wolfe (1984), 212 Mont. 12, 16, 685 P.2d 361, 363, that AG Opinions are binding on those requesting them or to whom they apply, absent a contrary ruling from this Court. How can we now “unbind” those clearly bound by a 1942 AG's Opinion by our contrary opinion on the law? What, then, is the purpose of our 80–year–old statute requiring the Montana Attorney General to provide legal opinions in writing, without fee, to those entitled by law to request them? See, e.g., § 199(6), RCM (1921); § 82–401(6), RCM (1947); § 2–15–501, MCA.

¶ 122 In its rush to do the right thing by the Miners in this case, the Court makes AG's Opinions not only useless, but dangerous. What busy Attorney General in his or her right mind would continue to issue such opinions once this Court has held the persons to whom they are directed rely on them at their peril? Having obtained an AG Opinion, should those who sought it then seek competing legal opinions, or should they merely ignore it because it may be wrong and relying on it may decades later be the basis of liability?

¶ 123 An examination of the AG's Opinion leads to the conclusion that it was not incorrect and most assuredly was not “palpably erroneous.” In 1939, the Legislature created
**125** the Industrial Hygiene Division of the Board of Health (IHD) and required it, among other things, to study and investigate industrial hygiene and occupation disease and “report to the industries concerned the findings of such investigations.” Sections 1, 2(1), (3), (5), Ch. 127, L.1939, re-codified as §§ 69–201 through –208, RCM (1947) (emphasis added). Section 5 of Chapter 127 required at least annual statistical summaries of all reported occupational diseases, together with dissemination of instruction and information believed appropriate to prevent the occurrence or recurrence of occupational diseases “to all employers of this State.” (Emphasis added). Section 7 required health care providers and certain mine inspectors, upon request of the secretary of the IHD, to report knowledge of any occupational disease and file a report regarding that knowledge. Section 7 stated without equivocation that “such reports and all records and data of the [IHD] … pertaining to such diseases are hereby declared not to be public records or open to public inspection….” Section 7, Ch. 127, L.1939 (emphasis added).

¶ 124 It is clear that nothing in Chapter 127 required or even suggested public dissemination of investigations and studies by the IHD. Those matters were to be reported to the involved industries. Moreover, as noted above, the language of Section 7 clearly prohibited making the reports from health care providers and “all records and data of the division” public or open to public inspection. Attorney General Bonner's Opinion in 1942 responded to a query about whether reports of workplace investigations should be furnished to anyone requesting them by relying on the clear language of Section 7. He concluded the reports were not public records or open to public inspection. I would conclude the Opinion was 1) not palpably erroneous, and 2) even if incorrect, binding from its issuance until today. For these reasons, I disagree with the Court's analysis of the AG's 1942 Opinion.

¶ 125 Nor do I agree with the Court that the re-codification and renumbering of Section 7 of Chapter 127 as § 69–207, RCM (1947), changed anything at all about the law. The language of § 69–207, RCM (1947), was identical in all respects to the former Section 7. It continued to require physicians, other health care providers and mine inspectors “having knowledge of a case of occupational disease” to report such cases “upon request” of the secretary of the IHD. More importantly, those reports “and all records and data of the division of industrial hygiene of the state of Montana pertaining to such diseases are hereby declared not to be public records or open to public inspection.” The Court fails to read the statute in its entirety and according to its plain language.

¶ 126 Moreover, the Court is simply wrong in its unsupported statement that the presumption accorded the title of an act as expressing the Legislature's intent “applies equally to titles of sections within an act.” To the contrary, it is well established in Montana that “the text of [a] statute takes precedence over the title in matters of statutory interpretation.” See, e.g., Orozco v. Day (1997), 281 Mont. 341, 348, 934 P.2d 1009, 1012; ISC Distributors, Inc. v. Trevor (1995), 273 Mont. 185, 196, 903 P.2d 170, 177; Manufacturers Acceptance Corp. v. Krsul (1968), 151 Mont. 28, 35, 438 P.2d 667, 671. Consequently, the so-called “title” of § 69–207, RCM (1947) —added by the Code Commissioner, and which speaks of a “duty of physicians and others to report cases”—cannot, and does not, impact the language contained within the statute. As discussed above, in 1947, § 69–207, RCM, retained the clear “not public records” language previously contained in Section 7 of Chapter 127.

¶ 127 Additionally, with regard to the 1942 AG Opinion, the Court states at ¶ 30:

[T]he language of the original § 7 interpreted by Attorney General Bonner was significantly revised by the legislature in 1967. The result of the legislative revision was to clarify § 7 in a manner that continued to prohibit health care workers from disclosing private medical records but that rendered Attorney General Bonner's Opinion moot.

¶ 128 As stated above, in 1967, the Legislature generally revised the laws relating to the Board of Health, amending and repealing many statutes. See Ch. 197, L.1967. In doing so, the Legislature created a number of statutes under the heading “State Board of Health,” which created the board and set forth its general duties, one of which was to “make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public.” See Sec. 10(3), Ch. 197, L.1967. Nothing in those statutes requires particular investigations, much less requires that results of each and every investigation be disseminated to the public.
¶ 129 Totally overlooked by the Court in the context of the 1942 Attorney General’s Opinion is Title 69, Chapter 42, Industrial Hygiene. This chapter expressly addresses occupational diseases and corresponding duties. As previously explained, these specific statutes regarding occupational diseases require only that the reports generated by the investigation are to be given to the “industry concerned” and “are neither public records nor open to public inspection.”

¶ 130 Thus, while I agree with the Court that the 1967 amendments retained the prohibition against disclosure of reports of occupational diseases, neither logic nor law allows me to join the Court’s next giant step. That is, I cannot agree with the Court’s implicit conclusion that, because the earlier language about “division data” was deleted, thereby “mooting” that portion of the AG Opinion, there somehow sprang into being an express requirement that other occupational disease reports suddenly were required to be disseminated to the public. Nothing in the statutes at any point in their history requires it and, indeed, such an interpretation is belied by the express provision in the 1967 legislation that the findings of investigations into occupational diseases were to be reported “to the industry concerned....”

¶ 131 Finally, with regard to the AG’s Opinion, I feel compelled to express my disappointment with the Court’s language at ¶ 28 when it *432 speaks of reliance on the AG Opinion “to justify the concealment of the results of workplace inspections” and the statement at ¶ 30 about “the State’s decision to withhold from the workers at the Libby Mine investigation reports.” These statements clearly imply that public employees—“the State”—engaged in some sort of conspiracy to harm the Libby Miners. I am sad the Court would see fit to suggest that employees in the executive branch of government would conduct themselves in such a fashion. I disagree.

Public Duty Doctrine

¶ 132 Having invented a statutory duty, never enacted or intended by the Legislature, the Court next goes on to determine the Public Duty Doctrine does not defeat the Miners’ claims because the “special relationship” exception to the doctrine applies. The Court’s description of the Public Duty Doctrine, and the special relationship exception is correct. In my view, however, the Court errs in concluding the special relationship exception applies in the present case.

¶ 133 First, and in a circular fashion, the Court states the special relationship exception applies because the statutes in question here were intended to “protect workers from occupational diseases.” Although the Court correctly reasons “the lack of specificity in these statutes does not render them meaningless,” a protective intent or meaning does not necessarily create a special relationship. Assuming, *arguendo*, these statutes created a duty to the Miners, even the Court does not posit these statutes applied solely to them. Thus, they cannot be said to apply to the “specific class of persons” of which the plaintiffs are members, that is, workers at the Libby mines. The statutes covered all Montana workers who were employed, in every occupation, and in every place in the State. The Public Duty Doctrine provides that if a statute creates a duty to everyone, it does not create a duty to a specific class of persons. The Court acknowledges this in ¶ 41. Yet, the Court’s conclusion is that when a statute creates a duty to everyone it raises the exception to the Public Duty Doctrine because it creates a duty to a specific class of persons. Considering the very definition of the Public Duty Doctrine, I find this singularly confusing. I must disagree with the Court in this regard.

¶ 134 The statutes in question do not even mention, let alone create a special relationship with, the workers of a particular industry. **127** At best, these provisions constitute general directives to the agency itself, by which the agency is empowered to address public health problems. As such, they create no “special duty that is more particular than the duty owed to the public at large.” *Nelson*, ¶ 22. Nonetheless, the Court *433 reads* a special duty into these provisions, an analysis which taken to its logical conclusion would create a special relationship between the State and every single Montana citizen in every place of work. Indeed, the Court determines this “special duty” exists because these statutes “were designed to protect men and women working in the various industries in Montana from occupational disease.” *See* ¶ 44. Such an argument could be made about virtually any directive in the Montana Code Annotated.

¶ 135 Next, the Court says that a special relationship was created with the Miners because they repeatedly saw State employees making inspections and this “qualifies as a ‘specific action to protect a person’ and creates a special relationship between the State and the Miners.” ¶ 45. The actions taken were discretionary inspections. The Miners’ complaint is the State did not take any affirmative action to warn them after these inspections. Unfortunate as it may have been, the State’s actions in past decades were for the
purpose of “working with the industry,” and not directed to, or communicated with, the workers. Therefore, these efforts cannot be considered a “specific action to protect a person.”

¶ 136 Neither can the State's inspections be considered actions which reasonably induced detrimental reliance which would create a special relationship under the Public Duty Doctrine. See Nelson, ¶ 22. What the Court in essence concludes at ¶ 46 is that even though the Miners knew there was a danger, the lack of information from the State equates to the State telling them there was no danger. This erroneous conclusion is reached because the Court fixates on the inspections themselves as the “act” upon which the Miners may rely, and not on the salient point that there was no representation at all to the Miners upon which they could reasonably rely. It is every bit as logical to reason the lack of information equates to the State telling the Miners there was a danger. However, the point is this: The State took no action upon which the Miners could reasonably rely which would create a special relationship between it and the Miners, and the Court's contrary conclusion appears to be a stretch for a desired result.

¶ 137 The workers were not told of any dangers because the law at that time prohibited such disclosure, and thus the State's discretionary decision to make inspections at Libby could not create reliance that gives rise to the necessary special relationship.

¶ 138 In the end, I conclude that the Court changes centuries of law on sovereign immunity, creates a mandatory statutory duty out of discretionary code provisions, and misconstrues the special *relationship exception to the Public Duty Doctrine. I too wish the proper defendant was not, in all probability, judgment proof. I cannot join what is, in my view, the creation, by judicial fiat, of a remedy where the State is now substituted for a bankrupt employer.

¶ 139 I dissent.

Chief Justice KARLA M. GRAY and Justice JIM RICE join in the foregoing dissent.

Parallel Citations

106 P.3d 100, 20 O.S.H. Cas. (BNA) 2112, 2004 MT 354

Footnotes

1 mppcf is the acronym for “millions of particles per cubic foot of air.” At that time, according to the State's report, the maximum allowable concentration (MAC) of asbestos in airborne dust was 5 mppcf.


3 We note that the dissent accuses the Court of relying on “incomplete references and misleading quotations” from past statutes. One such statute to which the dissent refers is § 69–4203(4), which, as quoted here, contains the language required for the dissent's analysis. In this instance, the dissent apparently narrowly defines the word “industry” as used in § 69–4203(4) to mean the employer or the management group of a facility as opposed to the workers and laborers who, in actuality, make up an industry. The term “industry” is not defined in the statute; therefore it must be given its ordinary meaning. Mont. Vending, Inc. v. Coca–Cola Bottling Co., 2003 MT 282, 318 Mont. 1, 78 P.3d 499. Without supporting authority, the dissent defines the term “industry” to exclude the workers who comprise it. Applying this narrow definition to a Department of Health program designed to safeguard the health of these very workers runs contrary to its purpose.

4 Renamed the Board of Health and Environmental Sciences by the OHA. Section 69–4208(11), RCM (1947)(Supp.1977).

5 David E. Engdahl, Immunity and Accountability For Positive Governmental Wrongs, 44 U. Colo. L.Rev. 1, 3 (1972). The Magna Carta concept of government subject to law was born, and the phrase “the king can do no wrong” in actuality meant that the king certainly could do wrong, but would not be permitted to by the law.

6 “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.” Alexander Hamilton, Federalist No. 81 (1788).

7 Engdahl, at 59.

8 Jacques v. Montana Nat'l Guard (1982), 199 Mont. 493, 506–07, 649 P.2d 1319, 1326, does not stand for the proposition that an event that happened while sovereign immunity was in effect could 40 years later give rise to an action against the State. In Jacques the plaintiff was injured and the damages were sustained after the legislature abrogated the doctrine.
Exhibit 10
Newspaper articles:
Bozeman Methane and
Helena Armory
Lead discovery drives DEQ from Armory building

The old Armory building on Last Chance Gulch abruptly closed after initial contaminant sampling found lead dust at levels up to 40 times federal standards that warrant additional investigation.

Its immediate closure Monday displaces some 98 employees in the Department of Environmental Quality until further testing and abatement can take place.

The testing was the first step in implementing a plan that DEQ employees and department officials have developed during the past year in response to reports of employee health problems. They are awaiting results from other tests to determine whether mold, volatile organic compounds or any other airborne contaminants may have contributed to employee symptoms.

The complaints go back a decade, with reports from employees of various agencies housed in the building.

Current employees have been complaining about a variety of symptoms, including headaches, severe fatigue, chronic sinus infections and itchy skin, since the department moved into the building at the corner of Last Chance Gulch and Lyndale Avenue in 2002.

Part of the concern is related to the Armory’s past use by the Montana National Guard. Constructed in 1942 around the old city landfill, it housed an indoor maintenance shop and shooting range until 1994.

Last week, samples of lead dust were collected from areas above ceiling tiles throughout the building. Of 22 samples taken, 13 yielded lead dust concentrations above the acceptable workplace limit of 40 micrograms per square foot.

Samples from the second floor, where the shooting range once operated, were the highest — each above 100 micrograms per square foot, with one measuring 1,600 micrograms, or 40 times the limit.

Air and workplace surface samples have since been taken, but those results aren’t expected until later this week, so employees don’t yet know whether they have been exposed to lead in significant quantities.

Some may find it ironic that the DEQ’s remediation division, which is tasked with cleaning up contaminated areas, found its own building contaminated.

“The irony is not lost on us, but the issue is also the reason we are asking those detailed
questions, because we are DEQ and the remediation division,” DEQ Director Tracy Stone-
Manning said.

If the lead dust is just above the ceiling tiles, the problem may be more manageable to deal
with, said Sheryl Olsen, public information officer for the Montana Department of
Administration, which rents the Armory Building to DEQ. “That’s what we’re waiting for, to see
the extent of the problem.”

Regardless of what those tests say, Stone-Manning said she wants her employees working in a
safer atmosphere.

“People are not going back into that building until the plenums are cleaned, remediated and
tested again,” said DEQ Public Affairs Coordinator Lisa Peterson, referring to the space above
the ceilings that showed high lead contamination levels.

Meanwhile, the department is offering free blood tests to all employees who currently or have
worked there, hoping to detect any exposure to lead.

Olsen said the Department of Administration is scrambling to locate and notify past employees
who have worked inside the Armory so they can receive blood tests as well.

She wasn’t sure on Monday how many total employees may be at risk for exposure. “We’re
trying to get our arms around that universe right now,” she said.

Past employees living outside Helena as well as children of employees who were nursing or
pregnant are also encouraged to seek the free testing, Olsen added.

Officials said DEQ employees have been put on paid administrative leave through Wednesday.

“We’re trying to put everything in place to prevent as much disruption as possible,” Peterson
said.

Staff under critical deadlines will work remotely until temporary facilities are located, which
officials said will happen by Thursday.

Stone-Manning said she was looking for open office space on Monday afternoon.

At a department meeting early Monday morning, employees were given copies of the lab
results as well as a list of frequently asked questions pertaining to the situation.

For one question, “What does this mean for my health?” the following was provided:

“Many of you are aware of the difficulty of predicting illness based on environmental factors.
With lead contamination, risk is based on exposure and duration — how much you’ve been
exposed to and for how long. Results from the air test and your blood test will help you to
better understand your potential risk. We will share additional sampling results from the
building when we receive them.”

Last week was the first time a buildingwide test for lead particles was conducted, officials said.

“We have tested for lots of other things. We just hadn’t done a comprehensive test of lead. We
maybe missed the obvious,” Olsen said.

Peterson noted that the indoor shooting range was tested for lead and abated in 1994, but
similar testing was not conducted in other areas. She called lead testing one of the “data gaps” identified during the building contaminant testing plan developed over the past year.

“We’ve had some complaints from employees about that building even prior to DEQ being in that building. All the investigations that were done in the building from 1994 to 2009 were as a result of employee health complaints or site-specific complaints,” Peterson said.

David Bowers, an employee in the DEQ’s reclamation division, has been involved in the group that put together a plan over the past year to comprehensively test all aspects of the building. He described past testing procedures as taking “a shotgun approach” of evaluating small areas in response to specific concerns, which didn’t offer a thorough look at the building as a whole.

He said past testing shows evidence of due diligence, but the methods and results don’t provide enough information to fully assess the building.

“From our perspective, there wasn’t enough information to say yes or no and be satisfied,” Bowers said.

In 2012, department officials agreed to conduct a $90,000 study to assess the contaminant questions, which began last week.

Stone-Manning said employees’ questions and concerns from the last decade and finally the last spring were integral for the department’s decision to “pull the trigger” to do a comprehensive analysis.

“We work with the people who knew the right questions to ask,” she said.

“Turns out, we don’t like the first answer,” she added.

Hayden Janssen, however, thinks state officials should have addressed employee complaints long ago.

Janssen said he’s experienced some throat and sinus issues since joining the DEQ as a reclamation specialist a few years ago. As with some other employees, Janssen said his symptoms tend to subside when he is not in the office.

“We’re talking about physical scientists; they’re the people who actually know this. I think that merits an investigation long before the one that began on the 16th of this month.”

“I believe that this current administration are taking this seriously and understanding the gravity of this issue,” he added. “Previously, unfortunately I do not believe that was the case.”

Stone-Manning said questions about how the problem has been dealt with in the past deserve to be asked.

“The state of Montana needs to learn from this. My immediate concern is the immediate well-being of the people I work with,” she said.

“The decision we made today to temporarily close the building is truly a cautious decision,” she added, noting that all additional testing scheduled under the plan will still take place.

“I think people in the last year have certainly felt like we’re taking this very seriously,” Peterson said. “In the past year, we’ve really taken major steps forward.”
Janssen said he's glad employees were involved in drafting a sampling plan, but hopes “the parties that did not act when given the information in the past are held accountable as to why.”

“You're talking about a department that's charged with protecting health and human environment,” Janssen said. “We have to be accountable to our own employees as well.”
Mayor: City's top priority is mitigating landfill gases

AMANDA RICKER, Chronicle Staff Writer | Posted: Thursday, August 29, 2013 12:15 am

The city of Bozeman's highest priority right now is dealing with unhealthy gases detected in homes near the old landfill, said Mayor Sean Becker.

"There's no other issue that has higher importance for our citizens," Becker told a room packed with residents of the Bridger View subdivision during a meeting at the Holiday Inn this week.

The city brought in representatives from Tetra Tech, an environmental company hired to test and mitigate the issue, as well as officials from the Montana Department of Environmental Quality, to speak with the property owners.

Tetra Tech engineers tested the indoor air quality in the subdivision and detected volatile organic compounds, or VOCs, in at least 25 homes.

Brian Howard, a toxicologist with the company, said VOCs come from thousands of products, including gasoline, dry cleaning, paint and smoking. But the VOCs found in the subdivision may be coming from liquid chemicals degrading in the old landfill, then becoming gases and getting into the groundwater or air.

"The complicating issue here is that many of these chemicals are also found in household products," said Kirk Miller, senior project manager for Tetra Tech. "The city has made the decision that we are going to proceed as assuming these chemicals are coming from the landfill until we have data to show otherwise. So, we are taking a conservative approach."

Residents at the meeting said they're concerned about their health and losses in property value.

In small quantities, the compounds pose no health threat, Howard said.

"There's no acute risk," he said.

Mayor Becker said the city will do what it can to reduce the risks from any long-term exposure.

"Since 1970, our entire region has put their garbage in this landfill and it's our entire community's responsibility to make sure your homes are safe and that your air quality is perfect," Becker said.

He said the city will begin efforts in September to eliminate the VOCs.

"We're not taking any chances with this situation," he said. "We're going to be proactive with every step."

Miller explained that if residents choose to have a mitigation device installed in their home, the device would consist of a pipe that vents soil gas from beneath the home up and out through the home's roof and into the air. Sunlight degrades the gases.

Testing for the gases was done at homes on Caddie Court, St. Andrews Drive and Turnberry Court.

One woman said she has contacted three real estate agents to sell her home and none would list her property. She asked the city to survey VOC levels in other parts of the city, so potential buyers would have a comparison.

Howard said the federal government's recommended levels for allowable VOCs were set for sensitive populations like the elderly and children. The amount allowed for workplaces is much
higher.

In addition, he said all 11 of the VOC compounds detected were never found in the same home. The Bozeman landfill, which operated from 1970 until 2008, has had biannual groundwater tests conducted since 1981.

Earlier this spring, 14 ground probes placed near the old landfill's boundary indicated three areas of concern. That prompted the city to notify residents and to hire Tetra Tech to investigate the situation.

Rick Thompson, supervisor for solid waste at the Montana Department of Environmental Quality, said vapor intrusion issues are common around the nation as landfill technologies evolve.

Cities used to dump their garbage next to the river and burn it. Underground liners weren't required at landfills in Montana until 1994, Thompson said.

Becker said Bozeman plans to identify and deal with the source of the VOCs at the landfill after dealing with the nearby homes. Houses are the first priority. Eliminating the source of the VOCs, a process that follows specific government protocols, takes much longer.

For more information on the city's study of landfill VOCs, go to www.bozeman.net/Soil-Gas-Study.

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