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Anatomy of a gas spill in Montana: An attorney's view

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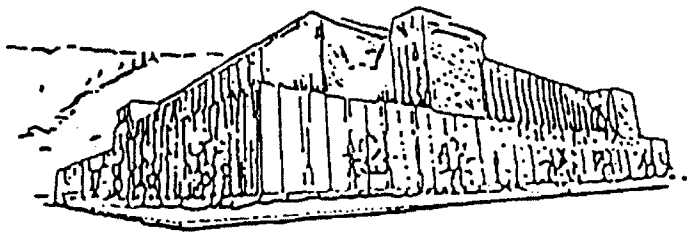

ANATOMY OF A GAS SPILL IN MONTANA: AN ATTORNEY'S VIEW

By

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TABLE OF CONTENTS

Preamble

The author is licensed to practice law in the State of Montana and had occasion to represent Gerald Miller in a lawsuit against City Services of Kalispell, Inc. The subject matter of the lawsuit relates to the emotional, physical and property damage sustained by Mr. Miller and his neighbors, the Twetos when a City Service gasoline tanker spilled approximately 4,223 gallons of gasoline in a ditch located directly above their homes. The author seeks to provide an attorney's viewpoint of an environmental-related lawsuit in the State of Montana along with editorial comments regarding same.

INTRODUCTION

On September 16, 1992, Jeffrey Pierce was driving a tank truck filled with unleaded gasoline along Montana State Highway 35, near Yellow Bay, when he felt a tug on his rig and glanced in his rear view mirror. He saw the dolly which he was carrying veer off the highway into the culvert alongside and turn over, spilling its contents. The tanker truck dolly had overturned on the east side of the highway, and released product[1] flowed down-slope into Flathead Lake via a network of streams, culverts and sisterns.

Pierce had worked for City Service of Kalispell, Inc. (hereinafter "City Service") for a number of years, and he was close to completing his 200-mile cycle at the time the gasoline spill occurred. He drove to the Yellow Bay Store, where he made several calls to his home office. His office, in turn,

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The information concerning the initial spill and response thereto is taken from the November 3, 1992 *Spill Response and Site Monitoring Activity Report*, created by Olympus Environmental, Inc. for the benefit of City Service, Inc. City Services used Olympus as its environmental engineer throughout the tenure of the clean-up campaign. The original report, which was submitted to the Confederated Salish and Kootenai Tribes, included an estimated spill of 1,500 gallons of gasoline. This "estimate" served as the basis for all underlying reports submitted thereafter until January 19, 1996, when, in its answers to several interrogatories, City Services stated that the estimated spill was approximately 4,223 gallons.

notified the local authorities.

A few hours later, several engineers from Olympus Engineering of Helena, Montana were on the scene to supervise "the clean up operations" on behalf of City Service.[2]

At the time of the accident, Gerald Miller and his friend Penny were inside their home on Flathead Lake, just downhill from the point of the gasoline spill. Shortly after the gasoline spill, a number of volunteer firefighters converged on the home and told Gerald and Penny to vacate the premises immediately. They were told that there was a chance of a fire as well as an explosion because of the gas spill.

Barbara Tweto and her daughter Carol Lawrence were sitting in their home (also located immediately downslope from the gasoline spill) when the same group of firefighters told them to vacate immediately. Barbara Tweto had a chance to take pictures of the overturned dolly, which was still leaking gasoline.[3] However, she did not have much time to do anything else and she

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2

These activities purportedly included a local emergency response team "[washing] the gasoline off the surface of Highway 35 with high-powered streams of water," but no one other than Olympus can remember any gasoline spilling on the highway. According to various Olympus reports and photographs, the dolly had flipped over after it left the highway, at which time it released its contents. In addition, "in order to restrict the spread of gasoline in the subsurface, soil was excavated from the gasoline filled ditch along the east side of the highway." Page 1 of November 3, 1992 Olympus Report.

3

Although she spent much time on the highway watching the "clean-up operations," Barbara Tweto could not recall any gasoline being sprayed off the highway. In addition, none

felt a sense of loss as she abandoned her home. She felt sickened as she watched unleaded gasoline pour into the culvert next to the highway and make its way down towards their property and Flathead Lake.[4]

Over the next two weeks the area on and near the Miller and Tweto residences reeked with a smell of gasoline, so strongly that it was necessary for Gerry Miller to move out of his home. Barbara Tweto became physically ill, feeling extreme nausea and incurring a continuous reaction to the noxious gasoline smells. Soon afterward, she noticed large patches of grass turning brown and dying in her yard.

The winter held new surprises for the Millers and the Twetos. As the result of what might be characterized as Olympus' hastily done "remedial work" which seemed to deal only with the immediate affects of the spill and not with a view toward long term remediation, a new pattern of surface and

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of her photographs show evidence of same. ("[By the time we got there], the gasoline was through the ditch. So it wasn't coming across the highway, so we weren't alarmed." Deposition of Barbara Tweto dated February 9, 1996, page 16, lines 14-21.

4

Soil was excavated from the gasoline filled ditch along the east side of the highway and an excavation trench was dug and the soil was hauled away by truck for stockpiling in City Services' yard in Kalispell. A total of 22 truckloads of soil were hauled to the property. Page 3 of November 3, 1992 Olympus Report. Immediately after the spill, two scientists at the Yellow Bay Biological Station conducted some independent studies on the effects of the gasoline spill on Flathead Lake. This author does not believe that subsequent tests were taken on the effects on Flathead Lake, however, one must query the lack of follow through by applicable government authorities in not pursuing subsequent testing on Flathead Lake. Would evidence of extensive environmental damage to the Lake triggered other applicable environmental laws or responses?

sub-surface springs and water runways were formed on and under both properties to create new runoff patterns. As a result, both residents suffered ice blocks which flooded their homes and caused havoc with their sanitation and water systems. The floods caused extensive damages to the residences[5] and despite Olympus' promise to pay for it, no payments were tendered.

The following spring, Miller and the Twetos started noticing the dying vegetation and trees, many of which were older, more mature trees adding to the area's beauty, and, according to both residents, additional value for their homes.

Throughout this period, Olympus continued to monitor the properties for contamination. Beginning from the date of the gas spill and quarterly thereafter, Olympus created a series of monitoring reports. From the date of the spill until January, 1996, Olympus conducted all monitoring based on the premise that a total of 1,500 gallons of gasoline had spilled onto the two properties. Interestingly enough, it was not until January, 1996, after almost two years of litigation between the parties, that City Service disclosed a

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[5] According to Gerald Miller, his basement flooded several times as the result of his water line becoming plugged up. According to Miller, Olympus put in a french drain and dumped the clay from the excavation in such a way as to cause blockage to his water line. In another instance, Olympus severed the water line and caused the basement to flood. When he told Olympus about the problems and asked the company to come up and fix them, Olympus responded that it was too busy. The company and Olympus told Miller that he should contact someone locally and he would be reimbursed. He contacted local contractors and paid them for the repairs, but he was never reimbursed. Deposition of Gerald Miller, pages 21-24.

leakage amount of 4,223 gallons. This reflected a significant increase over the original estimate, a noteworthy disparity given the fact that all monitoring and testing was performed on the basis of the original estimate of 1,500 gallons.

Olympus collected quarterly data for ground water, surface water and drinking water. Ground water monitoring data collected at Yellow Bay, adjacent to the spill site, showed an increase in petroleum contaminant concentrations over time.[6] TPH as gasoline (Total Petroleum Hydrocarbons) concentrations in ground water samples collected from the Olympus wells showed continual increases. Based upon these results, Olympus recommended installing an interception trench along with a ground water pump and treat system, to control the down-gradient migration of the dissolved-phase gasoline plume. Most of these suggestions were implemented, however, only after later recommendations such as injecting air under the highway were not.

Olympus installed a culvert recovery well and interception trench along the edge of Miller's driveway. Monitoring well M-2 had to be removed during construction activities in order to build the shed which houses the air stripper unit. The trench was backfilled with gravel, and 3/4-inch copper tubing was fused together and run from the recovery well to the air stripper unit to serve as the influent line. The air stripper, a LP500 series low-profile air stripper

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[6] See sample monitoring information attached hereto as Appendix A.

manufactured by Ejector Systems, Inc., includes two-trays to increase efficiency during aeration of the influent stream.[7] Mitigation measures were also completed on the Tweto property, including, but not limited to installation of a carbon treatment unit to remove gasoline odors from the Tweto's cabin water system plus shallow drain lines to drain saturated soil and gasoline odors from the property's marshy areas.

Selected soil samples from the excavation were sent to the laboratory and analyzed for benzene, toluene, ethyl benzene, and xylenes (BTEX), according to EPA Method 8020.[8] All soil samples were screened in the field for the presence of hydrocarbons. According to Olympus, the highest BTEX concentration of any excavation site was collected from the middle of the west wall of the excavation on September 17, 1992 , and soil samples collected on September 21, 1992; showed

both lower TIP II readings and BTEX concentrations: "These data indicate that the majority of gasoline contamination was removed."[9]

7

See diagram of remedial mitigation implemented by Olympus at Appendix B.

8

EPA Publication No. SW-846, "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods." Method 8020 is the method used to test benzene, toluene, ethyl benzene, and xylenes. Method 8020 detects benzenes using a photo ionization detector.

9

Subsequent quarterly reports indicate, however, that this statement was incorrect and overreaching. For instance, in its July 7, 1993, report, Olympus found significant benzene levels six and eight inches deep into the topsoil. Olympus, *Results of a Remedial Investigation and*

City Services' immediate reaction to the gasoline spill was to obtain the services of Olympus. Subsequently, those Olympus employees who were on this job formed a good rapport with Gerald Miller and the Twetos. As a result of Olympus' purported expertise, both were "lulled in[to this] false sense of security..."[10]

Approximately two months before the applicable statute of limitations expired, both the Twetos and Gerald Miller obtained separate legal counsel.[11] Gerald Miller obtained my services and the Twetos went to their old friend,

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Quarterly Monitoring Report for Yellow Bay, Montana, dated July 7, 1993. When Gerald Miller and the Twetos subsequently hired Land & Water Consulting, Inc., of Missoula, Montana as an expert, they found that "the magnitude of the dissolved phase plume appears to be underestimated on the Tweto property. During the site characterization, groundwater samples were collected from areas with little or no apparent soil contamination as measured in the field. Laboratory samples from the worst case sample points should have been collected to estimate the magnitude of the dissolved phase plume. Furthermore, the Olympus remedial investigation and site characterization did not rely on laboratory analysis to locate the highest concentration of total petroleum hydrocarbons and gasoline compounds in their design of corrective action measures for the site." Land & Water Consulting, Inc., *Review of Remedial Investigation & Action*, dated June, 1995, page 5. See copies of July 7, 1993 report and September, 1995 Land & Water reports attached hereto at Appendix C and D, respectively.

10

Deposition of Gerald Miller, February 8, 1996, page 71, lines 17-25; page 72-75. Throughout his deposition, Gerald Miller discusses the many promises made and broken by Olympus, such as a promise to pay for various repairs on the property, a promise to landscape and resod parts of his property, etc. In addition, Gerald Miller believes that he was almost lulled into a forfeiture of his right to sue for damages. He was relying on Olympus to clean up his property and he believed that it was doing what was right for him, and, as a result, he did not hire his own experts and, with his limited technical background, he could not have been expected to understand the long term ramifications of the gasoline spill. In addition, Miller almost missed filing an action for injuries involving person and property under Montana's 2-year limitations statute. MCA §27-2-207 (1995).

11

This was smart. Both parties and their respective attorneys turned out to have diverging views on the amount of damages applicable to the spill, and, in the long run, this difference allowed one party to settle prior to trail as discussed below.

Sherman Lohn, at the Missoula firm of Garlington, Lohn & Robinson.[12] For purposes of discussion throughout this paper, I shall describe Gerald Miller's case and make appropriate comments concerning the Twetos case, where necessary.

On September 7, 1994, Gerald Miller sued City Services and its driver, Jeffrey Pierce. Miller subsequently filed an amended complaint seeking damages as the result of the spill, alleging trespass[13], negligence[14], private nuisance[15], public nuisance[16] and strict liability for abnormally dangerous

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12

I would like to thank Stephen Brown, Esq., an associate of Mr. Lohn and a member of my graduate paper committee, for his invaluable assistance and support on this thesis. In addition, David Aronofsky and Tom Roy, the other members of my committee, provided great support and assistance with this paper.

13

A trespass is any unlawful interference with one's person, property, or rights. A "trespass" comprehends any conduct which damages another person's health, reputation or property. Black's Law Dictionary Abridged 5th Edition. A trespass may be committed on, beneath, or above the surface of the earth. RESTATEMENT, SECOND, TORTS §159(1) (1965). A person may be subject to liability for trespass if he intentionally, negligently, recklessly or through an abnormally dangerous activity enters land in possession of the other, or causing a thing, such as water or gasoline or water contaminated with gasoline constituents, to do so or failing to remove from the land a thing, such as water or gasoline or water contaminated with gasoline constituents, which the person has a duty to remove. Twetos Jury Instruction No. 28; Restatement (Second) of Torts §161(1) (1965); Guenther v. Finley, 236 Mont. 422, 425, 769 P.2d 917 (1989). See copy of Miller's Amended Complaint at Appendix E.

14

Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. A party is negligent by failing to act as an ordinary careful party would act under the circumstances. Montana Jury Instruction MPI 2.00.

15

A private nuisance exists when "one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor." Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953); Exxon v. Yarema, 516 A.2d 990 (Md. App. 1986).

activity. A subsequent amended complaint added counts of strict products liability and negligent infliction of emotional distress. The addition of negligent infliction of emotional distress allowed Gerald Miller to ask the jury for punitive damages.[17]

City Services and Pierce responded with an answer denying most

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The essential elements of the nuisance are: (1) defendant unreasonably interfered with plaintiff's use and enjoyment of plaintiff's property; and (2) defendant's conduct caused a substantial injury to the plaintiff or plaintiff's property. A claim of nuisance, unlike trespass, does not require a physical invasion of the plaintiff's property. RESTATEMENT (SECOND) OF TORTS §821D (1979). However, some states still hold that owners may not recover under private nuisance laws if the [spill] is not visible or otherwise physically perceptible form the owner's properties. Adams v. Star Enterprise, 51 F.3d 417 (4th Cir. Apr. 6, 1995). In Montana, the term "nuisance" may be described as anything that injures health, offends the senses, or otherwise obstructs the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property. On who creates or contributes to the creation of a nuisance is liable to any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. MCA §27-30-101(1); Gravely Ranch v. Scherping, 240 Mont. 20, 782 P.2d 371, 373 (1989).

16

"A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise." Mont. Code Ann. §27-30-203.

17

The Twetos never included an allegation of negligent infliction of emotional distress in their complaint as did Miller. A recent Montana Supreme Court case permitted inclusion of such a count. Sacco v. High Country Independent Press, Inc., et al, Docket No. 94-304, MT Sup. Ct., decided May 19, 1995, holding that negligent infliction of emotional distress could be pled as a separate cause of action so long as plaintiff's serious emotional distress was the reasonably foreseeable consequence of defendant's negligent or intentional act or omission. The Court held that emotional distress includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea, but only where it is extreme does liability arise... "the law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it." City Service argued that because the Twetos did not include a Sacco allegation and they were not entitled to damages relating to emotional distress, etc., the jury followed the Tweto's jury instruction to the effect that the negligent gasoline spill interfered with the Twetos property and found the Twetos entitled to an award for their pain, discomfort, fears, anxiety, annoyance, inconvenience and other mental, physical and emotional distress in awarding them additional damages in the amount of $250,000. French v. Ralph B. Moore Inc., 203 Mont. 327, 335, 661 P.2d 844 (1983).

liability and asserting that the exact cause of the accident was not, at that time, known. This answer set the stage for City Services to cross-claim against Beall, Inc., and Beall Trailers of Montana, Inc., the manufacturer of the tandem dolly which was used to carry the load which spilled on September 16, 1992.

In its cross-claim against Beall, City Service alleged that Pierce was pulling a trailer connected to this tractor unit by a reach tube. The reach tube is a portion of the tandem dolly which was designed, manufactured and sold by Beall, and City Service asserted that the tandem dolly unit was in a defective condition and unreasonably dangerous to users and consumers. City Service' claim was therefore that it had the right to obtain damages from Beall and contribution from Beall in the event Plaintiff received damages against City Service.[18]

City Service's cross complaint served as an effective method of delaying the litigation process for a long period of time. This cross complaint, coupled with City Service's claim that it had fully remediated all damages suffered by Miller as a result of the gasoline spill, lengthened final settlement for more

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[18] See Answer to Second Amended Complaint and Cross-Complaint filed in Montana Twentieth Judicial District Court, Lake County, Cause No. DV-94-281 at Appendix F.

than one year.[19] Strategically, the burden of proving damages to City Services and its insurance carrier shifted heavily to Miller and set the stage for a prolonged lawsuit--in other words, the defense had accomplished its apparent goal to delay the Plaintiff's case for as long as possible.

In addition to setting up and attending various depositions wherein all parties tried to ascertain what happened and why, the parties obtained the services of appraisers who valued the properties. Miller hired Tom Stuckey of Missoula and City Services hired Roger Jacobsen of Kalispell. Jacobsen found that Miller's property had a value of $275,000 immediately prior to the gasoline spill but he did not assess its value after the spill. Stuckey found that Miller's property had a value of $245,000 prior to the spill and calculated the gasoline spill effects to arrive at a value equal to the "salvage value."[20]

19

The Cross-Complaint against Beall was filed on August 7, 1995. Beall settled with Miller and was found not liable for any damages in the Tweto trial in April, 1997.

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Stuckey discussed the effect of fuel spills on property. "In cases where contamination has occurred where the site can be cleaned up, the effect of the fuel spill has an impact on the property, but does not substantially affect the value. The subject property does not have that possibility since major cleanup efforts could only remove up to 50% of the contamination. Because, in essence, the site cannot be cleaned up, the subject property would not be marketable. Stuckey said that only the improvements on the property would have a salvage value.

Stuckey stated that "a portion of the gasoline spill could be vaporized, some could degrade naturally, a portion could be absorbed to the soil or attached to the soil and other fuel can be dissolved in the ground water with a portion dissolved in the lake. There may be free phase gasoline floating in the ground water." Stuckey also discussed his conversations with Charley Vandam of Land & Water Consulting concerning cleanup: "Mr. Vandam [attempted] to address the possibility of cleaning up the site. One possibility of cleanup is to remove all shallow soil, or that area of soil within three feet of the surface, that is approximately

According to the U. S. Government, the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT") had jurisdiction over the spill.[21] Whereas City Services desired to clean the site up to Safe Drinking Water Act "maximum contaminant levels ("mcl") only, Gerald Miller desired that the site be restored to its natural, nearly pristine condition based particularly on the fact that the site had always been used for residential purpose. However, the CSKT established no cleanup level for soil and

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100'x150' or 2,000 yards of soil and remove it from the property. The cost of removal, transportation, assessment, monitoring, and tipping or placing in a land site would be approximately $60/yard or $120,000. Additional costs would be necessary for re-landscaping, restoration, and utility lines at Mr. Vandam's estimated cost of $50,000 to $80,000 or a cost of cleanup between $170,000 to $200,0000. This cleanup will only take out the topsoil impacted and does not involve ground water. Soils deeper than three feet will still be impacted by the fill. A second way to remove the contamination would be by the pump and treat method or installing several shallow wells and a treatment system on the property. Assuming a five year pump, the cost of this system would be between $170,000 to $255,000 or if both systems were completed the total cost would be between $340,000 to $465,000. Assuming that both systems were completed on the property the site will still have contamination. Mr. Vandam has stated that the two stated reclamation processes could potentially remove 50% of the gasoline, or in other words, leave 50% of the gasoline in the soil."

21

This fact was confirmed in writing when, after receiving a letter from me in my capacity as Miller's attorney, indicating Mr. Miller's desire to pursue a federal action under the RCRA statutes (42 U.S.C. §§6972(b)(2)(A), et seq.), the Attorney General's office of the State of Montana sent a copy of same to William Yellowtail, the Regional Administrator of the Environmental Protection Agency, in Denver, Colorado. The Montana Attorney General's letter stated, in part, "... while the State of Montana believes it has jurisdiction [over the gasoline spill] pursuant to applicable state laws over non-member fee lands within Indian Reservations, the EPA has retained all hazardous waste authority under RCRA which applies to "Indian Country" in Montana. [citing 59 F.R. 2752, 2753] Furthermore, pursuant to the Cooperative Enforcement Agreement between EPA and the State of Montana, the EPA has agreed to take timely and appropriate enforcement action for any violations of RCRA which occur in "Indian Country" within the State of Montana." Letter from J. Mark Stahly to William Yellowtail dated July 6, 1995. The EPA is empowered to enforce state program requirements against regulated entities, however, in this case it declined to do so. Wycoff Co. V. EPA, 796 F.2d 1197 (W.D. Wash. 1986).

mentioned in correspondence to Olympus that contaminated groundwater must be cleaned up to MCL levels. Of course, the lack of cleanup standards cast a considerable doubt over whether City Service would terminate its "cleanup activities" before work was complete to ensure protection of human health and environment. This concern was even more troubling given the lack of any formal risk assessment at the site by the CSKT. Nonetheless, the CSKT declined to pursue any further action (other than to receive monitoring reports from Olympus).[22]

ACTUAL AND POTENTIAL LEGAL ISSUES

It was up to Gerald Miller and the Twetos to enforce any property rights they might have through the civil courts. At the time they filed their complaints, it became apparent that the potential legal claims revolved around common law: trespass, negligence, private and public nuisance, strict liability for an abnormally dangerous activity, strict product liability and negligent infliction of emotional distress. While both Miller and Tweto complaints in

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[22] In Tribal attorney Marion Yoder's November 3, 1995, letter to Stephen Brown, the Twetos' attorney, she stated; "I am advised by our experts that existing data does not warrant further action by the Tribes at this time, although we do not disagree that some degree of hydro carbon contamination persists at the site." It is interesting to note that many Indian Nations have environmental standards and seek to impose them in a spill which affects their lands. The Blackfeet Nation has an environmental standard called "pristine standard" as pristine is the original condition of the land, air and water as if it were not polluted. Tribal Tradition and Custom language taken from Official Tribal and Blackfeet Community College Comments to Clean-Up Plan on March 30, 1995.

Lake County District Court, neither had pursued other legal remedies they might have, including claims based on the federal Resource Conservation and Recovery Act ("RCRA").[23]

RCRA[24] gives individuals the right to file a civil action in a federal district court with jurisdiction over the subject matter and seek the imposition of civil penalties. A precondition of filing any such suit, however, is that the individual give ninety (90) days prior written notice to the EPA Regional Administrator, the perpetrator and the state where the alleged endangerment may occur.[25]

To establish a prima facie case, one must demonstrate that: (1) the alleged endangerment stems from a solid or hazardous waste as defined by RCRA; (2) the alleged endangerment creates conditions which may present an imminent and substantial endangerment[26], and (3) the defendant has

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23 42 U.S.C. §6901-6992k.

24 Resource Conservation and Recovery Act, 42 U.S.C. §1601, et seq.

25 42 U.S.C. §6972(a)(1)(B). The courts have made exceptions to this notice requirement when there is a danger that hazardous waste may be discharged. Hallstrom v. Tillamook County, 493 U.S. 20 (1989).

26 To show imminent endangerment, one need not show that actual harm will occur immediately as long as the risk of threatened harm is immediately present. Imminent endangerment may be declared at any point in a chain of events if it may ultimately result in harm to the public. The endangerment need not require a showing of actual harm; rather, it means a potential or threatened harm--much the same as that which was perceived by Gerald Miller. Craig Lyle Limited Partnership v. Land O'Lakes, Inc., 877 F.Supp 476 (D.Minn. 1995). The threat of harm may be imminent even if the harm may not occur for years.

contributed to or is contributing to such handling, storage treatment, transportation or disposal.[27]

In this case, we learned that spilled oil fits the description of solid waste as defined in RCRA as: "any garbage, refuse ... and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities."[28] In addition, RCRA's implementing regulations and especially 40 C.F.R. 261.2(a) defines solid waste as: any "discarded material" in turn defined as any material which has been abandoned. Part 261.2(b) states that materials are solid wastes if they have been abandoned by being disposed of. Courts have held that petroleum product wastes fall under this definition, and are also actionable under the citizen's lawsuit provisions.[29]

United States v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985). A RCRA civil action, however, is not authorized to recover the prior cost of cleaning up toxic waste that does not, at the time of the lawsuit, continue to pose an endangerment to health or the environment. Meghrig v. KFC Western, 116 S.Ct. 1251 (1996). In Meghrig, the plaintiff sought damages from the former owners of the property for the costs of cleaning up oil contaminated soil. They termed these damages "equitable restitution." The court stated that the plaintiffs were entitled only to the remedies allowed by the statute, which did not provide for damages for past cleanup costs. Past cleanup costs do not comply with the statute since they do not meet the requirement that there is an imminent and substantial endangerment. To comply with this requirement, there must be a threat which is present now, even if the impact may not occur until later.

[27] Craig Lyle, supra.

[28] 42 U.S.C. § 6903(27).

[29] Craig Lyle, n. 26, supra, at page 481. The Court stated that discarded materials include those no longer serve their intended purpose and no longer wanted. Although

Another important aspect of a RCRA citizen lawsuit is that the court, in issuing any final order, may award costs (including reasonable attorney fees and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.[30]

Throughout the tenure of this lawsuit, Miller emphasized his right to initiate a RCRA citizen lawsuit in federal court even though the attorneys for City Service merely scoffed at such a threat. We believed, as did CSKT legal counsel, that such a lawsuit would have been viable in this instance, but only Miller and the Twetos had standing to initiate such an action.[31]

In addition to bringing a RCRA action, Marion Yoder, an attorney with

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petroleum products are useful, petroleum that has leaked into soil or groundwater ceases to be useful and cannot be used for its intended purposes. Zands v. Nelson, 779 F.Supp 1254 (S.D.Cal. 1991), holds that solid waste is defined very broadly and can include any discarded material, but not materials that are still useful products. The fact that a product might, at one point in time in the past been useful is of no benefit to those trying to avoid liability under the RCRA citizen suit provisions once the product's usefulness lapses. City Service, did, at times, insinuate that much of the gasoline which was initially recovered (although it was recovered along with soil, gravel, etc.), was still viable, and was therefore, still a viable product. The Zands case held that once gasoline leaks into and contaminates the soil, it is no longer a useful product. Zands, id. page 1262

[30] 42 U.S.C. §6972(e).

[31] Miller considered suing Olympus on RCRA violations. Olympus was essentially acting as a "response action contractor" during the remedial action taken on behalf of City Service. In order to ascertain Olympus' possible liability, we looked to the terms of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601-9675. Under CERCLA, a response action contractor is exempt from liability and all other federal laws for injuries, costs, damages, expenses, or other liability which result from a release which is the subject of the contractor's activities, unless the release (or threatened release) is caused by the contractor's negligence, gross negligence or intentional misconduct. 42 U.S.C. §9619(a)(2). We felt that we could not substantiate the burden of showing one or more of these three elements without unduly prolonging the lawsuit.

the CSKT Legal Counsel's Office, also suggested pursuing a claim under the Oil Pollution Liability and Compensation Act.[32] That Act limits the amount of damages that may be recovered. The total liability of a responsible party may not exceed (1) for a tank vessel, the greater of (A) $1,200 per gross ton; or (B)(I) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or C)(ii) in the case of a vessel of 3,000 or less gross tons, $2,000,000.

We believed that the problem of trying to use this law for damages revolved around trying to define City Service's truck as a "tank vessel." According to the statute, a "tank vessel" means a vessel "constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that: C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States."[33]

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The Act allows a private individual to seek cleanup costs for oil spills providing that: "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs or damages specified in subsection (b) that result from the incident." 33 U.S.C §2702(a).

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There is case law that might support a finding that City Service' truck was a "vessel" as defined in the Act. In United States v. Buntin, (1976, DC Tenn) 11 ERC 1061, a homeowner's motion to dismiss a complaint by the United States pursuant to the homeowner's contention that a home fuel oil heating tank was not an "offshore facility" as defined in 33 U.S.C. §1321(a)(10) and therefore he was not liable for oil leakage into a navigable river, was denied. The Court noted that §311(b)(1) provided that it was the policy of the United States that there should be no discharges of oil or hazardous substances into or on the navigable waters of the United States. The Court said the fact that the homeowner was not operating a commercial operation at his home had no effect on its ruling. See also Union Petroleum Corp. v. United States, (1980, Ct Cl) 14 ERC 2072, wherein the Court found that

Another notable problem was the three (3) year statute of limitation for damages which runs from the date of the loss or when connection of the loss with the discharge is reasonably discoverable with the exercise of due care. The three year limitations statute also applies to recovery of removal costs, three years after completion of the removal action.[34]

DAMAGES

From the inception of filing the lawsuit against City Services, we had no doubt whatsoever about defendant's liability for the spill. The more complex issue would be the amount of damages attributable to City Services and Beall, or in the event we obtained no concessions from either, the amount of damages which the jury would find.

As stated above, Miller and City Services each had appraisals prepared. These appraisals created a framework within which to begin calculation of total damages. Although it came as a surprise when City Service's appraiser came in with a higher pre-spill valuation on Miller's property than Miller's appraiser, we knew that there was still quite of bit of work to be completed.

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when vandals opened valves on two railroad cars that had previously been filled on an oil terminal and distribution facility, and which resulted in discharge of about 60,000 gallons of fuel oil, part of which reached a navigable waterway of the United States, the oil discharge occurred from an "onshore facility" owned or operated by the terminal.

[34] 33 U.S.C. §2717(f). Because of the time periods involved, Miller's best bet was to sue for recovery of removal costs.

Although we thought that there would be a permanent property loss because of the spill, City Service continued to maintain its position that time would attenuate the effects of the spill.

A major element of Miller's argument included the concept of "stigma" which refers to the pecuniary effect caused by an environmental "occurrence" on property.[35] To substantiate the fact that Miller's property had suffered a "stigma," we began assembling names of experts who would assist us in showing a jury how the gasoline spill had created a public perception of possible risks which thereby reduced or eliminated the property's value. Measuring the impact of stigma is more complex than measuring the impact of physical damage, although the best circumstances for assessing possible effects occur with residential properties where an active market exists for allegedly stigmatized houses. The market data permit the question of potential impact to be resolved through statistical and economic analysis rather than subjective

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"The meaning of the term "stigma" has changed over time and has been the subject of much debate. In some instances, the term is used to indicate a decrease in, or loss of, property value due to a perception that the property poses health or safety risks. In other instances, stigma is used to refer to a decrease in, or loss of property value caused by fear that a property owner may face future cleanup liability--for example, as a result of a government enforcement action or a third-party claim. However defined, stigma can stem from actual contamination on or near the property--even when no actual or potential environmental threat exists." Davis and Longo, *Stigma Damages in Environmental Cases: Developing Issues and Implications for Industrial and Commercial Real Estate Transactions*, 26 ELR 10345 (July, 1995). In order to protect one's client from liability for future governmental actions and/or third party suits, all final mutual releases must fully cover this possibility and hold your client harmless from any such liability.

judgment.[36]

In their writings, Wise and Guthrie stress that the goal in damage estimation is to determine what would have happened "but for" the alleged problem. In order to do so, they say a "baseline" must be established to satisfy the following two criteria:

- The baseline must not be affected by the impact; and
- Property value trends in the allegedly affected area (the subject area) must exhibit a predictable relationship to the baseline "but for" the potential impact.

According to most commentators, the loss of real property market value is measurable by objective and well-established testing techniques such as appraisals or on a hedonic regression analysis.

The basic idea behind measuring damage through appraisals is to analyze price differences in comparable properties. Because the properties are comparable, differences in the prices then indicate possible damage from stigma. Estimates of damage derived from this approach are often very precise because of the large amount of detailed information on the property.

A hedonic regression analysis is often performed by an economist using

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[36] Wise and Guthrie, *Correct Estimation of Stigma Damages: Avoiding the Pitfalls*, as presented at the Defense Research Institute Inc.'s Environmental and Chemical Exposure Seminar in Baltimore, MD April 20-21, 1995.

market sales data to reflect the buying public's reaction to the revelation that particular properties have been affected by close proximity to a toxic waste dump or spill. Hedonic analysis evaluates the contribution of each feature to the value of the whole. This can be accomplished statistically using regression analysis to estimate coefficients in the following type of model:

$$Value = a + b\ (square\ feet) + c\ (bedrooms) + d\ (bathrooms) + e\ (location) + \ldots + unexplained$$

The estimated values of the coefficients (*a, b, c, d, e,...*) indicate the marginal contribution to the value from an incremental change in each feature.

In most cases, those whose conduct cause stigma damages appear to consider it unfair that they should have to pay for this intangible damage caused by the "unfair" public perception of the disadvantages of living near a waste dump or spill.[37] Roisman and Mason explain the effect of "stigma" on the homeowner:

> "One consequence of the interference may be a large loss in market value. The drop in market value, in turn, impairs the owner's ability to sell the property at a fair price, obtain home financing, or otherwise freely use his property. This too substantially and unreasonably interferes with one's property, as the right to alienate property is as much an attribute of

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Roisman and Mason, *Nuisance and the Recovery of Stigma Damages: Eliminating the Confusion*, 26 ELR 10070 (February, 1996). Mason and Roisman point out that the same perpetrators who scoff at the recovery of "stigma" damages, "would fight vigorously if they were told that they could not list their "goodwill" on their balance sheets or if expenditures for goodwill advertising were disallowed as ordinary and necessary business expenses under the Internal Revenue Code." 26 ELR 10071.

> ownership as the right to barbeque in the backyard or open a window on a warm night.
>
> In most cases of environmental contamination, there is simply no scientific certainty of safety, at least not for many years, and the decline in market value is long term. The reason for the prolonged uncertainty is apparent. Toxic emissions in the air and massive discharges into the groundwater are, by nature, difficult and often impossible to demarcate. One difficulty lies in the limitations of scientific technologies. Even the best technology cannot predict the migration of contamination with absolute certainty, nor can it achieve a complete cleanup in the sense that the site will be returned to the condition it was in before the contamination. In the typical property damage case, the scientific community is simply unable to provide assurance about the long-term effects of exposure to the contaminants on the health of the residents.[38]

As the result of rounding up a list of potential expert witnesses, we found out that the practical effects of a gasoline spill on a residential property can be significant. We lined up a mortgage broker from Bigfork who would testify that the capability of either refinancing or obtaining a new loan for a purchaser would be minimal. We talked with the general counsel of a title insurance company who said that there would be a cloud on the title of the property until the title company could definitively ascertain the environmental state of the property. We also obtained an appraisal which found that the property, for all practical purposes, had little or no value other than the

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[38] 26 ELR 10073.

salvage value of the residence and building remaining thereon.[39] We also discussed the property's relative value with other area real estate brokers who agreed that the value of the property had been affected, whether through actual contamination, or stigma.[40]

In addition to stigma damages, of course, Miller should be entitled to compensation for damages sustained by him and those incurred by his property.[41] Because Miller suffered physical[42] and mental anguish as the result of the gasoline spill, we also included a claim for negligent infliction of

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Tom Stuckey is a reputable appraiser and his final report greatly assisted us with Miller's case, although I tend to disagree with his bottom line. Ample evidence tends to support the fact that the effects of the gasoline spill were being attenuated over time and that the site would eventually restore itself to a reasonable level, although never the same as prior to the accident. I believed all along that the property had value and that Miller could have sold it to someone, although that value would have been less than comparable homes in the area, at least for awhile.

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"Damage to real property has both an individualized and a market component...[T]o some extent, the values of *all* property [in the identified area are] adversely impacted the moment the marketplace learn[s] of the release of these toxins. That is true whether or not the Plaintiff's property has in fact been physically affected at all." Escamilla v. Asarco, Inc., No. 91 CV 5716, slip op. (D. Ct. Colo., Denver County Apr. 23, 1993; and Bixby Ranch Co. v. Spectrol Elecs. Corp., No. BC052566, slip op. (Cal Super. Ct. Los Angeles County, Dec. 13, 1993), wherein the jury awarded damages for "permanent post-cleanup stigma" based on an expert's conclusion that property would carry a stigma discount after restoration.

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"Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." Mont. Code Ann. §27-1-202.

42

Approximately two years after the gasoline spill, Miller began suffering from asthma. Miller had never had any trouble with asthma-related symptoms previous to the gasoline spill.

emotional distress in the complaint against City Service, potentially entitling Miller to an award of damages for emotional or mental distress.[43]

SETTLEMENT

From the inception of the lawsuit, City Services was reluctant to come to the table and propose settlement, relying instead on a combination of delay; an argument that the spill was cleaning itself up; and its insistence that the whole matter would not have occurred but for the negligence of Beall in manufacturing a defective dolly.

However, the court rules applicable to this particular lawsuit, combined with the possibility of a bad faith claim against the insurer for failure to use reasonable efforts to settle a claim, mandated that the Defendants made good faith efforts toward settlement.[44]

In this case, liability was quite clear; City Service's actions or inactions had caused the gasoline spill on Gerald Miller's property. City Service sought to bring in a third party, Beall, in an attempt to effectuate contribution from them for the accident. City Service never claimed, however, that anything occurring before, during or after the gasoline spill was in any way attributable

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[43] Mont. Code Ann. §27-1-310.

[44] Mont. Code Ann. §33-18-201 disallows practices by insurance companies wherein they "neglect to attempt in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." §33-18-201(6).

to Gerald Miller's actions or inactions.[45] Therefore, the liability was clear and the burden of attempting to settle the case in good faith shifted to City Service and, secondarily, to Beall plus Beall's insurance carrier.

In addition to a possible claim of bad faith that City Services' insurance carrier had delayed attempting to settle the matter[46], the Local Rules of the Fourth Judicial District of the State of Montana became applicable when Lake County Judge McNeil had to recuse himself after appointing Missoula District Judge Ed McLean in his stead.[47] The Local Rules of the Missoula District Court mandate that a settlement master be appointed by the parties, or, if they cannot agree, then by the judge. The appointee then would act as settlement master during a mandatory settlement proceeding which takes place between all parties to the lawsuit.

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Judge McLean awarded partial summary judgment against City Services on negligence *per se*, finding that City Service had violated many state, federal and local environmental statutes when it spilled the gasoline. See discussion below.

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As stated herein, there was no question about City Service's liability for the gasoline spill. Nonetheless, City Service's attorney attempted to delay ultimate settlement in this matter by insisting that the results of the gasoline spill were minimal and final cleanup would occur shortly, based on Olympus' cleanup efforts. Therefore, it was first necessary for Miller to hire another environmental engineering firm to solidify his position that the spill affects were longer term and greater in magnitude. We also considered the fact that we were not informed about 4,223 gallons of gasoline spilling (rather than 1,500) until two years after the lawsuit began another example of bad faith by City Service's insurance carrier.

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Judge McNeil's son, Charles, is a partner with Garlington, Lohn & Robinson, the firm handling the Tweto claims and was the partner in charge of the Tweto trial. His father had to recuse himself from the case and appointed Missoula County District Court Judge Ed McLean to hear it.

Although the Plaintiffs attempted to set up a settlement procedure, City Service seemed to drag its heels by sometimes indicating that it did not have a list of the available settlement masters (a list is published by the Clerk of the Court); and at other times, by not agreeing on which settlement master would work. The parties finally selected Robert Emmons, a respected sole practitioner who had been in practice for many years in Great Falls.

When the settlement conference finally took place there was great disparity between many of the parties. The Twetos, an older couple, desired to move out of their home and wanted full payment for the value of their home (but for the spill) along with damages.[48] On the other hand, Gerald Miller wanted to stay in his home which he had built with his deceased wife in 1964; and he sought payment for damages done to his property and to his person.[49] During the settlement conference, the Twetos requested damages in

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Ms. Tweto, who is 69 years old, was both psychologically and physically affected by the gasoline spill. Because of an elevation difference between the Miller residence and the Twetos' property, a greater amount of gasoline might have ended up on the Twetos' property. In any event, the fumes emanating from the gas made Ms. Tweto seriously ill.

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Gerald Miller's wife passed away some time ago and it was his desire that her urn and his be buried together on the property.

an amount 267% greater than that requested by Gerald Miller. During trial, however, the Twetos lowered their settlement demands.[50]

The settlement conference lasted an entire day, and at the end it was apparent that the Twetos stood little chance of settling their claims. It also became apparent that Gerald Miller's claims could be settled within certain parameters. As of the date of this paper, Gerald Miller's claim has been settled and he has received full payment from both Beall and City Services. The settlement with Beall occurred quickly, but City Services' proposed Settlement Agreement elicited several comments from Gerald Miller and his attorney. Eventually these matters were worked out in full with City Service and Gerald Miller's case has been dismissed with prejudice.

On March 21, 1997, Judge McLean ruled on the Tweto's Motion for Summary Judgment wherein the Twetos argued that there were violations of numerous state, federal and tribal environmental laws, making City Service liable for negligence *per se*.[51] City Service did not dispute that all of the

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Because Gerald Miller settled his portion of the lawsuit and both Beall and City Services' required that all settlement amount remain confidential, it is not possible to discuss exact numbers in this thesis.

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Under Montana law, the elements of negligence per se include: (1) the defendant violated a particular statute; (2) the statute was enacted to protect a specific class of persons; (3) Plaintiff is a member of that class; (4) the plaintiff's injury is the sort the statute was enacted to prevent; and (5) the statute was intended to regulate a member of defendant's class. Hislop v. Cady, 261 Mont. 243, 247, 862 P.2d 388, 391 (1993).

elements of negligence *per se* and a nuisance *per se* claim were satisfied, based on contamination of the Tweto's property in violation of state, federal, and tribal environmental laws. According to the Court, City Service "cannot deny that the gasoline spill from its tanker violated numerous contamination provisions, federal, state and tribal, enacted for purposes of protecting innocent victims from such contamination."[52] Judge McLean found the Twetos entitled to partial summary judgment holding City Service liable for their damages, leaving for trial the issue of whether Beall had to share that liability and the amount of damages to which the Twetos were entitled.

On April 10, 1997, the Twetos and their counsel went to trial against City Service and Beall. A 12-0 jury awarded them $190,000 for property damage and $250,000 for bodily injury and emotional distress caused by the gasoline spill on their property. The jury rejected negligence and product liability claims against Beall on City Services' claim that the spill occurred because Beall had manufactured a defective trailer reach tube. Therefore, Beall was found to have had no responsibility whatsoever for the gasoline spill. The jury also found that City Service's negligence and the nuisance which it created were substantial factors in the Twetos' damages. The jury believed

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[52] Judge Ed McLean's Opinion and Order dated March 21, 1997, page 3.

that City Service trespassed on the Twetos' property and the trespass was also a substantial factor in their damages.

Finally, the jury found that City Service had ongoing responsibility for continuous environmental remediation and clean-up costs.

According to a submitted report, the Twetos had demanded the sum of $750,000 during the trial and pretrial offers were $100,000 from City Service and $150,000 from Beall. As of the date of this paper, City Services has expressed its desire to appeal the judgment. City Service has cited as grounds for the appeal that the damages awarded for the Twetos' pain and suffering should not have been awarded because the Twetos failed to include a claim for negligent infliction of emotional distress in their complaint; and that the amount of damages awarded for same ($250,000) was too high. It might be advisable for the Twetos' attorneys to suggest to the attorneys for City Service an argument that City Service was guilty of bad faith negotiation throughout the litigation and, as a result, the Twetos intend to initiate a lawsuit alleging bad faith against City Service. The damages awarded to the Twetos seem fair and reasonable, in this author's view.[53]

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[53] City Service did not appeal and paid the Twetos the full amount of the judgment.

CONCLUSIONS

There are several conclusions that one can draw from this long and drawn-out experience. Primary among them is that the defense in any such case, unless up against the proverbial wall, will attempt to greatly lengthen the time periods involved in any similar lawsuit.

I have tried to ascertain what I might have done differently; what could I have done to speed up this process? I have considered the effect of filing both the state (common law) action along with a federal lawsuit based on RCRA violations. Although this action might have helped to speed the process[54], both are merely civil matters brought in different jurisdictions. Adept defense counsel could probably delay both cases for a period of time, however, it is this author's experience that the Federal Courts are more time efficient and that Federal Judges and/or magistrates do not easily put up with delay stratagem.

Perhaps the best alternative to litigating this case requires increasing the degree of involvement of the government entity with primary jurisdiction over the spill. Here there was a preliminary question among state, federal and tribal authorities about who had primary jurisdiction over this spill, which

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[54] RCRA claims must be filed in Federal District Courts and allow an award of attorney fees to the victor.

occurred on land normally overseen by the CSKT tribe. Somewhere during the early phases of the case, the lines of authority became blurred and this spill fell through the cracks. CSKT demonstrated no forcefulness when it came to clean up, and also demonstrated few definitive clean up standards or any direction toward final remediation of the spill. The federal authorities could take no action because of the jurisdictional dilemma in which they found themselves and the CSKT apparently had little or no interest in the matter. The only real response plaintiff came when plaintiff initiated contact with the tribe, not otherwise. Therefore, all parties involved had to fend for themselves with no direction from CSKT.

Without adequate knowledge of relevant law, neither Gerald Miller nor the Twetos stood a chance against City Service and Olympus. City Service had Olympus oversee clean-up over a long period of time, during which members of the Olympus team developed a strong rapport with Mr. Miller and the Twetos. This relationship harmed the plaintiffs by inducing the latter to wait until the statute of limitation was about to expire before seeking third party advise. Because of the time periods involved at that late time, the only path open to either Plaintiff was to file a lawsuit. Immediately after filing the lawsuit, the Plaintiffs began feeling anger; they were upset because they did not know the extent of the damages to their property and they were upset

because they thought that Olympus had misled them throughout the clean-up process. On the other hand, had the Plaintiffs received some sort of direction (which could arguably have been supplied by the proper state or federal authorities), they might have understood what their rights were at an earlier stage of the clean-up, thereby enhancing the likelihood of settling the matter outside a court of law.[55]

Once the attorneys became involved in the lawsuit, there was little likelihood of a quick settlement. The attorneys first had to assay their respective legal positions (while learning more about certain technical and legal aspects of environmental spills) and then the attorneys had to go position themselves accordingly--they had to represent their clients zealously while, at the same time, endeavoring to establish a "clucking order" wherein each attorney ascertains his position in the power structure at work in any particular lawsuit. The author finds this exercise to be an intricate part of the initial stages of most lawsuits.

By the time the attorneys have exhausted this stage of the lawsuit, the parties are sufficiently distrustful of the other thereby assuring continuing litigation which in turn, inevitably produces more attorneys fees for defense

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[55] Plaintiffs each hired an attorney, and that attorney had to be paid. It is customary in a tort action such as this for the attorney to take the matter on a contingency basis in which case the attorney might receive a fee equal to 25-33.33% of the judgment/settlement. Therefore, the injured parties receive less than the reported judgments.

counsel and further delays possible settlement negotiations.[56]

The Miller case is an example of the defense tactics which plaintiff's counsel might expect in an environmental lawsuit. Therefore, not only is it important for a potential plaintiff in an environmental lawsuit to plan strategy prior to filing a complaint, it is also important to educate oneself on environmental damage and applicable cases and statutes pertaining thereto from the moment a potential plaintiff discovers the environmental damage. If Gerald Miller had been more aware of his legal rights from the time he discovered the gasoline spill on his property, the chances are good that he could have avoided a prolonged lawsuit; he could have asserted his rights at a early stage which would have set the direction for other parties to the lawsuit. More importantly, if Gerald Miller would have been offered direction from a viable governmental entity, it is this author's view that this matter could have been resolved much quicker, even possibly avoiding a lawsuit.

RECOMMENDATIONS

How does one assert ones' position when one is not aware of what rights one might have? Minimally, I think it is important for the governmental agencies with jurisdiction over environmental damage to provide

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[56] Defense counsel in cases such as this, are usually hired by the defendant's insurance company and are paid on an hourly basis.

involved parties with information regarding their respective rights and responsibilities.[57] When I asked Gerald Miller what he would have done had he understood the full extent of his rights, he indicated that he would have asserted more forcefulness at an earlier stage of the transaction. Timely assertion of plaintiff's rights along with assistance from a viable governmental entity can lead to a quicker settlement which, in this author's view, is both economically and emotionally beneficial for all involved parties.

I also suggest amendments to existing environmental-related statutes wherein all persons/entities involved in environmental spills/occurrences are made responsible for supplying certain information to aggrieved parties. This information could be in summary form, however, legislation should mandate supplying it to aggrieved parties within a certain time period following the occurrence.[58]

Generally, this informational package should include references to applicable state and federal statutes as well as summary information about common law remedies and how they might protect aggrieved persons. It should also contain information about applicable statutes which might limit

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This might be a good project for interested environmental studies students and/or other environmental activists.

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In a gasoline spill such as this, the information should be delivered to the potentially-injured party within thirty (30) days following the occurrence.

the aggrieved person's rights to bring legal action (such as applicable statutes of limitations) and information regarding the fact that one or more state or federal agencies might have jurisdiction over the spill/occurrence and that these agencies should be contacted immediately.

A notation (preferably in larger, boldface print) that aggrieved persons might have certain legal rights which they must exercise within certain time periods, or, failing to do so, they might lose should also be a requirement.

Finally, the law should have some teeth; such as an increased fine, penalty or provisions for increased damages for those who do not comply with the notice requirements. The law could also provide for attorney's fees to be awarded to the prevailing party for failure of one of the parties to comply with its provisions. I also suggest a new law wherein the issue of damages evolving out of an environmental spill/occurrence must be submitted mandatory arbitration within one-hundred eighty (180) days from the occurrence[59] if the possibility exists that (1) the party accused of the spill/occurrence may be found guilty of negligence *per se*[60]; and/or (2) The responsible party may be found liable for the spill/occurrence prior to or during trial; and/or (3) The

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[59] Although this is an arbitrary number of days, the time limit should not exceed a reasonable period of time after the spill/occurrence.

[60] See discussion of negligence per se in footnote 51, supra.

responsible party(ies) do(es) not deny responsibility for the spill/occurrence but is merely contesting the amount of damages.

This statute must also have teeth. The legislature might provide for additional penalties and/or sanctions for failure to comply with the law, including an award of attorney's fees and costs to the prevailing party. The prevailing party must also be able to enforce an arbitration award in a court of competent jurisdiction.

Lastly, the applicable state statutes covering imposition of costs which are awarded to a prevailing party should be amended so as to allow recovery of certain costs expended in prosecuting/defending an environmental spill/occurrence. Allowable costs should include recovery of independent studies/reports and related expert witness costs obtained by a party, so long as said studies/reports were prepared by said party in anticipation of arbitration/litigation and the court, finds that said expenditures were necessary in order to fairly represent to the court/jury/arbitrator the amount of damages incurred as the result of said spill/occurrence.[61]

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[61] In Montana, costs are recoverable by the prevailing party in an action for the recovery of real property or damages thereto. Mont. Code Ann. §25-10-101. The costs which are generally allowable in Montana include but are not limited to the expenses of taking depositions, the legal fees of witnesses, the legal fees of publication, and such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law. Mont. Ann. Code §25-10-201. Currently, in some cases, the court has the discretion to award costs, however, the court must not abuse its discretion in doing so. Mont. Code Ann. §25-10-103.

APPENDIX A

OLYMPUS SPILL RESPONSE AND SITE MONITORING ACTIVITY REPORT DATED NOVEMBER 3, 1992

1.0 INTRODUCTION

This report summarizes the site cleanup activities and environmental monitoring of a gasoline spill that occurred at Yellow Bay, Montana on September 16, 1992. The report is organized into sections that discuss the spill response actions and site monitoring activities of Olympus Environmental for the period from September 16, 1992 to October 3, 1992. Section 2.0 describes the spill location, size, and principal responsible parties. Excavation and trench sampling activities, as well as analytical results for soils are discussed in Section 2.1.

A description of the surface water conditions, water sampling locations, and analytical results for surface water are provided in Section 2.2. Laboratory results for local drinking water supplies are presented in Section 2.3. Soil boring and ground water monitoring activities are described in Section 2.4. This section includes analytical results for ground water samples, as well as a description of the subsurface stratigraphy and aquifer. Conclusions are presented in Section 3.0 and recommendations in Section 4.0.

2.0 SPILL RESPONSE AND SITE MONITORING ACTIVITIES

On September 16, 1992 Olympus Environmental, Inc. responded to a gasoline spill on Montana State Highway 35, at Yellow Bay, Montana, that resulted from the overturning of a City Service, Inc. tanker truck (Figure 1). An estimated 1,500 gallons of gasoline were released by the tanker. Local emergency services, the Montana State Disaster and Emergency Services (DES), tribal officials from the Confederated Salish and Kootenai Tribes and personnel from City Service, Inc. were all represented at the site.

The gasoline tanker truck had overturned on the east side of the highway, and released product that flowed down-slope into Flathead Lake via a network of streams, culverts and cisterns (Figure 1). Tribal officials employed sorbent booms to contain the spreading of the product on the lake water surface. A ditch located on the east side of Highway 35, at the point of release, contained an estimated 3-5 inches of free product. This free product was suction pumped by Cities Service into a standby tanker truck. The remaining product within the overturned tanker was also pumped into the standby tanker truck.

A local emergency response team washed the gasoline off the surface of Highway 35 with high-powered streams of water. In order to restrict the spread of gasoline in the subsurface, soil was excavated from the gasoline filled ditch along the east side of the highway. Local residents, with homes down-slope of the spill, were contacted and warned not to drink their household water. The excavation trench was dug and the soil was hauled away by truck for stockpiling.

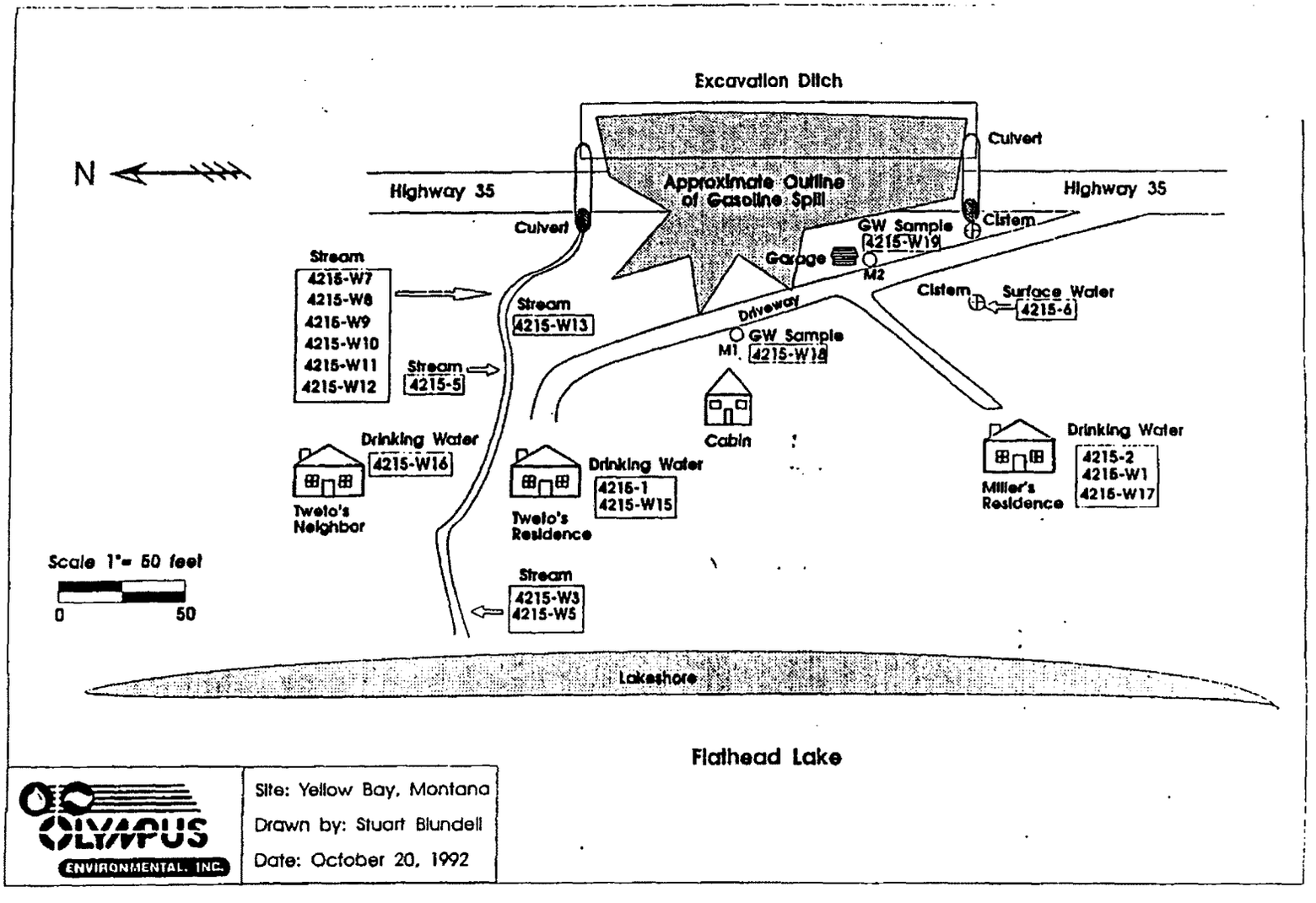


Figure 1. Site map of Yellow Bay showing the outline of the gasoline spill. Water sampling and domestic residence locations are shown as well.

A local contractor, Jenson Excavating, dug the trench and the firm of McElroy & Wilkin, Inc. transported the dirt. A total of 22 truckloads of soil were hauled to City Service property in Kalispell, Montana.

2.1 Excavation

The excavation trench was dug on the east side of Highway 35 on September 16, 1992. Dimensions of the trench were approximately 150 feet in length, 6 feet in width, and 4 feet in depth (Figure 1). A reverse siphon dam was installed on the north end of the excavation to prevent further surface runoff of the product contained in the trench. Culverts are located at either end of the excavation which drain surface runoff water from the east side of the highway downslope to the west.

The original excavation trench was deepened on September 21, 1992. Sorbent pads that had become saturated with product were removed, and clean sorbents were placed in the excavation and sump. After the trench was dug, a snow fence and flagging were installed to warn motorists and prevent entrance into the excavation. On October 1, 1992 the remaining saturated sorbent pads were removed from both the excavation and the Yellow Bay area on Flathead Lake.

2.1.1 Soil Sampling

On September 17, 1992 soil samples were collected from the east and west walls of the excavation (Figure 2). All samples were collected under the guidance of the Olympus quality assurance and quality control program for field sampling of soils (Appendix A). A thin (quarter-inch) layer of gasoline was observed on the surface of water that filled the trench at a depth of 3 feet during sampling. Sorbent pads were used to cleanup this free product. Additional soil samples were collected from the excavation on September 21, 1992 after it was deepened.

2.1.2 Analytical Results for Soils

Selected soil samples from the excavation were sent to the laboratory and analyzed for benzene, toluene, ethylbenzene, and xylenes (BTEX), according to EPA Method 8020. All soil samples were screened in the field for the presence of hydrocarbons with the TIP II photo-ionization detector, calibrated to Isobutylene, and according to the headspace method. Table 1 summarizes the results of the laboratory analyses and field screening for soil. The laboratory analytical data is included in Appendix B.

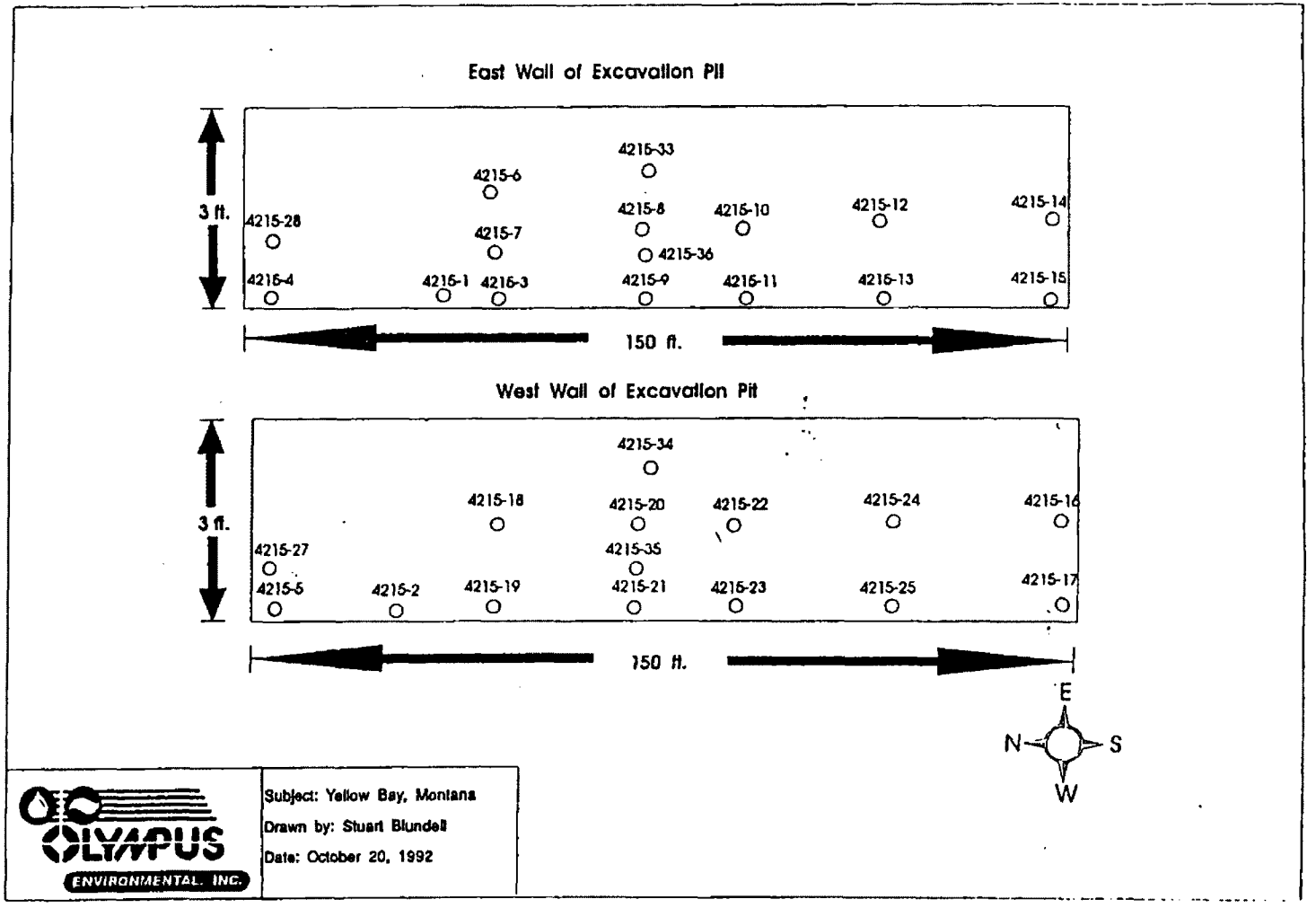


Figure 2. Side views of excavation trench showing soil sample locations.

Table 1. Soil Quality Analyses

Sample Description	Sample ID	Sample Date	ug/g(ppm) Benzene	Toluene	Ethyylbenzene	Xylenes	Total BTEX	TPH	TIP II
Excavation Floor	4215-1	9/16/92	NA	NA	NA	NA	NA	NA	450
West Sidewall	4215-2	9/17/92	NA	NA	NA	NA	NA	NA	400
East Sidewall	4215-3	9/17/92	NA	NA	NA	NA	NA	NA	60
East Sidewall	4215-4	9/17/92	NA	NA	NA	NA	NA	NA	580
West Sidewall	4215-5	9/17/92	NA	NA	NA	NA	NA	NA	425
Middle East Sidewall	4215-6	9/17/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	14
Base East Sidewall	4215-7	9/17/92	<0.20	<0.20	<0.20	0.21	<1.0	NA	440
Middle East Sidewall	4215-8	9/17/92	NA	NA	NA	NA	NA	NA	20
Base East Sidewall	4215-9	9/17/92	NA	NA	NA	NA	NA	NA	180
Middle East Sidewall	4215-10	9/17/92	NA	NA	NA	NA	NA	NA	280
Base East Sidewall	4215-11	9/17/92	NA	NA	NA	NA	NA	NA	440
Middle East Sidewall	4215-12	9/17/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	5
Base East Sidewall	4215-13	9/17/92	NA	NA	NA	NA	NA	NA	9
Middle East Sidewall	4215-14	9/17/92	NA	NA	NA	NA	NA	NA	3
Base East Sidewall	4215-15	9/17/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	2
Middle West Sidewall	4215-16	9/17/92	NA	NA	NA	NA	NA	NA	4
Base West Sidewall	4215-17	9/17/92	NA	NA	NA	NA	NA	NA	6
Middle West Sidewall	4215-18	9/17/92	<0.20	6.2	9	41	56.4	NA	589
Base West Sidewall	4215-19	9/17/92	NA	NA	NA	NA	NA	NA	413
Middle West Sidewall	4215-20	9/17/92	NA	NA	NA	NA	NA	NA	520
Base West Sidewall	4215-21	9/17/92	NA	NA	NA	NA	NA	NA	240
Middle West Sidewall	4215-22	9/17/92	NA	NA	NA	NA	NA	NA	170
Base West Sidewall	4215-23	9/17/92	NA	NA	NA	NA	NA	NA	390
Middle West Sidewall	4215-24	9/17/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	53
Base West Sidewall	4215-25	9/17/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	249
Excavation Floor	4215-26	9/21/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	4
West Sidewall	4215-27	9/21/92	NA	NA	NA	NA	NA	NA	6
East Sidewall	4215-28	9/21/92	NA	NA	NA	NA	NA	NA	5
South of Stream	4215-29	9/21/92	NA	NA	NA	NA	NA	NA	130
South of Stream	4215-30	9/21/92	<0.20	<0.20	<0.20	0.28	<1.0	NA	16
Base of Culvert	4215-31	9/21/92	<0.20	0.44	<0.20	0.78	<2.0	NA	180
Between Two Culverts	4215-32	9/21/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	7

Table 1. Soil Quality Analyses

Sample Description	Sample ID	Sample Date	ug/g(ppm) Benzene	Toluene	Ethyylbenzene	Xylenes	Total BTEX	TPH	TIP II
West Sidewall	4215-33	9/21/92	NA	NA	NA	NA	NA	NA	11
East Sidewall	4215-34	9/21/92	<0.20	<0.20	<0.20	<0.20	<1.0	NA	10
West Sidewall	4215-35	9/21/92	<0.20	0.38	0.44	1.8	<3.0	NA	240
East Sidewall	4215-36	9/21/92	NA	NA	NA	NA	NA	NA	7
Monitor Well #1	B1, 3-4'	9/29/92	NA	NA	NA	NA	NA	<2.0	32
Monitor Well #2	B2, 3-4'	9/29/92	NA	NA	NA	NA	NA	<2.0	2
Monitor Well #2	B2, 8-9'	9/29/92	NA	NA	NA	NA	NA	<2.0	210

NA= Not Analyzed

Sample 4215-18 contained the highest BTEX concentration of any excavation sample. This sample was collected from the middle of the west wall of the excavation on September 17th. Soil samples collected on September 21, 1992 showed both lower TIP II readings and BTEX concentrations. These data indicate that the majority of gasoline contamination was removed.

2.2 Surface Water

The residential property sites affected by the spill are located on the eastern shore of Flathead Lake. A steep slope drains the hillside immediately to the east of the lake shore and across Highway 35. Surface water runoff drains downslope to the west, towards the lake, and occurs through a network of culverts, water lines, cisterns, and small streams. Numerous small springs and bogs are evident downslope along the lake shore.

The release of the gasoline spill, coupled with the flushing of the product off the highway by emergency crews using high-powered hoses, caused rapid product runoff downslope through the existing drainage network. Residents affected by the spill obtain their drinking water either from wells or from cisterns. Water lines of PVC plastic, located upslope from the spill point, supply water to the cisterns which are downslope on the west side of Highway 35.

2.2.1 Surface Water Sampling

All surface water samples were collected under the guidance of the Olympus quality assurance and quality control program for field sampling (Appendix A). Surface water samples were collected from the stream north of the Tweto's residence on September 17, 1992. On September 18, 1992 Olympus personnel returned to the site and met with David Haire of the Water Quality Program, Confederated Salish and Kootenai Tribes. A sampling program was devised to collect stream samples on a daily basis from September 19th to September 27th.

2.2.2 Analytical Results

Surface water samples were analyzed for TPH as gasoline, according to EPA Method 8015 Modified. In addition, selected water samples were analyzed for BTEX according to EPA Method 602. Analytical results for stream samples are included in Table 2. Stream sample 4215-5, collected on September 17th from the Miller's property, contained elevated levels of BTEX and TPH. Stream samples 4215-W3 through 4215-W12 were collected during the time period September 18th to September 24th. The analytical data for these samples indicate a consistent decrease in TPH as gasoline over the seven day monitoring period.

Table 2. Water Quality Analyses

Sample Description	Sample ID	Sample Date	mg/l				
			Benzene	Toluene	Ethylbenzene	Xylene	TPH
Tweto Residence	4215-1	9/17/92	<0.001	<0.001	<0.001	0.001	<0.1
Miller Residence	4215-2	9/17/92	<0.001	0.0016	<0.001	0.0017	<0.1
Duplicate (4215-2)	4215-3	9/17/92	<0.001	0.0012	<0.001	0.0015	<0.1
Field Blank	4215-4	9/17/92	<0.001	<0.001	<0.001	0.001	<0.1
Stream	4215-5	9/17/92	0.021	0.173	0.059	0.24	1.70
West Cistern-Miller	4215-6	9/17/92	0.015	0.068	0.021	0.092	0.58
Miller Residence	4215-W1	9/18/92	<0.001	<0.001	<0.001	0.001	NA
Duplicate (4215-W1)	4215-W2	9/18/92	<0.001	<0.001	<0.001	0.001	NA
Stream	4215-W3	9/18/92	NA	NA	NA	NA	1.30
Field Blank	4215-W4	9/18/92	<0.001	<0.001	<0.001	0.001	NA
Stream	4215-W5	9/19/92	NA	NA	NA	NA	0.84
Stream	4216-W6	9/20/92	NA	NA	NA	NA	0.44
Stream	4215-W7	9/21/92	NA	NA	NA	NA	0.29
Stream	4215-W8	9/22/92	NA	NA	NA	NA	0.14
Stream	4215-W9	9/23/92	NA	NA	NA	NA	<0.1
Stream	4215-W10	9/24/92	NA	NA	NA	NA	<0.1
Stream	4215-W11	9/24/92	NA	NA	NA	NA	<0.1
Stream	4215-W12	9/24/92	NA	NA	NA	NA	<0.1
Stream	4215-W13	10/3/92	NA	NA	NA	NA	<0.1
Duplicate (4215-W13)	4215-W14	10/3/92	NA	NA	NA	NA	<0.1
Tweto Residence	4215-W15	10/3/92	<0.001	<0.001	<0.001	<0.001	NA
Tweto Neighbor	4215-W16	10/3/92	<0.001	<0.001	<0.001	<0.001	NA
Miller Residence	4215-W17	10/3/92	<0.001	<0.001	<0.001	<0.001	NA
Monitor Well M-1	4215-W18	10/3/92	0.01	<0.001	<0.001	0.10	0.63
Monitor Well M-2	4215-W19	10/3/92	5.6*	<0.001	<0.001	1.90	3.60
Field Blank	4215-W20	10/3/92	0.001	0.002	<0.001	0.001	<0.1
	Method Blank	10/12/92	<0.001	<0.001	0.002	<0.001	<0.1

* Analyte concentration exceeds instrument calibration range.
NA=Not Analyzed

2.3 Drinking Water

The primary focus throughout the spill response, and site monitoring activities, was the immediate health and safety of the residents. Of particular concern were local drinking water supplies, because of the toxicity of the spilled product gasoline, and the possibility of product collection in cisterns via surface water runoff. Accordingly, the Miller's were contacted and asked not to use their drinking water supplies until they had been tested since they utilize shallow spring water. The Tweto's obtain their drinking water from a 200 foot deep well.

2.3.1 Drinking Water Sampling

Drinking water samples were collected from the Tweto and Miller residences on September 17, 1992. The Tweto's obtain their drinking water from a well; whereas, the Miller's obtain their drinking water supply from a cistern located on the east side of Highway 35. Water sample (4215-1) was collected from an outdoor faucet at the residence of Don Tweto. Water sample (4215-2) was collected from the Miller's residence. Unfortunately, the Miller's were not home at the time when water sample 4215-2 was collected. As a result, the sample had to be collected from their garden hose because the water pressure at the faucet was too strong. A water sample (4215-6) was also collected from the cistern located furthest downslope from the spill. Sample locations are shown in Figure 1.

2.3.2 Analytical Results

Drinking water samples collected on September 17th, from both the Miller and Tweto residences, were rushed to the laboratory and analyzed for BTEX, according to EPA Method 602, and TPH as gasoline, according to EPA Method 8015 Modified. Table 2 summarizes the results of the laboratory analyses for these water samples. The analytical data from the laboratory is contained in Appendix B. The water sample (4215-1) collected from the Tweto's outdoor faucet on September 17, 1992, did not contain analytes at concentrations above the detection limit of the analytical method.

Water sample (4215-2), collected that same day, from the Miller's outdoor spigot did contain detectable concentrations of toluene and xylenes. However, this sample was considered suspect because it was collected through the garden hose. A second drinking water sample (4215-W1) from the Miller's residence, collected from the kitchen faucet on September 18, 1992, did not contain detectable levels of BTEX. Drinking water samples were collected again on October 3, 1992 from the Miller's and Tweto's residences, as well as the domestic residence north of the Tweto's, and these samples did not contain detectable BTEX concentrations.

2.4 Ground Water

After consultation with David Haire, Olympus proposed a soil boring and sampling program to determine both the subsurface depth and lateral extent of the product spill. On September 29, 1992 two soil borings were drilled downslope of the spill on the Miller's residential property (Figure 1). Olympus personnel supervised the drilling, logging and sampling of the borings while representatives of the Tribal Water Quality Program, David Haire and Seth Makepeace, witnessed the project.

2.4.1 Soil Borings and Monitor Well Installation

Cuttings and split spoon samples from each of the monitor wells were logged to describe the subsurface stratigraphy. The soil boring logs and diagrams of the well completions are included in Appendix C. The first boring (M-1) penetrated four feet of sandy, well-graded, gravels before encountering a gray silt and clay unit The gray silt and clay unit became sandier with depth, and was saturated throughout the interval. Depth to ground water was estimated at four feet below ground surface (BGS). The total depth of the boring was 14 feet.

The second boring (M-2) penetrated three feet of water-saturated gravels, five feet of poorly-graded gravel, sand and silt, and then five feet of a pebbly-coarse unconsolidated sand Depth to ground water was estimated at 3.0 feet, and the total depth of the boring was 13 feet. Each of the borings were completed as monitor wells. The aquifer at this site is unconfined and occurs in a poorly-graded, sandy-gravel, horizon that includes clayey silts. The interval most-likely represents glacio-fluvial and lake shore deposits.

2.4.2 Soil and Ground Water Sampling

Soil samples were collected with a split spoon sampler and screened in the field with the TIP II photo-ionization detector, according to the headspace method. Drilling operations and sampling procedures are described in Appendix C. Split spoon soil samples were collected at subsurface depths of 3, 5, 7.5, and 13 feet from the first soil boring (M-1). TIP II readings for these samples were 33, 32, 7, and 8 respectively.

Split spoon samples were recovered at depths of 3, 8, and 11.5 feet BGS from the second soil boring (M-2). TIP II readings for these samples were 2, 210, and 288 respectively. Soil samples from both borings were analyzed for TPH as gasoline. Each boring was completed into a monitor well. On September 30, 1992 the wells were developed and allowed to recover before being sampled. Water samples were collected from each monitor well on October 3, 1992.

2.4.3 Analytical Results

Ground water samples from both monitor wells were analyzed for BTEX, according to EPA Method 602, and TPH as gasoline, according to EPA Method 8015 Modified. Table 2 summarizes the results for each well and the laboratory data sheets are included in Appendix A. The ground water samples from both wells contained elevated levels of benzene, xylenes, and TPH. The sample collected from well M-2 contained a benzene concentration of 5.6 mg/l. This analyte concentration exceeds the federal drinking water standards for benzene of 0.005 mg/l. The analytical laboratory noted, however, that the concentration of benzene in this sample exceeded the instrument calibration range.

Selected soil samples from the borings were analyzed for TPH as gasoline according to EPA Method 8020. Results of the analyses are contained in Table 1. All three soil samples from the monitor wells were below the detection limit of the analytical method.

3.0 CONCLUSIONS

Analytical results for surface and drinking water samples, collected on October 3, 1992, indicate that BTEX and TPH concentrations have diminished to levels below the detection limit. The immediate danger to the health and safety of local residences from contaminated drinking water does not appear to be a threat, at present. Nevertheless, ground water samples from the two monitor wells did contain elevated levels of benzene, xylenes, and TPH. Of particular concern is the benzene concentration of 5.6 mg/l in monitor well M-2. This analyte concentration exceeds the maximum contaminant level of 0.005 mg/l for benzene established by the federal drinking water standards.

Analytical results for soils collected from the excavation trench contained BTEX at concentrations near detection limits of the analytical method. As a reference point, the Montana Department of Health and Environmental Sciences (DHES) Underground Storage Tank (UST) program generally sets an action level of 10 PPM total BTEX for contaminated soil. The total BTEX for soil samples from the excavation trench is well below this action level. The rapid removal of the gasoline and the soil from the ditch, immediately after the spill, reduced the risk of the spill area serving as a contaminant source for either surface or ground water. Soil boring samples did not contain any detectable levels of TPH.

4.0 RECOMMENDATIONS

We recommend that ground water samples be collected from the monitor wells, on a quarterly basis, and analyzed for BTEX and TPH until an overall trend is established. Drinking water samples from the Gerald Miller and Don Tweto residences should also be collected and analyzed on a quarterly basis. The ground water monitoring program can be discontinued once the trend in hydrocarbon concentration is established, and displays a consistent decrease in concentration level over time.

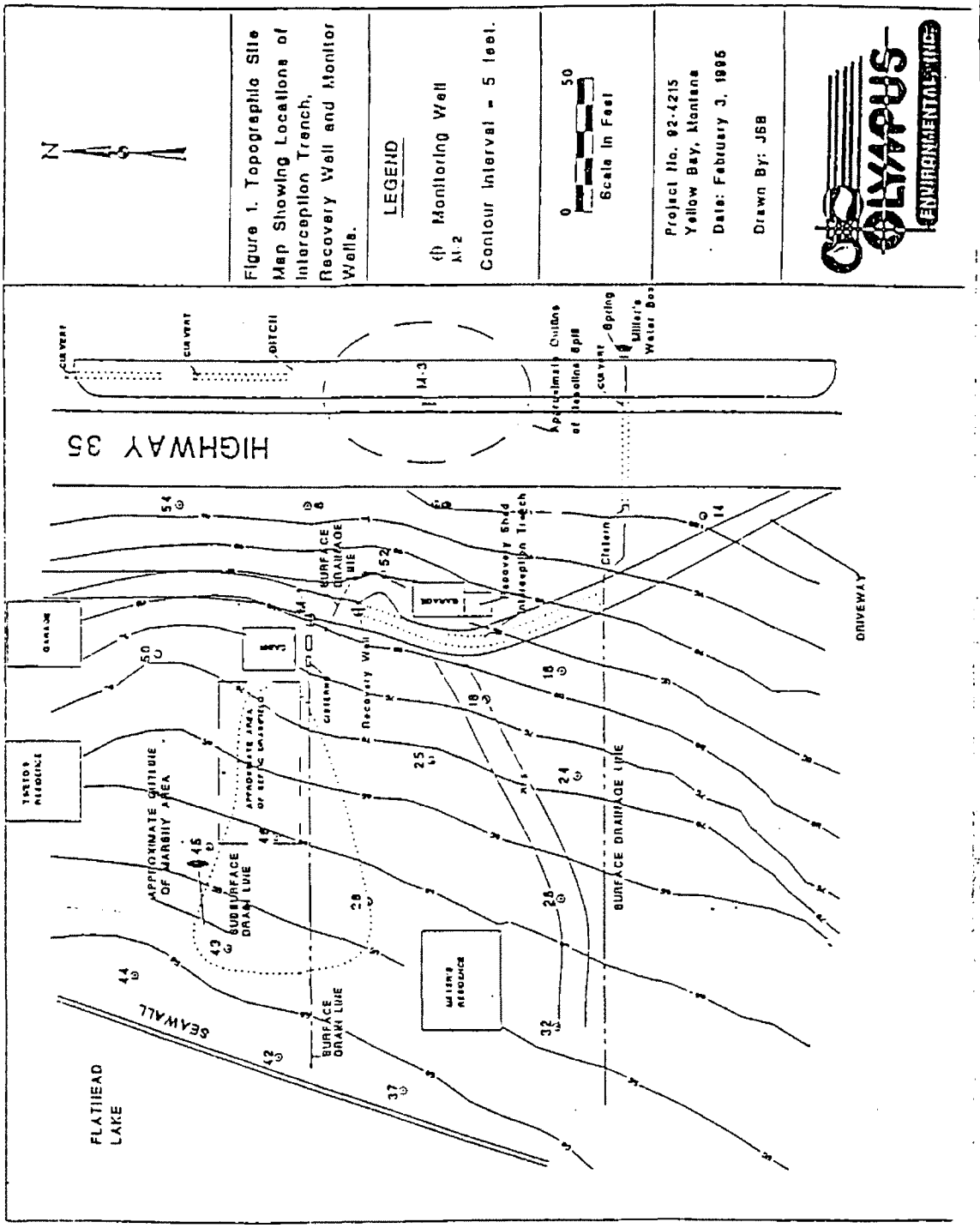
5.0 LIMITATIONS

The interpretations of site conditions in this report are based on data obtained from widely spaced borings. It is possible that additional hazards exist in areas that were not investigated. Within the limitations of scope, schedule and budget, our services have been executed in accordance with generally accepted practices in this area at the time the report was prepared.

Stuart Blundell, Geologist

APPENDIX B

DIAGRAM OF REMEDIAL MITIGATION



APPENDIX C

OLYMPUS REPORT— JULY 7, 1993

3.0 RESULTS

3.1 Analytical Results for Soil Samples

Field screening data for soils were collected from a total of 18 different sampling stations. Figure 3 is a contour map of headspace analyses results for soil samples collected between 0-6 inches BGS. The data indicate two areas of concentration for organic vapors: 1) At Station #52 located north of the Miller's garage; and 2) at Station #45 located in the vicinity of the Tweto's septic drainfield. Figure 4 is a contour map of headspace analyses results for soil samples collected at the top of the water table. The data show a concentration of organic vapors measured at Station #52 of 1350 ppm. Samples collected from stations #16, #18, #45, and #46 also had field screening results that exceeded 100 ppm.

A total of 11 soil samples were collected and analyzed for BTEX per EPA Method 8020 and TPH as Gasoline per EPA Method 8015 Modified. Table 1 summarizes the soil lithology, field screening results, and laboratory analytical results. BTEX results for soils indicate that samples collected at depths between 0-8 inches BGS, at stations #16, #45 and behind the Miller's garage, contained detectable concentrations of BTEX. The sample collected at Station #52, at a depth of 16 inches BGS, contained detectable concentrations of toluene, ethylbenzene, and xylenes, but not benzene. BTEX analytes were not detected in soil samples collected from stations #46, #18, #24, #50, and #43.

TPH as Gasoline was detected in soil samples collected from stations #16, #18, #43, #45, #46, #50 and #52. Figure 5 is a contour map of TPH as Gasoline concentrations. The data indicate a decreasing trend in TPH concentration from east to west in the vicinity of the Miller's garage; however, a concentration of 200 ppm TPH occurs at Station #45. The TIP II field screening data for this station also indicated a concentration of 449 ppm organic vapors for soils between 0-8 inches BGS. Although the field screening data do not have a positive correlation with the TPH analytical results in terms of magnitude, the headspace results do appear to identify areas where petroleum contamination is present. Hence, the field screening data for soils provides a reliable tool for defining both the areas of highest hydrocarbon concentration as well as the approximate boundaries of the hydrocarbon plume.

Table 1. Summary of Field Screening and Laboratory Analytical Results for Soils

Station Number	Date	Time	Depth	Lithology	TIP II ppm	Benzene ppm	Toluene ppm	Ethylbenzene ppm	Xylenes ppm	TPH as Gas ppm
14	6/2/93	14:14	6"	Topsoil	<1.0					
14	6/2/93	14:36	31"	Till-Silt and Clay Matrix	<1.0					
1	6/2/93	13:50	6"	Topsoil	1.2					
1	6/2/93	14:00	32"	Till-Silt and Clay Matrix	20.0					
52	6/2/93	15:05	6"	Topsoil	450.0					
52	6/3/93	15:36	16"	Till-Silt and Clay Matrix	1350.0	<0.20	1.3	0.7	7.8	86
46	6/3/93	8:31	6"	Till-Silt and Clay Matrix	102.0	<0.20	<0.20	<0.20	<0.20	7.5
46	6/3/93	8:58	24"	Till-Silt and Clay Matrix	189.0					
18	6/3/93	9:30	6"	Till-Silt and Clay Matrix	8.3					
18	6/3/93	10:05	32"	Sandy Gravel	235.0	<0.20	<0.20	<0.20	<0.20	2.4
16	6/3/93	10:37	6"	Topsoil	83.0	0.4	2.5	0.8	1.4	73
16	6/3/93	10:54	36"	Sandy Gravel	229.0	<0.20	<0.20	<0.20	<0.20	2
24	6/3/93	13:55	6"	Topsoil	52.0	<0.20	<0.20	<0.20	<0.20	2
24	6/3/93	14:26	32"	Gravel	121.0					
25	6/3/93	14:42	6"	Topsoil-Loam	20.0					
25	6/3/93	15:00	38"	Sandy Gravel	92.0	<0.20	<0.20	<0.20	<0.20	2
50	6/3/93	15:46	6"	Topsoil-Loam	45.0	<0.20	<0.20	<0.20	<0.20	3.2
50	6/3/93	16:10	32"	Gravel	1.3					
28	6/4/93	11:04	6"	Topsoil-Loam	27.0					
28	6/4/93	11:20	36"	Till-Silt and Clay Matrix	27.0					
43	6/4/93	11:43	8"	Clay	<1.0					
43	6/4/93	11:47	18"	Till-Silt and Clay Matrix	2.2	<0.20	<0.20	<0.20	<0.20	3.6
45	6/4/93	12:17	8"	Topsoil	449.0	0.7	4.3	0.7	23.0	200
45	6/4/93	12:20	14"	Till-Silt and Clay Matrix	244.0					
26	6/8/93	10:16	6"	Gravel	1.1					
26	6/8/93	10:48	32"	Till-Silt and Clay Matrix	2.5					
32	6/8/93	10:59	6"	Till-Silt and Clay Matrix	<1.0					
32	6/8/93	11:31	40"	Till- Sand Matrix	<1.0					
37	6/8/93	11:43	6"	Gravel-Sandy Loam	<1.0					
37	6/8/93	12:30	36"	Gravel-Sandy Loam	<1.0					
42	6/8/93	12:43	6"	Topsoil	4.0					
42	6/8/93	13:06	30"	Gravel-Sandy Loam	2.0					
44	6/8/93	13:19	8"	Till-Silt and Clay Matrix	142.0					130
Garage	6/4/93	9:30	6"	Topsoil	333.0	0.2	3.6	1.1	12.0	87

3.2 Analytical Results for Stream Sediment and Water Samples

The two stream sediment samples collected from Dee Creek were analyzed for BTEX per EPA Method 8020 and TPH as Gasoline per EPA Method 8015 Modified. The water sample collected from the stream was analyzed for BTEX per EPA Method 602 and TPH as Gasoline per EPA Method 8015 Modified. The laboratory reports for these samples are included in Appendix B. Table 2 summarizes the laboratory analytical results for the stream sediment samples:

Table 2. Analytical Results for Stream Sediment and Water Samples

Sample	Date	Benzene ug/g	Toluene ug/g	Ethlybenzene ug/g	Xylenes ug/g	TPH as Gas ug/g
4215-STR1	6/4/93	<0.20	<0.20	<0.20	<0.20	<2.0
4215-STR2	6/4/93	<0.20	<0.20	<0.20	<0.20	2.2
4215-W2	6/4/93	<0.50	<0.50	<0.50	<1.0	<20

Stream sediment sample 4215-STR2 was collected at the stream terminus; although the sample did not contain detectable BTEX concentrations it did contain a measurable concentration of TPH as Gasoline of 2.2 micrograms per gram. The stream sediment sample (4215-STR1) and water sample (4215-W2) were collected at the midpoint of the stream reach. Neither of these samples contained detectable concentrations of either BTEX or TPH as Gasoline.

3.3 Analytical Results for Drinking Water Samples

Drinking water samples were analyzed for BTEX per EPA Method 602. The results indicated that neither sample contained analytes above the detection limit of the analytical method. The laboratory reports for samples 4215-Miller and 4215-Tweto are included in Appendix B.

3.4 Analytical Results for Ground Water Samples

A clear teflon bailer was used to inspect the two wells for the presence of free-product prior to purging and sample collection. No free-product was observed in either monitor well. The ground water samples were collected after the ground water quality parameters of pH, dissolved oxygen content, and electrical

conductivity had stabilized. Ground water samples were analyzed for BTEX per EPA Method 602 and TPH as Gasoline Per EPA Method 8015 Modified. The laboratory reports for these samples are included in Appendix B.

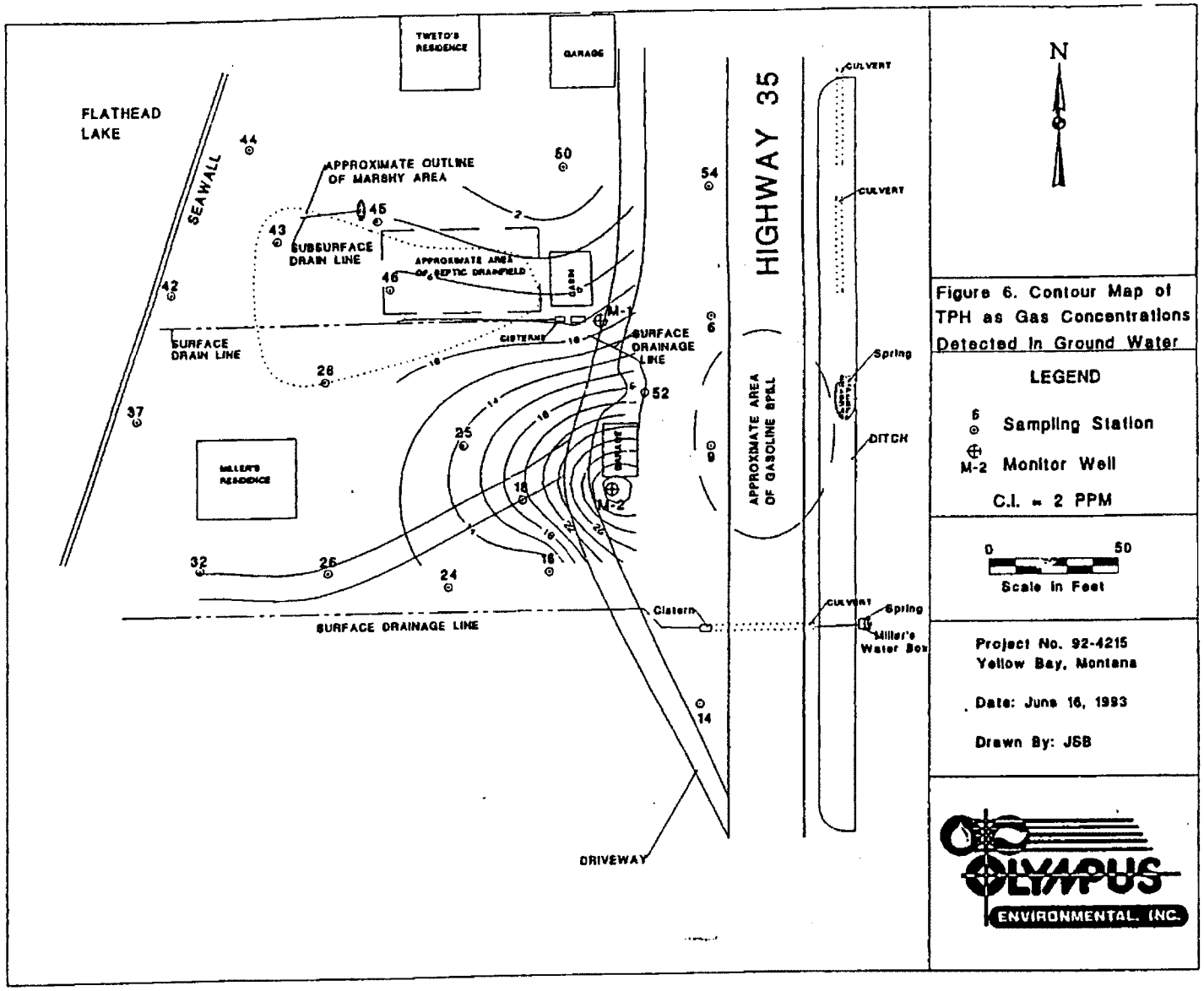
Table 3 summarizes the laboratory results for ground water samples. The analytical data for the sample collected from well M-1 indicates that both BTEX and TPH concentrations decreased since the previous monitoring event. Benzene levels also decreased in well M-2, relative to concentrations detected during monitoring in April 1993, but toluene, ethylbenzene, xylenes and TPH as Gasoline levels increased. Benzene and toluene levels detected in ground water samples from both monitor wells exceed the maximum contaminant levels (MCLs) for these analytes established by the federal Safe Water Drinking Act (SWDA). Ground water samples were collected from the temporary monitoring wells #16, #18, #46, and #50 were analyzed for TPH as Gasoline per EPA Method 8015 Modified. TPH concentrations ranged from 0.098 mg/l to 19.5 mg/l. Stations #16 and #18, which are located downgradient from well M-2, had the highest concentrations of TPH. Well #46 was placed in the Tweto's septic drainfield and had a concentration of TPH as Gasoline of 7.28 mg/l.

3.5 Data: Validation: Quality Assurance/Quality Control

Data validation and quality assurance and quality control (QA/QC) planning were used by Olympus to identify, measure, and control potential sources of error in sampling, analysis, and reporting and to test the precision of field collection methods. Field quality control methods were used to measure accidental sample contamination during collection, transportation, and storage. The laboratory analytical data were reviewed to evaluate sample holding times, results of method blanks and surrogate recovery percentages, and duplicate sample results. The results of the QA/QC review indicated that the analytical data were valid.

3.5.1 QA/QC Measures for Collection and Transport of Samples

A field blank was collected to measure incidental or accidental sample contamination during field collection of ground water samples. The field blank did not contain detectable concentrations of hydrocarbon analytes. Duplicate ground water samples were collected from monitor well M-2 to test the precision and reproducibility of laboratory analytical procedures. Sample 4215-M-4 was collected as a field duplicate of ground water sample 4215-M2. The field duplicate sample (4215-M4) exceeded the laboratory QC surrogate percent recoveries; therefore, the concentration is flagged as estimated. Relative percent differences calculated from the original and duplicate sample



center of the plume appears to be located in the area around well M-2. A water sample collected from the drain pipe that exits the seawall in front of the Miller's residence contained detectable concentrations of both BTEX and TPH analytes. The discharge pipe drains water from the french-drain installed around the perimeter of the Miller's house. The BTEX concentrations detected in this sample, however, are below the recommended drinking water standards for these analytes as established by the federal SWDA.

The source of contamination for ground water appears to be the residual phase hydrocarbons in soils in the area behind the Miller's garage. Ground water samples collected from the tile drain system revealed elevated levels of TPH. Ground water samples collected from the temporary monitoring wells at stations #16 and #18 indicate that the dissolved hydrocarbon phase plume is migrating down-gradient.

Slug test data collected during previous site monitoring activities suggests that the aquifer region surrounding the monitor wells has a low hydraulic conductivity. Ground water flow velocities were calculated at 0.02 feet per year. Analytical data from this investigation, however, indicate that hydrocarbons have migrated 200 feet from the original spill point. The most-likely mechanism for this migration is probably a combination of surface runoff and ground water flow through subsurface drainage pipes. For example, migration of the dissolved phase plume into the marshy area is occurring through ground water flow via the tile drain system behind the Miller's garage into the Tweto's septic drain field. Natural springs, buried drain lines, and the cisterns located on the Miller's and Tweto's property also provide additional pathways for hydrocarbons to migrate down-gradient to the lake.

5.0 CONCLUSIONS

The following conclusions have been drawn from the results of the remedial investigation:

1. Residual phase petroleum hydrocarbons are concentrated in soils in the hillside region directly east and south of the Miller's garage. This area appears to be serving as a source area for the dissolved hydrocarbon phase plume. In addition, a relatively high BTEX concentration was detected in ground water and soils down-gradient from the Tweto's septic drainfield.

2. Ground water contamination detected in the Tweto's septic drainfield migrated to the drainfield in surface and ground water flowing downslope through the tile drain system originating behind the Miller's garage.

3. The boundaries of the dissolved phase plume appear to be constrained as follows using well M-2 as the center of the plume:

   North: Approximately 125 feet north of well M-2 based on analytical results from Station #50.

   South: Approximately 80 feet to the south of well M-2 based on soil screening results from Station #14.

   East: Approximately 60 feet from well M-2 or within the boundaries of the original spill area.

   West: Approximately 100 feet west of well M-2 based on soil screening and analytical results from Stations #16, #18, #24, #25, #26, #32, #37, and #25.

6.0 REMEDIATION OPTIONS EVALUATION

A matrix evaluation of potential remediation options was performed in order to identify the most efficient and cost-effective remediation approach. The results of the matrix evaluation indicated that the preferred remediation approach is a french-drain type interception trench and an air stripper combined with passive soil venting. Section 6.1 presents the results of the matrix evaluation and the results of the evaluation are summarized in Table 4.

6.1 Matrix Evaluation of Remediation Options

Potential remediation options for the Yellow Bay site were considered based on the following parameters:

- Cost
- Performance
- Reliability
- Implementation
- Safety
- Effects on public health and the environment

Remediation alternatives have been screened and the following options are evaluated herein:

- Soil excavation and treatment/disposal
- Ground water treatment and passive soil venting
- Enhanced biodegradation
- Soil gas vapor extraction
- Air Sparging and soil gas vapor extraction

6.1.1 Soil Excavation and Treatment

The results of the remedial investigation and field screening of soils indicated that contaminated soils are located: 1) behind the Miller's garage; 2) downgradient from monitor well M-2; and 3) downgradient of the Tweto's septic drainfield. BTEX analytical results for soils confirmed the presence of these analytes at stations #16, #45, #52 and behind the Miller's garage. BTEX analytes were not detected in soil samples collected at stations #46, #18, #24, #50, and #43. Approximately 5-7 yards of contaminated soils could be removed from behind the Miller's garage and treated at the land treatment facility located at the City Service yard in Kalispell. Contamination of the soils downgradient

from the Tweto's septic drainfield is attributed to surface runoff and drainage of contaminated ground water. Excavation of the septic drainfield would require de-watering and water treatment due to the shallow depth of ground water in this area. No excavation is recommended for this area until the up-gradient source of the dissolved hydrocarbon phase plume is treated.

Excavation and treatment of soils behind the Miller's garage would have to be limited to a narrow path that follows the contours of the hill in order to prevent further erosion of soils and damage to trees. A retaining wall should be installed against the hillside behind the garage to stabilize the slope. The cost of removing and treating 5-7 yards of soil from behind the Miller's garage is low and it would effectively remove some of the source area. Health and safety risks are considered low because the BTEX concentrations in the soils are less than 1.0 ppm and the exposure time to workers would be minimal. Implementation is not expected to be a problem since their are no barriers to excavation. This remediation option is rejected as a stand-alone option since it will not remediate the ground water or restrict the migration of the dissolved phase plume. However, the option is retained in conjunction with a ground water treatment technology because of its low cost, high reliability, and low risk to health and the environment.

6.1.2 Ground Water Treatment and Passive Soil Venting

Ground water removal and treatment employs the extraction of ground water from recovery wells in order to remove contaminants from the subsurface. Slug test data from the two permanent monitor wells on the site indicate that the shallow aquifer system has a low hydraulic conductivity which would limit the size of a capture zone using a pumping well. An interception trench, however, placed along the contour of the hillside from behind monitor well M-1 and the Miller's garage, would restrict the downgradient migration of the dissolved hydrocarbon phase plume. Passive soil venting will remove hydrocarbon vapors from the unsaturated soil matrix into the atmosphere.

Ground water will be pumped from a recovery well placed in the trench. Recovered water would be treated before being discharged into Flathead Lake. The cost of the system and installation is moderate if a single air stripper were used to treat the water. Performance, reliability, and implementation of the system is rated high because of its effectiveness in removing hydrocarbons from ground water, its low maintenance, and relatively easy installation. Health and safety risks of the trench are rated as moderate since their will be hydrocarbon vapors discharged to the atmosphere from the treatment system. This remediation option is retained because it will effectively mitigate the migration of the dissolved phase plume and strip the hydrocarbon vapors from the ground water.

6.1.3 Enhanced Biodegradation

Enhanced biodegradation relies on enhancing environmental conditions in a manner that will promote and accelerate the growth of hydrocarbon degrading bacteria. It involves addition of nutrients (nitrogen and phosphorous), oxygen and water (in the vadose zone). This technology is generally used in combination with other options such as ground water pump and treat. Insufficient data is available to evaluate this option and since it would not stand alone it is rejected.

6.1.4 Soil Vapor Extraction

Soil vapor extraction relies on the natural tendency of volatile petroleum hydrocarbons to partition between the soil, ground water and air. Inducing a vacuum through extraction wells creates a subsurface pressure gradient, causing air flow through the soil mass. As air flows through the soil mass, vapor phase contaminants are removed and vented to the atmosphere. Soil vapor extraction is effective at treating contaminated soils, but it will not remediate ground water. The shallow depth to ground water at this site, however, reduces the effectiveness of soil vapor extraction because of ground water mounding. This option is rejected on the basis of effectiveness.

6.1.5 Air Sparging with Soil Vapor Extraction

Soil vapor extraction can be an effective means of removing volatile organics from unsaturated soils, but it is generally not effective in ground water treatment. Air sparging is a means of extending the utility of vapor extraction technology to the saturated zone. Air sparging involves the direct injection of air below the water table which enhances the volatilization of contaminants from the aquifer. Air sparging also enhances environmental conditions for in situ biodegradation.

Potential drawbacks with air sparging include the migration of volatile organics through the unsaturated zone to areas where they may present a health or environmental threat (both toxic and explosive). This threat can be mitigated through simultaneous operation of a soil vapor extraction system (VES). The second drawback to air sparging is that the injected air can accelerate ground water migration if too much pressure is used. An air sparging system at Yellow Bay would consist of injecting air through a perforated PVC pipe installed within the interception trench. Vapors would be drawn-off from the trench through a second perforated return pipe and then vented to the atmosphere.

The estimated cost of an air sparging /soil gas vapor extraction system is moderate. The performance of this system is rated moderate since it is an emerging technology. However, it has been reported in literature to be successful in similar applications and remediates both the ground water and unsaturated zone. The reliability is rated low because of the shallow ground water at the site. Air sparging would cause ground water to rise into the vapor discharge line rendering it ineffective. The safety of the system is rated high since there is little potential for worker exposure. The health/environmental effects are rated moderate since it is removing hydrocarbons from the subsurface and placing them into the atmosphere. This alternative is rejected because of the shallow depth to ground water.

Table 4. Summary of Matrix Evaluation

Alternative	Cost		Performance		Reliability		Implementation		Safety	
	Rating	Comments	Rating	Comments	Rating	Comments	Rating	Comments	Rating	Comments
No Action	+		-	Least effective	NA		NA		NA	
Excavate and treat/dispose of contaminated soil	+		+/-	Removes source but does not remediate ground water	+	No long term maintenance of equipment	-	Some obstacles to excavation	-	Potential for worker exposure during removal
Ground water Treatment and Passive Soil Venting	-		+/-	Remediates ground water but does not remove source in soils	+/-	Problems with mineralized water	+	No major obstacles	+/-	Some potential for worker exposure during installation
Enhanced biodegradation	NA		NA		NA		NA		NA	
Soil gas vapor extraction	NA		+/-	Reduces source hydrocarbons in soils, performance varies for dissolved plume in aquifer	+	Little maintenance	+	Shallow depth to ground water	+	Low potential for worker exposure
Air Sparging with soil gas vapor extraction	NA		+/-	Reduces source hydrocarbons in soils and ground water. Emerging technology.	+	Little maintenance	+	Shallow depth to ground water	+	Low potential for worker exposure

Table 4. Summary of Matrix Evaluation

Alternative	Health/environment effects		Conclusions	
	Rating	Comments	Rating	Comments
No Action	-	Does not remove hydrocarbons	Reject	Does not mitigate threats
Excavate and treat/dispose of contaminated soil	+/-	Reduces long term effects, increases short term risks.	Reject as stand alone but retained with use of the interception trench	Low cost and will remove source
Ground water Treatment and Passive Soil Venting	+/-	Reduces long term effects, increases short term risks.	Retain	Moderate cost. Will restrict plume migration.
Enhanced biodegradation	NA		Reject	Insufficient background information available
Soil gas vapor extraction	+/-	Reduces long term effects, increases short term risks.	Reject alone	Cost effective but does not stand alone because of shallow ground water
Air Sparging with soil gas vapor extraction	+/-	Reduces long term effects, increases short term risks.	Reject	Cost effective but not practical at this site because of shallow ground water

7.0 REMEDIAL WORKPLAN

Contaminated ground water and soils in the area directly east and south of the Miller's garage is acting as a source area for dissolved phase hydrocarbons migrating down-gradient. The area should be treated to remove the gasoline constituents. The following procedures should be implemented to remediate the soils and ground water in this area:

1. The tile drain system originating behind the Miller's garage should be removed to prevent further draining of contaminated ground water into the Tweto's cisterns and septic drainfield.

2. An interception trench should be constructed to prevent the further migration of dissolved phase hydrocarbons originating from behind the Miller's garage (Figure 7). The shallow trench will be constructed to a depth of two feet, a width of two feet, and a length of approximately 75 feet. Gravel drain rock (5/8") will be placed in the bottom of the trench to a depth of one and a half feet BGS. A low permeability liner/soil cap will be placed on the trench to minimize surface water infiltration. A two foot diameter culvert recovery well will be installed in the north end of the trench to capture contaminated ground water flowing from the trench. The water in the recovery well will be pumped into an air stripper and then discharged into Flathead Lake. The air stripper will be housed in a winterized shed located on the south side of the Miller's garage. Perforated two inch diameter PVC pipe will be used to passively vent hydrocarbon vapors volatilizing off the ground water as it flows through the trench.

3. The ditch along the east side of Highway 35 should be hydro-seeded to stabilize the bentonite clay and prevent further fines migration into Dee Creek.

4. An additional monitor well should be installed between the septic drainfield and Flathead Lake. The boring will be hand-dug and the well constructed according to field procedures outlined in Appendix A.

Stuart Blundell: Stuart Blundell
Author's Signature

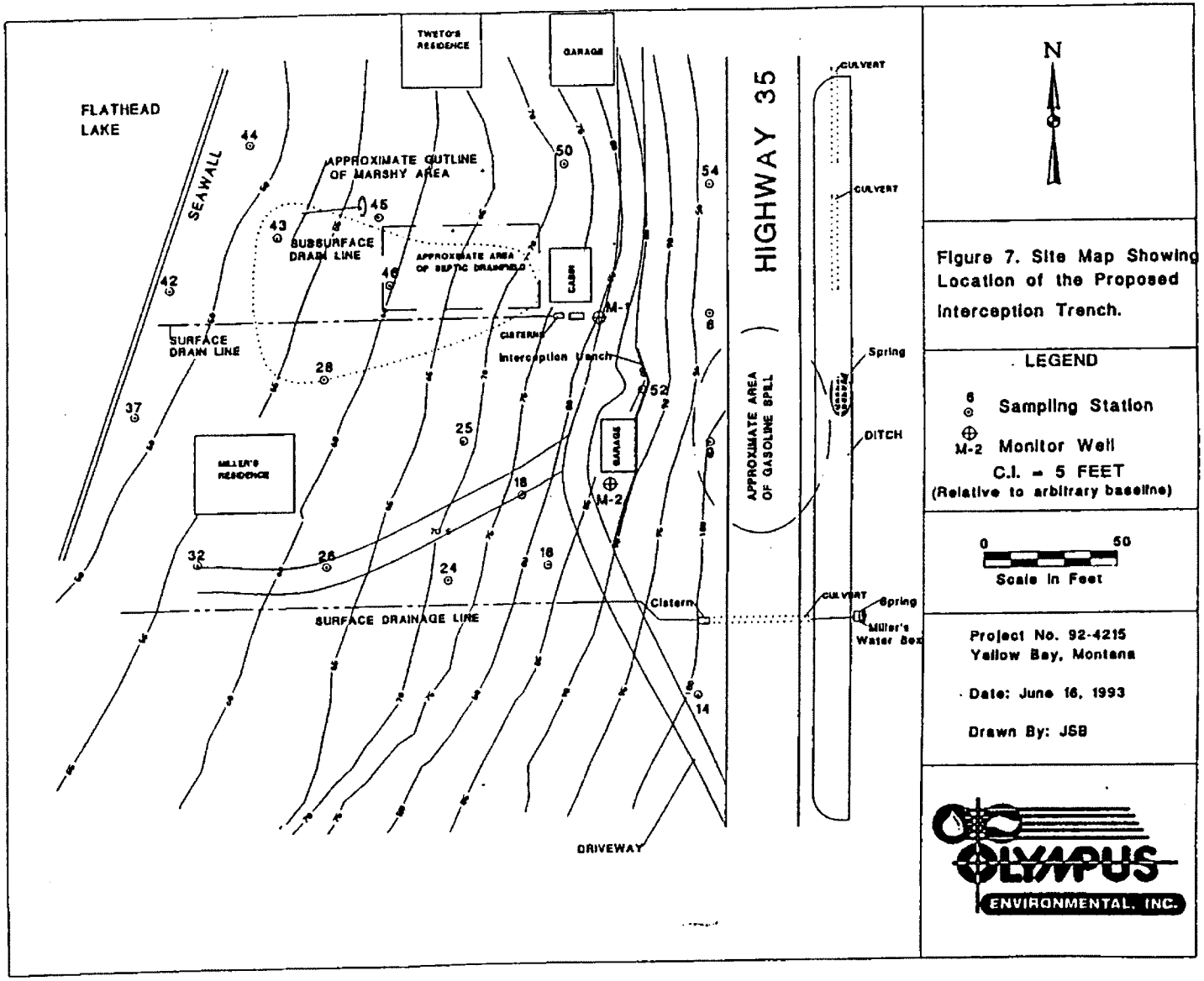


EXHIBIT D

LAND & WATER REPORT
SEPTEMBER, 1995

Final

Review of Remedial Investigation & Action

Miller Property
Yellow Bay, Montana

Prepared for:

Gerald Miller
Henry R. Crane
P.O. Box 7271
Missoula, Montana 59807

Prepared by:

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September 1995

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Review of Remedial Investigation on Miller Property
Yellow Bay, Montana

prepared for:
Gerald Miller and Henry R. Crane

Introduction

Olympus Environmental, Inc., completed a remedial investigation on the Gerald Miller property in July, 1993 (Olympus, 7/7/93). The investigation was completed after a City Service truck/trailer overturned and released 1500 gallons of gasoline adjacent to the property on Highway 35. The investigators concluded residual phase petroleum hydrocarbons to be concentrated east and south of the Miller garage (Olympus, 7/7/93). The investigation further delineated a dissolved phase plume to cover the eastern 140 feet of the Miller property. While the investigation confirmed the presence of contamination on the Miller property, the methods used to characterize the contamination may have underestimated the magnitude and perhaps extent of the contamination.

This review includes an assessment of Olympus sampling procedures and sampling plan for characterizing contamination from the spill. It discusses the remedial results of the investigation and evaluates Olympus' characterization of contamination on the Miller property. Finally, this review includes an assessment of the remedial actions completed to address contamination found on site. Figure 1 shows the physical layout of the Miller property and Table 1 shows a summary of analytical results from monitor wells in the vicinity of the spill (from Olympus 6/27/93).

Discussion of Remedial Investigation Work Plan

After six months of monitoring groundwater conditions on the east end of the Miller property, Olympus recommended a remedial investigation work plan of contamination on the area affected by the gasoline spill (Olympus, 5/24/93). The plan recommended collecting soil and groundwater samples from the Miller and Tweto property and analyzing the samples for total petroleum hydrocarbons as gasoline (TPH-g) and benzene, toluene, ethylbenzene, and xylenes (BTEX) compounds. The plan recommended collecting 7 groundwater samples and 10 soil samples for TPH-g and BTEX analysis. Olympus also included 3 surface water samples, 2 stream sediment samples, and 2 QA/QC water samples be collected for BTEX/TPH-g analysis.

Collecting soil samples for volatile organics analysis (VOA) requires careful sample preparation. VOA samples should be kept intact from the time of collection to the time of analysis (Mason, 1992). Every possible attempt should be made to reduce the exposure of the sample to air because volatile organics, such as BTEX compounds, can be easily volatilized during sampling. The analytical results can vary on orders of magnitude for improperly collected and preserved VOA soil samples (Mason, 1992).

The soil sampling procedures recommended by Olympus could increase the volatilization of samples collected in the field. Olympus' recommended collecting one composite sample at the surface of each sampling point. The report states:

One (1) composite surface soil sample will be collected from the 0 to 2 inch horizon. The surface sample will (be) collected into a glass or stainless steel bowl using a plastic or stainless steel spoon. A minimum of three (3) samples will be mixed to obtain composite samples. (Olympus, 5/24/93)

Compositing VOA samples in the field is not a recommended practice because of its increased exposure to air and potential for volatilization. According to the follow up report (discussed below), Olympus collected composite samples from the 0-6 inch soil horizon at each sample point.

DISCUSSION OF REMEDIAL INVESTIGATION RESULTS

The Remedial Investigation Work plan included a sampling plan to include 7 groundwater samples collected and analyzed for BTEX and TPH-gas (Olympus, 5/24/93). The actual groundwater samples collected in the remedial investigation included:

2 from existing monitor wells (BTEX and TPH-g)
4 from temporary monitor wells on the Tweto and Miller properties (TPH-g only)
2 from discharge points into surface water (one BTEX/TPH-g and one TPH-g only)

The two monitor wells provided no new spatial data to the remedial investigation since these points had already been sampled and analyzed in previous monitoring events. The two discharge points presented some confusing data. First the "clay pipe" sample was not discussed in the report. There is no reference as to where the sample was collected and what its high levels of TPH-g could suggest. Secondly, the "seawall discharge" sample cannot be used to represent groundwater conditions. Eventhough the seawall discharge does collect water from the upgradient side of the Miller drainfield (east of the Miller house), the water chemistry can change affecting the analytical results. Water that travels a distance of 100 to 120 feet in a pipe prior to its sampling point may undergo substantial volatilization. As a result, the BTEX and TPH-g results may be substantially less than the water that first enters the pipe. Excluding this sampling point and the unknown location of the "clay pipe" sample, the groundwater investigation was limited to four new sampling points to interpret the dissolved phase plume across the Miller and Tweto properties.

The four groundwater sampling points that did include analytical data were not adequately spaced to provide a good picture of the dissolved phase plume across the two properties. Groundwater sampling points on the Miller property were limited to an area west of the access road on the southside of the property (sample points 16 and 18). These points are south of the downgradient flow path of the gasoline spill area. Two temporary monitor wells appeared to have been located in the north one-half of the property (see Figure 2, sample points 25 and 28, Olympus, 7/793) but no groundwater analytical data was presented from these points. The north portion of the property, an area directly downgradient of the spill area, did not contain any groundwater sample points.

Of points sampled, only the two permanent monitor wells were analyzed for BTEX (the seawall discharge point discussed above was analyzed for BTEX). Without benzene analysis for the four temporary monitor wells, it is difficult to assess groundwater conditions in relation to state corrective action standards. Benzene at 5 parts per billion (ppb) is used as the corrective action standard for the clean-up of gasoline spills associated with underground storage tanks (MDHES, 1992). Without the laboratory analysis for benzene, one might extrapolate the benzene to TPH-gas ratio shown in the two monitor wells. Benzene represented 4% of total petroleum hydrocarbons in M-2 and 10% in M-1. Assuming a 4-10% ratio range, sample point 18 could range from 780 to 1950 ppb benzene and sample point 16 range from 496 to 1240 ppb benzene. These values are 100 to 400 times over the corrective action standard. With benzene levels in groundwater this high relative to the corrective action standard, greater efforts should have been employed to remediate groundwater conditions on both of the properties.

Based on these sample results and the potentiometric surface shown in the Olympus report (Figure 2, Olympus, 7/7/93), there appears to be significant groundwater contamination across the Miller property. Inadequate samples were collected to characterize the Miller property and samples were not analyzed for BTEX compounds. Land & Water recommends further investigation of groundwater throughout the Miller property to define the remaining dissolved phase contaminants.

REVIEW OF REMEDIAL ACTIONS

The remedial actions on the Miller property included the installation of a 75 foot groundwater interception trench located west of the Miller garage (Olympus, 11/11/93). The interception trench was intended to capture dissolved phase petroleum from its source area in the hill east of the garage. The interception trench and the treatment of pumped groundwater appears to be effective for the area immediately upgradient from the trench. Its design appears to intercept most of the contaminant flow onto the Miller property.

The interception trench does nothing to remediate the dissolved phase plume that may have already migrated on to the Miller property. Based on analysis in monitor wells, the bulk of the dissolved phase plume appears to have migrated past the interception trench prior to its installation. Benzene levels in M-1 increased for a period of nine months up to June 4, 1993. The sampled collected at this time was 750 ppb and began to decline thereafter. M-2 began declining after the installation of the monitor well. (Its highest reading was its first of 5600 ppb benzene, which appears to be an anomaly because it exceeds the TPH-gas value for the same sample.) Therefore, it is entirely possible that the bulk of the dissolved phase gasoline may have migrated beyond the interception trench prior to its installation. The interception trench would only be effective in removing the tail end of the dissolved phase plume.

Without additional monitor wells on the Miller property, it is difficult to assess the actual migration or degradation of the dissolved phase plume. Olympus cited recent monitoring results suggesting the plume has degraded (Olympus, 6/27/95). There is no evidence to suggest the plume has not migrated on to the Miller property and exists at higher levels than detected in either the groundwater remediation system or M-1 well. Land & Water recommends further

groundwater sampling on the Miller property to evaluate if the dissolved phase plume has degraded or just migrated to the western portion of the Miller property.

Summary & Conclusions

The Miller property has been impacted by a migrating dissolved phase petroleum from the City Service tanker spill. The extent of the dissolved phase plume appears to be underestimated on the property. During the site characterization, soil samples may have been improperly collected and preserved and an insufficient number of samples were collected to characterize benzene concentrations in groundwater. Because of the insufficient characterization, proposed remedial actions did not take into account contamination on the Miller property and only remediated the tail end of a migrating dissolved phase plume.

Further site characterization may be required to fully measure the impacts to the Miller property. The dissolved phase contaminant plume appears to have migrated beyond the existing monitoring well network and onto the Miller property. Groundwater and soil samples should be collected above and below the septic drainfield and near the sea(lake)wall. Any further remedial actions could be taken if BTEX levels remain high on the property.

REFERENCES

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MDHES, 1992. *Cleanup Guidelines Applicable for Petroleum Releases under the Montana UST Program*. Montana Department of Health and Environmental Sciences' Underground Storage Tank Program, May, 1992

Olympus, July, 1993. *Results of a Remedial Investigation and Quarterly Monitoring Report for Yellow Bay, Montana*. Report prepared for City Services, Inc., Kalispell, Montana, November 3, 1992.

Olympus, November, 1993. *Quarterly Environmental Monitoring Report, Yellow Bay, Montana*. Report prepared for AIG Consultants, Chicago, Illinois, November 11, 1993.

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Olympus, June, 1995. *Results of Quarterly Environmental Monitoring of Gasoline Spill, Yellow Bay, Montana*. Report prepared for AIG Consultants, Chicago, Illinois, June 27, 1995.

USEPA, 1988. *Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA (Interim Final)*. Office of Emergency and Remedial Response, EPA/540/G-89/004, OSWER Directive 9355.3-01, Washington, D.C., October, 1988.

LIMITATIONS

The conclusions presented in this report are professional opinions based on data described in this report. They are intended only for the purpose, site location, and project indicated. This report is not a definitive study of contamination at the site and should not be interpreted as such. An evaluation of subsurface soil and groundwater conditions was not performed as part of this investigation. No sampling or chemical analyses were performed as part of this assessment unless specifically stated.

This report has been prepared for Mr. Gerald Miller and Mr. Henry R. Crane pursuant to an agreement between Land & Water Consulting, Inc., and Mr. Miller, and is accurate to the best of Land & Water's belief. This report is based, in part, on unverified information supplied by third-party sources. While efforts have been made to substantiate this third-party information, Land & Water cannot guarantee its completeness or accuracy.

Land & Water staff participating in this environmental site assessment are scientists, not attorneys. Therefore, it must be clear to all parties that this report does not offer any legal opinion, representation, or interpretation of environmental laws, rules, regulations, or policies of federal, state, or local governmental agencies.

APPENDIX E

MILLER'S AMENDED COMPLAINT

HENRY R. CRANE
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(406) 721-4440

Attorney for Plaintiff
Gerald Miller

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

GERALD MILLER, Plaintiff, vs. CITY SERVICE OF KALISPELL, a Montana corporation, JEFFREY PIERCE, and DOES 1 through 30, inclusive, Defendants.	Cause No. DV-94-280_ **AMENDED COMPLAINT**

For its Complaint against Defendants City Service of Kalispell, Jeffrey Pierce, Beall, Inc. and Beall Trailers, Inc., and John Does 1 through 30, Plaintiff, Gerald Miller alleges:

THE PARTIES

1. At all times relevant to this action, Plaintiff Gerald Miller has owned property commonly known as 17179 East Lakeshore Drive in Lake County, Montana (the "Property").

2. Defendant City Service of Kalispell is a Montana corporation.

3. Defendant Jeffrey Pierce is an individual resident of Montana.

4. Defendant Beall, Inc. is a Montana Corporation.

5. The true names or capacities, whether individual, corporate, associate or otherwise of defendants, Does 1 through 30, are unknown to Plaintiff at this time. Plaintiff,

therefore, sue Does 1 through 30 by fictitious names and will ask leave of the court to amend this complaint to show the true names and identities once they are ascertained.

GENERAL ALLEGATIONS

6. On or about September 16, 1992, the rear unit of a gasoline tanker truck owned by City Service overturned while being driven by Defendant Jeffrey Pierce on Montana State Highway 35.

7. At all times relevant to this action, Defendant Jeffrey Pierce was an employee and agent of Defendant City Service and acted within the course and scope of that employment and agency relationship.

8. Defendants Does No. 1-10, owned or otherwise controlled the gasoline being transported and was responsible for its safe transportation and delivery.

9. Defendants Does No. 11 to 30 designed, manufactured, owned, operated or maintained the equipment that failed or malfunctioned causing the incident that is the subject of this action.

10. When the unit overturned, gasoline being transported spilled out of the unit and saturated the adjacent ground. Some of the spilled gasoline migrated to the Property resulting in significant contamination. Spilled gasoline also flowed into and contaminated Dee Creek, local groundwater, and Flathead Lake.

11. Defendants' acts or omissions taken in response to the gasoline spill have caused changes to the existing surface and ground water runoff patterns that existed on and around the Property resulting in periodic flooding and other damage to the Property.

12. Defendants' acts or omissions taken in response to the gasoline spill have failed to remove all gasoline and associated contamination and sources of contamination from the Property and adjacent areas.

13. As a direct and proximate result of the release of gasoline caused by Defendants' acts or omissions, the Plaintiff has suffered damages to his Property, personal

property, fixtures and water rights, including but not limited to water damage, actual contamination, the stigma of potential contamination and a reduction in the Property's market value and rental value.

14. As a direct and proximate result of the Defendants' acts or omissions that have caused Plaintiff to be exposed to actual or potential contamination and other physical changes to the Property, Plaintiff has suffered pain, discomfort, fear, anxiety, annoyance, inconvenience and other mental, physical or emotional distress.

15. Gerald Miller mitigated his damages by allowing full access to the Property to consultants, contractors and governmental and tribal officials as necessary to investigate and remediate suspected areas of contamination.

FIRST CLAIM FOR RELIEF

(Trespass)

16. Gerald Miller realleges and incorporates by reference the allegations in paragraphs 1 through 15.

17. Defendants' acts or omissions committed in the course of designing, manufacturing, owning, operating or maintaining the tanker trailer and associated equipment caused or contributed to the release of gasoline and the presence of contamination on or at the Property. The release of gasoline to the Property and the resulting damage and contamination of the Property caused by the spilled gasoline is an invasion of the Plaintiff's right of exclusive possession of the Property and constitutes a trespass. The trespass continues because spilled gasoline remains on the Property.

18. As a direct and proximate result of Defendants' trespassory invasion of the Property, the Plaintiff has suffered general damages including, but not limited to, mental, physical or emotional distress.

SECOND CLAIM FOR RELIEF

(Negligence)

19. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 18.

20. Defendants' negligent acts or omissions, including but not limited to: (1) failing to exercise reasonable care in designing, manufacturing, owning, operating, or maintaining the tanker truck trailer and associated equipment in a condition that would have prevented the trailer form overturning and spilling its contents; (2) failing to exercise reasonable care in selecting a safe route for the transport of a large cargo of gasoline; (3) failing to take reasonable action to divert the flow of gasoline away from the Property; (4) failing to respond to gasoline spill in a fashion that would have prevented contamination of the Property; and (5) violating §75-5-605, MCA by causing pollution of state waters, breached a duty of care owed by Defendants to Plaintiff.

21. A gasoline tanker truck does not normally overturn and spill its contents in the absence of the negligence of those responsible for the design, manufacture, ownership, operation, or maintenance of the trailer and its associated equipment.

22. Defendants' negligent acts or omission were the direct and proximate causes of the damages suffered by and continuing to be suffered by the Plaintiff.

23. As a direct and proximate result of Defendants' negligence, Plaintiff has suffered general damages including but not limited to, mental, physical or emotional distress.

THIRD CLAIM FOR RELIEF

(Private Nuisance)

24. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 23.

25. Defendants City Service of Kalispell or Jeffrey Pierce's acts or omissions with respect to the gasoline spill have caused a substantial interference in Plaintiff's comfortable

use and enjoyment of the Property by allowing gasoline to spilled near, migrate to and remain on the Property, constituting a private nuisance. The private nuisance continues to this day.

26. As a direct and proximate result of Defendants' substantial interference with Plaintiffs' use and enjoyment of the Property, the Plaintiff has suffered general damages including but not limited, mental, physical or emotional distress.

FOURTH CLAIM FOR RELIEF

(Public Nuisance)

27. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 26.

28. Defendants City Service of Kalispell or Jeffrey Pierce's acts or omissions have created a public nuisance by injuring state waters with gasoline, a substance that is injurious to health and offensive to the senses.

29. Defendants' acts or omission resulting in a pubic nuisance, interferes with Plaintiff's use and enjoyment of the Property and has resulted in special damage, including but not limited to the decrease in market value and rental value of the Property.

30. As a direct and proximate result of Defendants' creation and maintenance of a public nuisance, the Plaintiff has suffered general damages, including but not limited to, mental, physical or emotional distress.

FIFTH CLAIM FOR RELIEF

(Strict Liability for Abnormally Dangerous Activity)

31. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 30.

32. Defendants City Service of Kalispell or Jeffrey Pierce engaged in an abnormally dangerous activity by allowing a double-trailer truck loaded with gasoline to be transported on Montana State Highway 35 despite the opportunity to select a safer alternative route better suited for the transport of a hazardous cargo.

33. These Defendants are strictly liable for all direct and proximate damages resulting from acts or omissions during the transport of gasoline on Montana State Highway 35.

34. As a direct and proximate result of Defendants' engagement of an abnormally dangerous activity, the Plaintiff has suffered general damages including, but not limited to, mental, physical or emotional distress.

SIXTH CLAIM FOR RELIEF

(Strict Products Liability)

35. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 34.

36. Defendant Beall, Inc. or Beall Trailers, Inc. designed or manufactured defective or abnormally dangerous equipment that caused the incident that is the subject of this action. The failure of this equipment cause the damages suffered by the Plaintiff.

37. As a direct and proximate result of Defendant Beall, Inc. or Beall Trailers, Inc. design or manufacture of defective or abnormally dangerous equipment, Plaintiff has suffered property and general damages, including, but not limited to, mental, physical or emotional distress.

SEVENTH CLAIM FOR RELIEF

(Negligent infliction of Emotional Distress)

38. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 37.

39. The acts or omissions complained of herein have caused Plaintiff to suffer great emotional distress including, but not limited to nervousness, anxiety, lack of sleep, and similar symptoms, some of which have exhibited physical affects.

40. As a direct and proximate result of the Defendants' acts or omissions complained of herein, Plaintiff has suffered property and general damages, including, but not

limited to, mental, physical or emotional distress.

WHEREFORE, Plaintiff prays for relief from Defendants as follows:

1. On the First Claim for Relief: For property and general damages in an amount be determined at trial.

2. On the Second Claim for Relief: For property and general damages in an amount to be determined at trial.

3. On the Third Claim for Relief: (a) For property and general damages in an amount to be determined at trial, and (b) for an order requiring Defendants to abate the private nuisance by removing gasoline from the Property.

4. On the Fourth Claim for Relief: (a) For property and general damages in an amount to be determined at trial, and (b) for an order requiring Defendants to abate the private nuisance by removing gasoline from state waters.

5. On the Fifth Claim for Relief: For property and general damages in an amount to be determined at trial.

6. On the Sixth Claim for Relief: For property and general damages in an amount to be determined at trial.

7. On the Seventh Claim for Relief: For general damages to be determined at trial.

8. For prejudgment interest at the legal rate.

9. For Plaintiff's costs and disbursements incurred herein.

10. For such other relief as the Court deems just and proper.

DATED this _____ day of July, 1995.

_____
Henry R. Crane
Attorney for Plaintiff

APPENDIX F

ANSWER AND CROSS-CLAIM FILED BY CITY SERVICES

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Attorneys for Defendants, City Service Incorporated of Kalispell and Jeffrey Pierce

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

GERALD MILLER, Plaintiff, vs. CITY SERVICE INCORPORATED OF KALISPELL, a Montana corporation, JEFFREY PIERCE, BEALL, INC., a Montana corporation, and BEALL TRAILERS, INC., a Montana corporation, and DOES 1 through 30, inclusive, Defendants.	No. DV-94-281 ANSWER TO SECOND AMENDED COMPLAINT AND CROSS-COMPLAINT
CITY SERVICE INCORPORATED OF KALISPELL, a Montana corporation, and JEFFREY PIERCE, Cross-Plaintiffs, vs. BEALL, INC., a Montana corporation, and BEALL TRAILERS, INC., a Montana corporation, Third-Party Defendants.	

ANSWER TO SECOND AMENDED COMPLAINT

COME NOW the defendants, City Service Incorporated of Kalispell and Jeffrey Pierce (hereafter City Service), by and through their counsel of record, and respond to plaintiff's Second Amended Complaint as follows:

FIRST DEFENSE

Plaintiff's Second Amended Complaint fails to state a claim against City Service upon which relief may be granted.

SECOND DEFENSE

1. City Service admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, and 8.

2. City Service admits defendants Beall, Inc., or Beall Trailers, Inc., and the Doe defendants designed and manufactured the equipment that failed or malfunctioned, but denies the remaining allegations contained in paragraph 9.

3. In answering paragraphs 10, 11, 12, 13, 14, and 15, City Service admits that a quantity of gasoline migrated into the adjacent real property, into local groundwater, and possibly into Flathead Lake. City Service took prompt action to attempt to mitigate the damages which might be caused by the spill. To date, the total nature and extent of any damages is as yet unknown to these defendants whether said resulting damage is to real property, personal property, or to the persons of the plaintiff. City Service specifically denies they were at fault in any way for the gasoline spill inasmuch as the same occurred when a defec-

trailer hitch failed which allowed the trailer to come unhitched from the tractor, go off the road, and tip over. City Service further denies that anything that was done in attempting to clean up the spill was in any way a cause of damage to the plaintiff. City Service denies every matter, fact, and thing set forth in paragraphs 10, 11, 12, 13, 14, and 15 of the Second Amended Complaint not herein specifically admitted.

4. In answer to paragraph 16, City Service realleges and incorporates by reference its previous answers to paragraphs 1 through 15.

5. City Service denies that their acts or omissions caused or contributed to the release of the gasoline in that the gasoline was released due to the failure of a defectively designed trailer hitch which failed. City Service specifically denies that they were in any way at fault respecting said gasoline spill and denies that they did anything intentional with respect to the subject incident. City Service denies the remainder of the allegations contained in paragraph 17 of plaintiff's Second Amended Complaint.

6. In answering paragraph 18, City Service admits that plaintiff has suffered damages, but, at this time, City Service is unaware of the total nature and extent of any said damages. City Service denies that any damage was suffered as a direct and proximate result of a trespassory

invasion of the subject property.

7. In answer to paragraph 19, City Service realleges and incorporates by reference its previous answers to paragraphs 1 through 18.

8. City Service specifically denies that they were in any way negligent with respect to the spill of the cargo of gasoline. Therefore, City Service denies the allegations contained in paragraphs 20, 21, and 22 of plaintiff's Second Amended Complaint.

9. In answer to paragraph 23, City Service admits that the plaintiff has suffered damages, the same being uncertain as of this date, but denies that any said damages suffered were a direct and proximate result of the negligence of City Service.

10. In answer to paragraph 24, City Service realleges and incorporates by reference its previous answers to paragraphs 1 through 23.

11. City Service denies that they committed any act or omitted to do anything with respect to the gasoline spill as alleged in paragraph 25 of plaintiff's Second Amended Complaint. City Service affirmatively alleges that they have done and will continue to do everything that they can in order to alleviate the problem. City Service denies that a private nuisance exists and deny each and every other allegation of paragraphs 25 and 26 of plaintiff's Second Amended Complaint. City Service admits that plaintiff has suffered

damages as a result of the gasoline spill, but it is unknown to City Service the nature and extent of all of the damages at this time. City Service further denies that the damages suffered by plaintiff were a direct and proximate result of their actions or inactions.

12. In answer to paragraph 27, City Service realleges and incorporates by reference its previous answers to paragraphs 1 through 26.

13. In answer to paragraphs 28, 29, and 30, City Service denies that their acts or omissions have created a public nuisance as to state waters or as to any property interest claimed therein by the plaintiff. These defendants further deny that their acts or omissions resulted in a public nuisance which interferes with plaintiff's use and enjoyment of the property or that the same has resulted in special damages recoverable thereby by this plaintiff. City Service admits that the plaintiff suffered some damages, the same as yet not totally determined, but deny that said damages were a direct or proximate result of their creation and maintenance of a public nuisance. City Service denies the remainder of the allegations contained in paragraphs 28, 29, and 30 of plaintiff's Second Amended Complaint.

14. In answer to paragraph 31, City Service realleges and incorporates by reference its previous answers to paragraphs 1 through 30.

15. In answer to paragraphs 32, 33, and 34, City Service denies that they were engaged in an abnormally dangerous activity as alleged in plaintiff's Second Amended Complaint and that they are strictly liable for all proximate damages arising from the spilling of gasoline on Montana State Highway No. 35. City Service admits that plaintiff has suffered some damages to the date hereof, the extent of which is unknown, but specifically deny that the damages were a direct and proximate result of any acts or omissions on their part. City Service denies the remainder of the allegations contained in paragraphs 32, 33, and 34 of the Second Amended Complaint.

16. In answer to paragraph 35, City Service realleges and incorporates by reference its previous answers to paragraphs 1 through 34.

17. The allegations of paragraphs 36 and 37 are not directed to City Service who will not respond to such allegations.

18. In answer to paragraph 38, City Service realleges and incorporates by reference its previous answers to paragraphs 1 through 37.

19. In answer to paragraphs 39, 40, and 41, City Service is without any information or belief as to whether plaintiff has incurred any of the described damages or injuries. City Service also denies that it was negligent. Therefore, City Service denies the allegations of said

paragraphs in their entirety.

20. City Service denies every matter, fact, and thing set forth in the Second Amended Complaint not herein specifically admitted.

WHEREFORE, City Service and Jeffrey Pierce pray that plaintiff take nothing by virtue of any of the counts in his Second Amended Complaint, for costs incurred herein, and for such other and further relief as to the Court seems proper.

CROSS-CLAIM AGAINST BEALL, INC.
AND BEALL TRAILERS OF MONTANA, INC.

COMES NOW City Service Incorporated of Kalispell (hereinafter City Service) and Jeffrey Pierce by counsel, and for their cross-claim against Beall, Inc., and Beall Trailers of Montana, Inc., allege as follows:

1. At all times relevant to this action, City Service was a Montana corporation with its principal place of business in Kalispell, Montana.

2. At all times relevant to this action, Beall, Inc., and Beall Trailers of Montana, Inc., were Montana corporations with their principal place of business in Billings, Montana.

3. On January 18, 1984, City Service purchased a tandem dolly which was designed, manufactured, and sold by defendants.

4. On or about September 16, 1992, Jeffrey Pierce, an employee of City Service, was pulling a trailer which was connected to his tractor unit by a reach tube which is a

portion of the tandem dolly heretofore identified.

5. While the tractor and trailer unit were being driven near Polson, Montana, the reach tube on the dolly broke and caused the trailer unit to separate and overturn.

6. The tandem dolly unit purchased by City Service from defendants Beall, Inc., and/or Beall Trailers of Montana, was in a defective condition unreasonably dangerous to users and consumers, it reached City Service without substantial change in its condition when sold, and the product was either defectively designed or defectively manufactured, or both. The Beall defendants also failed to warn City Service with respect to possible failures of the reach tube although they knew or should have known that the reach tube might fail.

7. As a proximate result of the defective condition of the dolly and/or its component parts, City Service suffered damages to the dolly and trailer unit; incurred towing costs associated with removing the damaged vehicle from the accident scene and delivering it to a repair shop; incurred expenses in transferring and delivering fuel to customers; and incurred continuing expenses for the cleanup of the accident scene and neighboring property.

8. City Service and Pierce have been sued for damages arising out of gasoline that was spilled on the property of certain landowners which occurred when the aforesaid product failed.

9. City Service and Pierce are entitled to indemnity and/or contribution against the Beall defendants for any and all damages of whatsoever kind or nature, including attorneys fees and costs, for which City Service or Pierce may become liable to the plaintiffs in Lake County Civil Cause No. DV-94-280 and/or Lake County Civil Cause No. DV-94-281, and to indemnity and/or contribution for any and all costs or expenses for which City Service and Pierce shall become liable to any local, state, or federal agency.

WHEREFORE, City Service and Pierce pray for judgment against Beall, Inc., and Beall Trailers of Montana, Inc., as follows:

1. For damages to the dolly and trailer unit;

2. For costs associated with transferring and delivering fuel to customers;

3. For towing costs;

4. For expenses involved in the cleanup of the accident scene;

5. For expenses involved in the cleanup of neighboring property;

6. For costs and disbursements incurred herein;

7. For any and all other costs or expenses, including attorneys fees, for which City Service and Pierce may become liable by virtue of claims made by damaged landowners or any local, state, or federal agency, as a result of the gasoline spill;

8. For such other and further relief as the Court deems just and equitable.

DATED this 7th day of August, 1995.

CONKLIN, NYBO, LeVEQUE & MURPHY, P.C.

By _____
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