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Legal Memorandum

To: Bob Harrington, DNRC Forestry Division Administrator
From: MP Mark Phares, DNRC Forestry Division Attorney
Re: Montana Department of Natural Resources and Conservation & County Cooperative Fire Control Agreements – Liability under Montana's Worker Compensation and Tort Claims Acts
Date: November 1, 2011

I. ISSUE:

Does the Montana Department of Natural Resources and Conservation ("DNRC") face tort liability exposure for county volunteer firefighters who are injured while suppressing wildland fires using DNRC/County Cooperative Program equipment?

II. SHORT ANSWER:

Most likely yes. DNRC likely faces tort liability exposure because it is unlikely to get the protection of the "exclusive remedy" provision of the Workers' Compensation Act. Except when it hires county government volunteer firefighters as emergency firefighters[1] on extended attack wildfires, DNRC is not likely an employer of those firefighters because it: 1) does not have supervisory control over volunteer firefighters; 2) does not have the right to terminate volunteer firefighters; and 3) does not pay wages or workers' compensation premiums for them.

III. BACKGROUND:

Harold Blattie, Executive Director of the Montana Association of Counties ("MACO"), expressed concern during the May 25, 2011 Northern Rockies Geographic Area Agency Administrators Pre-Fire Season Coordination meeting held at the DNRC Forestry Division Headquarters that many counties do not provide workers' compensation coverage for volunteer firefighters. Concern was expressed at this meeting that this may expose both counties and DNRC to tort claims such as negligence. Mr. Blattie said that while counties are required to have workers' compensation coverage pursuant to the terms of DNRC Form 202 – a form signed as part of the County Cooperative Program - counties are often not providing this coverage. You subsequently requested that a legal memorandum be drafted to address this matter.

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[1] I will use the terms "county firefighters" and "volunteer firefighters" interchangeably in this memo and use the terms to refer to those volunteer firefighters provided for in Title 7, Chapter 33 of the Montana Code Annotated.

DNRC Form 202, "Cooperative Equipment Agreement," requires that "Counties shall provide or ensure Workers' Compensation Insurance coverage on drivers, passengers, or workers using or working with any equipment loaned under this agreement." See Appendix A, DNRC Form 202, Cooperative Equipment Agreement. DNRC has workers' compensation coverage through Montana State Fund. While DNRC employees (including casual temporary employees) "are covered under the provisions of the State of Montana Workers' Compensation Insurance Program (Montana State Fund)," the State's workers' compensation coverage does not apply to local government entities or volunteer firefighters.

A. OVERVIEW OF DNRC FORM 202 AND WORKERS' COMPENSATION COVERAGE

DNRC and each of the fifty six Montana counties enter into "County Cooperative Fire Control Agreements," whereby DNRC loans firefighting equipment to those counties. In exchange for the equipment, counties provide wildland fire suppression services and help the DNRC meet its mandatory statutory "duty to ensure the protection of land under state and private ownership and to suppress wildfires on land under state and private ownership."[2] Counties and DNRC refer to this arrangement as the County Cooperative Program ("CCP"), which has existed since 1969 and ensures that DNRC can fulfill its suppression mandate - particularly in eastern Montana - because DNRC's six land offices do not have the resources to provide complete protection without the cooperation provided by the Program.

DNRC Form 202, the "Cooperative Equipment Agreement," specifically requires counties to "provide or ensure Workers Compensation Insurance coverage on drivers, passengers or workers using or working with any equipment loaned under this agreement." DNRC Form 202, ¶10. In addition, counties are required to notify the State of any accidents involving State or federally owned equipment. The form also requires counties to indemnify the State of Montana and the Federal Government.

III. VOLUNTEER FIREFIGHTERS AND EMPLOYMENT STATUS UNDER MONTANA'S TORT CLAIMS ACT.

Mont. Code Ann. § 2-9-101(2)(a) defines "employee" as "an officer, employee, or servant of a governmental entity" including "elected officials or appointed officials, and *persons acting on behalf of the government entity in any official capacity* temporarily or permanently in the service of the government entity whether with or without compensation." (emphasis added). Operation by a volunteer firefighter of a DNRC vehicle loaned pursuant to the CCP would be done on behalf of DNRC to aid DNRC in fulfilling its statutory mandate under Mont. Code Ann. § 76-13-104(1) to protect state and private lands from wildfire. See also Form F-202, ¶ 2, which cites § 76-13-104 as the reason for loaning fire equipment to Counties. The Montana Tort Claims Act defines an employee as "persons acting on behalf of the government entity in any official capacity temporarily or permanently in the service of the government entity whether with or without compensation." Mont. Code Ann. § 2-9-101 (emphasis added).

[2] That duty is found in Montana Code Annotated section 76-13-104.

IV. THE WORKERS' COMPENSATION ACT PROVIDES THE EXCLUSIVE REMEDY FOR INJURED WORKERS IN AN EMPLOYEE-EMPLOYER RELATIONSHIP.

Article II, § 16 of the 1972 Montana Constitution provides that workers' compensation benefits are the exclusive remedy for injured workers, and provides in relevant as follows.

> The administration of justice. . . . . No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. . . .

Mont. Const. art. II, § 16. *Adsem v. Roske*, 224 Mont. 269, 270-71, 728 P.2d 1352, 1353 (1986). The Montana Legislature implemented the exclusive remedy in Mont. Code Ann. § 39-71-411; *Adsem*, 224 Mont. at 271, 728 P.2d at 1353. That provision states in relevant part that:

> Provisions of chapter exclusive remedy -- nonliability of insured employer. . . . . Except as provided in part 5 of this chapter for uninsured employers and except as otherwise provided in the Workers' Compensation Act, an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act or for any claims for contribution or indemnity asserted by a third person from whom damages are sought on account of the injuries or death.

In other words, "when an employee is injured in the work place due to negligence or accident, his remedy is exclusive to the Workers' Compensation Act" ("WCA"). Common law tort claims, such as negligence, therefore, are not available to the injured worker. *Sitzman v. Schumaker*, 221 Mont. 304, 307, 718 P.2d 657, 659 (1986) (internal citation omitted). The exclusive remedy provision excludes tort claims by the injured worker and "in case of death binds his personal representative and all persons having any right or claim" for his injury or death. Mont. Code Ann. § 39-71-411; *Maney v. La. Pac. Corp.*, 303 Mont. 398, ¶ 20, 15 P.3d 962 (2000).

In exchange for giving up the right to sue one's employer, the employee gains workers' compensation benefits under this "quid pro quo" set up for medical benefits and lost wages. Employers, by paying workers' compensation insurance premiums on behalf of the employee, get protection from lawsuits that are based on tort claims.

> The purpose of the [WCA] is to protect both the employer and the employee by incorporating a quid pro quo for negligent acts by the employer. The employer is given immunity from suit by an employee who is injured on the job in return for relinquishing his common law defenses. The employee is assured of compensation for his injuries, but foregoes legal recourse against the employer.

State Farm Fire & Cas. Co. v. Bush Hog, LLC, 353 Mont. 173, ¶¶ 12-13, 219 P.3d 1249 (2009) (citations omitted); *Stratemeyer II*, 276 Mont. 67, 74, 915 P.2d 175, 179. *Walters v. Flathead Concrete Prods.*, 359 Mont. 346, ¶ 12, 249 P.3d 913 (2011).

A. COUNTY VOLUNTEER FIREFIGHTERS ARE NOT LIKELY DNRC EMPLOYEES UNDER COMMON LAW TESTS.

While recognizing the complexity of finding a such relationship, the U.S. Supreme Court has described the common law test for an employee-employee relationship as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)) (internal citations and footnotes omitted).

A 1983 Attorney General opinion held that based on statutes at that time volunteer firefighters were not "'employees' within the meaning of the Workers' Compensation Act, but are entitled to benefits under the Volunteer Firefighters' Compensation Act." Greely, Mike, 40 Op. Atty Gen. Mont. No. 9. Former Attorney General Mike Greely cited Mont. Code. Ann. § 39-71-401 in stating that the Workers' Compensation Act applies to all employees as defined in Mont. Code Ann. § 39-71-118(1)(a), and does not apply to a person who is not defined as an employee under that statute. Mont. Code Ann. § 39-71-118(1)(a), defines "employees" as those who are "in the service of an employer . . . under any appointment or contract of hire, expressed or implied, oral or written."

The current Workers Compensation Act specifically defines volunteer firefighters in incorporated cities and towns as employees. Mont. Code Ann. § 39-71-118(1)(g). However, rural volunteer firefighters are considered employees only if a rural fire district[3] elects to cover them as an employee under the Workers Compensation Act pursuant to Mont. Code Ann. § 39-71-118(7).[4]

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[3] The board of trustees or county commissioners if no board of trustees exists.

[4] Which provides: "(7) (a) The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may elect to include as an employee within the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers' compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.
(b) In the event of an election, the employer shall report payroll for all volunteer firefighters for premium and weekly benefit purposes based on the number of volunteer hours of each firefighter times the average weekly wage divided by 40 hours, subject to a maximum of 11/2 times the state's average weekly wage.
(c) A self-employed sole proprietor or partner who has elected not to be covered under this chapter, but who is covered as a volunteer firefighter pursuant to subsection (7)(a) and when injured in the course and scope of employment as a volunteer firefighter, may in addition to the benefits described in subsection (7)(b) be eligible for benefits at an assumed wage of the minimum wage established under Title 39, chapter 3, part 4, for 2,080 hours a

Volunteer firefighters are specifically defined as "a firefighter who is an enrolled and active member of a governmental fire agency organized under Title 7, chapter 33, except 7-33-4109." Mont. Code Ann. § 39-71-118(4)(a). "Volunteer hours" are defined as "all the time spent by a volunteer firefighter in the service of an employer, including but not limited to training time, response time, and time spent at the employer's premises." Mont. Code Ann. § 39-71-118(4)(b).

The court typically errs on the side of the worker when there is doubt about the viability of an injured worker's claim for compensation, in order to fulfill the purposes of the Workers Compensation Act, the Montana Supreme Court has stated that:

> [i]n interpreting and construing our Workmen's Compensation Act and its various parts, this court has said, 'When it is open to more than one interpretation, one favorable to the employee and the other against him, we must give it the construction most favorable to the injured workman in order to carry out the humane purposes of the Act.'

State ex rel. Morgan v. Industrial Accident Bd., 130 Mont. 272, 287, 300 P.2d 954, 963 (1956), (citations omitted). In other words, County volunteer firefighters are employees under the act when counties choose for them to be employees. If counties do not make this choice, then volunteer firefighters would not be defined as an employee under the Workers Compensation Act. While that may be the end of the inquiry, it is possible that a court might look to common law tests to determine if the facts of a case created an employer-employee relationship.

Montana's Workers' Compensation Act defines the State and each county as employers. Mont. Code Ann. § 39-71-117. An employer "who uses the services of a worker furnished by another person ... other than a temporary service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker." § 39-71-117(3). This presumption can be rebutted by substantial credible evidence of:

> a) the contractor ... furnishing the services of a worker to another retains control over all aspects of the work performed by the worker, both at the inception of employment and during all phases of the work; and
> (b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another has obtained workers' compensation insurance for the worker in Montana both at the inception of employment and during all phases of the work performed.

Mont. Code Ann. § 39-71-117(3). DNRC is an employer who uses the services of a worker, a volunteer firefighter, furnished by another person, [5] namely a county (or local government fire-protection entity provided for in Title 7, Chapter 33 of the Montana Code Annotated). A county

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year. The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may make an election for benefits. If an election is made, payrolls must be reported and premiums must be assessed on the assumed wage.

[5] This presumes that a county falls under the heading of "another person" or "person" as those words are used in Mont. Code Ann. § 39-71-117(3), a presumption that may not sustain scrutiny.

is not a temporary service contractor pursuant to the cooperative contracts between DNRC and counties discussed above. Thus, under Mont. Code Ann. § 39-71-117, one could possibly argue that DNRC is the "employer for workers' compensation premiums and loss experience purposes for work performed by the worker," pursuant to Mont. Code Ann. § 39-71-117(3), unless there is evidence of the contractor - a county - maintaining control over all aspects of work performed by the volunteer firefighter during *all* phases of the work *and* the county has obtained workers' compensation insurance for the worker in Montana at the beginning of employment and during *all* phases of the work. DNRC both (a) lacks supervisory control and (b) does not provide workers' compensation coverage to county volunteers. MACO does not appear to provide this coverage to volunteer firefighters in many cases, so prong (b) of the above analysis would not be satisfied and the presumption of DNRC being an employer to county volunteers would not likely be rebutted. However, the county likely does in most if not all circumstances - pursuant to Mont. Code Ann. § 39-71-117(3)(a) - retain control over all aspects of the fire-suppression work performed, which would allow the statutory presumption to be rebutted.

Four common law factors guide a court's decision over whether a person is an employee or an independent contractor, and if the right of control is enough to create an employer-employee relationship:

(1) direct evidence of right or exercise of control;
(2) method of payment;
(3) furnishing of equipment; and
(4) right to fire.

Eldredge v. Asarco Inc., 360 Mont. 112, ¶ 51, 252 P.3d 182 (2011). "The right to control constitutes the most crucial factor in distinguishing between employees and independent contractors." *Id.* citing *Am. Agrijusters Co. v. Mont. Dept. of Labor & Indus.*, 1999 MT 241, ¶ 22, 296 Mont. 176, 988 P.2d 782 *Agrijusters Co. v. Mont. Dept. of Labor & Indus.*, 1999 MT 241, ¶ 22, 296 Mont. 176, 988 P.2d 782. Providing valuable equipment to a contractor is highly suggestive of a relationship between an employer and an employee. *American Agrijusters Co. v. Montana Dep't of Labor & Indus., Bd. of Labor Appeals*, 1999 MT 241, ¶ 33, 296 Mont. 176, 988 P.2d 782 (citations omitted); *St. John's Lutheran Church v. St. Comp. Ins. Fund* (1992).(the furnishing of equipment was considered strong evidence of control of a church over a pastor and a lack of independence, which was sufficient to establish the pastor's status as the church's employee rather than as an independent contractor).

Under the *Eldredge* factors, the only clear factor that DNRC satisfies is the furnishing of equipment to counties. The other factors would have to be examined on a case by case basis to determine DNRC's right to control a volunteer firefighter is if DNRC made any payments to the Counties and to volunteer firefighters, or if DNRC had any rights to fire volunteer firefighters. In order to be classified as an employer, DNRC would need to exercise supervisory control over the volunteers, make payments for them, such as for their workers' compensation coverage, and have the right to fire volunteers, in addition to providing the equipment.[6] While furnishing equipment

[6] An example would be for extended-attack wildfires in which DNRC has hired the volunteer fire fighters as emergency fire-fighters.

is a strong indicator, it is typically in the presence of supervisory control over the person using the equipment provided.

B. VOLUNTEER FIREFIGHTERS CAN LIKELY SUE DNRC BECAUSE DNRC IS A THIRD PARTY.

An employee can sue a third party entity that is not its immediate employer, even for work related injuries if that third party's negligence causes that work-related injury.[7] If a volunteer firefighter is not a DNRC employee, then the firefighter may be able to institute a tort claim against DNRC as a third party, although the Forms F-200 and F-202 may otherwise contractually protect DNRC from such a claim. However, there is a strong presumption in favor of letting injured workers bring claims against third parties. "[T]he Montana Legislature has specifically recognized that third-party claims may be made by those who receive statutory benefits for injuries sustained during the course of their employment, and has enacted laws to adjust the two types of remedy to each other." *Trankel v. Department of Military Affairs*, 282 Mont. 348, 356, 938 P.2d 614, 622 (1997). See also Mont. Code Ann. §§ 39-71-412 and -414. The legislature implemented the right to sue third parties for work related injuries at Mont. Code. Ann § 39-71-412.

Prior to the 1972 Constitution, the Montana Supreme Court held in *Ashcraft v. Montana Power Co.*, 156 Mont. 368, 371, 480 P.2d 812, 813 (1971), that the worker could not sue Montana Power Company because the Company had required the plaintiff's employer to carry workers' compensation coverage. The Constitutional Convention's history shows the delegates responded to Ashcraft with Article II, § 16. *Trankel v. Department of Military Affairs*, 282 Mont. 348, 360-361, 938 P.2d 614, 622. The *Trankel* Court recounted the Constitutional Convention history as direct evidence that Article II, § 16 allowed injured workers to sue negligent third parties and that the exclusive remedy only applies to immediate employers that provider workers compensation coverage to their employees.

Under *Trankel* and the Montana Constitution, since DNRC is not likely an employer of a volunteer firefighter, there is a high probability that an injured volunteer firefighter could bring a tort claim against DNRC as a third party if DNRC negligently causes the injury.[8] DNRC would not likely have the benefit of workers' compensation's exclusive remedy due to a lack of an employer-employee relationship. The challenges of establishing an employer-employee relationship are discussed above.

C. VOLUNTEER FIREFIGHTERS LIKELY DON'T HAVE A STRONG CLAIM AGAINST DNRC AS A GENERAL CONTRACTOR.

A volunteer firefighter would likely not have a strong claim against DNRC based on a claim that the DNRC is a general contractor that subcontracted to counties, because DNRC lacks

[7] Mont. Code Ann. § 39-71-412.

[8] This right already exists under the Montana Tort Claims Act, discussed above in Section III of this Legal Memoranda, but for purposes of this discussion, I am addressing the specific "third party additional cause of action" provided for in Mont. Code Ann. § 39-71-412, which is part of Montana's Workers' Compensation Act.

supervision and control over county volunteer firefighters. While "[e]mployers are generally not liable for the torts of their independent contractors" *Umbs v. Sherrodd, Inc.*, 246 Mont. 373, 376, 805 P.2d 519, 520 (1991), "this rule is subject to certain exceptions." Thus, employers can be liable for torts of independent contractors when all of the following elements are present:

> (1) where there is a non-delegable duty based on a contract;
> (2) where the activity is inherently or intrinsically dangerous; and
> (3) where the general contractor negligently exercises control reserved over a subcontractor's work.

Beckman v. Butte-Silver Bow County, 299 Mont. 389, ¶12, 1 P.3d 348 (2000). The *Beckman* court found in this case that, despite the lack of a written contract, the county retained the means to address unreasonably dangerous conditions. The terms of the contract provided that the county would provide monitoring. Moreover, county employees were present during the trenching operation. These factors were enough to deny summary judgment to the county and remand for further proceedings. *Beckman v. Butte-Silver Bow County*, 299 Mont. 389, ¶¶ 38-39, 1 P.3d 348 (2000).

Even though firefighting is an inherently dangerous activity, DNRC does not typically supervise or control a county rural volunteer firefighter's use of its equipment. Thus only one out of three prongs of the *Beckman* test would be met, and DNRC would likely not be liable for the torts of counties, rural fire districts, or volunteer firefighters.

V. THE EMPLOYER-EMPLOYEE RELATIONSHIP BETWEEN GOVERNMENT AGENCIES AND FIREFIGHTERS.

The tension between a tort claim and the exclusive remedy provided by workers' compensation laws played out in California, in *Enslow v. United States* , 811 F. Supp. 503 (C.D. Cal. 1992). In that case, a California Department of Forestry and Fire Protection ("Cal Fire") firefighter was, pursuant to the equivalent of Montana's "Six-Party Agreement," working on a strike team on the Recer Fire, a 1990 wildland fire on the Mendocino National Forest on which the Bureau of Land Management was the protecting agency. This firefighter, Kenneth Enslow, was killed when a burning dead tree fell and struck him on the head. The firefighter's son brought a wrongful death action under the Federal Tort Claims Act. The United States District Court for the Central District of California reviewed California law in its assessment of whether an employer-employee relationship existed between Mr. Enslow, as a member of a Cal Fire strike team, and the United States government. The District Court concluded that dual employment may exist, with both the State of California and the United States government being the employer. If dual employment exists, the District Court concluded, then the workers' compensation's exclusivity provision bars a tort claim. *Enslow v. United Stat*es, 811 F. Supp. 503, 506 (C.D. Cal. 1992), citing *Kowalski v. Shell Oil* (1979), 23 Cal. 3d 168, 174-75, 151, 588 P.2d 811, Cal. Rptr. 671, 674-75. The District Court found as particularly persuasive in finding the existence of an employer-employee relationship the fact that a United States Forest Service crew liaison supervised the operations of the strike team on which Mr. Enslow was a member. The District Court further looked to the *Kowalski* factors to determine if the firefighter was an employee, with the employer's right of control being the most important factor: (1) power to discharge a worker;

(2) payment of wages; (3) nature of the services; (4) duration of employment period; and (5) provision of work tools. *Id.* at 177, 151 Cal. Rptr. at 676; Martin, 42 Cal. App. 3d at 272-73, 117 Cal. Rptr. at 272-73. *Enslow v. United States,* 811 F. Supp. 503, 506 (C.D. Cal. 1992). Based on these factors, the District Court found the existence of an employer-employee relationship and dismissed the tort claim. The United States Court of Appeals for the Ninth Circuit, in an unpublished opinion,[9] reversed the District Court, finding that the District Court mis-interpreted the *Kowalski* factors, leading to an erroneous conclusion regarding the existence of an employer-employee relationship. The Ninth Circuit Court of Appeals remanded the case to the District Court for further proceedings consistent with its opinion. *Enslow ex rel. Enslow v. United States*, 1994 U.S. App. LEXIS 32765 (9th Cir. Cal. Nov. 15, 1994). In addition to and for the reasons set forth above pursuant to Montana law, the Ninth Circuit Court of Appeal's decision calls into serious question whether DNRC may consider as employees those county volunteer firefighters who operate Program equipment.

VI. CONCLUSION.

DNRC will not likely be able to establish an employer-employee relationship with county volunteer firefighters because DNRC does not supervise volunteer firefighters, does not pay them benefits or provide workers compensation, and does not have the right to terminate them. Thus, the exclusive remedy that protects immediate employers from injured workers' tort claims is likely unavailable to DNRC. DNRC likely faces tort liability exposure as a third party for the injuries sustained by a volunteer firefighter who operates equipment under the County Cooperative Program, but only if that injury was related to DNRC's negligence.

[9] An opinion that may not be cited or relied on as precedent in future litigation.