

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2021-009

**TO:** Mayor, Dale Bickell, Jeremy Keene, Brian Hensel, Kevin Slovarp, Troy Monroe, Monte Sip

**CC:** Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** June 28, 2021

**RE:**

If parties to an agreement subsequently enter into a new independent agreement containing some of the same matters as the original agreement that are inconsistent with the original contract, the subsequent agreement controls any inconsistent provisions between the two agreements.

### **FACTS:**

In early 1938 the Montana Department of Highways, Northern Pacific Railway Company and City of Missoula entered into a three (3) party agreement to construct an underpass bridge carrying railroad tracks over Harris Street (Orange Street). The underpass project was constructed with 1938 FEDERAL AID GRADE CROSSING FUNDS utilizing funds approved by the BUREAU OF PUBLIC ROADS AND FEDERAL AID GRADE CROSSING FUNDS allocated for the construction. The Montana Department of Highways administered the project. Engineers of the Northern Pacific Railway Company and Montana Department of Highways approved detailed plans and specifications for the project.

The Northern Pacific Railway Company granted to the State of Montana an easement across the Railway Company's right-of-way and under tracks. The Montana Department of Highways performed the construction work to complete the underpass, subject to approval of the railroad engineers. The Northern Pacific Railroad Company was responsible for any changes to their railroad tracks/telephone lines. The state highway route to and from the Bitterroot (Lolo, etc.)(I-93) passing through Missoula intersected with the East/West state highway route at the intersection of Broadway and Harris (Orange) known north of the railroad tracks as Urlin Avenue).

Pursuant to the 1938 agreement the City of Missoula was to maintain the street across the railway company's right-of-way including road, sidewalks, curbs, drainage and lighting systems including the necessary electric current for operation of drainage and lighting systems. In addition the City was required to vacate and close existing grade crossings on Woody and Owen

Streets immediately upon completion of underpass on Harris (Orange) Street. The City did vacate and close the existing grade crossings on Woody and Owen Streets,

Subsequently in the 1960's the east/west state highway route (I-90) was relocated northward to the north side of the railroad tracks to the base of Waterworks Hill. The relocation of I-90 also necessitated extending the (I-93) state highway Orange Street (I-93) north of Broadway to I-90 beyond its intersection with the east/west Broadway state highway route. Also, as a result of the extension of Highway-93 north to the Interstate the annual City of Missoula state maintenance agreements with the Montana Department of Transportation (MDT) for maintaining state highway routes in Missoula included some provisions of Montana Department of Transportation that were inconsistent with the 1938 agreement; because now the Orange Street underpass was part of a Montana state highway route. Thus, MDT now had an expanded state highway responsibility with respect to Orange Street north of Broadway.

For example the annual street maintenance agreement with MDT provides that "MDT will make payment to Northwestern Energy for electrical energy for signals, lights, school flashers, and pumps presently installed on the State street and intersections identified in "Appendix A". See provision 1(A). "Appendix A" identifies STATE ROADS AND INTERSECTIONS and identifies "Orange, NH Route N-130N from I-90 to Stephens Ave. The parameters of this description includes the Orange Street underpass.

Also, the City' annual maintenance agreement with MDT for state highway routes located inside the city limits states in provision 3 on page 3

"3. STORM WATER MAINTENANCE: The City will provide periodic maintenance of the storm sewer drainage systems to keep the systems in working order. When failure of any part of the system occurs, the City will notify MDT for approval as a special project activity. MDT shall provide periodic service and scheduled maintenance for the Orange Street pump station."

#### **ISSUE:**

When parties to an agreement enter into a subsequent agreement that sets forth some provisions that are inconsistent with the first agreement, which agreement controls the inconsistent provisions?

#### **CONCLUSION:**

If parties to an agreement enter into a subsequent independent agreement and some of the same matters and terms of the latter are so inconsistent with those of the original to the extent that they cannot stand together, the latter may be construed to discharge the former.

#### **LEGAL DISCUSSION:**

The Montana Supreme Court in *Kester v. Nelson*, 92 Mont. 69 (1932) indicated that a contract need not be rescinded by the parties in instances where the parties enter into a new independent

agreement that has provisions that are inconsistent with the original agreement and the latter agreement will control inconsistent provisions.

The Montana Supreme Court, after discussing the fact that a contract may be rescinded by mutual agreement or the joint will of the parties to the contract and after recognizing that the parties to an agreement may enter into a new contract, the Montana Supreme Court went on to state:

“. . . Again, a contract need not be rescinded by an express agreement to that effect. If the parties to a contract make a new and independent agreement concerning the same matter, and the terms of the latter are so inconsistent with those of the former that they cannot stand together, the latter may be construed to discharge the former.”

There can be no question but what a contract may be mutually abandoned or modified by the parties at any stage of performance, and each of the parties released from further obligation on account thereof; that it may be accompanied by parol, and the fact of it having been done established by evidence of the acts and declarations of the parties.  
(Tompkins v. Davidow, 27 Cal. App. 327, 149 P. 788(1915)

Black's Law Dictionary, Eighth Edition, 1149 defines the term “parol” as meaning unwritten, an oral statement or declaration.

In the Orange Street underpass maintenance matter of the Orange Street underpass, the factual circumstances with respect to state highway routes located within the Missoula city limits that existed in 1938 changed and were added to when the east/west state highway route through Missoula (I-90) was relocated further north to the north side of the railroad tracks during the 1960's.. Thus, the subsequent City of Missoula annual state maintenance agreement pertaining to state roads and intersections located inside the city limits should be controlling with respect to any inconsistent provisions between the two agreements.

### **CONCLUSION:**

If parties to an agreement enter into a subsequent independent agreement and some of the same matters and terms of the latter are so inconsistent with those of the original to the extent that they cannot stand together, the latter may be construed to discharge the former.

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/s/ Jim Nugent

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Jim Nugent, City Attorney

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