

SENATE BILL NO. 316

INTRODUCED BY S. FITZPATRICK

1
2
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING CIVIL LAWS; REVISING LAWS
5 RELATED TO THE USE OF FUNDS FOR CONSTRUCTION REPAIRS AND PROPERTY RESTORATION;
6 REVISING THE MONTANA CONTAMINATED PROPERTY AND RESTORATION ACT; REVISING THE
7 LIABILITY STANDARD USED IN REMEDIAL ACTIONS IN THE COMPREHENSIVE ENVIRONMENTAL
8 CLEANUP AND RESPONSIBILITY ACT; REQUIRING THAT AWARDS AND SETTLEMENT FUNDS FOR
9 CONSTRUCTION REPAIRS AND RESTORATION DAMAGES ARE USED FOR CORRECTIVE ACTION ON
10 PROPERTY; REQUIRING FUNDS TO BE PLACED IN ESCROW OR TRUST ACCOUNTS AND USED FOR
11 INTENDED PURPOSES; PROVIDING OTHER CRITERIA RELATED TO THE USE OF THE FUNDS;
12 PROVIDING FOR RESTORATION DAMAGES; PROVIDING A DEFINITION DEFINITIONS; AMENDING
13 SECTION 75-10-711, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY
14 DATE."

15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17
18 NEW SECTION. Section 1. — Purpose — scope. (1) ~~This part applies to civil claims brought in judicial~~
19 ~~proceedings on behalf of private interests of individuals or entities, including residential construction disputes~~
20 ~~under 70-19-427, in which :~~

21 (a) ~~a party claims restoration CONSTRUCTION REPAIR damages ; and~~

22 (b) ~~a verdict or settlement awards a party more than \$25,000 \$100,000 in restoration CONSTRUCTION~~
23 ~~REPAIR damages.~~

24 (2) ~~This part does not apply to an insured filing a claim against its insurer under a policy of insurance.~~

25 (3) ~~Nothing in this part ;~~

26 (A) ~~precludes the award of other damages allowed under common law and statute; OR~~

27 (B) ~~may BE CONSTRUED TO CREATE A PRIVATE CAUSE OF ACTION.~~

28

1 NEW SECTION. Section 2. — **Definition.** As used in this part, unless the context clearly indicates
 2 otherwise, "restoration CONSTRUCTION REPAIR damages" means the amount of :
 3 (1) ~~compensation determined necessary by a trier of fact or agreed to in a settlement agreement to :~~
 4 (a) ~~restore a contaminated special use property to its function and use prior to the contamination on~~
 5 ~~which a common law claim is based ;~~
 6 (b) ~~remediate a contaminated property to a level determined by the trier of fact;~~
 7 (c)(A) ~~repair damages to a BUILDING, structure, or fixture, including but not limited to repairs related to~~
 8 ~~foundations, roofs, windows, or construction defects; or~~
 9 (d)(B) ~~repair damage to landscaping or other damage to land CAUSED BY A DAMAGED BUILDING,~~
 10 ~~STRUCTURE, OR FIXTURE.~~

11 (2) ~~The term does not include :~~
 12 (a) ~~attorney fees and costs;~~
 13 (b) ~~punitive damages;~~
 14 (c) ~~damages related to emotional distress ;~~
 15 (d) ~~treble damages;~~
 16 (e) ~~finer or penalties; or~~
 17 (f) ~~any other award of damages that are specifically delineated on a verdict form for categories of~~
 18 ~~damages unrelated to property damage.~~

20 NEW SECTION. Section 3. — **Award of restoration** construction repair **damages -- funds placed in**
 21 **escrow** or trust **-- use of funds.** (1) When a court or jury awards restoration CONSTRUCTION REPAIR damages or
 22 parties enter into a settlement that provides for the payment of restoration CONSTRUCTION REPAIR damages, the
 23 party receiving money for restoration CONSTRUCTION REPAIR damages shall :
 24 (a) ~~pay the party's outstanding attorney fees, whether charged on an hourly basis or a flat fee basis,~~
 25 ~~as well as the percentage of the restoration damages owed to an attorney pursuant to a contingency fee a,~~
 26 ~~agreement, and the party's costs associated with the litigation;~~
 27 (b)(A) ~~within 30 days of paying the costs outlined in subsection (1)(a) RECEIVING THE MONEY FOR~~
 28 ~~CONSTRUCTION REPAIR DAMAGES AND AFTER DEDUCTING ANY OUTSTANDING ATTORNEY FEES AND COSTS OF LITIGATION~~

1 ~~OWED~~, deposit the remaining restoration ~~CONSTRUCTION REPAIR~~ damages in escrow ~~OR A TRUST ACCOUNT~~ at a
 2 commercial bank or trust company where the escrow ~~OR TRUST ACCOUNT~~ is overseen by a qualified
 3 professional to restore the property ~~REPAIR THE BUILDING, STRUCTURE, OR FIXTURE~~ ;

4 ~~(c)(B)~~ use the funds in escrow ~~OR TRUST~~ to conduct any remedial and corrective action ~~REPAIRS~~
 5 necessary to restore the property for which the damages were awarded to its function and use prior to the
 6 contamination ~~CONDITION~~ for which the damages were awarded as claimed in the litigation or as ordered by the
 7 court ; and

8 ~~(d)(C)~~ commence remedial and corrective action ~~REPAIRS~~ within 3 years from the date the judgment is
 9 paid or settlement proceeds are received.

10 (2) Remedial and corrective action ~~REPAIRS~~ must be done in accordance with applicable standards or
 11 according to any expert disclosures or expert reports containing a restoration or remediation ~~REPAIR~~ plan or
 12 recommendation that is offered by the party seeking restoration ~~SERVED AS THE BASIS FOR THE AWARD OR~~
 13 ~~SETTLEMENT OF CONSTRUCTION REPAIR~~ damages. If the party alleges the restoration ~~REPAIR~~ work should have
 14 been done in a manner greater than any applicable standard, then the party must follow the plan or
 15 recommendations set forth in an expert witness disclosure or expert witness report.

16 (3) If the party sells the property and remediation or corrective action is not ~~BEFORE REPAIRS ARE~~
 17 completed, the escrow ~~OR TRUST~~ funds must be transferred to the new owner of the property at the time the
 18 purchase of the property is complete. ~~THE FUNDS MUST BE HELD IN ESCROW OR TRUST AND USED IN ACCORDANCE~~
 19 ~~WITH THIS SECTION.~~

20 (4) When ~~AFTER ALL~~ the funds in the escrow ~~OR TRUST ACCOUNT~~ are expended, the duty of the party
 21 to conduct remedial or corrective action to restore the property ~~CONSTRUCTION REPAIRS~~ ceases and the escrow
 22 ~~OR TRUST~~ account must be closed.

23 (5) When the party has completed the work, and if funds remain in the escrow ~~OR TRUST~~ account, the
 24 party shall notify the qualified professional overseeing the ~~ESCROW OR~~ trust to request the return of the funds,
 25 who may ~~ACCOUNT. THE QUALIFIED PROFESSIONAL SHALL~~ release the funds ~~TO THE PROPERTY OWNER~~ on the
 26 finding that the remediation or corrective action ~~CONSTRUCTION REPAIRS~~ has ~~HAVE~~ been completed in
 27 accordance with this section.

28 ~~(6) (A) A DEFENDANT, AN INSURER, OR AN ATTORNEY REPRESENTING A DEFENDANT OR AN INSURER HAS NO~~

1 ~~DUTY TO ENSURE FUNDS ARE USED IN ACCORDANCE WITH THIS SECTION.~~

2 ~~(B) AFTER THE FUNDS ARE PLACED IN AN ESCROW OR TRUST ACCOUNT, AN ATTORNEY REPRESENTING A~~
 3 ~~PROPERTY OWNER HAS NO DUTY TO ENSURE FUNDS ARE USED IN ACCORDANCE WITH THIS SECTION.~~

4
 5 NEW SECTION. Section 1. RESTORATION DAMAGES. (1) EXCEPT AS PROVIDED IN SUBSECTIONS (2) AND
 6 (3), THIS SECTION APPLIES TO CIVIL CLAIMS BROUGHT IN JUDICIAL PROCEEDINGS ON BEHALF OF INDIVIDUALS AND
 7 ENTITIES FOR THE RECOVERY OF RESTORATION DAMAGES TO ADDRESS IMPACTS TO REAL PROPERTY CAUSED BY
 8 RELEASES OF HAZARDOUS OR DELETERIOUS SUBSTANCES.

9 (2) RESTORATION DAMAGES MAY BE AWARDED ONLY FOR A CLAIM ALLEGING CONTAMINATION OF SPECIAL USE
 10 PROPERTY AND MAY BE OBTAINED ONLY IN ACCORDANCE WITH THE DEFINITIONS AND OTHER REQUIREMENTS SET FORTH
 11 IN THIS SECTION. THE PLAINTIFF BEARS THE BURDEN OF PROOF TO SHOW THAT THE PROPERTY MEETS THE DEFINITION
 12 OF SPECIAL USE PROPERTY.

13 (3) RESTORATION DAMAGES MAY NOT BE AWARDED OR USED TO ALTER AN INTERIM OR FINAL REMEDIAL
 14 ACTION THAT HAS BEEN OR WILL BE UNDERTAKEN ON, OR WILL BENEFIT, A SPECIAL USE PROPERTY PURSUANT TO ANY OF
 15 THE FOLLOWING AUTHORITIES:

16 (A) A FEDERAL ADMINISTRATIVE ORDER ISSUED PURSUANT TO 42 USC 9601, ET SEQ., AS OF MARCH 27,
 17 2021;

18 (B) A STATE ADMINISTRATIVE ORDER ISSUED PURSUANT TO THIS PART;

19 (C) A JUDICIALLY APPROVED CONSENT DECREE; OR

20 (D) ANY OTHER INTERIM OR FINAL REMEDIAL ACTION PLAN APPROVED BY THE DEPARTMENT PURSUANT TO
 21 STATE STATUTORY OR ADMINISTRATIVE LAW.

22 (4) (A) RESTORATION DAMAGES AWARDED PURSUANT TO SUBSECTION (2), EXCLUSIVE OF AWARDS OF
 23 ATTORNEY FEES AND COSTS, MAY BE USED ONLY TO CONDUCT REMEDIAL AND CORRECTIVE ACTION NECESSARY TO
 24 RESTORE THE SPECIAL USE PROPERTY FOR WHICH THE DAMAGES WERE AWARDED. RESTORATION MUST COMMENCE
 25 WITHIN 3 YEARS FROM THE DATE THE JUDGMENT IS PAID OR SETTLEMENT PROCEEDS ARE RECEIVED.

26 (B) IF ANY AWARDED RESTORATION DAMAGES REMAIN AFTER COMPLETION OF THE RESTORATION WORK, THE
 27 SURPLUS MUST BE REFUNDED TO THE DEFENDANT. IF THE DEFENDANT IS NO LONGER VIABLE OR CANNOT BE FOUND, THE
 28 FUNDS MUST BE REMITTED TO THE DEPARTMENT.

1 (5) ANY PARTY MAY REQUEST THAT A COURT AWARDING RESTORATION DAMAGES ALSO ORDER THAT THOSE
 2 DAMAGES BE DEPOSITED IN A SEGREGATED TRUST OR ESCROW ACCOUNT AT A COMMERCIAL BANK OR TRUST COMPANY
 3 TO ENSURE COMPLIANCE WITH SUBSECTION (4)(A). THE PLAINTIFF MAY CREATE A TRUST OR ESCROW ACCOUNT TO BE
 4 OVERSEEN BY A QUALIFIED PROFESSIONAL TO RESTORE THE SPECIAL USE PROPERTY.

5 (6) NOTHING IN THIS SECTION PRECLUDES THE AWARD OF OTHER DAMAGES ALLOWED UNDER COMMON LAW
 6 AND STATUTE.

7 (7) AS USED IN THIS SECTION, THE FOLLOWING DEFINITIONS APPLY:

8 (A) "QUALIFIED PROFESSIONAL" MEANS A PERSON WHO POSSESSES SUFFICIENT SPECIFIC EDUCATION,
 9 TRAINING, AND EXPERIENCE NECESSARY TO EXERCISE PROFESSIONAL JUDGEMENT TO DESIGN AND OVERSEE
 10 IMPLEMENTATION OF A RESTORATION PLAN.

11 (B) "RESTORATION DAMAGES" MEANS THE AMOUNT OF COMPENSATION DETERMINED REASONABLY
 12 NECESSARY BY A TRIER OF FACT TO RESTORE A CONTAMINATED SPECIAL USE PROPERTY TO ITS FUNCTION, USE, OR
 13 CONDITION PRIOR TO THE CONTAMINATION ON WHICH A CIVIL CLAIM IS BASED, UNLESS CONTAMINATION WAS PRESENT AT
 14 THE TIME THE PLAINTIFF ACQUIRED THE SPECIAL USE PROPERTY, IN WHICH CASE THE TERM MEANS THE AMOUNT OF
 15 COMPENSATION DETERMINED NECESSARY BY A TRIER OF FACT TO RESTORE A CONTAMINATED SPECIAL USE PROPERTY
 16 TO THE FUNCTION, USE, OR CONDITION THAT EXISTED AT THE TIME THE PLAINTIFF ACQUIRED THE SPECIAL USE
 17 PROPERTY.

18 (C) "SPECIAL USE PROPERTY" MEANS REAL PROPERTY CONTAMINATED BY A RELEASE OF A HAZARDOUS OR
 19 DELETERIOUS SUBSTANCE THAT IS FOUND BY A TRIER OF FACT TO HAVE OBJECTIVELY REASONABLE PERSONAL VALUE TO
 20 THE PLAINTIFF NOT REFLECTED IN THE MARKET VALUE OF THE PROPERTY OR TO HAVE UNIQUE PUBLIC, HISTORIC,
 21 CULTURAL, OR RELIGIOUS VALUE NOT REFLECTED IN THE MARKET VALUE OF THE PROPERTY.

22

23 **SECTION 2. SECTION 75-10-711, MCA, IS AMENDED TO READ:**

24 **"75-10-711. Remedial action -- orders -- penalties -- judicial proceedings.** (1) The department
 25 may take remedial action whenever:

26 (a) there has been a release or there is a substantial threat of a release into the environment that may
 27 present an imminent and substantial endangerment to the public health, safety, or welfare or to the
 28 environment; and

1 (b) none of the persons who are liable or potentially liable under 75-10-715(1) and who have been
2 given the opportunity by letter to properly and expeditiously perform the appropriate remedial action will
3 properly and expeditiously perform the appropriate remedial action. Any person liable under 75-10-715(1) shall
4 take immediate action to contain, remove, and abate the release.

5 (2) Whenever the department is authorized to act pursuant to subsection (1) or has reason to believe
6 that a release has occurred or is about to occur, the department may undertake remedial action in the form of
7 any investigation, monitoring, survey, testing, or other information gathering as authorized by 75-10-707 that is
8 necessary and appropriate to identify the existence, nature, origin, and extent of the release or the threat of
9 release and the extent and imminence of the danger to the public health, safety, or welfare or to the
10 environment.

11 (3) Except as provided in 75-10-712, the department is authorized to draw on the fund to take action
12 under subsection (1) if it has made diligent good faith efforts to determine the identity of the person or persons
13 liable for the release or threatened release and:

14 (a) is unable to determine the identity of the liable person or persons in a manner consistent with the
15 need to take timely remedial action; or

16 (b) a person or persons determined by the department to be liable or potentially liable under 75-10-
17 715(1) have been informed in writing of the department's determination and have been requested by the
18 department to take appropriate remedial action but are unable or unwilling to take action in a timely manner;
19 and

20 (c) the written notice informs the person that if subsequently found liable pursuant to 75-10-715(1),
21 the person may be required to reimburse the fund for the state's remedial action costs and may be subject to
22 penalties pursuant to this part.

23 (4) Whenever the department is authorized to act pursuant to subsection (1), it may issue to any
24 person liable under 75-10-715(1) cease and desist, remedial, or other orders as may be necessary or
25 appropriate to protect the public health, safety, or welfare or the environment.

26 (5) (a) A person who violates or fails to comply with or refuses to comply with an order issued under
27 75-10-707 or this section may, in an action brought to enforce the order, be assessed a civil penalty of not more
28 than \$10,000 for each day in which a violation occurs or a failure or refusal to comply continues. In determining

1 the amount of any penalty assessed, the court may take into account:

2 (i) the nature, circumstances, extent, and gravity of the noncompliance;

3 (ii) with respect to the person liable under 75-10-715(1):

4 (A) the person's ability to pay;

5 (B) any prior history of violations;

6 (C) the degree of culpability; and

7 (D) the economic benefit or savings, if any, resulting from the noncompliance; and

8 (iii) any other matters as justice may require.

9 (b) Civil penalties collected under subsection (5)(a) must be deposited into the environmental quality
10 protection fund established in 75-10-704.

11 (6) A court has jurisdiction to review an order issued under 75-10-707 or this section only in the
12 following actions:

13 (a) an action under 75-10-715 to recover remedial action costs or penalties or for contribution;

14 (b) an action to enforce an order issued under 75-10-707 or this section;

15 (c) an action to recover a civil penalty for violation of or failure or refusal to comply with an order
16 issued under 75-10-707 or this section; or

17 (d) an action by a person to whom an order has been issued to determine the validity of the order,
18 only if the person has been in compliance and continues in compliance with the order pending a decision of the
19 court.

20 (7) In considering objections raised in a judicial action regarding orders issued under this part, the
21 court shall uphold and enforce an order issued by the department unless the objecting party can demonstrate,
22 on the administrative record, that the department's decision to issue the order was arbitrary and capricious or
23 otherwise not in accordance with law.

24 (8) Instead of issuing a notification or an order under this section, the department may bring an action
25 for legal or equitable relief in the district court of the county where the release or threatened release occurred or
26 in the first judicial district as may be necessary to abate any imminent and substantial endangerment to the
27 public health, safety, or welfare or to the environment resulting from the release or threatened release.

28 (9) A person who is not subject to an administrative or judicial order may not conduct any remedial

1 action at any facility that is subject to an administrative or judicial order issued pursuant to this part without the
 2 written permission of the department. If a state or federal administrative or judicial order is issued relative to a
 3 facility, the order and any remedial activity conducted pursuant to the order may be admissible in a civil action
 4 pertaining to the facility or property adjacent to or allegedly impacted by the facility provided that the reviewing
 5 court in its discretion determines the order to be relevant and ~~more probative than prejudicial~~ the probative
 6 value is not substantially outweighed by the danger of unfair prejudice. Admission of this evidence does not
 7 make the department a necessary party to the action. Remedial action performed in accordance with this part is
 8 intended to provide for the protection of the environmental life support system from degradation and to prevent
 9 unreasonable depletion and degradation of natural resources.

10 (10) The department may take remedial action pursuant to subsection (1) at a site that is regulated
 11 under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public
 12 Law 96-510, if the department determines that remedial action is necessary to carry out the purposes of this
 13 part.

14 (11) The department may take remedial action as provided for in 75-10-743(12)."
 15

16 NEW SECTION. Section 3. Codification instruction. (1) ~~[Sections 1 through 3] are intended to be~~
 17 ~~codified as a new chapter in Title 27, and the provisions of Title 27 apply to [sections 1 through 3]-~~

18 ~~(2) [SECTION 4 1] IS INTENDED TO BE CODIFIED IN TITLE 75, CHAPTER 10, PART 7, AND THE PROVISIONS OF~~
 19 ~~TITLE 75, CHAPTER 10, PART 7, APPLY TO [SECTION 4 1].~~

20
 21 NEW SECTION. Section 4. SAVING CLAUSE. ~~[THIS ACT] DOES NOT AFFECT RIGHTS AND DUTIES THAT~~
 22 ~~MATURED, PENALTIES THAT WERE INCURRED, OR PROCEEDINGS THAT WERE BEGUN BEFORE [THE EFFECTIVE DATE OF~~
 23 ~~THIS ACT].~~

24
 25 NEW SECTION. Section 5. EFFECTIVE DATE. ~~[THIS ACT] IS EFFECTIVE ON PASSAGE AND APPROVAL.~~

26
 27 NEW SECTION. Section 8. — Applicability. ~~[This act] applies to claims filed on or after October 1,~~
 28 ~~2024 [the effective date of this act].~~

