STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

GARY INGHAM and KATHLEEN INGHAM, GARY INGHAM, ET UX, *Plaintiffs*, vs. **YELLOWSTONE PROPERTIES, LLC., an Idaho limited liability company, CONTRACTORS NORTHWEST, INC., an Idaho corporation, THE SAGE CORPORATION, a Pennsylvania corporation, d/b/a SAGE TECHNICAL SERVICES, INC., and THE CITY OF HUETTER, an Idaho municipal corporation,** *Defendants*.	Case No. **CV 2014 5228** **MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOLLOWING COURT TRIAL**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

Defendant Yellowstone Properties, LLC (Yellowstone) owns a large parcel of land at 3448 North Huetter Road, which is located to the north of Gary and Kathleen Inghams' property. The exact size of Yellowstone's parcel was not discussed at trial, nor in any exhibit the Court can find, but from aerial photographs appears to be about two blocks long east to west, and a block or two wide north to south. Plaintiffs' Exhibit 2. Defendant Contractors Northwest, Inc. (CNI) owns Yellowstone, and Yellowstone leases the property to CNI. Yellowstone bought the property in 2007, and at the time there was an existing building. In 2007, that building and the land were not being used, but the land and the building were previously used by Yellowstone Trucking (not related

to Yellowstone) to store and service their over-the-road trucks. Since 2007 CNI has used most of the property for its storage of large building materials, large equipment which is not being used, and for fabrication of large items (columns built from raw steel, steel beams, and sewage plant items). The fabrication takes place in the building; the other activities of CNI take place outside. Dean Haagenson is the CEO of CNI. Haagenson testified that since 2006, the property has been zoned "industrial" by the City of Huetter, Idaho. Haagenson testified that in the summer of 2009, CNI began leasing part of the property and part of the building to Sage Technical Services, Inc. (Sage).

Sage conducts a truck driving school, and uses part of the building for classes and the office for Tina Sykes, Director of Operations for Sage. Sykes testified that Sage uses part of the property as a backing range where students can practice backing and hooking up trucks, and as a departure point from which a student and instructor take an over the road semi-truck out on the road for about four hours at a time, after which they return to the property and park the equipment.

The Inghams live in a house which faces east, on the west side of Millwright Lane. Millwright Lane is a street that runs north south and, which if proceeding north, runs into and ends at North Huetter Road. North Huetter Road runs east west and is the southern boundary of the Yellowstone property. Millwright Lane intersects North Huetter Road at the southeast corner of the Yellowstone property. The Inghams purchased their property on January 31, 2006. There appear to be seven houses on the west side of Millwright Lane. Plaintiffs' Exhibit 1 and 2. The Inghams live in the second house proceeding from north to south on Millwright Lane as you proceed away from the Yellowstone property. There are five houses on the east side of Millwright Lane across from the Inghams' house. *Id.* Immediately to the west of the houses on

Millwright Lane is a large, non-residential development known as Garage Town I, which is comprised of many interconnected storage units for large motor homes. Plaintiffs' Exhibit 2. Gary Ingham testified they are owners in Garage Town II. Thus, the Ingham's neighborhood is surrounded by the Yellowstone property to the north, and Garage Town I to the west. *Id.* There are residences to the east of the Inghams' neighborhood. *Id.*

Janiece Dahlberg and Ralph "Skip" Lincoln testified. Dahlberg testified she lives at 3268 Millwright Lane, across the street from the Inghams. Dahlberg testified she purchased her place in late 2009. Lincoln testified he lives across the street and to the south of the Inghams, apparently being Dahlberg's neighbor to the south. Lincoln testified he purchased his place in 2008.

The Inghams filed this lawsuit on June 26, 2014. They alleged a "public nuisance", "private nuisance", "violation of zoning ordinance" and "private attorney general doctrine". Complaint and Demand for Jury Trial, pp. 3-5. In addition to naming Yellowstone, CNI and Sage as defendants, the Inghams also sued the City of Huetter. Upon stipulation, the Inghams dismissed their claim against the City of Huetter on June 3, 2015, just prior to trial. At the beginning of trial, on June 8, 2015, the Inghams dismissed their "private attorney general doctrine" claims against the City of Huetter.

At a hearing on May 5, 2015, the parties agreed that the trial would be to the Court and not to a jury, and a stipulation to that effect was filed on May 15, 2015. A court trial was held on June 8, 2015 and June 9, 2015. Prior to the court trial, the remaining parties submitted trial briefs and proposed findings of fact, conclusions of law. Following the trial, the remaining parties submitted post-trial memoranda in lieu of closing argument. The last brief was filed on June 26, 2015, placing the matter at issue before this Court.

II. STANDARD OF REVIEW

"A trial court's findings of fact in a bench trial will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact." *Crea v. Crea*, 135 Idaho 246, 249, 16 P.3d 922, 925 (2000) (*citing Lindgren v. Martin,* 130 Idaho 854, 857, 949 P.2d 1061, 1064 (1997); *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.,* 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990)). As the trier of fact, the district judge must "weigh conflicting evidence and testimony and to judge the credibility of the witnesses." *Id.* (*citing* I.R.C.P. 52(a); *Marshall v. Blair,* 130 Idaho 675, 679, 946 P.2d 975, 979 (1997)). "[W]here findings of fact are based on substantial evidence, even if the evidence is conflicting, those findings will not be overturned on appeal." *Id*. (*citing Hunter v. Shields,* 131 Idaho 148, 953 P.2d 588 (1998)).

III. ANALYSIS.

A. The Court Finds the Inghams Purchased Their Property Knowing About Any Nuisance the Yellowstone Property Might Present.

The doctrine of "coming to the nuisance" is not an absolute bar to a nuisance action, but it is a factor to be considered by the Court. *Carpenter v. Double R Cattle Co., Inc.,* 105 Idaho 320, 332-33, 669 P.2d 643, 655-66 (Ct. App.1983); *McNichols v. J.R. Simplot Co.,* 74 Idaho 321, 325, 262 P.2d 1012, 1014 (1953). It is important to note what the Inghams knew and what the Inghams were capable of knowing when they purchased their property in January 2006.

Gary Ingham testified he noticed the lot now owned by Yellowstone (who leases to CNI, which in turn leases a portion to Sage) when the Inghams came up from Lancaster, California in mid-January 2006 to look for a house. Indeed, the Yellowstone parcel is so large that it could not have been ignored by Inghams. Gary Ingham

testified that at that time he observed a dirt lot with a commercial building and a couple of cars. The Court finds the Inghams had to have known the property of which they now complain was not in any way residential. In 2006, the property in question had ceased being used by Yellowstone Trucking. Had the Inghams investigated, they could have easily found the owner of the property in question, and most importantly, they could have found out that the property in question was located within the City of Huetter and was zoned "industrial", which, according to the City of Huetter's zoning ordinances, also included "commercial" uses. Gary Ingham testified when he purchased his property he thought the lot in question would be developed into something that "wasn't in any way a nuisance", yet the Court finds there was nothing about the lot as it existed at that time which would have given him that impression. Gary Ingham said he spoke to Jay Enus, the superintendent of his builder, Victory Homes, and asked about future uses of the property, but was vague as to what he was told by Enus. It is unknown how the builder of the Inghams' house could make any assurances about a parcel they did not own. In any event, if there were false assurances by their builder, the Inghams have not included Victory Homes in their present lawsuit. Gary Ingham testified he never looked up the zoning of the lot, never looked at the City of Huetter's website to see about how it was zoned, and only found out it was zoned "industrial" after first meeting with their attorney for this litigation, Art Bistline. Gary Ingham testified it was important for he and his wife to move to an area that was healthy, where there wasn't an industrial area next door, but he did absolutely nothing before they purchased their lot to ensure that is in fact what they were getting into.

Kathleen Ingham also testified the first time she found out the property in question was zoned "industrial" was when they hired a lawyer. Kathleen Ingham testified that if she'd known it was zoned industrial she never would have bought their

property. The problem is the Inghams could have easily known the Yellowstone property was zoned "industrial."

When Gary and Kathleen Ingham each signed their Real Estate Purchase and Sale Agreement on January 27, 2006, they checked the box which stated:

> BUYER is aware that membership in a Home Owner's Association may be required and BUER agrees to abide by the Articles of Incorporation, By-Laws and rules and regulations of the Association. Buyer is further aware that the Property may be subject to assessments levied by the Association described in full in the Declaration of Covenants, Conditions, and Restrictions, **BUYER has reviewed Homeowner's Association Documents.**

Exhibit S8, p. 3, ¶ 14 (bold added). The "Declaration of Covenants, Conditions Restrictions and Reservations of Easements for Mill River Second Addition a Subdivision Located in Coeur d'Alene, Idaho", is of record, and reads in pertinent part:

> Section 12.07 Recognition of Rights of Neighboring Land Owners and Users. Grantor for and on behalf of its successors and assigns acknowledges that subject Property lies adjacent to or in near proximity to existing traditional natural resource industries, including an operating lumber mill and wood pellet manufacturing business. Grantor acknowledges the perpetual right of these and other neighboring existing industries to continue their operation as they presently exist within the hounds of the law. Grantor acknowledges that these traditional natural resource industries can and do create a certain reasonable amount of dust, noise, and general unsightliness as a natural consequence of their operation, and Grantor for and on behalf of its successors and assigns waives any objection to such noted conditions as they presently exist. All persons succeeding Grantor are hereby deemed to acknowledge the existence of these neighboring industries, their right to continue operation, and by this Declaration waive objection to the same extent as the Grantor has done herein.

Exhibit S7, p. 33, § 12.07. Thus, in a variety of ways, the Inghams were on notice as to what could happen with the Yellowstone property.

Counsel for the Inghams made an opening statement on the first day of trial. The first sentence of that opening statement was that the Yellowstone property is "…a relic of a time gone by." The Court finds exactly the opposite to be the truth. While the

lumber mills that once lined the north bank of the Spokane River near this area are now gone, the area near Huetter has only recently become sprinkled with residential areas among what has never historically been residential. The fact that the Inghams neighborhood is bordered to the north by Yellowstone's large lot and to the west by Garage Town II bears out that reality. The covenants applicable to Inghams when they bought their property bear out that reality. The Yellowstone property is now, and was at all pertinent times, zoned "industrial" which includes "commercial", and nothing about the way the property appeared in January 2006 would have made the Inghams think otherwise. The Yellowstone property is no "relic". The Yellowstone property is being put to the same use today that it has been for decades, and it is being put to a use consistent with being zoned "industrial" or "commercial".

B. Inghams' Argument Regarding the Definition of "Industrial" is Not Persuasive.

Counsel for the Inghams has made a lengthy argument, citing out of state case law, the premise of which can be distilled to: 1) The City of Huetter's Ordinance provides that land and buildings in an "industrial" or "I" district must be used for "legal manufacturing and industrial plant operations which are not obnoxious by the emission of dust, creation of noise or emission of offensive odors"; 2) "neither manufacturing nor industrial plant are defined by the ordinance"; 3) "no Idaho case has defined 'industrial plant' or 'manufacturing'"; 4) an Alabama case citing Webster's International Dictionary defines "industrial plant" as including "engaged in a manufacturing industry"; and 5) a Pennsylvania case defines "manufacture" as "the act of creating a new item from raw materials". Plaintiffs' Trial Brief, pp. 3-5. The same premise is found at Plaintiffs' Closing Brief, pp. 5-6. Thus, counsel for Inghams concludes:

> Not even a strained definition of "industrial plant" or "legal manufacturing" could encompass what is occurring on the subject property. Neither Sage

> nor CNI is manufacturing anything on the subject property and those companies' activities plainly violate the City of Huetter's zoning ordinances. The Inghams are entitled to an order enjoining Sage and CNI's activities on the subject property.

Id., p. 5. The same conclusion is found at pages 6 and 7 of Plaintiffs' Closing Brief.

The problem with this argument by the Inghams' counsel is it ignores the fact that under the City of Huetter's "industrial" ordinance, if a business is in an "industrial" zone and engages in "[m]anufacturing, industrial and processing establishments, repair shops, warehouses, storage buildings, lumber and supply yards . . . .", that business must supply certain parking spaces. Plaintiffs' Exhibit 8, ch. 8, § 8.4(B), p. HTR0000034. Thus, the City of Huetter obviously contemplates that "industrial" includes "processing establishments, repair shops, warehouses, storage buildings, lumber and supply yards." There is nothing about the wording of that section that would limit "industrial" to just those enumerated uses, but even if it were so limited, CNI's activities are certainly within the definition "repair shops, warehouses, storage buildings", and essentially, many of Sage's activities are as well. While backing a semi-truck is not one of the enumerated uses, there is no "repair shop, warehouse, or storage buildings" that would be capable of being used without the ability to access semi-trucks for deliveries and pickups.

The Inghams' counsel claims the parking provision does not apply, arguing:

> CNI also argues that the zoning ordinance contemplates what it does because of language in the parking provision of the ordinance. First, those parking requirements would apply to conditional use permits issued for uses not consistent with the plain language of the permitted uses in the industrial zone. Second, no need exists to resort to other parts of the ordinance for interpretation issues because the language of the ordinance is not ambiguous and CNI made no attempt to suggest that it was.

Plaintiffs' Reply Brief, pp. 4-5. Neither argument is supportable.

The first argument, that the parking requirements only apply to conditional use

permits, is a blatant misreading by plaintiffs' counsel of the City of Huetter's "industrial" zoning ordinance. Chapter 8 governs "Industrial" zoning. Plaintiffs' Exhibit 8, pp. HTR0000032-35. The "Parking Regulations" are found in Chapter 8, § 4. *Id.,* p. HTR0000034. Nothing in that section on "Parking Regulations" makes any mention of "conditional uses". In fact, in Chapter 8, the only mention of "conditional uses" is in Section 2, which reads, in its entirety: "8.2 Conditional Uses: Mining and Asphalt Batch Plants", with a "strikethrough" through the words "Mining and Asphalt Batch Plants." Thus, the only reading that can be made of this section is that there are no "conditional uses." Inghams' counsel's argument is without merit.

The second argument made by Inghams' counsel, that "…no need exists to resort to other parts of the ordinance for interpretation issues because the language of the ordinance is not ambiguous…", is equally without merit. Inghams' counsel's argument is essentially, "The word 'Industrial' is not ambiguous." This Court notes that at no point in Chapter 8 is the word "industrial" defined. Inghams' counsel then writes: "As set forth in the Inghams' brief, "industrial plant" and "manufacturing" have established legal meanings and are not ambiguous just because those terms are not defined." Plaintiffs' Reply Brief, p. 5. Those "established legal meanings" found by plaintiffs' counsel, come from case law in the states of Alabama and Pennsylvania, cases that are 43 years old and 51 years old, respectively, and **neither of which are zoning cases**. *State v. Wallis,* 48 Ala.App. 652, 655, 267 So.2d 172, 173-74 (Ala.Civ.App. 1972), dealt with the important issue of whether a United States Air Force Base was or was not an "industrial plant" within a statute permitting an operator of a vending machine located in industrial plant to obtain an "occupational license" rather than a "vending machine license". Plaintiffs' Closing Brief, pp. 5-6. *Commonwealth v. Deitch Co.,* 449 Pa. 88, 93-94, 295 A.2d 834, 837 (Penn. 1972), addressed the age-old

question of whether a scrap yard which sold to steel manufacturers came within the "manufacturing" exemption to Pennsylvania's Capital Stock Tax Act. Counsel for the Inghams would prefer this Court take quotes, taken out of context, taken from old cases, from other states, which have nothing to do with zoning, and ignore the fact that the City of Huetter in its zoning ordinance has given specific examples of what "industrial" uses might be: "…processing establishments, repair shops, warehouses, storage buildings, lumber and supply yards." Plaintiffs' Exhibit 8, ch. 8, § 8.4(B), p. HTR0000034. That is something this Court cannot do.

C. Sage is Not Entitled to Involuntary Dismissal of Inghams' Claims Under I.R.C.P. 41(b), but Inghams Have No Private Right of Action Against Yellowstone, CNI or Sage Due to City of Huetter Zoning Ordinance 44-03.

Sage seeks an involuntary dismissal under I.R.C.P. 41(b) of the Inghams' claims alleging they "are not entitled to the relief they seek in this Court." Defendant the Sage Corporation's Closing Brief, p. 3. Counsel for Sage reiterated that motion at the conclusion of Inghams' evidence at the court trial. That motion was taken under advisement. In making that argument, Sage argues the Inghams were required to exhaust their administrative remedies under the Zoning Ordinance prior to seeking a judicial remedy. *Id.*, p. 5. According to Sage:

> [T]he Exhaustion Doctrine applies because the question the Inghams present, particularly with regard to whether Sage and CNI's action comply with industrial zoning classification, relates clearly to the interpretation of Huetter's zoning ordinance which is within the zoning authorities specialization and the Inghams[']administrative remedy is as likely as a judicial remedy to provide the relief they seek.

Id.

Similarly, Yellowstone and CNI contend Idaho Code §§ 67-5271 and 67-6535(3) require the Inghams to seek administrative remedies under the zoning ordinance. Closing Brief of Defendants Yellowstone Properties, LLC and Contractors Northwest,

Inc., p. 3. Yellowstone and CNI claim the Inghams, "are not entitled to circumvent that process by pursuing a lawsuit in District Court." *Id.* As such, they maintain the Court should dismiss the case pursuant to Idaho Rule of Civil Procedure 41(b)[1] and Idaho Code §§ 67-5271 and 67-6535(3).

In response, the Inghams claim they did comply with the procedure provided in Chapter 14 of City of Huetter Ordinance Number 44-03 when they sent a complaint letter to the City of Huetter on July 3, 2012. Plaintiffs' Closing Brief, p. 14. Inghams claim the City of Huetter failed to respond to their complaint. *Id.*

In the alternative, Inghams argue the Doctrine of Exhaustion does not apply in this case because "[t]ypically, the doctrine applies in a controversy between a private party and a governmental agency; it does not apply to a dispute between two private parties." Plaintiffs' Closing Brief, p. 8 (*citing Egelhoff v. Taylor*, 312 P.3d 270, 274 (Colo. Ct. App. 2013)). As this is a dispute between private parties, and not a dispute between a private party and a governmental agency, the Inghams claim the defense of exhaustion of remedies is inapplicable to this action. *Id.* The Inghams also contend Sage has waived the defense of exhaustion by failing to plead it as an affirmative defense. *Id.*

[1] Idaho Rule of Civil Procedure 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff 's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Moreover, the Inghams maintain that since the City of Huetter's Zoning Ordinance "does not provide for any final agency action and does not provide for any procedure to review that agency's action[, t]he Inghams were not required to exhaust their administrative remedies prior to bringing this action . . . because no administrative remedies existed for them to exhaust." *Id.*, p. 10.

The City of Huetter has a zoning ordinance that divides the City into zones. *See* City of Huetter Ordinance Number 44-03, Plaintiffs' Exhibit 8, pp. HTR0000012-44. The subject property is zoned "Industrial", also referred to as an "I District" (Industrial District). *Id.,* pp. HTR0000032-35. Chapter 8.1 of the City of Huetter Ordinance Number 44-03 provides in relevant part:

> 8.1 Purpose: In an "I" District, no land shall be used and no building shall be erected for or converted to any use other than legal manufacturing and industrial plant operations which are not obnoxious by the emission of dust, creation of noise or emission of offensive odors. **Any use permitted in the "C" Commercial District is allowed in the I District**. . . .

Id., at p. HTR0000032. (emphasis added). If a business is in an "industrial" zone and engages in, "[m]anufacturing, industrial and processing establishments, repair shops, warehouses, storage buildings, lumber and supply yards . . . .", that business must supply certain parking spaces. *Id.,* at ch. 8.4(B), p. HTR0000034. Chapter 7 governs "C" Commercial Districts, referred to in Chapter 8.1, and provides in pertinent part:

> 7.1 Purpose: The purpose of the Commercial Zone is to provide an opportunity for office space and large retail services that increases economic interests, promotes the cost-effective provision of public utilities and services, to provide effective off-street parking, and designed in a manner that encourages neighborhoods to have adequate access to commercial services.

Id. at ch. 7.1, p. HTR0000031.

Violations of the Zoning Ordinance are specifically enforced by the City of

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I.R.C.P. 41(b).

Huetter. *Id*. at ch. 14, p. HTR0000043. Pursuant to Chapter 14(B) of the Ordinance, "[i]t shall be the duty of the Building Inspector and/or the Mayor and City Councilor their duly authorized agents to enforce this Ordinance. . . ." *Id.* at ch. 14(B). However, any person may notify the City of Huetter, via the Planning Administrator, that a violation of the Zoning Ordinance is occurring. *Id.* at ch. 14(C). Specifically, Chapter 14(C) provides:

> Whenever a violation of this Ordinance occurs, or is alleged to have occurred, any person may file a written complaint. Such complaint, stating fully the causes and basis thereof shall be filed with the Planning Administrator. The Planning Administrator shall property record such complaint, immediately investigate, and forward that information to the City Council. The Mayor and City Council will review the complaint and investigation and determine what action shall be taken.

Id.

Pursuant to Idaho Code § 67-5271, administrative remedies must be exhausted prior to judicial review. Specifically, Idaho Code § 67-5271 provides:

> (1) A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.
>
> (2) A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy.

I.C. § 67-5271. Moreover, under the provisions of the Local Land Use Planning Act:

> An applicant denied an application or aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code, [which includes zoning matters,] may, within twenty-eight (28) days after all remedies have been exhausted under local ordinance, seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code. An appeal shall be from the final decision and not limited to issues raised in the request for reconsideration.

I.C. § 67-6535(3). "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Regan v. Kootenai Cnty.*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004) (*citing Myers v.*

Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51, 58 S.Ct. 459, 463–64, 82 L.Ed. 638, 644–45 (1938)). "If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted." *Id.* (*citing Bryant v. City of Blackfoot,* 137 Idaho 307, 313, 48 P.3d 636, 641 (2002).

Here, there is evidence that the Inghams complied with the administrative requirements provided in Chapter 14(C) of City of Huetter Zoning Ordinance 44-03 by filing a written complaint on July 3, 2012, alleging impermissible use of the subject property. Specifically, Gary Ingham and several others signed a written complaint addressed to the City of Huetter and other agencies, complaining that:

> CNI maintains and operates a facility in our residential neighborhood that is being rented to Sage Technical Services, a truck driving school. The operation of this school creates a significant amount of pollution, noise, dust and diesel contaminant that has a decidedly negative effect on the quiet enjoyment of one's home. It is our hope that the above agencies can mount a collaborative effort to investigate and resolve this situation.

Exhibit 8 attached to Court's Exhibit 2. As such, the Court finds the Inghams exhausted their administrative remedy. Thus, the Court rejects Sage's argument that the Court lacks subject matter jurisdiction on the grounds that the Ingham's failed to exhaust their administrative remedy. Accordingly, this Court denies Sage's Motion for Involuntary Dismissal under Idaho Rule of Civil Procedure 41(b).

However, the Zoning Ordinance does not create a private cause of action that allows a private person to enforce compliance with the zoning requirements against another private party. Any action was vested solely in the City of Huetter. "In the absence of strong indicia of a contrary legislative intent, courts must conclude that the legislature provided precisely the remedies it considered appropriate." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 176, 923 P.2d 416, 421 (1996) (*citing Middlesex County Sewerage Auth. v. National Sea Clammers,* 453 U.S. 1, 15, 101 S.Ct. 2615,

2623, 69 L.Ed.2d 435 (1981)).

The Zoning Ordinance allows a private party to make a complaint to the City of Huetter and if the private party then disagrees with the action taken or not taken by the City, that party can then seek a judicial remedy against the City for not enforcing the ordinance. It is clear from the plain language of the Ordinance that when the City Council enacted Ordinance Number 44-03, it did not intend to create a private cause of action, or impliedly authorize a private remedy. Chapter 14 specifically states "[t]his Ordinance shall be enforced by the City." City of Huetter Ordinance Number 44-03, Ch. 14.

The Court finds that any action regarding compliance with the Zoning Ordinance is vested solely in the City of Huetter. The Inghams dismissed the City of Huetter as a defendant in this case just prior to trial. As there is no express or implied private right of action under the Ordinance, the Inghams' cause of action to enforce the requirements of the City of Huetter Zoning Ordinance as against Yellowstone, CNI and/or Sage, are unavailable and must be dismissed.

D. Inghams Have No Private Right of Action for Nuisance Against Yellowstone, CNI or Sage Due to City of Huetter Zoning Ordinance 96-09.

The Inghams claim that the activities of Sage and CNI create a nuisance in violation of City of Huetter Ordinance Number 96-09 because "their activities interfere with the comfortable enjoyment of property in the residential neighborhood that surrounds the subject property." Plaintiffs' Closing Brief, p. 4. In response, Sage argues that since there are only two plaintiffs to this action, a husband and wife, the Inghams cannot pursue a nuisance action under City of Huetter Ordinance Number 96-09, which defines nuisance as "anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere

with the comfortable enjoyment of life or property by the community or neighborhood or by any considerable number of persons…" Defendant the Sage Corporation's Closing Brief, pp. 11-12. Yellowstone and CNI contend the City of Huetter Ordinance Number 96-09 is the governing law for this case but maintains the Inghams have failed to present evidence that CNI created a nuisance. Closing Brief of Defendants Yellowstone Properties, LLC and Contractors Northwest, Inc., pp. 4, 6.

City of Huetter Ordinance Number 96-09 sets forth what constitutes a nuisance in the City of Huetter and the means for abating prohibited nuisances. *See* City of Huetter Ordinance Number 96-09. Specifically, a nuisance is defined as:

> Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property **by the community or neighborhood, or by any considerable number of persons**, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or the free passage or use of any public park, square, street, or highway, is a public nuisance.
>
> For the purposes of this Chapter, nuisances shall specifically include, but are not limited to [those conditions enumerated herein].

City of Huetter Ordinance Number 96-09 § 2 (emphasis added). "The purpose of this Nuisance Ordinance is to provide a means *for the City of Huetter* to declare what shall be a nuisance and to provide means by which *it can* prevent and abate nuisances." *Id.* at § 1 (emphasis added). Moreover, "*[w]henever the mayor, City Clerk, City Attorney, or law enforcement agency* finds that a nuisance exists, he shall cause to be served upon the owner, agent, or occupant of the property on which the nuisance is located, or upon the person causing or maintaining the nuisance, a written notice to abate or to request a hearing as provided in Section 6 of this Chapter." *Id.* at § 3(B) (emphasis added). If the person fails to abate the nuisance as directed in the written notice, "*the Mayor or other officer* initiating the notice may cause the nuisance to be abated . . .

[and expenses incurred] shall be paid by the City, and then assessed against the real property owner where on the nuisance was located . . . ." *Id*. at § 4 (emphasis added).

In this case, the Inghams are attempting to bring a private right of action for nuisance pursuant to the City of Huetter Nuisance Ordinance. However, it is clear from the plain language of the Ordinance that when the City Council enacted Ordinance Number 96-09, it did not intend to create a private cause of action, or impliedly authorize a private remedy. Rather, any action was vested solely in the City of Huetter. The Inghams concede this point in their Closing Brief when they state "the City of Huetter Nuisance Ordinance makes no provision whatsoever for any private citizen to make any complaint regarding an existing nuisance to the City of Huetter." Plaintiffs' Closing Brief, p. 9. "In the absence of strong indicia of a contrary legislative intent, courts must conclude that the legislature provided precisely the remedies it considered appropriate." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 176, 923 P.2d 416, 421 (1996) (*citing Middlesex County Sewerage Auth. v. National Sea Clammers,* 453 U.S. 1, 15, 101 S.Ct. 2615, 2623, 69 L.Ed.2d 435 (1981)).

As there is no express or implied private right of action under the Ordinance, the Inghams' cause of action for nuisance under the Nuisance Ordinance is unavailable and must be dismissed.

E. Inghams Have Not Proved a Public or Private Nuisance Exists Under Idaho Code § 52-101, *et seq.*

While no remedy is available to the Inghams under the City of Huetter Nuisance Ordinance, the Court must analyze whether the Inghams have the right to bring a cause of action for nuisance pursuant to the Idaho Code. The term "nuisance" is defined in the Idaho Code as:

> Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to

> interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

I.C. § 52-101. "Remedies for nuisance can include abatement, injunction, and damages." *McVicars v.* Christensen, 156 Idaho 58, 61, 320 P.3d 948, 951 (2014) (*citing* I.C. § 52-111). Chapter 1, Title 52 of the Idaho Code enumerates three types of nuisances: public nuisance, private nuisance, and moral nuisance. The Inghams have alleged the activities of the defendants Sage and Contractors Northwest have created a public nuisance, or in the alternative, the activities of Sage and CNI have created a private nuisance. Complaint and Demand for Jury Trial, pp. 3-4.

A public nuisance is defined by Idaho Code § 52-102 as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." I.C. § 52-102. A private person may bring a cause of action for a public nuisance if the nuisance complained of "is specially injurious to himself." I.C. § 52-204.

As mentioned in the preceding section, Sage argues that since there are only two plaintiffs to this action, a husband and wife, the Inghams cannot pursue a nuisance action under Idaho Code section 52-102. Defendant the Sage Corporation's Closing Brief, p. 12.

The Court agrees with Sage. At trial, only four homeowners, Gary and Kathleen Ingham, Janice Dahlberg, and Ralph "Skip" Lincoln, testified that activities conducted by CNI and Sage on the Yellowstone property have created a nuisance in their nearby residential area. Exhibit 1 and Exhibit 2, aerial photographs of the location in controversy, depict a relatively high density housing and condominium development

adjacent to the Yellowstone property. Construction of the residential development began in 2007, and has continued until the present date. The homeowners who testified during the trial do not reside in the homes closest to the Yellowstone property. In fact, there are two homes located closer to the Yellowstone property as compared to those who testified. The residents of those two homes have not joined in this lawsuit and did not testify at trial about any nuisance coming from the Yellowstone property. There are five houses immediately to the south of the Inghams and two houses to the south of Ralph "Skip" Lincoln. Residents of those five homes have not joined in this lawsuit and did not testify at trial about any nuisance coming from the Yellowstone property. There are six houses on the east side of the same block as Janice Dahlberg and Ralph "Skip" Lincoln. Residents of those six homes have not joined in this lawsuit and did not testify at trial about any nuisance coming from the Yellowstone property.

Moreover, Ralph "Skip" Lincoln testified that the residential development adjacent to the Yellowstone property has a homeowner's association. He testified that he addressed his concerns about the Yellowstone property nuisance affecting homes within the residential development at every homeowner's association meeting he has attended. Lincoln testified that he had hoped the homeowner's association would help resolve the issue with the nuisance issues with Sage, but the homeowner's association declined to do so. Lincoln deposition, p. 35, L. 21 – p. 36, L. 6. The homeowner's association has not joined in this lawsuit. No one on behalf of the homeowner's association testified at the trial about any nuisance coming from the Yellowstone property. No one else who was present at the homeowner's association meeting when this issue was addressed has joined in this lawsuit. When his deposition was taken on May 28, 2015, eleven days before trial, Lincoln was unaware that the Inghams had filed a lawsuit. *Id.,* p. 34, Ll. 6-12.

Only four people have testified about a nuisance coming from the Yellowstone property. There are thirteen residences immediately adjacent to the residences of the four people who testified. Testimony from four homeowners does not show that any activity conducted on the Yellowstone property "affects at the same time an entire community or neighborhood, or any considerable number of persons" as required under Idaho Code § 52-102. As such, the Court finds the Inghams have failed to prove a claim for public nuisance against the defendants.

In the alternative, the Inghams pled a cause of action for private nuisance against the defendants. Complaint and Demand for Jury Trial, p. 4. "Every nuisance not defined by law as a public nuisance or a moral nuisance, is private." I.C. § 52-107. An "action [for private nuisance] may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance." I.C. § 52-111. That simply defines "who" can bring a claim, and the Court finds Inghams meet that definition. However the "standard" to prevail on a nuisance claim is much higher.

A nuisance claim must be supported by substantial and competent evidence. *Larsen v. Village of Lava Hot Springs,* 88 Idaho 64, 73, 396 P.2d 471, 476 (1964). The nuisance claimed must arise to the level of being "injurious to health", "offensive to the senses", or "obstructs the free use of the property". I.C. § 52-111. There is no medical testimony that these activities are "injurious to [Inghams'] health." Inghams testified at length that the noise, diesel fumes, dust and vibration is "offensive to [Inghams'] senses", but the Court is not persuaded that the noise, diesel fumes, dust and vibration arises to a level required to prove a private nuisance. The noise is intermittent during the business day and not at all present at night. The fumes are present to some extent during the business day, but are generated downwind of the prevailing wind in the area,

according to Mark Boyle, investigator for the Department of Environmental Quality. The fumes are not at all present during the night. There has been no dust observed by Boyle since Sage applied magnesium chloride. The Court finds Inghams' and Lincoln's claims of vibration to be not credible. Dahlberg did not testify about vibrations. Tina Sykes works in a building immediately adjacent to where Sage's trucks move, but slightly further from the backing area as compared to where the Inghams live. She is there eleven hours a day. She testified that she has never felt any vibration from Sage's operations. And even if the Inghams and Lincoln feel vibration, that vibration, the Court finds, is intermittent and of low intensity. A diesel tractor simply does not shake the ground to the extent the Inghams and Lincoln testified.

Sykes testified that Sage operates its skills training area called a backup range on the Yellowstone property. Students attending Sage work toward obtaining their commercial driver's licenses. They use the backup range for pre-trip safety checks, learning to start their vehicles, couple their tractor to a trailer and backing the trailer. The tractors are operated at low RPMs and in very low gears. The engines are not revved. All vehicles meet Department of Transportation inspections. From 2009 and each year thereafter Sage has applied for, paid for and obtained City of Huetter business licenses to operate this truck driving school at this location.

The Court need not establish the correct cause of the nuisance, it merely needs to determine that the defendant did "in fact generate[ ] the complained of odors, dust" or nuisance. *Payne v. Skaar*, 127 Idaho 341, 345, 900 P.2d 1352, 1356 (1995) (finding the exact cause of the nuisance was not needed when the court was given sufficient and detailed testimony describing the nuisance and conditions created by the defendant feedlot owner).

A nuisance can either be per se or in fact. "Nothing which is legal in its inception

is a nuisance per se." *Larsen v. Vill. of Lava Hot Springs*, 88 Idaho 64, 72, 396 P.2d 471, 475 (1964). "A nuisance per se is that which is a nuisance at all times and under all circumstances. A nuisance in fact is that which is not inherently a nuisance, or one per se, but which may become such by reason of surrounding circumstances, or the manner in which conducted." *McVicars v. Christensen*, 156 Idaho 58, 61, 320 P.3d 948, 951 (2014) (*citing Rowe v. City of Pocatello,* 70 Idaho 343, 348, 218 P.2d 695, 698 (1950)). This Court finds the Inghams do not meet the nuisance per se standard as the activities on the Yellowstone property are not a nuisance at all times and under all circumstances. This Court finds the Inghams do not meet the nuisance in fact standard as there is nothing about the manner in which the activities on the Yellowstone property are conducted result in a nuisance.

The Inghams contend the actions of Sage and Contractors Northwest constitute a private nuisance because "[t]he use to which CNI and Sage are putting the subject property is completely inconsistent with the surrounding neighborhood and make it impossible for the Inghams and their close neighbors to enjoy their property." Plaintiffs' Closing Brief, p. 4. While the Inghams concede, "[t]he operation of a truck driver school and the storage and repair of construction equipment are not nuisances per se", they claim that by "conducting these activities in a residential neighborhood" the defendants' activities are a nuisance in fact. *Id.*, pp. 2-3. In support of this, the Inghams testified that the Sage truck driving school creates noise, dust, vibrations and diesel fumes. They further testified that the back-up alarms from the trucks create a noise disturbance. They testified CNI's sandblasting creates occasional dust and noise.

In response, Sage claims the Inghams failed to prove the activities they conduct on the subject property create a private nuisance. Defendant the Sage Corporation's Closing Brief, pp. 13-15. It maintains the subject property where it conducts its

operation was formerly the location of the Yellowstone Trucking property, a location that "has always had a dirt lot and traditionally had trucks operating on it." *Id.*, p. 13. This was occurring prior to the Inghams purchasing their property. *Id.* Sage concedes that the dust, noise, fumes, and vibrations the plaintiffs complain about are part of its normal business operations. *Id.*, p. 14. However, Sage notes that a wall was built by CNI surrounding the subject property and the Inghams' home and that Sage has spent $22,000 to mitigate dust, unlike the Inghams, whom Sage contends have done nothing to mitigate the alleged nuisances. *Id.*

The Court finds the Inghams' nuisance claim is not supported by even a preponderance of the evidence, let alone the requisite standard substantial and competent evidence. The Inghams' have failed to demonstrate that the defendants' use of the subject property "interfere[s] with [their] comfortable enjoyment of life or property" as set forth in Idaho Code section 52-101. The Court finds the Inghams' testimony to be not entirely credible as to the frequency and intensity of the noise, dust and vibration.

Video deposition testimony from Mark Boyle, an investigator for the Department of Environmental Quality (DEQ), was presented to the Court during the trial. According to his testimony, Boyle visited the subject property seven times in response to Inghams' dust complaint in 2011. On the first two occasions he saw "fugitive dust" cross the property line from the subject property. On the first occasion in May 2011, Boyle determined that that the dust was created from sand blasting activities conducted by CNI and by trucks being operated by Sage. Boyle visited again in June 2011 and testified there were "really high winds". After the second visit, Boyle contacted CNI and Sage about the fugitive dust. He requested that CNI avoid sandblasting when winds would cause fugitive dust and requested that Sage apply magnesium chloride to

dampen the dust on the backup range. Tina Sykes, Director of Operations for Sage, testified that Sage applied the magnesium chloride to the subject property. Boyle verified that in his testimony. After the application of magnesium chloride by Sage, Boyle then returned to the subject property on five separate occasions following his contact with CNI and Sage. The most recent visit was in 2014, due to a complaint by the Inghams. Boyle testified he received no other complaints about the subject property from any party other than the Inghams. Boyle testified that he did not observe any fugitive dust on any of those occasions.

Lincoln testified that he purchased his property in 2008. He asserted that when purchasing his property he knew that the subject property was being used by Yellowstone Trucking as a freight yard and noticed semi-trucks coming and going from the subject property. Lincoln testified after he moved in, the activity on the subject property was not annoying and nothing he could not live with. However, he claimed use of the subject property increased in 2009, resulting in constant noise, dust, and he could feel the vibration from the vehicles. However, he further asserted that there were other dirt lots, including a large lot that was recently developed into condominiums, which could have created dust in the area surrounding the plaintiffs' property.

In determining whether or not a nuisance exists Idaho's Supreme Court has directed that the trier of fact consider what is reasonable under all the circumstances. *McNichols v. J.R. Simplot Co.* 74 Idaho 321, 325, 262 P.2d 1012, 1016 (1953). Such circumstances have been noted to include consideration of the relative time of construction of plaintiffs' home, including what the plaintiffs knew or should have known of conditions when they built, as well as what typically occurs in an industrial neighborhood. *Id*.

This is still the law in Idaho as more recently the Idaho Supreme Court, when

weighing a trial court's determination of a nuisance regarding a hog operation, found that a district court had acted properly when it took into account several different factors in reaching its decision, including what the plaintiffs knew or should have known at the time they came to the property. *Crea v. Crea* 135 Idaho 246, 16 P.3d 922 (2000). Even more recently, the Idaho Supreme Court remanded a nuisance case to a district court with direction that the district court should consider many factors in reaching its conclusion of nuisance. *McVicars v. Christensen* 156 Idaho 58, 320 P.3d 948 (2014).

Idaho Code § 52-111 provides that in a nuisance action "by the judgment the nuisance may be enjoined or abated, as well as damages recovered." Here, both at hearing on the record and in signed discovery responses the plaintiffs admit that they seek no monetary damages. They seek only to enjoin CNI and Sage from operating their businesses on the subject property.

The activities of CNI and Sage, when weighed under a totality of the circumstances in this case, do not create either a public or a private nuisance under Idaho Code § 52-101 *et seq*. Even if the lawful activities of Sage's business were found to create a nuisance (and this Court does not make that finding), the Idaho Supreme Court noted that injunctions are disfavored in situations where there is a useful purpose and a nuisance arises out of a legitimate business or activities particular manner of operation. *McVicars v. Christensen* 156 Idaho 58, 320 P.3d 948 (2014). This Court finds both CNI and Sage are engaged in a useful purpose and a legitimate business. A common result in such cases is not to enjoin the activity but to issue a decree enjoining the operation after certain hours or imposing certain other reasonable restrictions. *Id.,* 156 Idaho at 61. The Court finds the hours of operation of both CNI and Sage on the Yellowstone property are reasonable.

Since the Inghams seek only equitable relief and not damages, it is a factor for this Court that the Inghams ignored what was patently able to be observed, what was of record and what was noted in their own covenants. They purchased a lot and built a home which was located across the street from a large dusty lot, without checking out what was of record and without reading their covenants. After they purchased, CNI and Sage mitigated by building a brick fence, applying magnesium chloride, and CNI disconnected its back-up beepers and Sage's trucks do not have such beepers. Inghams have done nothing to mitigate.

F. Inghams Have No Private Right of Action for Nuisance Against Yellowstone, CNI or Sage Due to City of Huetter Noise Ordinance 58-04.

The Complaint also alleges the activities of the Sage and CNI constitute a nuisance pursuant to City of Huetter Noise Ordinance Number 58-04, Noise Ordinance. Complaint and Demand for Jury Trial, p. 3 ¶ 15. A copy of this Ordinance was not admitted as an exhibit at trial. None of the parties discuss City of Huetter Ordinance Number 58-04 in their closing briefs. Following the court trial, the Court obtained a copy of this ordinance. Courts of limited jurisdiction may take judicial notice of municipal ordinances. *City of Lewiston v. Frary*, 91 Idaho 322, 328, 420 P.2d 805, 811 (1966).

Section 7 of the Noise Ordinance governs noise control enforcement and provides in part:

> (A) Enforcement shall be the responsibility of the City of Huetter's designee. The designee may include, but is not limited to: City Council members, law enforcement, Planning Administrator and City Clerk

Zoning Ordinance Number 58-04 § 7.

Similar to City of Huetter Nuisance Ordinance Number 96-09, it is clear from the plain language of the Noise Ordinance that when it was enacted by the City Council,

there was no intent to create a private cause of action, or impliedly authorize a private remedy. Rather, any action was vested solely in the designee for the City of Huetter. The Inghams are attempting to bring a private right of action for a noise violation pursuant to the City of Huetter Nuisance Ordinance. "In the absence of strong indicia of a contrary legislative intent, courts must conclude that the legislature provided precisely the remedies it considered appropriate." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 176, 923 P.2d 416, 421 (1996) (*citing Middlesex County Sewerage Auth. v. National Sea Clammers,* 453 U.S. 1, 15, 101 S.Ct. 2615, 2623, 69 L.Ed.2d 435 (1981)).

As there is no express or implied private right of action under the Noise Ordinance, the Inghams' cause of action for any noise violations under this Ordinance are unavailable and must be dismissed.

IV. FINDINGS OF FACT.

I.

Plaintiffs Garry and Kathleen Ingham have resided at 3269 North Millwright Lane in Coeur d'Alene, Idaho since August 15, 2006, after moving from California and locating this property in January of 2006.

II.

The property located at 3448 N. Huetter Road in Huetter, Idaho was purchased by defendant Yellowstone Properties, LLC (Yellowstone) in 2007. The property was at all pertinent times zoned for industrial use, and was comprised of a large unpaved yard, maintenance/repair shop and office space. Such characteristics were present in 2006, and readily apparent to the Inghams prior to their purchase of the lot and construction of their home.

III.

Yellowstone leased the property to defendant Contractors Northwest, Inc. (CNI)

in 2007. CNI is in the commercial construction business and uses the shop to maintain and/or repair various pieces of construction equipment. CNI uses a portion of the yard to store construction materials and equipment before utilizing the same at various construction sites.

IV.

In 2009, CNI sub-leased the office space and a portion of the yard to defendant Sage Technical Services (Sage) for use as a truck driving training school. The sub-lease required Sage to comply with all municipal, state and federal statutes, ordinances and requirements.

V.

Sage operates its truck driving school pursuant to a business license issued by the City of Huetter. Sage has not been issued any notification by the City of Huetter that its operation of the truck driving school violates any local noise or nuisance ordinance, or is inconsistent with the property's industrial zoning classification.

VI.

CNI has not been issued any notification by the City of Huetter that its use of the property violates any local noise or nuisance ordinance, or is inconsistent with the property's industrial zoning classification.

VII.

The ability of CNI to utilize the property has enabled CNI to successfully operate as a general contractor on numerous commercial projects, which in turn produces a significant economic benefit to local residents and the municipalities within which they reside.

VIII.

CNI's use of the property, including the sandblasting of metal containers

approximately three times per year, does not create unreasonable levels of noise, vibration, fumes or dust.

IX.

The sporadic noise and vibrations associated with CNI's activities at the site in question are necessary byproducts of such conduct.

X.

The ability of Sage to utilize the property has enabled Sage to successfully operate as a truck driving school, which in turn produces a significant economic benefit to local residents and the municipalities within which they reside.

XII.

Sage's use of the property by driving semi-tractors does not create unreasonable levels of noise, vibration, fumes or dust.

XIII.

The sporadic noise, odors and vibrations associated with Sage's activities at the site in question are necessary byproducts of such conduct.

XIV.

CNI and Sage have mitigated dust and noise by installing a solid brick perimeter fence, by disconnecting back-up beepers and by using magnesium chloride upon the soil. The Inghams have not mitigated by planting trees or shrubs between their property and the Yellowstone property.

V. CONCLUSIONS OF LAW.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

I.

The activities conducted by CNI and/or Sage at the property owned by

Yellowstone do not constitute a nuisance under Idaho Code 52-101.

II.

The activities conducted by CNI and/or at the property owned by Yellowstone are not in violation City of Huetter Ordinances 96-09(1) or 58-04.

III.

The activities conducted by CNI and/or Sage at the property owned by Yellowstone are acceptable uses within the industrial zoning classification placed on said property by the City of Huetter.

IV.

The activities conducted by CNI and/or Sage at the property owned by Yellowstone are neither a public nor a private nuisance.

V.

The Inghams have no private right of action under any City of Huetter Ordinance. Additionally, neither CNI nor Sage have violated any City of Huetter Ordinance.

VI. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED all remaining claims of the plaintiffs Inghams are DISMISSED.

IT IS FURTHER ORDERED defendants CNI, Yellowstone and Sage are the prevailing parties in this litigation as compared to the plaintiffs Inghams.

IT IS FURTHER ORDERED counsel for the defendants CNI, Yellowstone and Sage prepare a Judgment consistent with these findings, conclusion and order.

Entered this 4th day of August, 2015.

_____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of August, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Art Bistline	665--7290	Clinton O. Casey	208 345-7212
		Art Macomber	664-9933
		Thomas Luchiani	509 327-3504

_____
Jeanne Clausen, Deputy Clerk