

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

JONATHAN R. MOTL
COMMISSIONER
TELEPHONE (406) 444-2942
FAX (406) 444-1643

1205 EIGHTH AVENUE
PO BOX 202401
HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

October 30, 2013

Chris Gallus
Attorney at Law
1423 East Otter Road
Helena, MT 59602

Subject: Request for Advisory Opinion Re Montanans for
Community Development Mailer

Re : COPP-2013-AO- 0001

Dear Mr. Gallus:

I write in response to your memo of October 29, 2013. The Memo is a follow-up to issues addressed in the Commissioner's October 18, 2013 advisory opinion letter.

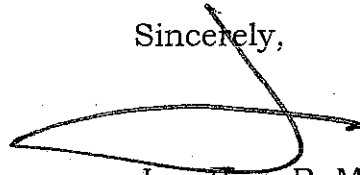
The Memo again asks for clarification of the standard used by the Commissioner in measuring an independent election expenditure. That standard was defined in the Commissioner's letter of October 18, 2013. In particular, at page two the Letter summarizes the standard as follows: "This Commissioner will continue to apply the ARM 44.10.323(3) express advocacy standard until such time as there is statutory or regulatory change to the "anything of value" standard mentioned by the Court in *WTP v Gallik*. Express advocacy, in turn, is defined in a number of Decisions, including the *Bonogofsky v National Gun Owners Alliance* Decision: COPP-2010-CFP-0008." The above response is clear and a further response is declined. See 44.10.201(1)(b)(i)(B) ARM.

Likewise, I again decline to provide an administrative advisory opinion as to the language related to the issue advocacy election expense status of the Flyers accompanying the Memo. You and your client do not need an additional advisory opinion as to the standards applicable to the language of the Flyer as those standards, including a specific review of language, are thoroughly defined by this (and prior) Commissioner(s) in *Bonogofsky v National Gun Owners Alliance* COPP-2010-CFP-0008 and the Decisions cited therein.

I also again decline to provide an administrative advisory opinion based on future election time use of the Flyers. There are thousands of election related flyers published and used in the last month or weeks of any single election cycle. It is intrusive and not appropriate for a

Commissioner to issue an advisory opinion approving or disapproving the type of election expense use of some or all of these Flyers in advance. Further, any such approval or disapproval would have no real value as any complaint filed will raise new facts or nuances. Candidate Kennedy, for example, in *Bonogofksy v Kennedy*, made the same sort of blanket "no coordination" representation as made in the Memo. The actual facts, however, showed evidence of coordination regardless of the representation. Once new facts are raised then the advisory opinion has no value as it is limited to the facts represented. Advisory opinions are not designed for speculative determinations based on speculative activity and the Commissioner declines such a response. See ARM 44.10.201(1)(b)(i)(C).

Sincerely,

A large, stylized handwritten signature in black ink, appearing to be 'J. Motl', written over the word 'Sincerely,'.Handwritten initials 'JM' in black ink, positioned to the right of the main signature.

Jonathan R. Motl
Commissioner of Political Practices

Chris Connett

October 30, 2013

Chris Gallus
Attorney at Law
1423 East Otter Road
Helena, MT 59602

Subject: Request for Advisory Opinion Re Montanans for
Community Development Mailer

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Sincerely,

Jonathan R. Motl
Commissioner of Political Practices

Motl, Jonathan

From: Chris Gallus <galluslaw@gmail.com>
Sent: Thursday, October 31, 2013 1:02 PM
To: Motl, Jonathan
Subject: MCD REQUEST FOR AGENCY DEC RULING

To: MT COPP Jonathan Motl

Jon,

Since my client has sent these mail pieces to print, I am trying to get an understanding of when you believe you will have a response to MCD's request for a declaratory agency ruling. Time is of the essence.

Although this most recent request was sent to your office yesterday, you have obviously had the issues presented in hand for nearly a month. And, since you have indicated that the Bonogofsky decision sets a clear standard for this mail piece, we assume that your office will be able to make quick determinations regarding the questions presented.

I note your response to the second AO request where I supplied you the additional factual information was turned out in a day. The issues and facts remain the same as do the legal issues you relied on yesterday. Please let me know if you have a projected timeframe.

Thank you. Chris
Chris J. Gallus
406.459.8676
Attorney for MCD

Motl, Jonathan

To: Chris Gallus
Subject: RE: MCD REQUEST FOR AGENCY DEC RULING

I do not yet have a time frame in regard to the request. I will let you know as soon as I do.

Jonathan Motl
Commissioner of Political Practices

From: Chris Gallus [<mailto:galluslaw@gmail.com>]
Sent: Thursday, October 31, 2013 1:02 PM
To: Motl, Jonathan
Subject: MCD REQUEST FOR AGENCY DEC RULING

To: MT COPP Jonathan Motl

on,

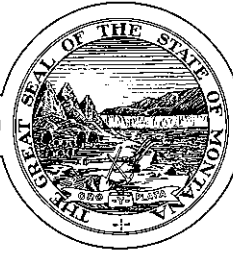
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Thank you. Chris
Chris J. Gallus
406.459.8676
Attorney for MCD

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

JONATHAN R. MOTL
COMMISSIONER
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FAX (406) 444-1643

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HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

October 18, 2013

Chris Gallus
Attorney at Law
1423 East Otter Road
Helena, MT 59602

Subject: Request for Advisory Opinion Re Montanans for
Community Development Mailer

Dear Mr. Gallus:

I write in response to your letter of October 4, 2013 (Letter) requesting an advisory opinion regarding: 1) The standard used by the Commissioner in measuring an independent election expenditure; and, 2) The issue advocacy status of a two page flyer (Flyer) that Montanans for Community Development (MCD) intends to distribute in the Billings area this year.

I apologize for the delay in providing this response. As you likely know, this Office was preparing to release five *Bonogofsky* Decisions; See COPP-2010-CFP- 7, 8, 9, 10, and 15, Commissioner's website. Those Decisions are now available for your review and the content of those Decisions adds to the basis of a response to your inquiry. I thought it best to wait so I could respond off the platform of those Decisions.

Given the precedent set by the *Bonogofsky* and predecessor Decisions I am waiving public comment [see ARM 44.10.201(1)(b)] and issuing an advisory opinion on the question of the standard of express advocacy, as posed by your Letter. Accordingly, please consider this letter as an administrative advisory opinion to the effect that the *Bonogofsky v NGOA* Decision (and predecessor Decisions) define the standard of express advocacy that will be applied by the Commissioner:

The Commissioner, consistent with the above precedent, measures the Letter as an independent expenditure if it is a "...communication[s] expressly advocating the success or defeat of a candidate or ballot issue...", ARM 44.10.323(3), emphasis added. It is noted that the last Decisions issued by a Commissioner involving the independent expenditure issue were those of Commissioner Unsworth in the *Matter of Graybill* and Deputy Commissioner Dufrechou in *Main Street Advocacy Fund*. Both Decisions were made in the midst

of, or shortly after, the litigation concerning §13-35-227 MCA. Still, *Graybill* and *Main Street Advocacy Fund* analyzed and applied the express advocacy standard of ARM 44.10.323(3) without consideration of the lesser “anything of value” standard of §13-1-101(11)(a) MCA that the district court discussed in *WTP v. Gallik*, 1st Judicial District, Lewis and Clark County No. BDV-2010-1120, 2011 Mont. Dist. Lexis 83, ¶17. This Commissioner continues to measure an independent expenditure under the express advocacy standard of ARM 44.10.323(3).

Bonogofsky v National Gun Owners Alliance COPP-2010-CFP-0008 at pp. 7-8.

This Commissioner will continue to apply the ARM 44.10.323(3) express advocacy standard until such time as there is statutory or regulatory change to the “anything of value” standard mentioned by the Court in *WTP v Gallik*. Express advocacy, in turn, is defined in a number of Decisions, including the *Bonogofsky v National Gun Owners Alliance* Decision: COPP-2010-CFP-0008.

The Commissioner declines to provide an administrative advisory opinion as to the issue advocacy election expense status of the Flyer attached to the Letter. The Commissioner takes this stance on the basis that the facts presented are inadequate for a determination. ARM 44.10.201(1)(b)(i).

In way of explanation, the Letter appears to accept that the MCD Flyer will be an election related expense. As an election expense the Flyer will be classified as a candidate contribution, independent expenditure or issue advocacy expenditure. See *Bonogofsky* Decisions. The Letter proposes the MCD flyer expense as an issue advocacy expenditure, but does not provide sufficient facts for the Commissioner to also make this determination. For example, the Letter does not provide sufficient facts describing: MCD and its election related campaign; any inter-relationship between MCD and any candidate whose name is mentioned in the Flyer; the timing of the use of the Flyer; the knowledge of a candidate that a Flyer is being prepared; the replication of Flyer use in other venues; or other information of the type considered by the Commissioner in the *Bonogofsky* Decisions. The additional facts may trigger classification of the Flyer as coordination (making the Flyer expense a candidate contribution) or as an independent expenditure. Or, the facts, when fully identified, may be such that the Commissioner agrees that the Flyer is an issue advocacy expense. See *Wittich v Main Street Advocacy Fund* COPP 2010-CFP-18.

It appears from the Letter that the Flyer wording is mindful of the analysis set out in the *Main Street Advocacy Fund* Decision. There is considerable guidance as to other factors, including coordination, in the *Bongofsky, Main Street Advocacy Fund* and other Decisions cited therein. You and your client should look to those Decisions and design election related activity, including the Flyer, that genuinely serves issue advocacy and does not trigger coordination or express advocacy concerns.

This letter is an advisory opinion based on the specific written facts and questions presented in your letter October 4, 2013. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the written facts presented in your letter of October 4, 2013.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Motl', is written over the typed name.

Jonathan R. Motl

Commissioner of Political Practices



CHRIS J. GALLUS
ATTORNEY AT LAW

**LAW, ELECTIONS &
 GOVERNMENT RELATIONS**
 1423 EAST OTTER RD, HELENA, MT 59602
 406.459.8676 galluslaw@gmail.com

RECEIVED

FAXED

2013 OCT -7 A 8:03
 COMMISSIONER OF
 POLITICAL PRACTICES

FACSIMILE TRANSMITTAL SHEET

TO: MT COPP	FROM: Chris J. Gallus <i>cf. 8-</i>
COMPANY: MT Political Practices Office	DATE: 10/4/2013
FAX NUMBER: 406.444.2942	TOTAL NO. OF PAGES INCLUDING COVER: And Exhibit = 8
PHONE NUMBER: 406.444.1643	SENDER'S PHONE NUMBER: 406.459.8676
RE: MCD AO Request MT COPP	YOUR FACSIMILE NUMBER: 406.443.0262

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

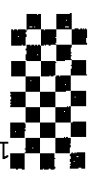
NOTES/COMMENTS:

Jon,

 Please feel free to contact me. Thank you.

Chris J. Gallus 406.459.8676

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**CHRIS J. GALLUS
ATTORNEY AT LAW**

RECEIVED

**LAW, ELECTIONS &
GOVERNMENT RELATIONS**

2013 OCT -7 A 8:03

1423 EAST OTTER ROAD, HELENA, MT 59602

406.459.8676 GALLUSLAW@GMAIL.COM

COMMISSIONER OF
POLITICAL PRACTICES

To: Jonathan Motl, Montana Commissioner of Political Practices
From: Chris J. Gallus, on behalf of Montanans for Community Development
Date: October 4, 2013
Subject: Advisory Opinion Request Regarding Montanans for Community Development Mail Piece

I. INTRODUCTION

Montanans for Community Development ("MCD" or "Organization") is an organization formed under section 501(c)(4) of the Internal Revenue Code to educate the public and promote and encourage policies that create jobs and grow local economies throughout Montana. Among other activities that will be conducted by the Organization consistent with its tax-exempt purpose, MCD plans to educate the public about various economic and energy policy proposals and encourage the public to learn more about these issues.

In the course of preparing for this type of activity, MCD has begun creating at least four mail pieces that it would like to begin distributing to the public in October 2013 and thereafter. These mail pieces all vary slightly, but each shares a similar message in that they inform the public about a policy matter and encourage the public to visit a website to learn more about the policy matter.

One of the mail pieces that the Organization has created and intends to distribute to the public in the Billings, Montana area includes the name and picture of a local Billings civic leader who actively supports the policy positions discussed in MCD's mail piece. The mail piece is attached hereto. This mail piece is being developed independently of the candidate. The purpose of referencing this local civic leader is to lend additional credibility to MCD's policy positions and help readers make a positive association with the policy message of the mail piece. The cost of creating and distributing the mail piece will exceed \$500. The other mail pieces do not mention or refer to candidates for office.

In light of the recent decision by the Commissioner of Political Practices (the "COPP" or "Commissioner") in the McLaren matter, however, MCD is concerned that the COPP might determine that the mail piece is an "expenditure" or "independent

expenditure" under Montana law because the local civic leader referenced in the mail piece is also a candidate for public office. The Organization, therefore, is seeking clarification as to whether it may distribute the attached mail piece, as prepared, without incurring any registration or reporting requirements, including disclaimer information, or otherwise violate any Montana campaign finance law or rule under the COPP's jurisdiction.

On behalf of my client, thank you in advance for your prompt consideration of this advisory opinion request.

II. QUESTIONS PRESENTED

1. If MCD spends more than \$500 to print and distribute the mail piece to the public in the Billings, Montana area, will the mail piece constitute an "expenditure" or "independent expenditure" under Montana law?
2. If MCD spends more than \$500 to print and distribute the mail piece to the public in the Billings, Montana area, will such activity trigger any reporting or registration requirements with the COPP?
3. If MCD spends more than \$500 to print and distribute the mail piece to the public in the Billings, Montana area, does the mail piece require a printed disclaimer statement identifying MCD as the entity paying for such activity? (If so, which disclaimer requirements apply?)

III. ARGUMENT

MCD's mail piece is characteristic of genuine issue advocacy communications, and the costs incurred to print and distribute such material constitute neither an "expenditure" nor an "independent expenditure" as either term is defined in Montana law.

A. The mail piece does not meet the applicable standards for express advocacy.

The term "expressly advocating" (or "express advocacy") has been thoroughly analyzed by prior Commissioners. These decisions have consistently applied the tests from *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), and *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"). See e.g., *Graybill v. Western Tradition Partnership and Coalition for Energy and the Environment*, October 21, 2010; *Close v. People for Responsible Government and the Gallatin Valley Licensed Beverage Association*, October 7, 2002. Using the analysis in these COPP decisions and from prior case law, the COPP should determine that the proposed mail piece does not constitute "express advocacy" or an "independent expenditure."

In *Furgatch*, the Supreme Court held that a communication constitutes express advocacy only if it is "susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Furgatch* at 864. The Court went on to develop the following three-part test to resolve any ambiguity about whether a communication is susceptible to another, reasonable, interpretation other than an exhortation to vote for or against a specific candidate:

1. Even if it is not presented in the clearest, most explicit language, speech is "express" if its message is unmistakable and unambiguous, suggestive of only one plausible meaning;
2. Speech may only be termed "advocacy" if it presents a clear plea for action, not merely informative; and
3. It must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

When analyzed using the *Furgatch* test, MCD's mail piece does not contain "express advocacy."

The COPP has also applied the definition of express advocacy utilized in *WRTL*. In that decision, the Supreme Court considered whether a communication constituted the "functional equivalent of express advocacy" or whether it was genuine issue advocacy not subject to the rules regulating election advocacy communications. Like MCD's mail piece, the three television advertisements at issue in *WRTL* specifically mentioned a candidate by name less than 30 days before an election. The Court said:

First, their content is consistent with that of a genuine issue ad: the ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL at 470.

Similarly, in this request, MCD's mail piece focuses on important policy issues: energy and the economy. It takes a position on these issues and urges the public to adopt and advocate that position by visiting a website to learn more. Second, the mail piece lacks any indicia of express advocacy. It neither mentions an opponent nor does it reference voting, an election, or a candidate's character, qualifications, or fitness for office.

Furthermore, the COPP must recognize that the "discussion of issues cannot be banned merely because the issues might be relevant to an election." *WRTL* at 474, n. 7. Simply because an advertisement names a candidate or discusses issues that are relevant to an election does not mean that the advertisement does not have a real, alternative, significance. As noted in Justice Scalia's concurrence in *WRTL*, election season is the time when candidates are most likely to be persuadable and attentive to the concerns of their constituents. Just because constituents are taking advantage of the increased attention on public issues does not mean that the purpose is to influence the election.

Even under *WRTL* test, therefore, MCD's mail piece fails to rise to the level of "the functional equivalent" of express advocacy.

B. An independent expenditure must expressly advocate.

Section 44.10.323 of the Administrative Rules of Montana contains the applicable definition of "independent expenditure": "an expenditure for communications expressly advocating the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee." The definition of "independent expenditure" does not change simply because the context in which it is used has changed.

The COPP's recent MacLaren decision appears to suggest that the consistent analysis utilized by previous Commissioners is being reconsidered and that the long-held standard of interpreting "independent expenditure" and "express advocacy" in light of *Furgatch* and *WRTL* is suddenly in question. MacLaren at p. 17. The fact that independent expenditures are no longer banned does not somehow narrow the definition of independent expenditure absent some statutory amendment. And while courts have routinely upheld the right of the government to impose disclosure obligations for election-related communications that do not rise to the "higher bar" of express advocacy, such rulings do not mean that "express advocacy" or "independent expenditure" can somehow take on new meanings when they are considered in the context of disclosure. Rather, these rulings mean that legislatures are free to enact a regulatory scheme with certain disclosure requirements for communications that do not constitute express advocacy or independent expenditures. As you know, the Montana legislature has not done so. Therefore, the meaning of "independent expenditure" and "express advocacy" remains unchanged.

C. The mail piece is not an "expenditure."

Montana law defines "expenditure" as "a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election. § 13-1-101(11)(a), MCA. In the Order on Motion for Summary Judgment in *Western Tradition Partnership v. Gallik*, Judge Sherlock cited the U.S. Court of Appeals for the First Circuit and narrowed the definition of "influencing" contained in the definition of "expenditure" in section 13-1-101(11)(a),

MCA. "Thus, as used in Montana's campaign finance disclosure requirements...the use of the word "influencing" will only include communications and activities that expressly advocate for or against a candidate or ballot issue or that clearly identify a candidate or ballot issue by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate or ballot issue." (emphasis added). As previously discussed, MCD's mail piece does not expressly advocate the election or defeat of a candidate nor does it contain the functional equivalent of express advocacy.

D. There are no reporting or registration requirements with the COPP as a result of printing and distributing these mail pieces.

A "political committee" is defined in Montana law as "a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure: (a) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination; or (b) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or (c) as an earmarked contribution. Stated another way, the definition only applies to a combination of two or more individuals or a person other than an individual who makes a *contribution or expenditure*."

Similarly, Montana law requires only the disclosure of "expenditures" and "independent expenditures." § 13-37-230, MCA.

As discussed above, MCD's mail piece does not constitute either an expenditure or an independent expenditure, and printing and distributing the mail piece therefore does not trigger political committee status or any reporting requirements with the COPP.

E. The mail piece does not require a printed disclaimer.

Montana law requires that "communications advocating the success or defeat of a candidate, political party, or ballot issue through any...direct mailing... must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication...In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer. § 13-35-225(1), MCA. These disclaimer requirements, as set forth in section 13-25-225(1), MCA, apply only to communications that "advocate the success or defeat of a candidate, political party, or ballot issue." Absent a specific regulation to the contrary, issue advocacy communications that do not advocate the success or defeat of a candidate, such as MCD's mail piece, do not require any form of attribution statement.



Environmental extremists like the Sierra Club are working every day to kill high-paying jobs through frivolous lawsuits and burdensome regulations.

It's time to understand how Montana's energy policy affects you.
Check out www.energyxxi.org

*Billings is a prime location to
feel the economic benefits of the
Bakken oil boom and development
of Otter Creek coal deposits.*



*Fortunately, local grassroots activists like
John Quandt are promoting pro-growth
policies that will develop resources and
create jobs right here in Billings.*

Institute for 21st Century Energy's 5 Point Plan:

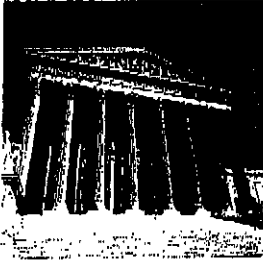
- Maximize America's own energy resources
- Make new and clean energy technologies more affordable
- Eliminate regulatory barriers derailing energy projects
- Do not put America's existing energy sources out of business
- Encourage free and fair trade of energy resources and technologies globally

But they can't do it alone.

Learn more at www.energyxxi.org and join the fight.

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Community Development

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**CHRIS J. GALLUS
ATTORNEY AT LAW**

**LAW, ELECTIONS &
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1423 EAST OTTER ROAD, HELENA, MT 59602
406.459.8676 GALLUSLAW@GMAIL.COM

To: Jonathan Motl, Montana Commissioner of Political Practices

From: Chris Gallus, on behalf of Montanans for Community Development

Date: October 29, 2013

Subject: Advisory Opinion Request Regarding Montanans for Community Development Mail Piece

I. INTRODUCTION

On or about October 4, 2013, Montanans for Community Development ("MCD" or "Organization") requested an advisory opinion from the Commissioner of Political Practices (the "COPP" or "Commissioner") regarding a specific mail piece, which is attached hereto and identified as "Mail Piece 1". As specified in that initial advisory opinion request, MCD had begun creating at least four mail pieces that it plans to distribute to the public in the Billings, Montana area in October 2013 and thereafter. These mail pieces all vary slightly, but each shares a similar message in that they inform the public about a policy matter and encourage the public to visit a website to learn more about the policy matter. Three additional mail pieces that MCD has created and plans to distribute to the public in the Billings, Montana area are attached hereto and identified as "Mail Piece 2", "Mail Piece 3", and "Mail Piece 4", respectively).

As you know, the COPP responded to MCD's request for an advisory opinion on October 18, 2013 (the "COPP's Response"), and it declined to provide an administrative advisory opinion regarding the questions presented "on the basis that the facts presented are inadequate for determination." Specifically, the COPP's Response noted the lack of sufficient facts describing: (i) MCD and its "election related campaign"; (ii) any inter-relationship between MCD and any candidate whose name is mentioned in Mail Piece 1; (iii) the timing of the use of Mail Piece 1; (iv) the knowledge of a candidate that Mail Piece 1 is being prepared; (v) the replication of Mail Piece 1 in other venues; or (vi) other information of the type considered by the Commissioner in the *Bonogofsky* decisions.

Furthermore, the COPP's Response states, "Given the precedent set by the *Bonogofsky* and predecessor Decisions I am waiving public comment [see ARM 44.10.201(1)(b)] and issuing an advisory opinion on the question of the standard of express advocacy, as posed by your Letter... The Commissioner will continue to apply the ARM 44.10.323(3) express advocacy standard until such time as there is statutory or regulatory change to the 'anything of value' standard mentioned by the Court in *WTP v.*

Gallik.” Finally, the response states, “You and your client should look to those [*Bonogofsky* and *Main Street Advocacy Fund*] Decisions and design election related activity, including [Mail Piece 1], that genuinely serves issue advocacy and does not trigger coordination or express advocacy concerns.” Despite the COPP’s best intentions, the foregoing guidance is unhelpful and does not permit MCD to make a reasonable determination regarding the questions presented in the Organization’s initial advisory opinion request.¹

MCD and its counsel have reviewed the *Bonogofsky* decision carefully, and it appears that the COPP’s analysis and application of the law in *Bonogofsky* follows a similar analysis and application of the law as *MacLaren*. As stated in MCD’s initial advisory opinion request, MCD was concerned that the COPP might determine that Mail Piece 1 is an “expenditure” or “independent expenditure” under Montana law in light of the *MacLaren* matter because that decision “appears to suggest that the consistent analysis utilized by previous Commissioners is being reconsidered and that the long-held standard of interpreting ‘independent expenditure’ and ‘express advocacy’ in light of *Furgatch* and *WRTL* is suddenly in question.” The *Bonogofsky* decision further reinforces this concern without providing any justification for the COPP’s reconsideration of long-standing standards absent some statutory amendment. Since the very analysis and application of the law used in *MacLaren* and *Bonogofsky* is what necessitated MCD’s advisory opinion request in the first place, referring the Organization and its counsel to *Bonogofsky* is a circular exercise that proves itself futile.

For example, both the *MacLaren* and *Bonogofsky* decisions state, “*Graybill* and *Main Street Advocacy Fund* analyzed and applied the express advocacy standard of ARM 44.10.323(3) without consideration of the lesser ‘anything of value’ standard of § 13-101(11)(a) MCA that the district court discussed in *WTP v. Gallik*.” (citation omitted). Based on the foregoing, it appears the COPP intends to categorize any disbursement that results in “anything of value” to a candidate as an “election expense,” “election related expense,” or “election related campaign.” MCD assumes this is an incorrect interpretation of the COPP’s intentions, however, since Judge Sherlock expressly held that the “the use of the word ‘influencing’ will only include communications and activities that expressly advocate for or against a candidate or ballot issue or that clearly identify a candidate or ballot issue by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate or ballot issue.” (emphasis added). Obviously, many disbursements result in “anything of value” to a candidate while simultaneously falling short of the standard espoused in Judge Sherlock’s order.²

¹ In the *Bonogofsky* decision, the COPP evaluated whether numerous advertisements distributed by Western Tradition Partnership were the functional equivalent of express advocacy. The contrast between Mail Piece 1 and the advertisements at issue in the *Bonogofsky* decision is stark, and the COPP’s analysis in those decisions cannot be applied wholesale to the mail piece MCD plans to distribute.

² Notably, the Federal Election Campaign Act similarly defines contribution to include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i); see also 2 U.S.C. § 441b(b)(2). (emphasis added). Yet the United States Supreme Court has held “[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other

For the foregoing reasons, MCD is resubmitting the initial request with additional facts so the COPP can issue an advisory opinion regarding the following questions:

1. If MCD spends more than \$500 to print and distribute Mail Piece 1 to the public in the Billings, Montana area, will the disbursements for the mail piece constitute an "expenditure" or "independent expenditure" under Montana law?
2. If MCD spends more than \$500 to print and distribute Mail Piece 1 to the public in the Billings, Montana area, will the disbursements for such activity trigger any reporting or registration requirements with the COPP?
3. If MCD spends more than \$500 to print and distribute Mail Piece to the public in the Billings, Montana area, does the mail piece require a printed disclaimer statement identifying MCD as the entity paying for such activity?

In its initial advisory opinion request, MCD asked for prompt consideration of the request because the Organization intended to begin distributing mail pieces, including Mail Piece 1, to the public in October 2013. Although the COPP declined to issue an advisory opinion "on the basis that the facts presented are inadequate for determination," the tests outlined in both *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), and *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007), require the COPP to read Mail Piece 1 as a whole with only limited reference to external events extraneous to the four corners of the mail piece. Regardless, since the COPP has already had the opportunity to review Mail Piece 1 and the thorough analysis of the applicable law that was included in MCD's initial advisory opinion request, the COPP should be capable of rendering an advisory opinion quickly with the additional facts provided below.

II. ADDITIONAL FACTS

A. MCD and its "election related campaign"

MCD is not planning to engage in any "election related campaign." In the COPP's Response, the COPP erroneously states, "In way of explanation, [MCD's advisory opinion request] appears to accept that [Mail Piece 1] will be an election related expense." MCD makes no such concession, and the facts and analysis presented in MCD's initial advisory opinion request clearly take the position that Mail Piece 1 constitutes genuine issue advocacy that is neither an "expenditure" nor an "independent expenditure" as either term is defined in Montana law.

Furthermore, MCD disputes the COPP's premise that "an election expense for [Mail Piece 1] will be classified as a candidate contribution, independent expenditure or issue advocacy expenditure" for two reasons. First, neither the Montana Code Annotated

than as an appeal to vote for or against a specific candidate" without regard to whether the ad constituted "anything of value" to a candidate. *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

nor the Administrative Rules of Montana define "election expense," "election related expense," or "election related campaign," and these terms certainly cannot be applied by the COPP in a manner that regulates genuine issue advocacy as political speech. Second, genuine issue advocacy, by its very definition, does not constitute an "election expense," "election related expense," or "election related campaign."

As stated in its initial advisory opinion request, MCD is an organization formed under section 501(c)(4) of the Internal Revenue Code to educate the public and promote and encourage policies that create jobs and grow local economies throughout Montana. Among other activities that will be conducted by the Organization consistent with its tax-exempt purpose, MCD plans to educate the public about various economic and energy policy proposals and encourage the public to learn more about these issues.

In the course of preparing for this type of activity, MCD created Mail Piece 1, Mail Piece 2, Mail Piece 3, and Mail Piece 4. As you will note, the four mail pieces vary slightly, but each shares a similar message in that they inform the public about a policy matter and encourage the public to visit a website to learn more about the policy matter. MCD intends to expend approximately \$600 each to distribute Mail Pieces 1, 2, 3, and 4. As noted in MCD's initial advisory opinion request, Mail Piece 1 references a local grassroots activist who is also a candidate for public office. The purpose of referencing this local grassroots activist is to lend additional credibility to MCD's policy positions and help readers make a positive association with the policy message of the mail piece.

Although no such materials have been created, the Organization will likely create and distribute mail pieces and other materials that are similar to Mail Pieces 1, 2, 3, and 4 as a means to educate the public about various economic and energy policy proposals and encourage the public to learn more about these issues. If MCD determines that such expenditures and activities are necessary to educate the public and promote and encourage policies that create jobs and grow local economies throughout Montana, then the Organization may also create and distribute a limited number of mail pieces or other materials that contain "express advocacy" and constitute an "independent expenditure" under Montana law. No such expenditures are currently planned, and in no event will the Organization create and distribute such materials to an extent that could jeopardize MCD's status as a nonprofit organization operating under section 501(c)(4) of the Internal Revenue Code.

B. Any inter-relationship between MCD and any candidate whose name is mentioned in Mail Piece 1

MCD created and plans to distribute Mail Piece 1 without coordination with John Quandt.

C. The timing of the use of Mail Piece 1

MCD originally planned to distribute one or more of the mail pieces in mid-October; however, given the need for an advisory opinion and the COPP's delayed

response, MCD delayed those plans. On October 28, 2013, the Organization's Board of Directors formally approved an initial mail budget of approximately \$2,500, and MCD now plans to distribute Mail Pieces 1, 2, 3, and 4 to the public in the Billings, Montana area on or about October 30, 2013. As noted above, MCD intends to expend approximately \$600 each to distribute Mail Pieces 1, 2, 3, and 4.

D. The knowledge of a candidate that Mail Piece 1 is being prepared

MCD created and plans to distribute Mail Piece 1 without coordination with John Quandt. To the best of MCD's knowledge, John Quandt does not have knowledge of Mail Piece 1 or the Organization's intentions to distribute it.

E. The replication of Mail Piece 1 in other venues

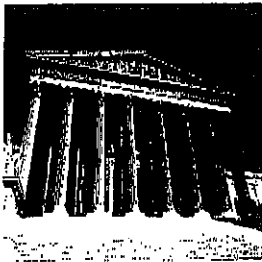
MCD currently plans to distribute Mail Pieces 1, 2, 3, and 4 in the Billings, Montana area only. As stated above, with respect to Mail Piece 1, the purpose of referencing John Quandt is to lend additional credibility to MCD's policy positions and help readers make a positive association with the policy message of the mail piece. Since individuals residing outside the Billings, Montana area are less likely to be familiar with John Quandt as a local grassroots activist, MCD believes that distributing this particular mail piece in other venues would be less likely to positively influence the policy views of recipients than another version of the mail piece containing a similar policy message. Therefore, it is unlikely that Mail Piece 1 will be distributed in other venues.

III. CONCLUSION

On behalf of my client, thank you in advance for your prompt consideration of this advisory opinion request. Since the tests outlined in both *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), and *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007), require Mail Piece 1 to be read as a whole with only limited reference to external events, I am confident that this advisory opinion request contains sufficient facts for the COPP to answer the questions presented.

Chris J. Gallus

INITIAL ADVISORY OPINION REQUEST



**CHRIS J. GALLUS
ATTORNEY AT LAW**

**LAW, ELECTIONS &
GOVERNMENT RELATIONS**
1423 EAST OTTER ROAD, HELENA, MT 59602
406.459.8676 GALLUSLAW@GMAIL.COM

To: Jonathan Motl, Montana Commissioner of Political Practices
From: Chris J. Gallus, on behalf of Montanans for Community Development
Date: October 4, 2013
Subject: Advisory Opinion Request Regarding Montanans for Community Development Mail Piece

I. INTRODUCTION

Montanans for Community Development ("MCD" or "Organization") is an organization formed under section 501(c)(4) of the Internal Revenue Code to educate the public and promote and encourage policies that create jobs and grow local economies throughout Montana. Among other activities that will be conducted by the Organization consistent with its tax-exempt purpose, MCD plans to educate the public about various economic and energy policy proposals and encourage the public to learn more about these issues.

In the course of preparing for this type of activity, MCD has begun creating at least four mail pieces that it would like to begin distributing to the public in October 2013 and thereafter. These mail pieces all vary slightly, but each shares a similar message in that they inform the public about a policy matter and encourage the public to visit a website to learn more about the policy matter.

One of the mail pieces that the Organization has created and intends to distribute to the public in the Billings, Montana area includes the name and picture of a local Billings civic leader who actively supports the policy positions discussed in MCD's mail piece. The mail piece is attached hereto. This mail piece is being developed independently of the candidate. The purpose of referencing this local civic leader is to lend additional credibility to MCD's policy positions and help readers make a positive association with the policy message of the mail piece. The cost of creating and distributing the mail piece will exceed \$500. The other mail pieces do not mention or refer to candidates for office.

In light of the recent decision by the Commissioner of Political Practices (the "COPP" or "Commissioner") in the McLaren matter, however, MCD is concerned that the COPP might determine that the mail piece is an "expenditure" or "independent

expenditure" under Montana law because the local civic leader referenced in the mail piece is also a candidate for public office. The Organization, therefore, is seeking clarification as to whether it may distribute the attached mail piece, as prepared, without incurring any registration or reporting requirements, including disclaimer information, or otherwise violate any Montana campaign finance law or rule under the COPP's jurisdiction.

On behalf of my client, thank you in advance for your prompt consideration of this advisory opinion request.

II. QUESTIONS PRESENTED

1. If MCD spends more than \$500 to print and distribute the mail piece to the public in the Billings, Montana area, will the mail piece constitute an "expenditure" or "independent expenditure" under Montana law?
2. If MCD spends more than \$500 to print and distribute the mail piece to the public in the Billings, Montana area, will such activity trigger any reporting or registration requirements with the COPP?
3. If MCD spends more than \$500 to print and distribute the mail piece to the public in the Billings, Montana area, does the mail piece require a printed disclaimer statement identifying MCD as the entity paying for such activity? (If so, which disclaimer requirements apply?)

III. ARGUMENT

MCD's mail piece is characteristic of genuine issue advocacy communications, and the costs incurred to print and distribute such material constitute neither an "expenditure" nor an "independent expenditure" as either term is defined in Montana law.

A. The mail piece does not meet the applicable standards for express advocacy.

The term "expressly advocating" (or "express advocacy") has been thoroughly analyzed by prior Commissioners. These decisions have consistently applied the tests from *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), and *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL*"). See e.g., *Graybill v. Western Tradition Partnership and Coalition for Energy and the Environment*, October 21, 2010; *Close v. People for Responsible Government and the Gallatin Valley Licensed Beverage Association*, October 7, 2002. Using the analysis in these COPP decisions and from prior case law, the COPP should determine that the proposed mail piece does not constitute "express advocacy" or an "independent expenditure."

In *Furgatch*, the Supreme Court held that a communication constitutes express advocacy only if it is "susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Furgatch* at 864. The Court went on to develop the following three-part test to resolve any ambiguity about whether a communication is susceptible to another, reasonable, interpretation other than an exhortation to vote for or against a specific candidate:

1. Even if it is not presented in the clearest, most explicit language, speech is "express" if its message is unmistakable and unambiguous, suggestive of only one plausible meaning;
2. Speech may only be termed "advocacy" if it presents a clear plea for action, not merely informative; and
3. It must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

When analyzed using the *Furgatch* test, MCD's mail piece does not contain "express advocacy."

The COPP has also applied the definition of express advocacy utilized in *WRTL*. In that decision, the Supreme Court considered whether a communication constituted the "functional equivalent of express advocacy" or whether it was genuine issue advocacy not subject to the rules regulating election advocacy communications. Like MCD's mail piece, the three television advertisements at issue in *WRTL* specifically mentioned a candidate by name less than 30 days before an election. The Court said:

First, their content is consistent with that of a genuine issue ad: the ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

WRTL at 470.

Similarly, in this request, MCD's mail piece focuses on important policy issues: energy and the economy. It takes a position on these issues and urges the public to adopt and advocate that position by visiting a website to learn more. Second, the mail piece lacks any indicia of express advocacy. It neither mentions an opponent nor does it reference voting, an election, or a candidate's character, qualifications, or fitness for office.

Furthermore, the COPP must recognize that the "discussion of issues cannot be banned merely because the issues might be relevant to an election." *WRTL* at 474, n. 7. Simply because an advertisement names a candidate or discusses issues that are relevant to an election does not mean that the advertisement does not have a real, alternative, significance. As noted in Justice Scalia's concurrence in *WRTL*, election season is the time when candidates are most likely to be persuadable and attentive to the concerns of their constituents. Just because constituents are taking advantage of the increased attention on public issues does not mean that the purpose is to influence the election.

Even under *WRTL* test, therefore, MCD's mail piece fails to rise to the level of "the functional equivalent" of express advocacy.

B. An independent expenditure must expressly advocate.

Section 44.10.323 of the Administrative Rules of Montana contains the applicable definition of "independent expenditure": "an expenditure for communications expressly advocating the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee." The definition of "independent expenditure" does not change simply because the context in which it is used has changed.

The COPP's recent MacLaren decision appears to suggest that the consistent analysis utilized by previous Commissioners is being reconsidered and that the long-held standard of interpreting "independent expenditure" and "express advocacy" in light of *Furgatch* and *WRTL* is suddenly in question. MacLaren at p. 17. The fact that independent expenditures are no longer banned does not somehow narrow the definition of independent expenditure absent some statutory amendment. And while courts have routinely upheld the right of the government to impose disclosure obligations for election-related communications that do not rise to the "higher bar" of express advocacy, such rulings do not mean that "express advocacy" or "independent expenditure" can somehow take on new meanings when they are considered in the context of disclosure. Rather, these rulings mean that legislatures are free to enact a regulatory scheme with certain disclosure requirements for communications that do not constitute express advocacy or independent expenditures. As you know, the Montana legislature has not done so. Therefore, the meaning of "independent expenditure" and "express advocacy" remains unchanged.

C. The mail piece is not an "expenditure."

Montana law defines "expenditure" as "a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election. § 13-1-101(11)(a), MCA. In the Order on Motion for Summary Judgment in *Western Tradition Partnership v. Gallik*, Judge Sherlock cited the U.S. Court of Appeals for the First Circuit and narrowed the definition of "influencing" contained in the definition of "expenditure" in section 13-1-101(11)(a).

MCA. "Thus, as used in Montana's campaign finance disclosure requirements...the use of the word "influencing" will only include communications and activities that expressly advocate for or against a candidate or ballot issue or that clearly identify a candidate or ballot issue by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the candidate or ballot issue." (emphasis added). As previously discussed, MCD's mail piece does not expressly advocate the election or defeat of a candidate nor does it contain the functional equivalent of express advocacy.

D. There are no reporting or registration requirements with the COPP as a result of printing and distributing these mail pieces.

A "political committee" is defined in Montana law as "a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure: (a) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination; or (b) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or (c) as an earmarked contribution. Stated another way, the definition only applies to a combination of two or more individuals or a person other than an individual who makes a *contribution or expenditure*."

Similarly, Montana law requires only the disclosure of "expenditures" and "independent expenditures." § 13-37-230, MCA.

As discussed above, MCD's mail piece does not constitute either an expenditure or an independent expenditure, and printing and distributing the mail piece therefore does not trigger political committee status or any reporting requirements with the COPP.

E. The mail piece does not require a printed disclaimer.

Montana law requires that "communications advocating the success or defeat of a candidate, political party, or ballot issue through any...direct mailing... must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication... In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer. § 13-35-225(1), MCA. These disclaimer requirements, as set forth in section 13-25-225(1), MCA, apply only to communications that "advocate the success or defeat of a candidate, political party, or ballot issue." Absent a specific regulation to the contrary, issue advocacy communications that do not advocate the success or defeat of a candidate, such as MCD's mail piece, do not require any form of attribution statement.



Environmental extremists like the Sierra Club are working every day to kill high-paying jobs through frivolous lawsuits and burdensome regulations.

It's time to understand how Mountain's energy policy affects you.

Check out www.energyxxi.org

*Billings is a prime location to
feel the economic benefits of the
Bakken oil boom and development
of Otter Creek coal deposits.*



*Fortunately, local grassroots activists like
John Quandt are promoting pro-growth
policies that will develop resources and
create jobs right here in Billings.*

Institute for 21st Century Energy's 5 Point Plan:

- Maximize America's own energy resources
- Make new and clean energy technologies more affordable
- Eliminate regulatory barriers derailing energy projects
- Do not put America's existing energy sources out of business
- Encourage free and fair trade of energy resources and technologies globally

But they can't do it alone.

Learn more at www.energyxxi.org and join the fight.

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Montanans for
Community Development

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US Postage
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DMAS

MAIL PIECE 1

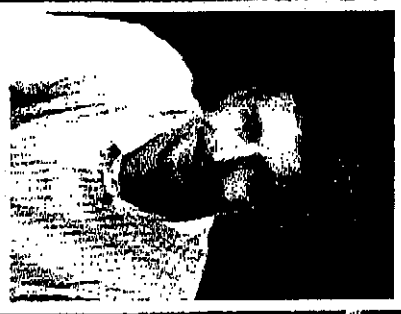


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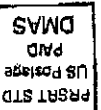
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Billings, MT 59102

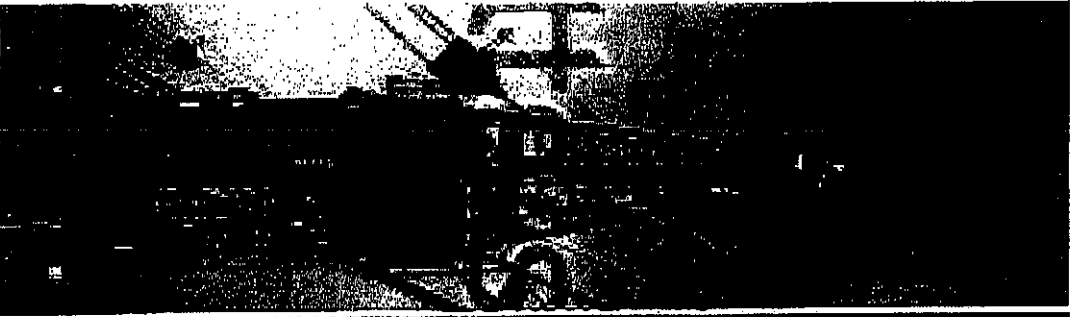


10/17 AM

MAIL PIECE 2

What does prosperity look like?





Billings is a gateway to Montana's boundless resources.

- Millions of acres of timber
- Billions of tons of quality coal
- Trillions of cubic feet of natural gas

So why is Montana 49th in annual take home pay?

Montana must streamline our obstructive legal system and reward job creation. Unfortunately, environmental groups have used our legal system to block numerous projects that cost our state and local communities billions of dollars in economic development and 24,000 jobs. Many of those jobs would have been right here in Billings.

We need to get to work to today to take back our destiny from the obstructionists and secure our energy future. Call your local elected officials today and tell them to support natural resource development.

City Council Members: (406) 657-8390 | Yellowstone County Commissioners: (406) 256-2701

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 Address line 1
 address line 2
 city state zip



MAIL PIECE 3

**TWO-THIRDS
OF AMERICANS**

**BUILDING THE
KEYSTONE XL
PIPELINE.**



**SO WHAT
IS HOLDING
US BACK**

have already
cost Montana 24,000 jobs and billions in economic
development through environmental lawsuits, regulatory
red-tape, and endless delays are still fully committed to
blocking the Keystone XL pipeline.

Currently, the oil and gas industry provides 40,200 jobs
and \$4 billion in economic activity. Keystone XL would
add another 2,650 jobs.²

Right here in Billings there are companies who can support
more oil and gas development, bringing jobs and
development back to our community.

**IT IS PAST TIME
AMERICA
ACTED.
WE NEED TO
SECURE OUR
ENERGY FUTURE.**

Call your representative and
senators today at
(202) 224-3121 tell them to
keep pushing hard for the
oil and gas development
projects like Keystone XL.

Paid for by Montanans for Community Development
Address line 1
Address line 2
City state zip



MAIL PIECE 4



Environmental extremists like the Sierra Club are working every day to kill high-paying jobs through frivolous lawsuits and burdensome regulations.

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