

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES

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IN THE MATTER OF THE	)	
COMPLAINT AGAINST CERTAIN	)	
EMPLOYEES OF THE MONTANA	)	SUMMARY OF FACTS AND
DEPARTMENT OF FISH, WILDLIFE,	)	STATEMENT OF FINDINGS
AND PARKS	)	

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Gary S. Marbut, President of the Montana Shooting Sports Association, in a complaint dated December 12, 1991, and filed with this office on December 13, 1991, alleges violation of an election law by employees of the Montana Department of Fish, Wildlife, and Parks (FWP). In his complaint, referring to accompanying documents, Marbut specifically asserts that FWP employees ". . . researched, prepared, printed, and distributed widely . . ." various materials against Constitutional Initiative 62 (CI-62) in violation of section 13-35-226(3), Montana Code Annotated (MCA). That statute reads as follows:

No public employee may solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at his place of employment. However, nothing in this section is intended to restrict the right of a public employee to express his personal political views.

On January 6, 1992, Marbut filed an addendum dated January 2, 1992, to his original complaint to provide further information

surrounding the matter and, in particular, to point out that Curtis Larsen, an employee of FWP, had been appointed to a committee to write arguments against CI-62 for the voter information pamphlet, although he noted that "[l]ater, Larsen withdrew from this assignment."

Also on January 6, 1992, Marbut filed another addendum dated January 3, 1992, to cite further instances of what he considered ". . . possible illegal opposition to CI-62 by [FWP employees] and one or more members of the FWP Commission."

The results of an investigation that began January 3 and ended February 27, 1992, are set forth in the summary of facts that follows.

#### SUMMARY OF FACTS

1. In support of his original complaint, Marbut filed copies of the following memoranda: one from Curtis Larsen to FWP commissioners dated November 8, 1991; a second from James D. Rector, with accompanying Larsen memo, to "Montana Sportsmen" dated November 8, 1991; and a third also from James D. Rector dated December 6, 1991, to "Montana Sportsmen," together with an "Assessment of CI-62 Impacts for FW&P Commission" also dated December 6, 1991.

2. As further support of his complaint, in his second addendum Marbut cited these materials: a memorandum from Jim Herman to "License Agents" dated December 24, 1991; a resolution

". . . apparently presented to the FWP Commission dated December 14, 1991"; and a memorandum from Bob Lane to all FWP employees dated November 20, 1991. In this second addendum, Marbut also cited meetings of the Russell Country Sportsmen and the Montana Outfitters and Guides where, he alleges, Bob Lane and James Rector made only negative presentations about CI-62.

3. Gary S. Marbut is the President of the Montana Shooting Sports Association (MSSA). He wrote a letter on MSSA letterhead to K. L. Cool, FWP director, dated June 3, 1991, stating that ". . . MSSA will soon be launching a constitutional initiative (CI) to place in the Montana Constitution the reserved and individual Right to Hunt game animals." With his letter, Marbut provided a draft of proposed language for the initiative and invited review and comment.

4. Marbut, by letter dated June 5, 1991, submitted the text of the proposed initiative to the Montana Legislative Council as part of the initiative petition approval process.

5. In a letter to Secretary of State Mike Cooney dated June 28, 1991, Marbut wrote that

The people of the Montana Shooting Sports Association wish to propose an amendment to the Montana Constitution by initiative petition. . . . This proposed measure has been submitted to the Montana Legislative Council for review as required by law, and written response to the Council has been made.

6. In his letter to Marbut dated August 23, 1991, Secretary Cooney advised that the petition for the initiative, by now designated CI-62, was in "substantial compliance" with the

law and, therefore, "[y]our petition has now received final approval from this office."

7. Section 13-1-101(10), MCA, defines a statewide ballot issue as follows:

For the purposes of chapters 35, 36, or 37 [of Title 13, MCA], an issue becomes a "ballot issue" upon certification by the proper official that the legal procedure necessary for its qualification and placement upon the ballot has been completed, except that a statewide issue becomes an "issue" upon approval by the secretary of state of the form of the petition or referral. [Emphasis added.]

Thus, when Secretary Cooney granted final approval of the petition for CI-62, it became a ballot issue for purposes of the chapters cited above. Chapter 35 of Title 13, MCA, includes section 13-35-226(3), MCA, supra, that Marbut alleges was violated.

8. Bob Lane is the chief legal counsel for FWP and reports directly to Director Cool. Curtis Larsen is a staff attorney for FWP in the legal services unit and reports to Lane. Both Lane and Larsen are cited by Marbut as being the principal FWP employees who he alleges wrote and spoke against CI-62 while on the job or at their places of employment. Lane and Larsen were interviewed surrounding the complaint allegations initially on January 3, 1992, and again on February 19, 1992.

9. Lane stated that Marbut's June 3, 1991, letter to Cool with the proposed initiative language was sent by Cool to the FWP legal unit for review. Lane then assigned Larsen to that review task. Following review and research, Larsen wrote a memorandum

to Cool dated June 24, 1991, discussing the potential impacts of the proposed measure. Larsen consulted with Lane before sending his memorandum to Cool.

10. Cool, when interviewed on February 19, 1992, said that he had never responded to Marbut's June 3, 1991, letter because he had learned that Marbut since had submitted the proposed initiative to the Legislative Council for review and comment. Cool stated that Marbut remained in touch with FWP, calling rather frequently. Cool said that Ron Aasheim, administrator of the Conservation Education Division of FWP, was the main person with whom Marbut had telephone discussions.

11. In a memorandum dated October 8, 1991, to Cool, Larsen, and other FWP staff, Deputy Director Pat Graham wrote that he wished to schedule a meeting soon to discuss CI-62. He stated that "[t]he Department has not taken a position on this initiative. However, we want to ensure that the voters benefit from clear and objective analyses of this initiative." Graham also noted that he had talked with Marbut on October 8 and that Marbut had ". . . confirmed that the intent of the initiative would be, in part, to earmark hunting license money for hunting purposes only."

12. During late summer and early fall, Larsen said that he attended several internal FWP meetings during which implications of the initiative were discussed. Larsen said that at some point, probably in October 1991, he became aware of the prohibitions in section 13-35-226(3), MCA. He said that the

awareness may have come about in a meeting with Cool, Graham, Rick Bartos of Governor Stephens's staff, and others concerning whether or not it would be appropriate for FWP to take a position with respect to CI-62.

13. Larsen stated that, after becoming aware of the law, it was clear to him and to Cool that employees of FWP could not take a position on the measure while on the job or at their places of employment. Larsen and Lane also stated that FWP had taken no position on CI-62 prior to Larsen's discovery of the prohibitions in section 13-35-226(3), MCA.

14. In a subsequent meeting in Helena in October 1991 at Jorgenson's with regional supervisors and also attended by Larsen, Cool, and Graham, Larsen advised everyone about the statutory prohibitions in section 13-35-226(3), MCA. Also, on October 25, 1991, Aasheim sent a "fax" to all regional office managers asking them to remind all personnel that they could not advocate for or against CI-62; he stated, however, that they could express their personal views on their own time.

15. On October 30, 1991, all FWP employees were advised of the prohibitions in section 13-35-226(3), MCA, through the department newsletter Fresh Tracks that was distributed with employee paychecks.

16. All FWP employees were reminded again in a memorandum from Lane dated November 20, 1991, that "[s]tate employees cannot take a position on ballot initiatives while on duty or while representing the Department, although you can explain the

potential impacts." He did advise that ". . . you can take a position on any initiative on your own time, just as any other citizen of Montana." This memorandum also provided information to FWP employees about CI-62 and is cited by Marbut in his second addendum to his original complaint as further evidence of illegal activity by FWP personnel.

17. On November 4, 1991, Larsen said that he received a telephone call from James Rector, a member of the Fish, Wildlife, and Parks Commission, who asked whether commissioners were employees covered by the prohibitions in the statute. Larsen said he advised Rector that commissioners are not employees because they are appointed and are not paid any salary.

18. In that same November 4 telephone conversation, Larsen stated that Rector discussed Larsen's June 24, 1991, memorandum addressed to Cool and that Rector asked him to update this legal analysis of the potential impact of CI-62.

19. Larsen said that he did further research that week and wrote a memorandum to the FWP Commission dated November 8, 1991. Prior to sending his memorandum to the FWP Commission, Larsen consulted with Lane, who reviewed it and suggested a few changes. This is another one of the memoranda that Marbut asserts in his complaint is evidence of wrongdoing on the part of a public employee.

20. Larsen and Lane said that their intent was to conduct an objective analysis of the potential legal implications of

CI-62. They admitted that their analysis, as set out in Larsen's November 8 memorandum, did not really turn up any "positive" or "beneficial" points with respect to the potential impact of the measure. If they had discovered any, they said, they would have included them in the analysis. However, Lane said later "please understand that 'positive' and 'beneficial' points [in the analysis] depend on the reader." As examples of possible other points of view of some readers of the analysis, he stated:

Many outfitters could favor less restrictions on nonresident hunters because approximately 90 per cent of their clients are nonresidents; some sportsmen believe that hunting license fees should fund only hunting activities; some sportsmen could favor an implied easement as a right to hunt on private property; etc.

He concluded by saying that the "Department presented or analyzed the impacts or changes to the present status quo so that the public would understand the potential impacts."

21. At its public meeting on November 8, 1991, the FWP Commission received Larsen's memorandum of that same date. Lane summarized its provisions orally for the commissioners. The FWP Commission decided to bring up the matter of CI-62 again at its next regular meeting on December 14, 1991. Copies of Larsen's memorandum were provided to the media and, on request, to other interested parties who had attended the open meeting.

22. Rector sent a memorandum dated November 8, 1991, addressed to "Montana Sportsmen" with the Larsen analysis attached, stating that "[m]any Montana sportsmen are asking me about the legal consequences that CI-62 . . . will have on sport

hunting in Montana." This is another document cited by Marbut in his original complaint as being in violation of state law. In his memorandum, Rector expressed his concern about CI-62, stating that he saw it ". . . as a solution in search of a problem." He stated, as well, that he had directed the FWP legal staff to do further research; that ". . . the full magnitude of CI-62 has yet to be determined"; and that he had requested the issue be on the agenda at the next commission meeting on December 14, 1991, in Helena. He concluded his memorandum with this statement:

If you have concerns about CI-62, I urge you to make them known to this commission, your friends, and your local newspapers, and consider attending the December 14 meeting to express your views so the commission can make an informed decision on this issue.

23. At its November 8, 1991 meeting, the FWP Commission directed department staff to conduct further analysis of the fiscal impact of CI-62. That analysis, dated December 6, 1991, with a cover memorandum of the same date from Rector to "Montana Sportsmen," comprise the third document Marbut cited in his original complaint as being in violation of section 13-35-226(3), MCA. In that December 6 memorandum, Rector again stated that the issue would be on the agenda of the meeting of the commission on December 14. He closed by asking the reader to "[p]lease take the time to read the enclosed assessment of CI-62, and if you have an interest in CI-62, I urge you to make it known to this commission."

24. Information provided by the Conservation Education Division of FWP indicates that the two memoranda from Rector,

with the noted attachments, were sent to 130 sportsmen's clubs, to 59 conservation districts, to various agriculture-related associations, and to selected media. Both the production and postage costs associated with the two mailings were charged to the FWP Commission budget, not to the department budget.

25. At its December 14, 1991, meeting, the FWP Commission heard a presentation by Lane summarizing the assessment dated December 6 that had been sent with Rector's memorandum to "Montana Sportsmen." Following discussion at this meeting, the FWP Commission passed a resolution explaining its concerns about CI-62 and indicating its opposition to the ballot issue.

26. Lane stated that the FWP Commission resolution adopted on December 14, 1991, was not distributed by department staff except on request of interested parties.

27. By memorandum dated September 20, 1991, Larsen advised Cool and Graham that Assistant Attorney General Elizabeth Baker had invited him or someone else in FWP to sit on the committee that would be drafting a statement against CI-62 for the required voter information pamphlet. He asked for guidance from Cool and Graham about whether he should serve on the committee, noting that ". . . the position statement against the measure would probably be attributed to the department by the public."

28. Cool, in an interview on February 19, 1992, said that he and Graham met with Larsen about his serving on the committee and decided that Larsen could provide some objectivity to the committee. Cool indicated that he believes none of them was yet

aware of the prohibitions in section 13-35-226(3), MCA, when they had this September meeting.

29. By memorandum of September 26, 1991, Larsen advised Cool and Graham that he had called Baker to say he would serve on the committee.

30. On October 8, 1991, Larsen wrote a letter to Baker confirming their telephone conversation of the previous day when Larsen told her he was resigning from the committee.

31. When interviewed on February 27, 1992, Jim Herman, chief of the Licensing/Data Processing Bureau of FWP, said that license agents (those who sell various FWP hunting licenses to the public) asked what was happening with respect to CI-62 because people buying licenses were asking them. Herman said that people in his bureau "don't give opinions; and, given the volatility of the issue, we directed questions to Lane and the commission." Larsen said that Lane actually wrote the memorandum dated December 24, 1991, but ". . . Lane suggested that I sign it since I am the one usually in touch them [license agents]." This memorandum is another cited by Marbut, in his second addendum to his original complaint, as further evidence of violation of section 13-35-226(3), MCA, by an employee of FWP.

32. Herman said that his memorandum was sent to all license agents so that all of them would have the same information from FWP and would know, as stated in the memorandum, ". . . the role of the department and the Fish, Wildlife and Parks Commission regarding CI-62." He pointed out in the memorandum that the FWP

Commission had adopted a resolution opposing CI-62 following analyses by FWP staff. Both the resolution and summaries of analyses were attached to Herman's memorandum. Herman also explained in the memorandum the distinction between public officials' being able to take a position on the issue and FWP employees' not being able to do so.

The department has not taken any position on CI-62 because state employees, as opposed to public officials, may not solicit support for or opposition to the passage of a ballot issue under state law. The department acted as staff to the commission in analyzing the impacts at the request of the commission. The department's analysis considered and evaluated all impacts that the department believed were possible, whether they may be considered adverse or beneficial by others.

33. Lane's November 20, 1991, memorandum to "All Department Employees," mentioned in paragraph 16. above and cited also by Marbut in his complaint as evidence of wrongdoing, provided FWP employees with some information surrounding CI-62. Attached to the memorandum was "a brief synopsis" of the legal analysis of CI-62 and the text of the initiative. The ". . . more detailed legal analysis prepared by Curt Larsen is available upon request." Lane also informed employees about FWP Commission activity and action with respect to CI-62 as follows:

At its November 8th meeting in Helena, the Commission asked the Department for a more detailed assessment of CI-62's potential impacts on the agency and Montana's wildlife. That analysis, which will explore CI-62's potential impacts on FW&P revenue, spending management and policy, is now being prepared and will be presented to the Commission on December 14th. The Commission will consider taking a position on CI-62 at that meeting.

As noted in paragraph 16. above, the memorandum concluded with the admonishment that "[s]tate employees cannot take a position on ballot initiatives while on duty or while representing the Department, although you can explain the potential impacts."

34. Lane met with several groups in late 1991, always, he said, at their request. His presentations to two groups, the Russell Country Sportsmen's Association and the Montana Outfitters and Guides, are cited by Marbut as more instances of a public employee's violating section 13-35-226(3), MCA.

35. Lane spoke before the Russell Country Sportsmen's Association in Great Falls on November 19, 1991. Rector and Marbut also were in attendance. Rector, Lane said, told the group that the FWP Commission had concerns about CI-62 and would take up the issue at its December 14 meeting. Lane said he summarized the analysis in Larsen's November 8, 1991, memorandum to the commission. He stated that he began by explaining the prohibitions in section 13-35-226(3), MCA, to explain that FWP employees could not take a position on CI-62 while on the job. He said that at some point he was asked to give his personal opinion. Lane, however, said that he told the audience that, even if he spoke as a private citizen, it would still be perceived as a statement by an employee of FWP; therefore, he said he declined to give his own personal opinion.

36. Lane also appeared before meetings of the Montana Stockgrowers Association in Billings on December 5, 1991, the Montana Outfitters and Guides Association in Kalispell on

December 12, 1991, and Trout Unlimited on December 14, 1991. At these meetings, Lane again said that he stated the statutory prohibition of a public employee's taking a position on CI-62. Then, as before, he said he provided a summarization of the analysis in the Larsen memorandum of November 8, 1991.

37. In a final interview on February 19, 1992, Lane again stated that he always began presentations before groups and in interviews with the media by stating the prohibitions in section 13-35-226(3), MCA. He said that he pointed out FWP had not and could not take a position on CI-62 but that it did have a duty to share information. Lane also stated again that the analyses had been conducted as even-handedly as possible and to identify the legal impacts of the proposed measure.

38. Jean Johnson, Executive Director of the Montana Outfitters and Guides, when questioned on February 21, 1992, stated that she had been in attendance at the meeting of that group in Kalispell on December 12, 1991, when CI-62 was the topic of discussion. She said that Marbut had led off the discussion. Then, she said, Rector spoke briefly, saying that he had requested the legal people in FWP to analyze the potential impacts of CI-62 for the FWP Commission. She said that Lane did not advocate rejection of CI-62; he presented the legal analysis, which she characterized as a "dry legal report," but "no way did he indicate a position." She said that he made it very clear in his presentation that neither he nor the department could take a position pro or con on the issue.

39. David Voldseth, chairman of the Land Use Committee of the Montana Stockgrowers Association, confirmed in a discussion with him on February 24, 1992, that Lane had spoken to members of his committee in conjunction with an association meeting in Billings on December 5, 1991. Voldseth said that Lane presented the CI-62 analysis fairly and "did not advise us one way or the other." Voldseth went on to say that Lane "gave us as unbiased a presentation as possible, just gave us information."

40. Stan Bradshaw, Resource Director for Trout Unlimited, in an interview on February 25, 1992, said that Lane at the outset of his remarks indicated clearly that he could not state recommendations as to any position to take on CI-62; all he could do was present the legal analysis of potential impacts of the measure. Bradshaw said that the reason he remembers Lane's having led off with the caveat of not being able to take a position pro or con on CI-62 was that he (Bradshaw) remembered asking "people in fisheries about how they felt about CI-62 and it put everyone in a dither." Bradshaw said the FWP Fisheries Division people told him that they had been advised they could not take a position as FWP employees. So, Bradshaw said, "I asked their opinions as private citizens. But they wouldn't say on the job; I would have to ask them when they weren't at work." He said this discussion took place in October 1991, maybe two or three weeks before the commission meeting on November 8, 1991.

41. When interviewed on February 25, 1992, Roscoe Canon said that Lane's presentation to the Russell Country Sportsmen's

Association was "very legalistic." Canon said "I felt he was not representing FWP or sportsmen, but some third party--like the state." Canon stated that he did recall Lane's saying that he was not permitted to take a position pro or con on CI-62 and that Lane said it more than once.

#### STATEMENT OF FINDINGS

As the facts show, both the FWP Commission as a whole and Commissioner James D. Rector individually were very much involved during late 1991 in assessing and discussing potential impacts CI-62 would have on the commission and the department. The culmination of this interest and activity resulted in the decision of the commission to oppose the initiative by resolution unanimously passed at its meeting on December 14, 1991.

As the facts also show, FWP employees Curtis Larsen, Bob Lane, and Jim Herman were involved with CI-62 to varying degrees. Larsen was assigned the principal tasks of research and analysis of CI-62, resulting in the two memoranda of June and November 1991 and the assessment dated December 6, 1991. Lane and others in FWP also assisted Larsen in the preparation of the analyses. Larsen also agreed to serve on a committee to write the argument against CI-62 for the voter information pamphlet; however, before the work of the committee began, he resigned.

Lane, as chief legal counsel, reviewed and monitored Larsen's work; he also made the oral presentations before the

commission surrounding CI-62 issues and spoke to various groups, on request, about the FWP legal assessment of CI-62, also referred to by Lane as the "risk analysis." Lane essentially provided oversight of staff work surrounding CI-62 and otherwise took the lead in the department in handling matters related to the initiative.

Herman's activity with respect to CI-62 and people outside FWP appears limited to his sending a memorandum to "License Agents" (prepared by Lane, but sent out under Herman's name) with summaries of FWP analyses and the commission resolution against CI-62 attached.

The signature-gathering process for CI-62 began after final approval of the initiative petition on August 23, 1991. CI-62, however, would not qualify for placement on the June 1992 ballot until and unless the requisite number of signatures of registered Montana voters were obtained and verified. Secretary of State Mike Cooney on February 24, 1992, advised Marbut and others, including this office, that the measure ". . . did not receive sufficient signatures to qualify for the June 2 ballot."

Despite the failure to gain the required signatures, CI-62 nonetheless was a ballot issue ". . . for the purposes of chapters 35, 36, or 37 . . ." of Title 13, MCA, from the date of the . . . approval by the secretary of state of the form of the petition or referral." Section 13-1-101(10), MCA, emphasis added. CI-62, thus, was a ballot issue as defined by law from the period August 23, 1991, through the fall and winter of 1991

and early 1992 until its failure to gain required signatures as certified on February 24, 1992.

Because there is no question that CI-62 was indeed a ballot issue during the time of the activity described above and about which Marbut has complained, the central issue then is whether or not solicitation in opposition to passage of a ballot issue took place in violation of section 13-35-226(3), MCA, which prohibits public employees from doing so while on the job or at their places of employment.

While the facts show that the FWP Commission took an official position in opposition to CI-62 and that Commissioner Rector sent memoranda with attached FWP analyses to sportsmen asking their review and comment " . . . so that the commission can make an informed decision on this issue" and stating that he viewed CI-62 " . . . as a solution in search of a problem," the real question is whether or not the commission as a body or any individual commissioner is a public employee and, therefore, subject to the prohibitions of section 13-35-226(3), MCA.

Section 13-35-226, MCA, does not define "public employee"; however, I find that there is a legal distinction between a "public employee" and a "public officer." Section 87-1-301, MCA, requires members of the FWP Commission to make policy decisions concerning the management of wildlife and the department. According to section 2-15-3402(5), MCA, the commission brings to this task the autonomy of a quasi-judicial board. Commissioners are not "hired" for a wage to work

designated hours under the supervision of an employer. Rather, as section 2-15-124, MCA, provides, commissioners are appointed by the governor, are confirmed by the senate, and are required to take an oath to perform their duties independently of any superior power except the law. Section 2-18-103(5), MCA, states that commissioners are not public employees for the purposes of Montana law concerning public employee benefits, compensation, and classification. Moreover, section 39-31-103(2)(b), MCA, excludes commissioners from the definition of "public employees" for collective bargaining purposes. A sensible construction, thus, of the term "public employee" as intended by the legislature does not include the commission or its members. I find, therefore, that the actions of the commission and its members did not violate the prohibitions of section 13-35-226(3), MCA.

Bob Lane, Curtis Larsen, and Jim Herman are salaried employees of the Department of Fish, Wildlife, and Parks; they are, therefore, public employees subject to the prohibitions of section 13-35-226(3), MCA. The question narrows then to whether or not their various activities and actions constitute prohibited solicitations under the statute.

Larsen, as the facts show, did agree to be on the committee responsible for writing the argument against CI-62 for the voter information pamphlet; therefore, a reasonable conclusion to be drawn is that Larsen personally opposed the initiative. He was concerned that his involvement might be seen as reflecting a

position of FWP, so he consulted with both the director and deputy director of FWP before agreeing to serve on the committee and apparently had their approval. Indeed, as the facts show, Cool said it was felt that Larsen could provide some objectivity to the work of the committee.

Before the work of the committee began in drafting the statement against CI-62, Larsen resigned from the committee. Obviously, then, he performed no work on a statement against CI-62 for the voter information pamphlet. I find, therefore, that Larsen did not solicit opposition to the passage of CI-62.

A careful reading of the Lane memorandum of November 20, 1991, of the Larsen memorandum of November 24, 1991, and of the Herman memorandum of December 24, 1991, with all of the attached documents--all of which Marbut cites to support his allegations of illegal activities--reveals no solicitation to oppose CI-62. The argument Marbut makes is that both the Larsen memorandum, which had been prepared at the request of Commissioner Rector and which provided the first analysis of CI-62 to the FWP Commission, and the Herman memorandum to "License Agents," which enclosed summaries of analyses, provided "only negative views of CI-62." As such, Marbut characterizes these documents as being opposed to CI-62 and their wide distribution as being illegal solicitations.

As noted in the facts, Lane pointed out, however, that what one reader of the FWP analyses might see as being "negative," another might view as being "positive." It must be remembered, as well, that the analyses were prepared at the direction of

Commissioner Rector for the benefit of the commission and its deliberations about the potential impacts of the initiative on matters under the jurisdiction and management of both the FWP Commission and the department. The staff would have been remiss in their assessment of CI-62 had they not included potential negative impacts that they found. But even if the analyses were conceded to be only negative with respect to CI-62, I do not find that they then would constitute solicitations of opposition to CI-62.

As for distribution of these documents, Rector, who is not a public employee within the meaning of section 13-35-226(3), MCA, and therefore not subject to its prohibitions, was responsible for the widest distribution of the analyses. And lest anyone be mistaken or think otherwise, Herman made it absolutely clear in his cover memorandum transmitting the commission resolution and summaries of FWP analyses that FWP had not taken a position on CI-62 ". . . because state employees, as opposed to public officials, may not solicit support for or opposition to the passage of a ballot issue under state law." Moreover, neither he nor anyone else on the staff of FWP could legally withhold public documents or public information from anyone who requested them.

I do not find, therefore, that the distribution of any of these public documents constitutes solicitations of opposition to CI-62.

As for the Lane memorandum, it was an internal document addressed to FWP employees to keep them informed by providing

them the text of the initiative and "a brief synopsis" of the legal analysis. At the same time, Lane cautioned employees about the prohibitions of section 13-35-226(3), MCA. I do not find in any respect that the Lane memorandum dated November 20, 1991, is a solicitation to oppose CI-62.

Finally, with respect to Lane's presentations before a number of groups, two of which Marbut cites as further evidence of illegal activity, the facts show that those interviewed who were in attendance at the various meetings confirm that Lane made clear that neither he nor FWP could take a position with respect to CI-62. In addition to their saying that Lane either expressed that caveat or clearly did not take a position on CI-62, different ones characterized his presentations as being "a dry legal report," "very legalistic," and "as unbiased as possible."

With respect in particular to the meeting of the Russell Country Sportsmen's Association, I personally listened to the tape of the meeting provided by Canon and found no instance in which Lane could be deemed to have solicited opposition to CI-62. Rather, the tape confirms Lane's statement that he made clear the prohibitions in the law about public employees taking a stand on CI-62. I do not find, therefore, any evidence that Lane was advocating a position against CI-62 when he appeared before various groups in late 1991.

CONCLUSION

Based on the facts and these findings, I have concluded that neither the Fish, Wildlife, and Parks Commission nor employees Bob Lane, Curtis Larsen, and Jim Herman of the Montana Department of Fish, Wildlife, and Parks violated section 13-35-226(3), MCA.

DATED this 4th day of March, 1992.

*Dolores Colburg*  
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DOLORES COLBURG  
Commissioner of Political  
Practices