

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

Matter of Mikkelsen Complaint

COPP-2013-CFP-15

SUMMARY DISMISSAL OF COMPLAINT

Mr. Alan Mikkelsen filed an April 25, 2013 campaign finance complaint against the Western Montana Water Users Association, LLC. Mr. Mikkelsen's complaint (Complaint) is hereby summarily dismissed for the reasons set out below.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign practice law addressed by this decision are: 1) Application of campaign practices law to campaigns for an irrigation district; and, 2) Determination of an exception from filing or reporting for entities making independent expenditures solely in a special district election.

I. VIOLATIONS OF TITLE 13, CHAPTER 37, PART 2

The Complaint alleges a number of breaches of Title 13, Chapter 37, Part 2, MCA (Part 2). This is the campaign finance section of Montana's campaign practices law.

The first finding of fact necessary for the analysis of this issue is that of whether there was an election communication. The Commissioner finds that there was an election communication, consisting of a letter from the Western Montana Water User's Association, LLC dated April 18, 2013 [hereinafter Letter]. The Complaint alleges that the content of the Letter was an illegal election expenditure. A copy of the Letter is attached to these Findings and Decision as Exhibit 1. The Commissioner hereby takes notice that the Letter cost money to produce, copy and mail. The Commissioner finds that the Letter advocates a vote for certain candidates. The Letter is therefore an election expenditure as defined by §13-1-101(11)(a), MCA.

The next necessary findings of fact concern the nature of the election addressed by the Letter. The Commissioner finds that the Letter advocated the election of two members to Flathead Joint Board of Control. The Commissioner further finds that the Flathead Joint Board of Control is a joint irrigation district board created under the authority of § 85-7-1601 MCA.

As shown by the above factual findings, this Matter concerns the election, including money spent on an election, of a member of the board of an irrigation district. Under Montana law an irrigation district election is deemed a "special district" election that is, with one exception, not subject to the requirements of Part 2. **See** §13-37-206 MCA. Accordingly, the campaign finance requirements of Part 2 (including candidate or committee filing with the Commissioner, appointment of a treasurer, and reporting of contributions and expenditures) do not apply to an irrigation district election. The Complaint is

dismissed as to all but one issue based on a violation of Part 2.

The only complaint allowed against an irrigation district under Part 2 is that of "money laundering" [contributions or expenditures made in a name of someone other than the true source of funds] prohibited by §13-37-217, MCA. This issue will be discussed as part of the remaining analysis set out below.

II. OTHER VIOLATIONS OF CAMPAIGN FINANCE LAWS

Irrigation district elections, while excepted from Part 2, are still subject to applicable regulations imposed by Title 13, including Part 1 of Chapter 37, by Chapter 35 or by §13-37-217, MCA. The Complaint is broad enough to trigger a review of any applicable such authority.

Part 1 of Chapter 37 provides enforcement authority. It applies should there be a violation set out in Chapter 35 or by §13-37-217, MCA. The following facts are hereby found:

1. Since August of 2012 The Western Montana Water Users Association, LLC has been a limited liability company in good standing with the Montana Secretary of State.
2. The Letter has the following attribution "Paid for by Western Montana Water Users Association, LLC, P.O. Box 1402, St. Ignatius, MT. 59865."
3. There is no connection alleged or shown between the campaign expenditure made by Western Montana Water Users Association, LLC campaign and any campaign run by the candidates themselves.
4. The sole campaign activity involvement of Western Montana Water Users Association, LLC was that of the irrigation district election.

First, we consider the violation of § 13-35-225 MCA alleged by the Complaint. The Letter constitutes an election expense (see above analysis).

Section 13-35-225 MCA applies to the Letter and requires an attribution so as to insure an election expense is not made anonymously.

There is an attribution on the Letter consisting of “[p]aid for by Western Montana Water Users Association, LLC, P.O. Box 1402, St. Ignatius, MT. 59865.” This attribution, however, does not meet the requirements of §13-35-225 MCA. Under this statute a political committee must attribute or list the name of the committee and the name of the committee’s treasurer. The attribution on the Letter does not list a treasurer and does identify the Western Montana Water Users Association as a political committee.

The Commissioner hereby finds that, while an attribution is required, the political committee and treasurer requirements of §13-35-225 MCA do not apply to special district elections. The Commissioner makes this finding consistent with the exception of special district elections from the registration and reporting requirements of Part 2. Because registration and reporting is not required for an irrigation district election it follows that a political committee structure and/or the naming of a treasurer are not required either.

In making this determination the Commissioner reconciles the language of §13-35-225 MCA with the language of §13-37-206 MCA. In making the reconciliation of two statutes “[w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” § 1-2-101 MCA. Maintaining the requirement of attribution without the requirements of naming a treasurer or forming a political committee reconciles and gives effect to both statutes. The Commissioner hereby holds

that the attribution as listed on the Letter meets the requirements of §13-35-225 MCA, as reconciled with §13-37-206 MCA. This portion of the Complaint is dismissed.

The Complaint also alleges a violation of the voting record attribution requirements of §13-35-225(3-5) MCA. The Commissioner, however, is enjoined from enforcing these requirements. See *Lair v Murry* 846 F. Supp. 2d 1116 (D. Mont. 2012) The Commissioner hereby holds that this portion of the Complaint is dismissed as unenforceable.

The Complaint further alleges that the Letter is a campaign contribution from or expense by a corporation prohibited by §13-35-227. Western Montana Water Users Association is, however, a limited liability company, a particular type of business entity created under Montana statutory authority. Title 13 does not define corporation as used in § 13-35-227 MCA to include an LLC. This Office, under Commissioner Unsworth, has already decided that an LLC is not included within the definition of corporation under §13-35-227 MCA:

Wittich also alleges that Utility Solutions, an LLC, violated § 13-35-227, MCA, because Double-Tree, a corporation, is Utility Solutions' managing member. Montana's prohibition against corporations making contributions or expenditures to support or oppose candidates was first enacted as part of a 1912 initiative intended to reduce the Anaconda Company's dominance of Montana politics. The Montana legislature has not expanded the corporate contribution prohibition to other non-human business entities such as limited liability companies or expressly declared that an LLC is subject to the §13-35-227 prohibitions because it may be managed by a corporation. The legislature could consider this issue, but as Commissioner, I cannot insert what has been omitted from §13-35-227, MCA. (See §1-2-101, MCA.)

In the Matter of the *Wittich* complaint, decided November 17, 2009.

This Commissioner applies the *Wittich* precedent and determines that Western Montana Water Users Association, as an LLC, is not prohibited from making an expenditure by §13-35-227 MCA. It is further noted that since *Wittich* the U. S. Supreme Court has invalidated that portion of §13-35-227 MCA prohibiting independent campaign expenditure by corporations.

American Traditional Partnership v Bullock 132 S. Ct. 1307, 181 L. Ed. 2d 1036 (2012). The Montana Water Users Association, LLC expenditure was an independent expenditure. Accordingly, this Commissioner also holds that, as an independent expenditure made by a recognized business entity, Western Montana Water Users Association's campaign expense associated with the Letter cannot be and is not prohibited by § 13-35-227.

Further, the Complaint alleges a violation of Chapter 35, Part 3 (the Code of Fair Campaign Practices). This Part, however, is voluntary such that nonconformance "is not a violation of the election laws." §13-35-302(2) MCA. The Commissioner holds, consistent with past decisions of this Office, that violations of Part 3 cannot be subject to prosecution. See *Matter of Complaint against Brian Close, et. al.* at 21-22 (March 25, 2005).

Still further, the Complaint alleges a violation of Title 13, Chapter 35, Part 4 (the Clean Campaign Act). The violation claimed is that of failure to provide an advance or simultaneous copy of the Letter to opposing candidates thereby providing fair notice. This Part, however, applies only to "a candidate [or]

political committee that has filed a certification under 13-37-201..." §13-35-402(1) MCA. Again, an irrigation district election is a special election that is excepted from Title 13, Chapter 37, Part 2, meaning that the Western Montana Water Users Association is not required to file a certification so long as its election activities are limited to a special district election [see Part I, these Findings and Decision].¹ Because Western Montana Water Users Association, LLC did not need to file a certification it made an independent expenditure but did not become an independent political committee. Accordingly, this Commissioner holds that Western Montana Water Users Association did not have an obligation to meet the requirements of Title 13, Chapter 35, Part 4 and therefore no violation occurred. This portion of the Complaint is dismissed.

We note that the sole campaign activity of Western Montana Water Users Association, LLC was that of the irrigation district election. Had Western Montana Water Users Association, LLC been involved in another campaign that was not excepted by §13-37-206 MCA then it would have had to register as a political committee and report/disclose its expenditures. In making this Finding and Decision the Commissioner notes that individuals, such as the complainant, could seek legislative change if they believe that the special district elections involve campaign practices that should be subject to Part 2.

Finally, the Complaint alleges a violation of §13-37-217 MCA, Montana's prohibition on money laundering. There are no facts given as to how or why

¹ Western Montana Water Users Association, LLC did voluntarily file a certification and a financial disclosure on May 23, 2013, after the Complaint was filed in this matter.

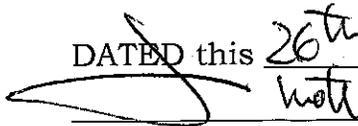
an expense made by Western Montana Water Users Association, LLC and attributed to Western Montana Water Users Association, LLC is money laundering. The Commissioner holds that there is no evidence of money laundering and therefore no evidence of violation of §13-37-217 MCA.

III. OVERALL DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must make, a decision as the law mandates that the Commissioner ["shall investigate," **See**, §13-37-111(2)(a) MCA] investigate any alleged violation of campaign practices law . The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ["shall notify", **See** §13-37-124 MCA] initiate consideration for prosecution.

This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that there is insufficient evidence to justify a civil or criminal prosecution under §13-37-124(1) MCA. The Commissioner hereby dismisses this Complaint in full.

DATED this 26th day of June, 2013.


Jonathan R. Motl
Commissioner of Political Practices

IMPORTANT INFORMATION: YOUR WATER RIGHTS ARE AT STAKE!

April 18, 2013

Dear Fellow Irrigators:

We are writing to inform you of several important issues affecting your water rights. Montana's Legislature rejected the proposed CSKT Compact, due to the diligent efforts of the Western Montana Water Users Association, LLC (WMWUA), the Concerned Citizens of Lake County and Western Montana, and numerous other Montanans. However, the irrigation districts may still try to approve the proposed FIP Agreement to give the CSKT your irrigation water. Be aware of the following.

1. **The CME Failed to Impound Reservoir Water.** The Flathead Joint Board of Control (FJBC) turned over operation and maintenance of the irrigation project to the Cooperative Management Entity (CME). The FJBC lacked the authority to turn over O&M to the CME. In past years, the FJBC and CME would send ditch riders to turn headgates to start impounding water in the high mountain reservoirs. This year, **Gordon Wind**, CME Manager, chose to go on a **two-week vacation** in late March and refused to turn headgates to store water before he left. Irrigators demanded the CME turn the headgates to store reservoir water. The CME finally did so on April 4-5, 2013, but it is unclear if they are properly impounding all the water to which irrigators are entitled. Further, the CME has failed to operate and maintain the project in numerous respects. **The FJBC and irrigation districts did nothing** to demand the CME impound water in the reservoirs. More than 3 weeks of spring runoff was lost because the CME and FJBC failed to store water and do their jobs. The CME must be dissolved and O&M turned over to the irrigators as required by the Act of 1908.

2. **Current FJBC Board May Not Honor Its Word to Allow Irrigators to Vote on the Proposed FIP Agreement.** Although each of the 3 irrigation districts individually agreed to hold a vote of irrigators regarding whether to approve the proposed FIP Agreement in January, they postponed the irrigators' vote after the District Court ruled the FJBC and irrigation districts exceeded their authority because they knew they would lose the vote. Now, it appears they will cancel the irrigators' vote altogether. During the April 8, 2013 Regular Monthly Meeting,

the FJBC had the opportunity to tell irrigators whether it would submit the proposed FIP Agreement to a vote of irrigators for their approval. However, they chose to do nothing and say nothing during the Regular Meeting, with over 50 irrigators in attendance. On April 16, 2013 the FJBC attempted to hold an Emergency Special Meeting with 24-hours notice-without a crowd of irrigators watching-to **circumvent** a vote of irrigators by approving the FIP Agreement. **It did not work, as discussed below.**

3. The FJBC Attempted to Hold a Secret Meeting to Approve the Proposed FIP Agreement Current members of the FJBC are playing dirty politics. Montana's Legislature rejected the proposed CSKT Compact, of which the proposed FIP Agreement is a crucial part. Despite the fact the Compact is dead, the FJBC attempted to hold an Emergency Special Meeting with just 24-hours notice to approve the proposed FIP Agreement and give your irrigation water and water rights to the CSKT. Fortunately, the District Court granted our Writ of Prohibition to stop the FJBC's plan. The current FJBC board members are advancing their own agenda over the irrigators' best interests. **Did you know:**

- **Walt Schock, FJBC Chairman,** received a new pipeline to his lands and his family's lands. Although the pipeline project also benefited Tribal lands, the Tribal lands are unirrigable, uneven lands whereas Walt Schock and his son's land consists of approximately 192 irrigated acres. Therefore, the Schock's received most of the benefit from the pipeline project and yet only paid part of the bill. Also, FJBC Chairman Walt Schock gave the WMWUA his assurance that a meeting to approve the FIP Agreement would not be scheduled unless WMWUA and other irrigators were given 7 days notice. On April 15, 2013, **Mr. Schock chose not to honor his word** and allowed a vote on the FIP Agreement to be scheduled with only 24-hours notice.
- **Steve Hughes, FJBC Board Member,** holds numerous Tribal grazing leases and his livestock herds have grown substantially in only a few years. Mr. Hughes lost his election in his own district. However, the current FJBC Board appointed him as an At-large Member of the FJBC Board.

These individuals have consistently supported the CSKT's proposed Compact and FIP Agreement. Clearly, these individuals are putting their own interests above the interests of the irrigators and must be voted off the Board.

4. The Tribes Attempted to Manipulate the Vote of Irrigators. Most of you have received postcards in the mail directing you to a website referred to as "Vote4Farmers." However, nowhere on the postcard or on the website did it identify who was behind

the marketing campaign pushing the proposed FIP Agreement. Pyramid Communications, Inc.'s website, shows that they own the website and the CSKT is a client. But don't take our word for it - see documentation at www.watermontana.com. During the FJBC meeting on April 8, 2013, the FJBC Board Members claimed they did not know who was behind the mailing. However, somehow the CSKT obtained the FJBC's address list to mail you the postcards. Therefore, someone within the FJBC knew about the Tribes attempt to manipulate irrigators into believing "Vote4Farmers" is a group of irrigators and the proposed FIP Agreement was a good deal.

5. FJBC and CME Shut Down Irrigators' Input During Meetings and Now Prohibit Video and Audio Recording Meetings. During the April 8, 2013 FJBC Meeting, and the April 10, 2013 CME Meeting, both boards instituted a new policy forbidding irrigators from asking questions or providing public comments at meetings and requiring public comment may only be provided in writing after the meeting and no cameras or recording devices are allowed without approval. A copy of the new policies can be viewed at www.watermontana.com. During the April 10, 2013 CME Meeting, the CME Board called the Sheriff to require local residents to cease video recording the meeting. Why do the FJBC and CME fear the public recording their meetings? What are they hiding?

6. April 9, 2013, the Montana Supreme Court Issued its Decision Overruling the District Court's Writs of Mandate. As a result, the Supreme Court will not require the FJBC to comply with irrigation district statutes requiring irrigation districts to submit contracts to a vote of Irrigators and submit it to the District Court for approval. The Montana Supreme Court's actions are a disappointment. Interpretation of Montana Code §§85-7-1956 and -1957 came down to the word "or." Amazingly, the Court refused to give the word "or" its plain and ordinary meaning. Further, the Court ignored numerous procedural defects and did its own research and relied on cases and statutes not cited by any of the parties. **The good news is the Court carefully tailored its decision and avoided ruling on who owns the water rights and whether the FIP Agreement would result in an unconstitutional taking.** Alan Mikkelsen, consultant to the FJBC, has emailed numerous people, erroneously claiming the Supreme Court held the FIP Agreement is constitutional. **Mr. Mikkelsen is wrong - he is not an attorney and is either confused or attempting to misinform irrigators.**

Rest assured the WMWUA has planned for all outcomes, including this Supreme Court's ruling. There are a number of other claims in the WMWUA's Complaint that the District Court will need to decide. The WMWUA's efforts to defeat the Compact were successful and, Lord willing, the WMWUA is confident its continuing efforts will be successful as well.

7. **IRRIGATORS MUST VOTE TO TAKE BACK THE FJBC.** In April, 2013, irrigators will receive mail in ballots and have the opportunity to retake control of the FJBC before it permanently transfers irrigators' water rights to the CSKT. FJBC Chairman, Walt Schock, is up for reelection from the Mission District and **Jerry Laskody** is running against him. In the Flathead District, **Shane Orien** is running against Susan Lake. Susan Lake was outspoken in her support for the Tribes' proposed FIP Agreement and Compact. In order to prevent the FJBC from giving away your irrigation water rights, the WMWUA urges you to vote for **JERRY LASKODY** and **SHANE ORIEN**.

Mission District: Vote for Jerry Laskody

Flathead District: Vote for Shane Orien

Once a Compact or FIP Agreement is entered, it would be difficult or impossible to undo it. **The time to act is now.**

Western Montana Water Users
Association, LLC

TO LEARN MORE PLEASE VISIT OUR WEBSITE

WWW.WATERMONTANA.COM

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