

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Safe Montana v. Montana Citizens for I-182 No. COPP 2016-CFP-030-A	Dismissal of Complaint
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On September 27, 2016, Safe Montana, a 2016 Montana ballot committee, filed a complaint against Montana Citizens for I-182, also a 2016 ballot committee and the Montana Cannabis Industry Association, a 2016 incidental political committee. The Complaint alleges multiple failures to properly register, report, and disclose. Because the responsibilities of a ballot committee are different than those of an incidental committee the Commissioner has split the Complaint into two parts. Part A (this Decision) deals with the allegations made against Montana Citizens for I-182.

A following Decision (COPP-2016-CFP-030-B) will be issued on the separated complaint against the Montana Cannabis Information/Industry Association. The COPP is committed to issuing Decisions on Complaints

within the time frame of the election addressed by the Complaint. However, it may not be possible to issue COPP-2016-CFP-030-B within the remaining time before the 2016 elections. The issues raised by the Complaint against the Montana Cannabis Information/Industry Association incidental committee require investigation and the time needed for the investigative work may push the COPP-2016-CFP-030-B Decision past the date of the 2016 election.

Discussion

The Complaint alleges multiple campaign practice violations by Montana Citizens for I-182. Each is identified and dealt with, below.

1. Montana Citizens for I-182 Is a Legitimate Ballot Committee

The Complaint alleges that Montana Citizens for I-182 is a “shell” ballot committee. The following Findings relate to this allegation.

Finding of Fact No. 1: On April 21, 2016 Montana Citizens for I-182 filed a Statement of Organization (Form C-2) as a 2016 ballot committee. The purpose of the ballot committee was listed as “support I-182 for the 11/8/2016 election”. (COPP records.)

Finding of Fact No. 2: Montana Citizens for I-182 filed periodic reports of contributions and expenses on campaign finance reports (Form C-6) filed with the COPP.¹ (COPP records.)

Finding of Fact No. 3: Montana Citizens for I-182 campaign finance reports disclose in-kind contributions (resulting from expenditures in support of I-182) from one incidental committee and four individuals (in total over \$200,000 in-kind) as well as cash contributions of \$1,600 from 13 individuals. (COPP records.)

¹ This Decision will address the timeliness of filing of the reports in the Part 2 of the Discussion, below.

Finding of Fact No. 4: All but \$2,300 of the in-kind came from one incidental committee – the Montana Cannabis Information Association, Inc.² (COPP records.)

Finding of Fact No. 5: The Montana Cannabis Information Association, Inc. is a Montana Domestic Non-Profit Corporation in good standing with the Montana Secretary of State’s office, with a corporate formation date of 3/1/2011. (Montana Secretary of State records.)

Montana Citizens for I-182 duly filed as a ballot committee (FOF No. 1) and duly reported contributions and expenses related to I-182 (FOF No. 2). The Complaint, however, asserts that these filings and reports are improper because the true ballot committee was the incidental committee called the Montana Cannabis Information Association, Inc. (*see* FOF No. 4).

The Commissioner disagrees with and rejects this allegation of the Complaint. First, the Commissioner notes that the Complaint demonstrates a fundamental misunderstanding of the nature of a ballot issue committee and a ballot issue campaign. As stated above (FOF No. 1), the specifically organized political committee “purpose” of Montana Citizens for I-182, dedicated solely to the passage of I-182, makes it a ballot committee.³ The Montana Citizens for I-182 purpose is in sharp contrast to purpose listed for the Montana Cannabis Information Association incidental committee: “trade association for the cannabis industry in the state of Montana.”⁴

The Complaint, however, argues that the “purpose” of a ballot committee is shown by looking to ballot issues expenditures by an entity, even a pre-

² The issue of the correct name of the incidental committee will be dealt with a separate Decision (COPP 2016-CFP-030-B).

³ Section 13-1-101(7), MCA defines a ballot issue committee as “a political committee specifically organized to support or oppose a ballot issue.”

⁴ I-182 is listed under “support” rather than the purpose of this incidental political committee.

existing corporate entity. Thus, the Complaint argues the Montana Cannabis Information Association, regardless of prior corporate existence, is a ballot committee by virtue of its expenditures in support of I-182.⁵ That argument, however, has been resolved for decades in Montana⁶ and is currently resolved in statute by the definition of incidental committee as “a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.” §13-1-101(22)(a), MCA. The Montana Cannabis Information Association, Inc. is not specifically organized to support I-182 (FOF No. 5) and therefore is an incidental committee under Montana, not a ballot committee.⁷

Montana’s careful distinction between a ballot committee and an incidental committee comes with considerable practical history that the Complainant chooses to ignore. Ballot issue campaigns were the first Montana political campaigns to see a large influx of corporate money.⁸ Complaints filed over ballot issue campaigns first defined the obligation of groups to report as in-

⁵ This argument, if accepted, would have profound campaign finance implications beyond this Decision. By measuring the “purpose” of campaign activity solely by campaign contributions, many trade associations, political associations and corporations registered as Montana incidental political committees would become independent political committees, subject to increased reporting and disclosure requirements.

⁶ See *Daubert v. Montanans for Clean Water*, February 27, 1997 (Commissioner Argenbright) for application of incidental committee status to the initiative expenditures of an established corporate entity.

⁷ Montana’s careful treatment of incidental committees (including a one-step registration, disclosure and closing for incidental committees with a single campaign expenditure) has protected its reporting and disclosure statutes from constitutionally-based challenges for years. See *National Association for Gun Rights, Inc. v Murry*, CV 12-95-H-DLC, Summary Judgment Order (Sept. 17, 2013).

⁸ The 1990 tobacco sales tax initiative (I-115) saw seven tobacco companies spend more to defeat a single initiative than all 1990 candidates for Montana public office spent, combined.

kind contributions the value of the time spent by paid professional staff working to support or oppose a ballot issue.⁹ A 1996 ballot initiative (I-125) resulted in a new Montana law prohibiting direct corporate expenditures in initiative campaigns.¹⁰ The new law stood for the 1998 election cycle and was then stricken by a Montana federal court.¹¹ The limited “corporate speech” focus of the I-125 Federal Court decision was a precursor to the sweeping *Citizens United* decision, made a decade later by the US Supreme Court.¹²

Further, a larger portion of the COPP complaints filed from 2000 through 2005 focused on the activity of ballot committees, as compared to the current focus of COPP complaints on candidate campaign activity.¹³ Given that early-2000s focus on problems and issues associated with ballot committee campaigns, the COPP, under the leadership of former COPP staffer Mary Baker, worked to develop a practical system of campaign finance reporting for ballot committees.

Foremost on the ballot committee reporting agenda was a practical means by which business entities interested in influencing a ballot issue could “speak” (spend money in the election), and still have the lesser reporting responsibility that federal courts were dictating as to this type of election speech. The solution was the dual ballot committee and incidental committee reporting

⁹ *Montana Common Cause v. Montana Chamber of Commerce*, June 2000 (Commissioner Vaughey).

¹⁰ Initiative 125, codified at §13-35-227, MCA.

¹¹ *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (2000).

¹² *Citizens United v. Fed. Election Comm.*, 130 S.Ct. 876 (2010).

¹³ A review of COPP website information shows that ten of the 39 COPP Decisions issued during 2000 through 2006 dealt with ballot committee complaints. In contrast, only five of the 44 Decisions issued to date in 2016 dealt with ballot committees, with four of those ballot issue Decisions dealing with complaints filed against or by Safe Montana.

system now in place in Montana. This system allows a business entity (in this Matter, a trade association) the lesser reporting responsibility of an incidental committee, but retains full reporting responsibility with the ballot committee, including the responsibility to report and disclose affiliated incidental committee activity.¹⁴ A ballot committee thus provides to the public, press and opposing committee a comprehensive list of ballot expenditures, including those of any incidental committee.¹⁵ The ballot committee in this Matter formed and reported consistent with law and Montana's political culture.

There is, however, a current problem relating to ballot issue campaigns that is highlighted by the Complaint in this Matter. That problem is the manipulation of, or attack on, the ballot issue process itself by an entity or person who sees the attack or manipulation as a way to advance or inhibit a particular initiative effort. Montana's history of volunteer signature gathering on initiative petitions was shattered for good in 2006 when a ballot committee funded by large amounts of out-of-state funds brought in paid out-of-state petition signature gatherers who used bait-and-switch and other illegal tactics to gather signatures on three ballot issues.¹⁶ The Montana Supreme Court struck all three ballot issues from the ballot for fraud in signature gathering

¹⁴ This approach is possible with ballot committees because, unlike candidate campaigns, corporate entities can spend directly on ballot issues. This means incidental committees can coordinate with the ballot committee (which, of course, will happen as this allows more efficient and effective campaign activity), including direct contact by the ballot committee by which it tracks incidental committee activity, reporting this activity in a single campaign finance report.

¹⁵ See, for example, Initiative 164 (2010 ballot) where incidental committees from Montana Women Vote, Montana Human Rights Network, AARP Montana, Rural Dynamics, Inc., NeighborWorks Montana, and the Montana Community Foundation all reported through a central ballot committee.

¹⁶ The ballot issues were Initiative 154 and Constitutional Initiatives 97 and 98.

and the Montana legislature imposed new restrictions on initiative petition signature gatherers.¹⁷

Further, Montana's orderly progression of signature gathering, leading to an ballot issue vote at the general election has been forever changed. Litigation challenging the statements placed on a ballot issue or the legitimacy of signatures is now a common step preceding placement of an issue on the ballot.¹⁸ The Complainant in this Matter, perhaps inadvertently, expanded these issues by challenging the integrity of the verification duty by Montana's county and state officials.¹⁹ The COPP has already determined that the Complainant improperly attempted to merge two initiative ballot committees. *Krauss v. Safe Montana*, COPP-2016-CFP-028.²⁰

Montanans have used the initiative process to directly enact, by majority vote, reform of a variety of laws, including those governing campaign finance, lobbying, tobacco taxation, and medical marijuana use – all areas where representative democracy could not or would not act. One would hope, if not expect, that those involved in an initiative effort respect this history and

¹⁷ *Montanans For Justice v. State of Montana*, 2006 MT 277, 334 Mont. 237, 146 P3d 759. Section 13-27-102, MCA limits residency and payment method of signature gathering.

¹⁸ *Montana Consumer Finance Association v. State of Montana*, 2010 MT 185, 357 Mont. 237, 238 P.3d 765. The Supreme Court litigation, as well as following state district court challenge to petition signature legitimacy, concerned I-164.

¹⁹ Initiative signature gatherers turn in initiative petition sheets, with signatures, to the county clerk and recorder office where the petition signers reside. The County clerk and recorders, together with the Montana Secretary of State, verify signatures (disqualifying some) as defined by §§13-27-303 through 307, MCA. The signature verification process at the local and state levels is an established and respected part of the initiative process. The challenge by this Complainant may be the first challenge to this part of the initiative process.

²⁰ The Commissioner asks that a ballot committee be regarded in the same context as a candidate committee. Clearly, reporting and disclosure would be lost if two candidates in adjacent legislative districts filed a single campaign finance report for both legislative campaigns. The same need for separate reporting applies to two ballot committees.

understand that the initiative process itself is worth more than its application on any single issue.

With the above considerations in mind, the Commissioner dismisses any allegations that Montana Citizens for I-182 is improperly registered as a ballot committee.

2. Failure to Timely File

The complaint alleges that Montana Citizens for I-182 late-filed campaign finance reports.

Finding of Fact No. 6: Montana Citizens for I-182 filed its 2016 campaign finance reports as follows: the May 1 report was timely filed on May 2 (May 1 was a Sunday); the 12-day pre-primary report was timely filed May 23, the June 1 report was timely filed on June 1; the 20-day post-primary election was timely filed on June 27; the July 1 report was timely filed on July 1; the August 1 report was timely filed on August 1; the September 1 report was timely filed on September 2;²¹ and the October 1 report was timely filed on October 3 (October 1 was a Saturday). (COPP records.)

Reporting and disclosure is required so that the public, press and opposing candidates understand the contribution and expenditure of funds used in support of a particular campaign. A Montana ballot committee, including Montana Citizens for I-182, is required to report at the times specified in §13-37-226(1)(b), MCA. Montana Citizens for I-182 has so timely filed (FOF No. 6) and this part of the Complaint is dismissed as to Montana Citizens for I-182.

²¹ Montana Citizens for I-182 attempted, without success, to file the report through CERS on September 1 and on September 1 notified the COPP that it was unable to file. Montana Citizens for I-182 contacted the COPP office on 8:37 AM on September 2 for assistance in filing and, with assistance, was able to file the campaign finance report on September 2. The one day delay in report filing, under these facts, is excused on excusable neglect principles. See *MDP v. MRLCC*, COPP-2016-CFP-029 for a discussion of excusable neglect principles.

3. Lack of Reporting of Expense Detail

The Complaint alleges that Montana Citizens for I-182 failed to properly report detail of certain expenses made in support of I-182.

Finding of Fact No. 7: Montana Citizens for I-182 filed a campaign finance report (Form C-6) on August 1, showing \$20,000 of in-kind contributions from an incidental committee for “campaign management, field staff for petitioning, travel, office overhead, and materials.” (COPP records.)

The Commissioner’s recently issued Decision of *MDP v. MRLCC*, COPP-2016-CFP-029 determined that there is an affirmative duty on the part of a candidate or committee to use a word or words in their campaign finance report that provide “sufficient detail to disclose the specific services” covered by the expenditure. The use of the terms “campaign management, field staff for petitioning, travel, office overhead, and materials” meets the “specific services” disclosure standards defined in *MDP v. MRLCC* and therefore meets any requirements of disclosure currently in place by the COPP.²²

The Commissioner notes that the COPP intends to require that each of those “specific services” be described in more detail in campaign finance reports filed in future election cycles. See discussion in *MDP v. MRLCC*, COPP-2016-CFP-029; see also, *Krauss v. Safe Montana*, COPP-2016-CFP-028. This requirement of greater detail does not apply to the current election. *Id.* This portion of the complaint is therefore dismissed.

²² The Commissioner notes that the specific services listed by the ballot committee in this Matter were in-kind services provided by an incidental committee. This Decision does not parse or distinguish the varying duty, if any, of a ballot committee and/or incidental committee to report and disclose specific services.

4. Dark Money and Incidental Committees

The Complaint alleges that Montana Citizens for I-182 engaged in dark money activity through its reporting of incidental committee activity. Montana Citizens for I-182 reported in-kind contributions from four individuals and one incidental committee (FOF No. 3).²³ As noted at the outset, the Commissioner will address the allegations against the incidental committee in a separate Decision (COPP-2016-CFP-030-B).²⁴

For the purposes of this Decision, the Commissioner notes that the “dark money” allegation is made indiscriminately, without regard to the disclosure requirements of Montana’s campaign finance laws. For starters, there is no basis for the overall “dark money” allegation asserted in the Complaint, as this allegation includes contributions received and expenses made in an election. Montana Citizens for I-182 disclosed expenses made in support of I-182, including those made by the incidental committee reporting to the ballot committee (FOF No. 3).

Disclosure of expenses made in support of I-182 takes this Matter out of overall “dark money” campaign activity that occurs where a candidate or third party fails to disclose either expenditures made or contributions received in a campaign or part of a campaign. Such overall “dark money” activity has occurred in Montana on multiple occasions based on falsehood (an assertion that the campaign activity did not exist) or deception (a claim that the activity,

²³ An in-kind contribution is an expense made by the incidental committee or person in support of the ballot issue.

²⁴ The issue of interchangeable use of “Montana Cannabis Industry Association” and “Montana Cannabis Information Association” will be dealt with in a separate Decision (COPP-2016-CFP-030-B).

if it existed, was issue advocacy that need not be reported or disclosed).²⁵

Stated another way, overall “dark money” occurs when no candidate or political committee discloses contributions received or expenses made for a campaign activity.

The Montana Citizens for I-182 ballot committee did disclose expenses made in support of I-182 and therefore a dark money allegation cannot lie as to expense disclosure. Further, there can be no claim against the Montana Citizens for I-182 ballot committee as to inadequate disclosure of those expenses because the ballot committee reported as in-kind contributions the full amount of in-kind expenses reported to it by the incidental ballot committee. In that regard, an incidental committee is required to report expenditures made in the same detail as other political committees. §13-37-232(2), MCA. Any issue with inadequacy of the incidental committee in-kind reporting therefore needs to be directed at the incidental committee, not the ballot committee.²⁶

Likewise there is no allegation that can be (or even is) directed against the Citizens for I-182 ballot committee for failure to disclose contributions. Again, this allegation must be directed against the incidental committee because, under Montana law, an incidental committee is required to report only certain contributions – those that are earmarked for or solicited for a

²⁵ See *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033; and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

²⁶ The Commissioner will examine the incidental committee aspect the Complaint in COPP-2016-CFP-030-B.

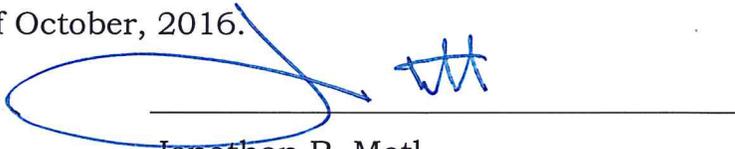
particular candidate or ballot issue. §13-37-232(1)(f), MCA. Stated another way, “[a]n incidental committee that does not receive contributions for a specified candidate, ballot issue ... and that does not solicit contributions for incidental committee activity ... is required to report only its expenditures.” §13-37-232(4), MCA. Any issue of failure to follow this law lies with the incidental committee, not the ballot committee and this allegation is dismissed as to the ballot committee. The incidental committee aspect of this Complaint will be dealt with as described in Footnote 26.

The Commissioner will fully discuss the incidental committee aspect of this Complaint in the later Decision, COPP-CFP-2016-030-B. This Decision, however, also requires a brief discussion of incidental committees. Montana’s incidental committee contribution law is based on the assumption that the third party entity carrying out an in-kind expenditure on a ballot issue (which becomes a contribution to the ballot committee) has a business purpose that produces the funds that are being used by the business entity for the campaign expenditures. Thus, the Orvis Company fined in *Daubert v. Montanans for Clean Water*, February 27, 1997 (Commissioner Argenbright) was properly listed as the source of the incidental committee campaign funds because the funds used for the campaign advertisement, in fact, came from profits from the sale of Orvis products and belonged to Orvis. This justification becomes strained, of course, when the entity is a non-profit corporation with a limited history and no apparent purpose (or source of funds) other than involvement in political campaigns. Nevertheless, given *Citizens United* and its progeny, the

Montana legislature and the COPP must apply law equally to all 3rd party entities until facts allow some way to distinguish between business entities. Any such issue, however, is that of the incidental committee.

This Decision is simultaneously released to the press, public and the parties. Montanans are already voting on the Initiative addressed in this Decision requiring a full release at the earliest possible date.

DATED this 18th day of October, 2016.



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