

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Peters v. Confederated Salish and Kootenai Tribes, No. COPP-2015-LOB-001 Threlkeld and Morris v. Confederated Salish and Kootenai Tribes, No. COPP-2015-LOB-002	JOINT DECISION: DISMISSAL OF COMPLAINTS
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On April 3, 2015, Mr. Jayson Peters of Lakeside, MT filed a Lobbying Complaint with the Office of the Commissioner of Political Practices (“COPP”) against the Confederated Salish and Kootenai Tribes (“CSKT”) alleging that CSKT failed to report and disclose money spent by CSKT in direct and grassroots lobbying of the 2015 legislature.

On July 1, 2015, Terry Threlkeld of Gallatin Gateway, MT, and Walter E. Morris of Twin Bridges, MT filed a Lobbying Complaint with COPP against CSKT also alleging that CSKT failed to report and disclose money spent by CSKT in direct and grassroots lobbying of the 2015 legislature.

The allegations of both complaints are similar, and the Threlkeld & Morris complaint refers to exhibits attached to Mr. Peters' complaint. COPP will address both complaints in this single dismissal.

ISSUES ADDRESSED

This decision presents and clarifies issues regarding direct lobbying of legislators, including through voluntary and paid lobbyists, grassroots lobbying

efforts used to encourage Montanans to contact their legislators, and the extent to which COPP has the ability pursuant to case law and rule to require the reporting and disclosure of lobbying in Montana¹. COPP recognizes that a civil complaint may not be brought regarding lobbying violations more than three years after the alleged violations. Mont. Code Ann. § 5-7-305(5).

FINDINGS OF FACT

The following factual findings are necessary to this Decision.

1. CSKT engaged Mercury Public Affairs, LLC (“Mercury”) in June 2014 to create a plan to develop support for the CSKT-Montana Water Rights Compact (Peters Resp. at 3).

2. In late 2014, a coalition of individuals, business owners, tribes, and water users formed Farmers and Ranchers for Montana (“FARM”).² CSKT is a member of FARM and has made contributions to FARM.³

3. On January 5, 2015, CSKT registered as a Principal with COPP, stating that it would engage in supporting and opposing varying legislation before the Montana Legislature in the 2015 session. On January 7 and 9, 2015, CSKT authorized Shane Morigeau and Mark Baker as its registered lobbyists. Mr. Baker is an attorney who was engaged by CSKT as its lobbyist

¹ The Commissioner has concurrent jurisdiction to prosecute violations of the Montana Lobbyist Disclosure Act with the Attorney General or the County Attorney of the county in which an alleged violation takes place. Mont. Code Ann. § 5-7-305(2).

² See *Farmers and Ranchers for Montana Launches*, The Prairie Star, (Dec. 9, 2014), https://www.agupdate.com/theprairiestar/news/state-and-regional/farmers-and-ranchers-for-montana-launches/article_7c893a20-0447-57cf-95d5-778f0403972a.html; see also Mike Dennison, *Farmers, Ranchers, Business Owners Form Group Backing Flathead Water Compact*, The Missoulian (Dec. 9, 2014), https://missoulian.com/news/local/farmers-ranchers-business-owners-form-group-backing-flathead-water-compact/article_e6f7d9da-d223-54a8-abcf-b309942d9514.html.

³ See *Farmers and Ranchers for Montana, About*, <http://montanawatercompact.com/about/> (last visited July 5, 2018) (listing supporting organizations).

through payments to his law firm, Anderson, Baker and Swanson, PLLP. Mr. Baker also serves Mercury in an of counsel capacity.⁴

4. Early into the 2015 legislature, COPP received a request from a legislator to clarify whether FARM had registered as a Principal, and whether it had authorized any paid lobbyists on its behalf to support the CSKT Water Compact before the 64th Montana Legislature. COPP investigated and provided a memorandum to the legislator and to FARM (Ex. A). At that time FARM acknowledged its duty to report and disclose direct lobbying expenditures if it crossed the \$2,500 threshold in the 2015 legislative session (*id.*).⁵

5. On December 16, 2014 a bill draft was requested from Legislative Services which would eventually be introduced (*infra*, ¶4) as Senate Bill 262, "Implement CSKT water rights settlement." SB. 262, 64th Leg. (Mont. 2015).

6. On January 13, 2015, Shelby DeMars on behalf of FARM sent an email to undisclosed recipients with the subject line of "Helena Compact Commission Votes Unanimously to Support Compact." (Peters Compl., Ex. H.)

7. On February 1, 2015, Ms. DeMars, again on behalf of FARM, sent an email to Matthew Monforton⁶ and other undisclosed recipients with the subject line of "Analysis of the 2015 Water Compact." (Threlkeld and Morris Compl., Ex. 2).

⁴ See Mercury LLC, *Experts*, <http://www.mercuryllc.com/experts/mark-baker/> (last visited July 5, 2018).

⁵ The threshold is adjusted annually for inflation. Mont. Code Ann. § 5-7-112. In 2015, payments over \$2,500 triggered reporting and disclosure requirements.

⁶ In 2015, Mr. Monforton was serving as the Representative for HD 69. Mr. Monforton is identified as having received five of the emails attached to the Threlkeld & Morris complaint: Exhibit 2, at 3, Ex. 4, at 3, Ex. 5, at 3, Ex. 7, at 3, and Ex. 8, at 4. The emails were sent to the address, Matthewmonforton@yahoo.com; which address was publicly disclosed as the email contact for his 2014 campaign for HD 69 on COPP's website. Rep. Monforton's public legislative email address for the 2015 session was Rep.Matthew.Monforton@mt.gov.

8. On February 3, 2015, SB 262 (*supra*, ¶1) was introduced to the 2015 Legislature, with a purpose to “Implement CSKT water rights settlement”. On February 4, 2015, the bill had its first reading and was referred to the Senate Judiciary Committee. SB. 262, 64th Leg. (as introduced, Feb. 3, 2015).⁷

9. On February 12, 2015, Ms. DeMars on behalf of FARM sent an email to undisclosed recipients with the subject line of "CSKT Water Compact: The Week in Review." (Peters Compl., Ex. F.)

10. On February 16, 2015, Ms. DeMars on behalf of FARM sent an email to Mr. Monforton and other undisclosed recipients with the subject line, "To Legislators, from Former Representative and State Senator Walt McNutt." (Threlkeld and Morris Compl., Ex. 4.)

11. On February 16, 2015, SB 262 was heard by the Senate Judiciary Committee. During the hearing, former State Senator Lorents Grosfield provided oral testimony in which he identified himself as a member of "an organization called FARM, Farmers and Ranchers for Montana" and clarified that his testimony for FARM was on a voluntary basis: "I am a voluntary co-chair, as are a number of others. Completely unpaid, just volunteering our services." (Senate Judiciary Committee, Feb. 16, 2015 minutes and archive, 1:25:45 – 1:29:32.)

12. Also on February 16, 2015, Ms. DeMars provided oral testimony at the SB 262 hearing in the Senate Judiciary Committee: "My name is Shelby DeMars, my family ranches and irrigates in Dillon, and I support the compact." (*Id.*, at 2:07:49.)

13. On February 20, 2015, Ms. DeMars on behalf of FARM sent an email to Mr. Monforton and other undisclosed recipients with the subject line,

⁷ See <https://leg.mt.gov/bills/2015/billpdf/SB0262.pdf>

"Must Read Article on CSKT Compact from former Montana Water Court Senior Water Master, Colleen Coyle." (Threlkeld and Morris Compl., Ex. 4.)

14. On March 6, 2015, Ms. DeMars on behalf of FARM sent an email to undisclosed recipients with the subject line, "Release: Agriculture, Water Use Groups Urge House Members to Pass CSKT Water Compact." (Peters Compl., Ex. G.)

15. On March 18, 2015, FARM ran an advertisement in the Flathead Beacon newspaper advocating for Montanans to support the Montana Water Compact. (Peters Compl., Ex. J.)

16. On an unspecified date, FARM mailed a flyer urging Montanans to learn more about the CSKT-Montana Water Compact, noting the deadline of June 30, 2016 for the Legislature to pass the Compact. (Peters Compl., Ex. K.)

17. On an unspecified date after January 29, 2015, FARM mailed a flyer urging Montanans to support the Montana Water Compact. (Peters Compl., Ex. L.)

18. On an unspecified date after February 25, 2015, FARM mailed a flyer to Montanans urging them to contact their state representative to have their voice heard on the Compact. (Peters Compl., Ex. M.)

19. On March 23, 2015, Ms. DeMars on behalf of FARM sent an email to Mr. Monforton and other undisclosed recipients with the subject line, "City of Polson: Vote Yes on CSKT Water Compact." (Threlkeld and Morris Compl., Ex. 7.)

20. On April 2, 2015, Ms. DeMars on behalf of FARM sent an email to Mr. Monforton and other undisclosed recipients with the subject line, "CSKT Water Compact Update." (Threlkeld and Morris Compl., Ex. 8.)

21. On April 11, 2015, the House Judiciary Committee held a hearing on SB 262. During that hearing Walt Sales provided oral and written

testimony in support of passing SB 262. Mr. Sales did not identify himself as a member of FARM during his oral testimony; however, in his written, two-page testimony submitted to the Committee, he did identify himself as "a co-chair of Farmers and Ranchers for Montana." (H. Judiciary Comm. Apr. 15, 2015 Minutes, Ex. 15 at 2, and video 3:32:04.)

DISCUSSION

The complaints allege that CSKT failed to report and disclose lobbying money spent by CSKT for Mercury to develop a strategy to build support for the Compact. (FOF No. 1) The complaints also allege that CSKT failed to report their contributions to FARM as lobbying. (FOF No. 2)

Montana law requires the disclosure of lobbying expenditures. Mont. Code Ann. § 5-7-101(1) (2017).⁸ Lobbying is defined as “[t]he practice of promoting or opposing the introduction of enactment of legislation before the legislature or the members of the legislature[.]” Mont. Code Ann. § 5-7-102(11)(a)(i); *accord* Mont. Admin. R. 44.12.102(3). A lobbyist is “a person who engages in the practice of lobbying.” Mont. Code Ann. § 5-7-102(12)(a). In 2004, former Commissioner Vaughney adopted an administrative regulation stating that lobbying reporting and disclosure regulations “only would be applied to legislative lobbying promoting or opposing the introduction of enactment of legislation before the legislature or legislators[.]” Mont. Admin. R. 44.12.101A(1).

Issue 1: Grassroots lobbying efforts

So-called “grassroots lobbying” is generally considered non-legislative lobbying activity that is not required to be reported and disclosed under the

⁸ The events at issue in these Complaints took place during the 2015 legislature, when the 2013 version of the Montana Code Annotated was in effect. Since there have been no revisions to the lobbying statutes (Title, 5, Chapter 7) since 2007, this decision cites to the most-current version (2017) of the code.

Montana Lobbyist Disclosure Act (“Act”). Grassroots lobbying generally describes efforts by an organization to “encourage others, including the general public, to engage in direct communication with a public official to influence official action.” COPP-Lobbying FAQ, at 3.⁹ An organization sending postcards to citizens urging them to contact their legislators to support or oppose pending legislation is the classic example of grassroots lobbying. *Id.*

Grassroots lobbying of the general public does not trigger reporting and disclosure requirements with the COPP. *Id.* The 2004 amendments to COPP’s lobbying rules limited the scope of application of the law to legislative activities only; “the rules will not be applied to non-legislative lobbying activities[,]” such as grassroots organizing for a general cause. Mont. Admin. R. 44.12.101A(2). The amendments did not limit the obligation to disclose expenditures for direct lobbying for a legislative action on legislation. If grassroots lobbying involves directly communicating with legislators regarding pending or proposed legislation, this activity has shifted from non-legislative to legislative lobbying and is, therefore, direct lobbying.

FARM’s outreach to the general public through mailers and advertisements is grassroots activity to build support for ratifying the CSKT water compact. (FOF Nos. 15-18.) Although the grassroots activities concern the implementation of the compact which was then-pending before the 2015 Legislature as SB 262, they fall into the category of so-called “non-legislative” activities to which the lobbying reporting and disclosure laws do not apply pursuant to Commissioner Vaughey’s 2004 rule.

Grassroots activities are targeted at the general public in that they encourage *citizens*, rather than legislators, to support the compact. The

⁹ Available at <http://politicalpractices.mt.gov/Portals/144/4lobbying/FAQupdated2015.pdf>.

advertisements and mailers sought community support and encouraged community members to individually contact their own legislators regarding the water compact. According the guidance set forth by Commissioner Vaughney, as these grassroots lobbying efforts were not taken “before the legislature or legislators” they are beyond the scope of the reporting requirements. Mont. Admin. R. 44.12.101A(1). The Commissioner takes this opportunity to reiterate that grassroots lobbying involves constituent-based communications, not legislator-based communications.

Activities such as direct communication with a state legislator or the time spent preparing for the testimony are legislator-based and thus are *not* grassroots lobbying; those activities are considered legislative lobbying and must be reported and disclosed. Mont. Admin. R. 44.12.102(3). However, members of organizations involved in grassroots lobbying may also directly communicate with legislators without being required to report and disclose if they are acting on a volunteer, unpaid basis. Mont. Code Ann. § 5-7-102(12)(b)(i).

Issue 2: Direct lobbying of legislators (voluntary and paid lobbyists)

Under Montana law, direct communication “includes face-to-face meetings, telephone conversations, and written or electronic correspondence or communication with a public official.” Mont. Admin. R. 44.12.102(2). If an individual is lobbying a legislator on their own behalf on a volunteer basis, as noted above, that person is exempted from the definition of a lobbyist. Mont. Code Ann. § 5-7-102(12)(b)(i). If an individual is compensated for legislative lobbying activity, that person is exempted from the definition of lobbyist if they

do not exceed the threshold amount mandating disclosure.¹⁰ Mont. Code Ann. §§ 5-7-102(12)(b)(iii) and 5-7-112.

Some members of FARM testified at hearings with the legislature regarding their support of SB 262, which is legislative lobbying. (FOF Nos. 7, 17.) However, because they testified in their individual capacities and were not paid for their efforts, they are exempt from the lobbying classification in the Act. Mont. Code Ann. § 5-7-102(12)(b)(i).

The complaints also reference emails apparently sent a legislator, see fn. 5, *supra*. (FOF Nos. 6, 7, 9, 10, 13, 14, 19, 20) It is unclear if additional legislators received Ms. DeMars' emails on behalf of FARM since the emails attached to the complaints redacted the recipient information. (*Id.*) The content of the emails clearly promotes the enactment of legislation, Mont. Code Ann. § 5-7-102(11)(a)(i), and was emailed directly to at least one legislator, Mont. Admin. R. 44.12.102(2). However, the Commissioner finds that there is no evidence that Ms. DeMars was paid by FARM for her activities. Ms. DeMars actions are therefore exempt from the lobbying disclosure requirements for acting in a volunteer capacity. Mont. Code Ann. §§ 5-7-102(12)(b)(iii) and 5-7-112.

DECISION

The two complaints focus on CSKT's involvement in creating FARM through their engagement with Mercury. The Commissioner finds that CSKT was not required to report and disclose its engagement with Mercury for grassroots lobbying efforts. Entities such as CSKT may support and join grassroots organizations like FARM. The Commissioner finds that CSKT adequately reported Mark Baker as a lobbyist for the Tribes through his law

¹⁰ *Supra* FN 4.

firm ABS Legal. There is no evidence that Shelby DeMars was acting outside of a volunteer capacity for FARM; thus, FARM was not required to register as a principle, and designate Ms. DeMars as their lobbyist. Accordingly, this matter is hereby dismissed.

DATED this 27th day of July, 2018.



Jeffrey A. Mangan
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To: Jonathan Motl, Commissioner of Political Practices
Date: January 24, 2015
From: Jaime MacNaughton,
General Counsel for the Office of the Commissioner of Political Practices
Re: FARM, Registration, Reporting and Disclosure with the COPP

INTRODUCTION

In December of 2014 a group was formed: “Farmers and Ranchers for Montana (FARM) is a grassroots coalition of farmers and ranchers, united with local leaders, Indian tribes, business and other Montanans committed to fair water policies and the approval of a Water Compact that quantifies and secures water access to the benefit of all Montanans”¹. The organization has engaged in some grassroots efforts like a website, mailer and radio advertisement to inform the general public about the Water Compact. A member of the organization has also lobbied the legislature on a volunteer basis in support of the Water Compact.

QUESTIONS PRESENTED

The COPP received a question about whether or not FARM had registered with the COPP as a political action committee or as a lobbying organization.

Question 1. Has FARM registered with the COPP as a political action committee?

Question 2. Has FARM registered with the COPP as a lobbying organization?

Question 3. What rights does an individual as a member of an organization to volunteer their time lobbying the legislature?

SHORT ANSWER

Question 1. FARM is not, and at this time is not required to register with the COPP as a political action committee.

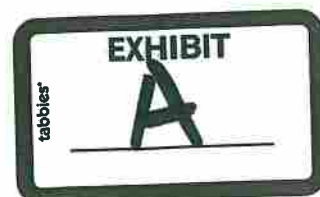
Question 2. FARM is not at this time required to register, report and disclose as a principle employing a lobbyist with the COPP

Question 3. An individual has the right to state that they are a member of an organization, and to volunteer their time to lobby the legislature without triggering reporting on behalf of the organization or the individual with the COPP.

DISCUSSION

Political Action Committee. A political committee is a “combination of two or more individuals or a person other than an individual who makes a contribution or expenditure to support or oppose a” candidate, candidate committee, or a ballot issue,

¹ FARM’s website is available online at <http://montanawatercompact.com/>. The quote above is from their “About” page, last accessed January 24, 2015.



Mont. Code Ann. § 13-1-101(22). Since the time of FARM's formation, there has not been an election, and presumably FARM has not yet made a contribution or expenditure in support of a candidate for office or ballot issue. Therefore, at this point in time FARM is not required to register as a political action committee with the COPP.

Lobbying. Lobbying is defined in statute as “[t]he practice of promoting or opposing the introduction or enactment of legislature before the legislature or the members of the legislature” Mont. Code Ann. § 5-7-102(11)(a). A lobbyist is “a person who engages in the practice of lobbying”, Mont. Code Ann. § 5-7-102(12)(a). Specifically exempted from the definition of a lobbyist are individuals who lobby on their own behalf, someone working for a principal who also employs a lobbyist if the person does not lobby on the principal's behalf, and someone who receives payments of less than the threshold in a calendar year (\$2,500 for the 2015-16 legislative session), Mont. Code Ann. §§ 5-7-102(12)(b) and 5-7-112. A principal is a person or entity “who employs a lobbyist” or makes “payments for the purpose of lobbying” Mont. Code Ann. §§5-7-201(15) and 5-7-208.

FARM has publically taken the position of supporting the passage of the Water Compact in the 2015 Montana legislative session². At this time FARM does not employ nor pay a lobbyist to lobby the legislature or legislative committees on their behalf. If in the future FARM does hire a lobbyist or make payments in support of lobbying efforts³, the organization has committed to reporting and disclosure with the COPP (Commissioner's records).

Individual Lobbying. Individuals lobbying on their own behalf are exempt from the definition of lobbyist in the statute, Mont. Code Ann. § 5-7-102(12)(b). Individuals also have constitutionally protected rights to associate with whom they choose. An individual also has the right to publically state that they are a member of an organization.

Susan Lake is a member of FARM. It is the COPP's understanding that Ms. Lake has lobbied the legislature or legislators in support of passage of the Water Compact, and intends to do so in the future. Ms. Lake has informed the COPP that her actions are completely voluntary, and that she is not receiving any payment from FARM which support her volunteering her time on FARM's behalf. FARM has confirmed that they have not made any payment to Ms. Lake to lobby the legislature, and that her actions are volunteer in nature. Ms. Lake has the freedom of association right to state that she is a member of FARM when lobbying the legislature. Because she is volunteering her time and receiving no payments from FARM to lobby on their behalf, she is not required to register as a lobbyist with the COPP.

² News articles: The Prairie Star “Farmers and Ranchers for Montana Launches”, December 9, 2014. The Helena Independent Record “Farmers, Ranchers, business owners form group backing Flathead water compact”, Mike Dennison, January 11, 2015.

³ See Mont. R. Admin. 44.12.102 for a list of reportable activities and payments.