BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES

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| Wheeler v. American Dream Montana<br><br>No. COPP-2012-CFP-031 | Summary of Facts and Statement of Findings of Sufficient Evidence to Show a Violation of Title 13, Chapters 35 or 37 |

James Wheeler is a resident of Kalispell, Montana. On October 22, 2012 Mr. Wheeler filed a complaint against American Dream Montana (ADM) claiming it made an election expense through the publication of a newspaper advertisement. The complaint further claimed that ADM violated Montana law by failing to register as a political committee, disclose and report the expense.

A copy of ADM newspaper ad is attached to this Decision as Exhibit 1. The newspaper ad is hereafter referred to as "the Ad."

## I. INTRODUCTION

This Decision is one of several decisions by Commissioners addressing the issue of whether a particular election centered activity was or was not an election expense subject to reporting and disclosure. The Ad was published on October 16, 2012 as a full page ad in the Kalispell, Montana, *Daily InterLake* newspaper.

An election expense, such as the Ad addressed in this Decision, falls into

one of three types of election expense. The first type is that of a candidate election expense. A candidate election expense includes money spent in an election that is contributed to or expended by a candidate. Funds contributed to a candidate are, of course, subject to contribution limits and must be attributed, disclosed and reported by the candidate. A candidate election expense includes a third party election expense coordinated with a candidate, as a coordinated election expense is deemed to be an in-kind contribution to a candidate.

There is no evidence that the Ad involves a candidate expense, either direct or coordinated. This means the Ad is one of the remaining two types of election expense; that is, it is either an independent expenditure or an issue advocacy expenditure. An independent expenditure is that of a third party entity independent of a candidate, but focused on a candidate in the election. Any "independent expenditure" must be disclosed, reported, and attributed, albeit by the third party rather than the candidate. An independent expenditure, however, is not deemed to be a contribution to a candidate and therefore it is not subject to contribution limits or to reporting by a candidate.

The third type of election expense is that made coincident to the election by a third party entity independent of a candidate, but with the use of the money focused on an issue and not on a candidate. This election expense is called issue advocacy. An "issue advocacy" expense is not considered to be a candidate related expense and therefore is not subject to campaign practice requirements. Specifically, Montana law does not require that an issue

advocacy expense be attributed, reported or disclosed.[1]

## II. SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Independent Expenditures; 2) Issue Advocacy; 3) Express Advocacy; and 4) Attribution, reporting and disclosure of independent expenditures.

## III. FINDING OF FACTS

The following are the foundational relevant facts for a Decision in this Matter:

Finding of Fact No. 1: A general election was held in Montana on November 6, 2012. (Secretary of State –SOS- website.)

Finding of Fact No. 2: Gil Jordan and Clara Mears-LaChapelle were candidates in the 2012 general election for the public office of Commissioner of Flathead County, Montana. (SOS website).

Finding of Fact No. 3: American Dream Montana was a Montana non-profit corporation at all times at issue in this Matter. (SOS website).

Finding of Fact No. 4: On October 17, 2012 American Dream Montana published the full page Ad in the Kalispell *Daily InterLake*. (See Ex. 1.)

Finding of Fact No. 5: The Ad involved production and publication cost and therefore meets the value standard of Montana law, assuming that the Ad is determined to be a reportable campaign expense. (Administrative Notice by Commissioner.)

Finding of Fact No. 6: There is no evidence of coordination between American Dream Montana and any candidate. (Commissioner's records.)

## IV. DISCUSSION

The Commissioner determined that the Ad had value [FOF No. 5]. The Ad

[1] The 2012 Montana Legislative session considered several bills that would have required reporting and disclosure of any election expense, including issue advocacy, made within 60 days of the date of an election. None of these bills passed into law. A 2014 ballot initiative has been proposed to address this issue.

was becomes a campaign expenditure under Title 13 if it meets the following standard: "...anything of value made for the purpose of influencing the results of an election." §13-1-101(11)(a) MCA.

The Ad was not coordinated and therefore was not a candidate expense [FOF No. 6]. The remaining issue to determine is whether or not the Ad is an expenditure aimed at influencing the results an election. Stated in contrast, the issue is whether or not the Ad is an expenditure made during an election but serving discussion of an issue rather than the results of an election. The Ad was one or the other; either candidate related or issue related. If the Ad was candidate related then it was aimed at influencing an election and became an independent expenditure that ADM was required to attribute, report and disclose. If the Ad was an issue advocacy expense then it served an issue and it need not be attributed, reported and disclosed.

**A. Neither Issue Advocacy or Independent Expenditures May Be Limited**

An issue advocacy and/or an independent expenditure made by a corporate entity may be made in any amount in any Montana election, including the 2012 general election of Commissioners in Flathead County. This notation is necessary because Montana law had historically banned candidate election expenditures, including independent expenditures, by a group operating as a corporation, such as ADM. *See* §13-35-227 MCA and *see also* the history of this law set out in *Western Tradition Partnership, Inc. v. State of Montana*, 2011 MT 328, 363 Mont. 220, 271 P. 3d 1.

In 2010 The US Supreme Court decided *Citizens United v. F.E.C.*, 130 S.

Ct 876, 175 LO. Ed. 2d 753. *Citizens United* established the general right of a corporation to make independent expenditures in a candidate election. However, section 13-35-227 MCA, which banned corporate independent expenditures in Montana elections, remained in place until July of 2012 when *Citizens United* was applied to strike down the part of §13-35-227 MCA prohibiting corporate independent expenditures. *See American Tradition Partnership v. Bullock*, 132 S. Ct. 2490, 183 L. Ed. 2d 448 (2012).[2] The Ad expense at issue in this matter was made in October of 2012 and is allowed under the above holdings, even as a corporate independent expenditure.

**B. An Independent Expenditure Must Be Disclosed**

ADM may, under Montana law (*see* above), make an independent expenditure of any amount in a Montana election. However, any independent expenditure (as contrasted to an issues advocacy expenditure), must be attributed, disclosed and reported as an election expense. Montana law mandates an entity must file as an independent committee ("shall file") and report its independent election expenditures (§13-37-226(5) MCA). Montana law further requires attribution on the communication funded by the expense ("must clearly and conspicuously include the attribution 'paid for by'...) (§13-35-225(1) MCA). Further, Montana law requires certain disclosures ("must disclose") as to contributions to (§13-37-2229 MCA) and the cost of the communication (§13-37-230 MCA).

**1. The Ad as an Independent or Issue Advocacy Expenditure**

[2] The portion of §13-35-227 MCA prohibiting contributions by corporations to candidates was not stricken and remains in force in Montana elections, including the 2012 elections.

There has been considerable past analysis by this Office as to whether an expenditure made during the time of an election is an issue advocacy or an independent expenditure. To date the Commissioner's analysis on this issue has been subjected to only one judicial review, that being by a state district court in *Western Tradition Partnership v. Gallik*, 1st Judicial District, Lewis and Clark County, No. BDV-2010-1120, 2011 Mont. Dist. LEXIS 83.

Sixteen years ago this Office, through Commissioner Argenbright, first discussed the differing constitutional standards measuring campaign practices law applicable to independent expenditures. *See Harmon v. Citizens for Common Sense Government* decided December 31, 1997. This issue has been revisited by succeeding Commissioners as applied to Decisions including: *Michels v. Nelson* decided July 31, 2001 (Commissioner Vaughey); *Little v. Progressive Missoula and Handler* decided July 22, 2004 (Commissioner Vaughey); *Close v. People for Responsible Government* decided December 12, 2005 (Commissioner Higgins); *Keane v. Montanans for True Democrat* decided April 2, 2008 (Commissioner Unsworth); *Erickson v. PRIDE, Inc.* decided July 22, 2008 (Commissioner Unsworth); *Roberts v. Griffin* decided November 19, 2009 (Commissioner Unsworth); *Graybill v. Western Tradition Partnership*, COPP-2010-CFP-016 (Commissioner Unsworth); *Wittich v. Main Street Advocacy Fund*, COPP-2010-CFP-018 (Deputy Commissioner Dufrechou); *Bonogofsky v National Gun Owner's Association* COPP-2010-CFP-008 (Commissioner Motl); and *Montanans for Community Development Advisory Opinion* COPP-2013-AO-001 (Commissioner Motl) .

This Commissioner, consistent with the above precedent, measures the Ad as an independent expenditure if it is a "...communication[s] expressly advocating the success or defeat of a candidate or ballot issue...", ARM 44.10.323(3), emphasis added.[3] It is noted that the Decisions issued by Commissioner Unsworth in the *Matter of Graybill* and Deputy Commissioner Dufrechou in *Main Street Advocacy Fund* were made in the midst of, or shortly after, the litigation concerning §13-35-227 MCA. Still, *Graybill* and *Main Street Advocacy Fund* analyzed and applied the express advocacy standard of ARM 44.10.323(3) without consideration of the lesser "anything of value" standard of §13-1-101(11)(a) MCA that the district court discussed in *WTP v. Gallik*, 1st Judicial District, Lewis and Clark County No. BDV-2010-1120, 2011 Mont. Dist. Lexis 83, ¶17. This Commissioner continues to measure an independent expenditure under the express advocacy standard of ARM 44.10.323(3). See *Bonogofsky v National Gun Owner's Association* COPP-2010-CFP-008 and *Montanans for Community Development Advisory Opinion* COPP-2013-AO-001.

**1. The Ad as Express Advocacy**

The "express advocacy" phrase incorporated into Montana law through ARM 44.10.323(3) originated from a 1976 decision of the US Supreme Court

[3] Montana's prohibition of corporate independent expenditures originated as a statute passed in initiative in 1912. *See* annotations §13-35-227 MCA. The "expressly advocating" language of the current ARM 44.10.323(3) was added through administrative rule hearings adopted and approved by Commissioners on January 20, 1986 and September 27, 1999. The Notice of Adoption for each such rule change described the addition of the express advocacy words as being necessary to adjust to the "state of law" brought about by litigation.

(*Buckley v. Valeo,* 424 U.S. 1 (1976)). The phrase was intended as a measure of the allowed breadth of governmental regulation of political speech.

The *Buckley* Court narrowly construed the federal statutory definition of "expenditure" to apply, for certain purposes, "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley* at 44, emphasis added. The *Buckley* Court recognized that general discussions of issues and candidates are distinguishable from more pointed exhortations to vote for or against particular persons. In a footnote the Court listed examples, which have become known as the "magic words" of express advocacy, including phrases such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat," "reject," etc. *Buckley* at 44, n. 52.

As measured by the "magic words" standard of *Buckley,* the Ad is not express advocacy. While the Ad is certainly more than a general discussion of issues and candidates, it is does not use any "magic words". The *Buckley* magic words standard, however, has been subjected to 37 years of jurisprudence and it has since been refined by Court decisions, administrative action and legislative acts. Express advocacy, while still subject to rigorous analysis, is no longer measured by magic words but by whether the communication is the "functional equivalent of express advocacy". The Commissioner has defined the "functional equivalent of express advocacy" express advocacy legal standard in detail in the *Graybill,* COPP-2010-CFP-16. The reader is directed to *Graybill* for a further discussion.

Under the "functional equivalent of express advocacy" test an analysis is made as to whether or not the communication (and therefore the expenditure) is express advocacy based on the content of the communication. The Ad at issue in this Matter is a full page newspaper ad. The content of the Ad is reviewed as follows: "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) ("*WRTL*").

Chief Justice Roberts, writing for the majority, applied the test to WRTL's ads as follows:

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

*WRTL* at 470.

The Ad is examined for content with the above guidance as to functional equivalency of express advocacy.

**a. Examination of Content of Ad for Issue Advocacy**

Roberts first directs that the Ad be examined for the issue content consistent "with that of a genuine issue ad". We hereby apply the "focus", "position", "exhort" and "contact" considerations set out by Roberts in regard to issue determination.

Finding of Fact No. 7: The Ad takes a position on an issue (property owner's bill of rights) and therefore meets this standard of issue advocacy. However, the Ad does not focus on the legislative issue as opposed to the candidate or election. The final sentence of the Ad includes the statement: "...when running for a trusted position of Flathead County Commissioner....". As further discussed below, the Ad instead focuses on candidates and election.

Finding of Fact No. 8: The Ad cannot reasonably be interpreted as a general exhortation to the public on an issue. The Ad instead focuses more on "...the two Democrat candidates to the county commission[er] GIL JORDAN and CLARA MEARS-LACHAPPELLE" than it does on the issue.

In addition to reading the Ad for issue advocacy content, the Commissioner may place the content in the context of use by a limited examination of background information. This is allowed because while "contextual factors...should seldom play a significant role in the inquiry," courts "need not ignore basic background information that may be necessary to put an ad in context", *WRTL* at 473-74.

Finding of Fact No. 9: The Ad was published 21 days before the general election and highlights and states the names of the Democratic Party and the two Democratic candidates, as well as the county commission office position. The names are used in conjunction with the words "opposed", "opposition", and "objectionable".

With this background information added to the content of the Ad there is no reasonable interpretation that could find the Ad is consistent with a genuine issue ad. The Commissioner determines that Ad focused on an election, not an issue. Timing is recognized as important with an issue focus involving "a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of scrutiny in the near future." *WRTL,* 466 F. Supp. 2d 195, 207. The Commissioner determines that the Ad was

published 3 weeks before the general election voting date with its focus being on a candidate's election. The Commissioner finds that there is no reasonable interpretation that could find a focus on an issue (thereby becoming issue advocacy) as opposed to a focus on a candidate (thereby becoming express advocacy).

**2. Examination of Content of Ad for Indicia of Express Advocacy**

Roberts secondly directs that the Ad be examined for "indicia of express advocacy". Roberts lists those as "election, candidacy, political party or challenger" as well as "position on a candidate's character, qualifications, or fitness for office". We hereby apply the considerations set out by Roberts.

It is not necessary to separately address each of the Roberts' considerations because the Commissioner determines that the Ad includes each and every one of the indicia as it mentions election, candidacy, and political party. This Commissioner finds that there is no reasonable determination as to the Ad other than that it is express advocacy.

## V. FINDINGS ESTABLISHING CAMPAIGN PRACTICE VIOLATIONS

The Commissioner has determined that the ADM published an Ad concerning candidates running in the 2012 general election. The Commissioner has further found or determined that the production and printing of the Ad constitutes value and is therefore an election expense. Finally, the Commissioner determined that the Ad constitutes an express advocacy election expense.

Montana law mandates an entity such as the ADM must file with the commissioner as an independent political committee ("shall file") upon making an independent election expenditure. §13-37-226(5) MCA. Montana law further requires attribution on the communication ("must clearly and conspicuously include the attribution 'paid for by'...", §13-35-225(1) MCA). Finally, a political committee, having filed, "must disclose" as to contributions (§13-37-229 MCA) and the amount of expenditure (§13-37-230 MCA).

In accord with the above findings the Commissioner determines that sufficient evidence exists to show that ADM failed to register as a political committee and failed to report and disclose election contributions and expenses as required by Montana's campaign practices law. To be specific, sufficient evidence exists to show that the ADM failed to file as a political committee and failed to report and disclose election contributions and expenses related to the Ad publication, as required by Montana's Campaign Practices law.

The Commissioner also considered whether the findings create a constitutionally impermissible burden on ADM. The US Supreme Court, in *Citizens United,* determined that independent campaign expenditures, including those of a corporation, are protected election speech and cannot be limited or prohibited in amount. Disclosure and reporting of independent expenditures, however, do not limit such speech but instead keep elections fairer by informing the opposing candidate and the public as to who is making an election expenditure.

Consistent with the above reasoning, Montana courts have ruled that the filing and reporting requirements imposed by Montana law on incidental committees are constitutionally permissible as they do not create such a heavy burden that they interfere with the 1st Amendment political speech rights of the speaker. *National Association for Gun Rights, Inc. v. James Murry*, et. al., CV-12-95-H-DLC, (D. Mont. Sept. 17, 2013).

## VI. ADJUDICATION

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 adjudication.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. In this Matter an independent election expenditure applies to all "...communications expressly advocating the success or defeat of a candidate or ballot issue..." ARM 44.10.323(3), emphasis added. The Commissioner has found that the Ad attached as Exhibit 1 constitute express advocacy, *id.* The Ad, as a corporate independent expenditure, must be attributed, and contributions/expenditures disclosed and reported. The ADM must file as

independent committee to report and disclose §13-37-226(5) MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that ADM violated Montana's campaign practice laws, including but not limited to §§13-37-201, 225, 226, 229 and 230, MCA. Having determined that there is sufficient evidence to show a campaign practice violation has occurred, the next step is to determine whether there are circumstances or explanations that may affect adjudication of the violation and/or the amount of the fine.

ADM's decision to act through an Ad that was not properly reported or disclosed was by choice and deliberate. Excusable neglect cannot be applied to the failures of the ADM in this Matter. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 009. ADM chose to make the expense and also chose to avoid reporting and disclosure requirements of Montana law. Montana has determined that political discourse is more fairly advanced when, through disclosure, the public is informed as to the identify of those who seek to influence elections. There can be no excuse, but only punishment, when an avoidance of reporting and disclosing occur, such as are involved in this matter.

Likewise, the amounts of money are too significant to be excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

Because there is a sufficiency finding of violation and a determination

that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified (*see* §13-37-124 MCA). This Commissioner hereby, through this decision, issues a "sufficient evidence" Finding and Decision justifying civil adjudication under §13-37-124 MCA. This matter will now be submitted to (or "noticed to") the Lewis and Clark County attorney for his review for appropriate civil action. *See* §13-37-124(1) MCA.[4] Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to prosecute within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil adjudication as the Commissioner has discretion ("may then initiate" *see* §13-37-124(1) MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of Chapter 37, including those of §13-37-226. (*See* 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the

[4] Notification is to "...the county attorney in which the alleged violation occurred..." §13-37-124(1) MCA. The failure to report occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

matter *de novo.*

At the point this Matter is returned for negotiation of the fine or for litigation mitigation will be considered. It is hereby determined that case specific mitigation, stemming from the facts of this Matter, is not appropriate and will be not be a factor in negotiations. *See* discussion of mitigation principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 009.

## VII. CONCLUSION

Based on the preceding discussion as Commissioner, I find and decide that there is sufficient evidence to show that the American Dream Montana violated Montana's campaign practices laws, as set out above, and that a civil penalty action is warranted. This matter is hereby submitted to [or "noticed to"] the Lewis and Clark County Attorney for his review for appropriate civil action.

Dated this 18th day of November, 2013.

Jonathan R. Motl
Commissioner of Political Practices
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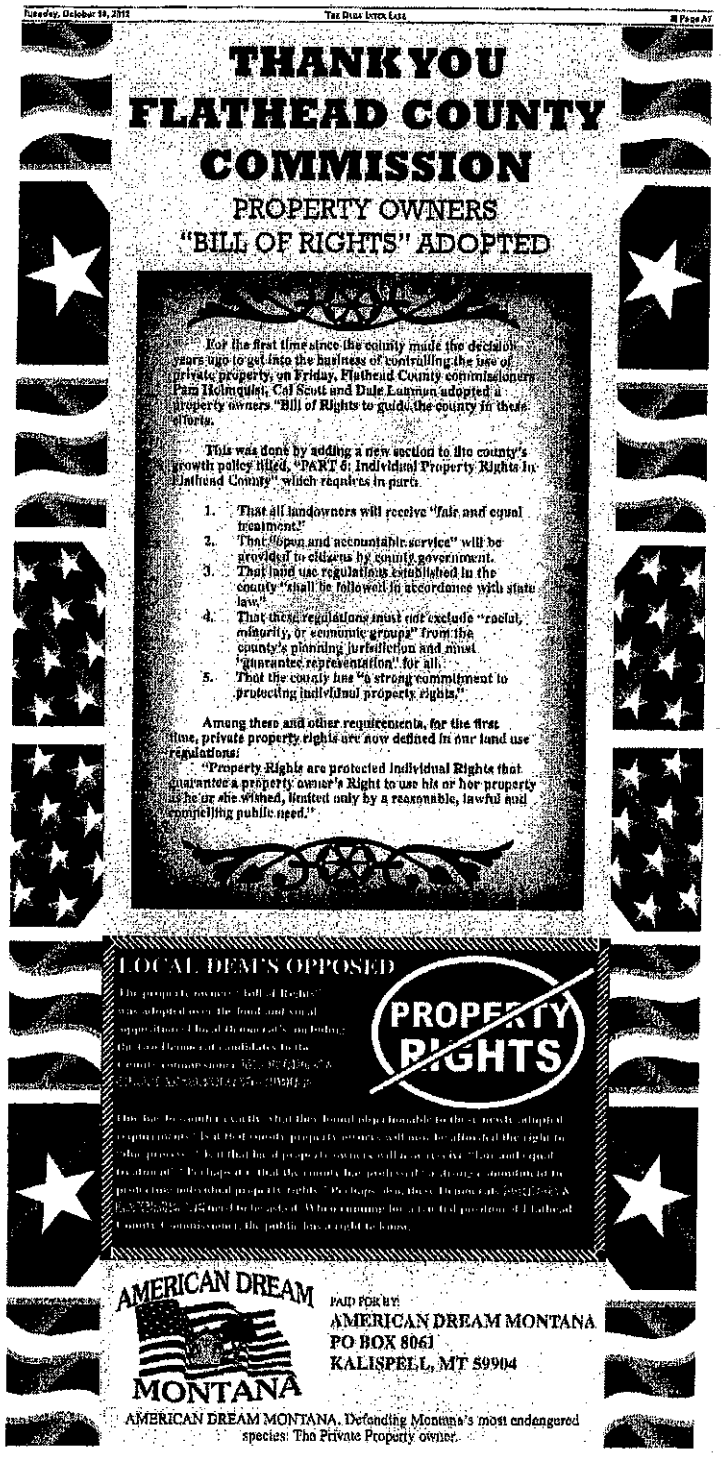

Tuesday, October 16, 2012 THE DAILY INTER LAKE B Page A7

# THANK YOU FLATHEAD COUNTY COMMISSION

## PROPERTY OWNERS "BILL OF RIGHTS" ADOPTED

For the first time since the county made the decision years ago to get into the business of controlling the use of private property, on Friday, Flathead County commissioners Pam Holmquist, Cal Scott and Dale Lamson adopted a property owners "Bill of Rights to guide the county in these efforts.

This was done by adding a new section to the county's growth policy titled, "PART 6: Individual Property Rights In Flathead County" which requires in part:

1. That all landowners will receive "fair and equal treatment."
2. That "open and accountable service" will be provided to citizens by county government.
3. That land use regulations established in the county "shall be followed in accordance with state law."
4. That these regulations must not exclude "racial, minority, or economic groups" from the county's planning jurisdiction and must "guarantee representation" for all.
5. That the county has "a strong commitment to protecting individual property rights."

Among these and other requirements, for the first time, private property rights are now defined in our land use regulations:

"Property Rights are protected individual Rights that guarantee a property owner's Right to use his or her property as he or she wished, limited only by a reasonable, lawful and compelling public need."

LOCAL DEM'S OPPOSED

PROPERTY RIGHTS

AMERICAN DREAM MONTANA

PAID FOR BY:
AMERICAN DREAM MONTANA
PO BOX 8063
KALISPELL, MT 59904

AMERICAN DREAM MONTANA, Defending Montana's most endangered species: The Private Property owner.

**EXHIBIT A**

regulations:

"Property Rights are protected individual Rights that guarantee a property owner's Right to use his or her property as he or she wishes, limited only by a reasonable, lawful and compelling public need."

# LOCAL DEM'S OPPOSED

PROPERTY RIGHTS

The property owners "Bill of Rights" was adopted over the loud and vocal opposition of local Democrat's, including the two Democrat candidates to the County commissioner GIL JORDON & CLARA MEARS-LACHAPPELLE.

One has to wonder exactly what they found objectionable to these newly adopted requirements? Is it that county property owners will now be afforded the right to "due process"? Is it that local property owners will now receive "fair and equal treatment"? Perhaps it is that the county has professed "a strong commitment to protecting individual property rights." Perhaps also, these Democrats JORDON & LACHAPELLE need to be asked. When running for a trusted position of Flathead County Commissioner, the public has a right to know.

AMERICAN DREAM MONTANA

PAID FOR BY:
**AMERICAN DREAM MONTANA**
**PO BOX 8061**
**KALISPELL, MT 59904**

AMERICAN DREAM MONTANA, Defending Montana's most endangered species: The Private Property owner.

Full Page Ad (lower half)
Daily Inter Lake
Kalispell, MT
Oct 16, 2012