

**Exhibit Number: 9**

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**The following exhibit is several assorted documents that exceeds the 10-page limit therefore it cannot be scanned. A small portion has been scanned to aid in your research for information. The exhibit is on file at the Montana Historical Society and can be viewed there.**

EXHIBIT 9  
DATE 3.11.05  
#B 474

MISSOULA  
**Independent**

Free Thinking



EXHIBIT  
DATE  
#B

**Witness Bio**

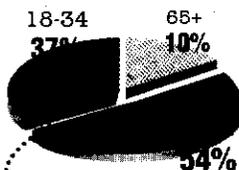
**Matt Gibson** has been the owner and Publisher of the Missoula *Independent* since 1997. He currently serves on the board of directors of the Montana Newspaper Association, Missoula County United Way, and the Partnership for Children, a joint venture between the InterMountain Children's Home in Helena and Missoula Youth Homes.

Mr. Gibson previously spent five years on the board of directors of the Missoula Food Bank, where he held the office of president, and three years on the board of the Washington, D.C.-based Association of Alternative Newsweeklies.

He came to Montana in 1990 to take his first job after college as a reporter for the Livingston *Enterprise*. He now makes his home in Missoula.

The Missoula *Independent* has been published since 1991. With weekly circulation in excess of 22,000 copies, it is the fourth largest newspapers in the state, reaching an estimated 46,500 western Montana adults with each issue. The *Independent* has been honored with countless editorial awards, and is a proud member of the Missoula Chamber of Commerce and the Missoula Downtown Association.

The Missoula *Independent* reaches a highly desirable demographic.



Of all *Independent* readers, 54% are 35-64, 37% are 18-34 and 10% are 65+.

The average age of an *Independent* reader is **43**.

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# MISSOULA *Independent*

## Support for HB 474

Under current Montana law, private parties can fulfill their obligation to give public notice for various purposes, such as publication of a summons in a civil action (M.C.A. §25-3-302), by placing an advertisement in "a newspaper of general circulation." Government entities however, must utilize a newspaper of general **paid** circulation with a **USPS periodicals mailing permit**. But as a practical matter, these additional requirements are no longer significant. They serve merely to protect the commercial interests of newspapers that meet the criteria by limiting competition, consequently increasing costs for taxpayers. Montana's counties would be better served if the relevant statutes were changed to omit the archaic criteria for paid circulation, which is precisely what HB 474 will do, simplifying the code to "newspaper of general circulation." The change will allow county governments to seek competing bids for their legal advertising from viable free papers like the *Missoula Independent*.

The bill is simple. It is fair. And it will benefit county governments and taxpayers.

Free rack distribution is a legitimate approach to newspaper publishing. Yellowstone and Silver Bow counties have substantive free weekly newspapers that would be suitable for public notices, but like the *Independent*, they do not fulfill the requirement for paid circulation set forth in the statutes. Looking toward the future, it's easy to imagine many more free weeklies taking root in other Montana cities. There's a current effort already underway in Helena and a likely effort developing in Bozeman. The time has come for state law to recognize the trend.

The average net circulation of a single issue of the *Missoula Independent* currently exceeds 22,000 copies, making it the fourth largest newspaper in the state, measured by readership. Distribution is carefully managed. We count the number of copies dropped at each of our more than 600 pick-up points and likewise count the number of copies left behind on the racks every week. An outside auditor monitors the accuracy of our count. (Many of Montana's paid circulation newspapers, for instance the *Kalispell Daily Inter Lake*, do not audit their circulation, so no confirmation of their claimed distribution exists.) We publish many of the public notices placed by private parties in Missoula. And we have won countless awards for our outstanding editorial content from the Montana Newspaper Association, the Society of Professional Journalists, and others. Yet the current law makes us ineligible to handle government notices.

Lee Enterprises and the Montana Newspaper Association oppose HB 474 on the grounds that it relaxes the legal definition of a newspaper, validating unworthy publications, thus

undermining the people's constitutional right to open government. But their assertions are untrue. "A newspaper of general circulation" has been defined by long-standing precedents established by the Montana Supreme Court. Under Montana law, for the practical purposes set forth in this bill, the legal definition of "a newspaper of general circulation" is every bit as clear and effective as "a newspaper of general paid circulation with a periodicals mailing permit."

John Shontz, who represents Lee Enterprises, has submitted written testimony to the House Local Government committee asserting that Montana state law relies on postal service standards for periodical mailing permits to clearly define a newspaper. He argues that removing those criteria would change the rules for everyone in unintended ways. But that assertion is heedless of the precedents set by the Montana Supreme Court.

In *State ex. rel. Bowler v. Board of County Commissioners of Daniels County, et. al.*, (1938) 106 Mont. 251, 76 P 2d 648, the Montana Supreme Court established guidelines defining a newspaper of general circulation as containing "news of a general character and interest to the community." In other words, **newspapers have news in them.**

For comparison, the corresponding criteria for a periodicals permit set by the United States Postal Service require merely that half of the issues contain no more than 75 percent advertising. The USPS requirements say nothing about general reader interest or subject matter. In fact, course catalogs and private newsletters from fraternal organizations qualify, although they would likely fail the standard set by the *Bowler* decision. **For the purposes of identifying viable publications for legal notices, the requirements for a periodicals mailing permit are effectively less stringent than the requirements of HB 474, which specify a newspaper of general circulation.**

In *Shelley v. Normile et al.*, 109 Mont. 117, 94 P.2d 206 (1939), the Montana Supreme Court affirmed the *Bowler* decision and addressed the issue of circulation, ruling that a newspaper with heavily concentrated distribution in a populated area satisfies the requirement for general circulation, even if it does not distribute as effectively in rural areas, as long as it has a diversity of readers. The *Shelley* decision clearly embraces a publication like the *Queen City News* as a newspaper of general circulation, and contrary to Mr. Shontz's warnings, it is unlikely that any reputable attorney would attempt to litigate the issue.

**Under HB 474, the legal definition of a newspaper of general circulation will not be changed or relaxed in any substantive manner. Advertising circulars, like the *Adit* in Helena, and all other publications that fail the legal definition of a newspaper under the current state law, would still fail the same well-established legal tests. The people's right to know will not be eroded in any way.**

Ignoring the significance of *Bowler* and *Shelley*, Mr. Shontz proceeds to make a series of specious claims. There is no defensible basis for his contention that advertising circulars like the *Adit* in Helena could be considered newspapers under HB 474. Advertising circulars are not considered newspapers of general circulation under Montana law,

because they do not satisfy the requirements of the *Bowler* decision. HB 474 does not change that. The testimony of Mr. Shontz is misleading.

Mr. Shontz goes on to suggest that the status of the *Queen City News* would somehow change under HB 474, but that suggestion is patently false. The *Queen City News* is clearly a newspaper of general circulation as defined by *Bowler* and *Shelley*, and it would remain a newspaper of general circulation under HB 474. However, it does not qualify for county legal notices now, nor would it qualify for such notices under HB 474, because it does not meet the statutory requirement to publish 52 times a year. The changes proposed by HB 474 will have no immediate impact on the status of *Queen City News* insofar as it qualifies as a newspaper of general circulation. The bill simply maintains the status quo.

Mr. Shontz continues this misleading line of argument by claiming that the status of the *Economist*, an international news magazine, would change under HB 474. Again, his claim is patently false. Indeed, if the *Economist* was a newspaper of general circulation under Montana law, it would be eligible to publish legal notices today under the current statute, by virtue of the magazine's paid circulation and periodicals mailing permit. (They've got one. I checked.) In fact, the *Economist* fails the criteria for general circulation established by *Shelley*, and it will still fail those criteria if HB 474 passes.

It should go without saying, but Mr. Shontz's most dramatic claim, that a feeble handbill with a crude cartoon illustration would somehow qualify under HB 474 as a newspaper of general circulation, is ridiculous. It fails the guidelines established by both *Bowler* and *Shelley*. **If it doesn't have any news in it, and only a handful of people read it, then it isn't a newspaper of general circulation under Montana law, and it won't become one if HB 474 passes.**

Based on these faulty, misleading arguments, Mr. Shontz has tried to persuade the committee members from the House that the people's constitutional right to know would be undermined by HB 474. Don't be fooled. There is no basis for his claims. HB 474 poses no threat to the people's right to know.

Mr. Shontz makes a couple of other misleading points that need debunking. Arguing that HB 474 would invite excessive litigation, he claims that free papers can't reliably count their circulation. That claim is false. The *Missoula Independent* counts every single paper distributed each week, and then counts every single paper still left on the racks at the end of the week. Four times a year, an independent auditor from Verified Audit Circulation, a private San Francisco-based company, secretly monitors our carriers delivering the paper and verifies the accuracy of the count. Many paid newspapers, including the *Kalispell Daily Inter Lake*, do not audit their circulation, so the state has no independent confirmation of their distribution claims. **Free papers can and do adhere to strict and reliable standards of counting and reporting their circulation, standards at least as strict and reliable as most paid newspapers in the state.**

In an effort to appear principled, Mr. Shontz insists that his client, Lee Enterprises, has little financial interest in the outcome of this debate. He bolsters that claim by contending that HB 474 would make more Lee publications eligible to publish legal notices, but that's not true. The advertising circulars Lee publishes would not become eligible to publish legal notices under HB 474, because they don't meet the definition for newspapers of general circulation established by the Montana Supreme Court. In fact, by allowing competition where none has existed before, HB 474 threatens Lee's financial interests, which perhaps offers a motive for the misleading testimony Mr. Shontz has presented to the members of the House.

Finally, Mr. Shontz suggests that the Legislature should not be tinkering with laws established only four years ago. The committee members should recognize, however, that applying a simple fix to flawed legislation after four years is perfectly defensible, even desirable.

Conceding one point to Mr. Shontz, he aptly complains that HB 474 makes the legal notice requirements for counties and municipalities inconsistent. **The bill would be improved significantly if it included identical revisions to MCA 7-1-4127, which governs notices placed by cities.**

HB 474 is really a very simple bill. Mr. Shontz has attempted to cloud the issue with unfounded fears. In fact, the bill does not present any discernable threat to the people's right to open government. It merely recognizes that some legitimate newspapers of general circulation are free and have no need for a periodicals permit. The competition engendered by the bill will undoubtedly benefit the taxpayers.

I urge you to advance this bill to the Senate floor. Thank you very much for your attention. Your efforts to cast informed votes are very much appreciated by all of your constituents.

## MEMORANDUM

**TO:** AAN MEMBERS  
**FROM:** AAN STAFF  
**RE:** SECOND-CLASS MAILING STATUS FOR ALTERNATIVE PAPERS  
**DATE:** JANUARY 7, 1998

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### **The Issue:**

For almost twenty years free alternative weeklies have battled with the Postal Service over the issue of second-class mailing status. That ongoing battle has resulted primarily from the fact that most alternative weeklies are freely distributed and are therefore grouped with unsolicited shoppers and promotional materials when applying for a second-class permit. In general, the fact that alternative papers are both manifestly editorial products and clearly solicited by those who receive them by mail has not been enough to change the Postal Service's view of the issue.

### **What's at Stake:**

The stakes for free weeklies are significant and exist on several levels. The most obvious concern is the direct financial cost associated with mailing papers at a higher rate. For the vast majority of weeklies, only a small fraction of their distribution is accomplished via the mail (generally less than one percent). Nonetheless, even for a paper that distributes only a few hundred papers through the mail, second-class mailing status would save thousands of dollars on an annual basis.

In addition, many states use second-class mailing status to determine the legal definition of a "newspaper." For instance, in New York and Arizona papers without a second-class permit are ineligible to carry legal notices and announcements, costing such publications potential revenue. In addition, this classification can affect a newspaper's protection from libel laws. While perhaps a lesser consideration, the lack of a second-class permit also prevents alternative papers from joining some statewide press associations.

Finally, and most basically, the lack of a second-class permit profoundly affects the ability of newspapers to get their product to their subscribers in a timely fashion.

### **The History of the Issue:**

The issue of second-class mailing status first arose for alternative weeklies in 1982, when the Postal Service altered its regulations to narrow the application of the "Requestor Rule." The Requester Rule mandates that any publication "must have a legitimate list of persons who request the publication, and 50 percent or more of the copies of the publication must be distributed to persons making such requests."

On its face, the Requester Rule does not appear to prohibit free alternative weeklies from achieving second-class mailing status. The Postal Service's interpretation of the rule and how its requirements could be met, however, created major obstacles for free weekly papers. The landmark case evolved from the

struggles of New Times Inc. to retain second-class permits for their flagship paper in Phoenix and Westword in Denver.

In 1983, the Postal Service informed New Times that it was going to revoke the second-class permits of the two papers, but allowed the company to appeal that decision. After several years, the USPS granted the New Times' papers second-class permits. However, the length of the negotiations and some of the points raised by the Postal Service are troubling for all alternative weeklies.

In the battle between New Times and the Postal Service, there were three primary issues of contention regarding the Service's interpretation of the Requester Rule and its stipulation that at least 50 percent of a publication's circulation is requested. First, USPS argued that the stipulation should apply to all of the paper's circulation, not simply those copies distributed by mail. Second, the Postal Service argued that multiple copies distributed to a vendor (the primary means of distribution for many weeklies) should only count as a single requested copy. Finally, the Postal Service and New Times disagreed on the means of verifying that at least 50% of those individuals who received a copy of the paper had requested it.

On the first point, New Times argued that the rule should only apply to the small percentage of readers who received their publications through the mail. In other words, the Postal Service should have no jurisdiction over circulation that does not occur through the mail. In addition, New Times argued that all of its readers, not just those who received the papers via mail, would be burdened by this requirement. Ultimately, the Postal Service acknowledged that New Times argument was reasonable, but said that the specific letter of the Requester Rule did not allow for these circumstances. Likewise, New Times argued that the Requester Rule should only be applied to papers that have a *de minimus* circulation by mail, suggesting five percent, which would have exempted the New Times papers. Again, the USPS said that the Requester Rule could not be adjusted in this way.

The Postal Service initially held its ground on the second point, that multiple copies requested by vendors could only count as one requested copy. Eventually, however, they agreed that this argument was wholly untenable, admitting that, for example, 500 copies requested by a store owner could be counted as 500 solicited copies.

The final point of contention proved to be the most difficult to resolve: how to verify that 50% of those receiving the paper were requesting it. For home delivery daily papers this is a simple prospect, as they can just provide subscription lists to the Postal Service. For free weeklies distributed primarily through newsracks, this is a far more difficult task. Obviously, New Times could have easily met the Requester Rule by altering its form of distribution, yet it argued that such a switch would fundamentally alter the audience that its paper's reached. Initially, the USPS suggested the prohibitive procedure whereby the papers would have to obtain signatures from 50 percent of their readers. The cost would have been in the millions, making that option utterly impractical.

Ultimately, New Times proposed that it meet the Requester Rule requirements through readership surveys that would provide a statistical sample of the readership and their reading habits relating to the papers in question. When New Times submitted an example of such a survey, the Postal Service admitted that it met the spirit of the Requester Rule, but not the letter of the rule, and as a result, was not acceptable. Eventually, however, the USPS relented, making an exception for free weeklies with a limited percentage of circulation by mail. This exception came to be known as the "New Times Rule." Under this rule, papers with a minimum number of pages, with less than 75% of those pages dedicated to advertising, and which are not otherwise dedicated to the promotion of a specific commercial pursuit (like a shopper, for example), are eligible for a second-class mailing permit, if they take the following steps: 1) provide reader surveys that demonstrate that more than 50% of the readership regularly reads the publication and 2) generate a list of businesses that ask to be a circulation drop point.

## The Current State of the Issue

A recent informal survey of AAN members (just over 20 publishers responded) indicated that just less than half currently have a second-class permit. Among those who do not, a few have not tried to obtain it, some have applications pending and others have been rejected for various reasons. There are three primary concerns regarding the current state of the issue:

**1) Precedent:** It is important to note that when the USPS established the New Times Rule, it was not codified, and the Service specifically stated that it was not establishing a firm precedent that would necessarily be uniformly applied. This was intended to give the Service flexibility in other pending cases.

Nonetheless, the case did establish what amounts to a *de facto* precedent. According to Alan Blankenheimer, an attorney for Brown & Bain in Phoenix who represented New Times throughout its battle with the USPS. "They basically have established a precedent," he said. "Other paper's have [obtained second-class privileges] in exactly the same way as New Times. As a result, weeklies meeting all of the conditions set in the New Times case should be awarded second-class permits. One snag for a number of papers is that the Postal Service does not accept Verified Audit Circulation figures alone, but rather requires a specific readership survey on this issue as well."

**2) Time:** In addition to the requirements for a second-class permit, another major problem has been the excessive amount of time the process takes. Virtually all of those who have obtained second-class permits have had to wait at least 18 months to 2 years from the time they first applied. Likewise, numerous AAN members report that they have applications that have been pending for at least that long, and do not even know where they stand in the process. Finally, the time also places a major burden on those who are rejected the first time around, as they do not find out that they do not qualify for perhaps two years, and then need to begin the entire lengthy process over again. As a result some papers have been trying to obtain second-class permits for a the better part of a decade.

**3) Regional vs. National:** Many of the difficulties associated with both of the above points relate to disparities in the rulings and procedures among the local, regional and national parts of the USPS bureaucracy. For instance, while the national USPS office in Washington seems to honor the New Times Rule, various regional postal officials do not. The general consensus seems to be that most of the difficulties associated with this issue stem from dealing with regional postal officials. The answer here is two-fold: One, all AAN members seeking second-class permits should be encouraged to seek them directly through the Washington USPS office if possible, and two, at the very least, AAN should encourage the Postal Service to codify the New Times Rule — either formally or informally — in order to create some consistency in the system.

# YOUR NEWS PAPER

John Shontz

8 JAN. 27 2005

THIS IS A NEWS-  
PAPER! - Under  
Montana Law.

THE LEGISLATURE  
IS MEETING IN  
HELENA TODAY

MAX BAUCAS SPOKE  
IN HELENA  
YESTERDAY

THE WEATHER IS  
COOL BUT NOT COLD

LOTS OF PEOPLE  
HAVE THE S-LU



WE CIRCULATED  
20 COPIES OF THIS  
NEWS PAPER IN  
HELENA TODAY

WE WILL PUBLISH  
A NEWS PAPER AGAIN  
IN ONE ~~WEEK~~  
AGAIN.

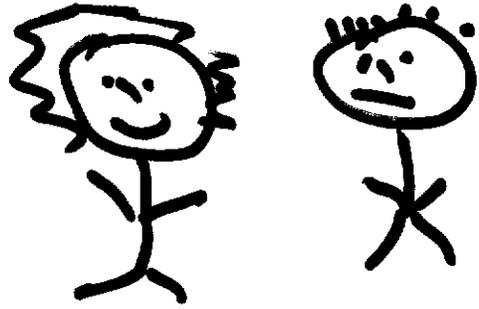
LEGAL NOTICES ARE LEGAL

# YOUR NEWSPAPER

John Shonta

Feb 10, 2005

This is a news-  
paper under H.B.  
474.



The Legislature  
is meeting in  
Helena today  
(AGAIN).

WE DOUBLED OUR  
CIRCULATION TO  
40 THIS WEEK!

K-MART IS  
OPEN TODAY!

THE COUNTY COM-  
MISSIONERS ARE  
MEETING ON  
THURSDAY

THE WEATHER IS  
COOLER TODAY  
THAN LAST FRIDAY.

THE CITY COUNCIL  
IS MEETING ON  
MONDAY.

DO YOU HAVE  
THE FLU?

GO HARLOW.