

Montana State Legislature

Exhibit Number: 14

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EXHIBIT 14
DATE 3.11.05
474

HOUSE BILL 474

SENATE JUDICIARY COMMITTEE

MARCH 7, 2005

JOHN SHONTZ on behalf of LEE ENTERPRISES

The drafters of Montana's Constitution gave the media in Montana a unique constitutional responsibility – to protect the public's right to know what government is doing. On the floor of the Con. Con., the chairman of the Bill of Rights Committee (he was mad at certain members of the press) stated, "They (the press) are here to serve us and to protect our right, and we want our rights protected first and foremost and always." Page 1674, Con. Con. Transcript.

He continued, "[what keeps] the press from acting as a watch guard upon the activities of government for our benefit? Not for their benefit, to sell newspapers, but for our benefit. And the two purposes behind this section, as are the basic purposes of behind the federal amendment contained within the Bill of Rights that provides freedom of the press, is twofold: one, to allow the press to be a watch guard on the activity of government and, second, to make sure that the rights of the individual citizen of a free democracy are protected. And that is the only justification for a free press in a democratic society." Page 1673, Con. Con. Transcript.

That is why we are here today. This is about county government's duty to inform the people about what it is doing. Let me state right up front that more Lee Enterprises publications in Montana will be eligible to print county legal advertising notices under H.B. 474 than is currently the case. This is not a commercial matter for us; this is a constitutional matter for us.

Participatory democratic government is not efficient. It is not free since we live in a market economy. It is not cost effective. It is not free. In fact, our system of government is the most expensive form of government in the world because, under our system, government is required to tell people what it is doing. Doing so costs money.

In fact, the most efficient form of government in the world is a dictatorship.

We note here, however, that the State of Montana controls the cost of legal advertising for counties in Montana – it is not a market pricing function. More on this issue later.

The drafters of the Montana Constitution created a *constitutional presumption of openness of government documents and operations*. Emphasis the Supreme Court's. *The Great Falls Tribune v. The Montana Public Serv. Comm.*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876.

Democracy requires that people know what their government is doing. In Montana, people are not obligated to try to find out what governments are doing. **"In effect, Article II, Sections 8 and 9, of the 1972 Montana Constitution impose an 'affirmative' duty on government officials to make all of their records and proceedings available to public scrutiny."**, *The Great Falls Tribune v. The Montana Public Serv. Comm.*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876.

House Bill 474 will seriously weaken Montanan's right to know what their government is doing because the bill will SUBSTANTIVELY reduce the reach of public notice BY COUNTIES in Montana.

The bill will generate litigation regarding the public's right to participate in the decisions made by governments in Montana as well as Montana's open meeting laws.

The bill will NOT do what people believe that the bill will do; it will not save money nor will the bill allow many 'free distribution' newspapers to publish government legal notices.

Finally, four years ago, the Legislature, working with many affected parties including this committee, completely overhauled Montana's local government notice provisions. This bill attempts, after just 48 months following that effort, to start amending that work.

This bill will give rise to massive changes in the public's right to know and will create grave uncertainties for both the private and public sectors; those issues were settled 48 months ago.

THE PUBLIC'S RIGHT TO KNOW.

The drafters of Montana Constitution did something unusual. They gave every person in Montana a constitutional right to know what government is doing and they gave every Montanan the constitutional right to participate in the decisions our governments make. Article 2, Section 8 & 9. Exhibit 1.

Prior to 1972, the legislature had the constitutional authority to determine the public's right to know. The drafters of our constitution SPECIFICALLY changed the seat of that right. The drafters, on a specific vote, took the authority to determine the extend of Montanans' right to know away from the Legislature and gave to the Montana Supreme Court. See approx. page 1670 of the proceedings of the Constitutional Convention.

Under Montana law today, the Legislature cannot reduce Montanans' rights to know; the Legislature can only broaden those rights. House Bill 94 for the 2003 session was one of the most significant broadening bills to pass the Legislature. The bill required governments to allow public comments at public meetings.

As noted above, under Montana's Constitution, state and local governments have an affirmative duty to tell the public what they are doing; people are not obligated to search the government to find out what government is up to.

THE BILL CHANGES THE RULES FOR EVERYONE IN UNINTENDED WAYS

2001 LEGISLATION – Representatives Jacobson, Anderson and Chairman Noenning may well remember the bill from the 2001 session – it went through this committee. We enclose a copy of that bill and the legislative history from the bill for your information. Exhibit 3.

As noted above the 2001 session of the Legislatures spent considerable time and energy consolidating and standardizing local government public notice provisions in the statute. This bill starts to unravel that standardization done just 48 months ago. We note that in 2001, MACo's representative commented that the counties had been waiting 16 years to pull this together; now we are starting to tear it apart.

We note that House Bill 474 does NOT affect public notices for municipalities in Montana. See section 1 of the bill – current law. This bill, if passed, will once again create different standards for local governments. That is precisely what we all worked to correct and avoid in the 2001 legislation.

THE BILL CREATES UNCERTAINTY

What is a newspaper? The current law defines what a newspaper is for public notice purposes and has for seventy years in Montana. In fact, local state and federal governments have depended on the U.S. Postal Service regulations to define a newspaper for decades. Thus the permit requirement in the current law. A copy of the postal service requirements to be eligible as a newspaper or periodical are enclose as Exhibit 4. House Bill 474 removes that definition. Jim Fall's from MNA comments on the definition of a newspaper under these regulations mentions that. Basically the current requirements ask that a certain percentage of the content be news instead of just advertising. The requirements also ask that a percentage of the distribution be paid circulation; that is to assure that people actually want to receive the publication. We make the choice to receive a publication by paying for it.

So let us look at what a newspaper is under House Bill 474.

The bill requires only that a newspaper be published once a week although it does not define a newspaper. A "newspaper" is really not defined anywhere else in Montana law. Assumptions here do not count.

One case from 1938 discusses a newspaper in the context of county printing contracts. If this bill passes then this is a newspaper under that case.

Current law in Montana will be:

In ordinary understanding, a newspaper is a publication, usually in sheet form, intended for general circulation and published regularly at short intervals, containing intelligence of current events and news of general interest.

***State Ex Rel Bowler v. Board of County Com'rs of Daniels County*, 106 Mont. 648, 76 P.2d 648 (1938).**

...that a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. *ID*

Some example are useful.

First is the Adit. The Adit is published by Lee Enterprises each week. Under house Bill 474 the Adit is a newspaper even though it contains no AP wire news. Under House Bill 474, the Adit could probably bid on and publish local government (except cities) legal notices because it does contain items of interest to the community. Exhibit 5.

No one buys the Adit so even though 27,000 copies are distributed. Copies are distributed by carrier to homes in the Helena area and placed in racks in the area as well. Under current law, the Adit is not a newspaper; House Bill 474 turns it into one. Exhibit 6.

Second is the Queens City News. The Queen City News does not currently qualify as a newspaper under House Bill 474. The Queen City news is not published weekly; the Queen City News took two weeks off during the Holiday Season this past month – it publishes 50 times a year. We have nly one copy but the reference is located on Page three.

The circulation of the Queen City News is 7,500 with no home delivery; only racks and some mailed copies. The Queen City News does, however, unlike the Adit contain well written news even though it would not be a newspaper under House Bill 474.

Next is the Economist. The Economist is a British publication dating back some 165 years. It is generally circulated in the Helena area; the county could purchased legal advertising in the couple dozen copies circulating in the zip codes in Lewis and Clark County and be legal under House Bill 474. Exhibit 8.

Finally is a copy of YOUR NEWSPAPER. Under House Bill 474, YOUR NEWSPAPER is eligible to bid on and publish legal advertising under HB 474. It is generally circulated in the community and is published weekly. This week's circulation was 40 copies. Should 40 copies of YOUR NEWSPAPER generally circulated in the community and published weekly be able to qualify as newspaper for legal notices by

local governments under Montana law? Under House Bill 474 and the 1938 Supreme Court decision it simply does. Exhibit 9.

CIRCULATION – Please note Exhibit 10. In 2003, People in Montana purchased some 1,500,000 community newspaper each week in Montana. This number does not include daily newspapers which are also home delivered in Montana such as the Wall Street Journal, the New York Times, and via racks, USA Today.

LITIGATION

The Montana Supreme Court has placed the burden for public notice clearly on governments. Exhibit 11. **Within the past year or so, the Court has said that governments have the affirmative duty to reach out to citizens to tell them what the government is doing and when and where it is doing it.**

The 2001 Legislation and the current law created certainty in the law based on the broadest reach of advising people as to what government is doing under the public notice provisions.

To change now invites litigation for a couple of reasons. First is coverage. The Queen City News, for example distributes 7,500 copies in racks in the Helena area. Liberally, each copy of a newspaper is read by 2.3 persons. This gives the Queen City News a total MAXIMUM readership of 17,250 people. Lewis and Clark County has some 56,000 people. Given the Queen City News low distribution, on a good day, some 38,750 people in the County would not have the opportunity to even see the notice particularly in out laying areas of the county.

The Helena Independent Record's circulation (daily) is 14,500. The paper is read by some 33,350 people mostly in Lewis and Clark County. Since the Independent Record's circulation is paid, the paper can actually verify who receives the paper. The Queen City news cannot do so since the paper is essentially racked; some one could take all the papers from each rack and essentially no one would see the notice.

If the weekly publication requirement was reduced, then a local government meeting could occur without anyone knowing about it since publication of the meeting or event would no occur. Again, the federal rules under the current law mandate publication and circulation minimums in order to assure that public notice is as widely spread as possible.

Furthermore, as I noted earlier, YOUR NEWSPAPER qualifies under House Bill 474 as a newspaper. Is that really what the Legislature seeks in terms of notice to the public about government activities? Question is – should it? Answer is probably not even though HB 474 allows it to be and rates for legal advertising in YOUR NEWSPAPER would be the lowest of all.

All of these issues will be litigated as the Court's are asked to define acceptable public notice provision parameters if the legislature abandons the long standing and time

tested standards by adopting House Bill 474. The current law suffices. **Legislation should not lead to litigation.**

Finally, we note that one proponent of HB 474 has stated in hearings that he just went to court and got an order declaring the Missoula Independent a newspaper of general circulation. **The truth is that the case a declaratory judgment and involved the Missoula Independent and a bank; no other parties were involved. The Court issued no findings of fact or conclusions of law; after pounds of litigation, the parties settled the case and the Court merely issued a stipulated order at the request of the parties.**

The decision reaches no further than the bank and the Missoula Independent in that one case since no one was a party to case under the rules of procedure. No other newspaper participated in the case. Missoula County did not participate in the case. The Montana Newspaper Association was not made aware of the case by its member the Missoula Independent and did not participate in the case.

PUBLIC LEGAL NOTICES VERSES PRIVATE LEGAL NOTICES

One of the issues raised in support of this bill is that fact that non government legal advertising (such a probate notices, adoption notices, name change notices, etc) can be published in free distribution newspapers while local government notices cannot.

Private legal notices are NOT required to meet the constitutional requirements under Article 2 of the Montana Constitution because they do not impact the public's right to know what government is doing. The newspaper industry recognized this fact long ago and supported the change from paid to free circulation for some legal advertising. All such non government legal advertising can be placed in YOUR NEWSPAPER today and meet the legal requirements for public notice.

The constitutional affirmative duty of Montana governments to inform the public about what they are doing is paramount under Article II, Sections 8 & 9.

Litigation has, however, ensued in this arena as well and has not been conclusive.

Finally, members of the Montana Newspaper Association were simply unable to be here Tuesday – most are actually putting out their newspapers. We thank you for continuing this hearing until today.

I want to clarify some statements which were made in past hearing by supporters of this bill. Counties across the state are not required to advertise in large daily newspapers (such as the Billings Gazette) for their current legal notices. The Terry Tribune (in Terry, Montana) has a circulation of 856 subscribers. The Terry Tribune meets ALL of the requirements of the current state and federal law for handling legal notices. Gosh, if the Terry Tribune or the Jordan Tribune (cir. 500) or the Ekalaka Eagle (cir. 1,083) can go through the expense and the time of acquiring the necessary permit,

why can't free distribution newspapers who circulations run into the tens of thousand do the same? They can and should rather than dilute the ability of Montanans to know what their county government is doing in the name of saving a few bucks by county governments.

Finally, I want to thank the League of Cities and Towns and its member communities for not being in this bill. They are to be commended for recognizing that the constitutional government is not free. It is most important to make sure that public knows what government, including local governments are doing.

SUMMARY

County governments in Montana pay a controlled (by the State of Montana) maximum price for legal notice advertising. The rate has been increased three times in 18 years and is today much less than the general advertising rates for newspapers in Montana including those without a periodicals permit.

More Lee Enterprise publications in Montana could bid for county legal notice advertising if H.B. 474 passes. The issue is not commercial for us – the issue is the public's constitutional right to know what government is doing. We do not think that the Adit ought to be a vehicle for legal notices even though it certainly will be under this bill.

We do not think YOUR NEWSPAPER ought to be a vehicle for legal notices even though it certainly will be under this bill.

We do firmly believe that this bill will crate the basis for multiple lawsuits against counties for breach of the notice requirements under Article Two, sections 8 & 9 of Montana's constitution.

The current law which was overhauled literally months ago is stemming the tide of, litigation. This bill should be tabled.

We appreciate your time in allowing us to discharge our constitutional duty today.

The delegates to the Constitutional Convention made a clear and unequivocal decision that government operates most effectively, most reliably, and is most accountable when it is subject to public scrutiny ... While on any given occasion there may be legitimate arguments for handling government operations privately, the delegates to our Constitutional Convention concluded that in the long term those fleeting considerations are outweighed by the dangers of a government beyond public scrutiny.

Great Falls Tribune v. Day, 289 Mont. 155, 959 P.2d 508 (1998)

Justice Terry Trieweller
Chief Justice Jean Turnage
Justice Karla Gray
Justice Jim Nelson
Justice Jim Regnier
Justice Bill Hunt
Justice Bill Leaphart

The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Article II, Section 8, Montana Constitution

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article II, Section 9, Montana Constitution