EXHIBIT 9
DATE 02/20/2013
HB 436

LEGAL REVIEW NOTE

LC#: LC0661, To Legal Review Copy, as of January 30, 2013

Short Title: Generally revise election laws

Attorney Reviewer: Ginger Aldrich/Todd Everts

Date: February 5, 2013

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

Section 25 of LC0611 regarding ballot arrangement may raise potential constitutional conformity issues with the right to freedom of association under the First Amendment of the United States Constitution.

LC0611 provides for a ballot arrangement in which all voters would be given one ballot that could potentially contain both party nominations and party preference candidates. Under this arrangement, all Montana voters would receive the same primary ballot regardless of the individual's party affiliation or lack of party affiliation. Whereas previously primaries served to determine the nominees of political parties, "top two" primaries will be conducted to "narrow the number of candidates for each office to the two candidates who, irrespective of political party preference, receive the highest number of votes cast in the race." LC0661, Section 19(36). Under LC0661, presidential preference primaries and political party precinct officer races (partisan *nomination* processes) and "top two" primaries will appear on the same ballot. Party precinct officers are not running for official, public positions. Unlike casting a vote for a candidate who may have a party preference but who is trying to advance to one of two open spots on the general election ballot, voters voting in a party precinct officer election are selecting individuals to serve as members of political parties. [Presidential preference primary candidates pose less of a problem because they are running for a government office, so even if they are

nominated by electors who do not consider themselves of that party, the candidates must still face a general election and must represent all electors, if elected.].

In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 230-231 (1989), the U.S. Supreme Court held that California's restrictions on how parties should be organized and how they select their leaders unconstitutionally burdened political parties' freedom of association. The 9th Circuit applied *Eu* to Arizona's precinct committee officer election scheme, holding that "allowing nonmembers to vote for party precinct committeemen violates the Libertarian Party's associational rights." *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F. 3d 1277, 1281 (9th Cr. 2003). Under the Arizona law at issue in that case, Arizona conducted a "semiclosed" primary system that allowed unaffiliated voters, independent voters, or party members of other parties not on the ballot to vote in the primary election. However, a federal district court in Washington found a similar provision unconstitutional, even where voters were authorized to vote only if they considered themselves members of the party (*Wash. State Republican Party v. Wash. State Grange*, 2011 U.S. Dist. LEXIS 2448). In its decision, the Washington federal district court cited *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 212, where the Supreme Court held that Connecticut's law violated the Republican Party's right to freely associate in part because "the freedom to join together in furtherance of common political beliefs necessarily presupposes the freedom to identify the people who constitute the association." *Id.* At 214 (quotation marks omitted). The court found that the precinct committee officer scheme, similar to the one contained in this bill, infringed upon the political parties' "freedom to identify the people that constitute their associations" (*Wash. State Republican Party* citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)). It held that personal consideration of party association was "insufficient to withstand constitutional scrutiny." *Id.*

However, LC0661 as drafted attempts to eliminate "widespread voter confusion" by segregating partisan primaries from top two primaries on the ballot with specific designations and notifications for the voter, and it requires a voter to designate a party affiliation to vote in partisan primaries. Section 25. Votes cast by voters who do not designate a party affiliation, who mark "none of the above," or who do not vote in a primary that corresponds with their chosen party affiliation as marked on the ballot are not counted in the partisan primary elections. Section 25(5)(b). LC0661 also provides for a second ballot organizational scheme, returning Montana to its multiple party ballot system if a court finds the one-ballot organizational scheme invalid. Sections 26, 106, and 108.

Requestor Comments: None.