

COMMISSIONER OF
POLITICAL PRACTICES

EXHIBIT 7
DATE 2/20/15
HB 446



STATE OF MONTANA

JONATHAN R. MOTL
COMMISSIONER
TELEPHONE (406) 444-2942
FAX (406) 444-1643

1205 EIGHTH AVENUE
PO BOX 202401
HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

February 20, 2015

Honorable Gerald (Jerry) Bennett
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House Judiciary Committee
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Re: House Bill 446
Hearing Date: Friday, February 20,
2015 at 8:00 AM
Sponsor: Representative Kirk Wagoner

Dear Representative Wagoner and Members of the Committee:

The Office of the Commissioner of Political Practices respectfully opposes
HB 446.

First, HB 446, if passed, likely increases the amount of litigation because
it provides a private citizen or a group the right to recover for narrow litigation
events (such as motion litigation) within enforcement actions brought by the
State or the parties. This approach is out synch with normal prevailing party
recovery in court actions which provides for reciprocal recovery for the

taxpayers of Montana for their attorney fees and costs when the State prevails against a party or group in State District Court.

The mischief that could be caused if this bill becomes law is illustrated by the COPP's current litigation posture. At this time the COPP is litigating 1st Judicial District enforcement cases against 7 candidates and 3 third party groups that were involved in 2010 Montana legislative elections. The Defendants involved in those enforcement actions have collectively filed 6 derivative counterclaims, 3 declaratory judgment actions and 3 appeals of procedural decisions to the Montana Supreme Court. In addition, the Defendants have briefed and argued 19 separate motions in these enforcement actions, with the COPP winning every one decided to date. I would hope this Committee would see that passage of HB 446 would only increase the level of non-merits litigation in enforcement actions as defendants would be awarded attorney fees for a single successful motion but not be held responsible for the 19 unsuccessful motions.

If this Committee wishes to pass something like HB 446 justice is best served if it is amended to allow reciprocal recovery both by the taxpayers of Montana and the opposing party. This serves justice and discourages, rather than encourages non-merits litigation.

Secondly, HB 446 could discourage settlement. The COPP is sparsely staffed with one in-house attorney, me. The Commissioner, however, is also an attorney. This has allowed the current Commissioner to write Decisions and pass the sufficiency Decisions on to the staff attorney for enforcement.

In the past 21 months the Commissioner has issued 122 Decisions resolving 142 complaints. The Commissioner has passed on 73 sufficiency Decisions to the staff attorney (me) for settlement or litigation. In turn, as staff attorney I have moved those Decisions through county attorney review (all were returned to the COPP). Once returned I have reached settlement of 24 sufficiency Decisions (all published on the website) with another 49 sufficiency Decisions awaiting settlement or in litigation. I have found, in settling sufficiency Decisions, that most candidates and committees have been willing to come to the table to work out a settlement to pay their social debt to Montanans. HB 446 has the potential to change that dynamic by unfairly rewarding litigation efforts and thereby discouraging settlement.

Lastly, I note that the COPP fiscal note projects \$64,000 a year if HB 446 passes. There have been no attorney fees paid in the past by the COPP based on enforcement litigation. However, attorney fees have been paid based on

federal court challenges to the constitutionality of some of Montana's campaign practice laws. The least amount paid in one of these federal court cases was \$31,000 (for a post-complaint, non-briefed stipulated settlement) and the most was \$225,000 (for a fully briefed and appealed summary judgment decision). The fiscal note for HB 446 is based on the assumption that HB 446, if it passes as written, will result in attorney fees awarded through a dispositive Court Order issued in regard to one fully briefed motion per year.

Thank you for your consideration of the COPP's comments on HB 446.

Sincerely,

A handwritten signature in black ink, appearing to read "Jaime MacNaughton". The signature is fluid and cursive, with a large initial "J" and "M".

Jaime MacNaughton

General Counsel for the Commissioner of Political Practices