

Quentin M. Rhoades  
State Bar No. 3969  
Jason Jewett  
State Bar No. 8092  
**SULLIVAN, TABARACCI & RHOADES, P.C.**  
1821 South Avenue West, Third Floor  
Missoula, MT 59801  
Telephone: (406) 721-9700  
Facsimile: (406) 721-5838  
[qmr@montanalawyer.com](mailto:qmr@montanalawyer.com)

*Pro Querente*

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

**MONTANA SPORTS SHOOTING  
ASSOCIATION, INC., and GARY  
S. MARBUT,**

**Plaintiffs,**

**v.**

**THE STATE OF MONTANA, THE  
MONTANA DEPARTMENT OF  
FISH, WILDLIFE, AND PARKS,**

**Defendants.**

**Cause No. DV-07-154  
Dept. No. 4**

***PRINCIPAL BRIEF IN SUPPORT  
OF APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER, ORDER TO SHOW  
CAUSE AND  
PRELIMINARY INJUNCTION***

COME NOW, Plaintiffs, Montana Shooting Sports Association, Inc. (MSSA), Gary S. Marbut, both as agent for MSSA and individually ("Plaintiffs"), by and through their counsel, Sullivan, Tabaracci & Rhoades, P.C., and in support of its Application for Temporary Restraining Order, Order to Show Cause and Preliminary Injunction, submits the following:

***PRINCIPAL BRIEF***

**INTRODUCTION**

Plaintiffs request that the Court grant a temporary restraining order

("TRO") and a preliminary injunction, pursuant to Mont. Code Ann. §§ 27-19-201, 314 through -318, enjoining Defendant Montana Department of Fish Wildlife and Parks ("DFWP") from lobbying the Montana Legislature, appearing before it as either proponents or opponents of any proposed legislation, or otherwise acting to influence the political decisions of it or its members. The request is based upon Mont. Code Ann. 87-1-204, which reads:

While retaining the right to vote as he may please and to express his opinions on all political questions, **no employee** of [the Montana Department of Fish Wildlife and Parks] **may use his official authority or influence** for the purpose of interfering with an election or affecting the results thereof or **for the purpose** of coercing or **influencing the political actions of any person or body.**

Under the statute, DFWP is not allowed, *inter alia*, to lobby the Montana Legislature, and it should be immediately enjoined from continuing do so.

### **FACTS**

DFWP officials and employees are currently engaged in seeking to influence the political actions of the Montana Legislature and/or its members.<sup>1</sup> This despite the plain language of the Mont. Code Ann. 87-1-204, and Plaintiffs written requests that DFWP cease all activity designed or intended to influence the political actions of the Montana Legislature and/or committees or members.<sup>2</sup> Regardless of the law, DFWP has refused and continues to refuse to cease its activities designed or intended to influence the political actions of the Montana Legislature and/or its members, including but not

---

1 See Affidavit of Gary Marbut, attached hereto as Exhibit 1; Letter from DFWP Director Jeff Hagener to G. Marbut, dated January 30, 2007, attached hereto as Exhibit 2.

2 See Aff. of Marbut.

limited to lobbying and appearing before committees as proponents or opponents of bills under consideration.<sup>3</sup>

## ARGUMENT

### 1. **Injunctive relief should be allowed upon a showing of political and lobbying laws.**

A TRO may be issued without written or oral notice if:

- (1) It clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or his attorney could be heard in opposition; and
- (2) The applicant or the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.<sup>4</sup>

If it is issued without notice, it must: (1) be endorsed with the date and hour of its issuance; (2) be filed immediately in the clerk's office and entered in the record; and (3) define the injury and state why the injury is irreparable and why the order was granted without notice.<sup>5</sup>

Meanwhile, a preliminary injunction order may be granted under Mont. Code Ann. § 27-19-201:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant; [or]
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting

---

3 *Id.*

4 Mont. Code Ann. § 27-19-315.

5 Mont. Code Ann. § 27-19-316.

the subject of the action, and tending to render the judgment ineffectual; ...

"It has been previously stated that the subsections of this statute are disjunctive, 'meaning that findings that satisfy one subsection are sufficient.'"<sup>6</sup> Thus, a preliminary injunction may be issued if even one subsection of § 27-19-201 can be satisfied.<sup>7</sup>

Finally, in this context – where legislative lobbying is being done in violation of Montana law – the Montana Supreme Court has allowed injunctive relief to enjoin such practices. For example, in *Reynolds*, the Court ordered the State Bar of Montana to stop using member dues to lobby for causes for which members dissented or to refund to the dissenting members an aliquot portion of dues.<sup>8</sup> Likewise, it has been stated that:

This Court has been quite consistent in its holdings concerning the issuance of injunctions and writs of mandate by district courts to control actions of administrative boards and agencies. ***The rule simply put is that a board may be enjoined from acting outside the scope of its authority ....***

Thus, in this case, if the Court finds DFWP to be in continuing violation of Mont. Code Ann. § 87-1-204, it may issue injunctive relief to stop DFWP's illegal activity.

///

///

---

<sup>6</sup> *Sweet Grass Farms, Ltd. v. Board of County Com'rs of Sweet Grass County* (2000), 2000 MT 147, ¶ 27, 300 Mont. 66, 72, 2 P.3d 825, 829 (quoting *Stark v. Borner* (1987), 226 Mont. 356, 359, 735 P.2d 314, 317).

<sup>7</sup> *Id.*

<sup>8</sup> *Reynolds v. State Bar of Montana* (1983), \_\_\_ Mont. \_\_\_, 660 P.2d 581.

<sup>9</sup> *Erie v. State By and Through State Highway Commission* (1969), 154 Mont. 150, 153, 54, 461 P.2d 207, 209 (emphasis added). See *Paradise Rainbows v. Fish and Game Commission* (1966), 148 Mont. 412, 421 P.2d 717 (court has authority to grant extraordinary relief against DFWP if it has violated the law).

**2. DFWP should immediately be enjoined from lobbying, supporting or opposing specific bills, or otherwise seeking to influence the actions of the Montana Legislature.**

**A. It is illegal for DFWP to attempt to influence legislation.**

Under Mont. Code Ann. § 87-1-204, no one from DFWP, acting on behalf of the agency, may use their official authority “for the purpose of ... influencing the political actions of any person or body.” This proscription is expressed in plain language under the statute. In such cases, the Montana Supreme Court has said:

We cannot overstress our limited role as interpreters of the statutes. It is axiomatic that when interpreting a statute, we seek to implement the objectives the Legislature sought to achieve, and if the legislative intent can be determined from the plain language of the statute, the plain language controls.<sup>10</sup>

Thus, it is the Montana Legislature’s intent that DFWP cannot seek to influence the fate of bills being considered before it.

For its part, DFWP claims this § 87-1-204 does not apply to “lobbying” the Legislature. Rather, it argues, the bill applies only to influencing elections. It contends:

The whole tenure [*sic*] of the section is for elections and campaigns and other similar political action. Lobbying for a certain bill in the legislative process is not an election, does not involve the results of an election and is not a similar political action to elections or their results. Therefore, the Department does not consider the section you have cited to apply to lobbying during the legislative process.<sup>11</sup>

---

<sup>10</sup> *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277, ¶ 60, 334 Mont. 237, ¶ 60, 146 P.3d 759, ¶ 60. See also, 1-2-101:

In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

<sup>11</sup> Aff. of Marbut, ¶ 10, and Exh. D, p.2.

This position, however, simply ignores the plain meaning of the words the Legislature employed. Black's defines "political", with emphasis added, as: "Pertaining to politics; ***of or relating to the conduct of government.***"<sup>12</sup> A "body" is: "A deliberative assembly <legislative body>. See deliberative assembly under ASSEMBLY."<sup>13</sup> "Influence" in plain English means: "Power to sway or affect based on prestige, wealth, ability, or position."<sup>14</sup> Applying the plain meaning of these terms, Mont. Code Ann. § 87-1-204 prohibits DFWP employees from doing anything during a legislative session or otherwise to "sway or effect" any decision "of or relating to" any person in, or any "deliberative body" affiliated with the Montana Legislature, including but not limited to Legislative members, committees or sub-committees, in the conduct of its governmental functions. In other words: "No lobbying."

DFWP has also argued that since Montana allows government officials generally to lobby the Legislature, it is allowed to as well:

If the above were not true, the other statutes that infer [*sic*] that the Department may engage in lobbying would be rendered useless. Specifically, the rules of conduct for public officers and public employees provide that a Department employee may only lobby in his or her official capacity as a public employee if the lobbying is on behalf of the Department and for no other organization. See Mont. Code Ann. (Section) 2-2-121(5). This section does not prohibit a public officer or public employee from lobbying altogether. The only prohibition on lobbying is when it is done for another organization while the public officer or employee is performing his or her job duties. Furthermore, if Department employees were not allowed to lobby at all, this section outlining when a public official can and cannot lobby would not be necessary.<sup>15</sup>

---

12 Black's Law Dictionary (8<sup>th</sup> ed. 2004), "political".

13 *Id.*, "body".

14 "Influence." The American Heritage® Dictionary of the English Language, 4th ed. Boston: Houghton Mifflin, 2000. [www.bartleby.com/61/](http://www.bartleby.com/61/). February 1, 2007.

15 Aff. of Marbut, ¶ 10, and Exh. D, p.2-3.

This argument, however, ignores the rule that in “the construction of a statute,” when “a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.”<sup>16</sup> Thus, while it is true the general rules allow executive branch officials to lobby and seek in their official capacities to influence legislation, a different, specifically stated rule applies to the DFWP. As a result, the general rule does not apply to employees of DFWP. Rather, the specific prohibition of Mont. Code Ann. § 87-1-204 applies, and it bars their seeking to influence the legislative process.

**B. Despite the plainly stated law, DFWP refuses to refrain from trying to influence legislation, and should therefore be subject to an immediate TRO and preliminary injunction.**

**(1) DFWP is currently seeking to influence legislation by appearing before the legislature to lobby for or against bills that could impact it.**

Plaintiffs in the past have explained their view of the law to DFWP and asked it respectfully to cease its lobbying efforts. Its response, with emphasis added, has been:

All other Department employees (five in this session) who are engaged in the legislative process are registered and licensed as lobbyists with the Commissioner of Political Practices. That statute does not prohibit a public agency staff to lobby on behalf of the public agency. **Therefore, the Department plans to continue to appear before the legislature to lobby for or against bills that could impact the Department.**<sup>17</sup>

This session, DFWP employees have registered as lobbyists and sought to influence the deliberations and decisions of the Legislature and its committees and members.<sup>18</sup> Plaintiffs therefore again submitted a written request to

---

16 Mont. Code Ann. § 1-2-102.

17 See Exh. 1, Aff. of Marbut, ¶ 10, Exhibit D, p. 3; see also Exh. 2.

18 *Id.*, ¶¶ 2-8.

DFWP seeking its compliance with the law.<sup>19</sup> DFWP refused.<sup>20</sup> Moreover Plaintiffs have exhausted whatever remedy they may have with the Commissioner of Political Practices.<sup>21</sup> Thus, Plaintiffs sole remaining remedy is the relief requested in this action.

**(2) *Both a temporary restraining order and a preliminary injunction are necessary to force immediate compliance with the law, and to thwart irreparable harm.***

Delay in allowing injunctive relief will cause irreparable injury. The Montana Legislature is now in session. DFWP has no less than six of its employees registered as lobbyists and the Director is often in the Capital seeking to influence legislation.<sup>22</sup> They have already appeared at committee hearings.<sup>23</sup> They clearly intend to continue such practices. Common sense dictates that DFWP would not commit its finite, scarce and valuable human resources to influencing legislative action if its people were not effective. They clearly must be attaining for DFWP palpable, concrete benefits or it would not send them to the Capital. To the extent they are effective, DFWP is injuring the public by benefitting from its own illegal conduct. Such a result violates the statutory maxim that "no one can take advantage of his own wrong."<sup>24</sup> Indeed, this principle is no more apt than when the wrong-doing is committed by a publicly funded entity. "The use of publicly owned resources to propagandize against a proposal made and supported by a significant

---

19 *Id.*, ¶¶ 15 and 16.

20 Exh. 2.

21 *Id.*, ¶¶ 11 and 12.

22 *Id.* at ¶ 13.

23 *E.g., id.*, at ¶¶ 3-6.

24 Mont. Code Ann. § 1-3-208.

number of those who were taxed to pay for such resources is an abridgement of those fundamental freedoms."<sup>25</sup> Thus injury is therefore manifest.

Meanwhile, although its lobbying has an effect – or DFWP would refrain – the influence illegally brought to bear is impossible to quantify or calculate in terms of monetary damages. There is no way to measure the bearing such efforts have on any particular decision, or what effect DFWP's illegal influence has on the interests of any particular citizen. Furthermore, no authority of which Plaintiffs know would allow the avoidance of legislative action taken under (or not taken) DFWP's illegal influence. Thus, there exists no remedy to either compensate or cure the continued wrong-doing. Consequently, the injury done by DFWP in continuing to wield its illegal influence on the Legislature, its members and its committees, is irreparable. Given the injury, and given its irreparable nature, a TRO should be immediately issued.<sup>26</sup>

Furthermore, undersigned applicants' attorney certifies to the Court that he has contacted DFWP attorneys to copy them with the complaint, with both an early draft and the final copy of this brief, and of Plaintiffs' intention to seek a TRO. DFWP objects to the TRO and states he is not available until February 8, 2007. In the meantime, however, there is no reason DFWP

---

<sup>25</sup> *Kidwell v. City of Union*, 462 F.3d 620, 630 (6<sup>th</sup> Cir. 2006) (quoting *Mountain States Legal Foundation v. Denver School District # 1*, 459 F.Supp. 357 36-61 (D.Colo.1978)).

<sup>26</sup> Mont. Code Ann. § 27-19-315, which reads:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or his attorney could be heard in opposition; and

(2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

should be allowed to continue its illegal conduct. It should be required to cease and desist immediately.

A preliminary injunction is also warranted. A preliminary injunction should be granted if it meets any of five criteria specified by statute.<sup>27</sup> The standards which are satisfied in this case are:

(1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant; [or]

(3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual.<sup>28</sup>

First, Plaintiffs are entitled to the injunctive relief they seek because DFWP's continuing efforts to influence legislation are illegal. Second, DFWP's continued illegal conduct will create irreparable injury, as discussed above. Third, DFWP is and has promised to continue its illegal conduct, and the continued influence on legislative action between now and the close of the current session will render a final judgment ineffectual. Thus, because any one of these three criteria are clearly met, a preliminary injunction is warranted.

## CONCLUSION

DFWP is and intends to continue to violate the clear statutory proscriptions of Mont. Code Ann. § 87-1-204. The harm done between now and the entry of a final judgment can be neither quantified nor remedied by either a final declaratory judgment or by money damages. Given the

---

27 *Sweet Grass Farms, Ltd.*, at ¶ 27.

28 *Id.*

indisputable violation of law, the continuing harm, and the lack of any remedy, the Court should enter a temporary restraining order immediately, and issue an order to show cause requiring DFWP to appear and give reason why it should not be permanently enjoined from continuing further in its illegal conduct.

DATED this 1<sup>st</sup> day of February, 2007.

Respectfully submitted,  
SULLIVAN, TABARACCI & RHOADES, P.C.

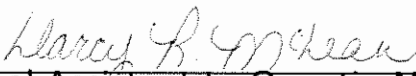
By: 

\_\_\_\_\_  
Quentin M. Rhoades  
*Pro Querente*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1<sup>st</sup> day of February, 2007, I served upon the following a true and correct copy of the foregoing by depositing said copy in the U.S. mail, postage prepaid, and addressed as follows:

Robert N. Lane  
Special Assistant Attorney General  
John F. Lynch  
Special Assistant Attorney General  
Montana Department of Fish, Wildlife and Parks  
1420 East Sixth Avenue  
P.O. Box 200701  
Helena, MT 59620-0701

  
Legal Assistant to Quentin M. Rhoades

**EXHIBIT 1**

AFFIDAVIT OF GARY MARBUT

STATE OF MONTANA        )  
                                      : ss.  
County of Missoula    )

I, GARY MARBUT, having been duly sworn, state as follows:

I am of adult age. I am mentally sound and competent to testify in the courts of the State of Montana. The matters set forth in this Affidavit are based upon my own personal knowledge unless otherwise stated. I will testify in open court, if called upon to do so, as to the facts set forth herein.

1.     The affiant is a resident of Missoula County, Montana.
2.     The affiant is the President of the Montana Shooting Sports Association, Inc., a Montana nonprofit corporation and organization of Montana citizens assembled to promote good public policy concern ownership and use of firearms, and hunting, Montana's hunting heritage, and proper management of Montana's wildlife resources.
3.     The affiant was in attendance at the public hearing on Senate Bill 58 before the Senate Fish and Game Committee, held on January 11, 2007, beginning at about 3:00 P.M.
4.     Also in attendance at this committee hearing were all assigned committee members, and about 20 other persons.
5.     Persons wishing to testify before the Committee are requested to sign a registration sheet for each bill at hearing specifying the name of the individual to testify, where the individual lives, the name of any entity the individual purports to represent, and whether the individual will testify as a proponent, an opponent, or as an informational witness.
6.     Chris Smith, Deputy Director of the Montana Department of Fish, Wildlife and Parks (FWP) registered as a proponent for SB 58 representing FWP, and did testify in favor of SB 58, did announce himself to be representing FWP to this Senate Committee, and did urge Committee members to support and pass SB 58.
7.     Affiant was one of many witnesses who observed Mr. Smith testify as a proponent for SB 58 and urged committee members to support and pass SB 58.

8. Attached hereto and marked as Exhibit A is a photocopy of the registration log for persons testifying in relation to SB 58 before the Senate Fish and Game Committee on January 11, 2007, which log includes a registration for Mr. Smith.

9. Plaintiffs have found their ideas about public policy before the Legislature opposed by employees at least since 1999. As an example, here is an excerpt from an MSSA memo of February, 2000. See Exhibit B.

10. In 2003, DFWP was notified in a letter from MSSA that it is illegal for DFWP employees to attempt to influence the Legislature. The text of that letter is attached as Exhibit C. FWP responded by declining to comply with the law. The text of DFWP's response is attached as Exhibit D. MSSA responded to that denial, text attached as Exhibit E.

11. MSSA then contacted the Commissioner of Political Practices (CPP) about this problem. The text of that letter is attached as Exhibit F. The Commissioner responded, but to no avail. The text of that response is attached as Exhibit G.

12. In 2006, MSSA again contacted the CPP, asking that the Commissioner reject DFWP applications for personnel to register as lobbyists because 87-1-204 prohibits DFWP personnel from attempting to influence the Legislature. The text of that letter is attached as Exhibit H. That request has been denied. (See copy of letter attached as Exhibit I.)

13. Meanwhile, the Website for the CPP shows the following DFWP employees currently registered and listed as lobbyists for DFWP:

Joe Maurier  
James Kropp  
Robert Lane  
Christian Smith  
Larry Peterman  
Susan Daly

14. This list does not include FWP Director Jeff Hagener, who has been in the Capitol many times since the beginning of the 2007 legislative session.

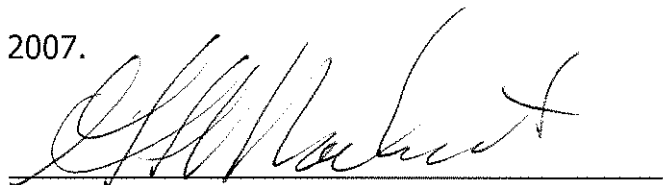
15. On January 23, 2007, MSSA sent a letter by U.S. Mail, return receipt, to Mr. Chris (Christian) Smith, known as either Deputy Director or Chief of Staff for DFWP, demanding that DFWP comply with 87-1-204, M.C.A. and cease efforts to influence the Legislature, and demanding written notification of DFWP intent to comply. The text of that letter is attached as Exhibit J. An image of the returned receipt for this mailing is attached as Exhibit K. Copies of that letter were mailed by First Class U.S. Mail to Mr. Jeff Hagener,

Director of DFWP; Mr. Bob Lane, Chief Legal Counsel for DFWP; Brian Schweitzer, Governor of Montana; Mike McGrath, Attorney General of Montana; Senator Joe Tropila, Chairman, Senate Fish and Game Committee; and Representative Mike Milburn, Chairman, House Fish, Wildlife and Parks Committee.

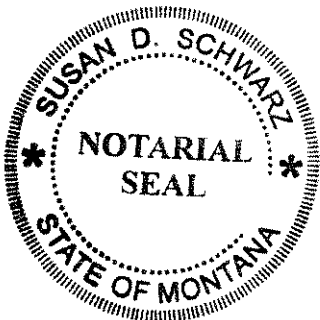
16. DFWP has not responded to this demand that they obey the law.


17. Plaintiffs have a long history of objecting to Defendants' violation of the law. Defendants have been given more than adequate notice that they are violating 87-1-204, M.C.A. Defendants' response has uniformly been a rejection of the notion that this law applies to the employees of DFWP. Plaintiffs have not been able to obtain any relief from DFWP or from the CPP.

DATED this 30<sup>th</sup> day of January, 2007.

  
\_\_\_\_\_  
Gary S. Marbut

**SUBSCRIBED AND SWORN TO** before me this 30<sup>th</sup> day of January, 2007, by Gary S. Marbut.



  
\_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Notary Public for the State of Montana  
Residing at \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

SUSAN D. SCHWARZ  
NOTARY PUBLIC for the State of Montana  
Residing at Missoula, Montana  
My Commission Expires Sept 3, 2008

**EXHIBIT A**

**MONTANA STATE SENATE  
2007 LEGISLATURE**

**VISITOR REGISTER**

**FISH AND GAME COMMITTEE**

DATE 1-11-07

BILLS BEING HEARD TODAY SB 58; SB 77; SB 112

**PLEASE PRINT**

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
CARY HILL	881-2345	MONTANAS FOR MULTIPLE USE	SB 58		X
Steve Forest	582-7571	WORLD WILDLIFE FUND	SB 58	X	
TRAPPER BADOVINAC	458-5613	SELF	SB 112	X	
Jim Jacobson	449-7233	MT AMERICAN LEGION	SB 112	X	
DAVE NULLE	442-4073	SELF	SB 58		X
GARY MARBET	549-1052	MONTANA SKATING SPORTS	SB 58		X
CHRIS SMITH	444-5621	FWP	SB 58	X	
"	"	"	SB 77	X	
"	"	"	SB 112	X	
Garett Bacon	475-3191	Prickly Pear Sprouts	SB 58		X
Janet Ellis	443-3949	MT Audubon	SB 58	X	
KEVIN CHAFFEL	444-3847	DNR	SB 58	X	
Sterling Miller	721-6705	Natl. Wildl Fed.	SB 58	X	
C FINN YRS BACON	158-2080	ALCOA Chamber	SB 24		X
Mark Angeles	449-9933	MTU	SB 77	X	
ROSEAN A. HAGAN	459-0773	MT VRA	SB 24		X
Kat Targetson	480-5154	WIFE	SB 58		X
MIRE GEARY	449-4632	LEWIS CLARK GYS	SB 112	X	
ROBERT THROSSELL	459-6865	MT WILDLIFE FEE	SB 112	X	

**PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY**

**EXHIBIT B**

**EXCERPT FROM MEMO OF 2/2000**  
**EXHIBIT B**

FWP's "Not Invented Here" attitude. Example: I first approached FWP about using PR/DJ funds or hunter license money to improve shooting ranges in 1987. I met with the Director and several other senior folk, and pitched them on my idea. They rejected the idea - didn't want to spend the money (notwithstanding that intended purpose under P-R). I asked them to reconsider. They said they'd get back to me. Despite repeated follow-up contacts, they never did.

We took a bill to the (in 1989 or 1991, I can't remember which) session of the Legislature to establish the shooting range funding program. In attempt to kill it, FWP arranged to have the bill diverted to the F&G subcommittee of the House Appropriations Committee, a subcommittee they always arrange to get loaded with people they can influence. We wrestled them to a draw there. We got the money for the program, but they retained the prerogative over how to manage the program.

In subsequent legislative sessions, we had the bill back to clarify how FWP would manage the program and to make funding permanent, and they always arranged to get the bill killed, until last session. Each session, however, they'd claim that they liked the idea of the program, but refused to allow our suggestion to increase the funding, and fought off our attempts to specify how the program would be handled.

In March of 1998, FWP Director Pat Graham attended the MSSA Annual Meeting. I told him in this public meeting that we'd had a new idea about how to generate new money to fund the shooting range program (one long-term objection by FWP to the program was that they didn't want to give up money they were accustomed to using otherwise). I told him that we were proposing to auction a small handful of sheep, moose, and goat permits, and combination non-resident licenses in a silent, mail auction, and that the first income from the effort would reimburse FWP for the lost revenue from the permits, and for the administrative costs of conducting the auction. I asked Pat if FWP had any objections to this concept for funding the shooting range development program. He said he'd have to get back to me.

I contacted Pat's office about every one or two weeks asking if FWP had any problems with our funding idea. I actually spoke with Pat several times. Other times I left messages to return my call - never returned. I

spoke several times with Ron Aasheim, telling him, as I had told Pat, that if FWP had any objections to the concept, I'd like to know what they were so maybe we could work out problems before going to the Legislature. After probably 20 or 30 overtures to FWP, I finally got through to Pat in late November. Once again, I asked if FWP had had any objection to the funding idea. He said, "I'll have to get back to you about that." I said, "Absolutely not! If you have any problems with the idea, tell me now, or I'm going to testify to the Legislature that FWP supports the idea." He said that he couldn't really think of any reason why FWP would have a problem with the idea.

On the day that the bill came up in the House Fish and Game Committee, FWP presented two pages of testimony and reasons why they opposed the bill!!! Two printed pages of objections!!! It turned out that about two thirds of the reasons listed were bogus, nonsensical, throw-away, made-up items just to fill up the pages. I cornered (FWP senior staffer) Ron Aasheim in the hall after the committee hearing, and was verbally violent with him over FWP's dishonor, deceit, and unwillingness to enter into the requested dialog about this bill. He was forced to admit that FWP had behaved most badly over this issue. I demanded (I was VERY angry) that he, and only he, obtain FWP authority to negotiate with me over FWP's list of objections to the bill.

He obtained that authority (I don't know how, but I do know that he was personally very embarrassed over FWP's conduct). Ron and I were able to sort out all or nearly all of the differences in about 1/2 hour of conversation. Some of the FWP objection were so stupid that Ron just dropped them. Some objections were easily cured with minor amendments to the bill, which could well have been done before it was introduced, if FWP had been willing to talk about the issue. The House passed the revised bill.

When the bill came up before the Senate Fish and Game Committee, Pat Graham was there. As a proponent, I was up first, and I began by reciting, in more detail than here, my long effort to get Pat and FWP to share with me any objection that they had about the bill. Then I discussed the features of the bill. During testimony for opponents, Pat went to the microphone and told the committee, "I don't remember things the same way Mr. Marbut does." He went on to testify that FWP had not had any real opportunity to become involved in drafting the bill, and didn't really know about the content/concept until it was introduced in the House. He also testified (contrary to what he'd clearly told me on the

phone) that FWP found the funding scheme to be totally unworkable. The committee killed the proposed funding scheme, and passed the bill without that provision.

**EXHIBIT C**

January 14, 2003

Mr. Jeff Hagener, Director  
Montana Department of Fish, Wildlife and Parks  
1420 E. 6th Avenue  
Helena, Montana 59620

Dear Jeff,

Greetings from Missoula, and Happy New Year.

With the Legislature now in session, the MSSA Board of Directors has asked me to broach a topic that will be of interest to you and perhaps the personnel of your department.

FWP is viewed by some sportsmen and legislators as an agency with powerful political influence, and with an aggressive lobbying presence before the Legislature. This perception is bolstered, in part, by the many "agency bills" carried by individual legislators on behalf of the department.

Of concern to many is FWP's performance in relation to the several existing laws that prohibit FWP personnel from lobbying the legislature. These prohibitions would collectively, it would seem, prohibit lobbying by FWP employees even if they are registered as lobbyists with the Commissioner of Political Practices. Copies of the relevant laws are attached for your consideration.

While state laws prohibit lobbying by FWP employees, the need for the Legislature to obtain information from FWP is not questioned. However, that would suggest a more passive role for FWP personnel than what may have been perceived or observed. Certainly, there is a fine line somewhere between providing information to the Legislature, and lobbying the Legislature concerning policy matters on behalf of an agency agenda.

For your information, my experience with the Legislature began actively in 1971, when I was Assistant Sergeant at Arms for the House. I have been active before the Legislature and in public policy formulation continuously since the early 1980s.

In order to assist FWP in recognizing the fine line between providing information to the Legislature, and lobbying the Legislature, I wish to suggest three guidelines for FWP personnel conduct. By following these guidelines, I believe FWP would go a long way towards defusing any perception that FWP is a powerful political entity, with its own bureaucrats' agenda, and aggressively influencing the Legislature in support of that agenda.

1) Since simply providing information to the Legislature is (and ought to be) a passive role, it is my suggestion that FWP personnel only offer information when requested to do so by an individual legislator, or by a legislative committee. In order for FWP personnel to be protected from accusations of improper conduct, I suggest that on each occasion when a legislator or committee requests information from FWP, a written request to appear and/or provide such information be obtained from the legislator or committee. I suggest that a file of these written requests for information be kept on record at FWP, a file that is available for public scrutiny. I also suggest that no request for FWP to provide information be honored unless it is specific to date and subject - no blanket requests. A suitable written request from a legislator might be as simple as, "Would you please arrange for knowledgeable FWP personnel to be present at the Fish, Wildlife and Parks Committee of the House on February 17th, at 3:00P.M., to provide information relevant to HB 999."

2) In the FWP informational role, it would be appropriate for FWP personnel appearing before legislative committees to testify only during the information period for comment on any legislation before the Legislature (not as proponents or opponents), and, equally important, that any testimony offered be content and delivery neutral in terms of the perception of or actual advocacy for or against any legislative proposal (I have personally witnessed testimony given by public employees during the "information" period of a committee hearing that was not at all neutral, but was outright advocacy).

3) It also seems significant whether any communications, written, electronic or verbal, about legislative issues are initiated by legislators or by FWP personnel. For example, if a legislator were to call you or one of your staff seeking information about a policy matter before the Legislature, it would seem very appropriate to accept that call, and to freely, even informally, provide the best information available. This suggested policy would also permit FWP staff to answer questions from committee members during legislative committee hearings. However, it would be unseemly for a FWP staffer (on his or her duty time) to initiate contact with a legislator to discuss or provide unrequested information about a policy matter pending before the Legislature.

Jeff, I hope these suggestions can be utilized by FWP to help bolster the image of FWP as a servant of the people, to give sportsmen and legislators greater confidence that FWP is not operating outside of its proper role, and to keep FWP on the right side

of the fine line between necessary provision of information and assertive agency lobbying.

Also, I'm sure that if you agree with these suggestions, you can easily implement them with directives to the employees of your department.

Finally, let me be clear about one possible issue. There is absolutely no intention here to interfere with the First Amendment rights of you or your employees to freely be involved in the political process when off-duty, not operating in an official capacity, and not attempting to influence legislative public policy specific to your department.

Thank you for your interest and attention. I hope to hear from you whether or not you are able to embrace and implement these suggestions.

Best wishes,

Gary Marbut, president  
Montana Shooting Sports Association

Cc: Senator Mike Sprague  
Representative Joe Balyeat

## MONTANA LAWS RELATED TO PUBLIC EMPLOYEE LOBBYING

### Law Specific to the Department of Fish, Wildlife and Parks

87-1-204. Political activity of employees. While retaining the right to vote as he may please and to express his opinions on all political questions, no employee of the department may use his official authority or influence for the purpose of interfering with an election or affecting the results thereof or for the purpose of coercing or influencing the political actions of any person or body.

History: En. Sec. 9, Ch. 193, L. 1921; re-en. Sec. 3658, R.C.M. 1921; re-en. Sec. 3658, R.C.M. 1935; amd. Sec. 1, Ch. 21, L. 1955; amd. Sec. 4, Ch. 188, L. 1975; amd. Sec. 13, Ch. 417, L. 1977; R.C.M. 1947, 26-109.

### Law Related to All Public Employees

2-2-121. Rules of conduct for public officers and public employees. (1) Proof of commission of any act enumerated in subsection (2) is proof that the actor has breached a public duty.

(3) A public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds for any campaign activity persuading or affecting a political decision unless the use is:

(a) authorized by law; or

(b) properly incidental to another activity required or authorized by law, such as the function of an elected public official, the official's staff, or the legislative staff in the normal course of duties.

(5) A state officer or state employee may not engage in any activity, including lobbying, as defined in 5-7-102, on behalf of an organization of which the officer or employee is a member while performing the officer's or employee's job duties. The provisions of this subsection do not prohibit an officer or employee from performing charitable fundraising activities if approved by the employee's supervisor or authorized by law.

(8) A person who purposely or knowingly violates this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$50 or more than \$1,000, by imprisonment in the county jail for not more than 6 months, or by both. A civil proceeding under 2-2-136 or 2-2-144 does not preclude an action under this subsection.

5-7-102. Definitions. The following definitions apply in this chapter:

(6) "Lobbying" means:

(a) the practice of promoting or opposing the introduction or enactment of legislation before the legislature or the members of the legislature by a person other than a member of the legislature or a public official; and

(b) the practice of promoting or opposing official action by any public official.

**EXHIBIT D**

Montana Fish, Wildlife & Parks

P.O. Box 200701  
Helena, Montana 59620-0701  
(406)444-3186  
FAX: 406-444-4952  
Ref: DO0060-03  
January 29, 2003

Gary Marbut  
President  
Montana Shooting Sports Association  
P.O. Box 4924  
Missoula, Montana 59806

Dear Mr. Marbut:

This letter is written in response to your letter dated January 14, 2003 regarding Department lobbying.

In your letter, you have asked that the Department implement a few rules regarding lobbying. The Department will not implement these suggestions for the following reasons. First, you suggest that the Department only be allowed to provide information the legislature when it comes to it in written form by either a legislator or a legislative committee. It is imperative that the Department not be put in the position of delaying the political process by requiring only written requests for information. This would take unnecessary time and resources by the legislature when it has so little time already to consider the number of bills before it. The Department will simply continue to follow the rules of the legislature just as every other public agency and lobbyist must do.

Additionally, you ask that the Department testify only during the information period for comment on any legislation before the legislature and not as opponents or proponents. When a bill is introduced that could adversely or positively affect the Department's operations (i.e., programs, budgets, personnel), the Department provides information regarding how and why the Department could be affected. The Department's information will likely be considered as opponent or proponents of the bill whether or not it is called one or the other simply by virtue of the information given. If the Department's programs will be cut because a bill in the legislature proposes to cut the Department's budget, that information is provided to the legislature and will likely be considered opposition to the bill whether or not it is labeled 'information' or 'opposition.' Therefore, the Department just calls it what it is, finally, the Department as part of the executive branch and like other agency, does have a position on many bills either for or against. The Governor, who has the final decision on Department positions, and our constituents expect FWP to participate fully in the legislative process.

Finally, you ask that the Department personnel be prohibited from initiating contact with a legislator regarding policy matters pending before the Legislature. It is important that a legislator have all information necessary to take an informed bill to the legislature. If the Department waits to provide that information until asked or until a legislator initiates contact, it may be too late in the process to rectify any problems that could occur. In fact, often the Department would be remiss in its responsibility to aid the process if it did not provide information where it could affect the process. Rather, it is preferable to give all necessary information the sponsor of a bill at the earliest possible stage instead of waiting for a legislator to ask for information. That way, there will be no surprises to the legislator of the legislative committee.

Marbut - DO0060-03  
January 30, 2003  
Page 2 of 2

As a member of this process, you will appreciate that the most informed legislature and individual legislators makes the democratic process more effective and smooth. Therefore, it is essential that legislators have access to the agency most informed about the programs that are the subject or could be impacted by the legislative process. This access to information should not be impinged in any way that could make the process any more burdened than it is currently.

You cite some specific statutes as authority for the proposition that the Department, or any state agency, does not have the right to lobby the Legislature. Specifically, you mention Section 87-1-204 wherein it provides, "...no employee of the department may use his official authority or influence for the purpose of interfering with an election or affecting the results thereof or for the purpose of interfering with an election or affecting the results thereof or for the purpose of coercing or influencing the political actions of any person or body." The Department interprets this section in light of the other laws and derives its meaning therefrom. In other words, this section prohibits employees of the Department engaging in activities to affect an \*election\* or \*results\* or other \*similar\* political actions while in their official capacity as a public employee. See Mont. Code Ann. (Section) 87-1-204. The whole tenor of the section is for elections and campaigns and other similar political action. Lobbying for a certain bill in the legislative process is not an election, does not involve the results of an election and is not a similar political action to elections or their results. Therefore, the Department does not consider the section you have cited to apply to lobbying during the legislative process.

If the above were not true, the other statutes that infer that the Department may engage in lobbying would be rendered useless. Specifically, the rules of conduct for public officers and public employees provide that a Department employee may only lobby in his or her official capacity as a public employee if the lobbying is on behalf of the Department and for no other organization. \*See\* Mont. Code Ann. (Section) 2-2-121(5). This section does \*not\* prohibit a public officer or public employee from lobbying altogether. The only prohibition on lobbying is when it is done for another organization while the public officer or employee is performing his or her job duties. Furthermore, if Department

employees were not allowed to lobby at all, this section outlining when a public official can and cannot lobby would not be necessary.

Finally, Montana law provides that any adult of good morel character who is otherwise qualified under the "Lobbying" chapter, Title 5, Chapter 7, may be licensed as a lobbyist. See Mont. Code Ann. (Section) 5-7-103. In fact, the directors of the executive branch agencies are exempt from the requirement to register as a lobbyist by administrative rule ARM 44-12-106(a). All other Department employees (five in this session) who are engaged in the legislative process are registered and licensed as lobbyists with the Commissioner of Political Practices. That statute does not prohibit a public agency staff to lobby on behalf of the public agency. Therefore, the Department plans to continue to appear before the legislature to lobby for or against bills that could impact the Department.

Sincerely,

/s/

M. Jeff Hagener  
Director

**EXHIBIT E**

February 11, 2003

Mr. Jeff Hagener, Director  
Montana Department of Fish, Wildlife and Parks  
1420 E. 6th Avenue  
Helena, Montana 59620

Dear Jeff,

Thank you for your detailed response of January 29th to my January 14th letter about FWP lobbying practices.

I wish to take this opportunity to get on the record with comment about some of the issues you raise in your response.

First, please allow me one general observation. The federal courts which have reviewed this sort of issue have expressed the opinion that no part of the money appropriated by the Legislature for general operations is appropriated for the specific purpose of influencing the Legislature - providing information, probably; swaying the opinion of this policy-making body, certainly not. The principle is, those entrusted with the strings of the public purse must spend public funds only for the purposes for which the funds are appropriated - not junkets to Mexico, and not trying to drive public policy.

U.S. District Court Judge Matsche of Denver (before his recent fame as the judge in the trial of the Oklahoma City Bomber) actually took the home of a public official and sold it at auction to reimburse the public treasury for funds spent by that official in an expansive but illegal attempt to influence a matter of statewide public policy. Please don't construe this as any sort of implied threat to you or other Department personnel. I only mean to convey how seriously the courts have taken this issue.

My comments may be most easily followed if I address your letter paragraph by paragraph.

Page 1, paragraph 1.

First item. It would be a simple matter indeed for a legislator to write on a blank piece of paper, "FWP: Please have someone present on January 6th at 3 PM at the House FWP Committee public hearing to provide information relative to HB 999", and sign his or her name. Then, the legislator could hand that scrap of paper to a legislative page and ask the page to fax it to your office. Total legislator time required would be about

30 seconds. Then, you would have a paper trail at FWP to use to demonstrate that your Department isn't just trying to bull through it's own, agency-built agenda, and is not operating outside the laws.

Second item. You say that FWP will continue to follow the same rules that every other public agency and lobbyist must. One of the points of my previous letter, which I may have failed to make carefully enough, is that the RULES ARE DIFFERENT for FWP than they are for other agencies and lobbyists. Specifically, 87-1-204, M.C.A. is specific to the DFWP, and is more restrictive than other laws that relate to other agencies. Arguing that FWP must only comply with the least restrictive law is like a murderer saying that he may only be charged with assault, and not murder, because he chooses assault as a less onerous accusation/restriction. On the contrary, FWP is obliged to hold itself and its employees to the most restrictive standard articulated in the law.

Page 1, paragraph 2.

First item. If the Legislature should propose to cut a Department program, that is entirely the business of the Legislature - a policy matter. If a legislative measure should propose to cut 50 FTEs from the Department budget, I imagine that legislators are capable of figuring out that the proposal is to cut 50 FTEs. At that point, it is not the proper place for the Department to regale legislators with tragic stories about how many children those FTEs have, and how those FTEs will be thrown out of their homes and on to welfare for lack of income. It **would** be the proper place for the Department to have a knowledgeable spokesperson in the audience and available to answer with factual information any possible questions from committee members about the consequences of the action. That is the difference between providing necessary information to policy-makers, and lobbying them.

Second item. "the Department calls it what it is." The exact point is what it IS, not what it is CALLED. If the Department is providing advocacy-neutral, factual information, what that will be and how it will be perceived will be in the vein in which offered, as information. Another way to articulate your comments here would be to say, "We're darned well going to push our agency agenda, so we might as well call a spade a spade and testify as proponents and opponents." You may guess that I find this to be not the proper attitude. Frankly, I think it is illegal.

Third item. See again Page 1, paragraph 1, Second item comment. FWP's lobbying practices are covered by a law that is specific to FWP, and regulates FWP personnel conduct differently - perhaps more strictly - than the personnel of other agencies. Further, the Governor, however much she may be in the loop, has no power to authorize FWP to violate a plain reading of the law. If the Governor finds that forthright compliance with the law is unduly restrictive of one of her agencies, she is perfectly able to ask the Legislature to repeal the law, and to see if she can get the Legislature to agree with her. That she has not done so only says that she has not chosen to make that request of the Legislature, not that she has authorized FWP to break the law.

Page 1, paragraph 3.

First item. I agree with you that legislators making important policy decisions should have all the information they want as a basis for those important decisions. If they want information or more information, I'm sure they won't be shy about asking. What you propose is being able to give them more than they want or request. That is a point where FWP crosses the line from simple provision of information to outright advocacy of agency-created positions.

Second item. I disagree with your assumption that FWP must be aggressive in providing legislators with agency "information" (which you have already said may often be outright advocacy) at the earliest possible point in the process. That logic embarks on a VERY slippery slope which could, in extrapolation, be used to justify FWP use of 50% of its budget to "provide information" (advocacy) to voters about which FWP-friendly legislative candidates to elect, or which non-friendlies to not elect. Once one embarks on that slope, there is no bottom in sight. If a legislator asks for information, give it as freely as possible. If a legislator doesn't ask, don't push.

Page 2, paragraph 1.

First item. It is no part of FWP's charter to make the "democratic process effective and smooth." Any further statements that are based on this premise simply are not applicable. Whether or not the Legislature is effective or smooth is up to the Legislature, or the people of Montana (Art. II, Sec. 1, M.C.), not up to FWP. It is implied between the lines in this paragraph that FWP personnel would not be able to supply requested information upon request from legislators. The extended implication is that FWP can only do a good job of providing information if in an advocacy role, working from prepared advocacy positions. If that is any part of the extant problem, it would be a more proper investment of FWP resources to better school agency information providers to be able to satisfy on-the-spot requests for information, information not necessarily prepared in advance to foster an agency agenda.

Page 2, paragraph 2. First item. Concerning the effects of 87-1-204, M.C.A., I note again that this statute is specific to the Department, especially since it is codified in Title 87, and mentions the DFWP by name. You say, "The Department interprets this section in light of other laws and derives its meaning therefrom." I predict that if this issue were to come before a court, the court would insist that the Department is simply not allowed to interpret this law "in the light of other laws". Any interpretation of this law that so easily dismisses this Department-specific statute would also necessarily require the Legislature to have committed an idle act in passing this law. Other Montana laws speak to this issue: "1-3-223. Idle acts. The law neither does nor requires idle acts."

The M.C.A. annotations note: "An interpretation that gives effect is always preferred over an interpretation that makes a statute void or treats the statute as mere surplusage. *Am. Linen Supply v. Dept. of Revenue*, 189 M 542, 617 P2d 131, 37 St. Rep. 1707 (1980), followed in *Corwin v. Bd. of Pub. Educ.*, 272 M 14, 898 P2d 1227, 52 St. Rep. 589 (1995)."

The only other argument that would then make any sense is that in adopting subsequent, less Department-specific laws, now found at 2-2-121 and 5-7-102, M.C.A., the Legislature somehow implied a repeal of 87-1-204, M.C.A. However, such an argument would not be consistent with existing case law. Again, I note from the annotations of the M.C.A.: “Repeal by Implication Not Favored: The Supreme Court looks with disfavor upon repeal by implication. Without an express declaration by the Legislature that an enactment repeals an existing law, a later statute will not repeal an earlier law unless the two are plainly and irreconcilably repugnant to or in conflict with each other. *W.R. Grace & Co. v. Dept. of Revenue*, 238 M 439, 779 P2d 470, 46 St. Rep. 1399 (1989).”

Second item. The other argument you make in this paragraph is an allegation that 87-1-204, M.C.A. relates only to elections. This is not consistent with a plain reading of the statute. 87-1-204 says, “Political activity of employees. While retaining the right to vote as he may please and to express his opinions on all political questions, no employee of the department may use his official authority or influence for the purpose of interfering with an election or affecting the results thereof or for the purpose of coercing or influencing the political actions of any person or body.”

The critical sentence contains four effective clauses.

Clause 1 says, “While retaining the right to vote as he may please and to express his opinions on all political questions”, which clarifies that the statute does not apply to private activities, and about which I don’t believe you and I have any disagreement. This clause could exist as a separate sentence for all the impact it has on this discussion, so let us dismiss it from further consideration.

Clause 2 is where the important and relevant part of the statute operates. It says, “no employee of the department may use his official authority or influence”. This is the effective prohibition.

Then, Clause 3 and Clause 4 express two separate types of activities for which the prohibition applies, each of which operate independently of each other, and carry equal weight, because they are connected by the word “or”.

I believe it may be worth citing Black’s Law Dictionary definition of “or”, which is: “The word ‘or’ is used as a function word to indicate an alternative between two different or unlike things.”

Clause 3 says, “for the purpose of interfering with an election or affecting the results thereof”. You have admitted in your letter that this clause prohibits FWP personnel from attempting to influence the outcome of an election. I believe you are correct in that interpretation, and I thank you for that admission.

Clause 4 says, “for the purpose of coercing or influencing the political actions of any person or body.”

Again, since Clause 3 and Clause 4 are separated by the work “or”, they clearly articulate two different types of activity to which the prohibition of Clause 2 applies.

Since Clause 3 and Clause 4 address two separate types of activity, and since we don’t disagree about the effect of Clause 3, we may also for the current discussion dismiss the effect of Clause 3.

When Clause 2 and Clause 4 are left, the impact of them together would be the following:

“... no employee of the department may use his official authority or influence ... for the purpose of coercing or influencing the political actions of any person or body.”

The only remaining issue that I can imagine is what the definition of the terms “person” and “body” may be. I doubt that we would disagree about the definition of the term “person”, or that a legislator is a “person” within the meaning of this law. You may disagree, but it seems clear to me that the Legislature is exactly the type of entity the statute intends when it uses the term “body”. And, in the phrase “person or body”, the word “or” will have the same meaning described above.

As you see, it appears axiomatic to me that other laws in the M.C.A. do NOT control or trump the interpretation of the Department-specific law found at 87-1-204, M.C.A., and further, that this statute is NOT limited by the reference to elections. I completely disagree with your interpretation that FWP is thereby exempt from the constraints imposed by 87-1-204, M.C.A.

Page 2, paragraph 3.

In this paragraph you declare that other statutes “infer” that Department personnel may lobby the Legislature. The fact that 5-7-102, et. seq., M.C.A. requires persons being paid for lobbying to register as lobbyists certainly does not exempt Department employees from the Department-specific prohibition on lobbying in 87-2-104, M.C.A. Said differently a clearly prohibitive statute trumps an inferential application of a statute every time. Nor does the less-specific and lower prohibition at 2-2-121(5), M.C.A. allow Department personnel to clear the higher bar established in 87-1-204, M.C.A.

Page 2, paragraph 4.

First item. In this paragraph you argue essentially that if FWP personnel are allowed to register as lobbyists, they are essentially thereby exempted from other prohibitions specific to the conduct of FWP personnel. This is essentially the same as arguing that if a person applies to the local sheriff for a concealed weapon permit, and is granted that permit, this permittee is then freed from the other prohibitions found in the laws against committing crimes with a firearm. This argument, that submitting to the regulation of a regulated activity exempts a person automatically from all other prohibitions, is simply not plausible. You are aware that the Commissioner of Political Practices is looking at this issue.

Second item. The A.R.M. (rules adopted administratively by the executive branch only) is a body of law inferior to the M.C.A. (the laws passed by the Legislature and signed into law by the governor). It is disingenuous to assert that, lacking specified legislative authority, an A.R.M. provision can supercede provisions clearly specified in the M.C.A. That's just not how the law works.

Jeff, in conclusion, let me say that I understand and grant that the personnel of FWP feel a powerful attachment and loyalty to the agency - that agency personnel have a strong desire to assert the needs and wishes of the agency.

Regardless of those strong feelings, however, it is simply not right or legal for Department personnel to command public resources, such as official staff time, for the purpose of influencing those whose duty and prerogative it is to establish broad public policy, even if that policy affects the Department. Further, since the positions taken by FWP before the Legislature are often in conflict with those taken by myself and the Montana Shooting Sports Association whose members I represent, the fact that your agency has been able to do so using commandeered public resources effectively diminishes the rights that are reserved myself and other MSSA members in the Montana and U.S. constitutions, including Article II, Sections 1 and 2 of the Montana Constitution and the First Amendment to the U.S. Constitutions.

Therefore, your personnel (while on official time) must bite their tongues, and sit on the sidelines, and with great circumspection and propriety, provide the best available and advocacy-neutral information to the decision-makers. The guidelines outlined in my previous letter will help you and your personnel achieve such a goal.

Sincerely yours,

Gary Marbut  
President

Cc: Mike McGrath, Attorney General of Montana  
Linda Vaughey, Commissioner of Political Practices  
Senator Mike Sprague, Chairman, Senate Fish and Game Committee  
Rep. Joe Balyeat, Chairman, House Fish, Wildlife and Parks Committee

# **EXHIBIT F**

February 6, 2003

Linda Vaughey  
Commissioner of Political Practices  
1205 8th Avenue  
Helena, Montana 59620

Dear Mrs. Vaughey,

Attached is a letter from myself to Mr. Jeff Hagener, Director of the Montana Department of Fish, Wildlife and Parks, wherein I remind Mr. Hagener that there are several laws in the M.C.A. which prohibit employees of FWP from actively lobbying the legislature - attempting to influence the public policy decisions of an elected body - while those employees are on the job, at work, and on the public payroll. Please note the laws cited in this letter. Please note also my suggestions to Mr. Hagener for guidelines that would allow FWP personnel to supply necessary and requested information to members of the Legislature. I understand, of course, that FWP's adherence to these guidelines would constrain FWP's historic ability to overtly influence public policy formulation. That, however, is the exact intent of the laws I cite, I believe.

Also attached is a reply letter from Mr. Hagener to me wherein Mr. Hagener essentially states the argument that it is appropriate for FWP employees to lobby the legislature (and thereby ignore the law) because your office has allowed them to register as lobbyists.

If my assertion is correct that Montana laws prohibit overt lobbying of the legislature by FWP employees (and I believe it is), and Mr. Hagener is correct that registering these employees with your office allows them to disregard the prohibitive laws, then it must follow that your office has made a mistake in allowing FWP employees to be registered as lobbyists. That is, I don't believe the Legislature has authorized your office to empower others to disregard the law, thus a mistake must have been made.

You may consider this to be an official complaint for the purpose of generating review and action by your office. In response to this complaint, I hope you will be able to answer four questions, to wit:

- 1) Do you agree that the laws cited in my letter to Mr. Hagener prohibit employees of FWP from using public resources, including employee time, to influence policy decisions pending before the elected Legislature?
- 2) If so, does registering FWP employees with your office as lobbyists empower the registered personnel to disregard the laws that prohibit lobbying by FWP employees?

3) If having registered their employees as lobbyists does allow them to disregard other laws, does that mean that your office made a mistake in allowing those lobbyist registrations?

4) If your office did make such a mistake, should those lobbyist registrations be rescinded?

These questions suggest one more generic and impinging question, but which may be outside the purview of your office. I'll understand if you can't answer it, but would like to state it for the record. Please answer if you can. That is:

When the Legislature appropriates money to fund the staff and other resources at FWP, and when federal money is used by FWP, is there any part of that money that is appropriated for the purpose of paying FWP personnel to influence decisions of the Legislature about matters of public policy?

Allow me two other comments, please. First, many people remember that we had a statewide election on CI-27, the constitutional initiative to repeal the property tax. We didn't. I was a pro se litigant in court for a year and a half over CI-27, alleging that the election was improperly held because of the improper influence of public employees illegally using public resources to campaign against this initiative. In the final result, the court agreed with me, and declared that the election on CI-27 was void "in abnito" (from the beginning - totally), because the illegal influence caused the results of the election to have been unfairly obtained. So, I am not without experience or information concerning these issues.

Second, time is of the essence. If I am correct that FWP personnel are prohibited by law from lobbying the Legislature, and that they may therefore have been mistakenly allowed to register as lobbyists, then every day that this circumstance continues unremedied, while the Legislature is in session and FWP personnel continue to lobby, additional injury accrues to the people of Montana and their laws. I'm sure your office has sufficient workload to occupy available resources. Still, I hope you can give this matter your earliest possible attention.

Finally, if you are able, please email a copy of your reply to me at [mssa@mtssa.org](mailto:mssa@mtssa.org).

Thank you very much for your assistance in this matter.

Sincerely yours,

Gary Marbut  
President

Cc: Mike McGrath, Attorney General  
Senator Mike Sprague, Chairman, Senate Fish and Game Committee  
Rep. Joe Balyeat, Chairman, House Fish, Wildlife & Parks Committee  
Jeff Hagener, Director, Department of Fish, Wildlife and Parks

**EXHIBIT G**

VIA EMAIL

February 12, 2003

Gary S. Marbut  
President  
Montana Shooting Sports Association  
P.O. Box 4924  
Missoula, MT 59806

Dear Mr. Marbut:

I have reviewed your letter dated February 6, 2003, regarding lobbying by employees of the Department of Fish, Wildlife, and Parks (FWP). In your letter you assert that certain laws prohibit employees of FWP from using work time to engage in lobbying activities for FWP.

Montana Code Annotated § 5-7-103 states that any adult of good moral character who is otherwise qualified under the lobbying laws may be licensed as a lobbyist. Rules adopted by this office make it clear that the employees, agents, officers, and attorneys of state department directors who are paid, reimbursed, or retained to lobby must register as lobbyists. See, e.g., Montana Administrative Rule 44.12.105(2)(a). This office has interpreted the laws governing lobbying to mean that employees and other representatives of state agencies who are registered as lobbyists may engage in lobbying activities. Thus, absent any other legal prohibition or restriction, all employees, agents, officers, and attorneys of FWP who are properly registered as lobbyists are authorized to engage in lobbying activities on behalf of FWP.

Your letter cites Montana Code Annotated § 87-1-204 as one of the statutes that restricts the lobbying activities of FWP employees. According to Mr. Hagener's response to your earlier letter to him, FWP interprets this section only to restrict employee activities related to elections, campaigns, and other similar actions. My office has no jurisdiction to review that determination by the director of FWP.

Your letter also cites Montana Code Annotated § 2-2-121, but does not specify which subsection of the statute restricts the ability of FWP to engage in lobbying. The 2001 Montana Legislature amended the version of the statute that you included with your letter. I have carefully reviewed the amended version of the statute and can find nothing therein that prohibits employees or other representatives of FWP from engaging in lobbying activities, provided they are properly registered with this office.

To the extent that your intent was to have your letter considered an official complaint, it does not comply with the requirements of Montana Administrative Rule 44.12.213.

Notwithstanding the deficiencies, I have reviewed the complaint, consisting of your letter to me and all the attachments and related submissions. I am dismissing the complaint pursuant to Montana Administrative Rule 44.12.213(4), for the reasons set forth in this letter.

Sincerely,

Linda L. Vaughey  
Commissioner

**EXHIBIT H**

November 13, 2006

Dennis Unsworth  
Commissioner of Political Practices  
1205 8th Ave  
P.O. Box 202401  
Helena, MT 59620-2401

Dennis,

Greetings from Missoula. Congratulations on your new position.

I understand that one of the functions of the Commissioner is to receive and process registration for lobbyists, and that any person must be so registered to legally be paid to appear before the Legislature.

One would suppose that there are circumstances under which you would decline to register a person who had submitted an application to be registered as a lobbyist. An imaginary example might be a person who failed to sign or otherwise complete the application form, or failed to include a check to pay the requisite fee. Another example might be a person under a court order prohibiting them from lobbying because of adjudicated violations of lobbying laws.

I wish to call to your attention a statute in the Montana Codes Annotated that specifically prohibits employees of the Montana Department of Fish, Wildlife and Parks from using their official position for the purpose of "influencing the political actions of any person or body."

87-1-204. Political activity of employees. While retaining the right to vote as he may please and to express his opinions on all political questions, no employee of the department may use his official authority or influence for the purpose of interfering with an election or affecting the results thereof or for the purpose of coercing or influencing the political actions of any person or body.

I believe this statute says clearly and specifically that FWP employees may not lobby the legislature. Therefore, I believe it would be improper, perhaps even illegal, for you to allow FWP employees to register as lobbyists.

I do understand that the Legislature needs to be able to request and receive information from executive branch agencies. And, I believe that FWP can provide

information, but only when requested by the Legislature, without lobbying or having their personnel registered as lobbyists. However, any such FWP personnel providing information at legislative request would need to testify on matters before the Legislature as "informational witnesses", not as opponents or proponents, AND that any information offered under those circumstances would need to be neutral in terms of influential impact, or balanced, or both neutral and balanced. Neutral or balanced or both is the test the courts have devised to determine if or when provision of information crosses the line into advocacy.

If I were in charge of FWP, under these circumstances, I would want a written request for information from the Legislature for every occasion when an FWP employee appeared before the Legislature during the normal or extended work hours for that employee, and any time an employee is providing information or comment upon legislation affecting, or potentially affecting, FWP. Possession of such a file of written requests, specific to date and topic of request for information, would help protect FWP employees appropriately providing information from accusations of having violated 87-1-204.

Under these circumstances, providing information only and only upon a written request to do so, I believe FWP personnel can still do as much as is necessary to provide information to the Legislature about executive branch activities, without being registered as lobbyists and without violating 87-1-204.

So, I reiterate that if or when FWP applies to register one or more of their employees as lobbyists, I suggest that you decline any such application because of 87-1-204.

Thank you for your interest in this issue. Please let me know what your policy will be in response to this request.

Sincerely yours,

Gary Marbut  
President

Cc: Greg Petesch, director, Legislative Legal Services Office  
Scott Seacat, Legislative Auditor  
MSSA Board of Directors

# **EXHIBIT I**

COMMISSIONER OF  
POLITICAL PRACTICES



STATE OF MONTANA

DENNIS UNSWORTH  
COMMISSIONER  
TELEPHONE (406) 444-2942  
FAX (406) 444-1643

1205 EIGHTH AVENUE  
PO BOX 202401  
HELENA, MONTANA 59620-2401  
[www.politicalpractices.mt.gov](http://www.politicalpractices.mt.gov)

January 4, 2007

Gary Marbut  
Montana Shooting Sports Association  
PO Box 4924  
Missoula MT 59806

Subject: Your requests regarding FW&P lobbying

Mr. Marbut, I respectfully decline your recent requests that I restrict the lobbying activity of the Department of Fish Wildlife and Parks.

I've reviewed the extensive correspondence in this regard; in particular, correspondence between you, former Commissioner Vaughney and Director Hagener. I'm not willing to revisit the issue, or reinterpret the relevant statutes. I believe the previous reply was clear, and is based on sound logic. I am not willing to change any policy in this regard.

As you know, I'm new to the Office of Political Practices. I intend to be responsive and helpful. In that regard, I'm sorry I can't help with your request.

A handwritten signature in black ink, appearing to read "Dennis Unsworth".

Dennis Unsworth  
Commissioner of Political Practices

Copies: Greg Petesch, Legislative Services Division  
Scott Seacat, Legislative Audit Division  
Clayton Schenck, Legislative Fiscal Division  
Jeff Hagener, Fish Wildlife & Parks

6.

7.

**EXHIBIT J**



---

# Montana Shooting Sports Association, Inc.

P.O. Box 4924 • Missoula, Montana 59806 • (406) 549-1252

<http://www.mtssa.org> email: [mssa@mtssa.org](mailto:mssa@mtssa.org)

---

Asserting the Rights of Gun Owners in Montana

## OFFICERS

January 23, 2007

Gary S. Marbut  
*President*  
John M. Mercer  
*Vice President*  
Donny Summers  
*Secretary/Treasurer*

Chris Smith, Deputy Director  
Department of Fish, Wildlife and Parks  
1420 E. 6th Ave  
Helena, MT 59620

Dear Mr. Smith,

## DIRECTORS

Joe Balyeat  
586-1838  
[joe@mtssa.org](mailto:joe@mtssa.org)

Bob Davies  
587-3394  
[bob@mtssa.org](mailto:bob@mtssa.org)

Dan Hawkins  
443-0139  
[dan@mtssa.org](mailto:dan@mtssa.org)

Gary Marbut  
549-1252  
[gary@mtssa.org](mailto:gary@mtssa.org)

John Mercer  
482-1776  
[john@mtssa.org](mailto:john@mtssa.org)

Donny Summers  
251-7980  
[donny@mtssa.org](mailto:donny@mtssa.org)

Harvey Hollandsworth  
627-2459  
[harvey@mtssa.org](mailto:harvey@mtssa.org)

Randy Pinocci  
899-1947  
[randy@mtssa.org](mailto:randy@mtssa.org)

Rick Maedje  
882-4376  
[rick@mtssa.org](mailto:rick@mtssa.org)

On January 11, 2007, there was a hearing before the Senate Fish and Game Committee concerning Senate Bill 58. I was present at that hearing and noted that you appeared and spoke as a proponent for SB 58, in your official capacity as an employee of the Department of Fish, Wildlife and Parks (DFWP)

I wish to call to your attention a statute in the Montana Codes Annotated that specifically prohibits employees of DFWP from using their official position for the purpose of "influencing the political actions of any person or body."

87-1-204. Political activity of employees. While retaining the right to vote as he may please and to express his opinions on all political questions, **no employee of the department may use his official authority or influence for the purpose of interfering with an election or affecting the results thereof or for the purpose of coercing or influencing the political actions of any person or body.** (Emphasis added)

The purpose of this letter is to demand that you and all other DFWP employees comply with this law, and that you and all other FWP employees cease and desist from any and all efforts to influence the Legislature, committees of the Legislature, and individual legislators. This letter is to also set a time certain for your response, and to notify you and FWP that I will initiate legal action to enforce 87-1-204 if I do not receive written assurance of DFWP compliance with this demand by the date set below or if I observe or have evidence of any further violations of 87-1-204.

First, allow me to clarify what is and is not included within this demand, so there will be no questions about what is at issue.

I do not believe that 87-1-204 prohibits any DFWP employee from expressing his or her views when that employee is not on the job and not holding himself or herself out to be an employee, official, or person of official capacity with DFWP. I would define "on the job" to be during the employees normal and regular work hours or when that employee is directly or indirectly on the payroll for DFWP. So, this demand is not at all intended

to muzzle any DFWP employee from engaging in activity protected by the First Amendment on the employee's own time.

I do not believe that 87-1-204 prevents DFWP employees from providing necessary information to the Legislature or legislators, when that information is requested by one or more legislators, or when a DFWP employee is testifying before a legislative committee as an informational witness only, and when the information provided is not advocacy - when the information is factual and not overtly persuasive for or against a pending matter of public policy for the Legislature to decide.

What is prohibited by 87-1-204, I believe, is influence and advocacy for or against matters of public policy pending before and to be decided by the Legislature. This would include any DFWP employee during paid hours who testifies or speaks as a proponent or opponent of any matter pending before the Legislature, or who provides information that constitutes advocacy beyond fact or facts only on one side of the issue.

Compliance deadline. I demand that you and other DFWP personnel comply immediately upon receipt of this letter. I ask that you notify me of your intent to comply by email within 24 hours of receipt of this letter, emailing to gary@marbut.com. I require that you notify me in writing by U.S. Mail of your intent to comply with this demand by January 30, 2007, replying to Gary Marbut, P.O. Box 16106, Missoula, Montana 59808. If I do not receive one of these notifications of intent to comply by the dates stated, I will commence legal action to enforce the provisions of 87-1-204. The Complaint for this is drafted.

Time is of the essence; effect of continuing violations. I assert that time is of the essence in generating DFWP compliance with 87-1-204, and that any attempts to stall the corrections I request will be seen as an overt attempt to violate the law further. Also, I assert that every appearance you or DFWP employees make before the Legislature attempting to influence legislation is a separate and additional violation of the law, for each individual involved, and should be viewed, redressed and treated as willful and overt intent to violate Montana law and is an additional injury to myself and the people of Montana.

I wish to raise two additional points, in case these should become important later:

1. About spending public funds to influence political processes, the courts have held that both the proponents and opponents of an issue have an "equal stake" in any public funds used to influence a political decision. This is called the "equal stake doctrine." Therefore, any application of public funds either must be distributed equally between the proponents and opponents of an issue (such as in the Secretary of State's Voter Information Pamphlet), or such use of public funds is a violation of the public trust.
2. About spending public funds to influence political processes, the courts have also held that generally such spending is not a purpose for which the funds were appropriated by the appropriating body (the Legislature in this case). If not appropriated for that purpose, then any such misspending by public employees constitutes theft, another

violation of the public trust. This could likely be seen as official misconduct under Montana laws.

I assume that you will understand these to be very serious matters. I hope to hear response of DFWP compliance with 87-1-204 by the times specified.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary Marbut". The signature is fluid and cursive, with a large initial "G" and "M".

Gary Marbut  
President

Cc: Jeff Hagener, Director, DFWP  
Bob Lane, Legal Counsel, DFWP  
Governor Brian Schweitzer  
Attorney General Mike McGrath  
Senator Joe Tropila, Chairman, Senate Fish and Game Committee  
Representative Mike Milburn, Chairman, House FW&P Committee  
Various legislators  
Scott Seacat, Legislative Auditor  
MSSA Board of Directors  
MSSA Members  
News Media

**EXHIBIT K**

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, SO THAT IT DOES NOT COVER ANY ADDRESSES.

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 *John Smith*  Addressee  
 B. Received by (Printed Name) *John Smith*  
 C. Date of Delivery *JAN 23 2007*

D. Is delivery address different from item 1?  YES  NO  
 If YES, enter delivery address below:

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
*CHRIS SMITH  
 DFWP  
 1120 E 6TH AVE  
 HELENA, MT 59620*

3. Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes  No  
 7006 0100 0006 2147 1328

2. Article Number (Transfer from service label)  
 PS Form 3811, February 2004  
 Domestic Return Receipt

**U.S. Postal Service™ CERTIFIED MAIL™ RECEIPT**  
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at [www.usps.com](http://www.usps.com)

HELENA MT 59620 SPECIAL USE

Postage	\$ 00.39
Certified Fee	\$2.40
Return Receipt Fee (Endorsement Required)	\$1.85
Restricted Delivery Fee (Endorsement Required)	\$0.00
<b>Total Postage &amp; Fees</b>	<b>\$ 04.64</b>



Sent To  
 Street, Apt. No., or PO Box No.  
 City, State, ZIP+4

MULLAN STATION  
 MISSOULA, Montana  
 598089998  
 2907770812-0096  
 01/23/2007 (406)728-5535 03:59:33 PM

Sales Receipt

Product Description	Sale Unit Qty Price	Final Price
HELENA MT 59620 First-Class 0.90 oz.		\$0.39
Return Ropt (Green Card)		\$1.85
Certified Label #:	70060100000621471328	\$2.40
Customer Postage		-\$0.39
Subtotal:		\$4.25
Issue PVI:		\$4.25
<b>Total:</b>		<b>\$4.25</b>

Paid by:  
 Visa \$4.25  
 Account #: XXXXXXXXXXXX7104  
 Approval #: 358125  
 Transaction #: 452  
 23902873272

Bill#: 1000400116439  
 Clerk: 04

All sales final on stamps and postage.  
 Refunds for guaranteed services only.  
 Thank you for your business.  
 Customer Copy

EXHIBIT 2



# Montana Fish, Wildlife & Parks

P. O. Box 200701  
Helena, MT 59620-0701  
406-444-3186  
FAX:406-444-4952  
Ref:DO044-07  
January 30, 2007

Mr. Gary Marbut  
President  
Montana Shooting Sports Association  
P.O. Box 4924  
Missoula, MT 59806

Dear Mr. Marbut:

Chris Smith, FWP's Chief of Staff for Montana Fish, Wildlife & Parks (FWP), received your letter dated January 23, 2007.

FWP does not agree with your interpretation of MCA § 87-1-204. That section relates to employees of the department engaging in activities to affect an election or election results or other similar activities. It plainly does not prohibit FWP employees from lobbying in the Legislative process.

In fact the lobbying by FWP employees is governed by the rules of conduct for public officials and public employees. Specifically, Mont. Code Ann. § 2-2-121(5) provides that a state employee may lobby in his or her official capacity. Since this is a more specific statute under the rules of construction it would govern. Furthermore, Montana law provides that any adult of good moral character who is otherwise qualified under the "Lobbying" chapter, Title 5, Chapter 7, may be licensed as a lobbyist. The directors of executive branch agencies are exempt from the requirement to register as a lobbyist by administrative rule ARM 44.12.106 (a).

In view of the above, FWP plans to continue to appear before the Legislature to lobby for and against bills that could impact the Department.

Sincerely,

A handwritten signature in black ink, appearing to read "Mr. Jeff Hagener". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mr. Jeff Hagener  
Director