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VIA FACSIMILE (406) 444-3976 & U.S. FIRST CLASS MAIL

Linda McCulloch
Secretary of State
100 North Park Avenue
Suite 260
Helena, MT 59601

RE: Proposed Ballot Initiative by Charles Denowh

Dear Secretary McCulloch:

This firm has been retained by the Montana Environmental Information Center (MEIC) regarding a proposed ballot initiative by Charles Denowh, "Private Property Rights Preservation Act." Mr. Denowh's proposal has gone through several iterations, and has recently been forwarded to your office for review pursuant to M.C.A. § 13-27-202.

The MEIC asks you to reject Mr. Denowh's proposal because it contains new substantive language not reviewed by Legislative Services.

Pursuant to M.C.A. § 13-27-202(4), "the Secretary of State shall reject the proposed issue if the text or ballot statement contains material not submitted to the Legislative Services Division that is a substantive change not recommended by the Legislative Services Division." (emphasis added). In this case, Mr. Denowh's submission to your office contains two substantive changes which were not recommended by Legislative Services. Indeed, Mr. Denowh acknowledges that he has "made substantive changes to the draft outside of [Montana Legislative Services Division's] recommendations . . ." See Exhibit 1 (highlighted portion). Accordingly, it is incumbent upon you to reject Mr. Denowh's proposal.

Mr. Denowh has substantively changed the definition of "taking or damaging."

The first substantive addition by Mr. Denowh—which Legislative Services did not review—is in the definition section. Particularly, the definition of "taking or damaging." Legislative Services commented that there was some confusion regarding whether the initiative concerned eminent domain proceedings, and recommended that "it would be more consistent to define taking or

damaging in your proposal as other than eminent domain.” Legislative Services’ suggested language incorporated this change.

Mr. Denowh’s final proposal largely accepted Legal Services’ suggestion, but also added an entirely new paragraph to the definition of “taking or damaging.” Particularly, paragraph (5)(a) states that taking or damaging is any governmental action which “causes or permits the public appropriation, occupation, possession or use of private property.” This language appears nowhere in either Mr. Denowh’s first draft, nor Legislative Services’ recommended changes. Accordingly, it is entirely new, and has not been reviewed by Legislative Services.

This new language has no threshold, and, taken on its face, would subject the government to damages anytime it occupies, possesses, or uses private property regardless of the amount, duration, or severity of the occupation, possession or use. Needless to say, this language could cause much confusion and lead to numerous government “takings” where the governmental “occupation” of private property is slight, infrequent, or of short duration. Regardless, this new language is definitively substantive, and this office must reject the issue because this language was not reviewed by Legislative Services.

Mr. Denowh has, by his own admission, inserted new substantive language into the damages section of his ballot measure.

Legislative Services commented that Section 8(3) of Mr. Denowh’s initial proposal was problematic because it allowed the government to choose between paying damages or having the governmental action invalidated. Legislative Services commented that this could lead to equal protection issues.

Legislative Services suggested a correction which would fix this problem. In the proposal sent to the Secretary of State, however, Mr. Denowh completely reversed course, and his proposal now allows **the landowner to elect** between damages or an invalidation of the governmental action. Needless to say, this is exactly opposite from Mr. Denowh’s initial proposal, which left that option up to the government. Indeed, Mr. Denowh, himself, recognizes and acknowledges that this is a substantive change.

The new language authorizes a prevailing owner to elect a remedy invalidating the governmental action or awarding the owner compensation in an amount equal to the diminution of fair market value. **This is the substantive change that I have made that I view as being outside of your original recommendations.**

Under M.C.A. § 13-27-202, the Secretary of State's Office is required to reject Mr. Denowh's proposal because it "contains material not submitted to the Legislative Services Division that is a substantive change not recommended by the Legislative Services Division." This proposal has two substantive changes, each of which will cause problems if the legislation is adopted, and neither of which have been reviewed or recommended by Legislative Services. Accordingly, the MEIC asks this office to reject the proposal.

If you have any questions, please do not hesitate to contact me.

Sincerely,

GOETZ, GALLIK & BALDWIN, P.C.

Jim Barr Coleman

JBC/pal

Attachment: Exhibit 1

cc: Client w/attachment

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