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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

)
ELLIOT MERJA and RILEY)
DENNING, TIMOTHY A. MILLER)
and LAURIE L. MILLER,) Cause No. ADV-23-255
)
)
)
Plaintiffs,) BRIEF IN SUPPORT OF MOTION
) FOR SUMMARY JUDGMENT ON
-vs-) THE PLAINTIFFS' FIRST CLAIM
) FOR RELIEF
CASCADE COUNTY, FORT SHAW)
IRRIGATION DISTRICT, WEST)
GREAT FALLS FLOOD and)
DRAINAGE CONTROL DISTRICT,)
SANDRA MERCHANT, in her)
official capacity as CASCADE)
COUNTY CLERK and RECORDER,)
)
Defendants.)

PRELIMINARY STATEMENT

A. Introduction

As former President Donald J. Trump recently said, “In some ways we’re a third-world country. . . . [W]e’re a third-world country at our elections.” See The Independent, “Trump Claims US Elections Are ‘Third World’ Despite Sweeping

Super Tuesday Primaries,” 3/6/2024. The 2023 Fort Shaw Irrigation District (FSID) election conducted by Cascade County, including an election office administrator who did not know what she was doing and undermined by undependable and malevolent people, serves as a prime example. Together, they manipulated information about voting processes, deterred voters from casting ballots, and allowed others to cast ballots based on phony designations of agents.

Manipulating information about voting processes and deterring voters from accessing polling sites are two of the “many ways to prevent the casting of votes.” National Academies of Sciences, Engineering and Medicine, Securing The Vote: Protecting American Democracy (2018) at 85-86. Here, with assistance from the Cascade County Election Office, the Fort Shaw Irrigation District provided incorrect information to electors that was based upon outdated statutes, laziness and a lie. Some of what they did may be described as a bungled ballot scheme, but it culminated in intentional interference with ballots whereby FSID refused to provide ballots to numerous electors who were co-owners of property in its May, 2023, election.

Ballots were provided to persons who were not co-owners of property, but the ballots were provided without secrecy or return envelopes and without instructions as to how to complete and where to send the ballots. No aspect of this election was conducted properly.

This brief uses terms which are not commonly used in Montana today: “bungle”, “bungled”, “bungler”, “boodling”, “boodler”, “graft”, and “corruption”. They were commonly used more than 100 years ago in political contests which resulted in our state capitol being located in Helena and the election of William A. Clark to the United States Senate. “Bungle” is defined as follows:

To incompetently perform (a task); to ruin (something) through incompetent action; to botch up, to bumble.

Wiktionary.org, definition of “Bungle”. “Boodling” is defined as follows:

graft and fraud, especially in politics.

Merriam-Webster.com/dictionary/boodling. “Graft, as understood in American English, is a form of political corruption defined as the unscrupulous use of a politician's authority for personal gain. . . .” Wikipedia.org definition of “graft”.

Although Montana generally has cleaned up its act in terms of elections, unfair, unlawful and unconstitutional practices – what Donald Trump might call “third world” practices – still occur when election workers and administrators do not pay attention, are not vigilant, and are unscrupulous. Here, there was incompetence and bumbling, but unscrupulous people took actions far beyond mere incompetence or bumbling. Tasks were incompetently performed. The election was botched and bumbled, both incompetently and with intent, until one of the candidates in the election was able to take advantage of and channel the botched and bumbled results

to ensure his re-election.

Voting in FSID elections is based on ownership of irrigable real estate. Montana law does not require electors who are co-owners of property to designate persons to vote. Despite this, the county election office provided a form letter to be sent to FSID's electors requiring such designations. FSID sent a letter containing this requirement to its constituents in which it falsely told the electors that they "MUST" sign and deliver such designations. Both the FSID and the county elections office then enforced the bungled ballot scheme by refusing to provide ballots to those who did not comply with the illegal demand.

Electors such as Riley Denning and Elliott Merja had designations on file before 2023. If the designation requirement were valid, prior designations should have sufficed to cause ballots to be sent in 2023. But election office employee Lynn Deroche and FSID secretary Charla Merja agreed among themselves to require new designations, apparently because it made their jobs easy.

Although it never was proper to disregard prior designations, there was a time when designations by property co-owners and entities were required by law. In 2019 the law was changed and designations are no longer required. Mont. Code Ann. § 85-7-1710 (2019).

The bungling here was not one simple mistake by one person. It involved layers of bungling by all of the following bunglers, some of which was negligent and

some of which was intentional:

1. Lynn Deroche, election office employee,
2. Sandra Merchant, elected clerk and recorder and election administrator¹
3. FSID clerk Charla Merja
4. FSID board of commissioners, especially Commissioner Kennard Steinke
5. Cascade County Commissioners who voted to certify the election
6. Cascade County Attorney (advising the Cascade County Commission)

Based on the bungling of DeRoche, Merchant and Merja, Kennard Steinke, FSID commissioner and candidate for office who benefitted from the scheme, turned the bungling into boodling. He convinced the FSID board at an April 27, 2023, board meeting, to vote not to accept “late” designations of voting representatives which, it turns out, were not late at all. Steinke’s boodling ensured his re-election as a

¹Ms. Merchant is reputed to have bungled every election she handled during her time as election administrator such that eventually a majority of the Cascade County Commissioners removed her pursuant to § 13-1-301(1), M.C.A. Discovery shows that Ms. Merchant was a pleasant, well-intentioned person who lacked experience and knowledge relating to elections, depended on others who should have known better, and ultimately fell victim to their actions and inactions when they proved undependable or shady. This is a risk of election to an office for which the legal requirements are few, but the practical requirements are many. Frankly, the county commissioners are at fault also. They could have but never had provided for the election administrator to have some basic skills and experience. Despite this, Ms. Merchant is still responsible. There was a time in our country when leaders applied the maxim that “the buck stops here” and would accept responsibility for what happened within their jurisdictions. Sadly, this is uncommon in today’s world. Today the practice is usually to delay, deny, dissemble and make every effort to avoid responsibility. Thus far, Ms. Merchant has followed that latter approach.

commissioner.

FSID's secretary Charla Merja, Steinke, and a majority of FSID's board of commissioners made no attempt to comply with the law, even though the change in law was brought to their attention in advance of the election. At the April 27, 2023, board meeting, Commissioner Steinke was a primary mover of this illegal vote shorting scheme, which resulted in his opponent Riley Denning being shorted votes and thus assuring Steinke's re-election as a commissioner. He thus cast himself as the primary boodler of the scheme.

B. Elections And The Fort Shaw Irrigation District

FSID is a an irrigation district created by district court decree in 1920. It has existed and functioned since then with a board of commissioners. In re Fort Shaw Irrigation Dist., 81 Mont. 170, 261 P. 962 (1927). An election of commissioners occurred on May 2, 2023. (Denning decl. ¶ 3)

Elections in Montana are governed by Title 13, Montana Code Annotated, with additional provisions for irrigation districts supplied by Title 85, Chapter 7, Part 17. Elections of commissioners (sometimes informally referred to as "board members") is governed by Montana Code Annotated § 85-7-1702, subsection (1) of which provides that "[t]he election for commissioners in each district must be held annually in accordance with Title 13, chapter 1, part 5." Section 13-1-505(1) provides for the election to be conducted by a county election administrator.

Voting in such elections is different than in most elections. The voting to elect FSID commissioners is by the owners of property located in the district, with owners having votes based upon the amount of land they own in the district. Mont. Code Ann. § 85-7-1710(2).

Section 85-7-1710 provides for qualification of electors and nature of voting rights. Before 2019, this statute provided as follows:

Each holder of the title or evidence of title to irrigable land within the district who is qualified as an elector under subsection (1)(a) shall provide notice to the irrigation district in which the land is located designating the individual who will be voting in the election with respect to the irrigable land. If there is a change in the designation, a new notice must be provided to the irrigation district.

Mont. Code Ann. § 85-7-1710(5)(a) (2017). This requirement was eliminated by the 2019 legislature. See Section 1, Chapter 225, 2019 Laws of Montana; Mont. Code Ann. § 85-7-1710 (2021). Consistent with eliminating the requirement quoted above, the statute also makes clear that any co-owner of property can vote on behalf of the co-owners, and they “may”, but no longer “shall”, designate an agent to vote on behalf of the co-owners. Mont. Code Ann. § 85-7-1710(3)(a) (2021).²

²The language of § 85-7-1010(3)(a) is clear, making it unnecessary to rely on legislative history. Disbelievers, if there are any, can satisfy themselves by listening to the testimony in support of the 2019 amendments to the statute. The testimony makes clear that the legislature intended exactly what the plaintiffs argue in this brief. See Montana House Administration Committee hearing, 3/20/2019, found in the 2019 Legislative history of Senate Bill 116 (Testimony was provided by Senator Dan Salomon, the Montana Water Resources Association, Bitterroot Irrigation District, Montana Farmers Union, Montana Stock Growers Association, and others; and Montana Senate State Administration Committee hearing, 1/2/2019).

C. The 2023 Election

An election to elect several FSID commissioners was held in May, 2023. In January, 2023, Lynn Deroche, an employee of the Cascade County election office, wrote to the election administrator, Sandra Merchant, incorrectly stating in relevant part that “if there are joint property owners only one owner will get the vote. So, there must be a designated voting authority sent to all joint property owners.” (Ex. 1, p. 2) (emphasis added) The employee then stated as follows:

In the past we the elections office have sent these letters out to the joint owners but as we looked close[r] into the law it seems to be the District’s responsibility as, these must be certified by the district and then the elections office gets a copy. So, since there will be an election these letters will need to be sent ASAP so, we have all information correct before we send out ballots. Please advise on how you like to proceed. I have notified Charla Merja [secretary of the FSID] her is the clerk for the Fort Shaw Irrigation District.”

(Ex. 1, pp. 2-3) It is noteworthy that although the employee incorrectly summarized the law to require “designated voting authority” with respect to joint property owners, a requirement which no longer existed, her email included a correct version of § 85-7-1710 in effect in 2023, which obviously contained no such requirement.

Ms. Merchant, the election administrator, apparently did not read the correct version of § 85-7-1710(3) included in the email. She did not comment on the inconsistency between what Ms. Deroche said in her email and the statute included with it. She responded to Ms. Deroche by agreeing with the incorrect analysis and asking if “we have a sample letter we could send her for her reference of what we

have sent out in the past?” (Ex. 1, p. 3) Ms. Deroche stated that she would give FSID “a copy of the letter that we had sent in the past.” (Ex. 1, p. 2) Unfortunately, letters used in the past did not incorporate the statutory changes made in 2019, but no one seems to have paid attention to this. (Ex. 2, p. 1)

On February 14, 2023, Ms. Merja on behalf of FSID sent an undated letter to the electors notifying of an election on May 2, 2023. (Ex. 3) The letter purported to quote Montana Code Annotated § 85-7-1710(3), but it quoted the prior version last found in the 2017 version of the Montana Code Annotated rather than the version in effect in 2023. Accordingly, Ms. Merja incorrectly notified co-owners of property that they “shall” designate either one of the co-owners or an agent to cast their votes. Such a requirement no longer existed. Further, the letter notified each elector as follows:

Although you may have completed this form in the past for the Fort Shaw Irrigation District, you **MUST** complete a new [designation] form and return it to the Fort Shaw Irrigation District office in order to receive a ballot for this election. When completing this form, **EVERY** co-owner of the property **MUST** sign off on the form.

(Ex. 3) Again, there was a requirement to designate contained in § 85-7-1710(5)(a) (2017), but it was repealed in 2019 and was not in effect in 2023.

In fact, § 85-7-1710(3)(c) (2021) in effect during the 2023 provides as follows:

When an irrigation district provides notice of an election, the notice must indicate that, if there is a change in a designated agent, a new signed document must be presented to the district indicating the change. The list of designated

agents compiled under this section must be maintained and certified by the irrigation district to ensure that only one vote is cast on behalf of each acre or fraction of an acre.

Ms. Merja's February 14, 2023, letter did not indicate this. This appears to be because Ms. Merja and Election Office employee Lynn Deroche engaged in nefarious conduct designed to bury designations already on file. Their nefarious conduct is described beginning at page 11 below.

Because voting within FSID is based upon property ownership rather than residence, the February, 2023, letter, also referred to Section 13-19-304, M.C.A. It incorrectly quoted the statute and told nonregistered electors that they had to vote in person at the election administrator's office. A correct quotation of the statute would have notified these electors that instead of appearing in person at the election administrator's office, they were entitled to provide "materials by mail, facsimile, or electronic means." Mont. Code Ann. § 13-19-304(1). The statute had contained this language for 14 years, since 2009, but neither the election office nor Ms. Merja, the FSID secretary, paid attention.

Importantly, both the election office and the FSID recognized that when a designation had been made, there was no requirement to submit a new designation. Rather, electors only needed to submit a new designation if there was a change in a designated agent. Mont. Code Ann. § 85-7-1710(3)(c) (2021). Ms. Merja stated to Ms. Deroche as follows:

Okay. It is confusing. This will be the first year we would receive and certify. The way I'm reading it [Section 85-7-1710], if there has been no change in ownership since the last election, they [the electors] don't have to do anything.

(Ex. 4, Merja email to Deroche, 1/20/23 at 3:24 p.m.) Deroche agreed, stating as follows:

Yes, that is way I read the law.

(Ex. 4, Deroche email to Merja, 1/20/23 at 3:33 p.m.) Charla Merja and Deroche never incorporated the requirements of § 85-7-1710(3)(c) into the letter sent to the electors. So contrary to the statute, Ms. Merja's letter sent to the voters on February 14, 2023, did not "indicate that, if there is a change in a designated agent, a new signed document must be presented to the district indicating the change." Further, FSID has never produced the "list of designated agents compiled under" § 85-7-1710 in 2021 as had been required by § 85-7-1710(3)(c), so it is safe to assume it had not maintained such a list. Instead, Ms. Merja and Ms. Deroche decided to disregard the statute and "pull the wool" over the electors. Ms. Merja told Ms. Deroche the following:

I won't say anything about changes if you don't have access to the previous forms. We'll just have everyone complete them . . .

(Ex. 4, Charla Merja email to Lynn Deroche, 1/20/2023 at 4:06 p.m.) Accordingly, Ms. Merja's letter to the electors told the electors they "**MUST**" submit designations prior to the 2023 election "in order to receive a ballot for this election." (Ex. 3) She and Ms. Deroche did this as a matter of convenience for themselves "because we have

sealed up the last letters [designating agents] with last election” in 2021 and apparently did not want to access those sealed records or any list of designated agents from 2021 as FSID had been required to keep. (Ex. 4, Deroche email to Merja, 2/20/23 at 3:56 p.m.)

At this point Ms. Deroche and Ms. Merja crossed over the line to nefarious conduct which should not be crossed. The law did not require designations in order to obtain a ballot. It is possible for them to maintain that they had not read the current version of § 85-7-1710 (even though it was quoted in its entirety in their initial emails in 2023). Still, even if they had not read the current statute, their email correspondence shows they were well aware that if designations had been filed in prior years, those designations remained in effect. That portion of § 85-7-1710 had not changed. Ms. Deroche and Ms. Merja simply decided to “bury” the prior designations, disregard them, and misrepresent to electors that new designations “MUST” be submitted because this was expedient. They did not want to look them up in the prior election records.

Riley Denning owns approximately 197,096 irrigable acres solely in his own name.³ He received a ballot for voting based upon that ownership. Mr. Denning owns many more irrigable acres, 619.427 according to FSID records, as a co-owner

³This is according to FSID’s records. Review of the Montana Cadastral website shows 198.256 irrigated acres.

with his wife, Cindy Denning. The Dennings did not receive ballots to cast votes based upon this land. (Denning decl., ¶¶ 5-8)

Elliott Merja has reviewed the list of electors and the list of electors who designated agents for voting to determine how many votes of co-owners of property and entities owning property in the FSID were denied votes because the defendants required compliance with the repealed statutes. (E. Merja decl., ¶¶ 17-18) It is evident from the landowners and acreage certified by the FSID commissioners that this amounts to at least 3,422 votes. (E. Merja decl., ¶ 19)

The 2017 version of § 85-7-1710(3) provided that when “land is owned by co-owners, the owners shall designate one of their number or an agent to cast the vote for the owners.” This language was replaced in 2019 by language eliminating this requirement. The replacement language states as follows:

Whenever land is owned by co-owners, either owner may vote on behalf of the co-owners, the owners may vote based on an agreed-upon percentage ownership, or the owners may designate one of their number or an agent to cast the vote for the owners. Whenever the land is owned by a single owner, the owner at the owner's discretion may designate an agent to cast the vote. . . .

Under the current version of the statute, either owner of land owned by co-owners may vote. In other words, a designation is permitted but not required.

Despite quoting outdated language in § 85-7-1710(3), the form included with the February 14, 2023, letter entitled “Notice of Designation of Special District Agent” stated in relevant part, “If you are a resident of the district . . . you do not need

to complete this form and may vote" (See Exhibit 3). The Dennings were (and are) residents of the district, but they were not sent ballots for the land they own as co-owners and were not permitted to vote. (Denning decl., ¶ 9)

It is noteworthy that under the repealed law, if a property owner filed a designation, the designation remained in effect, not just for one election, but until another designation was filed. The Dennings had designations on file from the years before the 2019 amendments went into effect. (Denning decl., ¶¶ 10, 12) Mr. Denning explained this to the election administrator, Sandra Merchant, but she still did not act upon it. (Denning decl., ¶¶ 13-16) Ms. Merchant will likely wish to maintain that the FSID supplied her office with information as to designations such that FSID, and not her or Cascade County, was responsible, i.e., that her hands were tied. However, Ms. Merchant and Cascade County were maintaining the prior designations in its files on behalf of FSID. She had the designations and it is only because her office agreed with FSID not to obtain the designations from county records that they were not accessible to both offices.

The law provides that if a designation is in effect, it may be changed. If the property owner or co-owners decide to file a different designation, it is proper to submit it up to 13 days prior to and including election day, as long as the electors' votes have not already been cast. Mont. Code Ann. § 85-7-1710(5)(b), (e) (2023). This language was added to § 85-7-1710 by the Legislature in 2019. As shown in the

following paragraphs, the Election Office and the FSID did not follow the 2019 amendments. FSID’s board of commissioners failed to comply with this.

Mr. Denning had already submitted written designations prior to this election (when the prior version of § 85-7-1710 was in effect) in which he was designated to vote the property he and his wife Cindy own as co-owners. (Denning decl., ¶ 12) According to § 85-7-1710(3)(c), it was unnecessary for the Dennings to submit new designations unless they wanted to make changes. Both the FSID and the Election Office ignored this, as explained above.

On April 14, 2023, Mr. Denning drove to Great Falls and met with Sandra Merchant. He told her he should have received ballots for more votes, based on his and Cindy Denning’s co-ownership of more acres than the 197.096 shown on the ballot he received. He showed her a document entitled, “2023 Season Assessment.” (Denning decl., ¶¶ 13-15) Ms. Merchant’s incorrect response was that there was not a voting designation listed on these other parcels. (Denning decl., ¶ 16) As shown above, it was unnecessary for the Dennings to designate an elector for their acres. However, in an attempt to get along, Mr. Denning obtained a “Notice of Designation of Special District Agent” form, filled it out, and hand delivered it to Sandra Merchant. (Denning decl., ¶ 17) He also told her there had not been any change in his votes or designations from the past election and that his similar designations should already be on file, either in the county office or at the FSID office. He of

course did not know that the Election Office had improperly sealed his prior designations with records from 2021. (Denning decl., ¶ 19) Ms. Merchant said the designation had to be given to Charla Merja at the FSID office but that she (Ms. Merchant) would do this for the Dennings. (Denning decl., ¶ 20)

No other ballots were ever provided to the Dennings, and they were not permitted to cast all of the votes to which they were entitled based upon their co-ownership of irrigable land. (Denning decl., ¶ 21) The same thing happened to all other co-owners of property within the district who did not designate agents for voting exactly as the district's February, 2023, letter had incorrectly instructed. (Denning decl., ¶ 22) The issue was brought to the district's board prior to the election, but based upon a self-serving motion by Commissioner Kennard Steinke, a majority of the board ignored § 85-7-1710(3)(c) and voted both to require designations for co-owned land and to certify only the designations submitted in 2023 as of its April 13, 2023, meeting. (Ex. 5; FSID board meeting minutes, 4/27/23) By doing this, the FSID board implemented the requirements of § 85-7-1710 which had been repealed in 2019 and failed to comply with the version of the statute in effect in 2023. This self-serving action enabled Steinke to win another term as commissioner. (Exs. 6 & 7).

It is also noteworthy that the board of commissioners did not certify a list of eligible electors to the election office at least 60 days before the election as required

by § 85-7-1710(5)(a). March 3, 2023, was 60 days before the May 2, 2023, election. The FSID board of commissioners did not certify designations until April 13, 2023. (Ex. 8) On April 27, 2023, it refused, on motion by Kennard Steinke, to certify the designations that Riley Denning had turned into Sandra Merchant on April 14, 2023, one day after the certification.

The designations that the board certified are in many cases ludicrous. The designation provided by commissioner Kennard Steinke is a good example. Steinke was running for a commissioner position against Elliot Merja. For obvious reasons, Mr. Steinke undoubtedly wanted his own defective designation, which had not been completed until March 28, 2023, to be included in those certified, but he did not want his opponent's declarations to be certified. Mr. Steinke's designation was defective because it did not designate him on the first page, had not been signed by all owners of the parcel and listed the physical address for a parcel of property which has no irrigated acres. (Ex. 13a) The Property Record Card for this parcel, No. 0004539400, lists Kennard E. and Amy L. Steinke as contract buyers. (Ex. 13b, p. 2) An abstract of their contract to purchase the land in Parcel No. 0004539400 was recorded as Document R0239989 in the records of the Cascade County Clerk and Recorder. (Ex. 13c) Yet Amy L. Steinke never signed the designation form as required by Exhibit 2 and § 85-7-1710(3)(a). (Ex. 13a) The Montana Cadastral Website shows a completely different parcel, which has no irrigable acres, as located at 196 Leistik.

Road, Sun River, Montana. (Ex. 13d) The Steinkes do not even own property located at 196 Leistikko Road, Sun River, Montana. That property is owned by Teichert Family Farm, LLC, of Clinton, Montana. (Ex. 13d, 13e) Steinke's designation, besides being complete nonsense, was thus void. However, all of the public servants involved – Steinke, Charla Merja, the FSID board, and the County Election office – looked the other way, the designation was certified, and Steinke received a ballot.

Similarly, the designation signed by Jason Dean Campbell on behalf of Elton Campbell Ranches identified only a property physically located in Great Falls, Montana, approximately 27 miles from FSID. The designation did not designate any property located within FSID. (Ex. 12) FSID improperly certified this designation, also.

A third example is the designation submitted by Orville and Arlene Skogen. They did not identify any physical address as the form requested. Their designation did not provide the essential information necessary for voting in FSID: the identification of and number of irrigable acres assigned to the designated agent. (Ex. 14) FSID had considered using a designation form which did not require the owners to designate physical addresses, but such forms would have required owners to designate one agent for all of their properties, and that was not what FSID wanted.

These are only examples. Pointing out all of the issues with respect to the designations certified by FSID would take more pages than are allowed for briefs in

this district. The point, obviously, is that, although crooked, the majority of FSID commissioners overlooked as much as necessary for them and their friends to have certified designations but required strict compliance with nonexistent requirements for opponents and opponents' supporters so as to deprive them of votes and ensure their own elections.

Further, ballots were mailed by the county election office without secrecy envelopes, return envelopes, or instructions; and the ballots were sent by the Elections Office on April 20 and 21, 2023, after the deadline to do so. (Merja decl., ¶¶ 20-22) Sections 13-1-404(2) and 13-19-207(1) require that “ballots be mailed no sooner than the 20th day and no later than the 15th day before election day.” In other words, ballots should have been mailed no later than April 17, 2023. Further, when the ballots are mailed, they are to be mailed all on the same day, not over a two-day period as was the case here. Mont. Code Ann. § 13-19-207(2). Without mailing to electors sufficiently in advance of an election, electors did not have sufficient time to return their ballots. People who did submit voting designations were permitted to vote if they had submitted the designations by April 13, 2023, even though they were submitted after the 60-day deadline of March 3, 2023. (Ex. 5)

Considering the numerous errors and failures to comply with deadlines on the part of FSID and the Election Office, their insistence upon strict deadlines which did not even exist in § 85-7-1710 is outrageous.

After the election, plaintiffs Merja and Denning asked the Cascade County Commissioners not to certify the election results. (Denning decl., ¶ 29; Merja decl., ¶ 23) The commissioners and the clerk of court met. Based upon Deputy Cascade County Attorney Carey Ann Haight's advice, the commission and the clerk of court gave no consideration whatsoever to Merja's and Denning's complaints and in a few minutes voted to certify the election results. No consideration was given to Merja and Denning's request. (Ex. 6)

ARGUMENT

Rule 56(c)(3) of the Montana Rules of Civil Procedure provides that summary judgment should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Article II, Section 13 of Montana's Constitution states the right of suffrage as follows: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The right to vote is also protected by the United States Constitution. The United States Supreme Court has stated as follows:

It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, Ex parte Yarbrough, 110 U.S. 651, and to have their votes counted, United States v. Mosley, 238 U.S. 383. In Mosley the Court stated that it is "as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box."

238 U.S., at 386. The right to vote can neither be denied outright, Guinn v. United States, 238 U.S. 347, Lane v. Wilson, 307 U.S. 268, nor destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, nor diluted by ballot-box stuffing, Ex parte Siebold, 100 U.S. 371, United States v. Saylor, 322 U.S. 385. As the Court stated in Classic, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . ." 313 U.S., at 315.

Reynolds v. Sims, 377 U.S. 533, 554-555 (1964). What happened here is exactly what both constitutions forbid. Incredibly, the statute governing voting for FSID commissioners and all attempts by Mr. Denning and Mr. Merja to seek compliance with the statute were disregarded at every level, by every public employee and public official involved. When electors complained, their complaints were given short shrift. No serious consideration at any level by any public official was given. Each of the following public officials or employees disregarded the voting rights of co-owners of property within the FSID:

1. The election office employee, Lynn Deroche
2. Sandra Merchant, elected clerk and recorder and election officer
3. FSID clerk Charla Merja
4. FSID board of commissioners, especially including Commissioner Kennard Steinke
5. Cascade County Commissioners who voted to certify the election
6. Cascade County Attorney (advising the Cascade County Commission)

Here is a list of errors in connection with the FSID election:

1. Lynn Deroche and Sandra Merchant of the elections office incorrectly agreed in January, 2023, that a designated voting authority must be sent to all joint property owners because “if there are joint property owners only one owner will get the vote.” This incorrect agreement appears to have been based on lack of knowledge regarding how § 85-7-1710 had changed approximately four years earlier in 2019, even though they had the current statute right in front of them.
2. The elections office provided to FSID as a sample a copy of a letter that had been sent in connection with elections in past years, which incorporated outdated statutory language taken from a pre-2019 version of § 85-7-1710 and which included incorrect instructions to electors telling co-owners that they must submit new designations.
3. Ms. Merja and Ms. Deroche agreed that when a designation had been made, there was no requirement to submit a new designation in a later election. However, they agreed to disregard this for reasons of expediency, i.e., they did not want to obtain the prior designations from sealed 2021 election records.
4. Charla Merja on behalf of FSID used the outdated sample letter to create a nearly identical letter. It incorporated the outdated statutory references and incorrectly instructed electors as follows:
 - a. It quoted and purported to enforce a version of § 85-7-1710(3) which was no longer in effect.
 - b. It quoted and purported to enforce a version of § 13-19-304(1) which was no longer in effect.
 - c. It incorrectly instructed that if electors designated an agent who was not a registered elector of Cascade County, the designation form could only be returned in person to the Election Administrator’s office. Yet § 85-7-1710(3)(a) required all designation forms to be “filed[d] with the secretary of the district.”
 - d. The notice of the election did not “indicate that, if there is a change in a designated agent, a new signed document must be

presented to the district indicating the change” as required by § 85-7-1710(3)(c).

- e. The letter incorrectly told electors that “[a]lthough you may have completed [a designation] form in the past for the Fort Shaw Irrigation District,” they “**MUST** complete a new [designation] form and return it to the Fort Shaw Irrigation District office in order to receive a ballot for this election.”
- f. The letter failed to provide electors a date by which they must submit designations to the FSID so that the FSID could comply with its obligation to provide “a list of eligible electors . . . to the county election office not less than 60 days before the election.”

- 4. Co-owners of property within the FSID who in 2023 did not provide new designations of someone to vote by April 13, 2023, were not sent ballots and were not permitted to cast votes for their co-owned acres in the 2023 election, even though such designations were not required.
- 5. Changes to designations should have been permitted up through April 19, 2023, but the FSID board incorrectly imposed a cut-off date of April 13, 2023.
- 6. The FSID board enforced an incorrect rule that denied co-owners the right to vote if they had not designated an agent or other elector by April 13, 2023.
- 7. The FSID commissioners failed to certify a list of eligible electors to the election office at least 60 days before the election as required by § 85-7-1710(5)(a). Charla Merja provided a list of acres on April 5, 2023. The next day Sandra Merchant was “trying to understand the process,” “wish I had paid more attention when I was out there” and admitted that she “didn’t know what was going on.” (Ex. 11) Since the list was not provided until after the 60-day period, it does not appear that it was certified by the deadline.
- 8. Ballots were mailed by the county election office without secrecy envelopes, return envelopes or instructions.

9. Ballots were mailed by the county election office after the deadline of April 17, 2023.
10. Ballots were mailed by the county election office over a two-day period rather than in one day as required by § 13-19-207(2).
11. The ballots in this election had a line for an elector to insert the total ballots cast, but they failed to have lines for the electors to state how many ballots were cast for each of the three district commissioners. Hence, the ballots forced electors to cast all of their votes or not vote at all for each of the three commission contests.
12. County Commissioners James L. Larson and Rae Grulkowski certified the election on May 19, 2023, despite having been informed by the Dennings that ballots had not been received by all electors. (Ex. 6; Denning decl. ¶ 29)
13. Ms. Merchant certified the canvass on the same date. She sent a copy of the signed canvass results to Charla Merja on May 24, 2023, with the following warning: “This, of course, doesn’t include those who couldn’t vote their acreage due to certification of designation issues.” (Ex. 15) That was an issue she did not raise at the canvass. (Merja decl. ¶ 24)

The Official Returns Sheet shows that 109 ballots were issued. (Ex. 7)

However, there are 192 electors in FSID. (Ex. 10) The Official Returns Sheet shows that 8,127 votes were cast in the election for commissioner in District 2; and that 8,537 votes were cast in each of the elections for commissioner in Districts 4 and 5. However, there are a total of 13,688 votes which could have been cast. Whether considering number of electors or number of total votes, only a little over half of the electors voted and a little over half of total votes were cast. Considering the confusion and pandemonium created by every public office involved (election

administrator, election staff, FSID secretary, and FSID board), it is surprising that even that many voted.

Section 13-35-107(1)(a), M.C.A., provides as follows:

If a court finds that the violation of any provision of this title by any person probably affected the outcome of any election, the result of that election may be held void and a special election held at least 85 days after the finding.

Because of privacy laws and constitutional provisions which apply to elections, it is not possible to determine how electors will vote who were not permitted to vote previously. Likewise, it is not possible to determine how individual electors who voted cast their votes. There are plenty of votes which could be cast by voters not allowed to vote previously which could be cast in favor of persons who were told they did not win their elections. It is obviously likely that when voters are informed about what happened in the 2023 election, they will overwhelmingly vote against any present commissioners who have been denying the plaintiffs' claims in this action, disregarding § 85-7-1710, and/or disregarding the rights of voters who were not permitted to vote in 2023. No one who has taken the stance that the present commissioners have been and are taking is likely to expect to be returned to office. A new election should be ordered at least 85 days after the Court enters its findings in this case.

CONCLUSION

The Court should grant plaintiffs' motion for summary judgment on plaintiffs'

First Claim For Relief and order a new election as provided in § 13-35-107(1).

DATED this 6th day of March, 2024.

STEVEN T POTTS, PLLC

By /s/ Steven T. Potts

625 Central Avenue West, Suite 200

Great Falls MT 59404

(Attorney for Plaintiffs)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7 of the Local Rules, I certify that this Memorandum contains 6,494 words and is thus less than 6,500 words, excluding the certificates of service and certificate of compliance, signature lines, and attachments.

/s/ Steven T. Potts

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon the persons named below by mailing, hand-delivery, Federal Express, or by telecopying to them a true and correct copy of said document.

U.S. Mail Hand-delivery Federal Express E-service except as noted below

Elizabeth Lund
BERG LILLY, PC
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Bozeman, MT 59715

Susan Swimley, Esq.
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FAURE HOLDEN ATTORNEYS AT LAW PC
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Great Falls, MT 59403

this 6th day of March, 2024.

/s/ Steven T. Potts

Section 85-7-1710 (2017)

Montana Code Annotated 2017

TITLE 85. WATER USE

CHAPTER 7. IRRIGATION DISTRICTS

Part 17. Elections

Qualification Of Electors And Nature Of Voting Rights

85-7-1710. Qualification of electors and nature of voting rights. (1) (a) At all elections held under the provisions of this part, except as otherwise expressly provided, the following holders of title or evidence of title to irrigable lands within the district, designated "electors", are entitled to vote if, except as provided in subsection (1) (b), they are qualified electors under the constitution and general election laws of the state:

- (i) guardians, executors, administrators, and trustees;
- (ii) domestic corporations, by their duly authorized agents; and
- (iii) owners of land described in subsection (3), including but not limited to corporations, limited liability companies, partnerships, and other entities that may vote through their duly authorized agents.

(b) Electors under this section are not subject to state residency or registration requirements.

(2) In all elections held under this part, each elector is permitted to cast one vote for each acre of irrigable land or major fraction of an acre owned by the elector within the district, irrespective of the location of the irrigable lands within the tracts designated by the commissioners for assessment and taxation purposes or within congressional subdivisions, platted lots or blocks except as otherwise provided for, election precincts, or district divisions, but any elector owning any less than 1 acre of irrigable land is entitled to one vote. Until the irrigable area under the proposed plan of reclamation is determined, all land included within the boundaries of the district must be considered irrigable land for election purposes.

(3) Whenever land is owned by co-owners, the owners shall designate one of their number or an agent to cast the vote for the owners. Whenever the land is owned by a single owner, the owner at the owner's discretion may designate an agent to cast the vote. Only one vote may be cast for each acre of irrigable land or major fraction of an acre by the voting individual. Whenever land is under contract of sale to a purchaser, the purchaser may vote on behalf of the owner of the land. When voting, the agent of a corporation, of a single owner or co-owners, of the co-owner designated for the purpose of voting, or of the purchaser of land under contract of sale shall file with the secretary of the district a written instrument of the agent's authority, executed and acknowledged by the proper officers of the corporation, by the single owner or co-owners, or by the owner of land under contract of sale, and upon filing, the agent or co-owner or purchaser is an elector within the meaning of this part.

(4) The board of commissioners shall choose one of the following methods of balloting:

- (a) for 10 votes or less, separate ballots must be used, and for more than 10 votes, the elector shall vote in blocks of 10 using one ballot for each 10 votes and separate ballots for odd votes over multiples of 10; or
- (b) the elector shall submit a ballot that includes the number of acres owned and the number of votes being cast.

(5) (a) Each holder of the title or evidence of title to irrigable land within the district who is qualified as an elector under subsection (1)(a) shall provide notice to the irrigation district in which the land is located designating the individual who will be voting in the election with respect to the irrigable land. If there is a change in the designation, a new notice must be provided to the irrigation district.

(b) The list of designated voters compiled under subsection (5)(a) and maintained and certified by the irrigation district must be provided to the county election office not less than 60 days before the election.

History: En. Sec. 19, Ch. 146, L. 1909; re-en. Sec. 7184, R.C.M. 1921; amd. Sec. 6, Ch. 157, L. 1923; re-en. Sec. 7184, R.C.M. 1935; amd. Sec. 1, Ch. 164, L. 1953; amd. Sec. 19, Ch. 460, L. 1977; R.C.M. 1947, 89-1311; amd. Sec. 371, Ch. 571, L. 1979; amd. Sec. 10, Ch. 27, L. 1981; amd. Sec. 1, Ch. 261, L. 1983; amd. Sec. 3, Ch. 584, L. 1989; amd. Sec. 1, Ch. 191, L. 1993; amd. Sec. 1, Ch. 134, L. 2013; amd. Sec. 1, Ch. 145, L. 2017.

Senate Bill 116 (2019)



AN ACT REVISING ELECTOR REQUIREMENTS IN AN IRRIGATION DISTRICT ELECTION; REVISING ELECTOR OPTIONS FOR CO-OWNERS; REVISING NOTIFICATION REQUIREMENTS FOR DESIGNATED ELECTORS; REVISING REQUIREMENTS TO NOTIFY A COUNTY ELECTION OFFICE OF DESIGNEES; AMENDING SECTION 85-7-1710, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-7-1710, MCA, is amended to read:

"85-7-1710. Qualification of electors and nature of voting rights. (1) (a) At all elections held under the provisions of this part, except as otherwise expressly provided, the following holders of title or evidence of title to irrigable lands within the district, designated "electors", are entitled to vote if, except as provided in subsection (1)(b), they are qualified electors under the constitution and general election laws of the state:

- (i) guardians, executors, administrators, and trustees;
- (ii) domestic corporations, by their duly authorized agents; and

(iii) owners of land described in subsection (3), including but not limited to corporations, limited liability companies, partnerships, and other entities that may vote through their duly authorized agents.

(b) Electors under this section are not subject to state residency requirements, or registration requirements, or county signature verification requirements.

(2) In all elections held under this part, each elector is permitted to cast one vote for each acre of irrigable land or major fraction of an acre owned by the elector within the district, irrespective of the location of the irrigable lands within the tracts designated by the commissioners for assessment and taxation purposes or within congressional subdivisions, platted lots or blocks except as otherwise provided for, election precincts, or district divisions, but any elector owning any less than 1 acre of irrigable land is entitled to one vote. Until the irrigable area under the proposed plan of reclamation is determined, all land included within the boundaries of the district must be considered irrigable land for election purposes.

(3) (a) Whenever land is owned by co-owners, either owner may vote on behalf of the co-owners, the

owners may vote based on an agreed-upon percentage ownership, or the owners shall may designate one of their number or an agent to cast the vote for the owners. Whenever the land is owned by a single owner, the owner at the owner's discretion may designate an agent to cast the vote. Only one vote may be cast for each acre of irrigable land or major fraction of an acre by the voting individual. Whenever land is under contract of sale to a purchaser, the purchaser may vote on behalf of the owner of the land. When Prior to voting, the agent of a corporation, or of a single owner or the co-owners, or the co-owner designated for the purpose of voting, or of the purchaser of land under contract of sale shall file with the secretary of the district a written instrument of document indicating the agent's authority, executed and acknowledged signed by the proper officers of the corporation, by the single owner or co-owners, or by the owner of land under contract of sale, and upon filing, the agent or co-owner or purchaser is an elector within the meaning of this part.

(b) Prior to voting, if there is a change in the designated agent, the new designated agent is responsible for providing a written document signed by the proper officers of the corporation, by the single owner or co-owners, or by the owner of land under contract of sale indicating the changes in the designated agent.

(c) When an irrigation district provides notice of an election, the notice must indicate that, if there is a change in a designated agent, a new signed document must be presented to the district indicating the change. The list of designated agents compiled under this section must be maintained and certified by the irrigation district to ensure that only one vote is cast on behalf of each acre or fraction of an acre.

(4) The board of commissioners shall choose one of the following methods of balloting:

(a) for 10 votes or less, separate ballots must be used, and for more than 10 votes, the elector shall vote in blocks of 10 using one ballot for each 10 votes and separate ballots for odd votes over multiples of 10; or

(b) the elector shall submit a ballot that includes the number of irrigable acres owned within the district and the number of votes being cast.

(5) (a) ~~Each holder of the title or evidence of title to irrigable land within the district who is qualified as an elector under subsection (1)(a) shall provide notice to the irrigation district in which the land is located designating the individual who will be voting in the election with respect to the irrigable land. If there is a change in the designation, a new notice must be provided to the irrigation district.~~

(b) ~~The Except as provided in subsections (5)(b) and (5)(c), if the county election office administers the election, the list of designated eligible electors that is voters compiled under subsection (5)(a) and maintained and certified by the irrigation district must be provided to the county election office not less than 60 days before~~

the election.

(b) If the irrigation district receives a valid change document regarding a qualified elector or a designated agent at least 14 days prior to an election being administered by the county election office and the district fulfills the requirements of subsection (5)(c), the elector or designated agent is eligible to vote.

(c) The irrigation district shall notify the election office within 4 days of receiving a change document as described in subsection (5)(b) and shall provide the necessary information regarding the change to the election office in order for the election office to administer the proper ballot.

(d) After receiving notice in accordance with subsection (5)(c), the county election office shall provide the elector with a ballot.

(e) If a qualified elector or designated agent provides a valid change document to an irrigation district within the 13 days prior to and including election day, the district must provide to the elector or agent a notice, which the elector or agent may present to the election office. If the election office determines that the votes have not already been cast for the respective irrigable acres, the elector or agent may receive a ballot and cast the votes for those acres."

Section 2. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,
SB 0116, originated in the Senate.

President of the Senate

Signed this _____ day
of _____, 2019.

Secretary of the Senate

Speaker of the House

Signed this _____ day
of _____, 2019.

SENATE BILL NO. 116
INTRODUCED BY D. SALOMON

AN ACT REVISING ELECTOR REQUIREMENTS IN AN IRRIGATION DISTRICT ELECTION; REVISING ELECTOR OPTIONS FOR CO-OWNERS; REVISING NOTIFICATION REQUIREMENTS FOR DESIGNATED ELECTORS; REVISING REQUIREMENTS TO NOTIFY A COUNTY ELECTION OFFICE OF DESIGNEES; AMENDING SECTION 85-7-1710, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

Section 85-7-1710 (2019, 2021 & 2023)

Montana Code Annotated 2023

TITLE 85. WATER USE

CHAPTER 7. IRRIGATION DISTRICTS

Part 17. Elections

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- (iii) owners of land described in subsection (3), including but not limited to corporations, limited liability companies, partnerships, and other entities that may vote through their duly authorized agents.

(b) Electors under this section are not subject to state residency requirements, registration requirements, or county signature verification requirements.

(2) In all elections held under this part, each elector is permitted to cast one vote for each acre of irrigable land or major fraction of an acre owned by the elector within the district, irrespective of the location of the irrigable lands within the tracts designated by the commissioners for assessment and taxation purposes or within congressional subdivisions, platted lots or blocks except as otherwise provided for, election precincts, or district divisions, but any elector owning any less than 1 acre of irrigable land is entitled to one vote. Until the irrigable area under the proposed plan of reclamation is determined, all land included within the boundaries of the district must be considered irrigable land for election purposes.

(3) (a) Whenever land is owned by co-owners, either owner may vote on behalf of the co-owners, the owners may vote based on an agreed-upon percentage ownership, or the owners may designate one of their number or an agent to cast the vote for the owners. Whenever the land is owned by a single owner, the owner at the owner's discretion may designate an agent to cast the vote. Only one vote may be cast for each acre of irrigable land or major fraction of an acre by the voting individual. Whenever land is under contract of sale to a purchaser, the purchaser may vote on behalf of the owner of the land. Prior to voting, the agent of a corporation, a single owner or the co-owners, the co-owner designated for the purpose of voting, or the purchaser of land under contract of sale shall file with the secretary of the district a written document indicating the agent's authority, executed and signed by the proper officers of the corporation, by the single owner or co-owners, or by the owner of land under contract of sale, and upon filing, the agent or co-owner or purchaser is an elector within the meaning of this part.

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(c) When an irrigation district provides notice of an election, the notice must indicate that, if there is a change in a designated agent, a new signed document must be presented to the district indicating the change. The list of designated agents compiled under this section must be maintained and certified by the irrigation district to ensure that only one vote is cast on behalf of each acre or fraction of an acre.

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(a) for 10 votes or less, separate ballots must be used, and for more than 10 votes, the elector shall vote in blocks of 10 using one ballot for each 10 votes and separate ballots for odd votes over multiples of 10; or

(b) the elector shall submit a ballot that includes the number of irrigable acres owned within the district and the number of votes being cast.

(5) (a) Except as provided in subsections (5)(b) and (5)(c), if the county election office administers the election, the list of eligible electors that is maintained and certified by the irrigation district must be provided to the county election office not less than 60 days before the election.

(b) If the irrigation district receives a valid change document regarding a qualified elector or a designated agent at least 14 days prior to an election being administered by the county election office and the district fulfills the requirements of subsection (5)(c), the elector or designated agent is eligible to vote.

(c) The irrigation district shall notify the election office within 4 days of receiving a change document as described in subsection (5)(b) and shall provide the necessary information regarding the change to the election office in order for the election office to administer the proper ballot.

(d) After receiving notice in accordance with subsection (5)(c), the county election office shall provide the elector with a ballot.

(e) If a qualified elector or designated agent provides a valid change document to an irrigation district within the 13 days prior to and including election day, the district must provide to the elector or agent a notice, which the elector or agent may present to the election office. If the election office determines that the votes have not already been cast for the respective irrigable acres, the elector or agent may receive a ballot and cast the votes for those acres.

History: En. Sec. 19, Ch. 146, L. 1909; re-en. Sec. 7184, R.C.M. 1921; amd. Sec. 6, Ch. 157, L. 1923; re-en. Sec. 7184, R.C.M. 1935; amd. Sec. 1, Ch. 164, L. 1953; amd. Sec. 19, Ch. 460, L. 1977; R.C.M. 1947, 89-1311; amd. Sec. 371, Ch. 571, L. 1979; amd. Sec. 10, Ch. 27, L. 1981; amd. Sec. 1, Ch. 261, L. 1983; amd. Sec. 3, Ch. 584, L. 1989; amd. Sec. 1, Ch. 191, L. 1993; amd. Sec. 1, Ch. 134, L. 2013; amd. Sec. 1, Ch. 145, L. 2017; amd. Sec. 1, Ch. 225, L. 2019.