

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

*Pro Querente*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

**MONTANA SHOOTING SPORTS  
ASSOCIATION, SECOND  
AMENDMENT FOUNDATION,  
Inc., and GARY MARBUT,**

Plaintiffs,

v.

**ERIC H. HOLDER, JR.,  
ATTORNEY GENERAL OF THE  
UNITED STATES OF AMERICA,**

Defendant.

Cause No. **CV-09-147-M-DWM**

***PLAINTIFF'S OBJECTIONS TO  
FINDINGS AND  
RECOMMENDATIONS OF  
MAGISTRATE JUDGE***

Plaintiffs Montana Shooting Sports Association, Second Amendment Foundation, Inc., and Gary Marbut ("Plaintiffs"), by and through their

counsel of record, hereby submit, in accordance with 28 U.S.C. § 636(b) and FED. R. CIV. P. 72(b)(2), their objections to the Findings and Recommendations of Magistrate Judge entered on August 31, 2010. (Dkt. No. 103.)

### **OBJECTIONS**

1. Plaintiffs object to the Magistrate Judge's finding that Defendant Eric H. Holder, Jr. ("Defendant") failed to waive sovereign immunity under the U.S. Administrative Procedures Act.
2. Plaintiffs object to the Magistrate Judge's finding that regardless of any waiver of sovereign immunity, Plaintiffs are not entitled to non-statutory review.
3. Plaintiffs object to the Magistrate Judge's finding that Plaintiffs lack standing on the basis of Defendants' threat of prosecution.
4. Plaintiffs object to the Magistrate Judge's finding that Plaintiffs lack standing on the basis that they have suffered no economic harm.
5. Plaintiffs object to the Magistrate Judge's finding that Plaintiffs lack organizational standing.
6. Plaintiffs object to the Magistrate Judge's finding that the Commerce Clause allows Congress to regulate purely intrastate activities

allowed under Montana law by the Montana Firearms Freedom Act and MONT. CODE ANN. §§ 30-20-104 *et. seq.*

7. Plaintiffs object to the Magistrate Judge's finding that the activities allowed under Montana law by the Montana Firearms Freedom Act and MONT. CODE ANN. §§ 30-20-104 *et. seq.*, are not protected under the Second Amendment of the U.S. Constitution.

8. Plaintiffs object to the Magistrate Judge's implicit finding that the activities allowed under Montana law by the Montana Firearms Freedom Act and MONT. CODE ANN. §§ 30-20-104 *et. seq.*, are not protected under the Ninth Amendment of the U.S. Constitution.

9. Plaintiffs object to the Magistrate Judge's finding that the activities allowed under Montana law by the Montana Firearms Freedom Act and MONT. CODE ANN. §§ 30-20-104 *et. seq.*, are not protected under the Tenth Amendment of the U.S. Constitution.

10. Plaintiffs object to the Magistrate Judge's recommendation that the Second Amended Complaint be dismissed for failure to state a claim.

11. Plaintiffs object to the Magistrate Judge's finding that the Second Amendment of the United States Constitution does not apply to this case because the issue is not plead in the Second Amended Complaint.

12. Plaintiffs object to the Magistrate Judge's failure to rule on the statutory issues raised by amicus Gun Owners of America (Dkt. No. 54) before ruling on the constitutional issue.

### **BASIS**

The forgoing objections are all based on the arguments of Plaintiffs and the *amicus curiae*, as set forth in the briefs filed in opposition to Defendant's motion to dismiss (Dkt. Nos. 32, 34, 45, 47, 48, 51, 54, 58, 64, 71, 85 and 93), as well as those arguments stated orally at the July 15, 2010, hearing on the motion to dismiss. (*See*, Transcr. of Proceedings (Jul. 15, 2010) attached hereto as Exhibit A.) Such arguments are incorporated herein by this reference. In addition, the basis for the Second Amendment arguments made at hearing arose from the United States Supreme Court case of *McDonald v. City of Chicago*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_, 2010 WL 2555188 (U.S.), 78 USLW 4844 (June 28, 2010), decided at the end of June, 2010, and over a month after the Government's reply brief was filed on the issue. If the Second Amendment argument is to be rejected as unplead, the Court should grant leave to Plaintiffs to amend their pleadings to include the issue. Pursuant to Plaintiffs objections, they request review *de novo*. FED. R. CIV. P. 72(b)(3).

## CONCLUSION

Plaintiffs respectfully request that their objections to the Magistrate Judge's Findings be sustained, the Recommendations of the Magistrate Judge be rejected, and Defendant's motion to dismiss be denied in its entirety.

Dated this 14th day of September, 2010.

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

By: /s/ Quentin M. Rhoades  
Quentin M. Rhoades  
*Pro Querente*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of September, 2010, I served a true and correct copy of the foregoing on the following persons by the following means:

- 1        CM/ECF
- Hand Delivery
- 2        Mail
- Overnight Delivery Service
- Fax
- E-Mail

1.    Jessica B. Leinwand  
      U.S. DEPARTMENT OF JUSTICE  
      Civil Division  
      P.O. Box 883  
      Ben Franklin Station  
      Washington, D.C. 20044  
      *Representing Defendant Eric H. Holder, Jr.*

1.    James Edward Brown  
      John E. Bloomquist  
      DONEY CROWLEY BLOOMQUIST & PAYNE UDA, P.C.  
      Diamond Block ,Suite 200  
      44 West Sixth Avenue  
      P.O. Box 1185  
      Helena, MT 59624  
      *Representing Weapons Collectors Society of MT (Amicus)*  
      *Representing Western Tradition Partnership (Amicus)*

1.    Mark L. Shurtleff  
      OFFICE OF THE ATTORNEY GENERAL  
      P.O. Box 142320  
      Salt Lake City, UT 84114-2320  
      *Representing State of Utah & Other States (Amicus)*

**CERTIFICATE OF SERVICE**  
***(continued)***

1. Patrick T. Fox  
DOUBEK & PYFER  
P.O. Box 236  
Helena, MT 59624  
*Representing State of Utah & Other States (Amicus)*
  
1. Jeffrey T. Renz  
CRIMINAL DEFENSE CLINIC  
School of Law  
32 Campus Drive  
University of Montana  
Missoula, MT 59812  
*Representing Montana Legislators (Amicus)*
  
1. Jennifer W. Bordy  
ATTORNEY AT LAW  
7720 A Shedhorn Drive  
PMB 132  
Bozeman, MT 59718  
*Representing Montana Legislators (Amicus)*
  
1. Duncan Scott  
SCOTT & KIENZEL  
1001 South Main Street  
Kalispell, MT 59901  
*Representing Paragon Foundation, Inc. (Amicus)*
  
2. Arthur V. Wittich  
WITTICH LAW OFFICE  
602 Ferguson Avenue  
Suite 5  
Bozeman, MT 59718  
*Representing Center for Constitutional Jurisprudence  
& Lawmakers from 17 States (Amicus)*

**CERTIFICATE OF SERVICE**  
***(continued)***

1. Anthony T. Caso  
LAW OFFICE OF ANTHONY T. CASO  
8001 Folsom Blvd  
Suite 100  
Sacramento, CA 95826  
*Representing Center for Constitutional Jurisprudence  
& Lawmakers from 17 States (Amicus)*
  
1. Nicholas C. Dranias  
GOLDWATER INSTITUTE  
500 East Coronado Road  
Phoenix, AZ 85004  
*Representing Goldwater Institute Scharf-Norton  
Center for Constitutional Gov't., et al. (Amicus)*
  
1. Timothy C. Fox  
GOUGH SHANAHAN JOHNSON & WATERMAN  
P.O. Box 1715  
Helena, MT 59624-1715  
*Representing Goldwater Institute Scharf-Norton  
Center for Constitutional Gov't., et al. (Amicus)*
  
1. Chris D. Tweeten  
OFFICE OF THE MONTANA ATTORNEY GENERAL  
P.O. Box 201401  
Helena, MT 59620-1401  
*Representing Montana Attorney Gen  
Steve Bullock (Intervenor)*

///

///

**CERTIFICATE OF SERVICE**  
***(continued)***

1. Gregory A. Jackson  
JACKSON LAW FIRM, P.C.  
320 - 11<sup>th</sup> Avenue  
Helena, MT 59601  
*Representing Gun Owners Foundation, Gun Owners of America, Inc. & Virginia Citizens Defense League*
  
2. Herbert W. Titus  
William J. Olson  
John S. Miles  
Jeremiah L. Morgan  
LAW FIRM OF WILLIAM J. OLSON  
370 Maple Avenue West  
Suite 4  
Vienna, VA 22180-5615  
*Representing Gun Owners Foundation, Gun Owners of America, Inc. & Virginia Citizens Defense League*
  
1. Cynthia L. Wolken  
Montana Legal Services  
616 Helena Avenue  
Suite 100  
Helena, MT 59601  
*Representing Brady Center to Prevent Gun Violence; & Int'l Brotherhood of Police Officers, et al.*
  
1. Gil N. Peles  
PROSKAUER ROSE, LLP  
2049 Century Park East  
Suite 3200  
Los Angeles, CA 90067  
*Representing Brady Center to Prevent Gun Violence*

///

**CERTIFICATE OF SERVICE**  
***(continued)***

2. Paul M. Kienzle  
Attorney At Law  
P.O. Box 587  
Albuquerque, NM 87103  
*Representing Paragon Foundation, Inc. (Amicus)*

By: /s/ Quentin M. Rhoades  
Quentin M. Rhoades