



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**BY ELECTRONIC MAIL ONLY**

October 4, 2021

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RE: MUR 7523  
Sandfire Resources, NL  
Sandfire Resources America, Inc.

Dear Mr. Toner, and Ms. Zehr:

On August 2, 2021, we notified you that the Commission, on July 13, 2021, voted to dismiss this matter, and on September 2, 2021, we notified you that the Commission voted to reopen the matter for further consideration.

This letter is to inform you that, on September 30, 2021, the Commission approved the enclosed Factual and Legal Analysis, which more fully explains the Commission's decision to dismiss this matter, and closed its file in the matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

If you have any questions, please contact Nick Mueller, the attorney assigned to this matter, at (202) 694-1577.

Sincerely,

*Mark Allen*

Mark Allen  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Stop I-186 to Protect Mining and Jobs **MUR: 7523**  
 Sandfire Resources America, Inc.  
 Sandfire Resources, NL  
 Montana Mining Association

**I. INTRODUCTION**

This matter involves allegations that that Sandfire Resources America, Inc. (“Sandfire”) and Sandfire Resources NL (“Sandfire NL”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by making prohibited foreign national donations to the Montana Mining Association (“MMA”) and Stop I-186 to Protect Mining and Jobs (“Stop I-186”) for the purpose of opposing a Montana ballot initiative that the Complaint states would “increase [Montana’s] ability to deny permits for hardrock mines . . . to avoid polluting the state’s waters.”<sup>1</sup> The Complaint further alleges that MMA and Stop I-186 also violated the Act by knowingly accepting such donations.<sup>2</sup>

Respondents do not dispute the facts alleged in the Complaint. Rather, they argue that ballot initiatives are not “elections” under the Act and that, therefore, the Act’s foreign national prohibition does not apply to their activities.<sup>3</sup>

For the reasons set forth below, the Commission dismisses the allegations in the Complaint and closes the file in this matter.

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<sup>1</sup> Compl. at 2 (Oct. 22, 2018).

<sup>2</sup> *Id.*

<sup>3</sup> Sandfire Resp. at 1 (Dec. 17, 2018); MMA Resp. at 4 (Dec. 18, 2018). Ballot initiatives are also sometimes called ballot measures, propositions, or referendum. For purposes of this Factual and Legal Analysis, the Commission uses the terms interchangeably to include all questions put to the voters on a ballot other than the election of a candidate for office.

## 1 II. FACTUAL BACKGROUND

2 The November 2018 election ballot in Montana included I-186, a ballot initiative that the  
 3 Complaint asserts would have created additional regulation on water pollution by hardrock mines  
 4 within the state.<sup>4</sup> In the eight months leading up to the election, Sandfire, a Canadian subsidiary  
 5 of an Australian company, Sandfire NL,<sup>5</sup> made \$270,000 in donations to the MMA, an  
 6 “incidental committee” established for the purpose of opposing I-186,<sup>6</sup> and on April 4, 2018,  
 7 Sandfire made a \$17,857 donation to a state ballot issue committee, Stop I-186.<sup>7</sup> The Complaint  
 8 alleges that Sandfire NL is the source of the donations made by Sandfire, asserting that  
 9 “[a]ccording to its public filings, Sandfire Resources America has no sources of revenue in the  
 10 United States, and a cash flow of zero.”<sup>8</sup>

11 The Complaint does not allege any link between any candidate and either MMA or Stop  
 12 I-186. While there were candidates, including federal candidates, on the same ballot as the  
 13 initiative, the only activity linking any candidate to either entity appears to be an advertisement  
 14 run by Stop I-186 on Facebook which featured two state legislators, one Republican and one  
 15 Democrat, expressing their joint opposition to the measure but not referencing their own  
 16 elections.<sup>9</sup>

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<sup>4</sup> Compl. at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* Under Montana law, “incidental committee” means a political committee that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure. *See* MCA 13-1-101(22)(a).

<sup>7</sup> Compl. at 3; *see* MCA 13-1-101(7) (defining “ballot issue committee”).

<sup>8</sup> Compl. at 3.

<sup>9</sup> *See* Stop I-186, Facebook Ad Library, FACEBOOK, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&view\\_all\\_page\\_id=1806830076004454&search\\_type=p&age&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&view_all_page_id=1806830076004454&search_type=p&age&media_type=all).

### 1     **III.     LEGAL BACKGROUND**

2           The Act and Commission regulations prohibit any “foreign national” from directly or  
3 indirectly making a contribution or donation of money or other thing of value, or an expenditure,  
4 independent expenditure, or disbursement, in connection with a federal, state, or local election.<sup>10</sup>

5     The Act’s definition of “foreign national” includes an individual who is not a citizen or national  
6 of the United States and who is not lawfully admitted for permanent residence as well as a

7 “foreign principal” as defined at 22 U.S.C. § 611(b), which, in turn, includes a “partnership,

8 association, corporation, organization, or other combination of persons organized under the laws

9 of or having its principal place of business in a foreign country.”<sup>11</sup> The Act also prohibits any

10 person from soliciting, accepting, or receiving a contribution or donation from a foreign

11 national.<sup>12</sup>

12           The Act defines “election” to mean “a general, special, primary, or runoff election” as

13 well as “a convention or caucus of a political party which has authority to nominate a

14 candidate.”<sup>13</sup> Commission regulations further specify that “[e]lection means the process by

15 which individuals, whether opposed or unopposed, seek nomination for election, or election, to

16 Federal office.”<sup>14</sup> The United States Supreme Court has long recognized that the Act “regulates

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<sup>10</sup> 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f).

<sup>11</sup> 52 U.S.C. § 30121(b); 22 U.S.C. § 611(b)(3); *see also* 11 C.F.R. § 110.20(a)(3).

<sup>12</sup> 52 U.S.C. § 30121(a)(2). Commission regulations employ a “knowingly” standard. 11 C.F.R. § 110.20(g). A person knowingly solicits, accepts, or receives a prohibited foreign national contribution or donation if that person has actual knowledge that funds originated from a foreign national, is aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the funds originated from a foreign national, or is aware of facts that would lead a reasonable person to inquire whether the funds originated from a foreign national but failed to conduct a reasonable inquiry. 11 C.F.R. § 110.20(a)(4).

<sup>13</sup> 52 U.S.C. § 30101(1).

<sup>14</sup> 11 C.F.R. § 100.2(a) (emphasis added).

only candidate elections, not referenda or other issue-based ballot measures.”<sup>15</sup> Consistent with the Act and court precedents, the Commission has observed that spending relating only to ballot initiatives is generally outside the purview of the Act because such spending is not “in connection with” elections.<sup>16</sup>

In Advisory Opinion 1989-32, the Commission considered whether a ballot initiative committee could accept funds from a foreign national. In that instance, a state candidate organized and controlled a committee that sought to qualify and pass a state ballot measure sponsored and promoted by the candidate, and both the ballot measure and the state candidate would be on the ballot in November 1990. Given this relationship between the candidate and the ballot initiative committee, the Commission determined that two were “inextricably linked” such that the activities of the committee should be viewed as campaign-related.<sup>17</sup> Thus, the

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<sup>15</sup> *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334, 356 (1995) (citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)); *see also First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (“Referenda are held on issues, not candidates for public office.”). In *Bluman v. FEC*, a three-judge district court upheld the constitutionality of the foreign national prohibition. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012). In doing so, the court explained, in dicta, that the foreign national prohibition is closely tied to candidate advocacy and does not ban foreign nationals from engaging in issue advocacy. *See id.* (“§ [30121] as we interpret it . . . does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues. It restrains them only from a certain form of expressive activity closely tied to the voting process — providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.”).

<sup>16</sup> Advisory Op. 1989-32 (McCarthy) (“AO 1989-32”); *see also* AO 1984-62 (B.A.D. Campaigns) at 1 n.2 (“The Commission has previously held that contributions or expenditures exclusively to influence ballot referenda issues are not subject to the Act”); AO 1984-41 (National Conservative Foundation) at 1-2; AO 1982-10 (Syntex) at 2-3.

<sup>17</sup> AO 1989-32 at 3-6 (detailing ways in which a candidate and a ballot initiative committee seeking to accept foreign national funds were “inextricably linked,” including through overlapping staff between candidate and ballot initiative committee, linking the name of the candidate and committee in public communications, the candidate soliciting for the committee, and appearance of candidate and initiative on same ballot, concluding that because of these links the activities of the ballot initiative committee were campaign-related and thus the foreign national prohibition applied to the ballot initiative committee).

Commission found that the committee was prohibited from accepting contributions from a foreign national.<sup>18</sup>

In MUR 6678 (MindGeek), the Commission considered, in the enforcement context, whether the foreign national prohibition applied to pure ballot initiative activity. The Office of General Counsel recommended that the Commission exercise its prosecutorial discretion and dismiss the allegations as a result of the “lack of information in the current record suggesting that the Ballot Measure Committee’s activity was inextricably linked with the election of any candidate” and “the lack of clear legal guidance on whether the foreign national prohibition extends to pure ballot initiative activity.”<sup>19</sup> The Commission ultimately split on whether to pursue the allegations in MUR 6678, and Commissioners issued four statements of reasons supporting various views on the scope of the foreign national contribution ban.<sup>20</sup>

#### IV. LEGAL ANALYSIS

Similar to MUR 6678, the available information in this matter is insufficient to demonstrate that MMA and Stop I-186 were inextricably linked to any federal, state, or local

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<sup>18</sup> Although the Commission considered Advisory Opinion 1989-32 under 52 U.S.C. § 30121(b)’s predecessor, 2 U.S.C. § 441e(a), which at the time prohibited foreign national contributions “in connection with an election to any political office,” there has been no intervening change in the law—including enactment of the Bipartisan Campaign Reform Act of 2002 (“BCRA”)—that has altered the longstanding distinction between elections and ballot initiative activity. To be sure, Congress amended the Act with BCRA to “clarify current provisions of law regarding donations from foreign nationals.” 147 Cong. Rec. S2773 (daily ed. Mar. 22, 2001) (statement of Sen. Thompson); *see also* 148 Cong. Rec. S1994 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold); 147 Cong. Rec. S2428 2001 (daily ed. Mar. 19, 2001) (statement of Sen. Specter). Further, after Congress enacted BCRA, not only did the Commission describe this revised statute as a clarification in its rules, *see* Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,944 (Nov. 19, 2002), it also continued to advise the public that ballot measure activity was “nonelection activity” that foreign nationals may lawfully engage in so long as it is not connected to a candidate’s campaign. FEC, Foreign Nationals (July 2003), *available at* [https://transition.fec.gov/pages/brochures/foreign\\_nat\\_brochure.pdf](https://transition.fec.gov/pages/brochures/foreign_nat_brochure.pdf).

<sup>19</sup> First Gen. Counsel’s Rpt., MUR 6678 (MindGeek USA, Inc., *et al.*) at 19-20.

<sup>20</sup> *See* Certification, MUR 6678 (Mar. 18, 2015); Statement of Reasons, Comm’r. Ravel, MUR 6678; Statement of Reasons, Comm’r. Weintraub, MUR 6678; Statement of Reasons, Comm’rs. Petersen, Hunter & Goodman, MUR 6678; Supp. Statement of Reasons, Comm.’r Goodman, MUR 6678.

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1 candidate for election. Sandfire and Sandfire NL appear to be foreign nationals, as defined in the  
 2 Act, and it is undisputed that they made donations to pure ballot initiative committees in  
 3 Montana. The complaint alleges that Sandfire and Sandfire NL made contributions to the ballot  
 4 measure committees to fund “an advertising media campaign to oppose I-186,” but the  
 5 Complaint does not suggest that any candidates were involved with the ballot measure  
 6 committees’ media campaign.<sup>21</sup> Further, while numerous candidates, including federal  
 7 candidates, appeared on the same ballot, and one advertisement run by Stop I-186 on Facebook  
 8 featured two state legislators, one Republican and one Democrat, expressing their joint  
 9 opposition to the measure but not referencing their own elections, the Commission is not aware  
 10 of any information suggesting that any candidate was involved in the operation of the ballot  
 11 measure committees, fundraising for the ballot measure committees, or otherwise linked their  
 12 candidacy to the passage or failure of the ballot measure.<sup>22</sup> Under these circumstances and  
 13 consistent with the relevant court and agency precedents construing the foreign national  
 14 prohibition, the Commission declines to further pursue this matter. Accordingly, the  
 15 Commission dismisses the allegations that Sandfire and Sandfire NL violated 52 U.S.C. § 30121  
 16 by making prohibited foreign national donations. Similarly, the Commission dismisses the  
 17 allegations that MMA and Stop I-186 violated 52 U.S.C. § 30121 by accepting prohibited  
 18 foreign national donations.

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<sup>21</sup> Compl. at 2.

<sup>22</sup> While the Stop I-186 ad on Facebook that included two state legislative candidates did indicate their shared opposition to the ballot measure, we are not aware of any information indicating that their involvement with Stop I-186, went beyond this single ad indicating their views on the ballot measure. *See* Stop I-186, Facebook Ad Library, FACEBOOK, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&view\\_all\\_page\\_id=1806830076004454&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&view_all_page_id=1806830076004454&search_type=page&media_type=all). *Cf.* 11 C.F.R. § 109.21(g)(1) (providing a safe harbor from the soft money prohibition for public communications by a federal candidate endorsing another candidate, so long as the communication does not promote, support, attack, or oppose the federal candidate or their opponent).