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EXHIBIT 5  
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February 16, 2005

Representative Christine Kaufmann  
Chair, Joint Appropriations Subcommittee on Health and Human Services  
825 Breckenridge Street  
Helena, Montana 59601

Dear Representative Kaufmann:

I am writing in response to your Subcommittee's request for an analysis of proposed uses of revenue from the cigarette and tobacco tax increases contained in Initiative No. 149. You have asked for an analysis of three specific proposed uses. In analyzing your questions, I will apply the rules of statutory construction. The rules applicable to interpretation of initiatives are the same as those applying to legislation enacted by the Legislature. See State Bar of Montana v. Krivec, 193 Mont. 477, 632 P.2d 707 (1981). The rules of statutory construction require the language of a statute to be construed according to its plain meaning. If the language is clear and unambiguous, no further interpretation is required. Legislative history may be consulted only if legislative intent cannot be determined from the plain wording of the statute. Lovell v. State Compensation Mutual Insurance Fund, 260 Mont. 279, 860 P.2d 95 (1993). In construing a statute, courts cannot insert what has been omitted. See State ex rel. Palmer v. Hart, 201 Mont. 526, 655 P.2d 965 (1982), and Skrukrud v. Gallatin Laundry Company, Inc., 171 Mont. 217, 557 P.2d 278 (1976). The duty of the Supreme Court in interpreting a statute is not to enact but to expound the law, to apply the law as it finds it, and to maintain its integrity as it is written. It may not insert what has been omitted or omit what has been inserted. See State ex rel. King v. Smith, 98 Mont. 171, 38 P.2d 274 (1934), and Clark v. Olson, 96 Mont. 417, 31 P.2d 283 (1934). With these rules in mind, I will address each proposed use in turn.

Your first question asks whether a reserve fund can be created to pay the future costs of programs initiated during the 2007 biennium. Section 7 of Initiative No. 149 established a health and medicaid initiatives account in the state special revenue fund. That section has been codified as section 53-6-1201, MCA. Money from cigarette taxes allocated under section 16-11-119(1)(c), MCA, and money from taxes on tobacco products other than cigarettes allocated under section 16-11-206(1)(b), MCA, must be deposited in the account. In general terms the account is restricted to use for the children's health insurance program (CHIP), provided for in Title 53, chapter 4, part 10, MCA, for a new need-based prescription drug program for certain enumerated individuals, to increase medicaid services and medicaid provider rates, and as an offset to loss of revenue to the general fund as a result of new tax credits or to fund new programs to assist small businesses with the costs of providing health insurance benefits to employees.

The establishment of a "reserve fund" is not a specifically enumerated use of the health and medicaid initiatives account. However, there is no requirement that the Legislature appropriate the entire amount of money deposited in the health and medicaid initiatives account. The

Legislature could appropriate money in the account in excess of some designated amount and effectively establish a "reserve" in the account. This is a policy choice for the Legislature.

Your second question is whether an appropriation for the CHIP state matching funds may fund costs below the level appropriated for the 2005 biennium. I assume that for the purposes of this question, that you are asking if the money in the account may be used to supplant state money appropriated for CHIP in the 2005 biennium. As discussed earlier, the use of money in the health and medicaid initiatives account for CHIP is specifically authorized in section 53-6-1201, MCA. However, section 53-6-1201(3)(a), MCA, provides that the money in the account may be used only to provide funding for the state funds necessary to take full advantage of available federal matching funds in order to maximize enrollment of eligible children under CHIP and to provide outreach to the eligible children. The statute also provides that the increased revenue in this account is intended to increase enrollment rates for eligible children in the program and not to be used to support existing levels of enrollment based upon appropriations for the biennium ending June 30, 2005. Section 10 of Initiative No. 149 provided that the Initiative became effective January 1, 2005. Because section 53-6-1201, MCA, did not exist prior to January 1, 2005, all money in the account appears to be "increased revenue". The restrictive language contained in section 53-6-1201(3)(a), MCA, is limited to "enrollment rates". Although that term is not defined, it appears that it is intended to be synonymous with the number of children insured by CHIP. Therefore, it appears that the money in the health and medicaid initiatives account is intended to be used to insure additional children beyond the number of children insured under CHIP for the biennium ending June 30, 2005. There is no similar restriction that would preclude the use of money in the account for an outreach program even if money for outreach was included in the CHIP budget for the biennium ending June 30, 2005. The restrictive language regarding CHIP appears to preclude the use of money in the health and medicaid initiatives account from being used to provide additional benefits under section 53-4-1005, MCA, from reducing participant cost-sharing amounts under section 53-4-1008, MCA, or from expanding the types of professionals who may deliver services under section 53-4-1009, MCA.

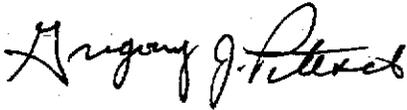
Your third question asks whether money in the health and medicaid initiatives account may be used for state matching funds for medicaid and for mental health service plan costs that were paid from the temporary diversion of tobacco settlement revenue during the 2005 biennium. The state mental health service plan is not one of the four statutorily enumerated uses for the account. Therefore, money in the account may not be used for mental health service plan costs. Section 53-6-1201(3)(c), MCA, authorizes the use of money in the account for increased medicaid services and medicaid provider rates. The increased revenue is intended to increase medicaid services and medicaid provider rates and not to supplant the general fund in the trended traditional level of appropriation for medicaid services and medicaid provider rates. Section 53-6-1201(5), MCA, provides that the phrase "trended traditional level of appropriation" means the appropriation amounts, including supplemental appropriations, as those amounts were set based on eligibility standards, services authorized, and payment amount during the past five biennial budgets. The tobacco settlement revenue referred to in your question is considered state special revenue pursuant to section 17-6-606, MCA. Therefore the language in section 53-6-1201(3),

MCA, concerning supplanting general fund does not apply to the temporary diversion of tobacco settlement revenue. However, section 53-6-1201(3), MCA, still requires that the money in the account must be used to "increase medicaid services and medicaid provider rates". In determining the meaning of a statute, the Montana Supreme Court has looked to an affirmative argument for the adoption of an initiative prepared by the sponsors of the initiative. See Guillot v. State Highway Commission, 102 Mont. 149, 56 P.2d 1072 (1936). I have reviewed the argument for the adoption of Initiative No. 149 contained in the 2004 Voter Information Pamphlet and found the argument particularly unenlightening in regard to this question.

Section 53-6-101, MCA, establishes the Montana medicaid program and enumerates services that are required to be provided under the program and that may be provided under the program. Section 53-6-101, MCA, also authorizes the Department of Public Health and Human Services to set rates for medical and other services provided to recipients of medicaid. Relying solely on the language contained in section 53-6-1201(3)(c), MCA, the money in the health and medicaid initiatives account is restricted to providing additional services or to pay more for existing services.

I hope that I have adequately addressed your questions. If you have additional questions or if I can provide additional information, please feel free to contact me.

Sincerely,



Gregory J. Petesch  
Director of Legal Services

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