



EXHIBIT 10
 DATE 4.13.05
 SB 520

Print Page

Trio of tax bills is going to cost you

The governor expressed concern last week that Republican leaders in the House are stalling action on a trio of tax bills in order to kill them.

We don't know whether that's what the Republicans are doing or not, but we are starting to think perhaps they should -- and perhaps Gov. Schweitzer should help them.

After all, the governor promised not to support any tax increases, and the more we look at the three bills in question, the more certain we are that they are ravenous tax increases in sheep's clothing.

Hearings are being held on Senate Bill 520 today and Senate Bills 521 and 513 on Thursday. It almost looks as though these bills were held back as long as possible to avoid public scrutiny, but as we approach the end of the session, let's make sure our legislators are held to the same high standard as when they were elected.

In order to try to shed light on the bills, all of which were sponsored or co-sponsored by Sen. Jim Elliott of Trout Creek, the Inter Lake will study them over the next two days.

Senate Bill 520 is being touted as a property tax rebate, and thus looks like it will be good for everyone. But that is hardly the case.

First of all, the "rebate" goes to property owners and renters alike. That's based on the theory that landlords pass their property taxes on to their renters. Maybe so, but maybe not. We think market forces have a lot more to do with rental prices, and besides -- if legislators really want to help renters, they should lower property taxes across the board to help put home ownership in reach of lower middle-income families.

Remember, it's the property owners who pay the taxes, and they are the ones who need the help.

Calling SB 520 a property tax rebate doesn't make it one. What it really turns out to be -- when you read the fine print -- is an income-tax increase and a capital-gains tax increase. You didn't think the \$100 million being divvied up across the state in \$135 chunks was coming from the surplus, did you? No, it's coming from your fellow Montanans, about half of which will see their income taxes rise thanks to SB 520.

The Inter Lake supports property tax reduction, but that's not what you get in 520. We think of it more as vote buying. After all, virtually every adult citizen in Montana is going to be getting that happy check for \$135, and they may remember it fondly on election day, but few of them are going to be able to decipher where it was exactly in their state income taxes that the government took back its pound of flesh. It's all done with smoke and mirrors, folks. Just don't look too closely, or it hurts.

(Coming tomorrow: An analysis of SB 521 and SB 513.)

OUR OPINION: Proposed property tax 'rebate' just semantics

By Chronicle Editor

EXHIBIT

DATE 4.13.05

SB 520

State Sen. Jim Elliot, D-Trout Creek, may win a few votes in his economically depressed constituency with his proposal to extend "property tax rebates" to renters.

It's long been a rallying cry of the downtrodden that they, too, pay property tax; they just give it to their landlord when they pay their rent. That may be true, but the same can be said for every other cost incurred by landlords -- costs renters are not even aware of much less entitled to when those costs go down.

Elliot's bill actually calls for a \$135 income tax rebate aimed at providing property tax relief to 336,000 Montana homeowners and renters. His bill was crafted specifically to counter a 2003 income tax rate reduction that he says gave more than half the resulting tax relief to those earning more than \$100,000.

Providing more income tax relief and trying to spread it more evenly over the whole range of wage earners may be a laudable goal, assuming the state treasury can afford it. But calling it property tax relief and then extending it to renters is just plain semantics.

Renters do indeed help their landlords pay property taxes when they pay rent. They also help them pay for insurance, building maintenance, loan interest and every other expense involved in owning a rental property.

Rent, however, is determined by what the market will bear in any given rental market. The property of landlords who charge anything higher will sit vacant and, that, as any business 101 student can tell you, is not a good thing.

If Elliot really wants to provide property tax relief, he needs to direct it at the property owners. And that makes sense, because this state is far too heavily dependent on property taxes. If that relief allows landlords to lower rents, the competitive nature of the rental market will see that they do.

If, on the other hand, Elliot is just trying to provide some income tax relief, then let's call it that and let everyone who pays it in on the action.

Figure 1 also illustrates the two other sources of Montana government revenues. Fees and miscellaneous revenues is a broad category including charges for services (university tuition is the largest, but also including parks and recreation, sewerage, and others) and other revenues such as interest earnings. The rise in fees and miscellaneous revenues in the early 1980s resulted from growth in the coal and other trust funds, and the record high interest rates at the time. Some readers will remember mortgages that carried interest rates of 15 percent or more.

The third revenue category is intergovernmental transfers from the federal government. This category includes only transfers to state and local governments – not transfers and other payments to individuals – so Social Security, Medicare, Crop insurance, CRP, etc. are not included. In the 1970s, the largest portion of these transfers were for highways, and Montana governments still receive a lot of Federal gas tax money. But the largest transfers now are for health and human services including the Medicaid program, which in Fiscal Year 2004 totaled \$575 million, up 64 percent in just 5 years. Medicaid provides health care services, including nursing home care, to low income Montanans.

The mix among taxes, fees and miscellaneous revenues, and federal transfers has changed quite dramatically over the years. Taxes were 58 percent of revenues in 1970 but only 42 percent in 2002. Federal transfers are at an all-time high of 31 percent. With the federal budget substantially out of balance, and with no end in sight to rising health care costs, dependence on federal transfers may be a problem in the future.

Property Taxes

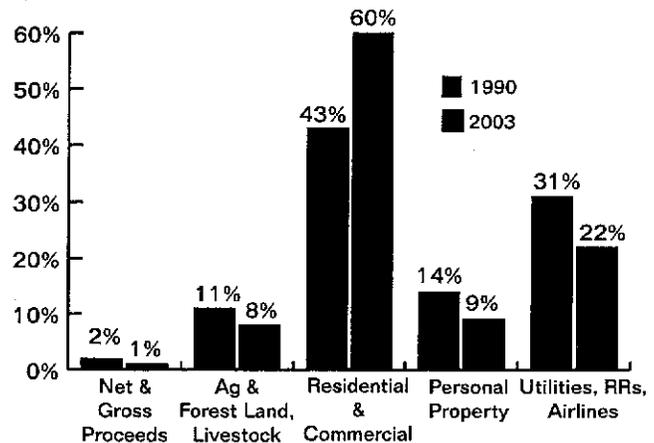
One of the most dramatic changes has been in Montana's property tax base. As Figure 2 indicates, residential and commercial property is now 60 percent of the statewide property tax base, up from 43 percent in tax year 1990. Thus, residential and commercial property pays over half the total taxes for the 101 mills levied statewide for schools and the university system. The shares of the other classes have shown a corresponding decline.

This "shift" in the property tax burden has resulted from two major factors: changes in property tax laws and changes in the economy. Among the legal changes, the taxable value rate for most business equipment dropped from 9 percent to 3 percent, electrical generation and telecommunications equipment dropped from 12 percent to 6 percent, and livestock dropped from 4 percent to zero. The taxable value rate for residential and commercial property fell from 3.86 percent to 3.37 percent, and 31 percent of the value of residential property is now exempted from tax (13 percent for commercial property).

Changes in the economy also affect the tax base. Substantial immigration to Western Montana resulted in new construction and rapidly rising property values, which would have increased the residential and commercial share even if the laws hadn't changed.

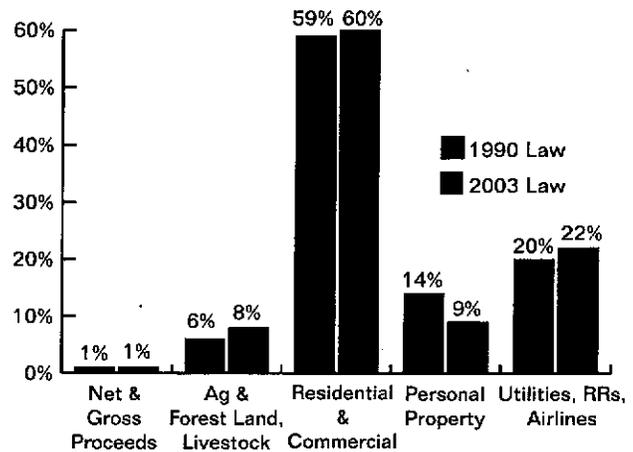
Figure 3 illustrates this idea: The market value of property in 2003 is used to compute the property tax base under 1990 law; i.e. what the 2003 property tax base would have been if there had been no changes in the law. The striking feature of the chart is that residential and commercial property would have grown to 59 percent of the tax base even if the law had not changed. That is, most of the shift in the

Figure 2
The Changing Property Tax Base
1990 and 2003



Source: Biennial Reports, Montana Department of Revenue.

Figure 3
Tax Base Under 1990 and 2003 Laws



Source: Biennial Reports, Montana Department of Revenue.

property tax burden has resulted from changes in the economy itself – specifically the growth of residential and commercial property – not from changes in the law.

Montana's Income Tax Reform

Montana's income tax underwent substantial changes effective January 1, 2005. As Table 2 indicates, the top marginal tax rate declined from 11 percent to 6.9 percent. However, Montana previously allowed taxpayers to deduct the full amount of their federal income taxes when filling out their state returns. Thus, the

Mr. Chairman, members of the committee for the record my name is Jason Todhunter with the Montana Logging Association.

The Montana Logging Association represents approximately 600 individual family owned businesses that are involved in the harvest and transportation of logs to the sawmills. These are small business 5-7 employees' average. The logging industry like many others has become more mechanized, and therefor is very capital intensive. Business equipment tax has always been an area of concern to these businesses. Having the business equipment tax drop down or go to zero would be an opportunity for these businesses to pay their employees higher wages and or increase benefits like health insurance and retirement.

One of our members in Belgrade who operates a mechanical logging operation paid about \$8,000 dollars in business equipment taxes last year. If the tax stays at three percent, they will pay closer to \$10,000 this year as they have upgraded some equipment. That is a significant tax for a business that has ten employees. This could equal a thousand dollars a year more in wages or benefits for each employee if the business equipment tax trigger was to stay in effect.

With that information the Montana Logging Association opposes SB 48.

Thanks for your time,

Jason Todhunter

SJ32

EXHIBIT
DATE 4-13-05
SB SJ32

**COALITION FOR
RATIONAL
AND
FAIR
TAXATION**

February 14, 2005

The Honorable Jim Elliott, Chairman of the Senate Taxation Committee
and Members of the Senate Taxation Committee
Montana State Capitol
Capitol Station
Helena, MT 59620

Re: Federal Legislation Affecting Business Activity Tax Nexus

Dear Chairman Elliott and Members of the Senate Taxation Committee:

We understand that Department of Revenue Director Bucks has recommended that the Montana Senate adopt a resolution regarding federal legislation (HR 3220) that was introduced in the last Congress. On behalf of the Coalition for Rational and Fair Taxation ("CRAFT"), a coalition of businesses that has long supported that federal legislation, I would like to take this opportunity to correct certain misstatements made in Director Bucks' memorandum. As a preliminary matter, it is essential to note that BATSA (as HR 3220 was named) would ensure that a business could be required to pay tax only to those jurisdictions that provide meaningful benefits and protections to the business.

Tax Shelters:

Director Bucks' memorandum states that BATSA would "legalize" corporate tax shelters. As an initial matter, it should be noted that tax planning is not inherently illegal; in fact, the U.S. Supreme Court has long recognized "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U.S. 465, 469 (1935). Nevertheless, taxpayers do not dispute the existence of "abusive" tax shelters that surpass the limits of legitimate tax planning or that such transactions are subject to attack by the states, e.g., for lacking economic substance. This is consistent with Montana law, as recognized by the Montana Supreme Court:

The Bates are correct in arguing that a taxpayer has a legal right to minimize or entirely avoid taxes by any means permitted by the law. . . . However, when the form of the transaction has not, in fact, altered any cognizable economic relationships, that form will be disregarded and the tax law applied according to the substance of the transaction.

Ruby Mt. Trust v. Department of Revenue, 300 Mont. 297, 305 (2000).

BATSA neither encourages the use of abusive corporate tax shelters nor weakens the ability of Montana to continue to use the economic substance doctrine to attack such tax shelters. Moreover, with respect to passive investment companies (the most public and reviled state tax "shelter"), Montana would continue to have both the economic substance doctrine and unitary combination at its disposal to curtail any abuse created by such arrangements.

Finally, it should be noted that the notion that "major manufacturing and materials processing plants could exempt themselves from Montana's corporate taxes through complex restructuring authorized under [BATSA]" ignores the non-tax costs and operational issues associated with such an endeavor. Because of the physical presence standard in BATSA, a Montana manufacturer would have to engage in an expensive physical relocation of its actual business operations to avoid taxes, not just a paper restructuring. It is unlikely businesses would engage in unworkable or costly restructurings simply to avoid paying Montana corporate taxes (and, concomitantly, likely increase their tax in another state). Charges that a business might do so are simply a scare tactic employed by state revenue departments. In fact, after P.L. 86-272 was enacted, the Congressional Willis Commission studied its impact and dismissed similar charges by concluding that virtually no companies had changed their business methods or structure in order to come within the protections of that statute.¹ Finally, it is more likely that a Montana business would look to BATSA for protection against unreasonable taxation by other states than to restructure their operations to avoid Montana corporate taxes.

Discrimination Against Small Businesses:

Director Bucks' memorandum states that BATSA would benefit large, multistate businesses at the expense of small Montana businesses. Nothing could be further from the truth. Those who oppose BATSA advocate for states being able to impose direct taxes on a businesses that merely has customers located in the state. Nowadays, it is more common than not for a small business – even an extremely small one – to have customers located in other states. Requiring a small business to pay tax where it merely has a customer would constitute unfair, bad tax policy (because the business would be receiving no benefits or protections from the customer's state), would impose an immense administrative burden (the business would have to know all about each state and localities' taxes), and would create increased economic costs (as the business would have to pay new taxes).

Moreover, the memorandum does not consider the effect that the actions of other states might have on Montana taxpayers. Montana businesses that merely solicit sales or have other *de minimis* activities outside Montana are currently targets for audits and tax collection by other states. Such businesses are required to undergo time-consuming and costly reviews that, ultimately, result in little or no tax collection. BATSA would establish bright-line standards for nexus (i.e., jurisdiction of a state to tax), and thus would prevent assessments against Montana businesses that do not have a physical presence in other states. It is worthwhile to note that state

¹ See Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary of the U.S. House of Representatives, "State Taxation of Interstate Commerce," H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964); H.R. Reps. Nos. 565 and 952, 89th Cong. (1965).

legislators, at meetings of the National Conference of State Legislatures, have noted their support for the principles embodied in BATSA because they desire to protect their in-state businesses from having to pay taxes to other states merely because the in-state business has customers in the other states. Most notably, a very small Montana business has supported BATSA because of this very concern (see attached letter from Montana Gourmet Garlic to Senator Baucus).

Establish Disincentives for Investing in Montana:

The memorandum from Director Bucks also states that BATSA would create disincentives for investing in Montana. However, BATSA would have absolutely no effect on attracting new investment into Montana. Nor would BATSA create an incentive for Montana businesses to headquarter outside of the state or to move jobs outside of Montana. If anything, BATSA would help retain Montana jobs – and perhaps even encourage new jobs. Inconsistent state law has resulted in businesses not being able to ascertain the definite tax cost of undertaking various business opportunities and initiatives. Enactment of a nationwide, bright-line standard such as that provided by BATSA would level the playing field, so that states cannot implement nexus policies that might encourage businesses to uproot from Montana or dissuade businesses from investing in Montana. Moreover, a physical presence standard would actually encourage out-of-state businesses to patronize Montana businesses without fear of being subject to tax by Montana.

Preemption of State Tax Policy:

Another major point made in Director Bucks' memorandum is that BATSA would preempt state laws and legislative policymaking authority. While BATSA establishes *when* a state may impose business activity tax on an out-of-state business, it does nothing to determine *how* or *what* a state may tax. Thus, Montana would remain free to determine what type of tax to impose, be it an income tax, a gross receipts tax, a value added tax, or a capital stock tax; to determine how to apportion the income that is taxed in the state, be it a single- or three-factor formula based on property, payroll and/or sales; to set the rate at which the tax chosen will be imposed; to determine whether or not to follow federal taxable income, e.g., to choose whether to decouple from federal bonus depreciation; to provide credits or deductions for certain types of expenses; and so on. BATSA merely confirms that the ability of states to tax is subject to constitutional limitations and, thus, strikes the correct balance between state autonomy/sovereignty and interstate commerce.

A fundamental aspect of American federalism is that Congress is given the authority and responsibility to ensure that interstate commerce is not burdened by state actions (including taxation of such commerce). The Founding Fathers understood that a free flow of commerce among the states and a single economy for our nation was essential for maintaining the strength of our country. Congress itself has recognized this numerous times in the context of state taxation and has exercised its responsibilities repeatedly by enacting laws that limit the states' authority to impose taxes that would unreasonably burden interstate commerce. One example of this is P.L. 86-272.

The Honorable Jim Elliott
February 14, 2005
Page 4

While no one disagrees that there is a tension between a state's authority to tax and the responsibility of Congress to regulate interstate commerce, it should be remembered that the adoption of the Constitution was itself a backlash against the inability of states to regulate commerce between the states. In adopting the Constitution, which expressly grants Congress the authority to regulate interstate commerce, the states relinquished a portion of their sovereignty.

To date, the ability of states to impose tax on out-of-state businesses has been determined primarily through judicial interpretation of the U.S. Constitution. The Supreme Court has made it clear that an out-of-state business must have "nexus" with the taxing state under *both* the Due Process Clause and the Commerce Clause before a state has the authority to impose business activity tax on that business. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Moreover, the Supreme Court has determined that the Commerce Clause requires the existence of a "substantial nexus" between the taxing state and the putative taxpayer, whereas the Due Process Clause requires only a "minimum" connection. In the context of sales and use taxes, the substantial nexus requirement was satisfied only by physical presence of the taxpayer. And, outside the context of passive investment companies, the state-level decisions on the business activity tax nexus issue have concluded that there is no principled reason for there to be any lower standard for business activity taxes than for sales and use taxes. *See, e.g., MBNA America Bank v. State Tax Commissioner*, W.V. Office of Tax App. File No. 510331454001 (Oct. 22, 2004); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. App. 2000); and *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000).

Unfortunately, what constitutes "substantial nexus" in the context of business activity taxes has not been defined by the U.S. Supreme Court. The U.S. Supreme Court, however, has explicitly noted Congress' role in the area of multistate taxation. *See Barclay's Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In light of the fact that states are applying inconsistent jurisdictional standards to out-of-state businesses, business activity nexus is an area appropriate for the exercise of Congress' Commerce Clause jurisdiction.

If you would like to discuss our concerns further, please contact me at the below address.

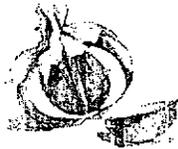
Sincerely,



Arthur R. Rosen
Counsel, Coalition for Rational and Fair Taxation
McDermott Will & Emery LLP
50 Rockefeller Plaza
New York, New York 10020

cc: Dan Bucks, Montana Department of Revenue
Mary Whittinghill, Montana Taxpayers Association

MONTANA



GOURMET
GARLIC

November 20, 2003

Honorable Max Baucus
United States Senate
Washington, DC 20510

Re: H.R. 3220, Business Activity Tax Simplification Act

Dear Senator Baucus:

I recently became aware that legislation was introduced (H.R. 3220, the Business Activity Tax Simplification Act ("BATSA")) that would prevent a state or locality from imposing tax on businesses that merely have a customer there (we understand that some states and localities are now trying to do this). As a small businessperson, the resolution of this issue is very important to my business, Montana Gourmet Garlic. I hope you will support similar legislation that might be introduced in the Senate.

Montana Gourmet Garlic sells gourmet garlic to customers in numerous states over the internet and by telephone. My operation is small, as I grow all of our garlic by hand on our small family farm located in Clinton. I currently generate about \$12,000 in revenue each year (which is growing yearly), on which my husband and I pay Montana income tax. It's not a huge income but it allows me to be a stay at home mom while contributing a little to the family finances. I also hire 3-4 other people each fall to help out with the planting of the garlic and in the summer to harvest and clean each crop (mostly other stay at home moms).

Having to comply with the income tax laws of each jurisdiction in which our company has a customer would either put us out of business or force us to use a national distributor. In the latter situation, we would take a serious revenue hit because we would be selling at wholesale prices. This may sound drastic but there is simply no way that a business like ours could afford to operate if we had to file in each state where we have customers - we do not have the resources to sort through the requirements of each tax

law or even to file the requisite forms. Even more ludicrous is the fact that some states impose a minimum tax or fee that is more than the money we make on the sales in that state!

Federal legislation such as BATSA would ensure that this would not happen because small businesses like mine would only pay tax to the states where income is earned. I work hard to plant, harvest, and process our gourmet garlic by hand – all on our small family farm in Montana. It seems only right that we should pay tax to Montana where we are actually earning our income. But it makes no sense that New Jersey, for example, should be able to impose tax on our business merely because I happen to mail garlic to a customer located there.

I urge you to support legislation such as H.R. 3220 that would resolve this important issue. On another note, we applaud you for ignoring the political partisanship and supporting the current Medicare reform bill. It is refreshing to see a politician who is not just a puppet of his or her political party but, instead, someone who supports legislation that is good for Montanans, regardless of its party origin. Thank you for your time and attention.

Very truly yours,

Nicole & Eric Smart
Montana Gourmet Garlic
15999 East Mullan Road
Clinton, Montana 59825
www.montanagourmetgarlic.com

EXHIBIT

DATE 4.13.05SB 276

CARTER COUNTY COMMISSIONERS
PO BOX 315 * 214 PARK STREET**
EKALAKA, MONTANA 59324

PHONE (406) 775-8749

FAX (406) 775-8750

April 11, 2005

State of Montana
House of Taxation Committee
State Capitol
Helena, MT 59620

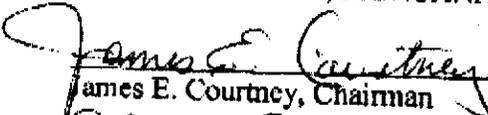
Dear Representatives: Waitschies, Branac, Iakc, Balyeat, Bixby, Butcher, Campbell, Cohcnour, Facey, Grinde, Groesbeck, Himmelberger, Lambert, McAlpin, Peterson, Raser, Ross, Sales, Warden, Wiseman, and Staffer -- Martin.

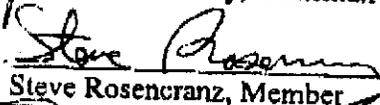
Carter County continues to support SB 276. Currently sixty percent of Carter County's Taxable Valuation is made up of Bentonite production. Our budgeting process is very dependent upon the current production of the companies involved. SB 276 would help to simplify the taxation of bentonite. We believe that the companies involved would appreciate the simpler version for calculating the taxes.

Carter County and Montana competes with Wyoming for bentonite mining. This is due to the current taxing structure of the company production records. SB 276 would assist the State and County in being more competitive with Wyoming with a simplified tax structure. It is our belief that with the passing of this bill, bentonite companies may increase their production in the county.

Please continue to support and defend SD 276. We appreciate your efforts in this area.

Sincerely,
BOARD OF COUNTY COMMISSIONERS
CARTER COUNTY, MONTANA


James E. Courtney, Chairman


Steve Rosencranz, Member


Bill Loehding, Member

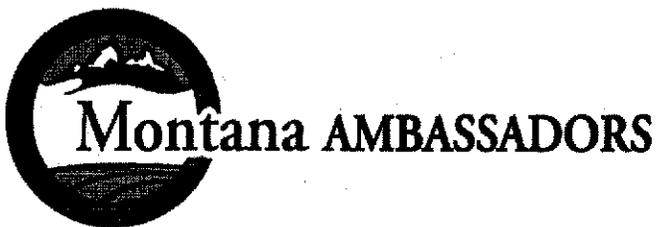


EXHIBIT _____
DATE 4.13.05
SB 520

April 13, 2005

The Honorable Karl Waitschies
Chairman
House Tax Committee
Montana State Capitol
Helena, Montana 59620

Dear Representative Waitschies:

We are writing to urge your committee to oppose any changes to the income tax schedules which became effective in January, 2005. The Montana Ambassadors fully supported the 2003 income tax changes. The Legislature did an exhaustive study before revising the rates in 2003 looking at income tax, property tax and sales tax in study committees comprised of a wide representation of experts and citizens. The current bills before you that would change the 2003 legislation have not had the considered study of a broad constituency. It seems very poor policy to go in and change tax schedules that have been in effect for less than four months, after waiting two years to implement, making Montana appear to have no consistent or reliable policy on tax issues. This sends a very bad message to business, retirees and all tax payers.

In addition, the proposed legislation would actually rebate income tax to those who pay no income tax. This is not good policy.

Tax policy is a powerful public sector tool for incenting positive economic growth. Montana is now in a region with states that have far more attractive income and capital gains tax rates: Wyoming, no income tax, Nevada, no income tax, North Dakota, no income tax, Washington, no income tax. We certainly do not want to be at a greater disadvantage by raising either our top marginal rate or our capital gains rate above the 2003 legislated rates.

The Montana Ambassadors represent 175 community and business leaders statewide committed to living and working in Montana. Thank you for your consideration of this critical issue to our state's future prosperity.

Sincerely,

Elizabeth C. Harris
President
Montana Ambassadors

Jon Marchi
Chairman
Ambassadors Legislative Committee