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T. DILLMAN

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

<p>DEPARTMENT OF MONTANA VETERAN OF FOREIGN WARS OF THE UNITED STATES, THE AMERICAN LEGION OF MONTANA, MONTANA PETROLEUM MARKETERS AND CONVENIENCE STORES ASSOCIATION, MONTANA WHOLESALE DISTRIBUTORS ASSOCIATION, U.S. SMOKELESS TOBACCO COMPANY, and R.J. REYNOLDS TOBACCO,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA, by and through BOB BROWN, in his official capacity as the Secretary of State, and MIKE McGRATH, in his official capacity as the Attorney General,</p> <p>Defendants.</p>	<p>Cause No. ADV-2004-559</p> <p>ORDER</p>
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Currently before the Court is a Complaint for Declaratory Judgment and Injunctive Relief. The lawsuit relates to Initiative No. 149 (I-149) which will appear on the November 2004 ballot. The initiative seeks to increase taxes on tobacco products

1 sold in Montana, with resulting revenues to be designated for specified programs
2 primarily related to health spending. Plaintiffs ask this Court to declare that defects in
3 the proposed initiative preclude its lawful submission to the Montana electorate.

4 Plaintiffs are two veterans organizations, two tobacco companies, and the
5 Montana associations of convenience stores and of wholesale distributors. They are
6 represented by Robert M. Murdo, Kati G. Kintli, and Valerie A. Thresher. Defendants
7 are State of Montana officials Bob Brown, Secretary of State, and Mike McGrath,
8 Attorney General (hereinafter the State), and are represented by Brian M. Morris,
9 Solicitor, and Anthony Johnstone, assistant attorney general.

10 In compliance with the mandate in section 13-27-316(3)(a), MCA, that
11 this type of action takes precedence over other matters in the district court, this case has
12 been handled as a priority matter, and the Court compliments the attorneys for
13 submitting their briefs on an expedited schedule, thereby permitting the Court to render
14 its decision quickly. The issues have been fully briefed and oral argument was heard on
15 August 26, 2004. Both sides agree that the case presents only legal issues and no fact-
16 finding is necessary.

17 BACKGROUND

18 The initiative at issue in this case was submitted by Helena attorney
19 Jonathan Motl on behalf of an organization called Healthy Kids Healthy Montana.
20 Pursuant to the various procedural requirements in Title 13, Chapter 27, MCA, the
21 proposed petition was submitted to and reviewed by the Legal Services Bureau of the
22 Montana State Legislative Services Division, the Office of the Secretary of State and the
23 Office of the Attorney General, and a fiscal note was issued by the Director of the
24 Office of Budget and Planning. The Attorney General's office, in accordance with
25 Section 13-27-312, MCA, reviewed the petition as to format and legal sufficiency, and

1 drafted a statement explaining the purpose of the initiative, statements of implication of
2 a vote for or against the initiative, and a fiscal statement based on the budget director's
3 fiscal note information. These statements were included in the petition which was
4 circulated for signatures. Following the signature-gathering process, the Secretary of
5 State's office approved the initiative for inclusion on the November 2004 ballot.

6 The provisions of the initiative impose an increase of approximately 140
7 percent in state taxes on tobacco products sold in Montana, and change the disposition
8 of such taxes. Currently, Section 16-11-119, MCA, provides that 8.3 percent or \$2
9 million, whichever is greater, of cigarette taxes are allocated to the state veterans'
10 nursing homes, 4.3 percent to the long-range building program, and the remainder to the
11 general fund. Section 16-11-202, MCA, provides that taxes on tobacco products other
12 than cigarettes currently go entirely to the general fund. The initiative amends these
13 sections so that 44 percent of cigarette taxes and 50 percent of taxes on other tobacco
14 products are allocated to a newly created "health and medicaid initiatives account" to be
15 administered by the Department of Public Health and Human Services (DPHHS); 2.6
16 percent of cigarette taxes will go to the long-range building program; the allocation in
17 Section 16-11-119 to the veterans' nursing homes is unchanged; and the remainder of
18 both types of tobacco taxes will go to the general fund.

19 Section 7 of the initiative creates the new health and medicaid initiatives
20 account and specifies that this account shall be used only to provide funding for the
21 following purposes: (a) maximizing enrollment of eligible children in the children's
22 health insurance program; (b) a new need-based prescription drug program for children,
23 seniors, chronically ill, and disabled persons; (c) increased medicaid services and
24 medicaid provider rates; and (d) new programs to assist small businesses with the costs
25 of providing health insurance benefits to employees, either through direct funding or by

1 offsetting loss of general fund revenue resulting from tax credits. The initiative provides
2 that the funds shall be used exclusively for the children's health insurance program and
3 for increased medicaid services and provider rates until the programs in (b) and (d) are
4 established.

5 DISCUSSION

6 Plaintiffs assert defects in the initiative on three grounds:

7 Count I: The proposed Statement of Purpose, Fiscal Statements and
8 Statement of Implication do not express a true and impartial explanation of the initiative
9 and could mislead the voter and create prejudice in favor of the measure;

10 Count II: The initiative constitutes an appropriation of money which is
11 prohibited by Article III, Section 4, of the Montana Constitution; and

12 Count III: The initiative contains more than one subject in violation of
13 Article V, Section 11, of the Montana Constitution.

14 The complaint further asserts in Count IV that the Attorney General's
15 determination of legal sufficiency was incorrect and asks this Court to overrule that
16 determination. Count V seeks injunctive relief enjoining the Secretary of State's office
17 from including the initiative on the November 2004 ballot.

18 The parties agree that the initiative is not being challenged on procedural
19 grounds. The only issues before this Court are the constitutionality of the initiative and
20 the legal sufficiency of the statements prepared by the Attorney General's office.

21 **Count I: Whether the Statement of Purpose, Fiscal Statement and Statements of** 22 **Implication Comply with Statutory Requirements**

23 Section 13-27-312(2), MCA, provides in relevant part that the attorney general
24 shall prepare (a) a statement, not to exceed 100 words, explaining the purpose of the
25 measure; and (b) statements, not to exceed 25 words each, explaining the implications of

1 a vote for and a vote against the measure. Subsection (3) states that the attorney general
2 must prepare a fiscal statement of no more than 50 words if a fiscal note was prepared.

3 The Attorney General prepared the following statement of purpose:

4 This initiative, effective January 1, 2005, would increase tobacco taxes
5 from 70¢ to \$1.70 per pack of cigarettes, 35¢ to 85¢ per ounce of moist
6 snuff, and 25% to 50% on all other tobacco products, and would reallocate
7 tobacco tax revenues. Forty-four percent of tobacco tax revenues would
8 fund: the children's health insurance program; a supplemental prescription
9 drug program for low-income children, seniors, chronically ill and
10 disabled persons; increased Medicaid services; and programs to help small
11 businesses pay employee health insurance costs. Remaining revenues
12 would continue to fund state veterans' nursing homes, the state building
13 program, and the general fund.

14 The statements of implication prepared by the Attorney General are:

15 FOR increasing tobacco taxes to fund new health insurance and Medicaid
16 programs.

17 AGAINST increasing tobacco taxes to fund new health insurance and
18 Medicaid programs.

19 The Attorney General's fiscal statement reads:

20 In fiscal year 2005 this initiative would raise \$38,400,000 for new health
21 insurance and Medicaid initiatives, and an additional \$400,000 for state
22 buildings and \$6,000,000 for the general fund. These revenues could
23 decrease over time as fewer persons consume tobacco. Funding for state
24 veterans nursing homes would remain at \$2,000,000.

25 Plaintiffs assert that these statements do not express a true and impartial
26 explanation of the measure, that the statements mislead voters and that the statements
27 create prejudice in favor of the ballot measure.

28 Section 13-27-312(4), MCA, sets forth the standard for these statements:

29 The statement of purpose and the statements of implication must
30 express the true and impartial explanation of the proposed ballot issue in
31 plain, easily understood language and may not be arguments or written so
32 as to create prejudice for or against the measure. Statements of
33 implication must be written so that a positive vote indicates support for
34 the measure and a negative vote indicates opposition to the measure.

1 The Attorney General has considerable discretion in drafting these statements. “[A]s
2 long as the Attorney General . . . uses ‘ordinary plain language,’ explains the general
3 purpose of the issues submitted, in language that is true and impartial, and not
4 argumentative or likely to create prejudice either for or against the issue, he has
5 followed the law. His discretion as to the choice of language . . . is entirely his.” *State*
6 *ex rel. Wenzel v. Murray*, 178 Mont. 441, 448, 585 P.2d 633, 637-38 (1978) (citation
7 omitted).

8 Plaintiffs first argue that the statement of purpose and the fiscal statement
9 mislead voters into believing that tobacco taxes would continue to fund the state
10 veterans’ homes at the current level of \$2 million. This argument is based on section 1
11 of the initiative, which would amend Section 10-2-417, MCA, to read:

12 (1) Revenue generated by 16-11-119 and allocated to the
13 department of public health and human services must be used to support
14 the operation and maintenance of the Montana veterans’ homes programs
15 or for the health and medicaid initiatives specified by [section 7].

16 (2) The legislature shall appropriate from the account established
17 in 16-11-119 the funds required for the operation and maintenance of the
18 Montana veterans’ homes or required for the health and medicaid
19 initiatives specified by [section 7].

20 Because this language is in the disjunctive, Plaintiffs argue, the legislature could decide
21 to use none of the cigarette tax funds for the veterans’ homes.

22 The Court agrees that this wording potentially creates uncertainty
23 regarding future funding of the veterans’ homes. The initiative’s amendments to Section
24 16-11-119 result in deposits to the special revenue fund for two different accounts, both
25 administered by DPHHS. Arguably only the account in Subsection 16-11-119(1)(a) is
“allocated” to DPHHS and “established” in Section 16-11-119 (the health and medicaid
initiatives account is actually established in section 7 which says that the account is
“administered” by DPHHS, and the long-range building account is established in Section

1 17-7-205 and is clearly not allocated to DPHHS), and those are the moneys which are
2 currently used for state veterans' nursing homes. Under the revised version of Section
3 10-2-417(1), however, the legislature could conceivably use the funds in that account
4 entirely for the health and medicaid initiatives, despite the designation in 16-11-119.
5 Similarly, the proposed amendment to Section 10-2-417(2) gives the legislature the
6 discretion to appropriate the funds in the veterans' homes account for the exclusive use
7 of the health and medicaid initiatives, thereby leaving the veterans' homes unfunded.

8 The same problem is encountered if Section 10-2-417 is read to include
9 both accounts in Section 16-11-119 administered by DPHHS – the legislature has the
10 discretion to appropriate the funds in those accounts for the health and medicaid
11 initiatives and not for the veterans' homes.

12 The State responds that this is a minor conforming amendment, and that
13 the only reasonable interpretation is that “or” is used in its inclusive sense to clarify the
14 reallocation, rather than to exclude one or the other funding recipient.¹

15 The Montana Supreme Court has considered the use of the word “or” in a
16 statute on at least three occasions. In *Contreras v. Fitzgerald*, 2002 MT 208, 311
17 Mont. 257, 54 P.3d 983, the court had to interpret the meaning of the word “or” in
18 Section 61-8-316, MCA. That statute provides in relevant part that the Department of
19 Transportation can indicate no-passing zones “by appropriate signs *or* markings on the
20 roadway When the signs *or* markings are in place and clearly visible to an ordinarily
21 observant person, every driver of a vehicle shall obey the directions of those signs.”
22 (Emphasis added.)

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25 The Court notes that the State cited no authority for this proposition.
Attorneys are reminded that it is their responsibility, not the Court's, to research legal
authority for their position.

1 The district court held that at the time of the accident between plaintiff and
2 defendant, defendant was passing in a no-passing zone because signs were posted and
3 clearly visible. Defendant argued, however, that road markings must be visible in
4 addition to posted signs for a portion of roadway to be properly designated a no-passing
5 zone. Since snow obscured the double yellow line, she argued that the portion of road in
6 question was not a no-passing zone and that she could therefore lawfully pass under the
7 requirements of Section 61-8-325, MCA.

8 The supreme court set forth and applied the following general rules of
9 statutory construction:

10 When we interpret a statute, our aim is "simply to ascertain and
11 declare what is in terms or in substance contained therein, not to insert
12 what has been omitted or to omit what has been inserted." Section 1-2-
13 101, MCA. Therefore, we determine legislative intent based on "the plain
14 meaning of the language used by the Legislature." We must reasonably and
15 logically interpret the statutory language, "giving words their usual and
16 ordinary meaning."

17 Here, we agree with the District Court that § 61-8-326, MCA, does
18 not require that both markings and signs be present to indicate a no-
19 passing zone. The word "or" connotes a disjunctive particle, and it is used
20 to express an alternative between two or more things. See BLACK'S LAW
21 DICTIONARY 1095 (6th ed. 1990); see also AMERICAN HERITAGE
22 DICTIONARY OF THE ENGLISH LANGUAGE 1271 (3d ed. 1996) (defining
23 "or" as a conjunction used to denote an alternative). When a requirement
24 contains a disjunctive, only one of the separately stated factors must exist.
25 Therefore, we conclude from the plain language of § 61-8-326, MCA, that
either signs or markings may designate a portion of road as a no-passing
zone.

20 *Contreras*, at ¶¶ 14-15 (citations omitted).

21 In *State ex rel. Goings v. City of Great Falls*, 112 Mont. 51, 112 P.2d
22 1071 (1941), the supreme court was called upon to interpret certain provisions of
23 Chapter 390, Revised Codes, 1935, including Section 5108.4 which provided that a
24 policeman who became disabled in the line of duty was to be transferred to the police
25 reserves if the injuries "in the opinion of the board of police commissioners *or* city

1 council" impaired his ability to act as a police officer. (Emphasis added.) The issue
2 before the Court was who had the power to make the finding of fact that the officer was
3 disabled within the meaning of this section. The police commission had found the
4 officer (relator) to be disabled, but the city of Great Falls argued that it had the ultimate
5 authority to make such a determination. The court held,

6 A study of the statutes convinces us that the relator's view is the
7 correct one. There are two reasons for that conclusion. The first is the use
8 of the disjunctive "or" in that portion of section 5108.4, Revised Codes,
9 under consideration. The city argues that the word "or" should be
10 considered as conjunctive so that the provisions of the statute would mean
11 that first there should be the hearing before the police commissioners, and
12 then a hearing before the city council, with both bodies having the power
to determine the facts, or that the city council could pass on it without any
action on the part of the commissioners. In the first place this is not the
ordinary interpretation to be given to the word "or." Its ordinary use is in
the disjunctive and unless the purpose of the statute and the intention of
the legislature are clearly otherwise, the courts ordinarily interpret the use
of the word "or" as having been used in the disjunctive.

13 *Id.* at 56, 112 P.2d at 1074.

14 The court went beyond the plain wording of the statute, however, and
15 looked at other statutes regarding police commissioners to determine legislative intent.
16 After concluding that the legislature had intended to make the police commission "a
17 body of considerable importance whose finding should have weight," the court stated,

18 To hold that the finding on this fact question by the police
19 commission constituted nothing more than a recommendation to the city
20 council, in addition to contravening what appears to be the clear language
21 of the statute, would to a large extent nullify the purpose of the legislature,
which in effect has placed policemen on civil service and by so doing has
attempted to remove them from the vagaries of the political winds.

22 *Id.* at 57, 112 P.2d at 1074.

23 In a much earlier case, *State ex rel. Patterson v. Lentz*, 50 Mont. 322,
24 146 P. 932 (1915), the supreme court considered an act creating an additional judgeship
25 in the fourth judicial district. Section 2 of the act provided that the governor shall

1 appoint a qualified person to hold the office "until the first Monday of January, 1917, or
2 until his successor is duly elected and qualified." (Emphasis added.) The relator was
3 appointed to and assumed the office in February 1913. The controversy occurred
4 because at the next general election in November 1914, respondent was elected to fill
5 the office and was sworn in on January 4, 1915, thereby displacing relator two years
6 before the date specified in the act. While the court resolved the case on constitutional
7 grounds, part of the discussion involved the use of the word "or" in the act:

8 There can be no doubt, we think that by the Act, supra, creating the
9 additional judgeship, the legislature intended that the appointment made by
10 the governor should hold good until the first Monday in January, 1917, and
11 until a successor should be elected and qualified. The person who drafted
12 the Act doubtless inadvertently used the disjunctive "or" instead of the
13 conjunctive "and," as found in the Constitution, where the clause following
14 the conjunctive is used in fixing the tenure of persons appointed to
15 vacancies in elective offices. The two other alternatives are either to
16 attach no meaning at all to this clause, or else to hold that the legislature
intended to provide by implication that a successor to the first appointee
should be chosen by the people at the next general election following the
appointment. The first of these latter alternatives we cannot accept,
because every word in a statute must be given some meaning, if it is
possible to do so; nor can we accept the second, because the legislature
would doubtless have expressly so provided if it had intended that a
successor to the governor's appointee should be elected at the next general
election.

17 *Id.* at 336-37, 146 P. at 936 (citations omitted).

18 This Court can derive no clear rule from these cases by which to interpret
19 the use of the word "or" in I-149. In *Contreras*, the supreme court confined its analysis
20 to the "plain meaning" standard and unequivocally held that "or" was disjunctive. In
21 *Goings*, the court looked at the clear language and the ordinary meaning of the word
22 "or," but also considered the overall purpose of the legislature. In *Patterson* the court
23 (in what is technically dicta, but is still enlightening in terms of statutory interpretation
24 principles) was apparently willing to rewrite "or" to read "and" based on the court's
25 determination that the only acceptable interpretation of the Act was that the use of the

1 word "or" was inadvertent.

2 As stated in *Contreras*, the primary principle of statutory interpretation is
3 the plain meaning rule – a statute must be construed according to the plain meaning of
4 the language therein. *State ex rel. Woodahl v. Dist. Ct.*, 162 Mont. 283, 511 P.2d 318
5 (1973). The intention of the legislature controls (in this case the intention of the
6 initiative's drafters), but such intent must be determined first from the plain meaning of
7 the words used, and if interpretation can be so arrived at, the court may go no further and
8 apply other means of interpretation. *State ex rel. Huffman v. Dist. Ct.*, 154 Mont. 201,
9 204, 461 P.2d 847, 849 (1969). When the language of the statute is plain, unambiguous,
10 direct and certain, the statute speaks for itself and there is nothing left for the court to
11 construe. *Hammill v. Young* 168 Mont. 81, 85-86, 540 P.2d 971, 974 (1975). The
12 statute must be construed according to the common and usual meaning of the words
13 therein. *Teamsters, Local 45 v. Cascade County Sch. Dist.*, 162 Mont. 277, 281, 511
14 P.2d 339, 241 (1973).

15 However, another fundamental rule requires the words of a statute to be
16 read in their context and with a view to their place in the overall statutory scheme. *Davis*
17 *v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The sense in which a word in the
18 statute is used must be determined from the context of the entire act. *State ex rel. Bd.*
19 *of Comm'rs v. Bruce*, 104 Mont. 500, 516, 69 P.2d 97, 104 (1937). Statutes relating to
20 the same subject matter must be construed together and be harmonized whenever
21 possible. *In re W.J.H.*, 226 Mont. 479, 484, 736 P.2d 484, 486-87 (1987). Courts
22 must reconcile conflicting statutory provisions and make them operative in accordance
23 with legislative intent, insofar as it is possible to do so. *State ex rel. Bennick v. Dist.*
24 *Ct.*, 167 Mont. 389, 391, 538 P.2d 1369, 1370 (1975).

25 Applying these rules to I-149, it is clear that despite the use of the word

1 "or" in Section 10-2-417, the drafters of the initiative did not intend to give the
2 legislature the discretion to change the level of funding for the veterans' nursing homes.
3 The initiative as originally written did not refer to Section 10-2-417. It was the code
4 commissioner who pointed out that this section would no longer be entirely accurate if
5 I-149 passed and recommended that the drafters amend it. Unfortunately he did not
6 suggest any specific language for the amendment, and the wording chosen by the drafters
7 was imprecise. The problem could have been avoided by simply changing the language
8 of Section 10-2-417 to read "16-11-119(1)(a)" instead of "16-11-119", rather than
9 adding language to both subsections; Section 10-2-417 is located in the portion of the
10 code dealing with veterans' affairs, and inserting references to health and medicaid
11 programs here is incongruous and confusing.

12 Despite the unfortunate choice of words in section 1 of the initiative,
13 I-149 clearly leaves unchanged Sections 16-11-119(1)(a) and (2), which provide that \$2
14 million of cigarette tax revenue is to be applied to the operation and maintenance of
15 state veterans' nursing homes. In light of this unchanged mandate, and the principle that
16 statutes relating to the same subject matter must be construed together, the Court
17 concludes that the purposes stated in Sections 16-11-119 (1)(a) and (c) limit the
18 discretion ostensibly granted to the legislature in Section 10-2-417. Funds deposited in
19 the veterans' nursing home account pursuant to Section 16-11-119(1)(a) must be used
20 for the operation and maintenance of the nursing homes, and funds deposited in the
21 health and medicaid initiatives account pursuant to 16-11-119(1)(c) must be used for the
22 programs specified in section 7 of the initiative. The word "or" is used merely to
23 distinguish between the two different accounts. To hold otherwise would render
24 meaningless the designation of the account in 16-11-119(1)(a) as being for the
25 operation and maintenance of the nursing homes, and, as noted in *Patterson*, every word

1 in a statute must be given some meaning, if it is possible to do so.

2 The Court concludes that the statement of purpose and the fiscal statement
3 drafted by the attorney general's office are not inaccurate or misleading by stating that
4 funding for the veterans' nursing homes will remain unchanged at \$2 million.

5 The second argument made by Plaintiffs regarding the statements drafted
6 by the attorney general's office concerns the statement that 44 percent of tobacco tax
7 revenue "would fund: the children's health insurance program; a supplemental
8 prescription drug program for low-income children, seniors, chronically ill and disabled
9 persons; increased Medicaid services; and programs to help small businesses pay
10 employee health insurance costs." Plaintiffs assert this statement is misleading because
11 two of these programs do not currently exist and may never exist, and argue that the
12 statement of purpose should reflect this. They also point out that the statement of
13 purpose is inaccurate in stating that 44 percent of tobacco tax revenue would go to these
14 programs, when in actuality it is 44 percent of cigarette tax revenue and 50 percent of
15 tax revenue on other tobacco products that the initiative designates for these programs.

16 The State responds that, in light of the "Procrustean" word limitation of
17 Section 13-37-312(2)(a), the statement's use of the phrase "would fund" captures "the
18 conditionality of all of the programs upon the Legislature taking action on the funds in
19 that account." (Defs.' Br. in Opp'n., at 8.) The State also argues that creation of these
20 programs is a "political near-certainty," whereas Plaintiffs' assertion that the programs
21 may never exist is far more speculative.

22 The Court concludes that these diametrically opposed assertions
23 exemplify the problem with the phrase "would fund" in the statement of purpose. The
24 reality is that two of these programs do not exist, and whether they will exist at some
25 future date is up to the legislature. The Court agrees with Plaintiffs that to the average

1 voter the phrase "would fund" means that the designated portion of tobacco tax revenues
2 would actually be spent for the four programs listed in the initiative, and does not convey
3 that expenditures would be conditional upon the legislature taking certain actions.
4 Unless the statement of purpose and statements of implication make it clear otherwise,
5 voters are likely to be misinformed as to the actual effect of a vote for or against the
6 initiative.

7 It is unrealistic to expect that voters will read and understand the
8 complicated text of this initiative, and even more unrealistic to expect that they will
9 thereby be informed that actual use of the money for these programs is dependent upon
10 the legislature choosing to take the necessary steps to create the programs and to
11 actually appropriate the funds. After all, this Court and a number of highly skilled
12 attorneys have spent a large amount of time and paper trying to determine exactly what
13 the language of this initiative means. To assert that voters would more easily understand
14 the implications of the text of the initiative is disingenuous. *See e.g., Sawyer Stores v.*
15 *Mitchell*, 103 Mont. 148, 161, 62 P.2d 342, 348-49 (1936).

16 The Court concludes that the phrase "would fund" in the statement of
17 purpose is misleading and does not express the true and impartial explanation of the
18 initiative in plain, easily understood language. Similarly, the statements of implication
19 do not reflect the conditional nature of money actually being spent for these programs.
20 The statements must therefore be rewritten by this Court, pursuant to Section 13-27-
21 316(3)(a), MCA:

22 The Court hereby amends the statement of purpose to read as follows:

23 This initiative increases tobacco taxes by approximately 140%, to \$1.70
24 per pack of cigarettes, 85¢ per ounce of moist snuff, and 50% on all other
25 tobacco products, and changes the use of these revenues. The initiative
reserves approximately 45% of these revenues for: additional enrollment
in the children's health insurance program; increased Medicaid services

1 and provider rates; and, if created by the legislature, a supplemental need-
2 based prescription drug program for certain groups and programs to help
3 small businesses provide employee health insurance. Remaining revenues
4 are allocated to state veterans' nursing homes, the state building fund, and
5 the general fund.

6 This statement more accurately reflects the fact that two of the programs will receive
7 funding only if the legislature decides to create them. Because this necessitated using
8 additional words and the statement of purpose as drafted by the Attorney General was
9 already at the mandated limit of 100 words, the Court changed other wording in the
10 statement in order to remain within the 100-word limit. The Court also corrected the
11 percentage of tobacco tax revenues that would be allocated to the listed programs, which
12 the State acknowledged was incorrect.

13 The statements of implication for and against the measure are rewritten as
14 follows:

15 FOR increasing tobacco taxes and changing the use of tobacco tax
16 revenues to include specific health insurance and Medicaid programs.

17 AGAINST increasing tobacco taxes and changing the use of tobacco tax
18 revenues to include specific health insurance and Medicaid programs.

19 These are the statements that the Court will certify to the Secretary of State's office,
20 pursuant to Section 13-27-316(3)(a), as meeting the requirements of Section 13-27-
21 312. The fiscal statement as drafted by the Attorney General will remain unchanged.

22 **Count II: Whether I-149 Is an Appropriation of Money in Violation of Article III,
23 Section 4, of the Montana Constitution**

24 Plaintiffs assert that I-149 is an appropriation of money and therefore cannot be
25 submitted to the voters. Article III, Section 4(1), of the Montana Constitution states,
"The people may enact laws by initiative on all matters except appropriations of money
and local or special laws."

1 The definition of appropriation in this context is “well-established and
2 quite limited. A long line of Montana cases has established that ‘appropriation’ refers
3 only to the authority given to the legislature to expend money from the state treasury.”
4 *Nicholson v. Cooney*, 265 Mont. 406, 415, 877 P.2d 486, 491 (1994). “‘Appropriation’
5 means an authority from the law-making body in legal form to apply sums of money out
6 of that which may be in the treasury in a given year, to specified objects or demands
7 against the state.” *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 78, 195 P. 841, 845
8 (1921).

9 In *State ex rel. Haynes v. Dist. Ct.*, 106 Mont. 470, 78 P.2d 937 (1938),
10 the measure at issue was a referendum on an act passed by the legislature to regulate
11 liquor traffic in Montana. The act also provided that certain fees and fines would be
12 imposed and apportioned by the state treasurer, 50 percent to the public school general
13 fund and 50 percent to the public welfare fund. Opponents obtained sufficient signatures
14 to have it submitted to the people, but a district court found that the act related to an
15 appropriation of money and therefore was not a referable measure. The supreme court
16 reversed the district court on that issue, and in its decision gave a thorough discussion of
17 the parameters of the constitutional prohibitions against submitting appropriation
18 measures to the voters.

19 The supreme court quoted the definition of appropriation in *Bonner* and a
20 similar discussion from *State ex rel. Tipton v. Erickson*, 93 Mont. 466, 19 P.2d 227,
21 229 (1933), wherein the court approved an earlier dictionary definition of appropriation
22 as “the act of setting apart or assigning to a particular use or person; the application to a
23 special use or purpose, as of money to carry out some public object.” *Haynes*, 106
24 Mont. at 477-78, 78 P.2d at 941.

25 The court then framed the question presented as: “Did the Act in itself

1 authorize the expenditure of the money received into the state treasury under this Act
2 without the aid of additional legislative action?" While the act was the vehicle for
3 bringing money into the fund, the court stated, it did not thereby authorize the
4 expenditure of that money unless the money, when placed in that fund, could be
5 expended without further legislative sanction. *Id.* at 477, 78 P.2d at 942.

6 The court also discussed the distinction between an appropriation and an
7 allocation:

8 There is a very decided difference between an appropriation and an
9 allocation. This distinction was pointed out by the supreme court of
10 Arizona. There the court held that money received for certain tax
11 collections was apportioned but was not appropriated by the Act in
12 question; that the money could not be disbursed without further
13 legislation. The court then proceeded to define an appropriation as "the
14 setting aside from the public revenue of a certain sum of money for a
15 specified object in such manner that executive officers of the government
16 are authorized to use that money, and no more, for that object, and no
17 other." It also said: "It will therefore be seen that . . . to make the
18 'appropriation,' there must be added to the dividing and assigning of funds,
19 which constitutes the 'apportionment,' the specific authority to spend."

20 *Id.* at 480, 78 P.2d at 943, citing *Hunt v. Callaghan*, 32 Ariz. 235, 257 P. 648, 649
21 (1927). The court ultimately found that the act was not an appropriation of money and
22 therefore was referable.

23 The question before this Court is the same as that in *Haynes*: Does the
24 initiative in itself authorize the expenditure of the money received into the state treasury
25 under this act without the aid of additional legislative action? Stated another way, can
26 DPHHS spend the money placed in the health and Medicaid initiatives fund without
27 further legislative sanction?

28 Money deposited in the special revenue fund may be paid out of the
29 treasury only on appropriation made by law. Section 17-8-101(1), MCA.

30 "Appropriation made by law" means an appropriation made by legislative enactment, by

1 budget amendment or a statutory appropriation made by permanent law. Section 17-7-
2 501, MCA. A statutory appropriation is an appropriation made by permanent law that
3 authorizes spending by a state agency without the need for a biennial legislative
4 appropriation or budget amendment; to be effective, the law must specifically state that a
5 statutory appropriation is made. Section 17-7-502, MCA.

6 Section 7 of I-149 provides that the health and medicaid initiatives
7 account is to be administered by DPHHS, specifies what funds must be deposited into
8 the account, and provides that the account shall be used only to provide funding for
9 certain programs, but none of this authorizes the actual expenditure of a specific amount
10 of money for a specific purpose, nor does the measure attempt to give this authority to
11 DPHHS. This measure is not self-executing and does not qualify as a statutory
12 appropriation as defined in Sections 17-7-501 and -502. It will be up to the legislature to
13 decide how much, if any, money is actually spent for each program and to authorize such
14 expenditures. Because further legislative action is required before these funds can be
15 spent, this initiative is not an appropriation of money.

16 Plaintiffs argue that because sections 7(3)(c) and 7(5) of the initiative
17 require that these funds be used for increased Medicaid services and provider rates, the
18 initiative in effect mandates the legislature to appropriate a certain level of general
19 funding to Medicaid services before it could spend any of the new revenue. This,
20 Plaintiffs assert, "goes beyond merely allocating tax revenues to specific purposes to
21 actually appropriating those funds by controlling the expenditures of those funds." (Pls.'
22 Reply Br., at 9.) The Court finds, however, that this reasoning imposes too broad a
23 definition of what constitutes an appropriation. These sections do not impose an
24 obligation on the legislature to fund Medicaid services at a certain level; they merely
25 state that the new revenues cannot be used as a substitute for existing Medicaid funding.

1 The legislature is still free to decide how much money will actually be spent on
2 Medicaid services and, in fact, could choose to not use these new moneys for Medicaid
3 services at all.

4 Plaintiffs also argue that section 7(4) of the initiative amounts to an
5 appropriation because it specifies that the funding "shall be used" exclusively for the
6 purposes of maximizing enrollment in the children's health insurance program and for
7 increased Medicaid services and provider rates, until the other two programs are
8 established. Again, however, this is a limitation on how the money can be used, but it is
9 not an appropriation – it is up to the legislature to actually appropriate the funds by
10 authorizing specific amounts of money for either or both of the existing programs if it
11 does not create the new programs.

12 The Court concludes that I-149 does not violate Article III, Section 4, of
13 the Montana Constitution.

14 **Count III: Whether I-149 Contains More than One Subject in Violation of Article**
15 **V, Section 11, of the Montana Constitution**

16 Plaintiffs contend that the proposed initiative violates the "single subject
17 rule" set forth in Article V, Section 11(3), of the Montana Constitution. That section
18 provides:

19 Each bill, except general appropriation bills and bills for the
20 codification and general revision of the laws, shall contain only one
21 subject, clearly expressed in its title. If any subject is embraced in any act
and is not expressed in the title, only so much of the act not so expressed
is void.

22 This requirement applies to initiatives as well as to bills in the legislature. *State ex rel.*
23 *Steen v. Murray*, 144 Mont. 61, 66, 394 P.2d 761 (1964).

24 The Montana Supreme Court has frequently interpreted this provision. In
25 addressing the purpose of the identical provision in the 1889 Montana Constitution, the

1 Court stated:

2 [T]hose purposes are to restrict the Legislature to the enactment of laws
3 the subjects of which are made known to the lawmakers and to the public,
4 to the end that any one interested may follow intelligently the course of
5 pending bills to prevent the legislators and the people generally being
6 misled by false or deceptive titles, and to guard against the fraud which
7 might result from incorporating in the body of a bill provisions foreign to
8 its general purpose and concerning which no information is given by the
9 title.

7 *City of Billings v. Smith*, 158 Mont. 197, 204, 490 P.2d 221, 225 (1971), citing
8 *Johnson v. Meagher County*, 116 Mont. 565, 570, 155 P.2d 750, 752 (1945).

9 In *State v. Morgan*, 1998 MT 268, 291 Mont. 347, 968 P.2d 1120, the
10 Montana Supreme Court looked to the policy behind the constitutional provision: "The
11 purpose of requiring singleness of subject is to prevent the practice of embracing in the
12 same bill incongruous matters which have no relation to each other or to the subject
13 specified in the title, so that measures may not be adopted without attracting attention to
14 them." *Id.* at ¶ 20, quoting *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 398, 632 P.2d
15 300, 311 (1981).

16 In *Evers v. Hudson*, 36 Mont. 135; 92 P. 462 (1907), the court stated that
17 the object of the constitutional provision requiring a single subject:

18 is not to embarrass honest legislation, but to prevent the vicious practice,
19 which prevailed in states which did not have such inhibitions, of joining in
20 one Act incongruous and unrelated matters. The rule of interpretation now
21 quite generally adopted is that, if all parts of the statutes have a natural
22 connection and can reasonably be said to relate, directly or indirectly, to
23 one general and legitimate subject of legislation, the Act is not open to the
24 charge that it violates this constitutional provision; and this is true no
25 matter how extensively or minutely it deals with the details looking to the
26 accomplishment of the main legislative purpose.

23 *Id.* at 145-46, 92 P. at 465.

24 Similarly, in *Merchants' Nat'l Bank v. Dawson County*, 93 Mont. 310,
25 19 P.2d 892 (1933), the supreme court stated, "[w]here all of the different parts of a

1 statute have a natural connection and relate directly or indirectly to one legitimate
2 subject of legislation, the Act is not invalid as containing more than one subject." *Id.* at
3 333, 19 P.2d at 900.

4 Initiative No. 149 addresses the single subject of tobacco taxes. The
5 measure increases tobacco taxes and allocates those revenues to specific accounts.
6 Although the intended accounts may not be directly related to tobacco, they are
7 reasonably related, since they involve health services. The initiative does not contain
8 such incongruity of matters that would deceive or mislead.

9 This Court concludes that I-149 does not violate Article V, Section 11(3),
10 of the Montana Constitution.

11 ORDER

12 COUNT I of the Complaint requesting declaratory judgment that the
13 statement of purpose, statements of implication and fiscal statement are legally
14 deficient, is GRANTED in part and DENIED in part in accordance with this decision.
15 The following Statement of Purpose and Statements of Implication shall be placed on the
16 ballot pursuant to Section 13-27-316(3)(b), MCA:

17 This initiative increases tobacco taxes by approximately
18 140%, to \$1.70 per pack of cigarettes, 85¢ per ounce of
19 moist snuff, and 50% on all other tobacco products, and
20 changes the use of these revenues. The initiative reserves
21 approximately 45% of these revenues for: additional
22 enrollment in the children's health insurance program;
23 increased Medicaid services and provider rates; and, if
24 created by the legislature, a supplemental need-based
25 prescription drug program for certain groups, and programs
to help small businesses provide employee health insurance.
Remaining revenues are allocated to state veterans' nursing
homes, the state building fund, and the general fund.

24 FOR increasing tobacco taxes and changing the use of
25 tobacco tax revenues to include specific health insurance
and Medicaid programs.

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AGAINST increasing tobacco taxes and changing the use of tobacco tax revenues to include specific health insurance and Medicaid programs.

The Court will certify this language to the Secretary of State in a separate order in Lewis and Clark County Cause No. SB-2004-8-2.

COUNT II, requesting declaratory judgment that Initiative No. 149 is constitutionally defective because it contains appropriations of money, is DENIED.

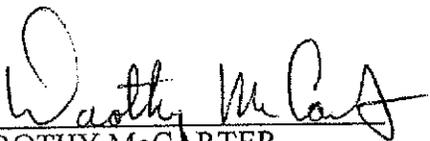
COUNT III, requesting declaratory judgment that Initiative No. 149 is constitutionally defective because it contains multiple subjects, is DENIED.

COUNT IV, requesting that this Court overrule the Attorney General's determination that Initiative No. 149 is legally sufficient, is DENIED.

COUNT V, requesting that the Secretary of State be enjoined from: (i) placing Initiative No. 149 on the next general election ballot; (ii) certifying a general election ballot containing Initiative No. 149, and (iii) delivering a voter pamphlet containing Initiative No. 149, is DENIED.

IT IS SO ORDERED.

DATED this 31 day of August, 2004.


DOROTHY McCARTER
District Court Judge

pc. Robert M. Murdo/Kati G. Kintli/Valerie A. Thresher
Mike McGrath/Brian M. Morris/Anthony Johnstone

T/DMc/VFW V STATE ORDER.WPD