EXHIBIT 5
DATE 3-18-09
HB 642

Revenue and Transportation Interim Committee

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60th Montana Legislature

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December 15, 2008

TO: Members of the Revenue and Transportation Interim Committee
FROM: Lee Heiman
RE: Omimex Supreme Court Decision

On December 2, 2008, the Montana Supreme Court filed it's decision in Omimex Canada, Ltd. v. Montana Department of Revenue, 2008 MT 403.[1] The Department is requesting a rehearing on the case.

The case involved the taxation of property belonging to Omimex and used in natural gas production with a little oil production. The following facts regarding Omimex and the property are summarized from the opinion. There were five properties belonging to Omimex characterized as gas fields that were not physically connected together with Omimex-owned property. Each of the five properties has low-pressure gathering lines that move gas, owned by both Omimex and others, from wells to central collecting points for further transmission in high-pressure lines. The collected gas was sold to a company called WPS for transport on high-pressure lines owned by a third party. Three of the five properties were centrally assessed when they were under ownership of MPC. All were centrally assessed at the time of the action, and the value was not contested.

The Department of Revenue contends that the property should be treated as class 9 property under 15-6-141, MCA, and be taxed at 12% because, as stated in the opinion, it is centrally assessed. Omimex contends the property should be locally assessed and treated as class 8 property under 15-6-138, MCA, and taxed at 3%.

The original District Court proceedings challenged the central assessment of the property and whether the assessment met equal protection and due process requirements of the U.S. and Montana Constitutions. The holding by the Montana Supreme Court sidestepped these questions. The Court limited its decision to a statutory interpretation based on classification

[1] The complete text of the opinion is on the Montana Supreme Court website at http://fnweb1.isd.doa.state.mt.us/idmws/custom/sll/SLL_FN_Home.htm. Enter Case Number DA 07-0356, choose "Omimex...", then choose "Opinion/Order". This page also has links to the documents for rehearing of the case. More documents will be available as they are filed.

language and facts concerning the property.

The Court, at ¶ 18, stated "[r]egardless of whether Omimex's property is centrally or locally assessed, its tax rate class is determined by the application of the of the physical attributes of Omimex's Montana properties to the terms of the property classification statutes §§ 15-6-138 and -141, MCA".

The Court then set forth the provisions it found applicable in the two statutes [emphasis mine]:

> Pursuant to 15-6-138, MCA,
> "(1) Class eight property includes . . .
> (c) all oil and gas production machinery, fixtures, equipment, including pumping units, oil field storage tanks, water storage tanks, water disposal injection pumps, gas compressor and dehydrator units, communication towers, gas metering shacks, treaters, gas separators, water flood units, gas boosters, <u>and similar equipment that is skidable, portable, or movable</u>, tools that are not exempt under 15-6-219, and supplies except those included in class five; . . .
> (n) all other property that is not included in any other class in this part, except that property that is subject to a fee in lieu of a property tax."
>
> Pursuant to 15-6-141, MCA,
> "(1) Class nine property includes . . .
> (b) allocations for centrally assessed natural gas companies <u>having a major distribution system</u> in this state; and
> (c) <u>centrally assessed companies' allocations</u> except:
> (i) electrical generation facilities classified under 15-6-156;
> (ii) all property classified under 15-6-157;
> (iii) all property classified under 15-6-158 and 15-6-159; . . .
> (2) Class nine property is taxed at 12% of market value. "

The Court used three rules of construction: in ¶ 21, it stated that "the expression of one thing [in a statute] implies the exclusion of another" and in ¶ 25, it set out that tax statutes must be construed in favor of the taxpayer and that a specific description prevails over a general catch-all provision. The pivotal factor in the decision was the language in 15-6-141(1)(b), MCA. If natural gas companies "having a major distribution system in this state" were class 9 properties, then by exclusion, all natural gas companies that did not have a major distribution system must be taxed in another class. They would not fall under subsection (1)(c), "centrally assessed companies' allocations", because that general phrase is subservient to the specific language of subsection (1)(b).

The Court, in ¶ 26, does not define a major distribution system, but states that "Omimex's properties are manifestly designed not to distribute, but rather to accumulate natural gas from hundreds of individual wells to central points where the gas is commingled and delivered to a single buyer." The decision then states "[t]herefore, Omimex's properties, regardless of whether

they are centrally or locally assessed should be classified as § 15-6-138(1)(c) or (n), MCA, class eight property subject to a 3% tax rate". There is no other discussion of the applicability of class 8 classification. As quoted earlier, 15-6-138(1)(c), MCA, is a laundry list of oil and gas production equipment that contains the phrase "and similar equipment that is skidable, portable, or moveable". That subsection was added by Chapter 551, Laws of 1999. The title of that act read:

> "AN ACT CLARIFYING THAT SKIDABLE, PORTABLE, OR MOVABLE OIL FIELD EQUIPMENT IS CLASS EIGHT EQUIPMENT; AMENDING SECTION 15-6-138, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

Under the rules of construction cited by the Court in interpreting 15-6-141, MCA, that the expression of one thing implies exclusion of another and that a specific provision prevails over a general provision, only skidable, portable, or movable oil and gas production equipment is taxable as class 8 property and other oil and gas property must be taxable in a different class. The catchall subsection, 15-6-138(1)(n), MCA, is no more applicable than the catchall provision of 15-6-141(1)(c), MCA.

The decision may have serious financial consequences and even more if it is applied to similar properties. Since the decision is based on statutory interpretation and not on constitutional principles, it can be changed by legislation. As pointed out in ¶ 25 of the decision, the Legislature can delete 15-6-141(1)(b), MCA, or modify the subsection to remove the qualifier "having a major distribution system in this state".

The decision also does not alter the present state of the central assessment system. If central assessment had been modified, the decision would have had a much greater impact affecting business property in many categories and tax classes. Prior to this decision, there was at least some centrally assessed property taxed in classes 1, 5, 9, 12, 13, 14, 15, and 16, as well as the coal gross proceeds tax.

In summary, the decision was decided purely on the grounds of statutory construction and the Legislature has total discretion to change the way this type of property is taxed.