

September 27, 2006

Ms. Kathy Bessette  
Mr. Douglas Kaercher  
Mr. Mike Anderson  
Hill County Commissioners  
Hill County Courthouse  
315 Fourth Street  
Havre, MT 59501

Dear Commissioners:

You have requested a Letter of Advice in answer to the following questions:

1. Is the prohibition on the use of public resources as set forth in Mont. Code Ann. § 2-2-121, and in particular subsection (3), as it relates to the passage of a ballot initiative, applicable to the Montana Association of Counties (“MACo”) because the association is partially funded with dues paid with public funds by member counties as authorized in Mont. Code Ann. § 7-5-2141?
2. Is MACo bound by the provisions of Mont. Code Ann. §§ 2-2-101 through -144, the Montana Code of Ethics?
3. Can MACo make expenditures or contributions in connection with ballot initiatives, or voice its support or opposition to ballot initiatives?
4. Does a member of the Hill County Commission violate Mont. Code Ann. § 2-2-121 (3) by authorizing the payment of dues in accordance with Mont. Code Ann. § 7-5-2141, or by serving as an officer of the association, if the association uses any part of the dues paid to solicit support or opposition to the passage of a ballot initiative? Is this a violation of the use of public resources, or do the

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public funds used to pay dues lose their identity as public money  
when transferred to the association?

The answers to your questions are developed through the application of the rules of statutory construction as found in our code and interpreted by our Supreme Court. The fundamental rule of construction requires that the intention of the legislature must be pursued if possible. Mont. Code Ann. § 1-2-102. The intention of the legislature is the “cardinal principle of statutory construction.” Baker Nat’l Ins. Agency v. Montana Dep’t of Revenue, 175 Mont..9, 15, 571 P.2d 1156, 1160 (1977). In determining legislative intent, resort is made first to the language of the statute in question. This determination is to be made “from the plain meaning of the words used, and if interpretation of the statute can be so determined the courts may not go further and apply any other means of interpretation.” White v. White, 195 Mont. 470, 473, 636 P.2d 844, 845-46 (1981). Furthermore, the intention may not be found by inserting what has been omitted or omitting what has been inserted. Mont. Code Ann. § 1-2-101.

## I.

Questions numbered 1 and 2 will be analyzed and addressed together.

The Montana Code of Ethics is found at Mont. Code Ann. §§ 2-2-101 through -144. The Code was initially enacted in 1977 and has been amended several times since then. The statement of purpose specifies the scope and focus of the law:

The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. The code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category.

Mont. Code Ann. § 2-2-101. This statement of purpose strongly suggests that the code is designed to prohibit certain conduct by legislators, public officers, and public employees. The statement of purpose makes no mention of corporation or organizations. This suggestion is supported by other sections of the code. The definitions section defines “public employees” and “public officers.” Mont. Code Ann. § 2-2-102(7) and (8). Neither definition includes corporations or organizations.

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The Montana Code of Ethics prohibits certain conduct on the part of legislators, public officers and public employees. The Montana Association of Counties is a corporation organized under the federal tax statutes as a 501(c)(3) corporation. The plain language of the statute does not address conduct by a corporation.

The Montana Association of Counties receives part of its funding from the counties of the state as authorized by Mont. Code Ann. § 7-5-2141. In other instances, the legislature has elected to regulate the behavior of organizations that receive public funding. For example, Mont. Code Ann. § 2-3-203(1) applies the open meeting requirement to organizations that receive some or all of their funding from the public. In the latter statute the intent to regulate was clearly expressed. The Code of Ethics contains no such expression with respect to organizations like MACo. Consequently, none can be found.

The Montana Association of Counties is not bound by the provisions of Mont. Code Ann. §§ 2-2-101 through -144. It follows that the prohibition on the use of public resources as set forth in Mont. Code Ann. § 2-2-121 does not apply to the organization. Even if one assumed that the public funding from the counties retained its public character after receipt by MACo, the Montana Code of Ethics places no restrictions on the use of the funds because MACo is not a public officer, employee or a legislator. In interpreting a statute, one may not insert into a statute that which was omitted from the statute. When the legislature passed the Code of Ethics, it chose not regulate corporations that receive part of their funding from public sources. No other intent can be inferred from the plain language of the law.

## II.

The issue of corporate support or contributions in the arena of ballot initiatives has been the subject of litigation in our courts and action by our legislature. In 1996, Montana voters approved Initiative 125, a measure that prohibited corporate contributions or expenditures in connection with a ballot issue. In 1998 a number of corporations and interested business groups challenged the prohibition. The Ninth Circuit Court of Appeals ultimately reviewed the case and held that the prohibitions were unconstitutional restrictions on corporate political speech. Montana Chamber of Commerce v. Argenbright, 226 F.3d 1049 (9th Cir. 2000), cert. denied, 534 U.S. 817 (2001). Subsequently, the Code was amended by the 2003 legislature to strike the offending language in section 13-35-227. Today, this section of our law contains no restriction on contributions or expenditures by corporations in connection with ballot issues.

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Given the history of this issue, it is beyond question that a corporation may make contributions and expenditures in connection with ballot initiatives and may voice its position on ballot initiatives. The Montana Association of Counties may avail itself of this right.

### III.

County participation in MACo is specifically authorized by statute. Mont. Code Ann. § 7-5-2141. The statute permits county membership, permits membership fees to be paid by county funds and suggests that membership in the organization shall be for the “furtherance of good government and the protection of county interests.” Nothing in the statute restricts the operation of an organization such as MACo if it is acting to further these two general goals.

The statutory context of the operation of county governments will necessarily have a substantial impact upon county interests and upon “good government” as provided by the counties. Both the actions of the legislature and the actions of the voters as expressed through ballot initiative will therefore be a primary concern of an organization contemplated by this statute. It is therefore not unexpected that an organization such as MACo would actively involve itself with either ballot initiatives or legislation that affected county interests. And it would be inconsistent and illogical for the legislature to specifically authorize payment of county funds to such an organization while harboring a secret intent to prohibit a commissioner from actually making the payment through application of the Code of Ethics statute. Furthermore, once the authorized payment of dues is made, the funds become the property of MACo. They may then be used as permitted under the Argenbright decision.

The counties of the state have a statutory right to join an organization like MACo. The counties have a statutory right to pay membership in the organization from county funds. The legislature has not expressed any intent to prohibit the use of these funds in campaigns on ballot issues. The organization itself has a constitutionally-protected right to involve itself in ballot issues. These facts lead to one conclusion: A county commissioner does not violate Mont. Code Ann. § 2-2-121(3) by authorizing the payment to MACo of dues from county funds if MACo then exercises its constitutional right to participate in the ballot issue process. This conclusion applies both to the official acts of a commissioner and to any acts that may be taken by that commissioner as an officer of the organization.

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This letter is a letter of advice and not a formal Opinion of the Attorney General.

Very truly yours,

JON ELLINGSON  
Assistant Attorney General

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