PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

# Montana Legislative Services Division

## Legal Services Office

October 4, 2005

TO: Economic Affairs Interim Committee

FROM: Greg Petesch

RE: Senate Bill No. 133

I am writing in response to your request for an analysis of Senate Bill No. 133 and an analysis of an August 10, 2005, memorandum to David Ewer concerning the constitutionality of Senate Bill No. 133. Senate Bill No. 133 is the Montana Equity Capital Investment Act, enacted as Chapter 537, Laws of 2005.

The Act is a blending of public and private activity for the purpose of benefitting Montana by attracting out-of-state venture investment funds interested in providing equity capital and near-equity capital to Montana entrepreneurs and economic innovators in Montana. Senate Bill No. 133 provides investment incentives for the creation of a private seed and venture capital industry in Montana to fund academic, technological, and innovative startup companies and other companies that are expanding or restructuring. A further purpose of the Act is to encourage lead local investors with which out-of-state venture investors can partner in a way that strengthens the state's economy and builds a significant, permanent capital resource available to serve the needs of Montana businesses. The Act creates a Montana Equity Capital Investment Board, as a state entity, and authorizes the Board to contract with a designated investor group to implement an investment plan approved by the Board. The investor group is directed to organize, capitalize, and administer the Montana Equity Fund. The designated investor group is directed to contract with investors to provide capital for the Fund. The Act provides for contingent deferred tax credits to investors. An investor in the Fund receives a certificate for a contingent deferred tax credit. The certificate memorializes a scheduled return of capital and a rate of return on the capital. The certificate reflects a tax credit that is registered with the Department of Revenue. If the actual return of capital or the rate of return on the capital does not meet the scheduled rate of return in the contract, the investor is entitled to redeem the certificate as a tax credit against individual income taxes, corporate income or license taxes, or insurance premium taxes, as applicable.

The memorandum to David Ewer addresses three areas of the Montana Constitution as areas of concern with regard to Senate Bill No. 133. I will address each of those areas in turn. The beginning point in any analysis of the constitutionality of legislation is the presumption that the legislation is constitutional. Statutes are presumed to be constitutional, and the Supreme Court will avoid an unconstitutional interpretation if possible. A party challenging the constitutionality of a statute has the burden of proving it unconstitutional beyond a reasonable doubt, and any doubt will be resolved in favor of the statute. Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners, 1999 MT 263, 296 Mont. 402, 989 P. 2d 800 (1999), following Steer, Inc. v. Department of Revenue, 245 Mont. 470, 803 P. 2d 601 (1990), State v.

Martel, 273 Mont. 143, 902 P. 2d 14 (1995), Davis v. Union Pac. RR Co., 282 Mont. 233, 937 P.2d 27 (1997), and State v. Nye, 283 Mont. 505, 943 P. 2d 96 (1997).

Article V, section 11(5), of the Montana Constitution provides that an appropriation may not be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state. Article VIII, section 1, of the Montana Constitution provides that taxes must be levied by general laws for public purposes. These provisions are often construed in conjunction with each other in determining the propriety of "economic development" legislation.

The question of whether a particular purpose for which taxes may be levied and collected is a public one is for the Legislature in the first instance, and courts will indulge every reasonable presumption in favor of the legislative decision in this respect. Lewis & Clark County v. Industrial Accident Board, 52 Mont. 6, 155 P. 268 (1916). The words "public purposes" are synonymous with "governmental purposes". State ex rel. Mills v. Dixon, 66 Mont. 76, 213 P. 227 (1923).

Shortly after the enactment of the 1972 Montana Constitution, two cases interpreted the two constitutional provisions concerning the limits of the appropriation and taxation power under consideration. The 1975 Legislature enacted Chapter 533, Laws of 1975, which provided for development of renewable natural resources. Bonds were to be issued and the money used by the Board of Natural Resources and Conservation (now abolished) to make loans to farmers and ranchers for the development and preservation of natural resources. The loans could be made only on proper application to and recommendation by the Department of Natural Resources and Conservation. Total control over granting the loans was vested in the Department. The legislation was challenged on several constitutional grounds. In Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), the Montana Supreme Court held that when the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power given to the agency. With the exception of section 90-2-105, MCA (now repealed), the provisions of the statutes involved here were sufficiently clear, definite, and certain to enable the agency to know its rights and obligations. Section 90-2-105, MCA, providing that a fund created by the sale of revenue bonds from which the Board of Natural Resources and Conservation was to make loans to farmers and ranchers "for any worthwhile project" for conservation and other renewable resources, was an unconstitutional delegation of legislative power because the standards and guides laid down by this statute were insufficient. In effect the only limit on the Board's power to loan money was its subjective determination of whether a project was worthwhile. However, the use of the bond money authorized by the legislation for the purpose of lending money to private individuals was not violative of Article V, section 11(5), of the Montana Constitution as authorizing an appropriation to a private individual not under control of the state. The delegation defect in the legislation was corrected and the program operated under the original legislation until 1993. In 1993, the Legislature enacted Chapter 478, Laws of 1993, which combined the water development and renewable resource development programs.

The 1975 Legislature also enacted Chapter 461, Laws of 1975, the Housing Act of 1975. The Act established the Board of Housing. The Board was authorized to issue revenue bonds and inject the proceeds of the bonds into the state's mortgage money market in order to make mortgage money available to persons and families of lower income. This legislation was also challenged on several constitutional grounds. In Huber v. Groff, 171 Mont. 442, 558 P.2d 1124 (1976), the Montana Supreme Court held that the Montana Board of Housing is a public corporation under the control of the state, and appropriations to it do not violate Article V, section 11(5), of the Montana Constitution. The Court also held that the purpose of the act, to provide low-income housing, is a public purpose and was not violative of Article VIII, section 1, of the Montana Constitution. The Court also held that the legislation did not intend to create a state debt in violation of Article VIII, section 8, of the Montana Constitution. The Court stated that it would not find that a state debt was created unless it was apparent that the creation of a debt was the obvious intent of the Legislature. The Court relied upon Fickes v. Missoula County, 155 Mont. 258, 470 P.2d 287 (1970), to conclude that the bonds did not constitute a "debt" within the meaning of Article VIII, section 8, of the 1972 Montana Constitution. The Court noted that the Legislature did not intend to create a state debt in the Housing Act and that the bonds were required to contain a statement that the State of Montana was not liable on the bonds and that neither the faith and credit nor the taxing power of the state is pledged to the payment of the bonds. The language of the Act was permissive in its direction to the Legislature, and the enacting Legislature did not bind a future Legislature to appropriate money. This program continues to operate in substantially the same manner in which it was enacted. See Title 90, chapter 6, part 1, MCA.

The 1983 Legislature enacted Chapter 705, Laws of 1983. That legislation authorized the creation of state debt for development of hydroelectric power at three state-owned dams. Under Title 85, chapter 1, part 5, MCA, the Department of Natural Resources and Conservation and Board of Natural Resources and Conservation (now abolished) were mandated to make the completed projects available for lease to utilities, electric cooperatives, or a state corporation proposing to use a substantial portion of the generated power. A legal challenge ensued contending that this scheme violated Article V, section 11(5), of the Montana Constitution by benefitting the public utilities, electric cooperatives, or a private corporation. The Montana Supreme Court stated that as long as the provisions relating to the expenditure of the funds derived from the proceeds of the bonds are under the control of the state, the constitutional mandate is satisfied. In this case, the proceeds of the coal severance tax bonds would be expended by a state agency under the control of the state for construction of hydroelectric projects. The appropriations therefore were made for an agency of the state. The fact that the state may afterwards lease the projects to a private association or corporation was no more offensive constitutionally than the power of the state to lease its state-held lands to private parties. Grossman v. State, 209 Mont. 427, 682 P.2d 1319 (1984). In Grossman, the plaintiff also contended that the plan of issuing bonds under Chapter 705, Laws of 1983, for loans to local governments for water systems violated Article VIII, section 1, of the Montana Constitution. The plaintiff contended that the funds used to service a debt of coal severance tax bonds were generated by the general taxing powers of the state and that the funds were to be used for special local purposes. The Court held that the question of whether a particular purpose for which taxes

may be levied and collected is a public purpose is for the Legislature in the first instance, and the courts will indulge every reasonable presumption in favor of the legislative decision. The Court found that it was clear that the purposes for which the loans were authorized affected the inhabitants of the particular areas as communities and not merely as individuals. The use of the loan proceeds was clearly for public purposes. This water development program is the program that was combined with the renewable resource development program, construed in Douglas, in 1993.

The Legislature continues to use the mechanism, upheld in Douglas, Huber, and Grossman, of appropriating money to a state agency and having the agency pass the funds through to other entities. See the cultural and aesthetic grants program provided for in Title 22, chapter 2, part 3, MCA, and the treasure state endowment program provided for Title 90, chapter 6, part 7, MCA. As long as the funds are expended for a "public purpose", there should be no legal impediment to this methodology.

In 1985, the Legislature enacted Chapter 640, Laws of 1985. That legislation authorized the Montana Economic Development Board to use the in-state investment fund to guarantee loans, authorized to be made by the Board, or bonds, authorized to be issued by the Board. This legislation was challenged in Hollow v. State, 222 Mont. 478, 723 P.2d 227 (1986). The Montana Supreme Court held that the provisions of the law that permitted the use of in-state investment fund money, derived from taxation, to guarantee loans or bonds of private individuals or private entities, either directly or through the capital reserve account or through the economic development guaranty fund, were unconstitutional under Article V, section 11(5), of the Montana Constitution, Article VIII, section 1, of the Montana Constitution, and Article VIII, section 13(1), of the Montana Constitution providing for a unified investment program.

In 1987, the Legislature enacted Chapter 461, Laws of 1987, the Science and Technology Development Board Seed Capital Bond Act. That act was drafted to conform to the legislation that was upheld in Grossman and to respond to the decision in Hollow. In White v. State, 233 Mont. 81, 759 P.2d 971 (1988), the Montana Supreme Court struck down the Science and Technology Development Board Seed Capital Bond Act. The Act was declared unconstitutional under Article V, section 11(5), of the Montana Constitution because the Act empowered the Montana Science and Technology Development Board to improperly funnel bond proceeds into private business ventures through technology investments. The legislation, in effect, unconstitutionally pledged the credit of the state to secure the bonds issued by the Board, the proceeds of which are to be used for the benefit of private businesses.

To date, I have been unable to reconcile, in my own mind, the holdings in Hollow and White with the holdings in Douglas, Huber, and Grossman. The decisions could lead a cynic to the conclusion that if the Court likes the purpose of the program it is upheld and if the Court dislikes the purpose of the program it is declared invalid. "Economic development" has been recognized as a legitimate "public purpose". For example, private property may be taken for the public purpose of "economic development" without offending the takings clause of the United States Constitution, embodied in the Fifth Amendment. See Kelo v. City of New London, U.S. (2005).

Kelo also recognizes that the determination of whether "economic development" is a "public purpose" is left to the individual states.

The Montana Attorney General has also analyzed an analogous situation. In 42 A.G. Op. 89 (1988), Attorney General Greely determined that under section 7-15-4282, MCA, a municipality is authorized to provide for tax increment financing as part of its plan for urban renewal. The grant of tax increment funds to a private nonprofit corporation for construction of a parking lot for use by a public fine arts museum was not prohibited because the grant was essentially for a public purpose. In that opinion, Attorney General Greely cited Stanley v. Jeffries, 86 Mont. 114, 284 P. 134 (1929), for the proposition that the test for a public purpose is not who receives the money, but whether the purpose for which it is to be expended is a public one. In Stanley, a challenge was brought to Chapter 24, Laws of 1929. Chapter 24, Laws of 1929, was designed to address a problem with the marketability of special improvement district bonds. The apportionment of costs of an improvement among the affected property owners was being thwarted by a significant delinquency of property owners in paying the assessments for the improvement. This delinquency rate had made the sale of bonds for funding the improvements virtually impossible. Chapter 24 authorized the imposition of a mill levy upon all property owners and a loan of city funds and credit to aid the special improvement district in meeting its obligations to the holders of the bonds and warrants of the special improvement district. The plaintiff contended that Chapter 24 was invalid on several grounds, including that the loans were in essence a donation to establish a guaranty fund for the protection of the individual holders of the bonds or warrants in violation of the 1889 Montana Constitution. The Court framed the issue as whether the tax levy was intended to aid the holders of the special improvement district bonds or warrants or to serve a public purpose by enabling cities and towns to erect needed public improvements through the instrumentality of the special improvement district law. The Court noted that the test is not who receives the money, but rather is the purpose for which the money is expended a public purpose. The Court acknowledged that the bondholders would profit by the provisions of Chapter 24, but that the work that would be performed was essentially public work and that the purpose of providing for the work was necessarily a public purpose. The Court also noted that it was concerned only with the legality and not the policy or reasonableness of the legislative enactment. The provision of Chapter 24 that authorized the same mechanism for the reimbursement of losses to the holders of bonds issued prior to the passage of Chapter 24 was declared invalid as a levy of taxes for a private purpose.

The other constitutional provision addressed in the memorandum to David Ewer is Article VIII, section 8, of the Montana Constitution. That provision governs state debt and provides that state debt may only be created by a two-thirds vote of the members of each house of the Legislature or by a majority of the electors voting on the issue. The creation of state debt is prohibited for the purpose of covering deficits incurred because appropriations exceeded anticipated revenue. The memorandum deals with this issue in a somewhat cursory manner. The memorandum relies upon the cases of State ex rel. Diederichs v. State Highway Commission, 89 Mont. 205, 296 P. 1033 (1931), and State ex rel. Ward v. Anderson, 158 Mont. 279, 491 P.2d 868 (1971), for its conclusion that Senate Bill No. 133 established a state debt without the necessary two-thirds vote by the members of each house of the Legislature.

In Diederichs, the Montana Supreme Court invalidated the issuance of $6 million worth of highway debentures. The Court found that under the 1889 Montana Constitution, there were two methods of raising revenue for public purposes: (1) the taxation system; and (2) the license system. The 1889 Montana Constitution placed positive limits on the power of the Legislature to incur a debt or impose a liability on the state beyond a prescribed limit, without referring the proposition to the electorate for approval. The Court also noted that the term "liability" was a broader term than the term "debt". The Court construed "liability" to mean an obligation that one is bound by law to perform. The Court found that the highway debentures would constitute a "liability" within the meaning of the 1889 Montana Constitution because the state was prohibited from reducing motor fuel taxes and paying those taxes to the debenture holders. This was prohibited without the approval of the electorate. The fact that a special fund was created by the imposition of the tax with which to pay the debentures was of no importance. In Ward, the Montana Supreme Court distinguished Cottingham v. State Board of Examiners, 134 Mont. 1, 328 P.2d 907 (1958), and held that there was no longer any reason to limit the words "debt or liability", as used in the 1889 Montana Constitution, to debts to be retired out of ad valorem taxes. The Court determined that if the payment of the principal and interest on bonds impairs the state's constitutional tax sources, it is at least a "liability", if not a "debt", and had to be approved by the voters. The Ward Court expressly upheld State ex rel. Rankin v. State Board of Examiners, 59 Mont. 557, 197 P. 988 (1921), and also noted that the opinion did not affect bonds payable by revenue from the project created by the bonds. In Rankin the Montana Supreme Court relied upon decisions from Idaho and South Dakota to determine that the issuance of revenue anticipation notes did not constitute the incurring of "debt" within the meaning of the 1889 Montana Constitution. The treasury notes under consideration were no different than registered warrants, which had been issued for years without question. The Court held that the "debt" or "liability" intended to be prohibited by the 1889 Montana Constitution was an amount in excess of revenue available or revenue provided for the biennium.

In 49 A.G. Op. 3 (2001), Attorney General McGrath determined that a long-term lease with an option to purchase containing a provision allowing a city to terminate the agreement without penalty if the governing body of the city failed to appropriate funds to make payments due under the lease in any fiscal year did not create an "indebtedness" of the city under section 7-7-4101 or 7-7-4201, MCA. In reaching his conclusion, Attorney General McGrath cited Rankin, Diederichs, and Fickes for the proposition that the authorities with respect to the definition of "indebtedness" are interchangeable without regard to the level of government involved.

I believe that Diederichs and Ward can be distinguished under the mechanism contained in Senate Bill No. 133, because bonds are not involved. I also believe that based upon 49 A.G. Op. 3 (2001), the case of Carbon County v. Dain Bosworth, Inc., 265 Mont. 75, 874 P.2d 718 (1994), is illustrative of a distinction contained in Senate Bill No. 133. In 1984, when a developer called Joint Venture petitioned Carbon County to approve a subdivision plat to develop a country club subdivision and golf course known as Red Lodge Country Club Estates, the then-seated County Commissioners required that Joint Venture construct street, water, and sanitary improvements. The County Commissioners agreed to help finance these improvements. After notice requirements were met under section 7-12-2105, MCA, the County Commissioners created two

rural special improvement districts (RSIDs), under section 7-12-2103, MCA. The County Commissioners agreed to issue bonds to the public to finance the improvements following the requirements found in sections 7-12-2169 through 7-12-2175, MCA, and agreed to levy and collect assessments in the principal amount of the bonds against property within the RSIDs under sections 7-12-2151 through 7-12-2168, MCA. The County Commissioners also created a revolving fund under section 7-12-2181, MCA, and agreed to authorize loans or advances from the revolving fund to the RSID fund when assessments were deficient to meet the bond payments. To replenish the revolving fund, section 7-12-2182(1)(a), MCA (1984), provided that County Commissioners may loan money from the general fund to the revolving fund as may be necessary, and section 7-12-2182(1)(b), MCA (1984), allowed the County to levy a tax on all taxable property within Carbon County "as shall be necessary to meet the financial requirements of such fund.". The RSID property did not sell as expected, and of the property that did sell, the assessments became delinquent resulting in inadequate revenue to pay the bond payments. The newly seated County Commissioners refused to loan funds from the revolving fund, asserting that the loans would be unsecured because the current value of the RSID property is less than the delinquent and future assessments against them.

In Carbon County, the Montana Supreme Court reversed a District Court decision holding that the loans from the revolving funds to the deficient RSIDs were the incurrence of additional debt to the County, in violation of section 7-7-2101(2), MCA (1984), which considered void any debt in excess of $150,000 unless authorized by a majority of voters. The Montana Supreme Court held that the plain meaning of statutes regarding revolving funds, as well as the legislative history, supported the legislative intent to allow counties to choose whether to finance a rural special improvement district by issuing bonds secured by the revolving fund. Nothing in the statutes voided the commitment to loan from the revolving fund if the district becomes deficient. In this case, the County Commissioners agreed to a revolving fund obligation and issued bonds secured by the revolving fund. The District Court reasoned that this was a violation of the constitutional prohibition against indebtedness beyond a certain percent, holding that the county was thus relieved of its obligation to make the loans. However, the Supreme Court noted that special improvement bond obligations are limited to the district funds and, if necessary, receive loans from the revolving fund. If both funds are insufficient to meet bond payments, there is no other source to pay the bonds. Under section 7-12-2182, MCA, revolving fund levies were limited to an amount that would increase the balance in the fund to no more than 5% of the principal amount of the outstanding bonds. The District Court erred in its decision that the county was not obligated to make loans to the special improvement districts. Having exercised the discretion to institute a revolving fund and freely enter into an agreement with the bondholders and the underwriters, under both the terms of the agreement and applicable statutes, the County was obliged to carry out that contractual obligation. Loans from the revolving fund and subsequent tax levies were within the constitutional mandates of Article VIII, section 1, of the Montana Constitution which requires that state funds be used for public purposes. In addition, the County's obligation to make the loans and levy taxes to fund the revolving fund was mandatory, rather than discretionary, and was not an unconstitutional pledge of credit.

The Carbon County case involved a contingent liability for the county. In Doorly v. Goodman, 71 Mont. 529, 230 P. 779 (1924), the Montana Supreme Court held that a "guaranty" is a collateral agreement or undertaking on the part of one person called the guarantor to pay a debt or perform an obligation in the event of the failure of the principal, who is liable in the first instance for the payment or performance to a third person called the guarantee. The-contract must be in writing and based upon a consideration. Under a guaranty, liability upon the guarantor is contingent. The guaranty depends upon a future uncertain event. Contingent liabilities are not debts. Hansen v. City of Havre, 112 Mont. 207, 114 P.2d 1053 (1941).

Senate Bill No. 133 was drafted to comply with the Court decisions discussed. The legislation establishes "economic development" through an infusion of venture capital into the Montana economy as a public purpose. This premise is based upon a legislative determination that a community as a whole benefits from "economic development" and not just a particular individual or a specific entity. State money is not appropriated to the Montana Equity Fund. All money placed in the fund is from private sources. Therefore, the financing of the Montana Equity Fund does not involve an "appropriation". The "contingent liability" contained in the Senate Bill No. 133 is in the form of a tax credit. I am unaware of any instance in which legislation providing tax credits, including refundable tax credits, has been construed as constituting a "debt" within constitutional restrictions. I am also unaware of any instance in which an "appropriation" has been required in order to provide for the payment of tax credits, including refundable tax credits. This is premised upon the assumption that foregoing the collection of revenue does not constitute an appropriation. However, I have cautioned that a refundable tax credit for an individual who did not have any tax liability for the costs of education at a "sectarian educational institution" could constitute an "indirect appropriation" in violation of Article X, section 6, of the Montana Constitution prohibiting "aid" to sectarian schools.

In addition, in May 2005, a Utah District Court upheld the validity of the Utah Venture Capital Enhancement Act under the Utah Constitution. See Utah Capital Investment Corporation v. Utah Capital Investment Board, Case No. 040923031, Third Judicial District (Utah 2005). For all practical purposes, the Utah legislation is substantially similar to the Montana legislation. The Utah challenge was based upon a concern over the state being a "surety" (guaranty) and lending its credit in violation of the Utah Constitution. Article VI, section 29, of the Utah Constitution prohibits the state from lending its credit or subscribing to stock or bonds in aid of any private individual or corporate enterprise or undertaking. In the Utah case, the plaintiff alleged that the use of refundable tax credits was the forgiveness of tax liability and was in a sense "paying public tax revenue" or "pledging the state's taxing power" in order to meet the state's obligation to investors. The Utah Court determined that the key to the analysis was to determine to which entity the "debt" belonged. The Utah Court said that if the money is merely loaned to the enterprises, who by contract must then repay the amounts loaned with interest, then as to the offer to "pay" the investors the difference between the amount targeted and the actual return in the form of tax credits, the state would be impermissibly acting as a surety on the loan of another. This analysis would render Montana's act invalid under Hollow. However, the Utah Court noted that "venture capital" is "money made available for investment in innovative

enterprises or research, especially in high technology, in which both the risk of loss and the potential for profit may be considerable", citing The American Heritage Dictionary 1982 (Third Edition 1996). The Court then held that a venture capital investment is simply not a loan. As with other types of investments that are not loans, there is no contractual guaranty that the money invested will be returned with a profit. The Utah Court stated that if a guaranty exists, it is an original promise and obligation. In this instance by offering tax credits as a mechanism to guaranty an investor a certain rate of return on the investment, the state had made an original guaranty--a potential debt--to the investor. It was apparent that the Legislature, by granting the Board the authority and discretion to determine how much return is to be guaranteed, believed that the benefit to the state, identified in the statutes, was worth the risk of loss. The Utah Court held that determination is a legislative and not a judicial function. In addition, the Utah Court held that if the state redeems the tax credits authorized, it is honoring its promise to give a tax credit. This amounts to foregoing revenue and is not the creation of a debt. The Utah Court determined that the tax credit is not an unconstitutional lending of the state's credit, but is a constitutional investment, by the Legislature, of funds for what has been identified by the Legislature as a legitimate public purpose. The Court determined that tax credits, particularly contingent tax credits, are different from the credit or payment of money by a state. The Court did not find the contingent tax credits to be an extension of credit.

Although the Utah decision would not be binding on Montana Courts, the analysis is helpful in defending Senate Bill No. 133. The Legislature has wide latitude in crafting tax policy. While courts are generally deferential to legislatures in the area of determining public purpose, the Hollow case indicates that the Montana Supreme Court will carefully scrutinize the legislative determination of what constitutes a public purpose. However, it is important to remember that "economic development" has become much more accepted and recognized as a legitimate "public or governmental purpose" since the Hollow decision. If a Montana court were to give the Montana Legislature the kind of deference to legislative determinations exhibited by the Utah court, Senate Bill No. 133 would survive a constitutional challenge.

You have also asked me to analyze Senate Bill No. 133 in light of Cuno v. Daimler Chrysler, 386 F.3d 738 (6th Cir. 2004). In Cuno, the Sixth Circuit Court of Appeals found that the Ohio investment tax credit was invalid under the dormant commerce clause embodied in Article I, section 8, clause 3, of the United States Constitution. Because the United States Supreme Court granted certiorari in that case on September 27, 2005, I am declining your invitation. It would be premature for me to speculate on the eventual outcome of that case or on the reasons for granting certiorari. I am enclosing a copy of an analysis of Commerce Clause jurisprudence that I prepared for Senator Bales in July 2004.

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

Cl0429 5277gpca.