HB

118 (FILE 1)

HOUSE COMMITTEE REPORT

(9)

Date Referred: January 25, 1989 FURTHER REFERRALS: FINANCE

Date of Committee Action: 2-28-89

The RESOURCES Committee recommends that:

HOUSE BILL NO. 118 [OIL & GAS PROPERTIES PRODUCTION TAX]
"An Act relating to the oil and gas properties production tax."

[X] be replaced with CS HB 118 (RES) [ ] the same title [✓] a new title

[ ] have attached amendment(s)

- [ ] do pass
- [ ] do not pass
- [ ] no recommendation
- [X] individual recommendations
- [ ] additional referral to the ______ Committee

ADOPTS: ______ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[X] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

APPROVES PREVIOUS:

[ ] fiscal note(s) published: ______

[ ] zero fiscal notes(s) published: ______

SIGNING DO PASS:

Cliff Davidson

Mike Navarre

[illegible]

Mike Davis

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

[illegible] NO REC

Richard Foster NO REC

[illegible] Do Not Pass See minority report

[illegible] No Rec

Bill Hudson No Rec

Cliff Davidson

Chairman's signature

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: HB 118
Publish Date:

FISCAL NOTE

REQUEST:

Revision Date:
Title: Act relating to the oil and gas properties production tax
Sponsor: House Finance Committee
Requestor: House Resources

Agency Affected: Department of Revenue
BRU: Oil & Gas Audit Division
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
OPERATING						
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LANDS & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	49,000	126,000	144,000	163,000	187,000	180,000

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: See attached page for analysis.

Prepared By: Roger Marks
Division: Dept. of Revenue, Oil & Gas Audit Division
Phone: 277-5627
Date: March 2, 1989

Approved by Commissioner:
Agency: Department of Revenue
Date: March 2, 1989

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Fiscal Analysis of HB 118

This bill modifies the economic limit factor (ELF) formula used in computing the production (severance) tax on oil.

The bill (1) introduces the rate of field production into the exponent of the current ELF formula; (2) repeals the so-called "rounding rule," the provision of current law which states that for any month during the first 10 years of commercial oil production for which the computed ELF of a lease or property exceeds 0.7 the ELF shall be considered to be one; and (3) fixes the production at the economic limit (PEL) at 300 barrels times the number of well days in the month.

This bill is retroactive to January 1, 1989, and applies to oil produced after December 31, 1988. Because the severance tax on oil for a given month is due during the following month, a tax change which takes effect on January 1 would not affect revenues until February. Depending on the actual passage date of the bill, the FY 89 amounts may not be actually collected until FY 90.

This fiscal note was calculated using the oil price and production assumptions of the Department of Revenue's Fall 1988 Petroleum Production Revenue Forecast mid-case scenario updated for actual data through November of 1988. That forecast was predicated on Alaska North Slope crude prices at the U.S. Gulf of $13.25 a barrel in FY 89 and $12.89 a barrel in FY 90. 1/

Additional revenues for future years in millions of dollars are as follows:

1995	174
1996	169
1997	163
1998	153
1999	152
2000	144
2001	136
2002	129
2003	117
2004	110
2005	104
2006	91
2007	80
2008	60
2009	45
2010	19

1/ Had the fiscal note used the oil price and volume assumptions of the "Consensus Revenue Analysis" of January 24, 1989, the FY 89 fiscal impact would be $56 million, and the FY 90 fiscal impact would be $132 million. That analysis was predicated on Gulf ANS prices of $14.07/bbl in FY 89 and $14.30/bbl in FY 90.

Date: March 1, 1989

Price/Revenue Sensitivity Matrix for HB 118

(Millions of $)

ANS @ US Gulf ($/bbl)	Fiscal Year 1989	1990	1991	1992	1993	1994
10.35	28	89	89	97	100	96
12.70	42	113	114	123	135	129
15.00	56	149	149	159	170	160
17.35	70	185	186	196	208	196
19.70	84	216	218	230	243	216
22.00	98	251	254	278	273	239

Assumptions:

1. Production and well assumptions from Department of Revenue mid scenario Fall 1988 forecast.
2. HB 118 effective date January 1, 1989.
3. The variation in revenue between years is a function of a number of factors, including:
   A. The changing relative tax rates under the current ELF and HB 118.
   B. The effect of price on production levels. (e.g. West Sak economic at $18/bbl.)
   C. The effect of changing production and wells on ELF under either formula.

Original sponsor: Finance Committee

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR HOUSE BILL NO. 118 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the oil and gas properties production tax; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 43.55.013(b) is repealed and reenacted to read:

(b) The economic limit factor for oil production of a lease or property shall be computed according to the following formula:

(1-[PEL/TP]) exp ([150,000/(TP/Days)] exp [(460 X WD)/PEL])

where: PEL = the monthly production rate at the economic limit;

TP = the total production during the month for which the tax is to be paid;

WD = the total number of well days in the month for which the tax is to be paid;

Days = the number of days in the month for which the tax is to be paid; and

exp = exponent.

* Sec. 2. AS 43.55.013(d) is repealed and reenacted to read:

(d) The monthly production rate at the economic limit for a lease or property is 300 barrels times the number of well days for the lease or property during the month for which the tax is to be paid.

* Sec. 3. AS 43.55.013(e) and 43.55.013(f) are repealed.

* Sec. 4. RETROACTIVE APPLICATION. This Act is retroactive to January 1, 1989, and applies to oil produced after December 31, 1988.

* Sec. 5. ALTERNATIVE RETROACTIVE APPLICATION DATES. (a) If a court makes a final determination that retroactive application under sec. 4 of

this Act is invalid, this Act is retroactive to the first day of the month in which it takes effect, and applies to oil produced on or after that day.

(b) If a court makes a final determination that retroactive application under (a) of this section is invalid, this Act applies to oil produced on or after the effective date of this Act.

* Sec. 6. PAYMENT OF TAX DUE. The oil production tax payable as a result of the retroactive application of this Act is due on the 20th day of the calendar month following the effective date of this Act. If the tax due and payable is not paid by the date specified in this section, the tax becomes delinquent and subject to payment of interest and the provisions of AS 43.10 relating to enforcement and collection of delinquent taxes.

* Sec. 7. OVERPAYMENT OF TAX UNDER REVISED FORMULA. The tax liability of a party that is reduced by the retroactive application of this Act shall be credited against the taxpayer's future tax liability. The provisions of AS 43.05.280(a) and 43.05.280(b)(1) do not apply to, and interest is not allowed on, the overpayment.

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA
1989 LEGISLATIVE SESSION

Bill Version: CS HB 118 (Res)
Publish Date:

FISCAL NOTE

REQUEST:

Revision Date: March 7, 1989
Title: Oil & gas properties production tax - ELF; providing an effective date
Sponsor: House Finance Committee
Requestor: House Resources

Agency Affected: Department of Revenue
BRU: Oil & Gas Audit Division
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

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ANALYSIS: See attached page for analysis.

Prepared By: Roger Marks
Phone: 277-5627
Division: Dept. of Revenue, Oil & Gas Audit Division
Date: March 7, 1989

Approved by Commissioner: Hugh Malone for
Date: 3/8/89
Agency: Department of Revenue

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

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   B. The effect of price on production levels. (e.g. West Sak economic at $18/bbl.)
   C. The effect of changing production and wells on ELF under either formula.

STATE OF ALASKA

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REPRESENTATIVE WALT FURNACE

MEMORANDUM

TO: Representative Cliff Davidson, Co-Chairman
Representative Curt Menard, Co-Chairman
House Resources Committee

FR: Representative Walt Furnace

DATE: Feb. 28, 1989

RE: Minority Report on HB 118

Please include with the Resource Committee's report on HB 118 the following minority report, which more fully and completely reflects my concerns about the changes to the Economic Limit Factor (ELF) under this bill.

MINORITY REPORT ON HOUSE BILL NO. 118

This bill proposes to change the statutory formula for the Economic Limit Factor (ELF) in the oil and gas properties production tax. The present ELF formula is based on a field's profitability as measured by its average production per well. The higher the profitability is, the higher the tax becomes under the present ELF. In the proposed formula, the dominant factor will be field size instead of profitability. Despite the many hours of testimony that the Committee heard on this bill, I am still concerned that a

number of basic questions have not been answered regarding the proposed change.

Should Alaska Rely on Field Size in Computing the Tax Rate?

I am concerned that the proposed bill would create a tax incentive to keep small fields small and to make large fields smaller than they should be. The new ELF formula would make field size a factor in the exponent, where it becomes the most important factor in the formula. With this formula, if new production is added to an existing field, there will be an increase in the tax rate not only on the additional new production, but on all of the existing production as well.

In BP Exploration's letter of February 22, 1989, we were given an example of how this would occur. For a 100,000 barrel-a-day field with 100 wells, the ELF would be 0.514701 and the tax rate would be 7.72%. If another well were added with the same average daily production (1,000 barrels a day), the new ELF would be 0.519903, making the tax rate 7.80%. This does not sound like a big increase, but because the higher rate applies to all 100,000 barrels a day of the existing production as well as the additional 1,000 from the new well, the increase in tax represents 15.60% of the value of the new production. Thus, the effective tax rate on the extra production would be *twice* the rate prevailing before the well is drilled. A person does not have to understand all the intricacies of the ELF in order to understand that such a tax scheme will frustrate people's development plans and leave valuable oil in the ground that could otherwise be produced.

Will HB 118 Help Truly Marginal Fields?

The Committee received uncontradicted testimony that, in terms of the dollars paid out per dollar invested, the most profitable field in Alaska's history has been a field in Cook Inlet that never reached 120,000 barrels a day at its peak. Yet for all of this field's life, HB 118 would have reduced its tax rates from what they would be with the present ELF. This seems to be leaving something on the table that the State should not be leaving for fields that are highly profitable but which happen to be small.

The Committee was also told that the new ELF in HB 118 would help Milne Point. Again, we received uncontradicted testimony that for the last half of the time Milne Point was in production, the present ELF laws had allowed the tax rate to be reduced to zero. HB 118 would repeal the rebuttable presumption that allowed this to happen. Instead, with HB 118,

Minority Report on HB 118
February 28, 1989

Milne Point will always have *some* tax to pay until its average production falls below 300 barrels a day per well. Based on the $7.36 wellhead price in the Administration's Revenue Forecast, Milne Point will pay almost $20,000 a year in production tax under HB 118.

Are the Administration's Numbers Reliable?

I am highly disturbed by the apparent misinformation that the Administration has advanced in support of HB 118. The following examples illustrate the type of thing I mean:

1. On the first day of testimony, the Commissioner of Revenue handed out several packets of materials. One of these had as its first page a graph with the title, "The Tax Rate on Prudhoe Bay Has Dropped Sharply." The third page of that packet gives the production tax as 13.1% during the 1982-1987 period, despite the fact that it was actually 15%. You can get to a 13.1% rate only by including the State's own one-eighth royalty share of the production, but State royalty is exempt from the tax.

2. During the "debate" last Wednesday evening, Mr. Erickson said HB 118 would only cost 15 cents out of a $15 value of the oil in Valdez. First, the tax will be more like 30 cents than 15. More serious, however, was the sudden increase in oil prices that Mr. Erickson made up for the occasion. The weighted average North Slope oil price in the Administration's Revenue Forecast (at page 20) is only $12.45, and that's for Alaskan oil *delivered* to the West and Gulf Coasts. Netted back to Valdez this is about $11. If oil prices went up $4 a barrel over the forecast and stayed there, the State would have the revenue it needs to balance the budget and we probably wouldn't be talking about the ELF at this time.

3. The Administration testified that HB 118 would lower the threshold oil price by $2 a barrel for bringing marginal fields into production. In other words, they said a marginal field would be profitable under HB 118 at a price $2 lower than they would need with the present ELF. This was contradicted by industry testimony. In light of the fact that there will be a substantial delay between the time a commitment must be made to develop a marginal field and the time that field comes into production, plain common sense suggests that it would be unlikely for the tax change to have such a large impact on the price needed for the project to go forward. The Administration has not shared any details of its calculation. It has also failed to present any information about how large a field would have to be in ANWR, for example, before it would be economic to build the transportation

infrastructure necessary to tie that field into TAPS so the oil can get to market.

4. The Administration said that the cumulative impact of the 1981 legislation has been a reduction of one billion dollars. It has failed to make clear that a third of this figure is based on the assumption that the federal windfall profits tax did not have to be allowed as a deduction under the old separate accounting income tax. The legal opinion at the time in 1981 was that such a deduction was necessary in order to preserve separate accounting against the constitutional challenge that had been brought against it.

5. The Administration said that the new ELF formula in the bill is the formula they meant. However, they said that the effect of the bill would be a benefit for fields under 150,000 barrels a day in size. There has been no explanation to reconcile this 150,000 figure with the effects of HB 118. The repeal of the "rounding" rule would benefit fields of any size -- even as big as Prudhoe Bay. The new formula will lower taxes for small fields producing less than 113,507 barrels a day. How does either effect tie in to the 150,000 figure? The explanation offered by industry -- that the parentheses are in the wrong place in the formula -- is more plausible at this point than the Administration's explanation. Can it be we are being asked to adopt the wrong formula simply because the Administration is embarrassed to admit there was a mistake in it?

Conclusion.

Because of these and other questions which still have not been answered to my satisfaction, I have serious misgivings about House Bill No. 118 and the formula it contains. Therefore, I recommend "DO NOT PASS" to you and my other colleagues in the Legislature regarding the original version of this bill and the draft Committee Substitute for it that is being considered by the Resources Committee.

Alaska State Legislature
HOUSE OF REPRESENTATIVES
COMMITTEE ON RESOURCES

POUCH V
JUNEAU, ALASKA 99811
(907) 465-3715

TO: Resources Committee Members

FROM: Representative Cliff Davidson, Co-Chair
Representative Curt Menard, Co-Chair
House Resources Committee

DATE: February 27, 1989

SUBJECT: HB 118; ELF Application Date Issues

ELF APPLICATION DATE ISSUES

Two legal memos (one by Legislative Legal and one by the Attorney General's Office) have been done on the constitutionality of retroactive dates. Both conclude that a reasonable retroactive date, supported by public policy reasons in the record, will be found constitutional.

In summary, the law requires that, to be retrospective, a statute must specify that it is retrospective, and there must be a two-thirds vote for an immediate effective date. There is precedent in Alaska and federal law for retroactive application of a statute back from the date of enactment to the beginning of the calendar year. Retroactivity has also been allowed during the year of the preceding session. In one federal case, a court upheld a tax passed in 1935 applicable to tax years 1933 and 1934. In the present case, the modification of the ELF would result in retroactive application back two years. While the present case is somewhat different from the 1935 case, that case supports the likelihood that the two-year application in this case will be upheld.

The federal rule of law is based on "reasonable notice" whether the nature or the amount of the tax could not have reasonably anticipated by the taxpayer at the time the application date would begin. Changes to tax rates are presumed to be foreseeable. In one case, the court flatly rejected a taxpayer's argument that retroactivity was barred by due process because the proposed rate increase had been under public discussion before Congress for about a year and concluded that this had provided ample notice of the increase. In the present case, the taxpayers have been on notice that

the ELF may be modified since January 1987, when HB 164 was introduced. In fact, the taxpayers were on notice even back in 1981 that the legislature might reassess the tax structure in 1987.

While it is unlikely that the retroactive date back to July 1, 1987 would be found unconstitutional if challenged, to ensure that there won't be a problem, alternative application dates are also added to the bill in the Committee substitute. Alternative dates include July 1, 1988 (the beginning of the fiscal year), January 1, 1989 (the beginning of the calendar year), and immediately on the effective date of the Act.

The following questions and answers establish for the record the reasonableness of the retroactive date back to July 1, 1987.

(1) Is the modification of the ELF and the retroactive application date remedial?

The answer is: Yes, the ELF modification and the retroactive application date are remedial. The modification of the ELF is designed to close up a loophole that allowed profitable Prudhoe Bay and Kuparuk oil fields a tax cut that was designed for marginal fields. The modification of the ELF allows the ELF to function the way it was meant to function. The retroactive date of July 1, 1987, enables the state to receive from the oil companies all the revenue lost as a result of the loophole going into effect at the end of June 1987.

(2) What important public policy does the modification of the ELF and the retroactive application date further?

The answer is: The modification of the ELF and the retroactive application date reflects important public policy relating both to state revenues and to use of state resources. The severance tax serves to raise revenue for the state, which allows the state to provide needed services for all the people. Aside from merely raising revenue, the severance tax serves to obtain for all the people of the state benefits from the oil resources of the state, in accordance with constitutional mandate. The Alaska Constitution requires the legislature to provide for the utilization, development, and conservation of all natural resources belonging to the state for the maximum benefit of the people. Thus, an appropriate severance tax is constitutionally necessary, regardless of the state's fiscal needs.

(3) Will the modification of the ELF and its retroactive application date accomplish the objective of the legislation?

The answer is: Yes. The modification of the ELF and its retroactive application date does accomplish its objectives. They will serve to raise revenue and to fulfill the

constitutional mandate to ensure that all Alaskans benefit fully from Alaska's resources. If the ELF were not to be modified, or if the application date was not made retroactive to July 1987, the people of Alaska would not be fully benefiting from Alaska's resources and revenue would be lost because of this loophole.

(4) Why is the retroactive application date reasonable in its nature, circumstances, and effect?

(A) Did the oil companies have reason to believe that the ELF might be modified and the loophole removed and the change applicable back to July 1, 1987?

The answer is: The retroactive date of July 1, 1987 is reasonable because it is retroactive only two years and because HB 164, a similar bill modifying the ELF, was introduced in January 1987, prior to this retroactive date, so the affected oil companies were on notice prior to this date that the ELF could be changed. In addition, even prior to 1987, the oil companies were on notice that the ELF could be modified and the loophole eliminated. In 1981, when the loophole was created, public officials indicated their expectation that the loophole would be reassessed and possibly changed by 1987, so the oil companies could not have reasonably expected the ELF not to be modified and to not have a change applicable to July 1987, preventing the oil companies from benefiting from the loophole.

(B) Will the retroactive application have an unduly harsh effect on the oil companies required to pay the retroactive tax?

The answer is: No. While the modification of the ELF and the retroactive date serves to raise the amount paid for the severance tax for Prudhoe Bay and Kuparuk oil fields beginning July 1987, it does not raise the amount paid above the 15% statutory nominal rate for the severance tax. Neither does it raise the amount that will be paid above the amount that had been paid by the affected oil companies for Prudhoe Bay oil fields prior to July 1987. The modification and the retroactive date is thus reasonable.

The Committee substitute also provides for payment of the tax on the 20th day of the calendar month following the effective date of the Act. It indicates that delinquent taxes are subject to payment of interest and to the provisions in AS 43.10, which relate to enforcement and collection of delinquent taxes, and also indicates that tax overpayments will be credited against the taxpayer's future tax liability.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M February 6, 1989

SUBJECT: Retrospective application of the economic limit factor tax amendments, CSHB 118 ( )

TO: Representative Cliff Davidson, Co-Chair
House Resources Committee

FROM: Jack Chenoweth
Legislative Counsel

The amendments requested are enclosed. The drafts differ only as to the date of retrospective application of each. The draft identified as 6-0652E applies the economic limit factor (ELF) retrospectively to oil produced after June 30, 1987; the draft identified as 6-0652H applies the economic limit factor retrospectively to oil produced after December 31, 1988. (A subsequent memo from your office specified different alternative dates. Mechanically changing a date in any of these drafts is not a significant drafting problem.)

It is my understanding that these provisions limit the applicability of the ELF to the state's major producing fields and that, as a consequence, the tax liability of some taxpayers subject to the severance tax, AS 43.55, would be increased, while the liability of others may decrease. 1/

1/ Under AS 43.55.020(a):

> The gross production tax on oil or gas shall be paid monthly. The tax is due on the 20th day of each calendar month on oil or gas produced from each lease or property during the preceding month. If the tax is not paid before the end of the month in which it becomes due, the tax becomes delinquent.

Thus, tax liability is incurred and remitted on a monthly, not an annual basis. For oil production during December, 1988, the tax became due and payable January 20, 1989, and tax liability for oil production during January, 1989, becomes due and payable February 20, 1989.

A retroactive tax adjustment will apply if there is a valid public purpose served by giving retrospective effect to that adjustment. Here, the committee's deliberations may be critical. As a committee substitute for HB 118 is considered, it would, in my judgment, be important to develop a record on which a court, if called upon to consider an argument, would conclude that there was a public purpose served by giving the adjustment a retrospective effect.

A reasonable retrospective application will be sustained. The farther back the retroactive provision is given effect, the less likely a court would be to sustain the provision without a clear showing of public purpose. (To foreclose a claim altogether, this office has discouraged retrospective application of severance tax adjustments beyond the narrow period recognized under AS 43.55.020(a), that is, a change amending the economic limit factor to be made retroactive only to the beginning of the month in which the bill is to take effect. That approach should not create any problems of retrospective applications since the tax liability would not have become due on that date.)

I

RETROSPECTIVE APPLICATION OF THE AMENDMENTS:

Tax statutes may be made retroactive. 2/ The threshold

2/ This office has also recently considered proposed retrospective application of severance tax adjustments, specifically relying on the federal and state constitutional prohibitions against passage of ex post facto laws. There are two ex post facto law prohibitions of the federal constitution. Article I, section 9, clause 3 is a limitation on the federal government, while article I, section 10, clause 1 imposes a similar limitation on the states. Alaska's constitution also contains a limitation in section 15 of article I.

Our previous conclusion that federal and state constitutional prohibitions against enactment of ex post facto laws would support a challenge to the amendment's retrospective application was surely in error. Federal court decisions have limited the application of the limitations to criminal or penal consideration is that the retrospective application of the measure must not impair an obligation of contract.

The impairment of contract consideration appears to be inapplicable in this instance. Retrospective application of a newly-enacted statute may, in some instances, impair obligations of contract, in violation of article I, section 10 of the United States Constitution and article I, section 15 of the State Constitution. However, the Alaska Supreme Court appears to have cut off an impairment of contract argument applicable to retrospective application of a tax amendment in Atlantic Richfield Co. v. State, 705 P.2d 418 (Alaska, 1985). To the argument that the oil and gas corporate income tax then in litigation impaired the obligation of the state's underlying lease contracts, the court concluded that "[the] argument [was] without merit":

> . . . No lease provision has been impaired. In entering into the leases the state could not, and did not, contract away its power as a sovereign to tax income earned in the state. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) disposes of this issue:
>
> > Contractual arrangements remain subject to subsequent legislation by the presiding sovereign. Even where the contract at issue requires payment of a royalty for a license or franchise issued by the government entity, the government's power to tax remains unless it "has been specifically surrendered in terms which admit of no other reasonable interpretation." St. Louis v. United R. Co., 210 U.S. 266, 280, 28 S.Ct. 630, 634, 52 L.Ed. 1054 (1908).
>
> 455 U.S. at 148, 102 S.Ct. at 907, 71 L.Ed.2d at 36 (citations omitted); see also Exxon v. Eagerton, 462

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statutes, concluding that retrospective tax legislation is not prohibited by the ex post facto clause. Personal Finance Co. v. United States, 86 F. Supp. 779 (D.Del., 1949). See 16A Am. Jur. 2d secs. 636, 677. Decisions in other state courts have similarly concluded. Parlato v. McCarthy, 69 A.2d 648 (Ct., 1949), Walker v. Commonwealth, 130 S.W.2d 27 (Ky., 1939). The Alaska Supreme Court has not extended application of the state constitutional ex post facto prohibition beyond penal or criminal matters. Danks v. State, 619 P.2d 720 (Alaska, 1980); Creekpaum v. State, 753 P.2d 1139 (Alaska. 1988).

U.S. at 187-94, 103 S.Ct. at 2304 - 2307, 76 L.Ed.2d at 508-12.

705 P.2d 418, at 438.

*

If legislation acts retrospectively, the nature and duration of its retrospective application should be reasonable. The arguments favoring a reasonable retrospective operation arise out of the equal protection and due process clauses of the state and federal constitutions.

Federal equal protection considerations.

State legislation retroactively imposing a tax is not necessarily and certainly invalid under the equal protection clause of the Fourteenth Amendment to the federal constitution. The inquiry to be made is one of whether the retroactivity impairs substantial, vested rights, and is reasonable in the circumstances. As to retroactively imposed new taxes, the courts have been reluctant to find a violation because of the impairment of a vested right. Welch v. Henry, 305 U.S. 134, 83 L.Ed. 87, 59 S.Ct. 121 (1938), rehearing denied 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 250 (1938). 3/ Several state courts have agreed. See Garrett

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3/ In Welch, the United States Supreme Court concluded that a Wisconsin state statute, enacted in 1935 and operating retrospectively to tax corporate dividends earned in 1933 which, when received, were deductible from gross income, did not violate the equal protection clause. The tax rates applied to the dividends differed from the rates applicable to other types of taxable income. As to the retrospective application of the new tax to dividends that were, when earned, exempt from tax, the court noted that:

> The equal protection clause does not preclude the legislature from changing its mind in making an otherwise permissible choice of subjects of taxation. The very fact that the dividends were relieved of tax [in 1933], when the need was less, is basis for the legislative judgment that they should bear some of the added burden when the need is greater.

Freight Lines v. State Tax Commission, 135 P.2d 523, at 526, 527 (Utah, 1943); Colonial Pipeline Co. v. Commonwealth, 145 S.E.2d 227 (Va., 1965), reh. den. (1966), app. dismissed, 384 U.S. 268, 16 L.Ed.2d 523, 86 S.Ct. 1476 (1966). 4/

> Numerous retroactive revisions of the federal and Wisconsin revenue laws . . . have imposed taxes on subjects previously untaxed and shifted the burden of old taxes by changes in rates, exemptions, and deductions. It has never been thought that such changes involve a denial of equal protection if the new taxes could have been included in the earlier act when adopted. If some retroactive alteration in the scheme of a tax act is permissible, as is conceded, it seems plain that validity, so far as equal protectior is concerned, must be determined, as in the case of any other tax, by ascertaining whether the thing taxed falls within a distinct class which may rationally be treated differently from other classes. If such changes are forbidden in the name of equal protection, legislatures in laying new taxes would be left powerless to rectify to any extent a previous distribution of tax burdens which experience had shown to be inequitable, even though constitutional.

83 L.Ed. 87, at 92.

4/ In Garrett Freight Lines v. State Tax Commission, 135 P.2d 523 (Utah, 1943), the Utah Supreme Court, called upon to determine whether an excise tax levied on the use of diesel motor fuel that was used prior to the date the legislative act became law, found no equal protection violation:

> It is well settled that a tax does not necessarily violate the Federal Constitution merely because it contains retroactive features. Milliken v. United States, 283 U.S. 15, 21, 51 S.Ct. 324, 75 L.Ed. 809 [(U.S., 1931)]; Billings v. United States, 232 U.S. 261, 34 S.Ct. 421, 58 L.Ed. 596 [(U.S., 1914)]; Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 125, 83 L.Ed. 87 [(U.S., 1938)] . . . .
>
> . . .
>
> Neither the Federal Constitution nor the Utah

Federal due process considerations:

Retroactive imposition of a tax is not necessarily a violation of the due process clause of the Fourteenth Amendment to the federal constitution. The leading case is Welch, cited earlier, in which the United States Supreme Court determined:

> The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. Milliken v. United States, 283 U.S. 15, 21, 75 L.Ed. 809, 814, 51 S.Ct. 324 [(1931)], and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

83 L.Ed. 87, at 93. But the assertion that due process is not violated is not absolute and, the court has said that

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Id.

Similarly, in Garrett Freight Lines, earlier cited, the Utah Supreme Court determined that the due process clause is not

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Constitution has any provision in terms prohibiting retroactive legislation -- excepting that which forbids the enactment of ex post facto laws. [Citations omitted.] That clause relates to criminal and penal matters and does not affect legislation such as the statute here involved. Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648, 1 Kent Commentaries 409; 3 Story on Constitution 212; 18 C.J.S. Constitutional Law, sec. 435, p. 886.

a limitation on the state's ability to retrospectively impose a tax:

> Although basing its case upon the due process clause, appellant does not show wherein the tax constitutes any arbitrary and oppressive discrimination except to assert that a tax based upon a transaction consummated prior to passage of the act amounts to a taking of property without due process. It has many times been questioned whether the due process clause constitutes any limitation upon the taxing power. In this connection we quote from Mr. Justice Sutherland of the United States Supreme Court in an opinion upholding the validity of a statute of the State of Washington levying a tax upon the sale of oleomargarine:
>
> > Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. * * * And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. * * * That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. * * * Collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful powers are matters beyond the scope of judicial inquiry. * * * Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses, * * * unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state.

A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 599, 601, 78 L.Ed. 1109.

Garrett Freight Lines, 135 P.2d 523, at 527.

Courts have, however, considered retrospective tax legislation unconstitutional as a vi tion of the due process clause when, as Welch conclu in light of "the nature of the tax and the circumstanc in which it is laid," the legislation is "so harsh and oppressive as to transgress [that] constitutional limitation." Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87, at 93. The question is typically one of the degree of harshness, based upon consideration of factors such as (1) the effect of the retroactive application of legislation amending a tax on a taxpayer's voluntary act that was influenced by the taxpayer's understanding of tax incidence or consequence at the time of that act, especially if the tax to be imposed or amended is "novel," (2) the sufficient certainty of the taxpayer's expectation of money that is jeopardized by the retroactive legislation, (3) the length of the period of the legislation's retrospective application, and (4) the importance of the public purpose to be served by the action. The first three elements are, to some degree, based on the taxpayer's expectations, while the fourth involves a determination of a public interest that necessitated the actual enactment.

Computation and payment of the severance tax is not greatly determinative of taxpayers' taxable activities that generate the tax liability, nor does this proposed legislation seem to strike at activities of a taxpayer that reasonably relied on the current severance tax rates before this bill proposed amendment of that tax. It is the length of the period of the legislation's retrospective application and the importance of the public purpose to be served that need be most carefully considered.

The state's strongest case would be one that suggests that the purpose of the retroactive provision was remedial and that its impact was limited to the shortest period practicable. One benchmark date that might serve that purpose is July 1, 1988 (start of the current fiscal year, if, indeed, the principal purpose of the retroactive application is to meet revenue shortfalls in this fiscal year); a number of cases would sustain the argument that the legislation may be retrospective over the calendar or fiscal period of its enactment. An alternative--riskier because of the length of the period over which that retroactivity would reach back, but perhaps stronger from the point of view of public policy considerations--would be that date in 1987 when the ten-year exemption from the ELF's operation expired

and the economic limit factor became applicable to the state's major producing fields. But this would probably be justified only if the state could demonstrate that the conditions that suggested in 1981 that adoption of the ELF would benefit production are now shown to have been inaccurate or incorrect.

State due process and equal protection considerations:

Nothing in my quick research suggested that an analysis under the state's "due process" clause, article I, section 7, would reach a conclusion at variance with the decisions based on the comparable federal provision discussed above.

State "equal protection" analysis differs, though the conclusion reached under that analysis is consistent with the conclusions reached under the analysis applicable to the federal provisions. In State v. Erickson, 574 P.2d 1 (Alaska, 1976), the court established a "single test" approach for state-constitution based equal protection analysis, essentially requiring that the court (1) ascertain the purposes of the legislation to determine whether they are legitimate; (2) determine whether the means chosen to accomplish the objectives actually do so; and (3) balance the importance of the state's interest against the constitutional right involved. The state has plenary authority to tax. Assuming an adequate record--and the April, 1988, "ELF Policy Perspective" document may be sufficient--the ELF adjustments now proposed, adding to tax liability on the major producing fields that are most profitable but continuing or reducing rates on marginally producing fields, seems to bear a strong correlation to the state's efforts to impose a tax burden on an oil field's production that is consistent with the field's economics. By that analysis, if the retrospective application of the change is reasonable, the court should reject any state constitutional equal protection-based claim.

II

IS THERE A NEED FOR A SEVERABILITY CLAUSE?

A severability clause is not needed, and one has not been included in either draft. In the absence of a severability clause, you may rely on AS 01.10.030.

III

TO THE EXTENT THAT THE BILL MAKES A RETROACTIVE TAX REDUCTION, MAY THE LEGISLATURE PROVIDE FOR THAT TAX

REDUCTION BY A CREDIT AGAINST THE TAXPAYER'S FUTURE TAX LIABILITY, OR IS THE PAYMENT OF AN IMMEDIATE [CASH] REFUND REQUIRED?

If retrospective application of the ELF adjustment reduces the tax liability of any taxpayer, the revenue having been received and deposited into the general fund, the state would not be able to refund amounts that have been previously paid by the taxpayer to that taxpayer without an appropriation. However, article IX, section 6 of the state constitution provides that appropriations of public money may be made only for a public purpose. In states operating with a constitutional provision comparable to Alaska's in which there has been a proposed payment of a retroactive refund of a validly enacted tax, the appropriation has been held to violate those constitutional provisions. Japan Line, Ltd. v. MacCaffree, 558 P.2d 211 (Wash., 1977); City of Yakima v. Huza, 407 P.2d 815 (Wash., 1965); In re Estate of Skinner, 303 P.2d 745 (Cal., 1956); San Bernardino County v. Way, 117 P.2d 354 (Cal., 1941). These considerations then would favor the use of a credit due the taxpayer against the taxpayer's future tax liability, for the use of this approach would necessarily avoid a "public purpose" challenge under article IX, section 6.

IV

TO THE EXTENT THAT THE BILL MAKES A RETROACTIVE TAX REDUCTION, IS INTEREST PAYABLE ON THAT REDUCTION? IF SO, FROM WHAT DATE WOULD INTEREST ACCRUE?

Assuming the draft makes a retroactive tax reduction, I would treat the reduction as the equivalent of a refund of taxes legally collected. In a refund situation, the legislature may shape the conditions and limitations of that refund. While interest is generally recoverable on the amount of the refund, the few Alaska precedents suggest that payment of interest is discretionary and depends principally on whether or not the legislature, by statute, has authorized its payment.

By statute, interest is allowed on an overpayment of a tax levied and collected under AS 43. See AS 43.05.280. That statute is, of course, more generally applicable to instances involving tax payments made in regular fashion, and not to adjustments made by retrospective application of a change of the tax law. But it would seem to have applicability to the changes suggested under AS 43.55. Apart from the statute, I know of nothing that mandates

payment of interest on a tax refund due for a tax that, at the time of levy, was legally collectable, and suggest that the state may act with respect to interest on the tax refunds as it sees fit.

The committee should determine what it wants to do and give instructions, and the draft will be prepared accordingly.

V

TO THE EXTENT THAT THE BILL INCREASES A TAXPAYER'S LIABILITY, IS THE TAXPAYER OBLIGATED TO PAY INTEREST ON THE INCREASED LIABILITY? IF SO, FROM WHAT DATE WOULD INTEREST ACCRUE?

Assuming the committee substitute serves to establish a greater liability on the part of certain taxpayers for one or more "past due" months, that liability arises not under AS 43.55.020(a), but by operation of this law. The legislature has authority to determine whether interest should be paid, and from what date it should be paid.

The bill should not leave taxpayers subject to the assertion that they failed to remit taxes by the deadlines established in AS 43.55.020(a). In each measure, I have incorporated an additional provision that sets a date certain for reporting and paying the retroactive tax liability. Thereafter, if the amount due has not been timely remitted, provisions governing delinquency should apply.

*

Your January 30 memo asks other questions concerning retroactive application of the proposed ELF changes. Let me briefly respond.

As should be clear from the decision in Atlantic Richfield v. State, there is sound benefit in adhering to the requirements outlined in the Agency's drafting manual. The current manual, at pp. 27, 28, instructs that

> The language providing for retroactive application of a bill or part of a bill should be set out in a separate section immediately preceding the effective date section. The retroactive section and the sections in the bill that are to be retroactive should have immediate effective date clauses.

I am bound to follow the drafting manual, and any draft version of legislation prepared for the committee's

consideration that contained a retroactive provision would necessarily include an immediate effective date. All the drafts I would provide for the committee's consideration would contain the effective date clause. However, if, in a mark-up, the committee directs (on the record) deletion of the clause with the immediate effective date, I would provide the bill with that section omitted. But, before departing from the directive of the manual, I would want to have committee instruction, for I think it is important that the record show why there has been a departure from standard drafting procedure.

If one house or both houses fail to adopt an immediate effective date for legislation having a retroactive provision, the bill would still take effect. The effective date would be delayed 90 days, however, but the retroactive elements of the legislation would not be impaired by that delay.

JBC:kb
wkk1/109

Enclosure

MEMORANDUM

State of Alaska
Department of Law

TO: Mary Halloran
Director
Division of Policy
Office of Management and Budget
Office of the Governor

DATE: March 31, 1988

FILE NO.: 663-88-0432

TEL. NO.: 465-3600

SUBJECT: Retroactivity of HB 164

FROM: Richard D. Monkman
Assistant Attorney General

You requested our opinion as to whether CSHB 164(Fin) am ("HB 164"), which would retroactively apply changes to the economic limit factor in the Oil and Gas Properties Production Tax (AS 43.55), would be likely to be held constitutionally permissible. If not, you ask our advice on "the maximum degree of retroactive application that would likely be held permissible."

The short answer is that the sections which would make HB 164 retroactive to June 1, 1987, would likely be held constitutional. If the law was retroactive to January 1, 1988, it would certainly be held constitutional.

1. Article II. The first step in analysis is the Alaska Constitution, article II, section 18:

> Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date.

This section was designed to give the public three months notice of a new law before it is applied to them - unless the legislature, by a two-thirds vote, provides otherwise. State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980). In line with this provision, the general state policy is against retroactive statutes, based on the philosophy that people "should be able to rely on existing laws with reasonable certainty." Norton v. State, ABC Board, 695 P.2d 1090, 1093 (Alaska 1985). Retroactive application of new laws requires an express statement in the statute itself:

> No statute is retrospective unless expressly declared therein.

AS 01.10.090.

The leading case on point is Atlantic Richfield v. State, 705 P.2d 418, 438 (Alaska 1985). In this challenge to Alaska's former "separate accounting" oil tax statute, the Supreme Court upheld retroactive application of the statute back from the date of enactment to the beginning of the calendar year. The bill in question was signed into law on July 8, 1978. It provided:

> * Sec. 4. This Act applies to taxable income earned or received after December 31, 1977.
>
> * Sec. 5. The Act takes effect immediately in accordance with AS 01.10.070(c).

Ch. 110 SLA 1978.

Retroactive application was challenged by the oil companies. The Supreme Court held that the statute was "properly retroactive to January 1, 1978," because (1) the statute expressly stated it was to be retroactive, in accord with AS 01.10.090 and (2) the two-thirds vote requirement on the immediate effective date clause was met. The Court rejected oil company arguments that a separate two-thirds vote was required for retroactivity:

> AS 01.10.090 states that "[n]o statute is retrospective unless expressly declared therein." A two-thirds vote requirement does not appear in that section, or elsewhere in Alaska law. The legislature, however, has recognized that where retroactive application of a portion or all of a bill is desired, an immediate effective date, which does require a two-thirds vote under article II, sec. 18 and AS 01.10.070(a), should be used in conjunction with the retroactivity section.

705 P.2d at 438, citing Legislative Affairs Agency, Manual of Legislative Drafting 11 (1977 ed.) and Uniform Rules of the Alaska State Legislature, Rule 10 (May 3, 1977); accord, Legislative Affairs Agency, Manual of Legislative Drafting 28-29 (1987 ed.).

The language of sections 3 and 4 of HB 164 is similar to the language approved by the Supreme Court in Atlantic Richfield. Ch. 110 SLA 1978. If passed by the legislature with the requisite two-thirds vote on the effective date clause, the bill is certain to pass this first constitutional hurdle. Without passage of the effective date clause by a two-thirds vote, the retroactive application section will be void, and the bill will operate prospectively only.

2. Due Process. The next constitutional question is whether the bill would offend guarantees of due process of law. Generally speaking, there is no vested right in any particular rate of taxation. Cohan v. Commissioner, 39 F.2d 540, 545 (2d Cir. 1930) (Learned Hand, J.). Both Congress and state legislatures can change tax statutes and apply the changes retroactively:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

Welch v. Henry, 305 U.S. 134, 146-147 (1935).

The federal rule on retroactivity is that "the application of an income tax statute to the entire calendar year in which enactment took place does not per se violate the Due Process Clause of the Fifth Amendment." United States v. Darusmont, 449 U.S. 292, 297 (1980). A tax rate "may be retroactively changed at the will of Congress at least for periods of less than twelve months; Congress has done so from the outset..." Cohan, 39 F.2d at 545, quoted in Darusmont, 449 U.S. at 298. The rule is based in large part on Congressional history:

> For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session.

Welch, 305 U.S. at 148.

Welch upheld a Wisconsin tax on dividends passed in 1935, and made retroactive to tax years 1933 and 1934. The Court noted that the Wisconsin legislature meets every other year, and thus the 1935 session was "the first opportunity after the tax year in which the income was received" at which the tax could be changed. Reaching back twelve months (1933 taxes were due in

1934) did not "exceed" the "limit of permissible retroactivity." Welch, 305 U.S. at 151.

The federal rule is based largely on questions of "fair notice", whether "the nature or amount of the tax could not have reasonably been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event." Welch, 305 U.S. at 147. Changes to tax rates are presumed to be foreseeable. In Darusmont, for example, the Court flatly rejected a taxpayer's argument that retroactivity of an income tax change was barred by due process concerns. The Court stated that the proposed rate increase had been under public discussion in the form of bills before Congress for about a year, and therefore, the taxpayer "had ample advance notice of the increase." 449 U.S. at 299. */

State courts generally follow the federal rule, noting that "[t]ax provisions, as key components in a system designed to fairly apportion the costs of government, seldom remain static. Rather, we expect them to change in response to changing conditions." Martin v. Board of Assessment Appeals, 707 P.2d 348, 354 (Colo. 1985). The Alaska Supreme Court, as noted above, approved retroactive application of the Oil Tax Act to the full year in which it was enacted. Atlantic Richfield. In another case, the Alaska court had "no doubt" that a license fee increase could have been retroactive to the start of the year of enactment, if the legislature had followed AS 01.10.090 and "stated expressly that it intended the revised fee schedule to be retroactive." State, ABC Board v. Odom, 671 P.2d 375, 377 (Alaska 1983), quoting United States v. Hudson, 299 U.S. 498, 500 (1937) ("it has been the practice of Congress to make [income tax statutes] retroactive for relatively short periods ... and repeated

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* The Court also rejected the taxpayer's argument, based on gift tax cases, that he "could have altered his behavior to avoid the tax if it could have been anticipated by him at the time the transaction was effected." Darusmont, 449 U.S. at 299. Gift taxes seem to be the only tax area where the Court has been receptive to arguments against retroactivity. The Court has refused to consider income in the same light as the "one time transaction" of a gift. "[A] tax on the receipt of income is not comparable to a gift tax. We cannot assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or an increase of an old one." Welch v. Henry, 305 U.S. at 148-149.

decisions of this court have recognized the practice and sustained it as consistent with the due process clause of the Constitution.").

Because HB 164, as written, goes back beyond the start of the calendar year in which it will be passed, we cannot absolutely assure you that the retroactivity section will be held constitutional. By contrast, there is "no doubt" that the bill could be retroactive to January 1, 1988. Odom, Atlantic Richfield. However, going back further is not an insurmountable problem by any means. The proposed effective date of May 31, 1987 is less than twelve months prior to the presumed date HB 164 will be enacted. Twelve months is a "short period," approved by the United States Supreme Court in Welch and again, albeit implicitly, in Darusmont. The bill proposes to change tax rates, an area which is presumed to be subject to legislative change on a regular basis. In this particular case, the taxpayers have been on actual notice that the tax rate might be changed since HB 164 was introduced in January, 1987. Thus, it can be argued that the May 31, 1987 effective date does not violate due process. We believe these arguments to be very strong, although, given the widespread adherence to the "calendar year" approach by the courts, not absolutely certain of success.

RDM:nb

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MEMORANDUM

TO: Deborah Vogt

FROM: Joseph K. Donohue

DATE: April 28, 2986

RE: **Retroactive Amendments to ELF Factor**

You have requested an opinion concerning the constitutionality of enacting a bill which would retroactively either repeal, or amend the methodology for calculating, the economic limit factor under AS 43.55.013. Specifically, you have asked whether a bill enacted in February 1987 and made retroactive to January 1, 1987 would present any due process problem under the Fifth Amendment to the United States Constitution or under Article I, Section 7 of the Alaska Constitution.

The gross production tax on oil or gas is payable monthly. The tax is due on the 20th day of each month for oil or gas production which occurred during the preceding month. The tax is delinquent if not paid before the end of the month following the month of production. AS 43.55.020(a). Thus, the tax on January production is due on February 20 and is delinquent if not paid on or before February 28.

The economic limit factor is defined in AS 43.55.013 and the Department of Revenue has promulgated a number of regulations which interpret and implement of the provision. See 15 AAC 55.010-.040 and .090. The economic limit factor (ELF) is a concept which is designed to reduce the effective rate of taxation on a producing field as production from that field becomes increasingly marginal. The ELF is multiplied by the percentage-of-value amount set forth in AS 43.55.011(b) or the cents-per-barrel amount calculated under (c) to determine the tax due. AS 43.55.013(b)(2) and (3) provide that during the first 10 years of commercial production from a lease or property, an economic limit factor which is greater than .7 is deemed to be one for purposes of the calculation of tax liability. For example, for the period since 1981 when the .7 threshold was enacted as part of Ch. 116 SLA 1981, the ELF at Prudhoe Bay has been greater than .7 and, therefore, one. This, in turn, means that the ELF does not have any operative effect unless it is found to be less than .7 during the initial 10-year period. For Prudhoe Bay, the 10-year period expires in June 1987.

The ELF is derived by the use of a rather complicated mathematical formula which in turn is based on certain simplifying assumptions. For oil, the monthly production rate at the economic limit is presumed to be 300 barrels times the number of well days for the lease or property during the month for which the tax is to be paid. AS 43.55.013(d).

The taxpayer may rebut this presumption at a formal hearing by providing clear and convincing evidence of a different monthly production rate. The determination of the monthly production rate at the economic limit is made by dividing the value at the point of production under AS 43.55.013(f) into the average monthly direct operating costs calculated under subsection (e). The hearing must be held before February 15 of a year or within 6 months after commencement of oil production from a lease or property. The results of the hearing "shall be used for all oil production during that calendar year from the lease or property." AS 43.55.013(d). Therefore, the statute expressly calls for an annual determination with some retroactive effect on the monthly tax period preceding the hearing on the appropriate monthly production rate. This procedural approach makes administrative sense since it is more efficient to have this potentially difficult issue decided on an annual basis rather than on a monthly basis.

Perhaps the leading case on the question of whether a tax statute can apply retroactively to previous tax periods is Welch v. Henry, 305 U.S. 134 (1938). There, the United States Supreme Court upheld a corporate income tax amendment enacted by Wisconsin in March 1935 which was applicable to receipt of corporate dividends in 1933. The court held that, except for a narrow category of gift taxation cases, the legislature had broad authority to adjust or amend tax liability retrospectively.

The exception to this rule mentioned by the court pertained primarily to instances where voluntary irrevocable actions of taxpayers (e.g., making a bequest) were impacted by the retroactive imposition of a tax. The Supreme Court stated that the critical part of the constitutional test was whether "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event." 305 U.S. at 147. The cases cited by the court, e.g. Nichols v. Coolidge, 274 U.S. 531 (1927), and Untermeyer v. Anderson, 276 U.S. 440 (1928), were instances where the donor might well not have acted as he did had he anticipated the tax. The court said that the facts of each case and the nature of the tax would have to be examined to determine if retroactivity gives rise to such harsh and oppressive results that it offends the Constitution. The court stated "there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence

is not on the voluntary act of the taxpayer." 305 U.S. at 147. The court specifically listed property taxes, income taxes and benefit assessments. 305 U.S. at 147-148. The Supreme Court also noted that it was historically the practice of Congress and the Wisconsin Legislature to enact revenue or tax legislation in a given year and to give it effect to the entire calendar year.

The United States Supreme Court more recently upheld the retroactive increase in the minimum tax on preferences in United States v. Darusmont, 449 U.S. 292 (1981). There, an amendment to the Internal Revenue Code enacted in October 1976 was applied to the entire 1976 tax year. In addition to relying on Welch v. Henry, supra, the Supreme Court cited its earlier decision in Cooper v. United States, 280 U.S. 409, 411 (1930), which upheld the taxation of gains from "prior but recent transactions." The Supreme Court also relied on the analysis of Judge Learned Hand in Cohan v. Commissioners, 39 F.2d 540, 545 (2d Cir. 1930). Judge Hand, in resolving a similar issue involving retroactivity of a tax, held that nobody had a vested right in the rate of taxation. In responding to the question of whether the tax law change was foreseeable, Judge Hand stated that once a system of taxation is already in place, a taxpayer "must be prepared for such possibilities ... ." 39 F.2d at 545.

Other decisions which uphold tax law changes with arguably retroactive impacts in the face of due process challenges include Buttke v. Commissioner, 625 F.2d 262 (8th Cir. 1980) (involving the same minimum tax amendments subsequently upheld by the U.S. Supreme Court in United States v. Darusmont, supra) and Neild v. District of Columbia, 110 F.2d 146, 153 (D.C. Cir. 1940) (involving the constitutionality of the application of a new gross receipts tax measured by the prior year's receipts).

Sometimes retroactive tax laws are challenged under state constitutional provisions barring retrospective laws per se or interference with vested rights. The analytical approach taken by the courts is substantially similar. Under the first line of cases, tax bills which are applied to the entire calendar year in which they are enacted are generally found not to be retrospective in operation. See, e.g., Martin v. Board of Assessment Appeals, 707 P.2d 348 (Colo. 1985). In the Martin case, a law changing the factors to be considered in appraising condominiums which took effect in May 1982 and which was used to assess property values as of January 1, 1982 was upheld. The court held that to find an unconstitutional retrospective effect required a showing of an impairment of a vested right. The court concluded:

> ... [P]roperty owners have no vested right to have their taxable property assessed by particular methods employed in prior years. ... Since the statute only alters the factors which may be considered in determining actual value, it does not impair the taxpayers' vested rights, and therefore is not unconstitutionally retrospective in its operation. 707 P.2d at 352.

A "vested rights" challenge in the context of a severance tax increase led to an identical conclusion. In Belco Petroleum v. State Board of Equalization, 587 P.2d 204 (Wyo. 1978), a 1975 amendment to the state severance tax increased the amount of tax due for the previous year. Under the Wyoming severance tax, a taxpayer paid his 1974 tax in July 1975 computed on the value of gross production for previous year. In upholding the application of the 1975 increase to the July assessment, the court ruled that such an increase was not retrospective but merely called for a tax measured by or computed on the basis of antecedent facts or transactions. The court also found that there was no vested right in a specific tax rate.

On the basis of the foregoing state and federal cases, one can conclude that there is no vested right in a particular tax rate or in a particular method of determining a tax liability. The U.S. Supreme Court cases focus on whether the transaction was taxable during the period of retroactive coverage and whether said period is reasonable, whether the transactions were "prior but recent" in time with respect to the tax law change, whether the change was reasonably foreseeable and whether or not the taxpayer might have voluntarily acted as he did had he but known of the change.

The question before us involves the proposed repeal or modification of the ELF factor in February 1987, effective January 1, 1987. The retroactive period is at most two months. It would adjust a factor which is determined on an annualized calendar basis under present law. The affected taxpayers are those whose decision to invest and produce oil or gas has already been made and whose production is already subject to taxation. In the State of Alaska, amendments to the oil and gas production tax must certainly be viewed as foreseeable. In fact, the Legislature has discussed and debated changes to the ELF factor during the 1986 legislative session. Under these circumstances, I conclude that neither state nor federal due process limitations would be abrogated by the repeal or amendment of the ELF factor under consideration here. Furthermore, under the analyses set forth in Martin and Belco Petroleum above, a change in the tax rate or ELF methodology prior to February 20, 1987 might not even be viewed as having "retrospective' operation.

147.JKD:ls

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM February 23, 1989

SUBJECT: Dedication of ELF Proceeds to Permanent Fund (HB 118)

TO: Representative Cliff Davidson
Attn: Lourene Miovski

FROM: David R. Dierdorff
Revisor of Statutes

This morning I discussed with Lourene Miovski your desire to provide that 30 percent of the additional revenue received under the oil and gas properties production tax by reason of the ELF amendments go into the permanent fund. As I told Lourene, the state constitution (Art. IX, sec. 7) prohibits the dedication of state revenue to a specific fund or purpose. However, the legislature could enact a provision that embodies the present intent that certain revenue be appropriated for certain purposes. The provision would not be legally binding on future legislatures.

Enclosed are two amendments that provide alternative means of enacting the legislature's intent. I drafted them as amendments to the original bill rather than for one of the draft CS's prepared for you. Amending the draft CS's would require several technical amendments in the sections after sec. 3, and the exact nature of those amendments will vary from version to version. Consequently, I determined that the simplest way to provide you with the language in amendment form was to amend the bill as introduced.

DRD:gc
WKG7/046

Enclosures(2)

6-0652Aa
Dierdorff

A M E N D M E N T

OFFERED IN THE HOUSE BY DAVIDSON

TO: HB 118

Page 1, following line 8:

Insert a new bill section to read:

"* Section 1. LEGISLATIVE INTENT. It is the intent of the legislature that 30 percent of any additional revenue received by the state under AS 43.55 as a result of the amendments made by this Act be appropriated annually to the principal of the permanent fund."

Page 1, line 9:

Delete "Section 1."

Insert "Sec. 2."

Renumber remaining bill sections accordingly.

2/23/89

6-0652Ab
Dierdorff

A M E N D M E N T

OFFERED IN THE HOUSE BY DAVIDSON

TO: HB 118

Page 1, following line 24:

Insert a new bill section to read:

"* Sec. 3. AS 43.55.013 is amended by adding a new subsection to read:

(l) The commissioner of administration shall separately account for 30 percent of any additional revenue received by the state under this chapter as a result of the 1989 amendments to this section that the department deposits in the general fund. The annual estimated balance in the account may be used by the legislature to make appropriations to the principal of the permanent fund."

Renumber remaining bill section accordingly.

2/23/89

Office of the Speaker
House of Representatives

3-16-89

Sheila,

Please make sure Mr. Baker's remarks get entered into the record for HB 118.

Thanks
Jeri

Sheila
Transcripts are the verbal record. Since we didn't put in any other written testimony we shouldn't put Baker in either
J.

HB 118 (ELF) - Testimony
Public Hearing
Feb. 13, 1989

Frank E. Baker

My name is Frank Baker and I work for BP Exploration; however, as a lifetime Alaska resident (43 years) who was raised in Seward, and as a person who remains fiercely independent in body and soul, I am testifying on behalf of myself and not the oil industry.

I am opposed to HB 118 or any legislation designed to place heavier tax burdens on the oil industry, or any industry trying to do business in this State. Alaska already spends about four times per capita what other states spend on their citizens--and I think it is absurd to perpetuate the "spend your way out" philosophy by taxing the one industry which provides about 85 percent of the revenues.

Changing ELF is just another excuse to drag in more revenues to feed our dinosaur government, which should be scaled down to about the size of a moose, or better yet, a goat.

When I was growing up in Seward I learned a lot from people who believed in private enterprise, and knew how to make it work--store owners like Bob Stanton and Larry Urbach, and later businessmen like Dale Lindsay. These are the kind of people who made Alaska work before Prudhoe Bay, and the kind of people who are trying to make it work today...people like Joe Usibelli. But our legislators, the officials we elected, don't seem to understand the principles of free enterprise. We've had 30 years as a State and 12 years as a big-time oil producer. It's about time we grew up and put some reason and balance into our concept of government.

If I worked for the State and not private industry--and I did once, for Fish and Game, for ten years--I would still favor reducing the scope of state government activities and the number of people on its payroll. This will take raw guts--something we have yet to see demonstrated by any recent legislature or governor.

As a final point, if we plan to diversify our economy by attracting outside investors, we should broadcast a more positive message by leaving this the ELF alone.

Thankyou.

Feb. 14, 1989

Dear Editor,

This is to voice my outrage at the way the statewide teleconference on House Bill 118 (on modifying the Economic Limit Factor, or ELF) was handled from Juneau February 13 by Rep. Cliff Davidson, (D-Kodiak) co-Chairman of the House Resources Committee.

I, along with 60 others in Anchorage, were "polled" by Davidson on whether we were "for" or "against" the legislation. Instead of allowing us to testify in the order in which we registered, Davidson "bumped" us to hear others in favor of the bill; in other words, those with views coinciding with his. This "pre-selection" resulted in considerable delay for those wishing to testify against the bill.

Also, Davidson strictly kept those

testifying against changing the ELF to three minutes, while those in favor of the legislation were often allowed more than five minutes.

Davidson's snappy, often rude behavior toward people testifying against HB 118 was unprofessional and completely out of line. A public hearing is for the public, and if Mr. Davidson doesn't like the views of the majority of Alaskans--who believe in private enterprise rather than a the government-run economy--then perhaps he should reassess why he became an elected official.

To end on a positive note, I would like to commend the folks at the State Legislative Affairs office in Anchorage for doing a great job on the teleconference despite the lack of protocol on the part of Rep. Davidson.

Frank Baker

Chugiak