

SB

112

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT
 MAY 18 2003
 SENATE FINANCE
 COMMITTEE

DATE: 4/25/03

FURTHER:

DATE TURNED IN TO OFFICE: 18 May 2003

Finance Committee considered

SENATE BILL NO. 112

SB 112 INCREASE MOTOR FUEL TAX

"An Act increasing the motor fuel tax and repealing the special tax rates on blended fuels; and providing for an effective date."

and recommends:

- be replaced with _____ CS SB 112 (FIN)
- adopt previous _____ CS CS forthcoming (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:

- same title
- new title

House Bill:

- same title
- technical title
- new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
		fiscal note(s) forthcoming		
		Revenue: 0		
		Admin: ?		

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>			✓	
<i>[Signature]</i>	✓			
COCHAIR: <i>[Signature]</i>				
COCHAIR: <i>[Signature]</i>			✓	

FISCAL NOTE

REPORTED OUT
MAY 18 2003
SENATE FINANCE
COMMITTEE

**STATE OF ALASKA
2003 LEGISLATIVE SESSION**

Fiscal Note Number: _____
 Bill Version: CSSB 112
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title Increasing the motor fuel tax... BRU Finance
 Component Finance
 Sponsor _____
 Requester Governor Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1033 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill provides a mechanism for government agencies to use a credit card for fuel purchases without paying the motor fuel tax. There is not expected to be additional cost to the state's credit-card procurement program.

Prepared by: Dan Spencer, Director Phone 465-5655
 Division Administrative Services Date/Time 5/18/03 2:00 PM
 Approved by: Kevin Jardell, Assistant Commissioner Date 5/18/2003
 Agency Department of Administration

MAY 18 2003

SENATE FINANCE
COMMITTEE

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: CSSB112(FIN)
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Revenue
Title Highway motor fuel tax BRU Revenue Operations
Component Tax Division
Sponsor Senate Rules Committee
Requester Senate Finance Committee Component No. 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation would simplify the process for state motor fuel excise tax refunds on credit card purchases by federal, state and municipal agencies.

Prepared by: Larry Persily, Deputy Commissioner Phone 465-5469
Division Department of Revenue Date/Time 5/18/03 2:20 PM
Approved by: Larry Persily, Deputy Commissioner Date 5/18/2003
Agency Department of Revenue

THE
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Adopted 5/18/03

WORK DRAFT

WORK DRAFT

WORK DRAFT

23-GS1118\W
Kurtz
5/17/03

CS FOR SENATE BILL NO. 112()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to tax refunds for government agency purchases of fuel; and providing**
2 **for an effective date."**

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

4 *** Section 1. AS 43.40.035 is amended by adding a new subsection to read:**

5 (c) For fuel sold to federal, state, and local government agencies for official
6 use and purchased with a government credit card, the credit card issuer may apply for
7 a refund of any motor fuel tax assessed on the purchase if the tax is not billed by the
8 credit card issuer to the government agency making the purchase.

9 *** Sec. 2. AS 43.40.050 is amended by adding a new subsection to read:**

10 (d) A credit card issuer who claims a refund under AS 43.40.035 shall present
11 the refund claim to the department on a form prescribed by the department together
12 with documentation of the claim required by the department.

13 *** Sec. 3. This Act takes effect immediately under AS 01.10.070(c).**



Official Business

Alaska State Senate

Senate Finance Committee

Mail Stop 3100
State Capitol
Juneau, Alaska 99801-1182

FAX COVER SHEET

DATE: 18 May 2003 TIME: 1:30 pm

TO: Legal Services

NUMBER OF PAGES, INCLUDING COVER SHEET: 1

FROM: MINDY ROWLAND
SENATE FINANCE COMMITTEE SECRETARY
PHONE: 465-4935
FAX: 465-2187

NOTES: Final Please
CS SB 112 (FIN)
23-GS1118\W
Kurtz
5/17/03
no changes

*

Also: fiscal note(s) forthcoming:
Revenue ϕ
Admin ?
* mundy
*

*

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 6, 2003

SUBJECT: Motor Fuel Tax and the Alaska Railroad Corporation
(CSSB 112(TRA), amendment U.1)

TO: Senator John Cowdery
Attn: Richard Schmitz

FROM: Kathryn L. Kurtz *KLK*
Legislative Counsel

Enclosed is the amendment you requested, replacing the motor fuel tax on the Alaska Railroad Corporation with a dividend payable to the state by the Alaska Railroad Corporation, if application of the motor fuel tax to the Alaska Railroad Corporation is held to be in violation of 49 U.S.C. 11501(b)(4).

I am not sure that the contingent language will fare any better in court than direct application of the tax to the railroad, since the dividend would correspond exactly to the tax. Also, 45 U.S.C. 1207(a)(5) specifies that the revenue generated by the railroad shall be retained and managed by the railroad for railroad purposes. A tax, for purposes of the Alaska Railroad Transfer Act, would likely be construed as a business expense.

KLK:lmb
03-171.lmb

Enclosure

AMENDMENT

OFFERED IN THE SENATE
TO: CSSB 112(TRA)

BY SENATOR COWDERY

1 Page 1, line 2, following "Railroad":

2 Insert ", or alternatively providing for payment to the state of an annual dividend
3 as if the Railroad were subject to that tax"

4

5 Page 1, following line 4:

6 Insert new bill sections to read:

7 **"* Section 1.** AS 42.40.530 is amended to read:

8 **Sec. 42.40.530. Revenue.** (a) Except as provided in (b) of this section,
9 revenue [REVENUE] generated by or appropriated to the corporation shall be
10 retained and managed by the corporation for railroad and related purposes in
11 accordance with 45 U.S.C. 1207(a)(5) (Alaska Railroad Transfer Act of 1982).

12 *** Sec. 2.** AS 42.40.530 is amended by adding a new subsection to read:

13 (b) The corporation shall pay an annual dividend to the state equal to the
14 amount of tax that would be due under AS 43.40.010 if the corporation were subject to
15 that tax."

16

17 Page 1, line 5:

18 Delete "Section 1"

19 Insert "Sec. 3"

20

21 Renumber the following bill sections accordingly.

22

23 Page 4, following line 26:

1 Insert a new bill section to read:

2 "* Sec. 7. AS 43.40.030(a) is amended to read:

3 (a) Except as specified in AS 43.40.010(j), a person [, OTHER THAN THE
4 ALASKA RAILROAD CORPORATION,] who uses motor fuel to operate an internal
5 combustion engine is entitled to a refund of 18 cents a gallon if

6 (1) the tax on the motor fuel has been paid;

7 (2) the motor fuel is not aviation fuel, or motor fuel used in or on
8 watercraft; and

9 (3) the internal combustion engine is not used in or in conjunction with
10 a motor vehicle licensed to be operated on public ways."

11

12 Renumber the following bill sections accordingly.

13

14 Page 6, following line 11:

15 Insert new bill sections to read:

16 "* Sec. 11. AS 43.40.100(2) is amended to read:

17 (2) "motor fuel" means fuel used in an engine for the propulsion of a
18 motor vehicle or aircraft, and fuel used in and on watercraft for any purpose, or in a
19 stationary engine, machine, or mechanical contrivance that is run by an internal
20 combustion motor; "motor fuel" does not include

21 (A) fuel consigned to foreign countries;

22 (B) fuel sold for use in jet propulsion aircraft operating in
23 flights

24 (i) to foreign countries; or

25 (ii) that continue from foreign countries, unless
26 exemption of the motor fuel from taxation is disallowed because of the
27 refiner's failure to comply with the provisions of a voluntary agreement
28 under AS 43.40.092 in conjunction with expansion of refinery capacity;

29 (C) fuel used in stationary power plants operating as public
30 utility plants and generating electrical energy for sale to the general public;

31 (D) fuel used by nonprofit power associations or corporations

1 for generating electric energy for resale;

2 (E) fuel used by charitable institutions;

3 (F) fuel sold or transferred between qualified dealers;

4 (G) fuel sold to federal, state, and local government agencies
5 for official use; [FOR THE PURPOSES OF THIS SUBPARAGRAPH, THE
6 ALASKA RAILROAD CORPORATION (AS 42.40) IS NOT A FEDERAL,
7 STATE, OR LOCAL GOVERNMENT AGENCY];

8 (H) fuel used in stationary power plants that generate electrical
9 energy for private residential consumption;

10 (I) fuel used to heat private or commercial buildings or
11 facilities;

12 (J) fuel used for other nontaxable purposes as prescribed by
13 regulations adopted by the department;

14 (K) fuel used in stationary power plants of 100 kilowatts or less
15 that generate electrical power for commercial enterprises not for resale; or

16 (L) residual fuel oil used in and on watercraft if the residual
17 fuel oil is sold or transferred in the state or consumed by a user; for purposes of
18 this subparagraph, "residual fuel oil" means the heavy refined hydrocarbon
19 known as number 6 fuel oil that is the residue from crude oil after refined
20 petroleum products have been extracted by the refining process and that may
21 be consumed or used only when sufficient heat is provided to the oil to reduce
22 its viscosity rated by kinetic unit and to give it fluid properties sufficient for
23 pumping and combustion;

24 * Sec. 12. AS 42.40.910(d) is repealed.

25 * Sec. 13. The uncodified law of the State of Alaska is amended by adding a new section to
26 read:

27 SEVERABILITY CLAUSE. Under AS 01.10.030, if secs. 3, 6, or 10 of this Act are
28 held by a court to contravene 49 U.S.C. 11501(b)(4), barring taxes that discriminate against a
29 rail carrier providing transportation subject to the jurisdiction of the Surface Transportation
30 Board, the relevant provisions of secs. 3, 6, and 10 of this Act are severable from the
31 remainder of this Act.

1 * Sec. 14. The uncodified law of the State of Alaska is amended by adding a new section to
2 read:

3 CONDITIONAL EFFECT. Sections 1, 2, 7, 11, and 12 of this Act take effect only if
4 AS 43.40.100(2)(G) as it relates to the Alaska Railroad Corporation, AS 42.40.910(d), or the
5 provision of AS 43.40.030(a) that denies a tax refund to the Alaska Railroad Corporation is
6 held by a court to contravene 49 U.S.C. 11501(b)(4), barring taxes that discriminate against a
7 rail carrier providing transportation subject to the jurisdiction of the Surface Transportation
8 Board.

9 * Sec. 15. If, under sec. 14 of this Act, secs. 1, 2, 7, 11, and 12 of this Act take effect, they
10 take effect on the later of (1) the date a court enters a final judgment that the amendment
11 made to AS 43.40.100(2)(G) by sec. 10 of this Act making motor fuel used by the Alaska
12 Railroad Corporation taxable for purposes of AS 43.40.010, AS 42.40.910(d), or the provision
13 of AS 43.40.030(a) that denies a tax refund to the Alaska Railroad Corporation contravenes
14 49 U.S.C. 11501(b)(4), barring taxes that discriminate against a rail carrier providing
15 transportation subject to the jurisdiction of the Surface Transportation Board, or (2) the
16 expiration of any time for appeal of that judgment, or entry of a final order on the appeal that
17 AS 43.40.100(2)(G), as amended by sec. 10 of this Act, AS 42.40.910(d), or the provision of
18 AS 43.40.030(a) that denies a tax refund to the Alaska Railroad Corporation violates 49
19 U.S.C. 11501(b)(4). The attorney general shall promptly notify the lieutenant governor and
20 the revisor of statutes of a judgment described in this section."

21

22 Renumber the following bill section accordingly.

23

24 Page 6, line 12:

25 Delete "This"

26 Insert "Except as provided in sec. 15 of this Act, this"

REASONS AGAINST TAXING ALASKA'S STATE RAILROAD

BACKGROUND

Governor Murkowski sponsored SB 112 as part of his 2004 budget package to increase the motor fuel tax from 8 cents to 20 cents per gallon. The Senate Transportation committee substitute subjects the Alaska Railroad Corporation (ARRC) to the motor fuels tax by making ARRC the only federal, state or local governmental entity not exempted from the bill's operation. CSSB112 (TRA) will cost the Railroad more than \$1.2 million each year and could open the door to additional tax proposals on the Railroad, which is tax-exempt as a state-owned corporation.

The tax proposed in CSSB 112 violates federal law and may also violate the pledge the State made to ARRC's lenders and creditors in the Alaska Railroad Corporation Act not to do anything that would impair ARRC's ability to pay its debts. CSSB 112 will also jeopardize ARRC's ability to provide safe, economical, and efficient transportation to residents, businesses, visitors and military installations in the state and foster and promote the long-term economic growth and development of the state. Besides being poor public policy, it violates common sense for the State to tax itself to "raise revenue."

ARRC ARGUMENTS

DISCRIMINATION

1) CSSB 112 (TRA) illegally discriminates against railroads in violation of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) which is codified at 49 U.S.C. sec. 11501(b)(4) because the bill will require ARRC to pay a substantially higher fuel tax (\$.20/gal) than that paid by barges/ships (\$.05/gal) and aircraft (\$.032/gal). Congress adopted this statute for the express purpose of protecting the financial stability of the railroad industry by shielding railroads from discriminatory taxation that put them at a competitive disadvantage to other modes of transportation. There have been several court decisions from other jurisdictions that have held that states may not impose a fuel tax on railroad that is greater than that imposed on other modes of transportation.

2) CSSB 112 also discriminates against ARRC because the fuel taxes collected under AS 43.40.010 are dedicated to the construction and maintenance of airports, highways, and port facilities whereas ARRC pays all of the costs to construct and maintain its roadbed. **Thus, ARRC will be at a direct competitive disadvantage because, unlike trucking, barge/ship and airline companies, ARRC will have to pay the tax and also pay to build and maintain its tracks.** The AG's office and the Legislature's own Legal Services office have both issued legal opinions stating that the proposed fuel tax against ARRC will likely violate the 4-R Act.

Provided by the Alaska Railroad Corporation

DEDICATED FUND: ARTA

The Federal Alaska Railroad Transfer Act (ARTA) may have an impact on the State's ability to tax ARRC. ARTA specifically provides that after transfer of the Railroad to the State, "revenues generated by the State-owned railroad shall be retained and managed by the State-owned railroad for railroad and related purposes." 45 U.S.C. sec. 1207(a)(5). This constitutes a federally mandated dedication of revenue which is binding on the State as a condition subsequent to the railroad transfer and is comparable to the quasi-trust imposed on school and university lands transferred to the State. 1984 Inf. Alaska Att'y Gen. Op. (366-565-84). The intent of Congress in requiring the dedication of railroad revenue was to prevent the piecemeal dismantling of an important transportation asset, the continued existence of which is vital to state and federal interests. 45 U.S.C. sec. 1201(3); 1982 U.S. Code Cong. and Adm. News at 4-30. This section of ARTA therefore prevents the Legislature from confiscating ARRC's funds and using them for a nonrailroad purpose.

OTHER STATE-OWNED RAILROADS

To our knowledge, other states do not impose a fuel tax on their state-owned railroads. (There are 18 state-owned passenger railroads and at least two state-owned freight railroads)

FEDERAL TAX EXEMPTION

State-owned railroads are exempted from paying the federal 4.3-cent railroad diesel fuel tax. In fact, Congress is considering eliminating the federal tax for private railroads as well...since the tax robs railroads of needed capital for track and roadbed maintenance and construction.

FINANCIAL IMPACT

- ARRC is a capital-intensive operation and simply cannot afford to pay \$1.2 million per year with its unpredictable year-to-year earnings. The Railroad spends nearly \$25 million per year on maintenance activities related to its track, roads, and facilities. This tax will directly impact the ability of the Railroad to remain a self-sustaining economic development enterprise that reinvests all earnings back into its infrastructure.
- ARRC is facing a difficult financial future – costs continue to rise (benefits, insurance, etc.) while revenues remain static.
- 2003 budget projects \$1.1 million net income, if no federal reimbursements are taken into consideration.
- This tax directly translates into less capital rehabilitation of the Railroad
 - Reduces funds available for our internally-funded capital program
 - Reduces funds available to match federal monies received (over 9% match required)
 - ARRC still battling significant deferred maintenance issue – this would exacerbate situation

FEDERAL FUNDS LOSS

ARRC net earnings are the only source of federal match funds (no state match funds provided). ARRC has a 9% Federal Transit Administration match. A state tax of \$1 million could cause the ARRC to lose \$10 million in FTA funds.

MIXED MESSAGES

ARRC uniquely gets no state funds compared to other state railroads. This, on top of a state decision to tax ARRC would send a strong message to Washington to D.C. that Alaska is not supportive of its state-owned railroad. Why should the federal government support the Alaska Railroad through federal grants when the state is sending a different message?

IMPACT TO BONDING AND FINANCING CAPABILITIES

Taxing the railroad could impact ARRC's ability to secure financing for its ongoing capital and operating needs ARRC lenders may view the state's attempt to amend the Alaska Railroad Corporation Act to tax ARRC as an alteration of ARRC's right to be exempt from state and local taxation. This could lead to more expensive financing costs and may be construed as a violation of the pledge the state made to lenders in ARRC's statute, AS 42.40.675, that it would not do anything to impair ARRC's ability to repay its debts.

PANDORA'S BOX

Taxing the Railroad's fuel opens the door to other tax proposals on the Railroad...a huge policy change.

STATE OF ALASKA

DEPARTMENT OF LAW

COMMERCIAL SECTION

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110300
DIMOND COURT HOUSE, 5TH FLOOR
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2539

May 1, 2003

The Honorable Gene Therriault
Senate Transportation Committee
State Capitol, Room 111
Juneau, AK 99801-1182

Re: CSSR 112 (TRA)
Taxing the Alaska Railroad
Our file: 023-96-0114

Dear Senator Therriault:

During the April 4th hearing on SB 112, language proposing to subject the Alaska Railroad to the motor fuel tax at the highway rate of \$.20/gallon was presented for discussion. In response, the Alaska Railroad cited a provision of federal law that purports to prevent tax discrimination in relation to railroads subject to federal jurisdiction: 49 U.S.C. § 11501. At the April 24th hearing in Senate Transportation, Senator Therriault requested an opinion with respect to 49 U.S.C. § 11501 from the Department of Law.

I. BACKGROUND

The language in 49 U.S.C. § 11501 was originally enacted in 1976 as part of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act").¹ 49 U.S.C. § 11501(b)(4) prohibits a state from imposing a tax "that discriminates against a rail carrier" subject to federal Surface Transportation Board jurisdiction. The Alaska Railroad is subject to federal Surface Transportation Board jurisdiction by virtue of the Alaska Railroad Transfer Act. 45 U.S.C. § 1207(a)(1).

¹ In 1995, the 4-R Act was re-enacted and re-codified as part of the Interstate Commerce Commission Termination Act of 1995, 109 Stat. 803.

The Ninth Circuit explained the intention of Congress in enacting this tax discrimination provision in *Atchison, Topeka and Santa Fe Railway Co. v. Arizona*, 78 F.3d 438 (9th Cir.), *cert. denied*, 519 U.S. 1029 (1996):

Moreover, the purpose of the 4-R Act was not to grant railroads preferential treatment. . . . Rather, in adopting the 4-R Act, Congress' purpose was to remedy discrimination against the railroads and place them on an even playing field with other state taxpayers.

Id. at 442.² The court went on to quote from legislative history regarding the bill that eventually evolved into the 4-R Act:

The proposal in no way alters the freedom of the State to tax its' taxpayers as in its discretion it deems best, so long as such carriers are *accorded equal tax treatment with other taxpayers.*

Id. Accordingly, it is clear that the 4-R Act does not prohibit state taxation of railroads. All that is prohibited is discriminatory taxation.

The *Atchison* court went on to hold that in order to determine whether the state's taxing scheme was discriminatory the tax treatment of all other "commercial and industrial taxpayers subject to the tax" must be examined. *Id.* On the facts of that case, the court determined that most other commercial and industrial taxpayers paid the same tax at the same rate, therefore there was no discrimination. *Id.* at 443-44.

Other states' fuel excise taxes have been challenged under the 4-R Act. Minnesota, for instance, sought to impose a \$.17/gallon fuel tax on railroads, which was the same rate as that imposed on the trucking and marine industry, but more than the rate imposed on the aviation industry. *See Burlington Northern Railroad Co. v. Triplett*, 682 F. Supp. 443 (D. Minn. 1988). There, the court found discrimination on two grounds. First, even though the tax rate for the trucking industry was the same, the court found that the revenues raised from the trucking industry were dedicated to repair and maintenance of roadbeds used by trucks. But none of the revenue raised from the railroad industry defrayed the costs of railroad bed maintenance and repair. Thus the trucks had a "distinct

² According to the U.S. Supreme Court, Congress determined in 1976 that railroads were overtaxed by at least \$50 million each year. *Burlington Northern Railroad Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457, 107 S. Ct. 1855, 1858 (1987).

competitive advantage.” *Id.* at 445.³ Second, the court found discrimination against the railroad industry by virtue of the lower rate paid by the aviation industry.

Courts have differed with respect to what the appropriate comparison class should be for evaluating discrimination. As noted above, the Ninth Circuit in *Atchison* compared the railroad’s treatment with “all other commercial and industrial taxpayers” subject to the tax. *Atchison*, 78 F.3d at 441. The *Atchison* court rejected a narrower comparison class of the railroad’s major competitors.

The Ninth Circuit view, however, was recently rejected by the Eighth Circuit, which held that the tax treatment of only the railroad’s direct competitors should be considered when evaluating discrimination. See *Burlington Northern, Santa Fe railway Co. v. Lohman*, 193 F.3d 984 (8th Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). In that case, only barges and trucks were held to be the railroad’s direct competitors and thus part of the comparison class. Since barges and trucks were exempt from the tax that the railroad was supposed to pay, the tax was struck down. *Id.* at 986.⁴

Thus, there appears to be a split in the federal circuit courts as to what the appropriate comparison class is for evaluating discrimination. Until that split is resolved by the U.S. Supreme Court (or the Ninth Circuit reverses itself), the broader view of the Ninth Circuit controls such disputes in Alaska. Thus, whether discrimination exists likely depends on the nature of the treatment of all other commercial and industrial motor fuel taxpayers.

³ This reasoning was recently rejected, however, by the Minnesota Supreme Court. See *Burlington Northern Railroad Co. v. Commissioner of Revenue*, 606 N.W.2d 54, 60-61 (Minn. 2000).

⁴ The Eighth Circuit view was recently applied by the Minnesota Supreme Court in *Burlington Northern Railroad Co. v. Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000). There the court found a 6.5% sales tax on railroad fuel (which equated to a rate that varied between \$.026/gallon to \$.042/gallon) to be not discriminatory when compared to the \$.20/gallon tax paid by the railroad’s primary competitors, motor carriers. *Id.* at 61. The court appeared less concerned about differentials between the railroad rate and the aviation rate, which varied between \$.005/gallon and \$.05/gallon. *Id.* n.7.

II. DISCUSSION

CSSB 112 (TRA) proposes to remove the Alaska Railroad from the government exemption from motor fuel tax set forth in AS 43.40.100(2)(G). This would in turn subject the Alaska Railroad to the general motor fuel tax rate set forth in AS 43.40.010. For purposes of the 4-R Act, the question then becomes the extent to which all other commercial and industrial taxpayers are subject to this tax at this rate.

Alaska Statute 43.40.010 sets different rates for different uses of motor fuel. CSSB 112 (TRA) proposes to raise the general motor fuel tax rate from \$.08/gallon to \$.20/gallon. The bill leaves the remaining rates unchanged. Aviation gasoline is taxed at a rate of \$.047/gallon. Marine motor fuel is taxed at the rate of \$.05/gallon. Jet fuel is taxed at a rate of \$.032/gallon. Off-road motor fuel is taxed at an after-refund rate of \$.02/gallon. AS 43.40.030(a).

The Department of Revenue advises that there are industrial and commercial motor fuel consumers in each category of motor fuel tax. Unfortunately, however, the Department of Revenue advises that it is impossible to tell the extent to which industrial users pay the tax as opposed to individual users. But it is clear that different industries pay at different rates, the lowest rate being the off-road rate of \$.02/gallon.

Applying the holding of the Ninth Circuit in the *Atchison* case to the state's motor fuel tax scheme, there is no question that the state can subject the Alaska Railroad to motor fuel taxes. The question is at what rate. The aviation and marine industries, as well as any industry that uses off-road vehicles, are granted preferential tax rates by AS 43.40. Subjecting the Alaska Railroad to the higher non-preferential rate would probably constitute discriminatory treatment under the Ninth Circuit's interpretation of the 4-R Act. 49 U.S.C. § 11501(b)(4). Nevertheless, under *Atchison*, we see no reason why the Alaska Railroad could not be subject to motor fuel tax at the off-road rate, the lowest rate in the motor fuel scheme.

That being said, if the Eighth Circuit view in *Burlington Northern* were to be applied in Alaska, the analysis would turn not on what rate all other commercial and industrial entities were paying, but rather what rate the Alaska Railroad's direct competitors were paying. Critical to this analysis would be the extent to which the Alaska Railroad directly competes with the marine, aviation and off-road industries. Full evaluation of this issue would require additional facts that are not presently before us. If, however, it could be demonstrated that the Alaska Railroad's only direct competitor was

The Honorable Gene Therriault, Senator
Alaska State Legislature
Our file: 023-96-0114

May 1, 2003
Page 5

the trucking industry, then an argument could be made that taxing the Alaska Railroad at the same rate as the trucking industry is not discriminatory. But this argument's chances of prevailing in a legal challenge are far from certain.⁵ It would require the Ninth Circuit to abandon its holding in *Atchison* or be reversed by the U.S. Supreme Court.


III. CONCLUSION

There is no legal prohibition against subjecting the Alaska Railroad to the motor fuel tax. If, however, the rate is more than the lowest rate other commercial and industrial taxpayers are paying the legislation could be vulnerable to a legal challenge. The litigation risk associated with such a legal challenge likely increases the higher the rate is set above the lowest rate.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:


Michael A. Barnhill
Assistant Attorney General

MAB:ame

cc: Senate Finance Committee

⁵ We have not researched the power of the Alaska Railroad to seek legal remedy against the State of Alaska in the courts.

FRANK H. MURKOWSKI
GOVERNOR

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March 5, 2003

The Honorable Gene Therriault
President of the Senate
Alaska State Legislature
State Capitol, Room 107
Juneau, AK 99801-1182

Dear President Therriault:

Under Authority of article III, section 18, of the Alaska Constitution, I am transmitting a bill that would increase the state's highway motor fuel tax rate from 8 cents a gallon to 20 cents a gallon and repeal the special rate for gasohol.

In order for Alaska's economy to grow and diversify, we must expand and improve our transportation infrastructure. To do this, we must adequately fund highway construction and maintenance activities. Currently, Alaska spends nearly \$50 million per year in general funds to match our federal highway capital program and nearly \$60 million dollars per year on maintenance.

At the current eight cents per gallon, Alaska's highway motor fuel tax rate is now the lowest in the nation. Even after the proposed increase, thirty-eight states would have higher rates, and Alaska's fuel tax would be at the 20 cent national average. In fact, had the tax rate been indexed for inflation when it was initiated in 1961, it would be nearly 2½ times the rate proposed in the bill.

Under existing law, revenue from the motor fuel tax used on roads and highways is deposited in a highway fuel tax account in the general fund. This fund is available for maintenance and construction of highway projects and ferries.

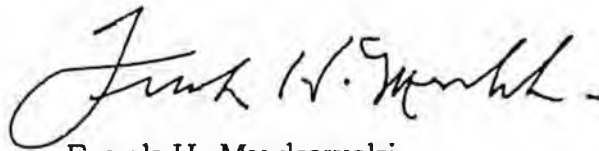
The Honorable Gene Therriault
March 5, 2003
Page 2

This bill also deletes AS 43.40.010(a)(4) and AS 43.40.010(b)(4), which provides a special tax rate for blended fuel. Working with industry and private citizens, Alaska no longer requires the use of oxygenated fuels to meet air quality standards. However, the U.S. Environmental Protection Agency requires that the state be able to rapidly re-impose a requirement for the use of oxy fuels should air quality deteriorate. This legislation will not impact the state's ability to do so.

This proposal represents a modest, user-pays approach to expanding and improving our state's transportation infrastructure.

I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank H. Murkowski". The signature is written in a cursive style with a large, sweeping initial "F".

Frank H. Murkowski
Governor

SENATE COMMITTEE REPORT First Committee of Referral

DATE: 3/6/03

FURTHER: Finance

Date of 5-Day Notice: 3/6/03
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 4/25/03

Transportation Committee considered SENATE BILL NO. 112

SB 112 INCREASE MOTOR FUEL TAX

"An Act increasing the motor fuel tax and repealing the special tax rates on blended fuels; and providing for an effective date."

and recommends:

- be replaced with _____ CS SB 112 (TRA)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

- Senate Bill:**
 same title
 new title
- House Bill:**
 same title
 technical title
 new: SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
...
...

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DEC	3/3		<input checked="" type="checkbox"/>	2
REV	3/3	<input checked="" type="checkbox"/>		1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:		DO PASS	DO NOT PASS	NO REC	AMEND
Olson	<i>Arnold Olson</i>		<input checked="" type="checkbox"/>		
Therriault	<i>Chris Therriault</i>			<input checked="" type="checkbox"/>	
Lincoln	<i>Deanna Lincoln</i>		<input checked="" type="checkbox"/>		
Wagner	<i>Thomas H. Wagner</i>			<input checked="" type="checkbox"/>	
Cowdery	CHAIR: <i>John J. Cowdery</i>	<input checked="" type="checkbox"/>			

SENATE FINANCE COMMITTEE

SIGN-IN

SB 112-INCREASE MOTOR FUEL TAX

NAME: LANDA BAILY Subject/Bill No: SB112

Co./Dept./Title: Revenue Phone: 2302

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: Robynn Wilson () Subject/Bill No: SB112

Co./Dept./Title: Revenue Phone: Anch 410

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: Mike Barnhill Subject/Bill No: SB112

Co./Dept./Title: Law Phone: 4118

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: Dendy Lindskog Subject/Bill No: SB 112

Co./Dept./Title: Alaska Railroad Phone: 240-9571

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

John Binkley, chairman of Arrc Board, will testify on tele conference. 05/07/03

AM

NAME: John MacKinnon Subject/Bill No: SB112

Co./Dept./Title: DBT/PT Phone: 321 2047

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? Yes No Respond To Questions

