

EXHIBIT 1
DATE 3.30.05
#B 795

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Montana Legislative Services Division

Legal Services Office

March 24, 2005

Representative Scott Mendenhall
214 Solomon Mountain Road
Clancy, Montana 59634

Dear Representative Mendenhall:

I am writing in response to a request for an analysis of the legality of House Bill No. 795. House Bill No. 795 provides for a refund of 60% of the gasoline tax on gallons of gasoline or special fuel as evidenced by delivery invoices or manifests that document mileage and fuel usage for agricultural commodity hauling. "Agricultural commodity hauling" is defined as the transport by motor vehicle of any agricultural crop, forage used by livestock, or livestock, timber, birds, or fish that are grown, raised, or produced in Montana or any value-added agricultural product that is made from those things. House Bill No. 795 also provides that special trip permits may be issued to Montana-based motor carriers operating Montana-licensed vehicles, on or after January 1, 2007, for the vehicle combinations and weights for travel on Montana nonnational network highways that are different from all other vehicle combinations and weights traveling on other highways.

I will first address the fuel tax refund portion of House Bill No. 795. A challenge to this portion of House Bill No. 795 would be under the Equal Protection Clauses contained in section 1 of the 14th Amendment to the United States Constitution and in Article II, section 4, of the Montana Constitution. The Equal Protection Clauses essentially require that similarly situated individuals and entities be treated in the same manner. In the area of taxation, the Legislature is required to have a rational basis for its action. Montana Stockgrowers Association v. State, 238 Mont. 113, 777 P.2d 285 (1989), followed in GBN, Inc. v. Department of Revenue, 249 Mont. 261, 815 P.2d 595 (1991). In the area of taxation, the United States Supreme Court has indicated that even under the rational basis test, its review is especially deferential. See Nordlinger v. Hahn, 505 U.S. 1 (1992), in which the United States Supreme Court held that California's acquisition-value assessment scheme did not violate the Equal Protection Clause of the 14th Amendment to the United States Constitution. The Court held that unless a state-imposed classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. I am unsure of what rational basis supports a determination that fuel taxes are less for a vehicle hauling Montana agricultural commodities than for a vehicle hauling identical commodities produced in another state. However, even if a rational basis could be articulated or inferred, the disparate tax treatment also raises Commerce Clause issues.

I hope that I have adequately addressed your question. If you have additional questions, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gregory J. Petesch", is written over a horizontal line.

Gregory J. Petesch
Director of Legal Services

cc: Representative John Witt
Leanne Kurtz
C10429 5083gpxa.

The Commerce Clause is contained in Article I, section 8, of the United States Constitution. The Commerce Clause delegates a positive power to Congress to regulate commerce between the states. The Commerce Clause has also been interpreted to contain a negative or "dormant" implication that preempts the power of the states over interstate commerce even in the absence of a positive enactment by Congress. The most common test for a Commerce Clause concern is contained in Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977). That test requires, upon examination of the practical effect of the tax, that the tax be applied to an activity having a substantial nexus with the taxing state, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the taxing state.

In Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977), New York enacted a tax that provided sellers of stock a reduction in a stock transfer tax if the stock sale was made through New York brokers. The tax reduction was designed to encourage in-state business activity. The United States Supreme Court found that the tax reduction offended the nondiscrimination principle inherent in the Commerce Clause. Under the statute, the seller's decision of where to sell the stock would no longer be made solely on the basis of nontax criteria. The Court concluded that New York was using its power to tax an in-state operation as a means of requiring other business operations to be performed in New York. However, the Court noted that its decision did not prevent states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry.

In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the United States Supreme Court struck down a Hawaii statute that exempted certain locally produced alcoholic beverages from its wholesale liquor excise tax. The purpose of the tax was to aid Hawaiian industry. However, the motivation of the Legislature was irrelevant to the Commerce Clause inquiry as to whether the tax discriminated against out-of-state products.

It would be difficult to argue that the fuel tax credits provided for in House Bill No. 795 do not discriminate against out-of-state products because the tax credits are only available to motor vehicles carrying Montana products. It appears that even if a rational basis could be articulated for the fuel tax credits, they would likely fail to pass Commerce Clause muster.

The special trip permits provided for in House Bill No. 795 may be issued only to Montana-based motor carriers operating Montana-licensed vehicles, on or after January 1, 2007, for the vehicle combinations and weights for travel on Montana nonnational network highways that are different from all other vehicle combinations and weights traveling on other highways. The permits allow the eligible vehicles to haul heavier loads than are allowed for similar vehicles traveling on national highway networks. A person whose business is located in an area that requires the person's vehicles to travel on a "national" highway is not eligible for the new permits. By nature of the location of the business, the person is required to haul lighter loads and is therefore at a competitive disadvantage. Because of this competitive disadvantage for vehicles that are not licensed in Montana, the Commerce Clause problems addressed with regard to the fuel tax credits are even greater with regard to the trip permit provisions in House Bill No. 795.