U.S. Department
of Transportation
**Federal Aviation
Administration**

Southern Region

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May 24, 2000

Mr. Winston B. Sitton
Assistant Attorney General
Tax Division
425 Fifth Avenue North
Nashville, TN. 37243

Dear Mr. Sitton:

This reply is in response to your May 18, 2000, letter and May 19, 2000, FAX concerning the Grandfather Provisions of 49 U.S.C. §§ 47107 and 47133.

You indicate that the Tennessee Legislature is currently examining a proposal to change to general purposes a 4.5% state transportation fuel tax, the aviation portion of which is currently being used to fund state aviation programs. You have asked to confirm your previous discussion with FAA officials concerning the applicability to the State's aviation fuel tax of the grandfather provisions of 49 U.S.C. §§47107(b)(1) and 47133(a) relating to local aviation fuel taxes. State aviation fuel taxes are governed by 49 U.S.C. §§47107(b)(3) and 47133(c).

It is not necessary to reach this legal issue, however, because even if the state aviation fuel tax currently being levied in accordance with Chapter 931 were to qualify for the grandfather exemption, that grandfathering would be limited to the tax that was in effect on December 30, 1987, when the Airway Safety and Capacity Expansion Act of 1987 (ASCEA) amended the Airport and Airway Improvement Act of 1982 (AAIA). The original revenue use statute, section 511(a)(12) of the AAIA, did not expressly reference fuel taxes. As a result, some controversy arose concerning whether the restrictive language would cover certain taxes on aviation fuel. To avoid future confusion over taxes on aviation fuel, Congress in 1987 through ASCEA amended section 511(a)(12) and added section 511(d). Thus, section 511(a)(12) was amended to read, "… all revenues generated by the airport, if it is a public airport, and any local taxes on aviation fuel (other than taxes in effect on December 30, 1987) will be expanded …" for airport purposes. The current provisions read similarly today. See, 49 U.S.C. §§47107(b)(1) and 47133(a). Section 511(d) was also added by the 1987 Amendment. That section stated,

> Nothing in subsection (a)(12) of this section shall preclude the use of state taxes on aviation fuel to support a state aviation program or preclude the use of airport revenue on or off the airport for noise mitigation purposes.

This provision is currently codified at 49 U.S.C. §§ 47107(b)(3) and 47133(c).

Airport sponsors would have a reasonable expectation that their existing programs would be exception from the amended version of the revenue use requirement, but that post-ASCEA changes to the use of state aviation fuel tax revenues would have to be consistent with the pre-ASCEA grandfathered provisions or with the Federal revenue use provision itself. Again, we believe that the proper interpretation of the AAIA and its 1987 amendment is generally to limit the grandfather exemption to the statutory program or tax that was in effect at the time the AAIA or its amendments were enacted.

As support for this view, we note that Congress saw fit to amend § 511 of the AAIA in 1989 (Public Law No. 101-281) by adding a subsection (g) (now codified at 49 U.S.C. § 47107(j)) to permit the State of Hawaii, an airport sponsor, use of a certain amount of revenues generated on the sale at off-airport locations in the State of duty-free merchandise for eligible transportation projects. Hawaii has had, since its territorial days, legislation transferring five percent of airport revenues to its State central services fund. This provision is legitimately grandfathered as a pre-AAIA statute controlling the State's financing and providing for the use of airport revenues for other facilities.

Had Congress intended the grandfather clause to apply to exempt any revenue diversion of the sponsor, however, § 511(g) would have been extraneous, since Hawaii would have been able to rely on that statutory provision to divert the off-airport revenues without further Congressional blessing. The State, however, requested the Department of Transportation's opinion on proposed State legislation permitting the diversion of the off-airport, duty free revenues (beyond that which was originally grandfathered when the AAIA was enacted). Upon receipt of Secretarial letters indicating that enactment and implementation of that legislation would place it in violation of the revenue use requirement, the State obtained Federal passage of the subsection 511(g) as a special exception.

Accordingly, the State of Tennessee may not rely on the fact that its 1986 state aviation fuel tax may be grandfathered to enact new measures to divert, directly or indirectly, airport revenue. Passage of the legislation to permit general use of the proceeds from the aviation fuel tax may jeopardize continued Federal funding of airport and noise abatement projects at Federally-assisted airports throughout the State of Tennessee.

This letter has been coordinated with the Office of the Chief Counsel at FAA Headquarters and the Director, Office of Airport Safety and Standards. If you have any further questions concerning the legal aspects of this letter, please contact Jonathan Cross, Airports and Environmental Law Division, at (202) 267-3473.

We appreciate you providing us with information to make sure that the State of Tennessee complied with Federal statutes.

Sincerely,

/s/

Stephen A. Brill
Manager, Airports Division

cc TDOT, Aeronautics Division