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

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

FEB 16 2010

The Honorable Mike Gabbard
Hawaii State Senate, 19th District
State Capitol
Honolulu, Hawaii 96813

By Overnight and Electronic Mail

Re: Proposed State Tax on Aviation Fuel

Dear Senator Gabbard:

Thank you for your January 8, 2010 letter, addressed to Robert S. Rivkin, General Counsel of the United States Department of Transportation, and myself, requesting an advisory opinion concerning a proposed state tax on petroleum products. This letter responds on behalf of both Mr. Rivkin and myself. You advise that the Hawaii Legislature is considering proposed amendment H.B. 1271, CD1, to Hawaii Revised Statute (HRS) § 243-3.5, which would increase and broaden the purposes of an existing tax. The proposed bill would increase the current tax, and make the proceeds available for energy and food security efforts as well as environmental response. Specifically, you request an opinion concerning whether the proposed legislation would violate 49 U.S.C. § 47133, the statutory restriction on use of airport revenue. You ask that if we find the proposed bill does violate the revenue use provision, that we include our reasons for such a determination.

The proposed bill would be part of HRS, Chapter 243, entitled, "Fuel Tax Law." The bill would impose an additional tax on a barrel of "petroleum product." Although H.B. 1271, CD1, does not specifically use the term "aviation fuel," based upon the statutory structure of HRS chapter 243, pertaining to fuel taxes, it is reasonable to interpret the term "petroleum products" to include such fuels (*e.g.*, Avgas, Jet A-1, Jet B, etc.). "Petroleum product" as defined in HRS § 243-1 means "any liquid hydrocarbon at standard temperature and pressure that is the product of the fractionalization, distillation, or other refining or processing of crude oil." Section 243-1 further defines "aviation fuel" as being "all liquid substances of whatever chemical composition usable for the propulsion of airplanes." The definitions further describe "Liquid fuel" or "fuel" as being "all liquids ordinarily, practically, and commercially usable in internal combustion engines for the generation of power.... All aviation fuel that is sold for use in or used for airplanes is deemed to be 'liquid fuel' or 'fuel' whether or not coming within the definition contained in the foregoing sentence." Moreover, the term "petroleum product" is defined in related provisions elsewhere in the HRS to include "aviation fuels." HRS § 486-50.

For these reasons, we respectfully disagree with the inference made in the Hawaii Attorney General's letter dated August 24, 2009, that the absence of the specific term "aviation fuel" in the proposed legislation means "aviation fuel" is not included in "petroleum products." Were aviation

fuel to be exempted, then the proposed amendment would be consistent with Hawaii's statutory airport grant obligations.

The Anti-Head Tax Act, 49 U.S.C. § 40116, permits a state to levy and collect sales or use taxes on the sale of goods or services which could include aviation fuel. However, in accordance with 49 U.S.C. §§ 47107(b) and 47133,[1] for those airports that have accepted Federal Aviation Administration (FAA) airport development grants or are the subject of federal assistance, state or local taxes on aviation fuel are considered to be "airport revenue" and using such tax revenue for non-airport purposes is prohibited. According to the FAA's *Policy and Procedures Concerning the Use of Airport Revenue*, 64 *Fed. Reg.* 7696, 7716 (Feb. 16, 1999),

> State or local taxes on aviation fuel (except taxes in effect on December 30, 1987) are considered to be airport revenue subject to the revenue-use requirement. However, revenues from state taxes on aviation fuel may be used to support state aviation programs or for noise mitigation purposes, on or off the airport.

Since the passage of the Airport and Airway Improvement Act (AAIA) on September 3, 1982, Congress has required that all revenue accruing to grant-obligated airports be used for the airport's capital or operating costs. The State of Hawaii owns and operates 15 airports and is an obligated sponsor on a number of grants issued under the AAIA's Airport Improvement Program (AIP). On December 30, 1987, the Airport and Airway Safety and Capacity Expansion Act amended this revenue use requirement to include local taxes on aviation fuel, such that the provision then 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 expended ..." for airport purposes. This provision is currently codified at 49 U.S.C. §§ 47107(b)(1) and 47133(a). Congress also added that the revenue use requirement "does not prevent the use of a State tax on aviation fuel to support a State aviation program or the use of airport revenue on or off the airport for a noise mitigation purpose." 49 U.S.C. § 47107(b)(3).

In short, while a tax on aviation fuel is permitted in accordance with § 40116, the proceeds derived from such a tax are subject to the revenue use requirements of 49 U.S.C. §§ 47107(b)(1) and 47133(a). Any action by the State Legislature to impose a tax on aviation fuel sold on an airport and to use the proceeds derived from the tax to support non-aviation activities would be inconsistent with federal law. Monies from such a tax would have to be spent to support either (1) the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property, or (2) a state aviation program or for a noise mitigation purpose. Accordingly, enactment of the legislation to permit a use of the proceeds from the petroleum tax on aviation fuel other than that described in (1) and/or (2) above could subject the State, as airport sponsor, to an administrative action to enforce the revenue diversion prohibition.

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[1] Sections 47107(b) and 47133 are essentially parallel provisions in Title 49. Section 47107(b) represents the original 1982 version of the revenue use statute, as amended and recodified. Title VIII of the FAA Reauthorization Act of 1996, § 804, codified the preexisting grant-assurance based revenue-use requirement as 49 U.S.C. § 47133, but expanded the application of the revenue-use restriction to any airport "that is the subject of Federal assistance."

This letter is based upon the information in your January 8 letter and its attachments, and provides only the present views of the FAA Counsel's Office, as joined by the DOT General Counsel, regarding relevant federal requirements. It neither precludes nor constrains the enforcement discretion of either the Office of the Secretary or the FAA, nor does it preclude any changes in our legal views. This letter also does not constitute a final order of the Administrator or bind the Office of the Secretary or the FAA to any particular resolution in the event that a complaint is filed concerning the issues addressed herein.

I hope that this response will be helpful to you. If you have any questions, please do not hesitate to contact me at (202) 267-3222, or Daphne A. Fuller, Manager, Airports & Environmental Law Division, at (202) 267-3199.

Sincerely,

James W. Whitlow
Acting Chief Counsel

cc: Robert S. Rivkin, Esq., General Counsel
Leila Sullivan, Esq., by e-mail to: l.sullivan@capitol.hawaii.gov