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Oil Tax Would be Overturned, Says Phil Talmadge **Lawmakers Would be Fuelish to Count on Money, Former Justice Argues** **Washington State Wire March 4, 2010**

By Erik Smith
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OLYMPIA, March 3.—If lawmakers expect to bail out the state general fund with a steep hike in the state's hazardous substance tax, they are in for a big surprise, warns a former state Supreme Court justice.



Attorney Phil Talmadge, former Supreme Court justice and lawmaker.

Phil Talmadge, widely regarded by legislators of both parties as one of the sharpest legal minds in the state-government arena, contends the tax is likely to be overturned if anyone takes it to court.

Coming from a onetime lawmaker who was a leader in the Senate Democratic Caucus in the '80s and early '90s, and who supported the tax when it was first imposed more than 20 years ago, the argument might seem as startling as Nixon's trip to China.

But Talmadge said it's a legal opinion, not a personal one. He maintains that the Model Toxics Control Act tax clearly violates the 18th amendment to the state constitution, which says that Washington fuel taxes can only be spent on highways and ferries. The argument has huge implications for the Legislature, which has been considering huge increases in the tax this year in order to pay for water-pollution projects and to bail out the state's general fund.

In fact, Talmadge said that the increase isn't the only thing at stake. The underlying tax would be thrown out with it, too, he said.

That would eliminate one of the environmental community's biggest victories of the eighties.

"Nobody has challenged that funding source for environmental cleanup since 1989," he said. "Recently the Legislature has been talking about dramatically increasing it and using the money for the state general fund. Some of the early proposals talked about a near-tripling of the tax. But it is clear that this tax violates the 18th Amendment, and it has probably been a violation since 1989."

The lucrative tax currently generates some \$114 million a year, about 84 percent of it paid by the oil industry. The plan favored by environmental groups and city and county lobbying organizations would raise that to \$329 million. Although lawmakers appear to be favoring a smaller proposal, the issue is likely to remain in play until the final day of this year's legislative session.

And the impact of Talmadge's argument is that if lawmakers write a budget that counts on any money at all from the tax, they could be in deep, deep trouble.

Opinion for Oil Industry

It should be noted that Talmadge offered his legal opinion at the request of the Western States Petroleum Association, one of the organizations that is battling the tax-

increase proposal in the Legislature. It also should be noted that he disagrees on a key issue with the state attorney general's office, which dealt with some of the same questions in a formal legal opinion in 2001.

But Talmadge, now an attorney in private practice, said his legal opinion is based his best reading of case law and statutes. He dug up a few precedents from other states he says have direct bearing on Washington, and which weren't considered when the attorney general last looked at the issue. And he pored through a few records that others have overlooked.

He said he tried to keep his own opinion out of it – that might incline him toward a different view. Back in 1988, he supported the environmental lobby in the stormy campaign for Initiative 97, which imposed the tax. And he opposed the Legislature's effort that year to place an alternative business-backed measure on the ballot.

"It isn't a question of my personal opinion," he said. "This is my best objective analysis of the issue."

Talmadge Carries Weight

Even Republicans say a legal argument from Talmadge means something. Said Sen. Dan Swecker, R-Rochester, "Phil Talmadge is an incredible legal talent and a great jurist, and he has done some really good analysis of this issue."

Swecker, an opponent of the tax, said no suit was filed 20 years ago because oil and transportation interests thought they had a deal that the tax revenue would never be allowed to rise. But that went out the window when gas prices skyrocketed, from less than \$1 a gallon in the '80s to more than \$4 at the peak. "I'll tell you," he said, "I hope someone does sue."

Supporters of the tax, meanwhile, grumble that Talmadge is a hired gun. The oil lobby "hired a lawyer to go after court cases," said state Rep. Hans Dunshee, D-Snohomish.

The Western States Petroleum Association hasn't made a decision to sue. But the Automotive United Trades Organization, an organization representing independent service-station owners, has already declared that it is going to court if the Legislature passes a tax hike. That means the legal issues identified by Talmadge would likely be tested in court over a lengthy period of time, and could tie up any deal on the budget.

Uncertainty alone is a good reason to reject the tax, said Dave Fisher, spokesman for Stop Washington Hidden Gas Taxes, the opposition coalition. "We're sharing this with the Legislature because it shows the MTCA tax is vulnerable to a legal challenge."

Is it a Fuel Tax?

The key question is whether the hazardous-substance tax is a fuel tax. The environmental lobby argues that it is not, because it is imposed on a wide variety of substances, 8,000 in all. The oil industry might pay the bulk of it, but it is far from alone. Anyone who uses pesticides pays it, too, for instance.

Talmadge argues that the tax paid by the oil industry can be considered separately. And he maintains it is clearly a tax on fuel.

It's not quite the same as the fixed gas taxes paid directly at the pump. The hazardous substance tax is based on a percentage of the wholesale price of gasoline and diesel fuel. But it still is possible to calculate a per-gallon cost.

Under the proposal favored by the green groups, the current 0.7 percent tax would rise to two percent. Meaning that two cents of every dollar paid by gas-station owners and suppliers would go to the state. Right now the current wholesale cost is around \$2.30 for regular unleaded, so the impact would be a little less than five cents a gallon.

If it's possible to calculate a per-gallon cost, Talmadge said, then it's a fuel tax.

Precedents in Other States

Though the tax has never been challenged in Washington, Talmadge has found precedents in Idaho and Oregon that speak directly to the issue. All three Northwestern states passed similar constitutional amendments in the early '40s that limited the use of gas-tax funds.

In 1992, the Oregon Supreme Court ruled that a tax on gasoline stored underground couldn't be used to replace leaking underground storage tanks. It had to be used for highways.

And in 1996, the Idaho Supreme Court ruled that a "clean water" tax on oil couldn't be spent on environmental programs.

Neither case made it to the U.S. Supreme Court, meaning that no precedent was established for the state of Washington. But Talmadge said the arguments that worked in Idaho and Oregon would no doubt succeed here as well.

Disagreement With Attorney General

The state attorney general's office offered an opposite opinion in 2001. There is a proviso in the 18th amendment that exempts taxes "not levied primarily for highway purposes." The attorney general's office took that to mean a sales tax could be imposed on gasoline, as long as it was at the same rate that is paid by the rest of the state.

The environmental lobby takes it a step further, to mean that any broad-based excise tax can be imposed on fuel – like the hazardous substance tax.

But Talmadge points out that the argument defeats the purpose of the 18th Amendment. So he dug a bit deeper into the argument, into the 1943 voter's pamphlet and the records of the legislative debates of the late '30s and early '40s.

They make it clear that the intent was to prevent grabs of fuel-tax money, Talmadge said. And the reason for the proviso was that lawmakers were worried that the amendment might cancel out two taxes that were being levied at the time – the state's business and occupations tax, which remains in force, and the motor vehicle excise tax, which was eliminated a decade ago.

In his opinion, Talmadge wrote, "I believe the more reasoned interpretation of the 18th Amendment's proviso is that it was designed to preserve those well-recognized excise taxes on fuel that existed in 1944 like the MVET and the B&O tax. It was not meant to authorize a variety of new excise taxes on fuel, limited only by the imagination, or need, of the Legislature."

The attorney general's office, meanwhile, continues to refer to the formal 2001 opinion. But last month, in an informal opinion offered to Swecker, the office acknowledged, "it is difficult to predict what conclusion a court would reach."