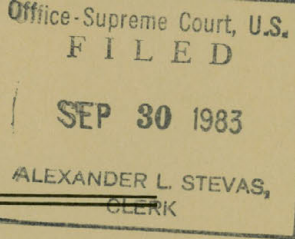


No. 95



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In the  
**Supreme Court of the United States**

October Term, 1983

State of Arkansas,

*Plaintiff,*

V.

State of Oklahoma,

*Defendant,*

ORIGINAL JURISDICTION

MOTION FOR LEAVE TO FILE COMPLAINT  
AND COMPLAINT

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*State of Arkansas*

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No.

**In the  
Supreme Court of the United States**

October Term, 1983

State of Arkansas,

*Plaintiff,*

V.

State of Oklahoma,

*Defendant,*

ORIGINAL JURISDICTION

MOTION FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Arkansas by the Chief Counsel for the Arkansas State Highway Commission, Thomas B. Keys, asks leave of this Court to file its complaint against the State of Oklahoma submitted herewith.

The plaintiff respectfully states as follows:

1. The Surface Transportation Act, 23 U.S.C. §127 was adopted by Congress which provides that no funds to be appropriated for any fiscal year under provisions of the Federal-Aid Highway Act of 1956 shall be apportioned to any State which does not permit the use of the National System of Interstate and Defense Highways within its boundaries by vehicles with a weight of twenty thousand pounds carried on any one axle, including enforcement tolerances, or with a tandem axle weight of thirty-four thousand pounds, including enforcement tolerances, or a gross weight of at least eighty thousand pounds for vehicle combinations of five axles or more.

2. In order to comply with federal law and to be able to qualify for federal-aid highway funds, the General Assembly of Arkansas passed Act 7 of 1983, Ark. Stat. Ann. §75-817 (Supp. 1983). Act 7 of 1983 raised the allowable gross weight of heavy motor vehicles up to 80,000 pounds. To offset the resulting damage to the highways caused by the heavier loads, the General Assembly of Arkansas passed Act 685 of 1983, Ark. Stat. Ann. §75-817.3 (Supp. 1983) which imposed the highway use equalization tax on motor vehicles with declared gross weights of 73,281 pounds or more. Under this statute, the operator of a heavy motor vehicle can pay the tax by one of three methods. One, he can pay \$175.00 annually. Second, an operator can pay \$ .05 a mile for each mile driven in Arkansas. Third, an operator can elect to use a trip permit at a fee of \$8.00 for each 100 miles of travel.

3. In response to the passage of the highway use equalization tax by Arkansas, the Oklahoma Tax Commission adopted regulations pursuant to 47 Okl. St. Ann. §225 j(K) (Supp. 1983) which imposed a tax of \$175.00 on Arkansas based trucks with declared gross weights of 73,281 pounds or more that operated on the highways of Oklahoma.

4. In July of 1983, Oklahoma began assessing Arkansas based heavy motor vehicle operators an additional annual fee of \$175.00 in retaliation against the highway use equalization tax imposed by Arkansas on non-resident operators of heavy motor vehicles using the highways of Arkansas.

5. The unlawful retaliatory legislation passed by Oklahoma violates the sovereign right of the State of Arkansas to tax motor vehicles using the highways of the State of Arkansas.

6. Arkansas in its proprietary capacity as a consumer and the general population of the State of Arkansas will

suffer economic damages due to the imposition of Oklahoma's retaliatory tax.

7. The Oklahoma "retaliatory tax" violates the rights and protections guaranteed to the State of Arkansas by Article 1, Section 8, Clause 3 of the Constitution of the United States.

WHEREFORE, plaintiff respectfully requests that this Court grant its Motion for Leave to File Complaint.

Respectfully submitted,

Thomas B. Keys  
Attorney for Plaintiff  
P.O. Box 2261  
Little Rock, AR 72203  
Phone (501) 569-2272

No.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

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State of Arkansas,

*Plaintiff,*

V.

State of Oklahoma,

*Defendant.*

---

ORIGINAL JURISDICTION

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COMPLAINT

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I.

The State of Arkansas, appearing by and through, Thomas B. Keys, Chief Counsel for the Arkansas State Highway Commission, and instituting this original action against the State of Oklahoma, makes parties hereto the following citizens of the State of Oklahoma:

The Honorable George Nigh  
Governor of the State of Oklahoma

The Honorable Michael C. Turpen  
Attorney General of the State of Oklahoma

The original jurisdiction of this Court is invoked under Article III, Section 2, Clauses I and 2 of the Constitution of the United States and 62 Stat. 927, 28 U.S.C. §1251(a) (Supp. 1983).



## II.

The plaintiff is the sovereign State of Arkansas with its capitol at Little Rock. This action is brought in the name of the State of Arkansas by Bill Clinton, Governor of the State of Arkansas, and by the Arkansas State Highway Commission. The Governor has requested the Arkansas State Highway Commission to represent the State of Arkansas in this cause. (See Exhibit 1 on p. A-3 of the Appendix). The Arkansas State Highway Commission is a constitutional agency of the State of Arkansas created by Amendment 42 of the Arkansas Constitution.

## III.

This action seeks a declaratory judgment, pursuant to 28 U.S.C. §2201-02 (1976), that Oklahoma's retaliatory statute, 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) and the regulations promulgated thereunder violate the plaintiff's rights and protections afforded by the United States Constitution under Article 1, Section 8, Clause 3 and seeks a permanent injunction against the State of Oklahoma restraining it from imposing the retaliatory tax against Arkansas resident operators of heavy motor vehicles.

## IV.

The Oklahoma Legislature adopted 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) which went into effect on July 1, 1982. This statute gave the Oklahoma Tax Commission the authority to adopt rules and regulations for the imposition of the same or substantially the same type of fee on out-of-state residents operating heavy motor vehicles in Oklahoma as is imposed on residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount of any fee or tax required by the laws of such other state to paid by a resident of Oklahoma making the same or similar use of a like vehicle in such state.

## V.

The Oklahoma Tax Commission adopted regulations pursuant to 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) which imposed a tax of \$175.00 on each Arkansas based motor vehicle using the highways of Oklahoma which are registered for more than 73,280 pounds in any state.

## VI.

The additional tax imposed by the Oklahoma Tax Commission pursuant to 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) was passed for the purpose of retaliating against the Arkansas tax imposed by Act 685 of 1983, Ark. Stat. Ann. §75-817.3 (Supp. 1983). Its purpose is to place pressure on the Arkansas legislature to repeal the motor vehicle tax under Ark. Stat. Ann. §75-817.3 (Supp. 1983). The Oklahoma tax is not fairly related to the services provided by the State of Oklahoma. It does not have a substantial nexus with the state of Oklahoma. It further discriminates against interstate commerce by placing a heavier tax burden on interstate commerce and thereby gives an economic advantage to Oklahoma residents. The Arkansas resident operators are required to pay more than Oklahoma resident operators while the Arkansas operators receive no greater benefit from the use of Oklahoma highways than Oklahoma resident operators.

## VII.

Oklahoma's retaliatory tax constitutes an unconstitutional burden on the sovereign power of the State of Arkansas to levy taxes.

## VIII.

The State of Arkansas in its proprietary capacity as a consumer and the general public of Arkansas will suffer economic damages by the increase in the costs of goods as a result of Oklahoma's retaliatory tax.

## IX.

The Oklahoma tax imposed pursuant to 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) constitutes an unreasonable, unlawful, and prohibited burden on interstate commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States.

## X.

The statute, 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983), is an unconstitutional delegation of legislative power to the Oklahoma Tax Commission and as such is void. The statute does not give the Tax Commission sufficient guidelines for administrative action. The legislature has completely vested the power to levy a retaliatory tax in the Oklahoma Tax Commission.

## XI.

The Oklahoma Tax Commission has failed to follow the statutory procedure in adopting its regulations which impose a retaliatory tax against Arkansas based truckers. The Tax Commission has not complied with 75 Okl. St. Ann. §251 et. seq. in adopting its regulations. It has not filed its regulations with the Oklahoma Secretary of State or with the State Librarian and Archivist. The failure of the Commission to follow this procedure voids the regulations.

WHEREFORE, PREMISES CONSIDERED,  
PLAINTIFF RESPECTFULLY REQUESTS:

1. That an order be issued declaring 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) and the regulations promulgated thereunder unconstitutional in violation of Article 1, Section 8, Clause 3 of the United States Constitution.

2. That an order be entered declaring 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) an unconstitutional delegation of legislative power to the Oklahoma Tax Commission.

3. That an order be entered declaring that the regulations adopted by the Oklahoma Tax Commission which imposed a retaliatory tax on Arkansas based truckers are void due to the failure of the Commission to follow the proper procedure in adopting said regulations.

4. That an order be entered enjoining the State of Oklahoma from imposing the retaliatory fees on Arkansas resident operators of heavy motor vehicles.

Respectfully submitted,

Thomas B. Keys  
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State Highway Commission  
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Little Rock, Arkansas 72203  
Phone (501) 569-2272

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No.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

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State of Arkansas,

*Plaintiff,*

V.

State of Oklahoma,

*Defendant.*

---

ORIGINAL JURISDICTION

---

BRIEF IN SUPPORT OF MOTION  
FOR LEAVE TO FILE COMPLAINT

---

JURISDICTION

By this action the State of Arkansas challenges the constitutionality and validity of Oklahoma's retaliatory statute and the regulations promulgated thereunder which impose a tax on Arkansas residents for certain vehicles operated on the highways of the State of Oklahoma.

This controversy between Arkansas and Oklahoma is within the original and exclusive jurisdiction of this Court under Article III, Section 2, clauses 1 and 2 of the Constitution of the United States and 62 Stat. 927, 28 U.S.C. §1251 (a) (Supp. 1983).

## QUESTIONS PRESENTED

The questions presented are:

1. Whether the Oklahoma retaliatory tax against out-of-state residents constitutes an unconstitutional discriminatory burden on interstate commerce.

2. Whether the Oklahoma retaliatory statute constitutes an unconstitutional delegation of legislative power to the Oklahoma Tax Commission.

3. Whether the Oklahoma Tax Commission has followed the proper statutory procedure in adopting and implementing the retaliatory tax against out-of-state residents in order for the regulations to be valid and have the full effect of law.

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Article I, Section 8, Clause 3 of the Constitution of the United States provides as follows:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article III, Section 2, Clause 1 of the Constitution of the United States provides as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies between two or more States . . .

Article III, Section 2, Clause 2 of the Constitution of the United States provides as follows:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction.

United States Statutes:

28 U.S.C. §1251 (a) (Supp. 1983) provides as follows:

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

49 U.S.C. §10701 (e) (Supp. 1983) provides as follows:

In proceedings to determine the reasonableness of rate levels for a motor carrier or group of motor carriers, or in proceedings to determine the reasonableness of a territorial rate structure where rates are proposed through agreements authorized by section 10706 (b) of this title [49 USCS §10706 (b) ], the Commission shall authorize revenue levels that are adequate under honest, economical and efficient management to cover total operating expenses . . .

23 U.S.C. §127 is set out in full in the Appendix on pp. A12-A13.

Arkansas Statutes:

Ark. Stat. Ann. §75-817 (Supp. 1983) is set out in pertinent part in our Appendix on pp. A13-A16.

Ark. Stat. Ann. §75-817.3 (Supp. 1983) is set out in full in the Appendix on pp. A16-A21.

Oklahoma Constitution:

Article 4, Section 1, provides as follows:

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

Oklahoma Statutes:

47 Okl. Stat. Ann. §22.5 j (K) provides as follows:

In addition to those taxes or fees imposed by Sections 22.1 through 22.34 of this title, the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sales, use or mileage tax required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

The Commission shall have the authority to adopt rules and regulations which provide procedures for implementation of comparable regulatory fees and taxes for vehicles used in this state by residents of other states.

Any revenue derived from this subsection shall be apportioned in the same manner as provided in Section 22.2A of this title.

It is the intention of the Legislature that the motor vehicle registration and licensing fees assessed against residents of other states operating similar vehicles in

Oklahoma be comparably the same as the motor vehicle registration and licensing fees assessed against residents of Oklahoma operating a similar vehicle for a similar purpose in such other state; and that the Commission diligently monitor the motor vehicle registration and licensing fees assessed against residents of Oklahoma by other states and to provide for uniform treatment of Oklahoma residents operating vehicles in other states and for residents of other states operating vehicles in Oklahoma.

75 Okl. St. Ann. §251 provides as follows:

(a) Every agency, including any authority, board, commission, department, instrumentality, office, or officer of the State of Oklahoma, that possesses rule-making powers shall file a certified original and one duplicate copy of all its rules or regulations in force and effect with the Secretary of State and a certified original and two duplicate copies with the State Librarian and Archivist on or before the effective date of this act. Thereafter, every such agency shall file similar copies of all new rules or regulations, and all amendments, revisions of existing rules and regulations, or revocations thereof, with the Secretary of State and with the State Librarian and Archivist within three days of their adoption, excluding holidays, Saturdays, and Sundays. The provisions of this act shall not apply to rules or regulations which (1) pertain to an agency's internal operation and organization only; (2) pertain to proclamations of the Governor; or (3) concern the internal management and operation only of an institution, including institutions of higher education. The filing of rules or regulations as required by this act does not dispense with the requirements of any other law necessary to make them effective.

75 Okl. St. Ann. §252 provides as follows:

Any rule or regulation, amendment, revision, or revocation of an existing rule or regulation made by an

agency prior to the effective date of this act shall be void and of no effect unless filed as required by Section 1 of this act and, except to the extent otherwise provided in Section 3 of this act, any rule or regulation, amendment, revision, or revocation of an existing rule or regulation made by an agency after the effective date of this act shall be void and of no effect unless filed and published as required by Sections 1 and 5 of this act. All provisions herein shall also apply to all agencies that may hereafter be created. All courts, boards, commissions, agencies, authorities, instrumentalities, and officers of the State of Oklahoma shall take judicial or official notice of any rule or regulation, amendment, revision, or revocation of an existing rule or regulation duly filed, or duly filed and published under the provisions of this act.

75 Okl. St. Ann. §255 provides as follows:

The State Librarian and Archivist is hereby authorized, directed, and empowered to publish The Oklahoma Gazette semimonthly and to publish therein and distribute copies of all rules and regulations adopted subsequently to the effective date hereof and all amendments or revisions of existing rules and regulations or revocations thereof adopted subsequently to the effective date hereof in the first number of The Oklahoma Gazette published after the date of receipt. No new rule or regulation nor any amendment, revision, or revocation of an existing rule and regulation shall be in effect until seven days, including holidays, Saturdays, and Sundays, have elapsed from the date of publication by the State Librarian and Archivist. The State Librarian and Archivist shall cause a copy of each such publication of a new rule or regulation or any amendment, revision, or revocation of an existing rule and regulation to be sent to every county clerk, and county law library in the State of Oklahoma, to members of the legislature, and to such other appropriate agencies, libraries, and officials he may select; provided that he may charge nongovernmental and nonofficial recipients. The State Librarian

and Archivist shall cause a copy of all rules and regulations, all new rules and regulations, and all amendments, revisions, or revocations of existing rules and regulations, to be on file and available for public examination in the Oklahoma State Library during normal office hours. The county clerks, court clerks, and county law libraries shall also maintain files of these publications for public examination during normal office hours.

75 Okl. St. Ann. §301 provides as follows:

As used in this act:

(1) "agency" means any state board, commission, department authority, bureau or officer authorized by the constitution or statutes to make rules or to formulate orders, except: . . .

(c) The Oklahoma Tax Commission, Oklahoma Public Welfare Commission, Oklahoma State Highway Commission, and Oklahoma Corporation Commission, except with respect to Section 4 (a) of this act; [Section 304 of this title]

75 Okl. St. Ann. §304 provides as follows:

(a) Each agency shall file copies of each rule adopted by it, including all rules existing on the effective date of this Act, as required by 75 O.S.1961, §251.

(b) Each rule hereafter adopted is effective twenty (20) days after filing except that:

(1) if a later date is required by statute or specified in the rule, the later date is the effective date;

(2) subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the Secretary of State, or at a stated date less than twenty (20) days thereafter, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety or welfare. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.



## STATEMENT OF THE CASE

This is a case of original jurisdiction between the plaintiff, Arkansas, and the defendant, Oklahoma. The issues presented concern the constitutionality and the validity of a tax imposed by the Oklahoma Tax Commission under 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) (hereinfter referred to as Oklahoma's retaliatory statute) on out-of-state residents who operate motor vehicles weighing more than 73,280 pounds. Under Oklahoma's retaliatory statute, the Oklahoma Tax Commission is authorized to impose on out-of-state residents the same or substantially the same fee as is imposed on residents of Oklahoma for the same or similar use of a vehicle in another state in the amount required by the laws of the other state to be paid by Oklahoma residents making the same or similar use of a like vehicle in another state. Pursuant to the statutory grant of authority, the Oklahoma Tax Commission passed regulations on July 1, 1983, (Plaintiff's Exhibit 2 on p. A5 of the Appendix) imposing \$175.00 against Arkansas based truckers who are registered to carry more than 73,280 pounds in any state. These regulations were passed in response to the highway use equalization tax imposed by Arkansas on truckers traveling the highways of Arkansas who are registered to carry more than 73,280 pounds.

Arkansas' highway use equalization tax was imposed by Act 685 of 1983 of the General Assembly of Arkansas, Ark. Stat. Ann. §75-817.3 (Supp. 1983) which placed the tax on any motor vehicle with a declared gross weight of 73,281 pounds or more. Under this tax, out-of-state residents can pay the highway use equalization tax by one of three methods: they can pay \$175.00 annually per vehicle; they can pay \$8.00 for each 100 miles of travel, or pay \$ .05 per each mile of travel in Arkansas.

Arkansas' highway use equalization tax was passed in the same legislative session that adopted Act 7 of 1983 of the General Assembly of Arkansas, Ark. Stat. Ann. §75-817

(Supp. 1983). Act 7 of 1983 raised the weight limit for motor vehicles on Arkansas highways to 80,000 pounds. The maximum weight limit was raised in order to comply with 23 U.S.C. §127 which requires that each state allow motor vehicles on their highways to carry a weight of up to 80,000 pounds on roads that make up the National system of Interstate on Defense Highways or lose all its funds authorized to be appropriated for any fiscal year under provisions of the Federal-Aid Highway Act of 1965. To provide the needed revenue for the damage to Arkansas highways that would occur from the raising of the weight limits, Arkansas passed its highway use equalization tax under Act 685 of 1983.

It is the plaintiff's contention that Oklahoma's retaliatory tax which was imposed in response to the passage of Arkansas' highway use equalization tax violates Article 1, Section 8, Clause 3 of the United States Constitution. The plaintiff state contends that Oklahoma's retaliation unconstitutionally impinges upon its right to impose an otherwise valid tax and that the state in its proprietary capacity and the general public of the State will unconstitutionally suffer economic damages as a result of a tax levy in Oklahoma that *only* applies to Arkansas licensed vehicles in violation of Article 1, Section 8, clause 3 of the United States Constitution.

Arkansas seeks an order declaring Oklahoma's retaliatory tax unconstitutional and an injunction enjoining Oklahoma from applying the tax.

## SUMMARY OF ARGUMENT

In this action, plaintiff, State of Arkansas, challenges the constitutionality and validity of the Oklahoma retaliatory tax, 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) which authorizes the Oklahoma Tax Commission, in its discretion, to collect from **non-Oklahoma licensed motor carriers any tax that is "not the same or substantially the same as taxes"** collected in Oklahoma. Arkansas levies a weight distance tax pursuant to Ark. Stat. Ann. §75-817.3 (Supp. 1983) on all motor carriers using the highways of the State of Arkansas. The Oklahoma Tax Commission has begun to collect an amount equal to the Arkansas Tax in "retaliation" from Arkansas motor carriers only. The State of Arkansas seeks a declaratory order declaring the Oklahoma retaliatory tax void and unconstitutional. It also seeks an injunction restraining Oklahoma from enforcing its retaliatory tax.

Because the Oklahoma retaliatory tax is imposed in differing amounts on different motor carriers, depending upon the tax structure of their licensing jurisdictions, its imposition does not have a sufficient nexus to the State of Oklahoma, is discriminatory, and is totally unrelated to services provided by the State of Oklahoma in violation of the Commerce Clause. The State of Arkansas files this action in its own right and as *parens patriae* for its citizen consumers of motor carrier services.

This Court has exclusive jurisdiction in cases of this nature involving two states, and should exercise its jurisdiction here. There are few facts, if any, in dispute. Because the motor carriers themselves can simply pass the cost of the tax on to consumers, and because the trucking industry derives a substantial practical political benefit from the existence of "retaliatory taxes", it is unlikely that this unconstitutional statute will be challenged by any other plaintiffs.

Arkansas alleges that the Oklahoma retaliatory statute is an unconstitutional delegation of legislative power to the Oklahoma Tax Commission and that the regulations passed by

Oklahoma Tax Commission imposing the retaliatory tax is void, because of the Tax Commission's failure to follow the appropriate procedures in adopting the regulations.

## ARGUMENT

### THE STATE OF ARKANSAS HAS STANDING IN ITS SOVEREIGN CAPACITY TO CHALLENGE THE OKLAHOMA RETALIATORY TAX.

In the absence of Congressional pre-emption, each state *retains* broad powers to innovate and develop its own mix of taxes and fees to insure that Interstate Commerce pays its own way. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Capitol Greyhound Lines v. Bruce*, 339 U.S. 542 (1950). This Court has long recognized the States' fundamental power of taxation.

That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal Government, either expressly by necessary implication, are propositions that have often been asserted by this Court. And it thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. *Union Pacific R.R. Co. v. Peniston*, 85 U.S. 5, 29 (1883); also see *McCann v. Silva*, 455 F. Supp. 540 (1978).

The power of a State to tax, basic to its sovereignty, is limited only if in substance and effect it is the exertion of a different and a forbidding power . . . *Bode v. Barrett*, 344 U.S. 583 (1953); *rh.den.* 345 U.S. 931 (1953).

The power to tax, within appropriate bounds and for legitimate ends, belongs equally to the State of Arkansas and the State of Oklahoma.

The Oklahoma retaliatory tax, 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) does not fall within the appropriate bounds of Oklahoma's power to tax. Its structure and effect indicate that it was *not* passed to insure that commerce "pay its own way". Carriers will pay differing amounts to the State of Oklahoma which bear no relationship to their activities in that state, but only to the actions of their home based legislatures. See, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627 (1981). In fact, because the tax is only levied after another state has acted, *and* after the Oklahoma Tax Commission has seen fit to retaliate, Oklahoma has no assurance, and apparently no interest in whether this tax ever raises *any* money. The purpose is simple retaliation. The effect is an infringement on the sovereignty of the State of Arkansas. Oklahoma seeks to compel Arkansas (and other States) to adhere to a taxing structure that is desirable to Oklahoma's interests regardless of the economic consequences to the State of Arkansas.

Although this Court, in *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981), recently upheld a California retaliatory tax, the majority opinion is not applicable to the case at bar. In reviewing the California retaliatory tax on foreign insurers, the Court acknowledged that the McCarran-Ferguson Act removed the regulation and taxation of insurance companies from any Commerce Clause restriction. Therefore, the majority in that case did not reach a decision whether California's retaliatory tax violated the Commerce Clause. In fact, Justice Stevens' dissent in *Western & Southern Life Ins. Co.*, *supra*, clearly leaves open the possibility that such a tax might be a violation of the Commerce Clause. Footnote 6 of Justice Stevens' dissent at p. 677 states:

California's objective is to confer a limited benefit on a limited group of companies that are incorporated under its laws. This case involves the special interest of insurance companies in paying taxes at a rate no higher than the rate California requires for its budgetary purposes. The next case may involve a different industry with a different special interest. Thus, for example, the trucking industry or the motorcoach industry might favor high speed limits, loose safety inspection laws and lax emission standards. If their lobbyists could persuade the legislature of a powerful State to adopt rules favorable to their interests, then under today's holding they may also seek retaliatory programs that would apply pressure to neighboring States to adopt similar rules. *Although such a statute might violate other constitutional provisions, such as the Commerce Clause*, under today's holding the Equal Protection Clause would present no impediment. (emphasis added).

To allow retaliatory taxes of this nature, is to sanctify the logical outcome or result of this type of taxation. More states will follow Oklahoma's lead until there will be countless state taxes that bear no relation to economic reality. All of these taxes will have been passed as a means of coercion and will have no economic justification. These types of taxes could lead not only to more retaliatory taxes against Arkansas but could ultimately lead to other states in Arkansas' position to pass counter-retaliatory taxes. This would eventually end in a pyramid effect where states retaliate against each others' taxes. This cannot be what the framers of the Constitution had in mind when the Constitution was written.

[T]he very purpose of the Commerce Clause was to create an area of free trade among the several states. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 328 (1944).

The State of Arkansas, and any other State impacted by Oklahoma's actions faces a harsh choice. It must "back down", conform its tax laws to Oklahoma's and suffer the diminution of its sovereign right to exercise the taxing powers it retains under the Constitution, or it must "bow its neck" and suffer the increasing loss of that guarantee of free trade that is also assured in Article I. The inevitability of having to make that choice is its "injury in fact" and that is an injury within the "zone of interest" protected by the Commerce Clause itself. Oklahoma "may not use the threat of economic isolation as a weapon to force sister states" to the tax mix it has found desirable. *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 379 (1976). This peculiarly sovereign interest in letting Arkansas make its own decisions unfettered by illegal retaliation must be vindicated by the State itself.

THE STATE OF ARKANSAS HAS STANDING  
TO CHALLENGE THE OKLAHOMA RETALIATORY TAX  
IN ITS PROPRIETARY CAPACITY AND AS  
PARENS PATRIAE OF ITS CITIZENS

The plaintiff state also files this action to protect the general welfare of the citizens of the State of Arkansas and to protect the State's proprietary interest as a consumer of goods that are affected by Oklahoma's retaliatory tax. The tax that Oklahoma has placed on Arkansas residents will inevitably lead to higher prices of goods that are sold in Arkansas. The higher cost of transporting goods through Oklahoma to Arkansas will cause the taxpayers of Arkansas and the State itself to expend more money purchasing goods.

Standing to sue, however; exists for constitutional purposes if the injury alleged fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court. *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) quoting from *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

In this case, the injury can be traced to the retaliatory tax of Oklahoma. This tax will cause the cost of goods to increase which will affect the general population of the State of Arkansas and the State of Arkansas which is a purchaser of goods that are transported by Arkansas residents.

A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens . . . But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way. *Maryland v. Louisiana*, supra, at p. 737.

The State of Arkansas is not advancing the claim of a limited number of its citizens. It is the general population that will be adversely affected by Oklahoma's retaliatory tax. The tax will make it more expensive for the operators of motor vehicles to conduct their business and out of necessity, they will have to pass the tax on to its customers. Unlike the highway use equalization tax imposed by Arkansas, the Oklahoma tax was not passed to generate more revenue for highway maintenance. The Oklahoma tax was passed only to retaliate against the Arkansas tax. Since it is not related to the benefits provided by the State, the tax will increase the cost of goods without having a constitutional justification.

At this point in time it is not clear what the full economic damage will be as a result of Oklahoma's retaliatory tax or the full extent of the discrimination. However, this should not be a factor in determining if an unconstitutional injury has occurred to the State of Arkansas.

It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates. *Maryland v. Louisiana*, supra, at pp. 759-760.



Since this plaintiff has filed this action not only in proprietary capacity but as *parens patriae*, the State of Arkansas submits that it has standing in this cause to challenge Oklahoma's retaliatory tax. *Hawaii v. Standard Oil Company of California*, 405 U.S. 251 (1972).

THIS CASE IS AN APPROPRIATE EXERCISE OF  
ORIGINAL JURISDICTION AND RAISES  
SUBSTANTIAL FEDERAL QUESTIONS

The Constitution provides for this Court's original jurisdiction over cases in which a "State shall be a Party." Art. III, §2, cl. 2. Congress has in turn provided that the Supreme Court shall have "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. §1251 (a) (Supp. 1983). In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). See *New York v. Illinois*, 274 U.S. 488, 490 (1927); *Texas v. Florida*, 306 U.S. 398, 405 (1939).

The Plaintiff, State of Arkansas, recognizes that this Court limits its exercise of original jurisdiction to "appropriate cases". What is "appropriate" includes not only "the seriousness and dignity of the claim", but also "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981). For the following reasons the Plaintiff submits jurisdiction is appropriate here and that this case raises substantial federal questions of such importance that this case should be heard by this Court.

First, there is nothing "ordinary" about the tax imposed by 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983). *Maryland v. Louisiana*, 451 U.S. 724, 744 (1981). Most taxes are imposed following a private decision of the taxpayer to engage in an activity that has a sufficient nexus to the taxing jurisdiction to justify its imposition. See, *Complete Auto Transit v. Brady*, 430 U.S. 274, 278 (1977). This challenged tax is only imposed if the motor carrier has made the *private* decision to operate on the roads of Oklahoma, and the legislature of the motor carrier's licensing jurisdiction has made the *public* decision to impose a tax "not substantially the same type" as that imposed by Oklahoma. 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983). This mixture of private and sister state "triggers" establishes the retaliatory character of the Oklahoma statute. Furthermore, the tax is not even imposed by *legislative* authority of the State of Oklahoma. It is apparently levied and collected at the whim of an administrative body of that State, the Oklahoma Tax Commission as evidenced by the concurrent resolution of the Oklahoma legislature. (Exhibit 3 on p. A6 in Appendix). In addition, the Oklahoma levy merely "mirrors" the taxes of its sister states. Because of this, it will be different in amount for the carriers of each "offending" jurisdiction.

Second, the tax is patently unconstitutional under the four pronged test adopted by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274, 277-278 (1977). It does not attach to an activity having a sufficient "nexus" to the State of Oklahoma because part of the triggering criteria is the independent action of another State's legislature. It is discriminatory on its face because it will never apply to an Oklahoma licensed vehicle, and it will apply in differing amounts to different carriers depending upon what taxes are imposed by *their own* licensing jurisdictions. For this same reason, the Oklahoma tax is not reasonably related to the services provided by Oklahoma: carriers will be paying differing amounts while receiving the same "service", i.e., the right to haul an unlimited number of miles on

Oklahoma's road. See, *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950).

Third, the challenged tax raises "serious and important concerns of federalism fully in accord with the purposes and reach of original jurisdiction". *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). This Court has never considered a *commerce clause challenge* to a "retaliatory" tax. See, *Western and Southern Life Insurance Company v. State Board of Equalization*, 451 U.S. 648 (1981). Article I, Section 8, Clause 3 is fundamentally a grant of authority to the Congress. The few simple words of the Commerce Clause - "The Congress shall have power . . . To regulate . . . Commerce among the several States . . ." reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation. See *H.P. Hood and Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-534 (1949). *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Yet, in the absence of Congressional action the "dormant" Commerce Clause also sets the parameters of legitimate state economic legislation consonant with the federal structure. In matters of taxation the Clause legitimizes some taxes and prohibits others. See, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Maryland v. Louisiana*, 451 U.S. 744 (1981). This Oklahoma retaliatory tax thus impinges upon the "concerns of federalism" from both directions. It is itself an improper tax, and its only purpose is to retaliate against Arkansas (and all other States) who wish to pass an otherwise proper one.

Finally, this Court should exercise its jurisdiction because it is the only forum in which the State of Arkansas can assert *its* interest and as a practical matter it is the only forum in which these important issues will ever be raised. The Oklahoma tax is collected from Arkansas' licensed

motor carriers, for whom the tax is simply an "operating expense" legitimately passed through to the customer in its published rates. 49 U.S.C. §10701 (e). The industry in fact derives substantial practical benefit from this Oklahoma tax since the threat (and actuality) of retaliation (and the effect it has on a broad spectrum of the state's economy) limits the Arkansas legislature's options in establishing its own legitimate mix of highway taxes and fees. Oklahoma "may not use the threat of economic isolation as a weapon to force sister states" to adhere to the mix it has found desirable. *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 379 (1976). This peculiarly sovereign interest in letting Arkansas make its own decisions (within the confines of Article I, Section 8, clause 3) must be vindicated by the State itself and must be vindicated in this Court.

Oklahoma's Retaliatory Tax Violates Article 1, Section 8, Clause 3 of the United States Constitution.

It is the plaintiff's position that Oklahoma's retaliatory tax, is unconstitutional as violative of the Commerce Clause. In recent years the standard for reviewing a commerce clause violation has undergone major changes. This Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), established a four pronged test to determine if a tax violates the commerce clause. This test was followed in *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981) where it was stated:

The State's right to tax interstate commerce is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.

The State of Arkansas contends first that the imposition of the challenged Oklahoma tax bears an insubstantial nexus to that State. The tax, by its terms, will only be im-

posed if the motor carrier has made the *private* decision to operate on the roads of Oklahoma *and* the legislature of its licensing jurisdiction has made the *public* decision to impose a tax “not substantially the same type” as that imposed by Oklahoma itself. The right of the State of Arkansas to work out its own mix of highway taxes and fees (within Constitutional bounds) is an indispensable attribute of its sovereignty. *Bode v. Barrett*, 344 U.S. 583, rh. den. 345 U.S. 931 (1953). The mere exercise of that right by the plaintiff state provides no appropriate nexus for a “mirror” levy by the State of Oklahoma.

Secondly, in applying the third prong of the *Complete Auto* test to Oklahoma’s retaliatory statute, it is evident on the face of the statute that it discriminates against out-of-state residents. 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) provides:

In addition to those taxes or fees imposed by Sections 22.1 through 22.34 of this title, the same or substantially the same type or category of tax or fee *may be imposed upon an out-of-state resident* as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount, or approximate total amount, of any fee or tax, including property, motor fuel, excise, sales, use or mileage tax required by laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state. (emphasis added)

Under Oklahoma law, residents will never have such a tax imposed upon them. It is only out-of-state residents who are charged this tax while the Oklahoma residents are immune from this tax and reap all its benefits.

[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned . . . Among these is the fundamental principle that we find dispositive of the case now before us: no State may,

consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business. The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects. *Phillips v. Oklahoma Tax Commission*, 577 P.2d 1278, 1284 (Okla. 1978) quoting from *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).

The fact that a limited number of States will be subject to the discrimination is immaterial. *Hunt v. Washington*, 432 U.S. 333 (1977). The fact that no precise determination of the extent of the discrimination has been calculated is no bar to having it eliminated. *Halliburton Oil Well Cementing Co. v. Reilly*, 378 U.S. 64 (1963); *Best and Co. v. Maxwell*, 311 U.S. 454 (1941).

Thirdly, the plaintiff submits that Oklahoma's retaliatory tax is not fairly related to the services provided by Oklahoma. "[T]he fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of the tax burden'." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). The Arkansas based trucks receive no greater benefits from the Oklahoma highways than those of any other states. In fact the triggering mechanism of *any* tax and the *amount* of the tax levied simply "mirrors" that of the motor carriers' "base state" tax structure. Carriers from each State will pay a differing amount although all simply receive the same right: that of traveling an unlimited number of miles on the highways of Oklahoma.

The Oklahoma tax is clearly illegal under the standards outlined by this Court.

## Oklahoma's Retaliatory Statute Is An Unconstitutional Delegation Of Legislative Power To The Oklahoma Tax Commission.

The constitutional prohibition against the delegation of legislative power is well ground in Oklahoma law. In *State v. Parham*, 412 P.2d 142 (Okl. 1966) the Oklahoma Supreme Court held:

The power to determine the policy of the law is primarily legislative and cannot be delegated, but if a legislative enactment prescribed the policy of the Legislature and establishes a standard or guideline for administrative action, the delegation is proper. Also see *Continental Oil Co. v. Okl. State Bd., etc.*, 570 P.2d 315 (Okl. 1976).

The Constitutional foundation for the prohibition against delegating legislative power is found in Article 4 §1 of the Oklahoma Constitution. It is the plaintiff's contention that the Oklahoma retaliatory statute is in violation of the constitutional principles laid down in Article 4 §1 of the Oklahoma Constitution. The plaintiff state asserts that the Oklahoma Tax Commission was not given sufficient guidelines to impose the tax by 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983). Moreover, the statute gives the Commission unbridled authority to exercise the sovereign right of the State of Oklahoma. It reads in part:

. . . the same type or category of tax or fee may be imposed upon an out-of-state resident as is imposed upon residents of Oklahoma for the same or substantially similar use of a vehicle in such other state in the amount or approximate total . . . required by the laws of such other state to be paid by a resident of this state making the same or similar use of a like vehicle in such state.

The Commission shall have the authority to adopt rules and regulations which provide procedures for

implementation of comparable regulatory fees and taxes for vehicles used in this state by residents of other states . . .

This statute does not direct the Tax Commission to pass regulations. Instead, it states that "the same or substantially the same type or category of tax or fee may be imposed upon an out-of-state resident." This authorization is not the mere power to adopt regulations to carry out a declared policy. It is a complete delegation of legislative authority to establish the policy of the law. Under 47 Okl. St. Ann. §22.5 j (K) (Supp. 1983) the same or substantially the same type or category of tax or fee *may* be imposed on an out-of-state resident by the Tax Commission. There is no statutory guideline to instruct the Tax Commission when the tax or fee should be levied. The discretion to levy the tax is vested in the Oklahoma Tax Commission.

The Oklahoma Supreme Court in *Rush v. Brown*, 101 P.2d 262, 263 (Okl. 1940) stated:

. . . [T]he power to determine the policy of the law is primarily legislative, and cannot be delegated, whereas the power to make rules of a subordinate character in order to carry out that policy and apply it to varying conditions, although partaking of a legislative character, is in its dominant aspect administrative and can be delegated. Also see *Harris v. State*, 251 P.2d 799 (1952).

This same principle of nondelegation has been more recently upheld by the Oklahoma Supreme Court. The Court in *Democratic Party of Oklahoma v. ESTEP*, 652 P.2d 271, 277-278 (Okl. 1982) held:

"While the constitutional doctrine of nondelegation has been somewhat relaxed in several jurisdictions, its force in this State remains undiminished. The doctrine teaches that the legislature must establish its policies and set out definite standards for the exercise of an agency's rulemaking power."



The Oklahoma retaliatory statute does not set out definite standards for the Oklahoma Tax Commission. It vests complete authority in the Tax Commission to decide whether or not the tax can be imposed. This fact has recently been emphasized by the concurrent resolution (p. A6 in the Appendix) passed by the Thirty-Ninth Legislature of Oklahoma. The resolution states that "the collection of said fee or tax is discretionary and the decision to collect the fee or tax is the responsibility of the Oklahoma Tax Commission." The plaintiff state submits that the delegation of legislative power is evident in the concurrent resolution and in the statute, and that by virtue of said delegation, the Oklahoma retaliatory statute is unconstitutional.

The Failure Of The Oklahoma Tax Commission To Follow The Proper Statutory Procedure In Adopting Its Regulations Voids The Retaliatory Tax.

According to the Oklahoma Administrative Procedure Act, 75 Okl. St. Ann. §301 et. seq., the Oklahoma Tax Commission is exempt from that Act except with respect to 75 Okl. St. Ann. §304. Under 75 Okl. St. Ann. §304 (a) each agency is required to file its rules in accordance with 75 Okl. St. Ann. §251 which provides:

(a) Every agency, including any authority, board, commission, department, instrumentality, office, or officer of the State of Oklahoma, that possesses rule-making powers shall file a certified original and one duplicate copy of all its rules or regulations in force and effect with the Secretary of State and a certified original and two duplicate copies with the State Librarian and Archivist on or before the effective date of this act. . . .

As evidenced by plaintiff's exhibits 4 and 5 and on pp. A8-A11 of the Appendix, the Oklahoma Tax Commission has not filed its regulations as required by law. The effect of the Tax Commission's failure to file its regulations is that its regulations are void. 75 Okl. St. Ann. §252 provides in pertinent part:

. . . any rule or regulation, amendment, revision, or revocation of an existing rule or regulations made by an agency after the effective date of this act shall be void and of no effect unless filed and published as required by Section 1 and 5 of this act. . . .

The language "Sections 1 and 5 of this act" in the above quoted statute refers to 75 Okl. St. Ann. §251 and 75 Okl. St. Ann. §255 respectively.

In addition to the Tax Commission not complying with the filing requirements of 75 Okl. St. Ann. §251, it has also not complied with the publishing requirements under 75 Okl. St. Ann. §255. It states that no new rule or regulation shall be in effect until seven days have elapsed from the date of publication by the State Librarian and Archivist.

The requirements under 75 Okl. St. Ann. §251 et. seq. have not been fulfilled by the Tax Commission. The Tax Commission has not filed copies of the regulations with the Secretary of State or with the State Librarian and Archivist as required by 75 Okl. St. Ann. §255. Furthermore, the regulations were not published in the Oklahoma Gazette. The failure of the Oklahoma Tax Commission to comply with the State Agency Rules and Regulations voids the Commission's regulations.

The purpose of the Section 255 publication requirement is to give public notice of the law contained therein. *State ex. rel. v. Kerr-McGee*, 619 P.2d 858, 862 (Okl. 1980).

In the case before this Court, the Oklahoma Tax Commission did not give the public notice as required. Therefore, the plaintiff respectfully submits that the Commission's regulations are void.

CONCLUSION

Plaintiff submits that the constitutional questions involved in this case are so substantial as to warrant plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

THOMAS B. KEYS  
Chief Counsel for the Arkansas  
State Highway Commission  
P.O. Box 2261  
Little Rock, Arkansas 72203  
Phone (501) 569-2272

*Attorney for Plaintiff  
State of Arkansas*



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APPENDIX

PLAINTIFF'S EXHIBIT NO. 1

STATE OF ARKANSAS  
Office of the Governor  
State Capitol  
Little Rock 72201

Bill Clinton  
Governor

July 12, 1983

Mr. Henry Gray  
Director of Highways and Transportation  
P.O. Box 2261  
Little Rock, Arkansas 72203

Dear Henry:

I recognize that retaliatory tax laws are broad in scope and encompass more than highway legislation. However, the immediate problem is the threat of retaliatory taxes against Arkansas based trucks as a result of the passage of Act 685 of 1983. At the present time, I have been reliably informed that the States of Oklahoma and Georgia will take retaliatory action under their current laws. Since the Arkansas Highway Commission will be directly affected by these retaliatory taxes, I am requesting that the Arkansas Highway Commission represent not only its own interests, but the interests of the State of Arkansas in challenging the institution of any retaliatory fees by a State as the result of the passage of Act 685 of 1983.

A4

The attorneys for the Arkansas Highway Commission have full authority to represent the State of Arkansas in this matter.

Sincerely,

/s/ Bill Clinton  
Bill Clinton

BC:ld



## PLAINTIFF'S EXHIBIT NO. 2

OKLAHOMA TAX COMMISSION  
 STATE OF OKLAHOMA  
 2601 Lincoln Blvd.  
 Oklahoma City, Oklahoma 73194

July 1, 1983

	Annual Fuel Marker Fee	Annual Mileage Use Tax	Annual Axle Tax	Trip Fee
Alabama	\$12.00			
Arizona				8¢/Mi
Arkansas	\$10.00	\$175.00/Reg over 73,280		
Connecticut	\$10.00			
Delaware	\$10.00			
Florida	\$ 8.00			
Georgia	(On Hold)			
Idaho	\$ 1.00			4 1/2 ¢/Mi
Kentucky	\$10.00	60,000 # or over -		3¢/Mi
Maine	\$10.00			
Maryland	\$25.00			
Massachusetts	\$10.00			
Mississippi	\$12.00			
New Hampshire	\$10.00			
New Jersey	\$ 6.00			
New Mexico	\$ 2.00			
New York			See Back - Trip Fee	
No. Carolina	\$ 1.00		(Household Movers Exempt)	4¢/Mi
Nevada				2 1/4 ¢/Mi
Ohio		Truck 3 or More Axles		1¢/Mi
		Tractor Semitrailer Combin. 3 Axles		1¢/Mi
		Tractor Semitrailer Combin. 4 Axles		1 1/2 ¢/Mi
		Tractor Semitrailer Combin. 5 Axles		2¢/Mi
		Truck-Trailer Combin. 4 or more Axles		2 1/4 ¢/Mi
Oregon				8¢/Mi.
Pennsylvania	\$ 5.00		\$36 Per Axle	
Vermont	\$50.00			
West Virginia	\$ 5.00			
Wyoming		Tax Eliminated		

PLAINTIFF'S EXHIBIT NO. 3

THIRTY-NINTH LEGISLATURE  
MOTOR VEHICLES—FEES—TAXES—COLLECTION

H.C.Res.No. 1001

A CONCURRENT RESOLUTION URGING THE OKLAHOMA TAX COMMISSION TO COLLECT CERTAIN FEES AND TAXES; ENCOURAGING THE NEGOTIATION OF CERTAIN AGREEMENTS; AND DIRECTING DISTRIBUTION.

WHEREAS, the 2nd Session of the 38th Oklahoma Legislature enacted House Bill No. 1855, Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K), which provide that a use fee or tax may be imposed upon a resident of another state for the operation of vehicles in this state if the other state imposes a similar use fee or tax upon Oklahoma residents for the operation of vehicles in said other state; and

WHEREAS, the collection of said fee or tax is discretionary and the decision to collect the fee or tax is the responsibility of the Oklahoma Tax Commission; and

WHEREAS, Oklahoma residents who must pay a fee or tax in other states are placed at an economic disadvantage because nonresidents do not have to pay a comparable fee or tax in this state; and

WHEREAS, it is the intent of the Legislature that the fee or tax authorized by Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K) be collected from nonresident if the state of residence of said nonresident imposes and collects a similar fee or tax from Oklahoma nonresidents.

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE 1ST SESSION OF THE 39TH OKLAHOMA LEGISLATURE, THE SENATE CONCURRING THEREIN:

SECTION 1. The Oklahoma Legislature urges the Oklahoma Tax Commission to collect the fees and taxes authorized by Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K) from nonresident operating vehicles in this state if the state of residency of such nonresident imposes a similar fee or tax upon Oklahoma residents.

SECTION 2. The Oklahoma legislature further encourages the Oklahoma Tax Commission to negotiate with other states imposing a use fee or tax similar to the fees and taxes authorized by Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K) to provide for reciprocity agreements which would exempt Oklahoma residents operating vehicles in other states from such fees or taxes in exchange for exempting residents of other states from the provisions of Section 1, Chapter 104, O.S.L. 1982 (68 O.S. Supp. 1982, Section 607.1) and House Bill No. 1853, Section 1, Chapter 155, O.S.L. 1982 (47 O.S. Supp. 1982, Section 22.5j, subsection K).

SECTION 3. Copies of this resolution shall be dispatched to members of the Oklahoma Tax Commission.

Adopted by the House of Representatives the 7th day of March, 1983.

Adopted by the Senate the 2nd day of May, 1983.

Filed with the Secretary of State May 3, 1983.

PLAINTIFF'S EXHIBIT NO. 4

THE OKLAHOMA DEPARTMENT  
OF LIBRARIES

200 Northeast 18th Street  
Oklahoma City, 73105  
AC 405 521-2502  
TWX 910-831-3178

Allen Wright  
Memorial Library Building

AFFIDAVIT

Affiant herein, being first duly sworn, states as follows:

I, Oliver Delaney, Editor, The Oklahoma Gazette for the State of Oklahoma, do hereby state under oath that after a diligent search of the records of the office of the Oklahoma State Librarian and Archivist, that the only record of tax regulations on file in my office are the attached, and that the attached tax regulations have been published in The Oklahoma Gazette as so indicated.

/s/ Oliver Delaney

Oliver Delaney, Editor  
The Oklahoma Gazette

STATE OF OKLAHOMA     )  
  ) ss.  
COUNTY OF OKLAHOMA    )

Sworn to before me the undersigned Notary Public this 15 day of September, 1983.

/s/ Louise L. Emmett

NOTARY PUBLIC

My Commission Expires:

My Commission Expires June 20, 1987

## TAX COMMISSION, Oklahoma

## Oklahoma Gazette

78-286 (R&R) - Filed *Joint Rule* (with Dept. of Public Safety) adopted 9-22-78 *to direct manner in which vehicle license plates are to be displayed upon a vehicle in addition to provisions in 47 O.S. 22.4.* (Published) Vol. 17, #19.

79-27 (R&R) - Filed *Order No. 66 608 concerning adoption of Rule 8-68.1001a-1(a) for proper administration of load and frac oil exclusions from gross production and petroleum excise taxes,* adopted 1-11-79. (Published) Vol. 18, #2.

79-352 (R&R) - Filed *Order No. 79-10-05-01* in the Matter of the Adoption of Regulations for the Administration of *the Section 1024 Title 68* of the Oklahoma Statutes, (*Gross Production Tax Division*) Vol. 18, #20. (Published)

79-381 (R&R) - Filed *Order No. 79-11-21-04* in the Matter of the Adoption of regulations to designate and authorize agent in accordance with Section 1010 of Title 68 of the Oklahoma Statutes. (Published) Vol. 18, #23. (*Gross Production Tax Div. - Agent*)

80-274 (R&R) - Filed *Order 80-06-09-20* in the matter of the adoption of regulations for *administration of the Gross Production Tax* dated 6-9-80. (Published) Vol. 19, #12.

80-412 (R&R) - *Order No. 80-10-10-04* in the matter of the adoption of Regulations for the administration of the *Tobacco Products Tax Code and payment of said tax by monthly reporting procedures.* (Published) Vol. 19, #20.

80-436 (R&R) - The Tax Commission directs that no *motor license agent's* representative, employee nor any other person acting as a messenger will perform any kind of solicitation or messenger service that would include picking up and/or delivery of lien entry forms, titles, registrations, or license plates *unless the Oklahoma Tax Commission has appointed, approved and bonded that person to perform these acts.* (Published) Vol. 19, #21.

80-445 (R&R) - Filed *Order No. 80-10-30-11* in the matter of the Adoption of *Regulations for the Administration of the Excise Tax on Alcoholic Beverages except Beer*, and payment of said tax by monthly reporting procedures. (Published) Vol. 19, #22.

80-446 (R&R) - Filed *Order No. 80-10-30-13* in the matter of *Amendment of Regulation No. 8-68. 1015-1* for issuance of *Refiner or Processor License*. (Published) Vol. 19, #22.

81-109 (R&R) Order No. 81-02-11-14 in the matter of the adoption of Regulation No. 1010-8 for amended reports and taxes on retroactive increase adjustment in price of gas. 20:4 (547-549)

81-190 (R&R) Order No. 81-04-10-11 concerning the adoption of regulations for issuance of releases of estate tax liability. 20:8 (1002-1006)

TAX COMMISSION, Oklahoma Card 2 Oklahoma Gazette

81-370 (R&R) Regulations for the administration of the annual registration fee on aircraft and payment of said fees by annual reporting procedures. 20:16 (1963-1972)

81-409 (R&R) Rule directing the manner in which new motor vehicle dealers' tags are to be utilized. 20:19 (2191-2192)

82-64 (R&R) Regulations for establishing procedures relating to the enforcement of the Unfair Cigarette and Tobacco Products Sales Act. 21:3 (244-248)

PLAINTIFF'S EXHIBIT NO. 5

OFFICE OF SECRETARY OF STATE  
STATE OF OKLAHOMA

CERTIFICATE

I, the undersigned Secretary of State of the State of Oklahoma, do hereby certify: That a diligent search has been made of the records of the Secretary of State, State of Oklahoma, for the tax regulations promulgated by the Oklahoma Tax Commission pertaining to highway taxes dated July 1, 1983 and that none has been found nor has been filed to our knowledge as of this date, September 15, 1983.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State of Oklahoma at the City of Oklahoma City this 15th day of September, 1983.

/s/ Jeanette B. Edmondson  
Secretary of State

By: /s/ Gerry Ann Smedley

STATUTES AND  
CONSTITUTIONAL PROVISIONS INVOLVED  
(Continued)

23 U.S.C. §127 provides as follows:

(a) No funds authorized to be appropriated for any fiscal year under provisions of the Federal-Aid Highway Act of 1956 shall be apportioned to any State which does not permit the use of the National System of Interstate and Defense Highways within its boundaries by vehicles with a weight of twenty thousand pounds carried on any one axle, including enforcement tolerances, or with a tandem axle weight of thirty-four thousand pounds, including enforcement tolerances, or a gross weight of at least eighty thousand pounds for vehicle combinations of five axles or more. However, the maximum gross weight to be allowed by any State for vehicles using the National System of Interstate and Defense Highways shall be twenty thousand pounds carried on one axle, including enforcement tolerances, and a tandem axle weight of thirty-four thousand pounds, including enforcement tolerances and with an overall maximum gross weight, including enforcement tolerances, on a group of two or more consecutive axles produced by application of the following formula:

$$W = 500 \left( \frac{LN}{N-1} + 12N + 36 \right)$$

where W equals overall gross weight on any group of two or more consecutive axles to the nearest five hundred pounds, L equals distance in feet between the extreme of any group of two or more consecutive axles, and N equals number of axles in group under consideration, except that two consecutive sets of tandem axles may carry a gross load of thirty-four thousand pounds each providing the overall distance between the first and last axles of such consecutive



sets of tandem axles is thirty-six feet or more: Provided, That such overall gross weight may not exceed eighty thousand pounds, including all enforcement tolerances, except for those vehicles and loads which cannot be easily dismantled or divided and which have been issued special permits in accordance with applicable State laws, or the corresponding maximum weights permitted for vehicles using the public highways of such State under laws or regulations established by appropriate State authority in effect on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway Amendments of 1974 [enacted Jan. 4, 1975], whichever is the greater. Any amount which is withheld from apportionment to any State pursuant to the foregoing provisions shall lapse. This section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof which the State determines could be lawfully operated within such State on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway Amendments of 1974 [enacted Jan. 4, 1975]. With respect to the State of Hawaii, laws or regulations in effect on February 1, 1960, shall be applicable for the purposes of this section in lieu of those in effect on July 1, 1956. With respect to the State of Michigan, laws or regulations in effect on May 1, 1982, shall be applicable for the purposes of this subsection.

(b) No State may enact or enforce any law denying reasonable access to motor vehicles subject to this title [23 USCS §§101 et seq.] to and from the Interstate Highway System to terminals and facilities for food, fuel, repairs, and rest.

Ark. Stat. Ann. §75-817 (Supp. 1983) provides in pertinent part:

... (e) No vehicle or combination of vehicles shall operate upon any highway in this state when the gross weight of the vehicle or combination thereof is in excess of seventy-three thousand two hundred and eighty (73,280) pounds unless the vehicle or combination thereof shall not exceed the value given in Table I corresponding to the distance in feet between the extreme axles of the group, measured longitudinally to the nearest foot. All vehicles desiring to operate with the increased axle weights as provided by these amendments to this Act must comply with the formula in Table I. (the extreme axles of the group, measured longitudinally to the nearest foot.)

### SIZE AND LOAD

Table I

GROSS WEIGHTS ALLOWABLE UNDER THE FORMULA CONTAINED IN THE FEDERAL WEIGHT LAW ENACTED JANUARY 4, 1975, THAT ARE APPLICABLE TO VEHICLES OR COMBINATIONS THEREOF IN ARKANSAS FOR GROSS WEIGHTS IN EXCESS OF 73,280 POUNDS

$$\text{FORMULA } W = 500 (LN - 1 + 12N + 36)$$

Except that two consecutive sets of tandem axles may carry a gross load of 34,000 pounds each providing that the overall distance between the first and last axles of such consecutive sets of tandem axles is thirty-six [36] feet or more.

W — maximum weight in pounds carried on any group of two [2] or more axles computed to nearest 500 pounds.

L — distance in feet between the extremes of any group of two [2] or more consecutive axles.

N — number of axles in group under consideration.

Distance in feet between the extremes of any group of 2 or more consecutive axles	Maximum load in pounds carried on any group of 2 or more consecutive axles		
	4 axles	5 axles	6 axles
33 .....			74,000
34 .....			74,500
35 .....			75,000
36 .....			75,500
37 .....			76,000
38 .....			77,000
39 .....			77,500
40 .....			78,000
41 .....		73,500	78,500
42 .....		74,500	79,000
43 .....		75,000	80,000
44 .....		75,500	80,000
45 .....		76,000	80,000
46 .....		77,000	80,000
47 .....	73,500	77,500	80,000
48 .....	74,000	78,000	80,000
49 .....	74,500	78,500	80,000
50 .....	75,500	79,500	80,000
51 .....	76,000	80,000	80,000
52 .....	76,500	80,000	80,000
53 .....	77,500	80,000	80,000
54 .....	78,000	80,000	80,000
55 .....	78,500	80,000	80,000
56 .....	79,000	80,000	80,000
57 .....	80,000	80,000	80,000

Provided that, if the Federal Highway Administration of the United States Congress prescribes or adopts vehicle size or weight limits greater than those now prescribed by the "Federal-Aid Highway Act of 1956, as Amended," which limits exceed in full or in part the provisions of this section, subsections (a), (b), (c), (d) or (e), the State Highway Commission shall adopt size and weight limits comparable to those prescribed or adopted by the Federal Highway Administration or the United States Congress and shall authorize said limits to

be used by owners or operators of vehicles while said vehicles are using highways within this state; but no vehicle size or weight limit so adopted by the Commission shall be less in any respect than those now provided for in subsections (a), (b), (c), (d) or (e) of this section.

Ark. Stat. Ann. §75-817.3 (Supp. 1983) provides as follows:

(a) As used in this Section of this Act, the following terms shall have the following meanings:

(1) "Department" means the Director of the Arkansas State Highway and Transportation Department;

(2) "Division" means the Commissioner of Revenues, Department of Finance and Administration, State of Arkansas;

(3) "Motor Vehicle", as used herein, means all cargo vehicles required to be registered for use upon the public highways of this State, designed, used or maintained primarily for the transportation of property and having a declared gross weight of 73,281 pounds or more. For the purpose hereof, truck-tractors, single unit trucks, semi-trailers and trailers operated in combination thereof shall constitute a single vehicle. The person having the use or control, or the right to the use or control of the part of such a vehicle furnishing the motive power is the highway user with respect to the entire vehicle and is accordingly subject as such to the provisions of this Section of this Act;

(3) [ (4) ] "Truck" includes the terms "truck" or "truck-tractor" and "semi-trailer" or "trailer" when operated in combination with a truck or truck-tractor;

(4) [ (5) ] "User" includes any person having the use and control or the right to the use and control, of any motor vehicle;

(5) [ (6) ] "Highway" includes all highways, roads, and streets of this State generally open to the use of the public as a way for vehicular traffic;

(6) [ (7) ] "Gross weight" means the actual weight of the truck or truck-tractor, plus the actual weight of the heaviest semi-trailer or trailer or combinations thereof with which it is to be operated in combination plus the actual weight of the heaviest load to be carried thereon.

(7) [ (8) ] "Arkansas Registered Vehicle" or "Arkansas Registered Truck" means a vehicle registered in Arkansas by a user who is an Arkansas resident, and bearing an Arkansas license plate.

(b) A tax is hereby imposed upon all users, as defined in Subsection (a), above, of motor vehicles, as herein defined, in compensation for the use of the highways of this State to be known as the "Highway Use Equalization Tax". Such tax shall be in addition to all other taxes now required to be paid on such vehicles except as hereinafter provided.

(c) The Highway Use Equalization Tax shall not apply to any motor vehicle whose declared gross weight, as defined in Subsection (a), above, is 73,280 pounds or less, nor to vehicles used exclusively in hauling unfinished and unprocessed farm products, forest products, and clay minerals, and ores, from the point of production, harvesting or severance to the point at which the same shall first undergo any processing, preparation for processing, conversion or transformation from their raw, natural or severed state, nor to any vehicle owned and operated by the United States of America or the State of Arkansas, or any political subdivision thereof.

(d) The provisions of this Section of this Act shall not apply to any motor vehicle used on an interstate trip with an origin or destination within 10 miles of the geographic boundaries of this State, provided the one-way travel distance in the State is not over 10 miles.

(e) (1) The user of every vehicle subject to this Section of this Act and which is an Arkansas registered vehicle, before operating such vehicle over the highways of this State, shall qualify such vehicle with the Division. Qualifications shall be made by application to the Division on forms to be provided by said Division. Said application may be filed with the Division at the time of registration of the vehicle.

(2) Such application shall be accompanied by payment to the Division of a fee of five dollars (\$5.00), to be deposited into the Constitutional and Fiscal Agencies Fund, which shall cover the clerical cost of such qualification. Upon receipt of such application and payment of the tax as hereinafter determined, the Division shall make appropriate record of the vehicle qualified and certify such qualification on the applicant's registration certificate or a registration cab card, one of which is to be carried in the cab of the vehicle at all times. The said registration certificate or registration cab card shall, in addition to the registration information and the required certification, show the amount of tax paid for such vehicle as determined by Subsection (f) of this Section.

(f) (1) At the time of such qualification of any Arkansas registered truck subject to this Section which is registered through the International Registration Plan, the Division may fix a mileage rate in cents per mile for each truck so registered and qualified. The Division shall determine the mileage rate, utilizing the gross weight declared in the application for registration of the truck, according to the following table:

<u>Vehicle Weight (pounds)</u>	<u>Mileage Rate (dollars)</u>
73,281 — 80,000	\$ .05

The tax determined under this provision for every truck subject thereto shall be in the amount of the determined mileage rate multiplied by each mile such truck is operated

over the highways of this State, as reported to the Division for registration under the International Registration Plan.

(2) At the time of such qualification of any Arkansas registered truck subject to the provisions of this Section, every user not registered through the International Registration Plan shall pay, and every user registered through the International Registration Plan may elect to pay, an annual mileage tax in lieu of an amount determined by the applicable mileage rate set forth by Subsection (f) (1) of this Section. The Division shall determine such annual mileage tax by utilizing the gross weight declared in the application for registration of the truck, according to the following table:

<u>Vehicle Weight (pounds)</u>	<u>Annual Tax (dollars)</u>
73,281 – 80,000	\$175

(g) The tax, as determined by either Subsection (f) (1) or Subsection (f) (2) of this Section, shall become due and payable at the time of registration. No license shall be issued, nor operation authority granted, to any Arkansas registered user subject to the provisions of this Act until such time as the full amount of the tax determined to be due under the provisions of this Section, together with all penalties, shall have been paid.

(h) The Division is hereby authorized to collect those taxes and fees imposed by this Section upon the Arkansas registered users subject to the provisions of this Act [§§75-817.2, 75-817.3, 75-819(b)], to make timely deposits into the State Treasury of all such moneys collected by the Division, and to administer the provisions of this Section as they pertain to Arkansas registered users, including the right to inspect and audit at reasonable times at any place within this State the books, records and documents of any Arkansas registered users required to pay the Highway Use Equalization Tax hereby imposed.

(i) (1) The user of any vehicle, subject to the provisions of this Section, may, in lieu of qualification in accordance with the

provisions of Subsection (e) of this Section, remit to the Department either an annual mileage tax in an amount determined by Subsection (f)(2) of this Section, or pay an amount determined by the applicable mileage rate set forth in (f)(1) of this Section, or pay a trip permit fee. It is the intent of this Act that all users, subject to the provisions of this Section, must either qualify with the Division as provided in Subsection (e) of this Section and pay the appropriate taxes, or comply with the provisions of this Subsection. Provided, that, all Arkansas registered vehicles must qualify with the Division and remit such taxes to the Division. If the user elects to pay the annual mileage tax, the Department, upon application thereof and receipt of such payment, shall issue an annual mileage tax certificate to the user which shall, by the user, be affixed to the cab of such vehicle. If the user elects to pay an amount determined by the applicable mileage rate set forth in (f)(1) of this Section, the Department shall utilize the appropriate rate multiplied by each mile such vehicle was operated over the highways of this State for the preceding twelve month period based on mileage records of the user acceptable to the Department. Upon payment of such amount, the Department shall issue a certificate to the user, which shall, by the user, be affixed to the cab of such vehicles. If the user elects to utilize a trip permit, such trip permits for trucks with a gross weight of 73,281 pounds through 80,000 pounds shall be issued at a fee of eight dollars (\$8.00) for each 100 miles of travel, rounded to the nearest 100 miles, whether loaded or unloaded. Said permits shall be issued by the Department in such forms as it deems appropriate.

(j) The tax provided for in this Section of this Act must be paid by the users of all applicable vehicles using the highways of this State, and no reciprocal agreement or agreement of any nature heretofore or hereafter entered into between officials of this State and those of any other State may exempt any user of such vehicles using the highways of this State from the provisions of this Section of this Act and payment of the tax levied by this Section of this Act.



(k) Any user found operating any vehicle subject to the provisions of this Section of this Act over the highways of this State without complying with this Section or without having available in or on the cab thereof the appropriate certificate or trip permit required by this Section, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of no less than two hundred dollars (\$200.00) and not more than five hundred dollars (\$500.00) for the first offense and of no less than five hundred dollars (\$500.00) and not more than one thousand dollars (\$1,000.00) for each subsequent offense.

(l) This Section of this Act shall be liberally construed to effectuate the purposes thereof.

(m) All fees, taxes, penalties and interest collected under the provisions of this Section of this Act not specifically classified as "Constitutional and Fiscal Agencies Funds" shall be classified as "special revenues" and shall be deposited in the State Treasury, and the net amount thereof shall be transferred by the State Treasurer on the last business day of each month: 15% of the amount thereof, to the County Aid Fund; 15% of the amount thereof to the Municipal Aid Fund; and 70% of the amount thereof, to the State Highway Department Fund, such funds to be further disbursed in the same manner and used for the same purposes as is set out in the "Arkansas Highway Revenue Distribution Law."





