

HOUSE BILL NO. 538

INTRODUCED BY BRADLEY, WALLIN, DRISCOLL, LYNCH,  
STANG, BENGTSON, D. BROWN, QUILICI, KIMBERLEY, GRADY,  
DAVIS, SQUIRES, HARRINGTON, KILPATRICK, PINSONEAULT  
BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE  
ON MARKETING OF MOTOR FUELS

IN THE HOUSE

FEBRUARY 1, 1991                   INTRODUCED AND REFERRED TO COMMITTEE  
  ON BUSINESS & ECONOMIC DEVELOPMENT.

  FIRST READING.

FEBRUARY 19, 1991                   COMMITTEE RECOMMEND BILL  
  DO PASS AS AMENDED. REPORT ADOPTED.

FEBRUARY 20, 1991                   PRINTING REPORT.

FEBRUARY 23, 1991                   SECOND READING, DO PASS AS AMENDED.

FEBRUARY 25, 1991                   ENGROSSING REPORT.

FEBRUARY 26, 1991                   THIRD READING, PASSED.  
  AYES, 67; NOES, 31.

  TRANSMITTED TO SENATE.

IN THE SENATE

FEBRUARY 27, 1991                   INTRODUCED AND REFERRED TO COMMITTEE  
  ON BUSINESS & INDUSTRY.

  FIRST READING.

MARCH 27, 1991                    ON MOTION, MINORITY REPORT ADOPTED.  
  CONCURRED IN AS AMENDED.  
  REPORT ADOPTED. AYES, 28; NOES, 21.

APRIL 1, 1991                    SECOND READING, CONCURRED IN.

APRIL 2, 1991                    THIRD READING, NOT CONCURRED IN.  
  AYES, 25; NOES, 25.

APRIL 3, 1991                    ON MOTION, PREVIOUS ACTION  
  RECONSIDERED AND BILL PLACED ON  
  THIRD READING ON THE 71ST  
  LEGISLATIVE DAY.

APRIL 4, 1991                    THIRD READING, CONCURRED IN.

AYES, 32; NOES, 18.

RETURNED TO HOUSE WITH AMENDMENTS.

IN THE HOUSE

APRIL 9, 1991

RECEIVED FROM SENATE.

SECOND READING, AMENDMENTS  
CONCURRED IN.

APRIL 10, 1991

THIRD READING, AMENDMENTS  
CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

1 *House* BILL NO. *538*  
 2 INTRODUCED BY *Bradley Wood*  
 3 *Berntson* BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE *Dave Brown*  
 4 *Miller* ON MARKETING OF MOTOR FUELS *Kimberley Dandy*  
 5 *Appo* *Hamington* *Patricia*

6 A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE PRICE OF  
 7 RETAIL MOTOR FUEL AT WHOLESALE AND RETAIL LEVELS; PROVIDING  
 8 FOR PENALTIES AND REMEDIES FOR SALES IN VIOLATION OF  
 9 ESTABLISHED PRICES; PROHIBITING UNFAIR PRACTICES IN THE SALE  
 10 OF RETAIL MOTOR FUEL; AND PROVIDING AN IMMEDIATE EFFECTIVE  
 11 DATE."

12  
 13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:  
 14 NEW SECTION. **Section 1.** Short title. [Sections 1  
 15 through 7] may be cited as the "Montana Retail Motor Fuel  
 16 Marketing Act".

17 NEW SECTION. **Section 2.** Purpose. The legislature  
 18 recognizes that independent and small dealers and  
 19 distributors of retail motor fuel are vital to a healthy,  
 20 competitive marketplace and are unable to survive  
 21 financially in competition with subsidized, below-cost  
 22 pricing at the retail level by dealers and distributors who  
 23 have other sources of income. The legislature believes that  
 24 subsidized, below-cost pricing is a predatory practice that  
 25 is not conducive to fair trade. The legislature finds that

1 below-cost pricing laws are effective in protecting  
 2 independent and small retailers and wholesalers in other  
 3 jurisdictions from subsidized pricing, which is inherently  
 4 unfair and destructive, reduces competition in the motor  
 5 fuel marketing industry, and is a form of predatory pricing.  
 6 The purpose of [sections 1 through 7] is to prevent and  
 7 eliminate predatory pricing of retail motor fuel.

8 NEW SECTION. **Section 3.** Definitions. As used in  
 9 [sections 1 through 7], unless the context requires  
 10 otherwise, the following definitions apply:

- 11 (1) "Affiliate" means a person who, other than through
- 12 a franchise or marketing agreement, controls, is controlled
- 13 by, or is under common control with any other person.
- 14 (2) "Cost of doing business", in the absence of proof
- 15 of lesser cost, means 3% of the delivered cost of motor fuel
- 16 for wholesale sales and 6% of the delivered cost of motor
- 17 fuel for retail sales and in other cases includes all costs
- 18 incurred in the conduct of business, including but not
- 19 limited to:
- 20 (a) labor, including salaries of executives and
- 21 officers;
- 22 (b) rent that is not less than the fair market value
- 23 based on current use;
- 24 (c) interest on borrowed capital;
- 25 (d) depreciation;



1 (e) selling cost;

2 (f) maintenance of equipment;

3 (g) losses due to breakage or damage;

4 (h) credit card fees or other charges;

5 (i) credit losses; and

6 (j) all licenses, taxes, insurance, and advertising.

7 (3) "Customary discount for cash" means an allowance,  
8 whether part of a larger discount or not, made to a  
9 wholesaler or retailer when a person pays for motor fuel  
10 within a limited or specified time.

11 (4) "Delivered cost of motor fuel" means:

12 (a) for a distributor or retailer, the lower of the  
13 most recent cost of motor fuel to the distributor or  
14 retailer or the lowest replacement cost of motor fuel to the  
15 distributor or retailer within 5 days prior to the date of  
16 sale, in the quantity last purchased, whether within or  
17 before the 5-day period, less all trade discounts except  
18 customary discounts for cash plus transportation costs and  
19 any taxes that may be required by law if not already  
20 included in the invoice cost; or

21 (b) for a refiner, that refiner's posted rack price to  
22 the wholesale class of trade at the terminal used by the  
23 refiner to obtain the motor fuel, plus transportation costs  
24 and any taxes that may be required by law. If the refiner  
25 does not regularly sell to the wholesale class of trade at

1 the terminal or does not post a terminal price, the refiner  
2 may use as its rack price the posted price of any other  
3 refiner at a terminal within the general trade area that has  
4 products readily available for sale to the wholesale class  
5 of trade.

6 (5) "Distributor" means a person engaged in the  
7 purchase of motor fuel for resale to a retail motor fuel  
8 outlet.

9 (6) "Motor fuel" means gasoline, as defined in  
10 15-70-201, alcohol blended with gasoline to produce gasohol,  
11 and special fuel as defined in 15-70-301.

12 (7) "Person" means an individual, a sole  
13 proprietorship, a partnership, a corporation, any other form  
14 of business entity, or any individual acting on behalf of  
15 any of them.

16 (8) "Posted rack price" means the f.o.b. terminal price  
17 for a particular motor fuel that a refiner, producer, or  
18 person offers for sale or transfer to itself or any related  
19 or unrelated person.

20 (9) "Refiner" means a person engaged in the production  
21 or refining of motor fuel, whether the production or  
22 refining occurs in this state or elsewhere, and includes any  
23 affiliate of the person.

24 (10) "Retailer" means a person engaged in the business  
25 of selling motor fuel at a retail motor fuel outlet.

1 (11) "Retail motor fuel outlet" means a place of  
2 business where motor fuel is sold and delivered into the  
3 tanks of motor vehicles regardless of whether the income  
4 from the selling and delivery of the fuel is the primary  
5 source of revenue of that business.

6 (12) "Sale" means a transfer, gift, sale, offer for  
7 sale, or advertisement for sale in any manner or by any  
8 means of motor fuel, including a transfer of motor fuel by a  
9 person to himself or to his affiliate.

10 (13) "Transfer price" means the price used by a person  
11 to transfer motor fuel to himself or to an affiliate for  
12 resale at a retail motor fuel outlet.

13 (14) "Transportation cost" means the actual cost of  
14 transportation of motor fuel or, in the absence of proof of  
15 actual cost, the common carrier rates fixed by the public  
16 service commission for the immediate market area concerned.

17 (15) "Wholesaler" means a person engaged in the business  
18 of making sales at wholesale to a retail motor fuel outlet.

19 NEW SECTION. **Section 4.** Below-cost sale prohibited.

20 (1) A wholesaler may not sell motor fuel to a retail motor  
21 fuel outlet at less than the delivered cost of the motor  
22 fuel plus the cost of doing business if the effect is to  
23 injure or destroy competition or substantially lessen  
24 competition.

25 (2) A retailer may not sell motor fuel at less than the

1 delivered cost of the motor fuel plus the cost of doing  
2 business if the effect is to injure or destroy competition  
3 or substantially lessen competition.

4 (3) A wholesaler may not sell or transfer motor fuel to  
5 itself or an affiliate for resale at a retail outlet at a  
6 transfer price lower than the price the wholesaler charges  
7 another retail motor fuel outlet that purchases a like  
8 quantity within the same competitive area if the effect is  
9 to injure or destroy competition or substantially lessen  
10 competition.

11 (4) The provisions of [sections 1 through 7] do not  
12 apply to a sale at wholesale or a sale at retail made:

13 (a) in an isolated transaction not in the usual course  
14 of business;

15 (b) if motor fuels are advertised, offered for sale, or  
16 sold in a bona fide clearance sale for the purpose of  
17 discontinuing trade in the motor fuel and the advertising,  
18 offer to sell, or sale states the reason for the sale and  
19 the quantity of the motor fuel advertised, offered for sale,  
20 or to be sold;

21 (c) if the motor fuel is advertised, offered for sale,  
22 or sold as imperfect or damaged and the advertising, offer  
23 of sale, or sale states the reason for the sale and the  
24 quantity of the motor fuel advertised, offered for sale, or  
25 sold;

1 (d) if motor fuel is sold upon the final liquidation of  
2 a business; or

3 (e) if motor fuel is advertised, offered for sale, or  
4 sold by a fiduciary or other officer under the order or  
5 direction of a court.

6 (5) Notice required under this section is not  
7 sufficient unless the subject of the sale is kept separate  
8 from other stocks and is clearly and legibly marked with the  
9 reason for the sale and any advertisement of the goods  
10 indicates the same facts and the quantity to be sold.

11 (6) A wholesaler or retailer may advertise, offer to  
12 sell, or sell motor fuel at a price made in good faith to  
13 meet the price of a competitor who is rendering the same  
14 type of service and is selling the same article at cost. The  
15 price of motor fuel advertised, offered for sale, or sold  
16 under the exceptions in subsection (4) may not be considered  
17 the price of a competitor and may not be used as a basis for  
18 establishing prices below cost, and the price established at  
19 a bankruptcy sale may not be considered the price of a  
20 competitor under the provisions of this section.

21 (7) If a wholesaler sells motor fuel to another  
22 wholesaler, the former is not required to include in his  
23 selling price to the latter the cost of doing business as  
24 defined in [section 3], but the latter wholesaler, upon  
25 resale to a retailer, is subject to the provisions of this

1 section.

2 NEW SECTION. Section 5. Voidance of existing  
3 contracts. A contract, express or implied, made by a person  
4 in violation of a provision of [sections 1 through 7] is  
5 void and no recovery may be had on the contract.

6 NEW SECTION. Section 6. Penalty. (1) A violation of  
7 [section 4] is an unfair trade practice, and upon  
8 conviction, a retailer or wholesaler is subject to a civil  
9 penalty of not more than \$1,000 a day for each day that the  
10 violation occurs.

11 (2) The department of commerce or a county attorney may  
12 bring an action for a violation of [section 4].

13 NEW SECTION. Section 7. Civil remedies. (1) The  
14 department of commerce may issue a cease and desist order  
15 requiring a wholesaler or retailer to cease violating the  
16 provisions of [section 4]. The department or a county  
17 attorney may commence an action on behalf of the state for  
18 failure to comply with an order. A civil penalty of not less  
19 than \$200 or more than \$5,000 may be recovered in the  
20 action.

21 (2) The department or a county attorney may bring an  
22 action to enjoin a violation of [section 4].

23 (3) An action under this section must be commenced in  
24 the county where the motor fuel is sold.

25 NEW SECTION. Section 8. Saving clause. [This act] does

1 not affect rights and duties that matured, penalties that  
2 were incurred, or proceedings that were begun before [the  
3 effective date of this act].

4 NEW SECTION. **Section 9. Severability.** If a part of  
5 [this act] is invalid, all valid parts that are severable  
6 from the invalid part remain in effect. If a part of [this  
7 act] is invalid in one or more of its applications, the part  
8 remains in effect in all valid applications that are  
9 severable from the invalid applications.

10 NEW SECTION. **Section 10. Effective date.** [This act] is  
11 effective on passage and approval.

-End-

## STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB0538, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

An act regulating the price of retail motor fuel at wholesale and retail levels; providing for penalties and remedies for sales in violation of established prices; prohibiting unfair practices in the sale of retail motor fuel; and providing an immediate effective date.

ASSUMPTIONS:

1. The Department of Commerce may bring an action for violations of the proposed legislation.
2. The adjudication of unfair practices in the sale of retail motor fuel complaints will require an additional attorney, an investigator, one clerical position, and associated costs.
3. The Department of Commerce does not currently have office space for additional FTE.


FISCAL IMPACT:

Dept. of Commerce:

	FY 92			FY 93		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
<u>Expenditures:</u>						
FTE	0.00	3.00	3.00	0.00	3.00	3.00
Personal Services	0	87,908	87,908	0	87,908	87,908
Operating Costs	0	51,068	51,068	0	51,068	51,068
Equipment	0	8,400	8,400	0	0	0
Total	0	147,376	147,376	0	138,976	138,976
<u>Funding:</u>						
General Fund	0	147,376	147,376	0	138,976	138,976

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

The proposed legislation provides for prosecution by county attorneys which could increase the legal cost of county governments.

  
 ROD SUNDSTED, BUDGET DIRECTOR  
 Office of Budget and Program Planning

DATE

2-6-91

DOROTHY BRADLEY, PRIMARY SPONSOR

DATE

Fiscal Note for HB0538, as introduced.

HB 538



## STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB0538, second reading.

DESCRIPTION OF PROPOSED LEGISLATION:

An act regulating the price of retail motor fuel at wholesale and retail levels; providing for penalties and remedies for sales in violation of established prices; prohibiting unfair practices in the sale of retail motor fuel; and providing an immediate effective date.

ASSUMPTIONS:

1. The Department of Justice may bring an action for violations of the proposed legislation.
2. The adjudication of complaints regarding unfair practices in the sale of retail motor fuel will require an additional 1.00 FTE attorney (Grade 19), 1.00 FTE investigator (Grade 16), 1.00 FTE clerical position, and associated costs.
3. The bill provides that 50% of the penalty revenue from action brought by the Department of Justice be deposited in the state general fund, and 50% be deposited in the county general fund where the action was brought. 100% of the penalty revenue is to be deposited in the county general fund if the county attorney brings the action. The potential revenue to be collected under this bill is not subject to reasonable estimate due to the lack of data for this state.
4. Current law is represented by the executive budget recommendation for the Legal Services Division of the Department of Justice.

FISCAL IMPACT:Department of Justice-Legal Services Division

<u>Expenditures:</u>	<u>FY 92</u>			<u>FY 93</u>		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
FTE	25.50	28.50	3.00	25.50	28.50	3.00
Personal Services	990,600	1,089,800	99,200	989,300	1,093,900	104,600
Operating Costs	242,300	264,800	22,500	237,700	260,200	22,500
Equipment	<u>13,000</u>	<u>23,500</u>	<u>10,500</u>	<u>12,700</u>	<u>12,700</u>	<u>0</u>
Total	1,245,900	1,378,100	132,200	1,239,700	1,366,800	127,100
<u>Funding:</u>						
General Fund (01)	1,245,900	1,378,100	132,200	1,239,700	1,366,800	127,100
General Fund Impact			(132,200)			(127,100)

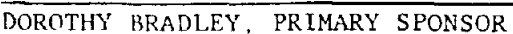
EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:

The proposed legislation provides for prosecution by county attorneys which could increase the legal cost of county governments and the revenues from imposition of civil penalties. Counties will also receive 50% of penalty revenue from actions brought by the Department of Justice. Expenditures and revenues are not subject to reasonable estimate.

  
 ROD SUNDSTED BUDGET DIRECTOR

DATE

Office of Budget and Program Planning

  
 DOROTHY BRADLEY, PRIMARY SPONSOR

DATE

Fiscal Note for HB0538, second readingHB 538

APPROVED BY COMM. ON BUSINESS AND ECONOMIC DEVELOPMENT

HOUSE BILL NO. 538

INTRODUCED BY BRADLEY, WALLIN, DRISCOLL, LYNCH, STANG, BENGTON, D. BROWN, QUILICI, KIMBERLEY, GRADY, DAVIS, SQUIRES, HARRINGTON, KILPATRICK, PINSONEAULT BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE ON MARKETING OF MOTOR FUELS

A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE PRICE OF RETAIL MOTOR FUEL AT WHOLESALE AND RETAIL LEVELS; PROVIDING FOR PENALTIES AND REMEDIES FOR SALES IN VIOLATION OF ESTABLISHED PRICES; PROHIBITING UNFAIR PRACTICES IN THE SALE OF RETAIL MOTOR FUEL; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 7 6] may be cited as the "Montana Retail Motor Fuel Marketing Act".

NEW SECTION. Section 2. Purpose. The legislature recognizes that independent and small dealers and distributors of retail motor fuel are vital to a healthy, competitive marketplace and are unable to survive financially in competition with subsidized, below-cost pricing at the retail level by dealers and distributors who have other sources of income. The legislature believes that

subsidized, below-cost pricing is a predatory practice that is not conducive to fair trade. The legislature finds that below-cost pricing laws are effective in protecting independent and small retailers and wholesalers in other jurisdictions from subsidized pricing, which is inherently unfair and destructive, reduces competition in the motor fuel marketing industry, and is a form of predatory pricing. The purpose of [sections 1 through 7 6] is to prevent and eliminate predatory pricing of retail motor fuel.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 7 6], unless the context requires otherwise, the following definitions apply:

(1) "Affiliate" means a person who, other than through a franchise or marketing agreement, controls, is controlled by, or is under common control with any other person.

(2) "Cost of doing business", in the absence of proof of lesser cost, means 3 1/2% of the delivered cost of motor fuel for wholesale sales and 6% of the delivered cost of motor fuel for retail sales and in other cases includes all costs incurred in the conduct of business, including but not limited to:

(a) labor, including salaries of executives and officers;

(b) rent that is not less than the fair market value based on current use;

SECOND READING



1 (c) interest on borrowed capital;  
 2 (d) depreciation;  
 3 (e) selling cost;  
 4 (f) maintenance of equipment;  
 5 (g) losses due to breakage or damage;  
 6 (h) credit card fees or other charges;  
 7 (i) credit losses; and  
 8 (j) all licenses, taxes, insurance, and advertising.  
 9 (3) "Customary discount for cash" means an allowance,  
 10 whether part of a larger discount or not, made to a  
 11 wholesaler or retailer when a person pays for motor fuel  
 12 within a limited or specified time.  
 13 (4) "Delivered cost of motor fuel" means:  
 14 (a) for a distributor or retailer, the lower of the  
 15 most recent cost of motor fuel to the distributor or  
 16 retailer or the lowest replacement cost of motor fuel to the  
 17 distributor or retailer within 5 days prior to the date of  
 18 sale, in the quantity last purchased, whether within or  
 19 before the 5-day period, less all trade discounts except  
 20 customary discounts for cash plus transportation costs and  
 21 any taxes that may be required by law if not already  
 22 included in the invoice cost; or  
 23 (b) for a refiner, that refiner's posted rack price to  
 24 the wholesale class of trade at the terminal used by the  
 25 refiner to obtain the motor fuel, plus transportation costs

1 and any taxes that may be required by law. If the refiner  
 2 does not regularly sell to the wholesale class of trade at  
 3 the terminal or does not post a terminal price, the refiner  
 4 may use as its rack price the posted price of any other  
 5 refiner at a terminal within the general trade area that has  
 6 products readily available for sale to the wholesale class  
 7 of trade.

8 (5) "Distributor" means a person engaged in the  
 9 purchase of motor fuel for resale to a retail motor fuel  
 10 outlet.

11 (6) "Motor fuel" means gasoline, as defined in  
 12 15-70-201, alcohol blended with gasoline to produce gasohol,  
 13 and special fuel as defined in 15-70-301.

14 (7) "Person" means an individual, a sole  
 15 proprietorship, a partnership, a corporation, any other form  
 16 of business entity, or any individual acting on behalf of  
 17 any of them.

18 (8) "Posted rack price" means the f.o.b. terminal price  
 19 for a particular motor fuel that a refiner, producer, or  
 20 person offers for sale or transfer to itself or any related  
 21 or unrelated person.

22 (9) "Refiner" means a person engaged in the production  
 23 or refining of motor fuel, whether the production or  
 24 refining occurs in this state or elsewhere, and includes any  
 25 affiliate of the person.

1 (10) "Retailer" means a person engaged in the business  
2 of selling motor fuel at a retail motor fuel outlet.

3 (11) "Retail motor fuel outlet" means a place of  
4 business where motor fuel is sold and delivered into the  
5 tanks of motor vehicles regardless of whether the income  
6 from the selling and delivery of the fuel is the primary  
7 source of revenue of that business.

8 (12) "Sale" means a transfer, gift, sale, offer for  
9 sale, or advertisement for sale in any manner or by any  
10 means of motor fuel, including a transfer of motor fuel by a  
11 person to himself or to his affiliate.

12 (13) "Transfer price" means the price used by a person  
13 to transfer motor fuel to himself or to an affiliate for  
14 resale at a retail motor fuel outlet.

15 (14) "Transportation cost" means the actual cost of  
16 transportation of motor fuel or, in the absence of proof of  
17 actual cost, the common carrier rates fixed by the public  
18 service commission for the immediate market area concerned.

19 (15) "Wholesaler" means a person engaged in the business  
20 of making sales at wholesale to a retail motor fuel outlet.

21 **NEW SECTION. Section 4. Below-cost sale prohibited.**

22 (1) A wholesaler may not sell motor fuel to a retail motor  
23 fuel outlet at less than the delivered cost of the motor  
24 fuel plus the cost of doing business if the effect is to  
25 injure or destroy competition or substantially lessen

1 competition.

2 (2) A retailer may not sell motor fuel at less than the  
3 delivered cost of the motor fuel plus the cost of doing  
4 business if the effect is to injure or destroy competition  
5 or substantially lessen competition.

6 (3) A wholesaler may not sell or transfer motor fuel to  
7 itself or an affiliate for resale at a retail outlet at a  
8 transfer price lower than the price the wholesaler charges  
9 another retail motor fuel outlet that purchases a like  
10 quantity within the same competitive area if the effect is  
11 to injure or destroy competition or substantially lessen  
12 competition.

13 (4) The provisions of [sections 1 through 7 6] do not  
14 apply to a sale at wholesale or a sale at retail made:

15 (a) in an isolated transaction not in the usual course  
16 of business;

17 (b) if motor fuels are advertised, offered for sale, or  
18 sold in a bona fide clearance sale for the purpose of  
19 discontinuing trade in the motor fuel and the advertising,  
20 offer to sell, or sale states the reason for the sale and  
21 the quantity of the motor fuel advertised, offered for sale,  
22 or to be sold;

23 (c) if the motor fuel is advertised, offered for sale,  
24 or sold as imperfect or damaged and the advertising, offer  
25 of sale, or sale states the reason for the sale and the

1 quantity of the motor fuel advertised, offered for sale, or  
2 sold;

3 (d) if motor fuel is sold upon the final liquidation of  
4 a business; or

5 (e) if motor fuel is advertised, offered for sale, or  
6 sold by a fiduciary or other officer under the order or  
7 direction of a court.

8 (5) Notice required under this section is not  
9 sufficient unless the subject of the sale is kept separate  
10 from other stocks and is clearly and legibly marked with the  
11 reason for the sale and any advertisement of the goods  
12 indicates the same facts and the quantity to be sold.

13 (6) A wholesaler or retailer may advertise, offer to  
14 sell, or sell motor fuel at a price made in good faith to  
15 meet the price of a competitor who is ~~rendering-the-same~~  
16 ~~type-of-service-and-is~~ selling the same ~~article-at-cost~~ OR A  
17 SIMILAR PRODUCT OF LIKE GRADE AND QUALITY. The price of  
18 motor fuel advertised, offered for sale, or sold under the  
19 exceptions in subsection (4) may not be considered the price  
20 of a competitor and may not be used as a basis for  
21 establishing prices below cost, and the price established at  
22 a bankruptcy sale may not be considered the price of a  
23 competitor under the provisions of this section.

24 (7) If a wholesaler sells motor fuel to another  
25 wholesaler, the former is not required to include in his

1 selling price to the latter the cost of doing business as  
2 defined in [section 3], but the latter wholesaler, upon  
3 resale to a retailer, is subject to the provisions of this  
4 section.

5 NEW SECTION. Section 5. Voidance of existing  
6 contracts. A contract, express or implied, made by a person  
7 in violation of a provision of [sections 1 through 7 6] is  
8 void and no recovery may be had on the contract.

9 NEW SECTION. Section 6. Penalty -- DISPOSITION. (1) A  
10 violation of [section 4] is an unfair trade practice, ~~and~~  
11 upon.

12 (2) UPON PRESENTATION BY AN OFFENDED PARTY OF EVIDENCE  
13 OF A VIOLATION OF [SECTION 4], THE DEPARTMENT OF JUSTICE OR  
14 A COUNTY ATTORNEY SHALL ISSUE TO THE SUSPECTED RETAILER OR  
15 WHOLESALER A DEMAND BY CERTIFIED MAIL TO CEASE THE  
16 VIOLATION. IF THE VIOLATION IS NOT CORRECTED WITHIN 24 HOURS  
17 AFTER THE SUSPECTED RETAILER OR WHOLESALER RECEIVES THE  
18 NOTIFICATION, THE DEPARTMENT OR THE COUNTY ATTORNEY MAY  
19 BRING AN ACTION TO ENJOIN THE VIOLATION.

20 (3) UPON conviction, a retailer or wholesaler is  
21 subject to a civil penalty of not more than \$1,000 a day for  
22 each day that the violation occurs, IS LIABLE FOR ATTORNEY  
23 FEES, AND IS SUBJECT TO INJUNCTIVE RELIEF.

24 ~~{2}~~(4) The department of commerce JUSTICE or a county  
25 attorney may bring an action for a violation of [section 4].

1 IF THE ACTION IS BROUGHT BY:

2 (A) THE DEPARTMENT OF JUSTICE, ONE-HALF OF THE AMOUNT  
3 OF THE PENALTY MUST BE DEPOSITED IN THE GENERAL FUND OF THE  
4 COUNTY WHERE THE ACTION WAS BROUGHT AND THE REMAINDER IN THE  
5 STATE GENERAL FUND; OR

6 (B) A COUNTY ATTORNEY, THE ENTIRE AMOUNT OF THE PENALTY  
7 MUST BE DEPOSITED IN THE GENERAL FUND OF THE COUNTY WHERE  
8 THE ACTION WAS BROUGHT.

9 ~~NEW SECTION. Section 7. Civil remedies. (1) The~~  
10 ~~department of commerce may issue a cease and desist order~~  
11 ~~requiring a wholesaler or retailer to cease violating the~~  
12 ~~provisions of (section 4). The department or a county~~  
13 ~~attorney may commence an action on behalf of the state for~~  
14 ~~failure to comply with an order. A civil penalty of not less~~  
15 ~~than \$200 or more than \$5,000 may be recovered in the~~  
16 ~~action.~~

17 ~~(2) The department or a county attorney may bring an~~  
18 ~~action to enjoin a violation of (section 4).~~

19 ~~(3)(5) An action under this section must be commenced~~  
20 ~~in the county where the motor fuel is sold.~~

21 NEW SECTION. Section 7. Saving clause. [This act] does  
22 not affect rights and duties that matured, penalties that  
23 were incurred, or proceedings that were begun before [the  
24 effective date of this act].

25 NEW SECTION. Section 8. Severability. If a part of

1 [this act] is invalid, all valid parts that are severable  
2 from the invalid part remain in effect. If a part of [this  
3 act] is invalid in one or more of its applications, the part  
4 remains in effect in all valid applications that are  
5 severable from the invalid applications.

6 NEW SECTION. Section 9. Effective date. [This act] is  
7 effective on passage and approval.

-End-

HOUSE BILL NO. 538

INTRODUCED BY BRADLEY, WALLIN, DRISCOLL, LYNCH,  
STANG, BENGTSON, D. BROWN, QUILICI, KIMBERLEY, GRADY,  
DAVIS, SQUIRES, HARRINGTON, KILPATRICK, PINSONEAULT  
BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE  
ON MARKETING OF MOTOR FUELS

A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE PRICE OF  
RETAIL MOTOR FUEL AT WHOLESALE AND RETAIL LEVELS; PROVIDING  
FOR PENALTIES AND REMEDIES FOR SALES IN VIOLATION OF  
ESTABLISHED PRICES; PROHIBITING UNFAIR PRACTICES IN THE SALE  
OF RETAIL MOTOR FUEL; AND PROVIDING AN IMMEDIATE EFFECTIVE  
DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1  
through 7 6] may be cited as the "Montana Retail Motor Fuel  
Marketing Act".

NEW SECTION. **Section 2. Purpose.** The legislature  
recognizes that independent and small dealers and  
distributors of retail motor fuel are vital to a healthy,  
competitive marketplace and are unable to survive  
financially in competition with subsidized, below-cost  
pricing at the retail level by dealers and distributors who  
have other sources of income. The legislature believes that

subsidized, below-cost pricing is a predatory practice that  
is not conducive to fair trade. The legislature finds that  
below-cost pricing laws are effective in protecting  
independent and small retailers and wholesalers in other  
jurisdictions from subsidized pricing, which is inherently  
unfair and destructive, reduces competition in the motor  
fuel marketing industry, and is a form of predatory pricing.  
The purpose of [sections 1 through 7 6] is to prevent and  
eliminate predatory pricing of retail motor fuel.

NEW SECTION. **Section 3. Definitions.** As used in  
[sections 1 through 7 6], unless the context requires  
otherwise, the following definitions apply:

(1) "Affiliate" means a person who, other than through  
a franchise or marketing agreement, controls, is controlled  
by, or is under common control with any other person.

(2) "Cost of doing business", in the absence of proof  
of lesser cost, means 3% 1 of the delivered cost of motor  
fuel for wholesale sales and 6% of the delivered cost of  
motor fuel for retail sales and in other cases includes all  
costs incurred in the conduct of business, including but not  
limited to:

(a) labor, including salaries of executives and  
officers;

(b) rent that is not less than the fair market value  
based on current use;

THIRD READING



- 1 (c) interest on borrowed capital;
  - 2 (d) depreciation;
  - 3 (e) selling cost;
  - 4 (f) maintenance of equipment;
  - 5 (g) losses due to breakage or damage;
  - 6 (h) credit card fees or other charges;
  - 7 (i) credit losses; and
  - 8 (j) all licenses, taxes, insurance, and advertising.
- 9 (3) "Customary discount for cash" means an allowance,  
10 whether part of a larger discount or not, made to a  
11 wholesaler or retailer when a person pays for motor fuel  
12 within a limited or specified time.
- 13 (4) "Delivered cost of motor fuel" means:
- 14 (a) for a distributor or retailer, the lower of the  
15 most recent cost of motor fuel to the distributor or  
16 retailer or the lowest replacement cost of motor fuel to the  
17 distributor or retailer within 5 days prior to the date of  
18 sale, in the quantity last purchased, whether within or  
19 before the 5-day period, less all trade discounts except  
20 customary discounts for cash plus transportation costs and  
21 any taxes that may be required by law if not already  
22 included in the invoice cost; or
  - 23 (b) for a refiner, that refiner's posted rack price to  
24 the wholesale class of trade at the terminal used by the  
25 refiner to obtain the motor fuel, plus transportation costs

- 1 and any taxes that may be required by law. If the refiner  
2 does not regularly sell to the wholesale class of trade at  
3 the terminal or does not post a terminal price, the refiner  
4 may use as its rack price the posted price of any other  
5 refiner at a terminal within the general trade area that has  
6 products readily available for sale to the wholesale class  
7 of trade.
- 8 (5) "Distributor" means a person engaged in the  
9 purchase of motor fuel for resale to a retail motor fuel  
10 outlet.
- 11 (6) "Motor fuel" means gasoline, as defined in  
12 15-70-201, alcohol blended with gasoline to produce gasohol,  
13 and special fuel as defined in 15-70-301.
- 14 (7) "Person" means an individual, a sole  
15 proprietorship, a partnership, a corporation, any other form  
16 of business entity, or any individual acting on behalf of  
17 any of them.
- 18 (8) "Posted rack price" means the f.o.b. terminal price  
19 for a particular motor fuel that a refiner, producer, or  
20 person offers for sale or transfer to itself or any related  
21 or unrelated person.
- 22 (9) "Refiner" means a person engaged in the production  
23 or refining of motor fuel, whether the production or  
24 refining occurs in this state or elsewhere, and includes any  
25 affiliate of the person.



1 (10) "Retailer" means a person engaged in the business  
2 of selling motor fuel at a retail motor fuel outlet.

3 (11) "Retail motor fuel outlet" means a place of  
4 business where motor fuel is sold and delivered into the  
5 tanks of motor vehicles regardless of whether the income  
6 from the selling and delivery of the fuel is the primary  
7 source of revenue of that business.

8 (12) "Sale" means a transfer, gift, sale, offer for  
9 sale, or advertisement for sale in any manner or by any  
10 means of motor fuel, including a transfer of motor fuel by a  
11 person to himself or to his affiliate.

12 (13) "Transfer price" means the price used by a person  
13 to transfer motor fuel to himself or to an affiliate for  
14 resale at a retail motor fuel outlet.

15 (14) "Transportation cost" means the actual cost of  
16 transportation of motor fuel or, in the absence of proof of  
17 actual cost, the common carrier rates fixed by the public  
18 service commission for the immediate market area concerned.

19 (15) "Wholesaler" means a person engaged in the business  
20 of making sales at wholesale to a retail motor fuel outlet.

21 NEW SECTION. **Section 4. Below-cost sale prohibited.**

22 (1) A wholesaler may not sell motor fuel to a retail motor  
23 fuel outlet at less than the delivered cost of the motor  
24 fuel plus the cost of doing business if the effect is to  
25 injure or destroy competition or substantially lessen

1 competition.

2 (2) A retailer may not sell motor fuel at less than the  
3 delivered cost of the motor fuel plus the cost of doing  
4 business if the effect is to injure or destroy competition  
5 or substantially lessen competition.

6 (3) A wholesaler may not sell or transfer motor fuel to  
7 itself or an affiliate for resale at a retail outlet at a  
8 transfer price lower than the price the wholesaler charges  
9 another retail motor fuel outlet that purchases a like  
10 quantity within the same competitive area if the effect is  
11 to injure or destroy competition or substantially lessen  
12 competition.

13 (4) The provisions of [sections 1 through 7 6] do not  
14 apply to a sale at wholesale or a sale at retail made:

15 (a) in an isolated transaction not in the usual course  
16 of business;

17 (b) if motor fuels are advertised, offered for sale, or  
18 sold in a bona fide clearance sale for the purpose of  
19 discontinuing trade in the motor fuel and the advertising,  
20 offer to sell, or sale states the reason for the sale and  
21 the quantity of the motor fuel advertised, offered for sale,  
22 or to be sold;

23 (c) if the motor fuel is advertised, offered for sale,  
24 or sold as imperfect or damaged and the advertising, offer  
25 of sale, or sale states the reason for the sale and the

1 quantity of the motor fuel advertised, offered for sale, or  
2 sold;

3 (d) if motor fuel is sold upon the final liquidation of  
4 a business; or

5 (e) if motor fuel is advertised, offered for sale, or  
6 sold by a fiduciary or other officer under the order or  
7 direction of a court.

8 (5) Notice required under this section is not  
9 sufficient unless the subject of the sale is kept separate  
10 from other stocks and is clearly and legibly marked with the  
11 reason for the sale and any advertisement of the goods  
12 indicates the same facts and the quantity to be sold.

13 (6) A wholesaler or retailer may advertise, offer to  
14 sell, or sell motor fuel at a price made in good faith to  
15 meet the price of a competitor who is ~~rendering the same~~  
16 ~~type-of-service-and-is~~ selling the same ~~article-at-cost~~ OR A  
17 SIMILAR PRODUCT OF LIKE GRADE AND QUALITY. The price of  
18 motor fuel advertised, offered for sale, or sold under the  
19 exceptions in subsection (4) may not be considered the price  
20 of a competitor and may not be used as a basis for  
21 establishing prices below cost, and the price established at  
22 a bankruptcy sale may not be considered the price of a  
23 competitor under the provisions of this section.

24 (7) If a wholesaler sells motor fuel to another  
25 wholesaler, the former is not required to include in his

1 selling price to the latter the cost of doing business as  
2 defined in [section 3], but the latter wholesaler, upon  
3 resale to a retailer, is subject to the provisions of this  
4 section.

5 NEW SECTION. Section 5. Voidance of existing  
6 contracts. A contract, express or implied, made by a person  
7 in violation of a provision of [sections 1 through 7 6] is  
8 void and no recovery may be had on the contract.

9 NEW SECTION. Section 6. Penalty -- DISPOSITION. (1) A  
10 violation of [section 4] is an unfair trade practice--and  
11 upon.

12 (2) UPON PRESENTATION BY AN OFFENDED PARTY OF EVIDENCE  
13 OF A VIOLATION OF [SECTION 4], THE DEPARTMENT OF JUSTICE OR  
14 A COUNTY ATTORNEY SHALL ISSUE TO THE SUSPECTED RETAILER OR  
15 WHOLESALE A DEMAND BY CERTIFIED MAIL TO CEASE THE  
16 VIOLATION. IF THE VIOLATION IS NOT CORRECTED WITHIN 24 HOURS  
17 AFTER THE SUSPECTED RETAILER OR WHOLESALE RECEIVES THE  
18 NOTIFICATION, THE DEPARTMENT OR THE COUNTY ATTORNEY MAY  
19 BRING AN ACTION TO ENJOIN THE VIOLATION.

20 (3) UPON conviction, a retailer or wholesaler is  
21 subject to a civil penalty of not more than \$1,000 a day for  
22 each day that the violation occurs, IS LIABLE FOR ATTORNEY  
23 FEES, AND IS SUBJECT TO INJUNCTIVE RELIEF.

24 {2}{4} The department of ~~commerce~~ JUSTICE or a county  
25 attorney may bring an action for a violation of [section 4].

1 IF THE ACTION IS BROUGHT BY:

2 (A) THE DEPARTMENT OF JUSTICE, ONE-HALF OF THE AMOUNT  
 3 OF THE PENALTY MUST BE DEPOSITED IN THE GENERAL FUND OF THE  
 4 COUNTY WHERE THE ACTION WAS BROUGHT AND THE REMAINDER IN THE  
 5 STATE GENERAL FUND; OR

6 (B) A COUNTY ATTORNEY, THE ENTIRE AMOUNT OF THE PENALTY  
 7 MUST BE DEPOSITED IN THE GENERAL FUND OF THE COUNTY WHERE  
 8 THE ACTION WAS BROUGHT.

9 NEW SECTION. Section 7. Civil remedies. (1) The  
 10 department of commerce may issue a cease and desist order  
 11 requiring a wholesaler or retailer to cease violating the  
 12 provisions of (section 4). The department or a county  
 13 attorney may commence an action on behalf of the state for  
 14 failure to comply with an order. A civil penalty of not less  
 15 than \$200 or more than \$5,000 may be recovered in the  
 16 action.

17 (2) The department or a county attorney may bring an  
 18 action to enjoin a violation of (section 4).

19 (3)(5) An action under this section must be commenced  
 20 in the county where the motor fuel is sold.

21 NEW SECTION. Section 7. Saving clause. [This act] does  
 22 not affect rights and duties that matured, penalties that  
 23 were incurred, or proceedings that were begun before [the  
 24 effective date of this act].

25 NEW SECTION. Section 8. Severability. If a part of

1 [this act] is invalid, all valid parts that are severable  
 2 from the invalid part remain in effect. If a part of [this  
 3 act] is invalid in one or more of its applications, the part  
 4 remains in effect in all valid applications that are  
 5 severable from the invalid applications.

6 NEW SECTION. Section 9. Effective date. [This act] is  
 7 effective on passage and approval.

-End-

## 1 HOUSE BILL NO. 538

2 INTRODUCED BY BRADLEY, WALLIN, DRISCOLL, LYNCH,  
 3 STANG, BENGTSON, D. BROWN, QUILICI, KIMBERLEY, GRADY,  
 4 DAVIS, SQUIRES, HARRINGTON, KILPATRICK, PINSONEAULT  
 5 BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE  
 6 ON MARKETING OF MOTOR FUELS  
 7

8 A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE PRICE OF  
 9 RETAIL MOTOR FUEL AT WHOLESALE AND RETAIL LEVELS; PROVIDING  
 10 FOR PENALTIES AND REMEDIES FOR SALES IN VIOLATION OF  
 11 ESTABLISHED PRICES; PROHIBITING UNFAIR PRACTICES IN THE SALE  
 12 OF RETAIL MOTOR FUEL; AND PROVIDING AN IMMEDIATE EFFECTIVE  
 13 DATE."  
 14

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 NEW SECTION. **Section 1.** Short title. [Sections 1  
 17 through 7 6] may be cited as the "Montana Retail Motor Fuel  
 18 Marketing Act".

19 NEW SECTION. **Section 2.** Purpose. The legislature  
 20 recognizes that independent and small dealers and  
 21 distributors of retail motor fuel are vital to a healthy,  
 22 competitive marketplace and are unable to survive  
 23 financially in competition with subsidized, below-cost  
 24 pricing at the retail level by dealers and distributors who  
 25 have other sources of income. The legislature believes that

1 subsidized, below-cost pricing is a predatory practice that  
 2 is not conducive to fair trade. The legislature finds that  
 3 below-cost pricing laws are effective in protecting  
 4 independent and small retailers and wholesalers in other  
 5 jurisdictions from subsidized pricing, which is inherently  
 6 unfair and destructive, reduces competition in the motor  
 7 fuel marketing industry, and is a form of predatory pricing.  
 8 The purpose of [sections 1 through 7 6] is to prevent and  
 9 eliminate predatory pricing of retail motor fuel.

10 NEW SECTION. **Section 3.** Definitions. As used in  
 11 [sections 1 through 7 6], unless the context requires  
 12 otherwise, the following definitions apply:

13 (1) "Affiliate" means a person who, other than through  
 14 a franchise or marketing agreement, controls, is controlled  
 15 by, or is under common control with any other person.

16 (2) "Cost of doing business", in the absence of proof  
 17 of lesser cost, means 3% 1% of the delivered cost of motor  
 18 fuel for wholesale sales and 6% of the delivered cost of  
 19 motor fuel for retail sales and in other cases includes all  
 20 costs incurred in the conduct of business, including but not  
 21 limited to:

22 (a) labor, including salaries of executives and  
 23 officers;

24 (b) rent that is not less than the fair market value  
 25 based on current use;

- 1 (c) interest on borrowed capital;
  - 2 (d) depreciation;
  - 3 (e) selling cost;
  - 4 (f) maintenance of equipment;
  - 5 (g) losses due to breakage or damage;
  - 6 (h) credit card fees or other charges;
  - 7 (i) credit losses; and
  - 8 (j) all licenses, taxes, insurance, and advertising.
- 9 (3) "Customary discount for cash" means an allowance,  
 10 whether part of a larger discount or not, made to a  
 11 wholesaler or retailer when a person pays for motor fuel  
 12 within a limited or specified time.
- 13 (4) "Delivered cost of motor fuel" means:
- 14 (a) for a distributor or retailer, the lower of the  
 15 most recent cost of motor fuel to the distributor or  
 16 retailer or the lowest replacement cost of motor fuel to the  
 17 distributor or retailer within 5 days prior to the date of  
 18 sale, in the quantity last purchased, whether within or  
 19 before the 5-day period, less all trade discounts except  
 20 customary discounts for cash plus transportation costs and  
 21 any taxes that may be required by law if not already  
 22 included in the invoice cost; or
  - 23 (b) for a refiner, that refiner's posted rack price to  
 24 the wholesale class of trade at the terminal used by the  
 25 refiner to obtain the motor fuel, plus transportation costs

1 and any taxes that may be required by law. If the refiner  
 2 does not regularly sell to the wholesale class of trade at  
 3 the terminal or does not post a terminal price, the refiner  
 4 may use as its rack price the posted price of any other  
 5 refiner at a terminal within the general trade area that has  
 6 products readily available for sale to the wholesale class  
 7 of trade.

8 (5) "Distributor" means a person engaged in the  
 9 purchase of motor fuel for resale to a retail motor fuel  
 10 outlet.

11 (6) "Motor fuel" means gasoline, as defined in  
 12 15-70-201, alcohol blended with gasoline to produce gasohol,  
 13 and special fuel as defined in 15-70-301.

14 (7) "Person" means an individual, a sole  
 15 proprietorship, a partnership, a corporation, any other form  
 16 of business entity, or any individual acting on behalf of  
 17 any of them.

18 (8) "Posted rack price" means the f.o.b. terminal price  
 19 for a particular motor fuel that a refiner, producer, or  
 20 person offers for sale or transfer to itself or any related  
 21 or unrelated person.

22 (9) "Refiner" means a person engaged in the production  
 23 or refining of motor fuel, whether the production or  
 24 refining occurs in this state or elsewhere, and includes any  
 25 affiliate of the person.

1 (10) "Retailer" means a person engaged in the business  
2 of selling motor fuel at a retail motor fuel outlet.

3 (11) "Retail motor fuel outlet" means a place of  
4 business where motor fuel is sold and delivered into the  
5 tanks of motor vehicles regardless of whether the income  
6 from the selling and delivery of the fuel is the primary  
7 source of revenue of that business.

8 (12) "Sale" means a transfer, gift, sale, offer for  
9 sale, or advertisement for sale in any manner or by any  
10 means of motor fuel, including a transfer of motor fuel by a  
11 person to himself or to his affiliate.

12 (13) "Transfer price" means the price used by a person  
13 to transfer motor fuel to himself or to an affiliate for  
14 resale at a retail motor fuel outlet.

15 (14) "Transportation cost" means the actual cost of  
16 transportation of motor fuel or, in the absence of proof of  
17 actual cost, the common carrier rates fixed by the public  
18 service commission for the immediate market area concerned.

19 (15) "Wholesaler" means a person engaged in the business  
20 of making sales at wholesale to a retail motor fuel outlet.

21 **NEW SECTION. Section 4. Below-cost sale prohibited.**

22 (1) A wholesaler may not sell motor fuel to a retail motor  
23 fuel outlet at less than the delivered cost of the motor  
24 fuel plus the cost of doing business if the effect is to  
25 injure or destroy competition or substantially lessen

1 competition.

2 (2) A retailer may not sell motor fuel at less than the  
3 delivered cost of the motor fuel plus the cost of doing  
4 business if the effect is to injure or destroy competition  
5 or substantially lessen competition.

6 (3) A wholesaler may not sell or transfer motor fuel to  
7 itself or an affiliate for resale at a retail outlet at a  
8 transfer price lower than the price the wholesaler charges  
9 another retail motor fuel outlet that purchases a like  
10 quantity within the same competitive area if the effect is  
11 to injure or destroy competition or substantially lessen  
12 competition.

13 (4) The provisions of [sections 1 through 7 6] do not  
14 apply to a sale at wholesale or a sale at retail made:

15 (a) in an isolated transaction not in the usual course  
16 of business;

17 (b) if motor fuels are advertised, offered for sale, or  
18 sold in a bona fide clearance sale for the purpose of  
19 discontinuing trade in the motor fuel and the advertising,  
20 offer to sell, or sale states the reason for the sale and  
21 the quantity of the motor fuel advertised, offered for sale,  
22 or to be sold;

23 (c) if the motor fuel is advertised, offered for sale,  
24 or sold as imperfect or damaged and the advertising, offer  
25 of sale, or sale states the reason for the sale and the

1 quantity of the motor fuel advertised, offered for sale, or  
2 sold;

3 (d) if motor fuel is sold upon the final liquidation of  
4 a business; or

5 (e) if motor fuel is advertised, offered for sale, or  
6 sold by a fiduciary or other officer under the order or  
7 direction of a court.

8 (5) Notice required under this section is not  
9 sufficient unless the subject of the sale is kept separate  
10 from other stocks and is clearly and legibly marked with the  
11 reason for the sale and any advertisement of the goods  
12 indicates the same facts and the quantity to be sold.

13 (6) A wholesaler or retailer may advertise, offer to  
14 sell, or sell motor fuel at a price made in good faith to  
15 meet the price of a competitor who is ~~rendering-the-same~~  
16 ~~type-of-service-and-is~~ selling the same article-at-cost OR A  
17 SIMILAR PRODUCT OF LIKE GRADE AND QUALITY. The price of  
18 motor fuel advertised, offered for sale, or sold under the  
19 exceptions in subsection (4) may not be considered the price  
20 of a competitor and may not be used as a basis for  
21 establishing prices below cost, and the price established at  
22 a bankruptcy sale may not be considered the price of a  
23 competitor under the provisions of this section.

24 (7) If a wholesaler sells motor fuel to another  
25 wholesaler, the former is not required to include in his

1 selling price to the latter the cost of doing business as  
2 defined in [section 3], but the latter wholesaler, upon  
3 resale to a retailer, is subject to the provisions of this  
4 section.

5 NEW SECTION. Section 5. Voidance of existing  
6 contracts. A contract, express or implied, made by a person  
7 in violation of a provision of [sections 1 through 7 6] is  
8 void and no recovery may be had on the contract.

9 NEW SECTION. Section 6. Penalty -- DISPOSITION --  
10 RELIEF. (1) A violation of [section 4] is an unfair trade  
11 practice, and upon.

12 (2) UPON PRESENTATION BY AN OFFENDED PARTY OF EVIDENCE  
13 OF A VIOLATION OF [SECTION 4], THE DEPARTMENT OF JUSTICE OR  
14 A COUNTY ATTORNEY SHALL ISSUE TO THE SUSPECTED RETAILER OR  
15 WHOLESALE A DEMAND BY CERTIFIED MAIL TO CEASE THE  
16 VIOLATION. IF THE VIOLATION IS NOT CORRECTED WITHIN 24 HOURS  
17 AFTER THE SUSPECTED RETAILER OR WHOLESALE RECEIVES THE  
18 NOTIFICATION, THE DEPARTMENT OR THE COUNTY ATTORNEY MAY  
19 BRING AN ACTION TO ENJOIN THE VIOLATION.

20 (3) UPON conviction, a retailer or wholesaler is  
21 subject to a civil penalty of not more than \$1,000 a day for  
22 each day that the violation occurs, IS LIABLE FOR ATTORNEY  
23 FEES, AND IS SUBJECT TO INJUNCTIVE RELIEF.

24 (2)(4) The department of commerce JUSTICE or a county  
25 attorney may bring an action for a violation of [section 4].

1 IF THE ACTION IS BROUGHT BY:

2 (A) THE DEPARTMENT OF JUSTICE, ONE-HALF OF THE AMOUNT  
3 OF THE PENALTY MUST BE DEPOSITED IN THE GENERAL FUND OF THE  
4 COUNTY WHERE THE ACTION WAS BROUGHT AND THE REMAINDER IN THE  
5 STATE GENERAL FUND; OR

6 (B) A COUNTY ATTORNEY, THE ENTIRE AMOUNT OF THE PENALTY  
7 MUST BE DEPOSITED IN THE GENERAL FUND OF THE COUNTY WHERE  
8 THE ACTION WAS BROUGHT.

9 ~~NEW-SECTION: Section-7---Civil---remedies---(1)---The~~  
10 ~~department-of-commerce-may-issue-a-cess--and--desist--order~~  
11 ~~requiring--a--wholesaler--or--retailer-to-cess-violating-the~~  
12 ~~provisions-of--(section--4);--The--department--or--a--county~~  
13 ~~attorney--may--commence-an-action-on-behalf-of-the-state-for~~  
14 ~~failure-to-comply-with-an-order;--A-civil-penalty-of-not-less~~  
15 ~~than-\$200--or-more--than--\$5,000--may--be--recovered--in--the~~  
16 ~~action-~~

17 ~~(2)---The--department--or--a-county-attorney-may-bring-an~~  
18 ~~action-to-enjoin-a-violation-of-(section-4);~~

19 ~~(3)(5) An action under this section must be commenced~~  
20 ~~in the county where the motor fuel is sold.~~

21 (6) A PERSON INJURED AS A RESULT OF AN ACT OR PRACTICE  
22 THAT VIOLATES [SECTION 4] MAY BRING A CIVIL ACTION FOR  
23 APPROPRIATE RELIEF, INCLUDING AN ACTION FOR DECLARATORY  
24 JUDGMENT, INJUNCTIVE RELIEF, AND ACTUAL DAMAGES.

25 NEW SECTION. Section 7. Saving clause. [This act] does

1 not affect rights and duties that matured, penalties that  
2 were incurred, or proceedings that were begun before [the  
3 effective date of this act].

4 NEW SECTION. Section 8. Severability. If a part of  
5 [this act] is invalid, all valid parts that are severable  
6 from the invalid part remain in effect. If a part of [this  
7 act] is invalid in one or more of its applications, the part  
8 remains in effect in all valid applications that are  
9 severable from the invalid applications.

10 NEW SECTION. Section 9. Effective date. [This act] is  
11 effective on passage and approval.

-End-



# MAJORITY REPORT

## SENATE STANDING COMMITTEE REPORT


Page 1 of 1  
March 26, 1991

MR. PRESIDENT:


We, the majority of the committee on Business and Industry having had under consideration House Bill No. 538 (third reading copy -- blue), respectfully report that House Bill No. 538 be amended and as so amended not be concurred in:

1. Title, line 13.  
Following: "DATE"  
Insert: "AND A TERMINATION DATE"

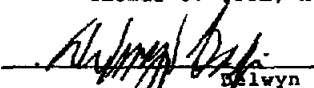
2. Page 10, lines 10 and 11.  
Following: "date" on line 10  
Insert: "-- termination"  
Following: "approval" on line 11  
Insert: "and terminates July 1, 1993"

Signed:   
John J.D. Lynch, Chairman

Signed:   
Gene Thayer

Signed:   
Jerry Noble

Signed:   
Thomas O. (Tom) Hager

Signed:   
Melwyn Gage

Jan 3-26-91  
Amd. Coord.  
5:15 3-26 2:50  
Sec. of Senate

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# MINORITY REPORT

## SENATE STANDING COMMITTEE REPORT

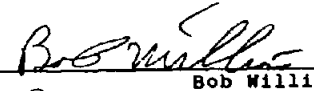
Page 1 of 1  
March 26, 1991

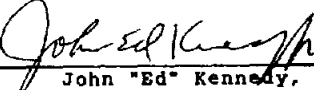
MR. PRESIDENT:


We, the minority of the committee on Business and Industry having had under consideration House Bill No. 538 (third reading copy -- blue), respectfully report that House Bill No. 538 be amended and as so amended be concurred in:

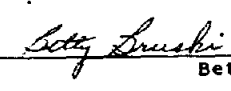
1. Title, line 13.  
Following: "DATE"  
Insert: "AND A TERMINATION DATE"

2. Page 10, lines 10 and 11.  
Following: "date" on line 10  
Insert: "-- termination"  
Following: "approval" on line 11  
Insert: "and terminates July 1, 1993"

Signed:   
Bob Williams

Signed:   
John "Ed" Kennedy, Jr.

Signed:   
Eve Franklin

Signed:   
Betty Bruski

Jan 3-26-91  
Amd. Coord.  
5:15 3-26 2:50  
Sec. of Senate

HB 538

SENATE

# MINORITY REPORT

## SENATE STANDING COMMITTEE REPORT

Page 1 of 1  
March 26, 1991

MR. PRESIDENT:

We, the minority of the committee on Business and Industry having had under consideration House Bill No. 538 (third reading copy -- blue), respectfully report that House Bill No. 538 be amended and as so amended be concurred in:

1. Title, line 13.

Following: "DATE"

Insert: "AND A TERMINATION DATE"

2. Page 10, lines 10 and 11.

Following: "date" on line 10

Insert: "-- termination"

Following: "approval" on line 11

Insert: "and terminates July 1, 1993"

Signed: Bob Williams  
Bob Williams

Signed: John "Ed" Kennedy, Jr.  
John "Ed" Kennedy, Jr.

Signed: Eve Franklin  
Eve Franklin

Signed: Betty Bruski  
Betty Bruski

JA 3-26-91  
Am. Coord.

SB 3-26 2:50  
Sec. of Senate

HB 538

SENATE

## 1 HOUSE BILL NO. 538

2 INTRODUCED BY BRADLEY, WALLIN, DRISCOLL, LYNCH,  
3 STANG, BENGTON, D. BROWN, QUILICI, KIMBERLEY, GRADY,  
4 DAVIS, SQUIRES, HARRINGTON, KILPATRICK, PINSONEAULT  
5 BY REQUEST OF THE JOINT INTERIM SUBCOMMITTEE  
6 ON MARKETING OF MOTOR FUELS  
7

8 A BILL FOR AN ACT ENTITLED: "AN ACT REGULATING THE PRICE OF  
9 RETAIL MOTOR FUEL AT WHOLESALE AND RETAIL LEVELS; PROVIDING  
10 FOR PENALTIES AND REMEDIES FOR SALES IN VIOLATION OF  
11 ESTABLISHED PRICES; PROHIBITING UNFAIR PRACTICES IN THE SALE  
12 OF RETAIL MOTOR FUEL; AND PROVIDING AN IMMEDIATE EFFECTIVE  
13 DATE AND A TERMINATION DATE."  
14

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 NEW SECTION. **Section 1.** Short title. [Sections 1  
17 through 7 6] may be cited as the "Montana Retail Motor Fuel  
18 Marketing Act".

19 NEW SECTION. **Section 2.** Purpose. The legislature  
20 recognizes that independent and small dealers and  
21 distributors of retail motor fuel are vital to a healthy,  
22 competitive marketplace and are unable to survive  
23 financially in competition with subsidized, below-cost  
24 pricing at the retail level by dealers and distributors who  
25 have other sources of income. The legislature believes that

1 subsidized, below-cost pricing is a predatory practice that  
2 is not conducive to fair trade. The legislature finds that  
3 below-cost pricing laws are effective in protecting  
4 independent and small retailers and wholesalers in other  
5 jurisdictions from subsidized pricing, which is inherently  
6 unfair and destructive, reduces competition in the motor  
7 fuel marketing industry, and is a form of predatory pricing.  
8 The purpose of [sections 1 through 7 6] is to prevent and  
9 eliminate predatory pricing of retail motor fuel.

10 NEW SECTION. **Section 3.** Definitions. As used in  
11 [sections 1 through 7 6], unless the context requires  
12 otherwise, the following definitions apply:

13 (1) "Affiliate" means a person who, other than through  
14 a franchise or marketing agreement, controls, is controlled  
15 by, or is under common control with any other person.

16 (2) "Cost of doing business", in the absence of proof  
17 of lesser cost, means ~~3%~~ 1% of the delivered cost of motor  
18 fuel for wholesale sales and 6% of the delivered cost of  
19 motor fuel for retail sales and in other cases includes all  
20 costs incurred in the conduct of business, including but not  
21 limited to:

22 (a) labor, including salaries of executives and  
23 officers;

24 (b) rent that is not less than the fair market value  
25 based on current use;

1 (c) interest on borrowed capital;  
 2 (d) depreciation;  
 3 (e) selling cost;  
 4 (f) maintenance of equipment;  
 5 (g) losses due to breakage or damage;  
 6 (h) credit card fees or other charges;  
 7 (i) credit losses; and  
 8 (j) all licenses, taxes, insurance, and advertising.

9 (3) "Customary discount for cash" means an allowance,  
 10 whether part of a larger discount or not, made to a  
 11 wholesaler or retailer when a person pays for motor fuel  
 12 within a limited or specified time.

13 (4) "Delivered cost of motor fuel" means:  
 14 (a) for a distributor or retailer, the lower of the  
 15 most recent cost of motor fuel to the distributor or  
 16 retailer or the lowest replacement cost of motor fuel to the  
 17 distributor or retailer within 5 days prior to the date of  
 18 sale, in the quantity last purchased, whether within or  
 19 before the 5-day period, less all trade discounts except  
 20 customary discounts for cash plus transportation costs and  
 21 any taxes that may be required by law if not already  
 22 included in the invoice cost; or  
 23 (b) for a refiner, that refiner's posted rack price to  
 24 the wholesale class of trade at the terminal used by the  
 25 refiner to obtain the motor fuel, plus transportation costs

1 and any taxes that may be required by law. If the refiner  
 2 does not regularly sell to the wholesale class of trade at  
 3 the terminal or does not post a terminal price, the refiner  
 4 may use as its rack price the posted price of any other  
 5 refiner at a terminal within the general trade area that has  
 6 products readily available for sale to the wholesale class  
 7 of trade.

8 (5) "Distributor" means a person engaged in the  
 9 purchase of motor fuel for resale to a retail motor fuel  
 10 outlet.

11 (6) "Motor fuel" means gasoline, as defined in  
 12 15-70-201, alcohol blended with gasoline to produce gasohol,  
 13 and special fuel as defined in 15-70-301.

14 (7) "Person" means an individual, a sole  
 15 proprietorship, a partnership, a corporation, any other form  
 16 of business entity, or any individual acting on behalf of  
 17 any of them.

18 (8) "Posted rack price" means the f.o.b. terminal price  
 19 for a particular motor fuel that a refiner, producer, or  
 20 person offers for sale or transfer to itself or any related  
 21 or unrelated person.

22 (9) "Refiner" means a person engaged in the production  
 23 or refining of motor fuel, whether the production or  
 24 refining occurs in this state or elsewhere, and includes any  
 25 affiliate of the person.

1 quantity of the motor fuel advertised, offered for sale, or  
2 sold;

3 (d) if motor fuel is sold upon the final liquidation of  
4 a business; or

5 (e) if motor fuel is advertised, offered for sale, or  
6 sold by a fiduciary or other officer under the order or  
7 direction of a court.

8 (5) Notice required under this section is not  
9 sufficient unless the subject of the sale is kept separate  
10 from other stocks and is clearly and legibly marked with the  
11 reason for the sale and any advertisement of the goods  
12 indicates the same facts and the quantity to be sold.

13 (6) A wholesaler or retailer may advertise, offer to  
14 sell, or sell motor fuel at a price made in good faith to  
15 meet the price of a competitor who is ~~rendering-the-same~~  
16 ~~type-of-service-and-is~~ selling the same article-at-cost OR A  
17 SIMILAR PRODUCT OF LIKE GRADE AND QUALITY. The price of  
18 motor fuel advertised, offered for sale, or sold under the  
19 exceptions in subsection (4) may not be considered the price  
20 of a competitor and may not be used as a basis for  
21 establishing prices below cost, and the price established at  
22 a bankruptcy sale may not be considered the price of a  
23 competitor under the provisions of this section.

24 (7) If a wholesaler sells motor fuel to another  
25 wholesaler, the former is not required to include in his

1 selling price to the latter the cost of doing business as  
2 defined in [section 3], but the latter wholesaler, upon  
3 resale to a retailer, is subject to the provisions of this  
4 section.

5 NEW SECTION. Section 5. Voidance of existing  
6 contracts. A contract, express or implied, made by a person  
7 in violation of a provision of [sections 1 through 7 6] is  
8 void and no recovery may be had on the contract.

9 NEW SECTION. Section 6. Penalty -- DISPOSITION --  
10 RELIEF. (1) A violation of [section 4] is an unfair trade  
11 practice,--and-upon.

12 (2) UPON PRESENTATION BY AN OFFENDED PARTY OF EVIDENCE  
13 OF A VIOLATION OF [SECTION 4], THE DEPARTMENT OF JUSTICE OR  
14 A COUNTY ATTORNEY SHALL ISSUE TO THE SUSPECTED RETAILER OR  
15 WHOLESALE A DEMAND BY CERTIFIED MAIL TO CEASE THE  
16 VIOLATION. IF THE VIOLATION IS NOT CORRECTED WITHIN 24 HOURS  
17 AFTER THE SUSPECTED RETAILER OR WHOLESALE RECEIVES THE  
18 NOTIFICATION, THE DEPARTMENT OR THE COUNTY ATTORNEY MAY  
19 BRING AN ACTION TO ENJOIN THE VIOLATION.

20 (3) UPON conviction, a retailer or wholesaler is  
21 subject to a civil penalty of not more than \$1,000 a day for  
22 each day that the violation occurs, IS LIABLE FOR ATTORNEY  
23 FEES, AND IS SUBJECT TO INJUNCTIVE RELIEF.

24 +2+(4) The department of commerce JUSTICE or a county  
25 attorney may bring an action for a violation of [section 4].

1 (10) "Retailer" means a person engaged in the business  
2 of selling motor fuel at a retail motor fuel outlet.

3 (11) "Retail motor fuel outlet" means a place of  
4 business where motor fuel is sold and delivered into the  
5 tanks of motor vehicles regardless of whether the income  
6 from the selling and delivery of the fuel is the primary  
7 source of revenue of that business.

8 (12) "Sale" means a transfer, gift, sale, offer for  
9 sale, or advertisement for sale in any manner or by any  
10 means of motor fuel, including a transfer of motor fuel by a  
11 person to himself or to his affiliate.

12 (13) "Transfer price" means the price used by a person  
13 to transfer motor fuel to himself or to an affiliate for  
14 resale at a retail motor fuel outlet.

15 (14) "Transportation cost" means the actual cost of  
16 transportation of motor fuel or, in the absence of proof of  
17 actual cost, the common carrier rates fixed by the public  
18 service commission for the immediate market area concerned.

19 (15) "Wholesaler" means a person engaged in the business  
20 of making sales at wholesale to a retail motor fuel outlet.

21 **NEW SECTION. Section 4. Below-cost sale prohibited.**

22 (1) A wholesaler may not sell motor fuel to a retail motor  
23 fuel outlet at less than the delivered cost of the motor  
24 fuel plus the cost of doing business if the effect is to  
25 injure or destroy competition or substantially lessen

1 competition.

2 (2) A retailer may not sell motor fuel at less than the  
3 delivered cost of the motor fuel plus the cost of doing  
4 business if the effect is to injure or destroy competition  
5 or substantially lessen competition.

6 (3) A wholesaler may not sell or transfer motor fuel to  
7 itself or an affiliate for resale at a retail outlet at a  
8 transfer price lower than the price the wholesaler charges  
9 another retail motor fuel outlet that purchases a like  
10 quantity within the same competitive area if the effect is  
11 to injure or destroy competition or substantially lessen  
12 competition.

13 (4) The provisions of [sections 1 through 7 6] do not  
14 apply to a sale at wholesale or a sale at retail made:

15 (a) in an isolated transaction not in the usual course  
16 of business;

17 (b) if motor fuels are advertised, offered for sale, or  
18 sold in a bona fide clearance sale for the purpose of  
19 discontinuing trade in the motor fuel and the advertising,  
20 offer to sell, or sale states the reason for the sale and  
21 the quantity of the motor fuel advertised, offered for sale,  
22 or to be sold;

23 (c) if the motor fuel is advertised, offered for sale,  
24 or sold as imperfect or damaged and the advertising, offer  
25 of sale, or sale states the reason for the sale and the

1 IF THE ACTION IS BROUGHT BY:

2 (A) THE DEPARTMENT OF JUSTICE, ONE-HALF OF THE AMOUNT  
 3 OF THE PENALTY MUST BE DEPOSITED IN THE GENERAL FUND OF THE  
 4 COUNTY WHERE THE ACTION WAS BROUGHT AND THE REMAINDER IN THE  
 5 STATE GENERAL FUND; OR

6 (B) A COUNTY ATTORNEY, THE ENTIRE AMOUNT OF THE PENALTY  
 7 MUST BE DEPOSITED IN THE GENERAL FUND OF THE COUNTY WHERE  
 8 THE ACTION WAS BROUGHT.

9 ~~NEW-SECTION: Section 7. Civil remedies. (1) The~~  
 10 ~~department of commerce may issue a cease and desist order~~  
 11 ~~requiring a wholesaler or retailer to cease violating the~~  
 12 ~~provisions of {section 4}. The department or a county~~  
 13 ~~attorney may commence an action on behalf of the state for~~  
 14 ~~failure to comply with an order. A civil penalty of not less~~  
 15 ~~than \$200 or more than \$5,000 may be recovered in the~~  
 16 ~~action:~~

17 ~~{2} The department or a county attorney may bring an~~  
 18 ~~action to enjoin a violation of {section 4}.~~

19 ~~{3}(5) An action under this section must be commenced~~  
 20 ~~in the county where the motor fuel is sold.~~

21 (6) A PERSON INJURED AS A RESULT OF AN ACT OR PRACTICE  
 22 THAT VIOLATES [SECTION 4] MAY BRING A CIVIL ACTION FOR  
 23 APPROPRIATE RELIEF, INCLUDING AN ACTION FOR DECLARATORY  
 24 JUDGMENT, INJUNCTIVE RELIEF, AND ACTUAL DAMAGES.

25 NEW SECTION. Section 7. Saving clause. [This act] does

1 not affect rights and duties that matured, penalties that  
 2 were incurred, or proceedings that were begun before [the  
 3 effective date of this act].

4 NEW SECTION. Section 8. Severability. If a part of  
 5 [this act] is invalid, all valid parts that are severable  
 6 from the invalid part remain in effect. If a part of [this  
 7 act] is invalid in one or more of its applications, the part  
 8 remains in effect in all valid applications that are  
 9 severable from the invalid applications.

10 NEW SECTION. Section 9. Effective date -- TERMINATION.  
 11 [This act] is effective on passage and approval AND  
 12 TERMINATES JULY 1, 1993.

-End-