

CURRENT DEVELOPMENT

Preserving Rural Gas Stations: State Financial Assistance for Underground Petroleum Storage Tanks

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I. INTRODUCTION

In 1989, the Washington State Legislature created the Pollution Liability Insurance Agency (PLIA) and directed the agency to develop a program that would assist owners and operators of underground petroleum storage tanks (USTs) in obtaining affordable pollution liability insurance.¹ By creating the program, the legislature responded to owner and operator concerns that state and federal financial responsibility requirements would force owners and operators to close their UST sites because of the scarcity and expense of pollution liability insurance.² The legislature, however, did not address similar

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1. WASH. REV. CODE § 70.148.005 (1991).

2. See John S. Conniff, *Financial Responsibility Assistance for Underground Storage Tanks: Can Washington State Run a Pollution Reinsurance Company?*, 14 U. PUGET SOUND L. REV. 1 (1990). Although state and federal environmental regulations permit owners and operators to demonstrate financial responsibility for pollution liability through a variety of risk financing methods, the purchase of insurance is the

concerns that costs of pollution clean-up³ and required upgrades of USTs would drive small gas station owners and operators out of business.⁴ To a great extent, owner and operator fears have been realized.

Since 1988, 357 Washington gas stations have closed as owners and operators have either removed their USTs or discontinued their use.⁵ In Eastern Washington, forty-six percent of the total number of UST sites selling gasoline have closed since UST regulations went into effect in 1988.⁶ Some gas station owners and operators cannot afford the capital improvements required by the regulations because their business volume is low⁷ and because lending institutions may not grant an improvement loan if secured by a mortgage of the UST site.⁸ Of course, many other owners and operators have upgraded their UST systems and still operate. Nevertheless,

only realistic option because most owners and operators cannot meet the regulatory standards for proof of financial responsibility through other alternatives. *Id.*

3. See INDEPENDENT BUSINESS ASSOCIATION OF WASHINGTON REPORT 12 (1988) (on file with author).

4. *Authorizing Loans and Grants to Preserve Underground Petroleum Storage Tanks in Rural Areas: Hearings on HB-2114 Before the Washington State House Financial Institutions and Insurance Committee*, 52nd Legislature, Regular Session (March 5, 1991) [hereinafter *Hearings*] (tape on file with author). HB-2114 was the House companion bill to SB-5806, which created the program. UST technical regulations appear at WASH. ADMIN. CODE § 173-360-300 to -399 (1990).

5. WASHINGTON STATE DEPARTMENT OF ECOLOGY, INFORMATION REGARDING UNDERGROUND STORAGE TANK FACILITIES IN WASHINGTON STATE (March 13, 1991) [hereinafter DOE REPORT].

6. *Id.* The DOE REPORT notes that many Eastern Washington communities no longer have gas stations or rely on a single station. For example, the town of Colfax in Whitman county once had five gas stations and now has only one. *Id.* at 1.

7. For a sampling of local media coverage of small gas station problems, see Kamilla McClelland, *Small Gas Dealers Squeezed*, THE OLYMPIAN, Oct. 14, 1990, at E1; Don Duncan, *Vanishing Gas Pumps*, SEATTLE POST-INTELLIGENCER, Jan. 7, 1990, at B1; Jess Walter, *New Rules Forcing Rural Gas Stations to Close*, SPOKANE SPOKESMAN REV., Nov. 11, 1990, at A1.

8. Stephen Goldsmith, *Neighborhood Stations Driven Out by Regulations*, ECONOMICS, SEATTLE POST-INTELLIGENCER, Aug. 16, 1991, at A1. See generally R. Mott & S. Slaughter, *Minimizing Environmental Liability For Lenders: The Most Common Mistakes*, 51 Banking Rep. (BNA) 949, 951-54 (Dec. 5, 1988); M. Bennett & R. Miller, *Environmental Risk in Real Estate Transactions: Due Diligence in the Secondary Market*, 51 Banking Rep. (BNA) 794, 795-99 (Nov. 7, 1988); and David Berz & Peter Gillon, *Lender Liability Under CERCLA: In Search of a Deep Pocket*, 108 BANKING L.J. 4 (1991).

Financial institution regulators require institutions to analyze strictly any loans secured by real property that may present an environmental hazard; regulators also alert institutions to pollution risks like those arising from USTs. See, e.g., Federal Home Loan Bank System, Office of Regulatory Activities, *Environmental Risk and Liability*, THRIFT BULLETIN 16, § 210 (Feb. 6, 1989).

gas station closures continue to create substantial hardships in isolated rural communities where no other convenient source of petroleum products exists.⁹

For example, the only gas station in the town of Bickleton closed and the people of that community must now drive to either Mabton or Roosevelt for gasoline.¹⁰ The distance between those two towns is forty-five to fifty miles. In the town of Grapeview, the local fire service district vehicles rely on the town's only gas station to supply fuel for fire trucks.¹¹ Without funds to comply with environmental regulations, gas stations must close.¹²

Local government entities and hospitals in rural areas also face problems finding sources of funds to upgrade their USTs and to clean up pollution at their UST sites.¹³ Local governments maintain USTs to supply fuel for public utility vehicles, emergency vehicles, and school buses. Rural hospitals¹⁴ maintain USTs to fuel emergency back-up power generators. These generators are mandated by a state law requiring hospitals to maintain an alternative emergency power source.¹⁵ Both the government and the hospital USTs must be upgraded in accordance with environmental regulations, but owners and operators of these USTs often do not have sufficient funds to meet regulatory requirements.¹⁶

The 1991 legislature responded to these problems by

9. Jerry Dyer, *Stuck In A Tank Trap*, MORNING NEWS TRIBUNE (Tacoma), Aug. 19, 1991, at C1. Paul Roberts, *Pumps Running Dry: Rural Service Stations an Endangered Species*, HORIZON AIR MAGAZINE, May 1990, at 10.

10. DOE REPORT, *supra* note 5, at 1. For a discussion of the plight of gas stations in Washucna, see Roberts, *supra* note 9.

11. Devin Smith, *Bill May Be Savior For Grapeview's Sole Gas Stop*, THE OLYMPIAN, May 8, 1991, at B8. The owner of Grapeview's gas station estimates the cost to replace his aging USTs at \$50,000. If pollution is discovered, he estimates additional costs of \$50,000 to clean up the pollution. If he closes, the next station is five miles away in Allyn. In commenting on the potential closure of the station, the fire district chief notes, "[i]t's a good asset to the community and to maintain our emergency services." *Id.* He also notes that the fire district has an agreement with the station allowing the district to refuel fire trucks at the station any time day or night. *Id.*

12. WASH. REV. CODE ch. 90.76 (1991) requires the state Department of Ecology to develop and implement UST regulations. Upon compliance with these regulations, the department will issue a "tag" for the USTs at a site certifying compliance. *Id.* § 90.76.020. If the UST is not tagged, no fuel may be delivered to the owner and operator for the untagged UST. *Id.* § 90.76.050.

13. *Hearings, supra* note 4.

14. A rural hospital may be a local government entity if owned and operated by a public hospital district under WASH. REV. CODE ch. 70.44 (1991).

15. WASH. ADMIN. CODE § 246-318-110(2) (1991).

16. *Hearings, supra* note 4.

directing PLIA to develop and administer a UST financial assistance program for small rural gas stations, local government entities, and rural hospitals.¹⁷ This Article¹⁸ briefly reviews environmental regulations requiring the upgrading of USTs, analyzes the development and implementation of the new financial assistance program, and considers the constitutionality of the program in light of state constitutional "lending of credit" prohibitions.¹⁹

II. UST TECHNICAL REGULATIONS

In 1986, Congress directed the Environmental Protection Agency (EPA) to adopt and implement a comprehensive UST regulatory program for the detection, prevention, and correction of petroleum releases from USTs.²⁰ These regulations were adopted by the EPA in September of 1988.²¹ Congress also permitted each state to adopt a UST regulatory program no less stringent than the federal program and to assume the EPA's role as primary regulator of USTs.²²

In 1989, the Washington State Legislature directed the state Department of Ecology (DOE) to implement a state UST regulatory program consistent with the federal program.²³ The DOE adopted these rules in 1990.²⁴ Among the many rules governing USTs are rules addressing performance and operating standards.²⁵ Compliance with these and other UST rules determines whether a UST owner or operator can obtain fuel and therefore continue using the UST for its intended purpose.

Unless an owner or operator obtains a permit from the DOE each year, no one may supply petroleum products to the owner or operator.²⁶ To obtain the permit, the owner or operator must provide evidence of compliance with DOE rules by

17. 1991 Wash. Laws ch. 4.

18. This Article supplements a previous article by one of the Authors on financial assistance for USTs; see Conniff, *supra* note 2.

19. For a discussion of the PLIA, state and federal environmental laws requiring pollution insurance, and the agency's pollution insurance program, see Conniff, *supra* note 2.

20. 42 U.S.C. § 6991b(a) (1988).

21. 40 C.F.R. § 280-81 (1990).

22. 42 U.S.C. § 6991c(d) (1988).

23. WASH. REV. CODE § 90.76.020 (1989).

24. WASH. ADMIN. CODE ch. 173-360 (1990).

25. *Id.* ch. 173-360, Part III.

26. WASH. ADMIN. CODE § 173-360-130(4) (1990).

the annual permit renewal deadline.²⁷ In addition to complying with all rules, the owner or operator must certify that the UST is not known to be leaking and must pay all required fees.²⁸ If these conditions are met, the department will issue a permit that must be displayed on the gas pump, in the office, or in other locations designated by the department.²⁹

In April 1991, the DOE published a thirty-page instruction guide to assist owners and operators in completing a one-page certification of compliance form.³⁰ For a moment, try to imagine the plight of the small, independent gas station owner receiving this guide: The guide explains the state UST regulations and the two-part certification process for financial responsibility and technical compliance to the owners or operators.³¹ According to the guide, owners or operators of one to twelve USTs must comply with financial responsibility requirements by October 26, 1991. A few months later, the owners or operators receive a newsletter or hear a news report that the EPA has extended this deadline to December 31, 1992, the second time the EPA has extended the deadline. On the other hand, the guide states that local government officials must comply sometime in mid-1992.³² If you were an owner, operator, or government official, what would you do?

In defense of the DOE, no agency can establish a comprehensive regulatory program when the EPA continues to adjust the rules. Extension of compliance deadlines for financial responsibility may be desirable because of their impact; however, the state's forms, brochures, and regulations become obsolete nearly as soon as they are printed because the DOE must amend its rules to avoid enforcement of rules more stringent than the EPA's regulations. The many extensions of the financial responsibility compliance deadline encourage owners and operators to wait until the last possible minute to comply in the event that the deadline is extended again.

The guide also advises owners and operators that an approved method of leak detection must be employed by a cer-

27. WASH. ADMIN. CODE § 173-360-130(1)(c) (1990).

28. WASH. ADMIN. CODE § 173-360-130(3) (1990).

29. WASH. ADMIN. CODE § 173-360-130(4) (1990).

30. WASH. STATE DEPARTMENT OF ECOLOGY, GUIDE FOR CERTIFICATION OF COMPLIANCE WITH STATE UNDERGROUND STORAGE TANK RULES 91-99 (April 1991) [hereinafter DOE GUIDE].

31. *Id.* at 4-10.

32. *Id.*

tain date to be determined in accordance with the age of the UST system.³³ Apart from this leak detection requirement, the guide notes that owners and operators who installed USTs before December 1988 need not upgrade their UST system until December 1998.³⁴ Theoretically, owners and operators have seven more years before they must incur the costs of replacing or upgrading their UST system. The seven-year period may be illusory, however, if the owner or operator must upgrade a UST for other reasons, such as when a leak is discovered during or after a tank tightness test.³⁵ Because the leak detection requirements are tied to the age, type, and use of a UST, the financial impact of regulations upon UST owners and operators varies.³⁶

The short term costs for compliance with leak detection requirements are nominal when compared with long term costs for compliance with UST upgrade requirements. For example, the typical older rural gas station need not upgrade the UST system until 1998, and the station owner or operator can comply with the leak detection requirements by simply conducting an annual tank tightness test in conjunction with petroleum inventory control (the dipstick method).³⁷ Inventory control requires only employee labor, and a tightness test averages \$500.³⁸ In contrast, the costs of installing a new sys-

33. WASH. ADMIN. CODE § 173-360-330 (1990). Except for emergency power generator tanks, owners and operators with pressurized pipe systems must have developed an approved leak detection method as of December 1990. *Id.* Owners and operators using suction piping must employ leak detection in accordance with the compliance schedule for leak detection of tanks. *Id.* The latest compliance date for using an approved leak detection system is December 1993, except for emergency power generation tanks, which have until 1995 for compliance. *Id.*

34. WASH. ADMIN. CODE § 173-360-310 (1990). However, if a UST system leaks or the system must be repaired to correct a structural defect, the entire system must be upgraded to the standards for installation of a new system. *Id.* § 173-360-325.

35. *Id.*

36. DOE GUIDE, *supra* note 30, at 15-16.

37. WASH. ADMIN. CODE § 173-360-345(3) (1990).

38. The following are samples of the varying costs and methods of compliance:

Upgrade—\$6,000 for internally lining a tank

\$2,200 for internal inspection 10 yrs. after installation and every five years after that

\$2,500 for catchment basin and automatic shutoff

\$500 for annual tank tightness test.

New UST—\$10,000 for removal of old UST (assuming no clean-up required)

\$30,000 for double-walled tank and piping

\$3,000 for cathodic protection

\$4,000 for automatic line leak detectors.

Because the costs vary depending upon the permitted choices made by the

tem at a gas station with three USTs averages \$82,000.³⁹ The costs for simply upgrading rather than replacing the same system averages \$45,000.⁴⁰ Given the relatively low short term technical compliance costs, why did the legislature rush to develop a financial assistance program to help rural owners and operators, and why have so many rural gas stations decided to quit so soon?

The answer lies primarily with the financial responsibility requirements that present a relatively high ongoing cost tied to the type and quality of the UST system. Older and less technologically advanced UST systems are more likely to leak; therefore, they are more expensive to insure.⁴¹ If the system is too old or technologically antiquated, insurance underwriting standards may preclude insurance of the system. Despite the favorable pollution liability insurance rates offered through the state insurance program, the difference in annual premiums between a new tank system and one that is over sixteen years old can equal \$2,100.⁴² If the tank is twenty-two years old the difference in annual premium amounts to \$3,770, money that could have been spent upgrading the UST system.⁴³ If the USTs at the site are extremely old, PLIA will not issue coverage until the owner or operator incurs costs for tank and line tightness testing, soil gas analysis, and site assessment.

Even acknowledging potential extensions of the financial responsibility deadlines for small gas stations and local governments, the risk of a tank leak grows with the aging of the UST system, and a UST site discovered to have suffered a fuel leak will not qualify for insurance until the pollution is cleaned up at the owner's or operator's expense.⁴⁴ Therefore, UST opera-

owner or operator, the owner may decide on a single-walled tank with other systems in lieu of a double-walled tank system.

Memorandum from the Pollution Liability Insurance Agency on Cost Estimates for Compliance (Mar. 19, 1991) (on file with the *University of Puget Sound Law Review*).

39. *Id.* Replacement with a single-walled tank is \$27,500 per tank; a double-walled tank is \$34,800 per tank. These figures include all costs. *Id.* at 3.

40. *Id.* Upgrading costs average \$15,200 per tank.

41. For a discussion of the risk factors related to insuring a UST, see Conniff, *supra* note 2, at 16-21.

42. Premium examples are based upon figures supplied through the state PLIA. Facsimile from Front Royal Insurance Company to Washington State Pollution Liability Insurance Agency (July 8, 1991) (on file with the *University of Puget Sound Law Review*).

43. *Id.*

44. WASH. REV. CODE § 70.105D.040 (1989). The state PLIA cannot provide coverage for past or existing pollution. WASH. REV. CODE § 70.148.005(3) (1989). The

tors may have a relatively long period of time before incurring costs for UST upgrades, but they still face liability exposure and the potentially high cost of financial responsibility compliance, including expenditures for testing to determine whether a UST site qualifies for coverage.

Considering these current compliance costs and looming future costs, small rural gas stations face a potentially bleak and expensive future. Any rational business person would weigh these costs against the small profit from low volume retail fuel sales in small rural communities and, resigned to the inevitability of financial failure, might quit.⁴⁵ To avoid this outcome, the legislature hopes to take the regulatory costs out of the owners' and operators' cost/benefit analyses by providing them with financial assistance. If owners and operators who are eligible for such assistance nevertheless decide to close their stations, probably no amount of legislative intervention would make a difference because the businesses simply are not sustainable, even without the financial impact of liability and environmental regulation.

III. THE UST FINANCIAL ASSISTANCE PROGRAM

The Underground Storage Tank Community Assistance Program (USTCAP) was signed into law on March 29, 1991, as SSB-5806.⁴⁶ The director of the Pollution Liability Insurance Agency (PLIA) was instructed to:

establish and manage a program for providing financial assistance to public and private owners and operators of underground storage tanks who have been certified by the governing body of the county, city, or town in which the tanks are located as meeting a vital local government, public health or safety need.⁴⁷

Such financial assistance may be provided to "a private owner or operator retailing petroleum products to the public,"⁴⁸ to "a

agency may insure a polluted UST site for future losses if the owner or operator has a plan for cleaning up existing pollution and implements such plan. WASH. REV. CODE § 70.148.070(5) (1989).

45. See *Hearings*, *supra* note 4.

46. 1991 Wash. Laws ch. 4. The program's official designation appears in § 7 of the law, amending WASH. REV. CODE § 70.148.020, which created the PLIA trust account. SSB-5806 contained an emergency clause and took effect immediately upon the governor's signature. 1991 Wash. Laws ch. 4, § 11.

47. 1991 Wash. Laws ch. 4, § 2.

48. *Id.* § 3(1).

public owner or operator,"⁴⁹ and to "a rural hospital as defined in RCW 18.89.020."⁵⁰

The petroleum products tax instituted to fund the pollution liability insurance program also funds USTCAP.⁵¹ While the term "financial assistance" implies that the director could create a program providing loans, loan guarantees, grants, or other kinds of financial assistance, the legislature intended that the director provide grants.⁵² The key to obtaining this financial assistance lies with the governing body of the local government in the community in which the UST site is located.⁵³ Unless a UST owner and operator obtains local government certification, no financial assistance can be provided by PLIA.⁵⁴ This precondition to assistance accomplishes three objectives.

49. *Id.* § 4(1). Although public owner or operator is not defined, the intent section of the law makes clear that public means local government entities. *Id.* § 1. The legislature commonly uses the phrase "local government entities" to refer to all types of local government bodies including cities, towns, and counties. See, e.g., *Hearings, supra* note 4, and WASH. REV. CODE § 48.62.020 (1989) (defining "local government entity" for purposes of the Insurance Code's regulation of local government self-insurance programs).

50. 1991 Wash. Laws ch. 4, § 5. WASH. REV. CODE § 18.89.020(6) (1989) provides: "Rural hospital" means a hospital located anywhere in the state except the following areas:

(a) The entire counties of Snohomish (including Camano Island), King, Kitsap, Pierce, Thurston, Clark, and Spokane;

(b) Areas within a twenty-mile radius of an urban area with a population exceeding thirty thousand persons; and

(c) Those cities or city-clusters located in rural counties but which for all practical purposes are urban. These areas are Bellingham, Aberdeen-Hoquium, Longview-Kelso, Wenatchee, Yakima, Sunnyside, Richland-Kennewick-Pasco, and Walla Walla.

51. 1991 Wash. Laws ch. 4, §§ 7-8.

52. Memorandum from John Conniff, Counsel, Office of Program Research, to Representative Dennis Dellwo, Chairman, House Financial Institutions and Insurance Committee (March 12, 1991) [hereinafter Conniff Memo] (on file with the *University of Puget Sound Law Review*). As noted in the memo's analysis of the substitute to HB-2114: To better meet constitutional constraints, "the program provides grants only, in recognition that grants are easier to constitutionally justify than are loans under existing court interpretations of the constitution." *Id.* at 5.

The substitute to HB-2114 was identical to the amendment made to SB-5806 adopted by the committee on March 21, 1991 when the committee considered the senate version of the bill.

53. The owner or operator must obtain certification from:

the appropriate governing body of the city or town in which the tanks are located or in the case where the tanks are located outside of the jurisdiction of the city or town, then to the appropriate governing body of the county in which the tanks are located.

1991 Wash. Laws ch. 4, § 3(1)(b).

54. *Id.*

First, the state frees itself from the political problem of deciding local needs. Local governments decide whether assistance is necessary to sustain local government and community services. Second, PLIA avoids the time consuming and expensive task of investigating the impact that a UST site closure would have on a local community. Local government is in a better position to know the impact of a site closure on its community. Finally, the precondition limits the number of UST sites qualifying for assistance, assuming the local government does not deem that every UST site within its jurisdiction meets vital community needs. To prevent this possibility, the legislature established criteria and procedures for certifying UST sites.⁵⁵ The PLIA director must develop and distribute certification forms incorporating statutory standards to local governments.⁵⁶ These forms can be designed to provide local government with a comprehensive questionnaire, thereby reducing the need for in-depth analysis and generating uniform and uncomplicated responses for PLIA use. Final approval of an application for financial assistance lies with the director of PLIA, who may ignore a local government certification if he finds that assistance would not further the overall purposes of the program or that the certification does not adequately describe existing local conditions.⁵⁷

These certification standards vary depending upon who owns the USTs. In certifying gas station owners and operators, the local government must:

- (a) Consider and find that other retail suppliers of petroleum products are located remote from the community;
- (b) Consider and find that the owner and operator requesting certification is capable of faithfully fulfilling the agreement required for financial assistance;
- (c) Designate the local government official who will be responsible for negotiating [an agreement]; and
- (d) State the vital need or needs that the owner or operator meets.⁵⁸

At a minimum, these criteria severely limit the number of UST sites eligible for assistance in two ways.

55. *Id.*

56. *Id.*

57. *Id.* § 2(5).

58. 1991 Wash. Laws ch. 4, § 6(2). The agreement mentioned in the criteria is discussed in part IV of this Article and relates to consideration in return for the financial assistance. See *infra* note 64 and accompanying text.

First, only one gas station in a local community may receive assistance. The gas station must be a "last chance" gas station; the next station must be miles away. This presents a problem for local government when two or more stations need assistance in the local community. The legislature intended the program to assist sole source gas stations.⁵⁹ If one of the stations in town closes, the other station can still sell gas for local needs. Thus, one of the stations must probably fail before local government can assist the other station. The alternative, funding more than one station in a local community, would contradict legislative observations that public funding is necessary to preserve local access to fuel.⁶⁰

The unanswered question is what happens if both local gas stations are about to go broke trying to comply with environmental regulations? Devising solutions to such dilemmas is precisely the reason the legislature invested so much authority in the director of PLIA. He can ignore the problem or develop an appropriate compromise in designing and managing the program. When faced with the closure of two local stations, the director could compromise by helping the best of the worst: by assisting the otherwise qualifying owner or operator most capable of sustaining an ongoing business and in need of the least amount of financial assistance.

The second way the certification criteria limits assistance to local gas stations is by requiring the local government to consider the impact that a gas station closure will have on the local community and to explain why such an impact merits state financial assistance. Unless the local government can identify the vital need served by the UST site, no financial assistance can be provided. For instance, some small towns may have alternative sources of fuel, especially where the next gas station may be just a few miles away. Because the legislature set no mileage limit between assisted stations and provided no definition of "sole source," the PLIA director has discretion when considering each community's unique circumstances to determine whether assistance conforms to the general intent of the law.⁶¹ This community impact requirement

59. 1991 Wash. Laws ch. 4 § 1.

60. *Id.*

61. For example, if the gas station in the town of Grapeview closes, another station is five miles away in Allyn. *Supra* note 11. Closure would affect the local fire district's fuel needs, however, and might encourage it to install its own UST at a cost

also applies to certification of local government and rural hospital USTs.

To obtain financial assistance, a local government must "provide to the [PLIA] director a copy of the resolution by the governing body . . . finding that the continued operation of [the government USTs] is necessary to maintain vital local public health, education, or safety needs."⁶² Thus, the local government must consider alternatives to the continued use of its own USTs and determine that a UST is necessary to provide local government services. These services typically include fueling school buses, public utility vehicles, and emergency vehicles for fire, medical, and law enforcement emergencies.

Local governments may certify rural hospitals after considering and finding that the hospital's use of a UST is necessary and "that the hospital provides health care services to the poor or otherwise provides charity care."⁶³

In addition to meeting the certification requirements, all owners and operators applying for financial assistance must meet the "serious financial hardship" criteria established by the PLIA director.⁶⁴ Though the law does not define financial hardship, the PLIA director may use a system, similar to the one developed for reimbursing owners and operators for the costs incurred for site assessments, to determine whether a UST site is eligible for pollution insurance with PLIA.⁶⁵ Under that separate program, created in 1990, gas station owners and operators may obtain reimbursement for UST site

greater than the cost to maintain the existing gas station serving the entire community. *Id.*

62. 1991 Wash. Laws ch. 4, § 4(1)(b).

63. *Id.* § 6(3). This charity care provision relates to the agreement required as consideration for financial assistance. See discussion *infra* part IV. WASH. REV. CODE § 70.39.020(7) (1989) defines charity care as:

necessary hospital health care rendered to indigent persons, to the extent that the persons are unable to pay for the care or to pay deductibles or co-insurance amounts required by a third-party payer, as determined by the [hospital] commission [now the state department of health].

64. 1991 Wash. Laws ch. 4, § 2.

65. Proposed changes to the Wash. Admin. Code provide that:

The director may design the [insurance] program to cover the costs incurred in determining whether a proposed applicant for pollution insurance under the program meets the underwriting standards of the insurer . . . In covering such costs, the director shall consider the financial resources of the applicant, [and] shall take into consideration the economic impact of the discontinued use of the applicant's storage tank upon the affected community . . .

Wash. St. Reg. 91-08-033 (to be codified at WASH. ADMIN. CODE ch. 374-50) (proposed March 29, 1991).

analysis costs if (1) they can prove that their net worth is \$500,000 or less; (2) they will incur an "unfair economic hardship" because of such costs (shown by their federal income tax return); or (3) they can demonstrate that the closure of the UST site will have a "substantial economic impact upon the community or area in which [the site] is located."⁶⁶ Based on the owners' or operators' net worth, the reimbursement program provides assistance on a sliding scale.⁶⁷

Similarly, the local communities' determination of financial hardship for USTCAP assistance to gas stations will involve a balance sheet analysis. A problem for local communities will arise when the local gas station operator does not own the USTs. The *operator* may be able to prove financial hardship; however, the *owner* may be unwilling to upgrade the USTs even though financially capable. Both owners and operators of a UST site must prove financial hardship under the USTCAP statute.⁶⁸ Ultimately, if the owner of the site decides not to continue the use of the property as a gas station, the state cannot and should not intervene in that decision. If a profitable market exists, a new owner can establish a new gas station.

Determining financial hardship for rural hospitals and local governments presents the director with a trickier problem. Theoretically, the director could find that all local governments have a potentially limitless supply of revenue—just raise taxes. In reality, most of the tax rates and revenue collection methods are set by the legislature,⁶⁹ and if taxes become too burdensome, citizens either revolt or move. As for rural hospitals, the director could examine the Washington State Department of Health's complex financial viability index

66. *Id.*

67. Insurance underwriting costs are reimbursed based upon the following scale:

- a) For applicants with a net worth of \$250,000 or less—75% of the first \$3,500 of eligible costs, to a maximum of \$2,625;
- b) For applicants with a net worth greater than \$250,000, but less than \$500,000—50% of the first \$3,500 of eligible costs to a maximum of \$1,750; and
- c) For applicants whose net worth is greater than \$500,000 but whose 1989 Federal Income Tax Return demonstrates a cash flow hardship—25% of the first \$3,500 of eligible costs to a maximum of \$875. *Id.* (to be codified at WASH. ADMIN. CODE § 374-50-050).

68. 1991 Wash. Laws ch. 4, § 2(1)(a).

69. *E.g.*, WASH. REV. CODE § 82.14.030 (1989) provides maximum rates for local government sales and use taxes; WASH. REV. CODE § 82.46.010 (1989) provides maximum rates for tax on real estate transactions; and WASH. REV. CODE § 84.55.10 (1989) provides limitations on property taxes.

to determine whether a hospital is "financially vulnerable."⁷⁰ Many rural hospitals are financially vulnerable.⁷¹ However, providing financial assistance to local governments and rural hospitals does not present the director with the constitutional "lending of credit" issue that concerned the legislature in providing assistance to private gas stations.⁷² Therefore, when considering the financial resources of local governments and rural hospitals, the director can be more flexible in creating a financial needs standard that meets the spirit, if not the letter, of the USTCAP law. For example, the director may consider the financial impact of a diversion of funds for a UST upgrade and may determine that such a diversion will harm other desirable public projects.

In addition to obtaining local government certification and demonstrating financial hardship, owners and operators must apply for pollution liability insurance through PLIA and show that they would be an insurable risk if USTCAP assistance was provided.⁷³ This limitation prevents the program from squandering its limited funds on a site destined to close. Financial assistance to an owner or operator would be a waste of money if an insurance company would still find the UST site an unacceptable pollution insurance risk despite upgrading the USTs and cleaning up minor pollution. As a result, the owner or operator could not meet financial responsibility regulations and would be required to discontinue the UST use.⁷⁴

The insurance eligibility requirement also saves administrative expenses and assures a comprehensive review of the site proposed for assistance. The insurance application process relies upon the resources and expertise of pollution liability insurance companies for a comprehensive UST site analysis. The insurance company's underwriting process is automatically invoked by the application for insurance, thus saving PLIA the difficulty and expense of conducting a similar UST site evaluation.⁷⁵ This evaluation allows PLIA to make a preliminary

70. WASHINGTON STATE DEPARTMENT OF HEALTH, FINANCIAL VIABILITIES RATIOS STATISTICAL REPORT FOR YEARS 1986-1989 34 (1990) (on file with the *University of Puget Sound Law Review*).

71. *Id.* (sets out rural hospitals index).

72. Conniff Memo, *supra* note 52, at 5. See constitutional analysis discussion *infra* part IV.

73. 1991 Wash. Laws ch. 4, §§ 3(1)(a), 4(1)(a), 45(1)(a).

74. See *supra* text accompanying notes 23-29.

75. The legislature created the underwriting reimbursement program for precisely this reason: site assessments are too expensive for many owners and operators. See

judgment on the extent of any existing pollution at the UST site. This judgment then permits the director to determine whether any assistance may be provided.

PLIA may not provide more than \$75,000 in financial assistance to clean up pollution at a UST site.⁷⁶ Moreover, no financial assistance of any kind may be provided if clean-up cost estimates exceed \$75,000.

If, at any time prior to providing financial assistance, or in the course of providing such assistance, the director finds that corrective action costs may exceed \$75,000, the director may not provide further financial assistance until the owners or operators develop and implement a corrective action plan with the Department of Ecology.⁷⁷ The practical effect of such a provision is to guarantee the demise of the UST site and force the site into the state Department of Ecology's jurisdiction for possible financial assistance under the Model Toxics Control Act.⁷⁸

The \$75,000 clean-up cost limit is part of the overall individual site limit on financial assistance. Total financial assistance for a single UST site cannot exceed \$150,000.⁷⁹ Moreover, any assistance provided must supplement owners' or operators' financial resources.⁸⁰ Thus, owners and operators will be expected to contribute to UST site upgrades to the greatest extent possible, consistent with their showing of financial hardship. In addition, financial assistance must be provided indirectly to allow the PLIA director to control UST upgrade and site clean-up costs.⁸¹ Whenever practicable, the director must pay contractors and other service providers rather than owners and operators for upgrades and clean-ups.⁸² As noted earlier, owners and operators have several methods for complying with the 1998 deadline for upgrading USTs.⁸³ Some methods are cheaper than others. Absent a showing that a more expensive method constitutes a more cost efficient approach to compliance, the state need not assist an owner or

supra note 38. All PLIA insurance applicants undergo a site analysis. Wash. St. Reg. 91-08-033 (to be codified at WASH. ADMIN. CODE ch. 374-50) (proposed March 29, 1991).

76. 1991 Wash. Laws ch. 4, § 2(1)(c).

77. *Id.* § 2(2).

78. WASH. REV. CODE § 70.105D.070(2)(d) (1989).

79. 1991 Wash. Laws ch. 4, § 2(1)(c).

80. *Id.* § 2(1)(b).

81. *Id.* § 2(1)(d).

82. *Id.*

83. See *supra* notes 33-40 and accompanying text.

operator in upgrading to the most expensive and technologically advanced system.

Finally, no more than \$15 million may be spent on the entire program.⁸⁴ If requests for assistance exceed available funds, the director must give preference to UST sites representing the sole source of fuel in a local community.⁸⁵ For example, the director should pass over assistance applications from local governments in favor of a private owner. The director thereby recognizes the greater hardship on a local community if a government UST site were upgraded, leaving no funds for a private UST site accessible by the entire community including the local government. Technically, from the perspective of the entire community's needs, "the sole source of petroleum products in remote rural communities" is not a local government UST. Furthermore, local governments are not required to meet financial responsibility requirements as soon as small gas stations and can therefore wait longer for assistance.⁸⁶

In conclusion, the owner operator is eligible for state financial assistance by fulfilling all of the foregoing conditions: (1) the site must receive certification from the local government, (2) the site must be the sole source of petroleum in the rural community, (3) the owner or operator must demonstrate serious financial hardship, and (4) the owner or operator must apply for pollution liability insurance through PLIA. Once these conditions have been fulfilled, the owner or operator must enter into a contract with the local government. This contract ensures that the state funding achieves its intended purpose while reducing the risk that the financial assistance fails to meet state constitutional requirements.⁸⁷

84. 1991 Wash. Laws ch. 4, § 7(3).

85. *Id.* § 2(3).

86. See *supra* notes 30-32 and accompanying text.

87. For a more detailed description of the agreement, see *infra* text accompanying notes 107-118. The confusion and inconsistency in the court's lending of credit opinions places the legislature in a quandary when facing complicated public policy questions where lending of credit may be an issue. In mildly chastising the legislature and the attorney general for trying to determine whether a program was constitutional, the court stated that this determination is a function of the judiciary. *City of Tacoma v. Taxpayers*, 108 Wash. 2d 679, 688, 743 P.2d 797-98 (1987). In its holding, the court implied that the legislature should focus on the purpose, strategy, and result of a proposed program with constitutional sensitivity rather than constitutional obsession. *Id.* For a more thorough discussion of how the court has approached lending of credit, see Jay A. Reich, *Lending of Credit Reinterpreted: New Opportunities for Public and Private Sector Cooperation*, 19 GONZ. L. REV. 639 (1984) and Hugh Spitzer, *An*

IV. CONSIDERATION FOR FINANCIAL ASSISTANCE: THE CONSTITUTIONALITY OF USTCAP

The public purpose of USTCAP includes the prevention and rapid cleanup of pollution, the assurance that petroleum is available in rural communities, additional benefits to rural communities, and public control provided by the agreement. Because these purposes sufficiently distinguish USTCAP from programs found unconstitutional, USTCAP should be considered constitutional by Washington courts.

Concerns about the constitutionality of USTCAP arise from Article VIII, Section 5 of the Washington State Constitution.

Article VIII, Section 5 provides that:

The credit of the state shall not, in any manner be given or loaned to, or in the aid of, any individual, association, company or corporation.⁸⁸

The Washington Supreme Court has interpreted this prohibition in conjunction with Article VIII, Section 7 of the state constitution, which provides that:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.⁸⁹

Despite the different words used in each of these two sections, the court has interpreted the sections identically and applied each sections' restrictions and exceptions with equal force to both state and local government.⁹⁰ As a result, the legislature

Analytical View of Recent "Lending of Credit" Decisions in Washington State, 8 U. PUGET SOUND L. REV. 195 (1985).

88. WASH. CONST. art. VIII, § 5.

89. WASH. CONST. art. VIII, § 7.

90. See *Washington Higher Education Facilities Authority v. Gardner*, 103 Wash. 2d 838, 845, 699 P.2d 1240, 1244 (1985); *In re Marriage of Johnson*, 96 Wash. 2d 255, 267, 634 P.2d 877, 883 (1981). For example, Article VIII, Section 5 prohibits the state from making its good credit standing available to individuals or businesses, but does not literally preclude the state from loaning money, making gifts, or owning stock in corporations. The court, however, says that the state is precluded because Sections 5 and 7 have the same exceptions and restrictions. *Washington Health Care Facilities Auth. v. Ray*, 93 Wash. 2d 108, 115, 605 P.2d 1260, 1263 (1980). Article VIII, Section 5 does not contain the exception found in Article VIII, Section 7 for the poor and infirm;

was concerned that providing grants to rural gas stations might be viewed as an unconstitutional "gift" of state funds.⁹¹

Generally, the court has defined "gift" as a transaction without consideration and with donative intent.⁹² The difficulty arises when attempting to define "consideration" for purposes of determining whether a state program provides financial assistance "without consideration," thereby constituting a "gift." For example, the *public benefit* of a state program that provides financial assistance to private individuals or businesses may constitute sufficient consideration,⁹³ especially where a fundamental public purpose is involved.⁹⁴ If the UST-CAP program addresses fundamental or basic government purposes, and if the program constitutes a reasonable approach to achieving such purposes with adequate public control, the program likely conforms to lending of credit provisions of the state constitution.⁹⁵

nevertheless, the Supreme Court has declared that this exception applies to Section 5. *Id.* The court also construes "poor and infirm" in the disjunctive, treating this phrase as "poor or infirm." See *Ray*, 93 Wash. 2d at 116, 605 P.2d at 1264.

91. Conniff Memo, *supra* note 52, at 1.

92. *City of Tacoma v. Taxpayers*, 108 Wash. 2d 679, 702-03, 743 P.2d 797, 805 (1987).

93. The key concerns of the court in lending of credit questions are whether the public benefit or "consideration" received by the public is the primary purpose of the expenditure and whether any private benefits are incidental to achieving the goals of the program. For example, the court held that real property upgraded by the city and resold to private persons as part of an urban renewal program was not a gift because a public benefit existed and because the private benefit was incidental to that public benefit. *Miller v. City of Tacoma*, 61 Wash. 2d 374, 387-88, 378 P.2d 464, 472-73 (1963). In another case, the court held that an energy conservation program was constitutional because the private benefit was incidental to the purpose of the program, and therefore, the program had no donative intent. *Taxpayers*, 108 Wash. 2d at 701-05, 743 P.2d at 804-08.

94. Under the constitution, tax revenues must be spent for public purposes. WASH. CONST. art. VII, § 1. The court distinguishes between general public purposes and "fundamental" public purposes. A fundamental public purpose is one that is "overriding," that satisfies a "moral obligation," or that arises from a government responsibility. See *City of Seattle v. State*, 100 Wash. 2d 232, 240-42, 668 P.2d 1266, 1270-71 (1983). For example, the court held that a campaign finance program was not a gift because it accomplished a fundamental government purpose. *Id.* Likewise, the court held that the state collection of child support for non-welfare persons was not a gift because the welfare of all children is a basic government function or purpose. *In re Marriage of Johnson*, 96 Wash. 2d 255, 264-68, 634 P.2d 877, 882-84 (1981). The fundamental public purpose distinction was reaffirmed in *Taxpayers*, 108 Wash. 2d at 702, 743 P.2d at 805.

95. This conclusion is based on two recent themes developed by the court. The first is the "fundamental government purpose." See *supra* note 94. The second theme arises from a more literal reading of the lending of credit provisions by the court. That reading focuses on a narrower interpretation of the limitations imposed by lending of credit restrictions and the evils that the constitution's framers sought to prevent. See

Moreover, if the program does not serve a fundamental public purpose, the program is still constitutional under the lending of credit provisions because it provides adequate public consideration and because the private benefits are incidental to achieving the public purpose. The Washington Supreme Court has often held government actions unconstitutional when they benefit a small group who possess financial and political strength. Likewise, the court has found actions unconstitutional when they do not address a public purpose recognized by the court as important; for example, programs that significantly benefit the private sector while providing a nebulous public benefit are usually struck down.⁹⁶ In contrast, the court tends to uphold government actions targeting a large group of individuals or businesses who possess limited financial or political resources, or uphold actions serving important public needs.⁹⁷

The legislature created USTCAP to address fundamental government purposes and provide substantial public benefit in three ways. First, USTCAP reduces the public's exposure to environmental risks arising from UST leaks.⁹⁸ USTCAP protects the environment by preventing or rapidly cleaning up pollution from USTs when owners and operators possess limited financial resources to accomplish these goals.⁹⁹ The program complements existing state efforts to control pollution.¹⁰⁰ USTCAP reduces the risk of leaks from USTs by financing new USTs and related equipment.¹⁰¹ The program also provides assistance for the clean-up of existing problems.¹⁰² In addition, USTCAP ensures that owners and operators of USTs

Taxpayers, 108 Wash. 2d at 701-02, 743 P.2d at 804-05. The evils to be prevented in drafting the lending of credit provisions include jeopardizing state assets, providing little or no public control over either the program or public liability, and entangling government and private enterprises inappropriately. See *Johnson*, 96 Wash. 2d at 266, 634 P.2d at 883.

96. For instance, although a public purpose existed, the court held that compensation to private billboard owners for the removal of billboards was an unconstitutional gift of public funds because the city was not obligated to compensate the owners. *Ackerley Communications, Inc. v. City of Seattle*, 92 Wash. 2d 905, 918, 602 P.2d 1177, 1186 (1978).

97. See, e.g., *Johnson*, 96 Wash. 2d at 261-68, 634 P.2d at 880-84.

98. See 1991 Wash. Laws ch. 4, § 1.

99. *Id.*

100. For example, see the Model Toxics Control Act, WASH. REV. CODE § 70.105D (1989).

101. See 1991 Wash. Laws ch. 4, § 1.

102. *Id.*

can qualify for pollution insurance covering future clean-ups through PLIA.¹⁰³

Second, USTCAP maintains public health and safety in rural communities by ensuring that petroleum is available for government emergency services.¹⁰⁴ Gas stations in rural communities provide fuel for emergency vehicles, fuel for public utility vehicles that maintain public roads, and fuel for school buses. Moreover, local service stations often provide the only vehicle repair and maintenance services in the community.¹⁰⁵ At a minimum, without a nearby reliable source of fuel, local governments in isolated rural communities must install their own new USTs to provide fuel for these vehicles. The result could be one older, possibly polluted site, and another new site, presenting its own pollution risks, owned by the local government.

Finally, USTCAP protects the welfare of a rural community by ensuring that a source of fuel is available to maintain a minimum level of economic activity critical to the vitality of that community.¹⁰⁶ A local government may spend limited funds to build a UST site for its own needs, but assistance to an existing gas station meets local government needs while allowing residents access to fuel.

Even if these public benefits are viewed as insufficient, USTCAP could still meet constitutional standards through the program's requirement of direct consideration for the financial assistance,¹⁰⁷ thereby blunting arguments that assistance provided to gas stations constitutes a gift of public funds. This direct consideration is set out in the required agreement between PLIA and the private owner or operator. The owner/operator agrees:

- (a) To sell petroleum products to the public;

103. The statute does not specifically state that owners or operators must *purchase* insurance from PLIA. However, no other reason exists for requiring them to apply to PLIA for insurance (see 1991 Wash. Laws ch. 4, §§ 3(1)(a), 4(1)(a), and 5(1)) or for qualifying for insurance "if such insurance were to be provided" (see 1991 Wash. Laws ch 4, §§ 3(1)(c), 4(1)(c), and 5(3)).

104. See 1991 Wash. Laws ch. 4, § 1.

105. See *supra* note 7.

106. The supreme court has never explicitly found economic development to be a fundamental government purpose; however, the court has alluded to the importance of a viable economy to the health and well being of a community. See *Washington State Housing Finance Commission v. O'Brien*, 100 Wash. 2d 491, 496-98, 671 P.2d 247, 250-51 (1983).

107. 1991 Wash. Laws ch. 4, § 3(2).

- (b) To maintain the tank site for use in the retail sale of petroleum products for a period of not less than fifteen years from the date of the agreement;
- (c) To sell petroleum products to local government entities within the affected community on a cost-plus basis periodically negotiated between the owner and operator and the city, town, or county in which the tanks are located; and
- (d) To maintain compliance with state underground storage tank financial responsibility and environmental regulations.¹⁰⁸

Although the state and the private owner or operator enter into this agreement, the local government has an initial and ongoing role in developing the agreement. As noted earlier, the local government must certify the owner or operator as meeting vital local needs.¹⁰⁹ The certification must “[d]esignate the local government official who will be responsible for negotiating the price of petroleum products to be sold on a cost-plus basis to the local government entities in the affected communities and the entities eligible to receive petroleum products at such price.”¹¹⁰

Thus, a primary consideration for USTCAP assistance is the local gas station’s agreement to sell gas to designated local government agencies at a price acceptable to both the gas station and the local government. Presumably, the local government will negotiate a price below the customary retail price. In addition, local government must find that the gas station owner will be able to keep the bargain.¹¹¹ The agreement would be meaningless and financial assistance would be wasted if, after installing new equipment, the gas station went bankrupt for other business reasons.

Owners or operators must file the agreement as a real property lien against the UST site; the lien expires fifteen years from its origination.¹¹² If the director of PLIA determines that the owner or operator has materially breached the agreement, or the UST site is transferred and the new owner or operator refuses to honor the agreement, any assistance provided under the USTCAP program becomes immediately due and repayable by the owner or operator who received the

108. *Id.*

109. *See supra* notes 60-64 and accompanying text (discussing certification).

110. 1991 Wash. Laws ch. 4, § 6(2)(c).

111. *Id.* § 6(2)(b).

112. *Id.* § 3(3)(5).

assistance.¹¹³ This penalty assures that owners and operators will take their commitment to serve the local community seriously.

Rural hospitals receiving USTCAP assistance must agree to provide charity care in the local community in an amount equivalent to the assistance received.¹¹⁴ As noted earlier, rural hospitals must also demonstrate that they provide charity care in order to receive local government certification during the financial assistance application process.¹¹⁵ The director of PLIA, in consultation with the state Department of Health, can negotiate with the hospital to devise any charity care program that meets the needs of the hospital while providing free health care benefits to the local community.¹¹⁶ The director may also negotiate with the hospital concerning how long such charity care must be provided.¹¹⁷ The only unwritten constraint on these negotiations is that the charity care must be in addition to care already provided; otherwise, by allowing existing charity care to fulfill the hospitals' obligation, the provisions would not increase charity care in rural communities.

While most, if not all, rural hospitals are local government entities¹¹⁸ and lending of credit restrictions do not apply to government entities, rural hospitals must provide direct consideration for financial assistance. At first glance, requiring charity care may seem peculiar as a condition to providing assistance; however, the requirement furthers a different state goal of assuring health care to the poor and to those without health insurance.¹¹⁹

In contrast to hospitals and gas stations, local government need not provide any direct consideration for USTCAP assistance.¹²⁰ However, the director may provide financial assist-

113. *Id.* § 3(3) & (4).

114. *Id.* § 5(4).

115. *See supra* note 63. Most rural hospitals provide some amount of charity care. WASHINGTON STATE DEPARTMENT OF HEALTH, HOSPITAL CHARITY CARE IN WASHINGTON, FIRST ANNUAL REPORT TO THE GOVERNOR, app. 1 at 56-61 (1990).

116. 1991 Wash. Laws ch. 4, § 5(4).

117. *Id.*

118. *See supra* note 71. Such public hospitals are part of a public hospital district created pursuant to WASH. REV. CODE ch. 70.44 (1989).

119. WASH. REV. CODE ch. 70.170 governs hospital charity care, and, in part, requires hospitals to "develop, implement, and maintain a charity care policy which . . . shall enable people below the federal poverty level access to appropriate hospital-based medical services . . ." WASH. REV. CODE § 70.170.060(5) (1989).

120. State constitution "lending of credit" prohibitions do not restrict direct financial assistance to governmental entities. *Anderson v. O'Brien*, 84 Wash. 2d 64, 66-

ance for closure of existing operational UST sites and for construction of new sites,¹²¹ which encourages consolidation of local government UST sites and cooperation among local government entities. Ideally, local government agencies should take advantage of the additional available funding to establish a convenient central UST site for use by several local government agencies, while decreasing the pollution risk to the community by closing and consolidating older operational sites.

In addition to the general public benefits and purposes of USTCAP, the requirement to supply direct consideration for a USTCAP grant provides an alternative basis for the courts to find that such financial assistance is not an unconstitutional gift of state funds. When courts review consideration in lending of credit cases, they usually give great deference to the legislature and will question the consideration established by the legislature only if it is "grossly inadequate."¹²² For example, if a court were to review USTCAP in the future, the requirement that private owners and operators commit their property for use as a gas station for a period of fifteen years is unlikely to be viewed as grossly inadequate consideration. Moreover, the UST owner and operator must demonstrate financial hardship and must pay for UST improvements to the greatest extent possible.¹²³ This requirement negates any "donative intent" on the part of the state.

In summary, the USTCAP program is consistent with constitutional lending of credit provisions because of (1) the basic or fundamental public purposes served by USTCAP; (2) the additional consideration provided to rural communities in the agreement for public financial assistance; and (3) the incidental nature of the benefits received by the private owners or operators relative to the public purposes of USTCAP.

V. CONCLUSION

Federal and state efforts to minimize public health risks and environmental damage through the adoption of UST regulations have created unintended hardships in isolated rural

67, 524 P.2d 390, 392-93 (1984). Therefore, the legislature was not concerned with obtaining an adequate return for the assistance provided apart from the public benefit derived. Coniff Memo, *supra* note 52, at 5.

121. 1991 Wash. Laws ch. 4, § 4(2).

122. See *City of Tacoma v. Taxpayers*, 108 Wash. 2d 679, 703, 743 P.2d 797, 805 (1987).

123. 1991 Wash. Laws ch. 4, §§ 2(1)(a)(b).

communities. By their very nature and location, rural gas stations may not generate sufficient income and profits to afford the high cost of compliance with these regulations. As a consequence, fully forty-six percent of rural gas stations in Washington have closed in the past few years, leaving some communities with no convenient source of fuel. Many of the remaining stations await a similar fate.

Some local governments in these locations cannot afford to comply with these environmental regulations, nor can they afford to do without fuel for emergency services and public utility vehicles. In addition, rural hospitals need USTs to fuel emergency back-up generators but face the problem of paying for new USTs while attempting to remain solvent in an era of increasing health care costs and declining revenues.

The legislature created the Underground Storage Tank Community Assistance Program to address these problems. Using funds received from the petroleum products tax, the legislature designed a program to pay for UST upgrades and minor pollution at UST sites to prevent and minimize the risk of pollution while ensuring continued fuel availability in rural communities. To minimize cost, address constitutional constraints, and further environmental policies, the legislature limited assistance to owners and operators who could demonstrate both that they have financial need and that the UST site meets vital local needs.

Some may question whether this financial assistance constitutes an unconstitutional gift of state funds because the program provides grants to private businesses and individuals. However, the public control of USTCAP expenditures, the stringent limitations and prerequisites for state assistance to private individuals and businesses, and the public benefits furnished by the program, all arguably distinguish this program from other programs found to be unconstitutional.

In designing USTCAP to meet critical public needs, the legislature considered both program operations and program constitutionality. If the program is challenged, the court will ultimately decide whether the legislature's approach is constitutionally appropriate. On the other hand, the legislature will measure the program's success by its ability to sustain rural communities while endeavoring to prevent pollution from UST leaks.