February 1, 1995

John R. Prukop Chief Pilot
Oregon Department of Forestry
2600 State Street Salem, OR 97310

Dear Mr. Prukop:

This is in response to your letter of January 3, 1995, requesting an opinion with respect to operation of public aircraft. You state that the Oregon State Department of Forestry owns and operates two twin-engine aircraft in support of its agency mission. It also makes the aircraft available to other state agencies for personnel transportation, such as the State Police, Department of Fish and Wildlife, Department of Justice, and Department of Transportation. These agencies are billed at the same hourly rate, which the Forestry Department users pay internally. Funds are electronically transferred to Forestry's receivable account. You question whether this arrangement might jeopardize the "public aircraft" character of the aircraft.

A recent amendment to Title 49 of the U.S. Code (P.L. 103-411, Section 3) amended the definition of "public aircraft" to exclude government-owned aircraft transporting passengers (other than crewmembers) unless their presence on the aircraft is required to perform, or associated with the performance of a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management. This amendment, which becomes effective April 25, 1995, would require that the personnel transportation operations conducted by the Department of Forestry, both for itself and for other units of the state government, be conducted under Part 91 of the Federal Aviation Regulations.

In my opinion, the reimbursement for the use of Forestry aircraft by other state agencies would not constitute a commercial use of the aircraft, which would require that operations be conducted under the provisions of Part 135.

Such use would not be a commercial use because the aircraft could be used by agencies of the same political entity--the State of Oregon--and the funds which are electronically transferred originate with the same source, the state treasury. The state is merely providing transportation services to itself--the electronic funds transfer constituting a reallocation of funds within the same overall state budget.

You also indicate that on other occasions, state fire control personnel are flown on these aircraft to other states for wildfire control on state, federal, and private lands. The aircraft pool internally charges the fire protection division and that division may or may not share the expense for such flights with state or federal agencies involved in a cooperative fire control effort.

While the internal billing of flight operations within the state government of Oregon would not constitute commercial activity, the receipt of payment by the state of Oregon for any share of flight operations from any other governmental entity, local or federal, would constitute a commercial operation, absent a formal timesharing, interchange, or joint ownership agreement under 14 C.F.R. 91.501(b)(6). The provision of the Federal Aviation Regulations allowing for the sharing of flight expenses is limited to that of a private pilot sharing the operating expenses of a flight with his passengers. It would not permit the state of Oregon to accept payment from other governmental agencies for their "share" of the operating costs of the flight under Part 91. This would be true even if the payment were to be received by an agency of the state which did not, itself, provide the air transportation since we would consider the state to be the operator of the aircraft.

A limited exception to this general principle was created in P.L. 103-411, Sec 3. This legislation allows an aircraft to be operated on behalf of another unit of government pursuant to a cost reimbursement agreement if the using agency certifies to the Administrator of the FAA that the particular operation was necessary to respond to a significant and imminent threat to life, property, or natural resources and that no service by a private operator was reasonably available to meet the threat.

Sincerely,

George L. Thompson
Assistant Chief Counsel