March 22, 1932

To Frank H. Holley, Commissioner of Taxation
Re: Gasoline Tax Law Amendments

Anticipating that the legislative session for the purpose of considering the gasoline tax will be brief, of course we want to do everything we can to prepare the ground without trespassing on the legislative functions. As the administrator of the gas tax you are, of course, interested in its effectiveness, as am I because my department has the legal details of administration to look after.

In connection with preparing the brief in the Standard Oil case I had occasion to examine the gasoline tax laws of the country, and have now re-examined them somewhat carefully in comparison with our own, and in the light of the Supreme Court decision, for the purpose of aiding in the preparation of such amendment to our statute as will adequately express the legislative policy to tax use as well as sale in case the Legislature wishes to do this, as I anticipate they do.

Gas Tax History and Court Decisions.

Our Gasoline Tax Act was passed in 1923, thus being one of the early laws. Just before adjourning, the Legislature requested the Law Court to rule on the constitutionality of the tax, and this the Court did (123 Me. 576), although some of the judges, at least, were somewhat reluctant to rule in this way on the statute after the Legislature had adjourned.

At that time there was considerable legal doubt as to the validity of gasoline taxes. The Supreme Court of the United States had, in Standard Oil Co. v. Graves, 249 U.S. 389 (1919) held unconstitutional, as a direct burden on interstate commerce, a state oil inspection law imposing fees greatly in excess of the cost of inspection, and applicable to original packages imported into the state.

The next year in Askren v. Continental Oil Co., 252 U.S. 444, . . the Court ruled that the importer had a right to sell without breaking bulk or original packages.

The statute just interpreted came before the Supreme Court again in Bowman v. Continental Oil Co., 256 U.S. 642 (1921) and was held constitutional as far as it imposed an excise tax upon the use of gasoline imported by a dealer.

In Texas Co. v. Brown, 258 U.S. 466 (1921), the Court again invalidated a tax on gasoline brought into the state and held in storage.

These cases obviously developed considerable uncertainty, and the reason for the indefiniteness of our statute can thus be appreciated.

Our court, however, ruled flatly that an excise tax on "the sale and dealing in" an article is valid, and stated that the Maine

Constitution does not limit the Legislature in imposing excise taxes, in which respect Maine differs from New Hampshire and Massachusetts, which have had to sustain their gasoline taxes as licenses for the use of the highways or registration fees on automobiles using the highways.

Subsequently, the Supreme Court of the United States clarified the situation. In Sonneborn Bros. v. Keeling, 262 U.S. 506 (1923), the Court breaks away from the original package doctrine and holds that an occupation tax upon a dealer, even though measured by original packages imported and held for sale, is valid. The state may tax the sale of merchandise in an original package. The apparent inconsistency with some of the previous cases was explained on the theory that the tax on sales prohibited in the previous cases was on sales of gasoline which had been ordered outside the state.

In Pierce v. Hopkins Oil Corp., 264 U.S. 137 (1924) the Court held that the provision requiring the gasoline tax payer to bear the expense of collection was valid.

Panhandle
In/~~Panhandle~~ Oil Co. v. Mississippi, 277 U.S. 218 (1928) the majority of the court (four judges dissenting) forbade a state to collect a tax upon the sale of gasoline to the Federal Government or its agencies.

In Hart Refineries v. Williams, 278 U.S. 499 (1929) the court says that a state may tax either sales or use or both.

There have been several cases involving the right of the state to impose a tax upon gasoline used in interstate commerce.

In Helson v. Kentucky, 279 U.S. 245 (1929) the court (three judges dissenting) prohibited Kentucky from taxing gasoline bought elsewhere and used in Kentucky to propel a ferry boat between Kentucky and another state. This case and some lower court Federal cases following it (Mid-continent Corporation v. Lujan, 47 Fed. 2d, 266; U.S. Airways v. Shaw, 43 Fed. 2d, 148), have, however, been disapproved, distinguished and limited in several other cases. The District Court of Missouri in Central Transfer Company v. Commercial Oil Co., 45 Fed. 2d, 400 (1930) permitted Missouri to levy an excise tax on the sale of gasoline which had come to rest in Missouri, even though the purchaser expected to use it in interstate commerce.

In Eastern Air Transport, Inc. v. S.C.Tax Commission, 52 Fed. 2d, 456 (D.C.South Carolina 1931), Judge Parker ruled that a gasoline sales tax on distributors measured by sales of gasoline which the purchaser intends to use and does use in interstate commerce, is valid, and distinguishes the cases last referred to above as being cases which attempt to tax the artual use rather than the sale. Judge Parker says that a tax simply on a use in interstate commerce might be invalid, while a tax on the sale would be valid, even if after the purchase the goods were to be used in interstate commerce. The decision in this case has recently been affirmed by the Supreme Court, not yet reported.

The gasoline taxes of other states as well as of Maine must be interpreted in the light of these various decisions. The law now

seems clear that a state may tax any sale of gasoline which takes place within its borders, and any use of gasoline in the state, with perhaps the simple exception of gasoline purchased elsewhere and brought into the state for use and used in an interstate shipment.

Because of these doubts, which have been gradually resolved by the Supreme Court, elaborate devices have been adopted by various states to secure tax money on gasoline without interfering with the Federal Constitution. For instance, many states have supposed that they could not tax sales in the original packages, and therefore have imposed taxes upon the storing of imported gasoline, have sometimes set up an additional tax based on importations, and have carried through various other complicated devices.

An examination of the gasoline taxes of the country shows, however, that a tax on use as well as on sale is practically universal. Several states have recently amended their laws to extend the tax on sales to the tax on use. I find but two or three which now limit the tax to sales.

Conclusion as to Present Law.

We can safely conclude, therefore, that to extend our tax to cover uses excluded from the present wording of our statute by the Standard Oil Company decision would be constitutional under the Federal and Maine Constitutions. As a matter of figures, I understand that the effect of the ruling in the Standard Oil case will be to cause an annual tax loss to the state of from fifty thousand to two hundred fifty thousand dollars, besides introducing considerable uncertainty as to the present effect and meaning of our statute in various respects.

The Special Session.

The primary object of the special legislative session is to enact legislation to secure this missing income for the state in case the Legislature determines in favor of this policy. This is obviously an emergency not only justifying the calling of the session, but also justifying the passage of legislation bearing the emergency clause, on the ground that the public safety is affected. The budget on which the appropriations made by the last Legislature were based, and thereby the appropriations themselves, are seriously affected by this prospective loss in revenue.

Such legislation as is passed may, and it seems to me properly should, correct and clarify certain administrative details of the present law, to which attention is naturally directed by the Standard Oil decision.

It is hardly practicable to cover the situation by a single short expression of legislative intent; e.g., legislation stating that all gasoline used in the state wherever purchased shall be subject to tax on its use unless such tax has already been paid, or the provisions of Federal law prevent. Such curt legislation would leave for inter-

pretation many administrative questions. It seems to me that some more elaborate legislation is required.

On the other hand, our legislative policy is to build on to what we have and not repeal and redraft anew.

It seems to me that the prospective legislation which might properly be considered by the Legislature falls into three categories: first, the absolutely necessary provisions extending our sales law to uses; secondly, administrative details made reasonably necessary by this addition; thirdly, substantive and administrative additions and changes based on statutes of other states and legislative policy which in effect are new legislation, although germane to the purpose for which the Legislature is called together, and to some extent at least worthy of consideration.

Prospective Legislation

I have made a preliminary rought draft of changes in our gasoline tax act based on the foregoing considerations, and these I submit herewith for your suggestions. I am also forwarding a copy of this letter and these suggested amendments to the Governor, and will consult with you regarding the method of making this draft available for legislative use after such preliminary conferences and correspondence with legislative members as may seem advisable.

Following is a summary of the changes comprised in the draft hereto annexed, with the reasons therefor.

Section 79 - Definitions.

Two of the definitions in this section seem to require redrafting: viz,- "fuel" and "distributor". The definition of fuel is ambiguous because it does not make plain whether all gasoline is a taxable product or merely gasoline used in an engine. The opinion of this department, which has been followed in practice, is that all gasoline and benzol are taxable; no kerosene or crude oil; miscellaneous products such as naphtha taxable at four cents (subject in certain circumstances to three-cent rebate) if to be used in an engine. Gasoline sold for any purpose is hereby taxable subject to the rebate if used for special purposes. If this is the interpretation which the Legislature intends, it should be clearly expressed, or if some other interpretation is intended it should be expressed. Otherwise, we may find ourselves at some time in the future up against another Standard Oil case with litigation, confusion, loss of revenue and claims for refund. Examination of the statutes of other states shows several definite ways of classifying the taxable product. One class taxes any product "usable", "commonly used", "suitable", "which may be used", "can be used", "useful". A second class taxes products compounded "for the purpose of use" in an engine, frequently limiting taxable sales to sales on products "to be used". A third class enumerates in detail taxable products by flash tests and other technical tests, frequently using the expression "commonly known" as gasoline, etc.

A fourth class uses merely a brief general expression such as "motor fuel" or "products sold, consumed or used" "for producing

power" or "used in" engines. Kerosene and certain kinds of fuel oils are very generally exempted wholly as Maine exempts them, although in at least one state (Illinois) kerosene is taxable when mixed with more volatile liquids for engine use, and in a number of states kerosene and crude oil are taxable when used in an engine. Unfinished products and smudge oil are often expressly exempted.

Whether or not kerosene and crude oil should be wholly exempted, even when in an engine, is a question of policy for the Legislature. I suppose we should hardly suggest a change, although in redrafting the section I have in parentheses covered the possibility of kerosene when mixed with higher explosives, as in Illinois. This half-way measure can be readily struck out.

To cover the situation, as I understand it to be, I suggest alternatives, as you will see:

One of these makes three classes: one, gasoline; two, benzol; three, other products (except kerosene and crude oil), when sold or used for motor fuel. The other alternative specifies the third class as products capable of being used as a motor fuel.

I have drawn Section 80 alternatively to cover these same possibilities.

As to distributors, practically all the states levy the tax as nearly as possible on the first wholesaler who gets the gas in the state, and many states, like Maine, have a special clause (our section 85), taking persons who use untaxed gasoline in the state. The other special provisions in many states have been already referred to, with which we are not concerned.

Maine has a special provision classing as distributors those who purchase in five-thousand gallon lots either in or out of the state. This is a unique provision designed to extend the benefit of loss by shrinkage. As expressed, this provision overlaps the provision taxing importers. All importers are taxed anyway. The five-thousand gallon provision does not need to mention purchasers "out of" the state. Many states have a provision exempting importers in lots of twenty gallons or less in the tank of an automobile for use in the tank. Such a provision expresses in law the actual present practice, but if embodied in our law would clearly allow us to tax trucks and busses which sometimes bring in extra tanks of gas. The suggestion that these should be taxed has been made to the Governor by a legislator.

The redraft of the definition for "distributor" should, of course, clearly include use as well as sale.

The redraft herewith classifies as distributors, first, those importing for sale or use in this state; secondly, producers, etc., as now; thirdly, purchasers within the state in five-thousand gallon lots, for sale or use within the state and refers to the special classification in Section 85 for clearness. The fact is that the present definition is not substantially changed except as to the twenty gallon deduction in Section 85 fere referred to and the addition of use.

Apparently, under our present law, any purchase for exportation, however small, is free from tax. Technically, a bus can load up with gasoline at Kittery en route to Boston, tax free. I do not understand that there is any practical difficulty in this respect, however, which requires legislation.

Section 80 - the Tax Imposed.

The omission in Section 80 of an express provision taxing gasoline used is the basis of the Standard Oil decision. The words should therefore be "sold or used". Two forms for Section are suggested. In the first, the tax is levied upon fuel "sold or used", with the exceptions as now of gasoline not taxable by Federal laws (e.g., gasoline sold to the Federal Government), and gasoline sold for exportation. The twenty gallon exemption already referred to is added, and a proviso, as in many states, to make plain the existing practice which does not appear expressed anywhere in the statutes; viz,- that on the same fuel only one tax shall be paid, to be paid primarily by the distributor first receiving the fuel in the state, with the exception that this first distributor may omit paying tax on such fuel when sold and delivered in the state in five thousand gallon lots to another distributor who has to pay the tax. The three-cent rebate in certain cases is, of course, left unchanged.

The alternative redraft of a portion of Section 80,based on the second form of Section 79, makes an additional exception from the tax on fuel other than gasoline or benzol sold or used for other purposes than motor fuel. In other words, the first form of 79 and 80 includes only naphtha sold or used for motor fuel within the taxable products as now, so that no exemption of commercial naphtha from the operation of the tax in Section 80 is necessary. The alternative draft includes all naphtha in the taxable product because it is "capable of being used" as a motor fuel; but excludes from the tax naphtha sold or used for other purposes than motor fuel.

Our law has never made any provision for rebates on gasoline bought by a person other than a distributor, and subsequently wasted or lost. Some states do, but of course such a privilege is not to be added unless the Legislature says so. The effect of Sections 79 and 80, as redrafted in either form, is intended to be that the tax must be paid by someone on all gasoline sold or used in the state, and if, after it has been bought by a purchaser other than a distributor, it leaks away, he is, nevertheless, stuck for the tax. On the other hand, naphtha may be bought tax free for commercial purposes. If, however, it should subsequently be used for motor fuel, the user must pay a tax.

Some states expressly tax distributors for the gasoline used by them, but the sections as here drafted tax all uses. All uses would in effect be taxed if the law merely taxed the distributor for his use because the definition of distributors includes anyone who uses gasoline in the state and is not exempt by Federal law; but it seems to me it is clearer to expressly tax all uses rather than do it by implication and deduction.

Several states expressly set forth the "purpose" of their acts. This, it seems to me, is unnecessary. The act should speak for itself, by its terms.

Section 81 - Certificates.

Here is proposed a provision effectuating the probable present legislative intent regarding certificates. There is no provision in our statute for posting the certificate or taking it away from the distributor. Included in the redraft of this section, therefore, is a provision (as in many states) that a certified copy of the certificate must be displayed, and the certificate may be suspended. A provision for appeal is included, similar to the appeal now provided, from the suspension of certificates by the Bank Commissioner under the Blue Sky Act. Similar provisions for appeal appear in a few statutes, and should be included.

Many states require a license fee from the distributor, either once when he takes out his certificate or annually. Usually the amount is comparatively small, $2.00 or $5.00. This is a change of policy, however, for the Legislature to act on, and is therefore not included in the draft. So also of the bond which in many States is or may be required from the distributor.

Section 84 - Method of Payment

Here, of course, the essential change required by the Standard Oil decision is necessary; viz,- to add expressly that the tax is to be paid on gasoline used as well as on gasoline "sold or distributed". Certain additional administrative provisions are needed, which are included in the draft of the section. The present section merely taxes the distributor on the basis of his report. In practice, the administrative officials have made audits from time to time, and on the basis of the audit have demanded an additional tax on shipments received, but not accounted for. There should, however, be an express provision permitting the collection of such a tax. As it stands now, on a showdown all we can collect is on gasoline "reported" under Section 84, except by working out an implication from other sections to the effect that additional tax can be collected if the report is inadequate.

Moreover, the present provision regarding shrinkage allowances is ineptly drawn. It permits a one per cent "deduction" for losses in shrinkage, evaporation or handling, and larger deductions when certain other calamities have occurred. The practical intent of this provision probably was to free the distributor from liability for tax on an audit of his books on gasoline within these limits, received but not accounted for in his sales; but it does not say so. Strictly, as worded, the section seems to permit him merely to deduct from his payment for gasoline sold or distributed, for losses on the gasoline which this same distributor has bought not as a distributor; that is, has bought in less than five thousand gallon lots inside the state. In other words, the present provision strictly seems to contemplate merely this situation,- a distributor who is paying a tax as a distributor on his gasoline sold or distributed,

and at the same time has sustained some other losses on gasoline which he did not buy as a distributor, but bought in small lots and therefore paid the tax on at the time of the purchase,- certainly this is absurd.

It seems to me, also, that the commissioner should be permitted to make reasonable rules and regulations. He has this power in many states. He also should be expressly permitted to examine books, invoices and vouchers. He has no such express power at present, and might need it if a distributor proved antagonistic.

The redraft of Section 84, therefore, taxes gasoline used by the distributor as well as gasoline sold or distributed; permits the commissioner to make reasonable rules and regulations, and have access to documents; and provides for the imposition of an additional tax on an audit.

The shrinkage deduction is made applicable in case of such audit as is probably the intention of the present act, but includes in the allowable one per cent distributors' expense in complying with the provisions of the act. This provision appears in New York, Texas and a few other states, and although including it may possibly extend the present provision beyond the legislative expression, yet it seems fair, reasonable and in accordance with practice elsewhere, that the one per cent should be allowed equally to a distributor who is careful to avoid losses and shrinkages, but who is under an expense of collection.

Some distributors have indicated that there would be an attempt made to obtain from the Legislature a still higher percentage to cover expenses of collecting and other expenses. Whether such a higher figure is allowed is, of course, a question of policy for the Legislature. The redraft of this section merely takes the existing one per cent and adds a further cause for permitting it. Penalties now included in Section 84 are, of course, left unchanged.

Section 85 - Special Distributors

This section fills in the gaps and permits taxation of persons using gasoline in the state and not subject to taxation as distributors of one of the three classes in Section 80. This section as it now appears contemplates that use shall be taxed, and I relied on this in my argument to the Law Court as using the intent of the present act to tax use, but the Law Court overruled my contention. The section is good as it stands, but should have added to it the exemption of not more than twenty gallons brought into the state in the tank of a motor vehicle and used in its operation in this state, as above explained. The redraft adds that section, which is found in the gasoline tax of many states.

Section 86 - Application of Tax Collected

This section has, of course, been modified by P. L. 1931, Chapter 251, setting up a state highway fund. It does not require amending to carry out our present purposes.

Section 88 - Suits and Penalties

The redraft of this section adds breach of rules and regulations as a ground for penalty to correspond to the provision in a previous section permitting such rules and regulations to be made.

The section also provides, as in several states, that the claim of the state for taxes is a priority claim in the event of assignment, receivership or bankruptcy. Whether or not this is now the law is not clear, but it certainly is a proper provision which we would seem to be justified in adding to the act.

The redraft also provides expressly, as in several states, for the method of proof in the event of suit. As the law now stands, in case of suit the state must apparently prove that the gasoline on which the tax is sought was sold or used in the state, and there is a possibility even that it must be proved that it was reported. For this reason, payment of several gasoline tax claims based on audits has been refused, and the Attorney General was hampered in effecting collection, and might not be able to prove his case on a showdown in court. For the state to prove that the gasoline has been sold or used means that an amount and character of proof difficult to obtain, based as it is on data within the possession of the defendant, must be produced. The redraft of this section, therefore, based on a Missouri provision, sets up as the state's prima facie case the distributor's receipts, less the one per cent deduction already referred to and his balance on hand.

Section 89 - Refunds.

These involve a question of policy and necessitate no redraft. . .

Section 89-A.

It is suggested that for convenience a section be added naming the gasoline tax sections as "The Gasoline Tax Act", and the tax as "The Gasoline Tax". This is the current practice and would save considerable circumlocultion. Strictly the tax can now simply be referred to as the tax provided in certain sections of the Revised Statutes upon internal combustion engine fuels.

Final Section

In order to cover the present situation due to the pending referendum of P.L. 1931, Chapter 236, which raises the present gasoline tax from four to five cents, a section is suggested to take effect in the event that the five cent tax is adopted by the people, which will make such a five cent tax effective as a tax on use. Otherwise, the effect of adopting the referendum would be for the courts to determine, but the result might be that from the time when the referendum was adopted until the next Legislature convenes, uses would not be taxed in accordance with the intent of the Legislature at this special session. Other devices for accomplishing the same effect with reference to the referendum election are, of course, possible, but this is suggested as a simple way of bringing the object to pass.

Clement F. Robinson
Attorney General

NOTE: See opinion of July 28, 1932, after the session.