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DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

June 16, 1983

Honorable Carl B. Smith
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Smith:

On June 9, 1983 you inquired as to the constitutionality of Legislative Document 1754, "AN ACT Creating a Maine Milk Pool" (the "bill").1/ For the reasons which follow, it is the opinion of this Department that the bill, if enacted, would not violate Article IX, Section 9 of the Maine Constitution, the "taking" clauses of the United States or Maine Constitutions,

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1/ Strictly speaking, your request related to a typewritten redraft of Legislative Document 1450, which redraft has now been printed as L.D. 1754. This response addresses L.D. 1754 only.

or the Equal Protection Clause of the United Constitution.2/

I.Article IX, Section 9 of the Maine Constitution.

Article IX, Section 9 of the Maine Constitution provides that:

> The Legislature shall never, in any manner, suspend or surrender the power of taxation."

In your first question, you ask whether the collection of money

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2/ Since the date of your request, the Maine Senate has given initial approval to L.D. 1754, affixing thereto an amendment which would exempt from its provisions producer-dealers in the "northern Maine market." Sen. Amend. A to L.D. 1754, No. S-210 (111th Legis. 1983). A suggestion has been made that this discrimination among Maine producer-dealers might violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

In scrutinizing legislation under this clause, the United States Supreme Court and the Maine Supreme Judicial Court have made it clear that they will not invalidate a legislative discrimination unless it is without any rational basis. Plyler v. Doe, 457 U.S. 202, 216 (1982); Inhabitants of Town of Kittery v. Campbell, 455 A.2d 30, 33-34 (Me. 1983). This office understands that the basis put forth by the proponents of the amendment is that a significnt difference exists in the costs of production between those areas included in the milk pool and those in the northern Maine market. Fully one half of the panoply of operational expenses incurred by every milk producer is subject to increased costs in the northern counties due to geographic isolation. In the instance of feed grain, which accounts for approximately thirty percent of operating costs, this additional expense has two components: due to the shorter growing season, less grain may be grown and more has to be imported at a price which reflects greater transport costs. In addition, one assumption upon which the redistribution is based, that Maine market producers enjoy a net income which is substantially greater than their Boston market counterparts, is less persuasive for producers in the northern counties, one of the poorest areas in the State. This office cannot say that this explanation for the need for discriminating between northern and southern Maine milk producer-dealers is so lacking in rationality as to be unable to survive the minimal scrutiny to which it might be subjected under the Equal Protection Clause.

from milk producers contained in L.D. 1754 constitutes a tax. In your third question, you ask that if the collection is a tax, whether it would violate Article IX, Section 9 of the Maine Constitution in that the formula in the bill for fixing the amount to be collected contains one variable which is to be determined by reference to a pricing order of the United States Government. In the view of this Department, it is unnecessary to answer this latter question because the assessment in question is not a "tax," within the meaning of the constitutional provision.

Section 4 of the bill, if enacted, would raise money for two separate purposes.[3] First, it would reenact as 7 M.R.S.A. § 3155(2)(B) a milk promotion tax formerly authorized by P.L. 1979, c. 452 and declared unconstitutional in Boston Milk Producers, Inc. v. Halperin, 446 A.2d 33 (Me. 1982).[4] As the Court held, this amount, which is to be deducted by the Commissioner of Agriculture, Food and Rural Resources (the "Commissioner") from total pool payments received, is a tax. The remaining balance, less administration fees, under proposed 7 M.R.S.A. §§ 3153(4) and 3154(3) would be redistributed to all Maine market and Boston market producers. Your inquiry is particularly directed at the constitutionality of the collection of funds which will be the subject of this redistribution. For the reasons discussed below, it does not appear that the collection of these funds would constitute a tax.

In its simplest terms, "[a] tax is generally understood to mean the imposition of a duty or impost for the support of government." Brewer Brick Co. v. Brewer, 62 Me. 62, 70 (1873); cf., Morris v. Goss, 147 Me. 89. 83 A.2d 556, 564 (1951). Thus, not all moneys collected by the government are deemed taxes. Maine case law has distinguished between taxes and license fees (Board of Overseers of the Bar v. Lee, 422 A.2d 998 (Me. 1980)); taxes and service or user fees (United States v. State of Maine, 524 F. Supp. 1056 (D. Me. 1981)

3/ Section 3 of the bill requires the payment of milk dealer license fees to support the activities of the Maine Milk Commission and the Maine Dairy and Nutrition Council. These payments are best regarded as license fees, not taxes.

4/ The prior law was declared unconstitutional because its effectiveness was made contingent upon a referendum, which contingency was found by the Court to constitute a surrendering of the power of taxation in violation of Article IX, Section 9. The bill contains no referendum provision.

(interpreting Maine law); and taxes and industry self-assessments (Boston Milk Producers, Inc. v. Halperin, 446 A.2d 33 (Me. 1982)). The clearest indication that a governmental exaction is a tax is whether it has as a goal the raising of revenue. See, e.g., City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); Virgo Corp. v. Paiwonsky, 384 F.2d 569 (3d Cir. 1967) cert. denied. 390 U.S. 1041, reh. denied 392 U.S. 917 (1968).

There is no revenue-raising function at all in the redistribution provisions of L.D. 1754. The total volume of payments which Maine market dealers must periodically pay their producers under the minimum price provisions of the Milk Commission Law, 7 M.R.S.A. § 2951 et seq. would remain unchanged under this legislation. Because dealers are no more than conduits for the collection and distribution of pool payments, L.D. 1754 cannot be deemed a tax as to them. Nor would L.D. 1754 as amended, see note 2, supra, raise revenue from the Maine market producers who would fund the pool established by § 3153. Unlike taxes, moneys paid into the pool would not be held in the State Treasury for governmental purposes (see Boston Milk Producers, Inc., supra, at 38), but would reside there only temporarily until redistribution is made to Maine and Boston market producers according to the Commissioner's rules for the operation of the pool. (See proposed 7 M.R.S.A. §§ 3153(1), (4)). L.D. 1754 merely mandates a continuing transfer of funds from one group of milk producers to another, creating an ongoing program of intra-industry subsidization for which the government is an administrator.

Many years ago the U.S. Supreme Court recognized that the essential attribute of taxation -- the raising of revenue -- was absent from such transfer programs. In Butler v. United States, 297 U.S. 1 (1936) the Court declared the Agricultural Adjustment Act of 1933 to be unconstitutional because the federal regulatory programs established thereby encroached, in the Court's view, upon the legislative powers reserved exclusively to the states under the Constitution. The AAA as originally enacted authorized a levy, expressly denominated a tax, on processors of agricultural commodities. The money so collected was earmarked for payment to producers who voluntarily reduced crop acreage. In an attempt to find a Constitutional haven for the Act, the government claimed that insofar as it was founded on the processing tax, the entire program was authorized by Art. I, § 8, ch. 1, which confers powers of taxation on the federal government. It was in this context that the Court in Butler, rejecting the government's argument, held that the transfer payments were not taxes:

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue, and legalized as a mere instumentality for bringing about a desired end. To do this wuld be to shut our eyes to what all others can see and understand. . .."
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> 297 U.S. at 61.

In Rickert Rice Mills v. Fontenot, 297 U.S. 113 (1936) the Court affirmed this holding with but short discussion, and since that time has done nothing to call into question the validity of the distinction between taxes and agricultural transfer payments.

Another consideration, not heretofore discussed, further leads us to conclude that pool redistributions are not taxes. The sole portion of the Maine producers' revenue which is payable into the pool is the so-called "Maine market premium," i.e., that amount by which the milk receipts of Maine market producers exceeds the milk receipts of Maine producers who sell their milk on the federally-regulated Boston market. As discussed in proposed 7 M.R.S.A. § 3151 of the bill, entitled "Legislative Findings and Intent", the object of L.D. 1754 is not to share with Boston market producers the entire receipts of Maine market producers, but only the increment represented by the Maine Market premium. For it is this amount which is attributable to the juxtaposition of state minimum pricing regulation (the Maine Commission Law) against the framework of the Federal Milk Order No. 1, which prevails in southern New England.

The Maine market premium is created by the Maine Milk Commission's use of the Boston-market classified prices dollar-for-dollar to establish Maine minimum producer prices under 7 M.R.S.A. § 2954(2)(A). Because the Maine market dealers have a much higher Class I (i.e., drinking use) utilization rate than do the Boston market dealers which the federal classified prices were developed to regulate, the so-called blend price payable to Maine market producers is markedly higher than that received by Boston market producers overall. Nor does the Maine Milk Commission, in establishing minimum prices payable to Maine market producers, recognize the location differentials included in the federal order which generally reduce the net revenues of producers subject to that order according to their distance from Boston.

The incongruency of transplanting part of the federal regulatory scheme into different economic soil is thus largely responsible for the existence of the Maine market premium. It is the creation of the Maine Legislature acting through the Maine Milk Commission. So viewed, the reblending proposal of L.D. 1754 is nothing more than the Legislature's modification of an existing agricultural subsidy program, funded by Maine market dealers, to include more producers within its scope. Although Maine market producers may have grown accustomed through passage of time to the exclusive enjoyment of this subsidy, the Legislature has always possessed the authority to add to the program's beneficiaries. Thus, far from being a tax, the proposed Milk Pooling Law is in essence an alteration of the minimum producer pricing scheme contained in the Milk Commission Law.

II. The "Taking" Clauses.

In your second question, you ask whether the redistribution provisions of L.D. 1754 violate the "taking" clauses of the Fifth Amendment of the United States Constitution and Article I, Section 21 of the Maine Constitution, in that they will reduce the income currently accruing to Maine market producers under the existing regulatory scheme.

Both constitutional provisions provide that "private property" may not be taken for public uses without just compensation. The first issue to be resolved in any "taking" question, therefore, is whether the interest of the person asserting a right to compensation is "property" within the meaning of the clauses. As discussed above, the pool payments approximate only the incremental value to the Maine market producers attributable to the price-setting activities of the Maine Milk Commission. In the absence of the Maine Milk

Commission, the price received by Maine market producers in an unregulated market would presumably be closely attuned to the Boston market blend price as periodically established by the federal market administrator. The increased income of the Maine market producers is thus a direct result of a government regulatory program. This office is aware of no authority that such a benefit is the "property" of the recipient so as to be immune from prospective legislative curtailment.

It should be further noted that since the decisions of Butler v. United States and Rickert Rice Mills v. Fontenot, supra, in 1936 the constitutionality of milk pools has been consistently upheld as against "taking" challenge. The 1937 amendments to the Agricultural Adjustment Act, 7 U.S.C. § 601, et seq., included the enabling legislation for milk marketing orders. Then, as now, the AAA permitted milk orders to provide for uniform payments to all producers selling to all handlers subject to the order based on the market-wide utilization rate of all handlers. See 7 U.S.C. § 608(c)(5)(B)(ii). This was accomplished by means of producer settlement funds. Handlers whose utilization rate exceeds the overall utilization rate pay into the fund. Handlers whose utilization rate is below the market average draw their shortfall from the fund. This, of course, characterizes the operation of the New England Milk Marketing Order at the present. On a larger scale, these pools are similar to the proposed Maine milk pool.

The establishment of the New York and Boston milk marketing orders produced a welter of litigation in which handlers sought to invalidate those orders on a number of grounds. As part of this attack they alleged that the equalizing features of the producer settlement funds, by preventing them from paying producers according to their own utilization rates, deprived them of liberty and property without due process of law.

In United States v. Rock Royal Co-op, 307 U.S. 533, 571-73 (1939) (N.Y. order) and H.P. Hood & Sons v. United States, 307 U.S. 588, 595 (1939) (Boston order) this challenge was squarely rejected. The Supreme Court characterized such pools as devices "reasonably calculated" to foster orderly milk marketing by eliminating the cutthroat competition earlier engendered by surplus production and the associated non-desirability of serving the surplus market. The constitutionality of equalization pools was also sustained in United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Crull v. Wickard, 137 F.2d 406 (6th Cir. 1943); and Green Valley Creamery v. United States, 108 F.2d 342 (1st Cir. 1939).

III. Equal Protection Clause.

Your final question is whether the assessment procedure in L.D. 1754 which requires different dealers or producers to pay unequal amounts violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The short answer to this question is that, for purposes of the clause, the dealers and producers are not unequally treated.

The formula for determining the amount which each producer is to contribute to the milk pool is the same for all producers. Simply put, each Maine market dealer calculates what payment would be due its Maine producers at its utilization rate and the amount which would be due these producers at the applicable utilization rate for the New England Milk Marketing Order. The producer receives the latter and any additional payment which might be received under the former calculation is tendered to the milk pool. Although the actual amount paid into the pool will differ from dealer to dealer, depending, for example, upon the size of his business and his utilization rate, the formula for payment is the same for all dealers. There is, therefore, no unequal treatment under the Act which might violate the Equal Protection Clause.

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I hope this reply satisfactorily responds to the questions you have raised concerning L.D. 1754. If I can be of any further assistance, please feel free to reinquire.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/d

cc: Senator Beverly M. Bustin
Representative Donald M. Hall
Representative Robert G. Dillenback
Representative Patrick K. McGowan