April 8, 1993

Honorable Ramona Barnes
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Re: January 15 letter from
Kenneth Mears
AG File No.: 663-93-0393

Dear Representative Barnes:

You recently asked our opinion whether a plan proposed by one of your constituents, Mr. Kenneth Mears, would be constitutional. It is our opinion that his plan, as it is presently stated, would likely be held unconstitutional. This conclusion is based on the following analysis.

In his January 15, 1993, letter to you, Mr. Mears describes his plan as "STATE BUSINESS TAX INCOME FROM NON-RESIDENT RESOURCE FREELOADERS." Under the plan, he proposes that a 10 percent renewable resource tax be levied on the gross business income of all guides, outfitters, and commercial fishermen. However, this tax would be offset by a credit, dollar for dollar up to $100,000, for persons who receive permanent fund dividends. In other words, all non-residents and persons who otherwise do not receive a PFD would pay the full tax, but resident PFD recipients would pay only the tax that exceeds $100,000.

There are several constitutional provisions that are pertinent. One is the Privileges and Immunities Clause of article IV, section 2 of the United States Constitution. It provides: "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[1]

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[1] Mr. Mears's plan also implicates the Commerce Clause, article I, section 8, clause 3 of the U.S. Constitution. Analysis under the Commerce Clause is similar to the analysis under the Privileges and Immunities Clause. Since it would be anomalous to conclude that a plan that facially discriminates against interstate commerce could pass muster under the Privileges and Immunities Clause, yet fail under the Commerce Clause, we will analyze Mr. Mears's plan under only the Privileges and Immunities Clause. *See Carlson v. State*, 789 P.2d

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. . . . In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Toomer v. Witsell, 334 U.S. 385, 395-96, 68 S. Ct. 1156, 1162, 92 L. Ed. 1460 1470-71, *reh'g denied,* 335 U.S. 837, 69 S. Ct. 12, 93 L. Ed. 389 (1948) (footnote omitted).

Less favorable treatment of nonresidents by the state runs afoul of the Privileges and Immunities Clause if the activity in question is "`sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the [clause]," and if "[it] is not closely related to the advancement of a substantial state interest." *Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 64-65, 108 S. Ct. 2260, 2264, 101 L. Ed. 2d 56, 63 (1988) (citations omitted). *See also Toomer,* 334 U.S. at 396, 68 S. Ct. at 1162; *Robinson v. Francis,* 713 P.2d 259, 263-64 (Alaska 1986).

Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause. *Carlson v. State*, 789 P.2d 1269 (Alaska 1990). *Compare Baldwin v. Fish & Game Comm'n of Montana,* 436 U.S. 371, 388, 98 S. Ct. 1852, 1962, 56 L. Ed. 2d 354, 368 (1978) (sport or recreational hunting not protected by Privileges and Immunities Clause). We believe that the same would be true for commercial outfitting and guiding.

1269, 1277 m.5 (Alaska 1990). Also, since we conclude that his plan would likely fail a challenge under the Privileges and Immunities Clause, we will not analyze it under three other constitutional clauses that are implicated--the equal protection clause of the U.S. Constitution (art. XIV, • 1), the equal protection clause of the Alaska Constitution (Art. I, sec. 1), and the "uniform application" clause of the Alaska Constitution (art. VIII, • 17).

Because license fees that discriminate against nonresident commercial fishermen are *prima facie* a violation of the Privileges and Immunities Clause, *Carlson*, 798 P.2d at 1274, it is reasonable to conclude that a tax scheme that discriminates against commercial fishermen, commercial outfitters, and guides would likewise be a *prima facie* violation of the clause. Thus, to avoid being found unconstitutional under the clause, Mr. Mears's business tax would have to satisfy two requirements. First, there would have to be a "substantial reason" for imposing the tax differentially on resident and nonresident commercial fishermen, guides, and outfitters. Second, placing virtually all of this related tax on nonresidents would have to be "closely related" to furthering this reason. *Carlson*, 798 P.2d at 1274. [2]

Concerning the first requirement, the U.S. Supreme Court examined South Carolina's practice of charging nonresidents 100 times more than residents for commercial fishing licenses. *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S. Ct. 12, 93 L. Ed. 389 (1948). The Court held that it was permissible "to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or any conservation expenditures from taxes which only residents pay." *Id.* at 399, 68 S. Ct. at 1163. Thus, the "substantial reason" that justified the discriminatory license fee was the nonresidents' proportional cost of fisheries management that, for residents, is paid by their taxes. *See also Mullany v. Anderson*, 342 U.S. 415, 416, 72 S. Ct. 428, 430 (1952). Under the same reasoning, Mr. Mears's business tax would arguably serve a "substantial reason" because it would pay the nonresidents' proportional cost of fish and game enforcement, conservation, and other state services--costs that for resident fishermen, guides, and outfitters are supported by other taxes paid by them.

The second requirement calls for a "close relationship" between this "substantial reason" and the particular tax plan proposed by Mr. Mears. His plan bears some resemblance to the

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[2] We conclude that virtually all of this tax would fall on non-residents and the few residents who do not receive PFD's. PFD recipients would receive a credit against the tax of up to $100,000. Since the tax rate is 10 percent of gross income, a PFD recipient would not begin paying Mr. Mears's tax until his or her income exceeded $1,000,000. It is unlikely that any commercial fishermen, guides, or outfitters earn an annual income that exceeds $1,000,000.

state's policy of charging a fee for nonresident commercial fishing licenses and limited entry permits that is three times greater than the fee that is charged for resident commercial fishing licenses and permits. Nonresident fishermen challenged this fee differential under the Privileges and Immunities Clause and other legal grounds. *Carlson*, 789 P.2d at 1269. The Alaska Supreme Court decided that it could not determine whether the 3:1 ratio constituted a "close relationship" to the state's "substantial reason." The Supreme Court sent the case back to the trial court, and directed it to conduct further proceedings consistent with this analysis:

> The proper focus in our view is on whether residents and similarly situated nonresidents are being treated with substantial equality. The appropriate inquiry is thus whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.
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> The language of *Toomer* to the effect that it would be permissible "to charge nonresidents a differential which would merely compensate the state . . . for any conservation expenditure from taxes which only residents pay" requires additional discussion. We read this statement to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out of which conservation expenditures were made, then differential fees would not be permissible. That, however, is not the case in Alaska where a very high proportion of total state revenues are derived from petroleum production. For example, in fiscal year 1986, 86 percent of state revenues were so derived. *Trustees for Alaska v. State,* 795 P.2d 805-810 (Alaska 1990). Thus, in 1986, it would be correct to say that eighty-six cents of each dollar spent for conservation came from state revenue sources to which nonresident fishermen made no contribution. These revenues could have been used to benefit residents through various other programs and they are, analytically, equivalent to "taxes which only

> residents pay."
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> The point of *Toomer*, thus, is that the state may equalize the economic burden of fisheries management; where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference. On this record we are unable to determine whether the higher fees charged nonresidents are excessive for this purpose. Thus, we are unable to say whether there is "a fairly precise fit between remedy and classificaiton [sic]." *Taylor v. Conta,* 316 N.W.2d at 823 n.17. The burden is on the state to make this showing.

Carlson, 798 P.2d at 1278.

It is clear from the *Carlson* decision that the state cannot impose an arbitrary differential between residents and nonresidents. To be constitutional, the amount of Mr. Mears's tax and his credit for residents would have to be based upon (1) the overall cost to the state of providing services to commercial fishermen, guides, and outfitters; (2) the proportion of this cost that resident commercial fishermen, guides, outfitters should pay and the amount that nonresidents should pay, based upon their respective numbers; and (3) an amount attributable to the residents' proportionate cost that is based on their payment of other state taxes or on petroleum revenues in lieu of these taxes.[3]

It is unlikely that the resident and nonresident revenues generated by Mr. Mears's plan would be consistent with the *Carlson* case. Only by coincidence would the taxes collected under his plan be the same as those collected by a plan that complies with the above principles. Accordingly, we believe that his plan, as presently stated, would probably not survive a legal challenge under the Privileges and Immunities Clause.

Please contact us if we can be of further assistance.

Sincerely yours,

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[3] The trial court in *Carlson* has not made a final determination on this last factor, that is, how much oil revenues can be attributed to the residents' proportionate cost. Until the courts decide this critical issue, it will not be possible to formulate a precise resident-nonresident tax differential.

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