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Percival P. Baxter's Vision for Baxter State Park: An Annotated Compilation of Original Sources in Four Volumes. Vol 2

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Friends of Baxter State Park

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Percival P. Baxter's Vision for Baxter State Park

An Annotated Compilation of Original Sources
in Four Volumes

Volume
II

Friends of Baxter State Park
Bangor, Maine

Percival P. Baxter's Vision for Baxter State Park

An Annotated Compilation of Original Sources

Volume II

Katahdin From Near Foster Field
Lou Mucci, 2004
Commissioned by Friends of Baxter State Park

Percival P. Baxter's Vision for Baxter State Park

An Annotated Compilation of Original Sources

Volume II

Compiled and Annotated by
Howard R. Whitcomb, Ph.D

Friends of Baxter State Park
Bangor, Maine

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P. O. Box 1442
Bangor, Maine 04402-1442
Second Printing 2008

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ISBN numbers are provided by The Osprey Press, Wiscasset, Maine
courtesy of The Chewonki Foundation

Percival P. Baxter's Vision for Baxter State Park
An Annotated Compilation of Original Sources
Compiled and Annotated by Howard R. Whitcomb
1 - 887940-08-1

Volume I:	Deeds of Trust and Judicial Opinions	
	1-887940-09-x	
Volume II:	Attorney General Opinions	
	1-887940-10-3	
Volume III:	Speeches and National Park Controversy Correspondence	
	1-887940-11-1	
Volume IV:	Correspondence Related to Baxter State Park	
	1-887940-12-x	

Painting Opposite Title Page: *Katahdin from Near Foster Field* by Lou Mucci, Alna, Maine

Design, Formatting, and Printing by:
J.S. McCarthy Printers • 15 Darin Drive • Augusta, Maine 04330-9479

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FOREWORD

Baxter State Park first inspired awe and fascination in me more than twenty years ago. It was then that my family and I first climbed Katahdin and camped at Roaring Brook. Subsequent treks to Russell Pond and Wassataquoik Lake, climbs up North Traveler and Doubletop, dips in the frigid kettles of Howe Brook and volunteer weeks at Daicey Pond deepened my respect for Baxter State Park, its visionary donor and the philosophy that guides its management.

The history of Baxter State Park is as complicated as it is remarkable. Governor Percival Baxter was not just a visionary. He was also one of the most determined, persistent and patient persons ever to live. It took him more than thirty-two years and more than two dozen separate land acquisitions to assemble all of the pieces of his "puzzle". The acquisition process was marked not only by Governor Baxter's tenacious persistence, but also by considerable negotiation and compromise. The result was one of the most unique public parks in the world: more than 200,000 acres of majestic mountains and forests.

Governor Baxter's gift to the people of Maine included not only a vast wilderness sanctuary but also an area designated for scientific forestry management. The Governor knew that controversy, political and otherwise, would inevitably surround management of the Park. That is why in 1939, he had the Park's enabling legislation amended so that responsibility for Park management would lie in the hands of the independent, three-person Baxter State Park Authority.

There have been, and undoubtedly will continue to be, controversies surrounding the wilderness concept that Governor Baxter evoked for much of the Park. The contextual meaning of trust phrases such as "natural wild

state" and "sanctuary for wild beasts and birds" has been the subject of a great many discussions over the years. So has the operation of scientific forest harvesting within Park confines. Until his death in 1969, Governor Baxter himself expressed his desires on the interpretation of the deeds of trust in a number of situations. Since his death, it has been necessary to research the various deeds of trust, a multitude of legal opinions and other documents in order to glean the Governor's intent with respect to certain Park management issues. To conduct such research required substantial effort since not all of the source documents were easily accessible.

Now, thanks to the efforts of the independent group Friends of Baxter State Park, all of the source documents that chronicle Governor Baxter's vision and intent for the Park have been collected and compiled in this four volume collection. The collection includes the deeds of trust, judicial opinions, Attorney General opinions, as well as Governor Baxter's speeches and correspondence. The collection also includes annotations by Professor Howard R. Whitcomb.

This collection is important because it will increase the clarity of, and accessibility to, these primary source documents. Such documents are critical because they reveal Governor Baxter's original thinking and trace its evolution over time. The collection will also increase the public's understanding and appreciation for the detailed information gathering and analysis that have accompanied Park management decisions over the years.

On behalf of the Baxter State Park Authority and the People of Maine, I congratulate and thank the Friends of Baxter State Park for undertaking and successfully completing this project. I particularly recognize and thank Professor Whitcomb for his fine work in managing the project and authoring the annotations. These volumes of annotated materials will help future generations of Maine people to better understand, appreciate and protect the very special gift given to them by Governor Percival Baxter.

G. STEVEN ROWE
Maine Attorney General
Chair, Baxter State Park Authority
April 2005

Preface

Friends of Baxter State Park is enormously pleased to contribute to public discourse and scholarship this four-volume annotated compilation of original sources, collectively conveying Governor Percival P. Baxter's intent and vision for the park, his unparalleled gift to the people of Maine. Herein are gathered together for the first time in one source the Deeds of Trust, legislative interpretations, opinions of Attorneys General, appellate court opinions, and Baxter's voluminous speeches and correspondence.

Purpose

Baxter State Park is unique among parks. It was conceived and created by one man, Governor Percival P. Baxter, who today is the hero of park users and conservationists from near and far. It was Baxter who:

- Doggedly bought and paid for every single parcel, amounting to 201,000 acres as of his last gift in 1963,
- Specified the governing structure and ground rules for park management as he gifted his "building blocks" to the state,
- Capitalized a trust fund for its operation and long term survival, and
- Guided policy and operations until his death in 1969.

Baxter was both a visionary and pragmatist. The conditions upon which he gave the park to the State of Maine are specific. Even if some of his words are not always consistent, taken as a whole, they are clear: his foremost purpose was to retain and enhance the park's wild state, for nature itself, as it were. Within that context, he also wished to provide opportunities for the people of Maine to experience this wildness apart from development.

But what does this mean today, especially when few alive actually knew the man and heard his ideas, and when technology has changed the ways in which we use the out-of-doors? How may the public trust remain as true as possible to the Governor's wishes? While current Park Director Irwin "Buzz" Caverly certainly had the privilege of first-hand instruction from the Governor, his successors most surely will not. Nor will other officials and citizens involved in the administration, management, and safeguarding of the park.

Friends of Baxter State Park offers these annotated materials in the belief that this knowledge is vital to ensuring that the Governor's wishes continue to endure in park management and administration. Much of the material herein has not been previously available to the public. Locating and using it should be easy for anyone.

We first began the project as a means of understanding within our own organization the basis for the Governor's intent and actions in establishing a wilderness park, even as he made concessions for hunting and forestry in acquiring some parcels, to get the job done. Our mission as an independent citizen's group is to help preserve, support, and enhance the wilderness character of the park, in the spirit of its founder. In carrying out this mission, we must ensure that we have our facts straight. This valuable resource will help us immeasurably. We hope you likewise will find it useful.

Organization

The seven parts of this compilation are organized into four volumes. Each part begins with an "Overview;" followed by brief "Annotations." The "Documents," copied from copies of originals from the sources consulted, complete each part.

Volumes I — II, Parts 1-3: Legal Documents

The first three parts are legal documents through which the park was created and by which the Governor's intent and transactions have been interpreted. These include the Deeds of Trust and Judicial Opinions (Volume I, Parts 1-2), presented chronologically, and Attorney General Opinions (Volume II, Part 3), treated by subject matter.

Volumes III — IV, Parts 4-7: Speeches and Correspondence

Three of the last four parts contain private exhortations and ideas that the Governor expressed about the park in speeches and correspondence. Hopefully, most of the countless extant materials are contained herein. The other part, in addition to personal items pertaining to Baxter himself, consists of documents recognizing his accomplishments such as letters of commendation from former U.S. Secretary of the Interior Stewart L. Udall and former Associate Justice of the Supreme Court William O. Douglas.

Speeches about Katahdin comprise Part 4 (Volume III).

Correspondence related to the attempt in the mid-1930s to create a national park in the Katahdin area, that the Governor headed off, make up Part 5 (Volume III). This correspondence is separated from that of Part 7 (Volume IV) because of its particular content.

Part 6 (Volume III) includes personal items, including his will and trust documents, and awards bestowed upon Governor Baxter.

Part 7 (Volume IV) comprises the remainder of his correspondence, selected for its bearing on his vision and intent for Baxter State Park. It is organized by subject matter to aid the user.

Research Limitations

Professor Whitcomb attempted to avoid interpretative judgments in his annotations, leaving such to the users of the four volumes, and the courts and attorneys general of the state.

Professor Whitcomb was not asked, nor did Friends of Baxter State Park expect him to conduct, independent research as an historian might do. Friends directed his efforts to the documents willingly made available by the Office of the Attorney General of the State of Maine, Baxter State Park Headquarters, and the Maine State Library which holds the Percival P. Baxter Collection. The State Library's guide to that collection appears as an Appendix in Volume I of this compilation. Professor Whitcomb did not use the Baxter scrapbooks that were in the process of restoration. That restoration will be completed soon and interested parties should consult the excellent index that is included in the aforementioned guide.

Availability

Thanks to the generosity of the Davis Conservation Foundation and other donors including Jon Lund, Robert Morrell, and Rupert White, copies will be made available to the Office of the Attorney General and Baxter State Park Headquarters. The general public will have access to the four-volume set at the Maine State Library, Maine State Law Library, Cleaves Law Library (Cumberland County), Maine Historical Society, and public libraries in Bangor, Portland, and Presque Isle (Mark and Emily Turner Memorial Library).

A Word of Thanks

Finally, we acknowledge the extraordinary contribution of Dr. Howard Whitcomb, Emeritus Professor of Political Science of Lehigh University, in bringing the material to publication. With little compensation, but much support from state and park officials and others whom he has named in his Acknowledgments, and the Friends of Baxter State Park subcommittee who guided his effort, Dr. Whitcomb painstakingly compiled, organized, and annotated the 1500 page set. We are grateful to him and to all who have helped him in his research.

Friends also commissioned Lou Mucci to paint a watercolor reflecting the park's capacity to inspire. It is his watercolor that graces this work, and we thank him.

May Governor Baxter's beloved park remain forever wild!

Charlie Jacobi,
President, Friends of Baxter State Park
Bar Harbor, Maine

Acknowledgments

I was pleased to have been asked by the Friends of Baxter State Park (FBSP) to take primary responsibility for this documentary project. My half-century of hiking and camping experiences in Baxter State Park began as a 13 year-old when my summer camp party climbed Katahdin via the Cathedral Trail. I even had the good fortune a few years later to meet Governor Baxter. I have been drawn back regularly to explore some of the Park's more remote locations and in each of the intervening decades I have climbed Katahdin. As a retired political scientist, I felt comfortable accepting the FBSP's invitation to undertake this project, while at the same time hoping that my efforts would be worthy of the confidence that had been shown in me.

For the past several years, it has been a distinct pleasure to work closely with three of the founding members of the FBSP's Board of Directors — John Neff, Holly Dominie, and Don Hudson. They have provided valuable guidance and, at times, much needed prodding. John Neff's extensive knowledge of and research on Katahdin helped point me in the right direction on a number of occasions. Likewise, the Board of Directors provided encouragement and unflagging support. My son, Gerald R. Whitcomb, with whom I share wonderful memories of the Park, provided invaluable assistance by critiquing my annotations.

The compilation of materials was greatly facilitated by the cooperation of the State Library, the Department of the Attorney General, and Park Headquarters in Millinocket. In particular, I would like to thank Maine State Librarian, J. Gary Nichols, and his staff, notably Ben Keating, Elaine Stanley and Louise Hinkley, for the courtesies extended to me on my many visits to the Baxter Collection at the State Library. Attorney General Steven Rowe and his deputy, Paul Stern, shared documents in their possession that were unavailable elsewhere. Finally, Park Director Irvin C. (Buzz) Caverly, Jr. was of enormous assistance. The multi-colored maps that accompany the annotations for the deeds of trust (Vol. I), were produced specifically for this project by Director Caverly and his staff. Furthermore, it was Buzz's suggestion that I include Attorney General opinions in my annotated compilation (Vol. II). The project would have been much less comprehensive without the inclusion of those documents.

Lou Mucci of Alna, ME was commissioned by the FBSP to do a painting of Katahdin. His beautiful watercolor appears as the Frontispiece in each of the volumes. Lou also designed the miniature maps of the Park that identify the parcels affected by the twelve sets of Acts of Acceptance from 1931 – 1963.

The generous support of the Davis Conservation Foundation enabled the FBSP to think more expansively about both the appearance of the volumes and the scope of their distribution throughout the State of Maine. Additional contributions to help underwrite the publication of these Baxter materials have been received from Jon Lund, Robert Morrell and Rupert White.

I would be remiss if I failed to acknowledge the usefulness of John W. Hakola's *Legacy of a Lifetime* and Neil Rolde's *The Baxter's of Maine: Downeast Visionaries* in preparing the annotations. When I was uncertain about particular individuals or events, I invariably found the information I needed by consulting these excellent sources. Those two volumes, along with Trudy Irene Scee's *In the Deeds We Trust: Baxter State Park 1970 – 1994,* are the principal accounts of the Park's evolution and its benefactor's extraordinary life.

I would also like to thank Attorney General Steven Rowe for generously consenting to write the *Foreword.* Finally, I would like to acknowledge the invaluable assistance of Sandy Knowles and Sue Bulger at J.S. McCarthy Printers in Augusta. Sandy oversaw all phases of the volumes' production, whereas Sue's expertise in graphic design enhanced their appearance.

Howard R. Whitcomb
Georgetown, Maine
April, 2005

Seldom has a more generous gift been presented
to a people than has been given by
Percival Proctor Baxter . . . to the State of Maine.

It is incumbent upon them, the recipients, to preserve
the trust impressed upon them, to ensure for themselves
and for future generations the fullest use of Baxter State Park
consistent with the desires of the donor.

Public Laws, 1971, Chap. 477

Volume II
Attorney General Opinions
Part 3: Attorney General Opinions*

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Private and Special Laws of 1961, Chapter 21 (effective February 16, 1961), creating the BSP Trust Fund (the so-called "State Trust")

Private and Special Laws of 1965, Chapter 30 (additional gift to the BSP Trust Fund; effective March 2, 1965)

3.2 Trust Fund Administration (10)

November 14, 1967

James S. Erwin, Attorney General

Transfer of Trust Funds

July 17, 1972

Charles R. Larouche, Assistant Attorney General

BSP Trust Fund income (Attachment – inter-departmental memorandum of August 16, 1972 from Marie H. Mitchell, State Controller, and Rodney L. Scribner, State Budget Officer, to James S. Erwin, Attorney General regarding "Accounting and Budgeting for the BSPA"

March 8, 1973

John W. Benoit, Jr., Deputy Attorney General

Income from BSP Trust Fund may be used to purchase rights to cut timber in BSP

July 31, 1975

Martin L. Wilk, Deputy Attorney General

Use of BSP Trust Fund income to construct new headquarters building without the Governor's approval

* This compilation includes several miscellaneous inter-departmental memoranda and letters from individuals in agencies other than that of the Department of the Attorney General.

August 25, 1977

Sarah Redfield, Assistant Attorney General

Acceptance of federal grants

October 23, 1979

Sarah Redfield, Assistant Attorney General

Contributions for BSP history

April 8, 1980

Rufus E. Brown, Senior Assistant Attorney General

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March 14, 1985

Letter from Rufus E. Brown, Deputy Attorney General, to Commissioner Glenn H. Manuel, Chairman of the BSPA

Interest on the Operating Account of the BSPA (Attachments – AN ACT To Provide Revenue to Baxter State Park from Interest Earned from Funds Donated by Governor Percival P. Baxter for the Protection and Operation of Baxter State Park, 1985)

December 11, 1986

Paul Stern, Assistant Attorney General

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May 29, 1992

Paul Stern, Assistant Attorney General

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3.3 Baxter State Park Administration (19)

3.3.1 Separate Identity (13)

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Power of the BSPA to purchase property located on leased state land in BSP

August 18, 1971

Letter from Attorney General James S. Erwin to Lawrence Stuart, Director, Park and Recreation Commission

Separate identity of BSP regarding proposed Department of Natural Resources

June 21, 1972

Charles Larouche, Assistant Attorney General

Construction of house in Millinocket without Governor and Council Approval

January 2, 1973

George C. West, Deputy Attorney General

BSPA has control and management of BSP that is paramount to another state agency, i.e., Land Use Regulation Commission

September 17, 1975

John W. Benoit, Jr., Deputy Attorney General

Applicability of Executive Order # 10 to BSPA (motor vehicles)

March 11, 1977

Sarah Redfield, Assistant Attorney General

Fisheries and wildlife management in BSP

July 28, 1977

Sarah Redfield, Assistant Attorney General

Sale of real property (Medway garage)

November 28, 1983

Rufus E. Brown, Deputy Attorney General

Membership of the BSPA

December 6, 1983

Letter from Rufus E. Brown, Deputy Attorney General to the Honorable G. William Diamond and the Honorable Neil Rolde, Chairman, Audit and Program Review Committee

Membership of the BSPA

April 12, 1988

William R. Stokes, Assistant Attorney General

BSP – Bureau of Public Improvements approval (Attachment – letter of April 27, 1988 from Dale F. Doughty, Director, Bureau of Public Improvements to Irwin C. Caverly, Jr.)

June 16, 1988

Jeffrey Pidot, Assistant Attorney General

Utility line installation in LURC jurisdiction

February 23, 1989

Terrance J. Brennan, Assistant Attorney General

BSP purchases

February 21, 1991

Letter from Michael E. Carpenter, Attorney General, to Rodney L. Scribner, State Auditor

Employee/contractor issue at Kidney Pond and Daicey Pond facilities (Attachments – letter of December 4, 1990 from Leslie D. Bloom, Counsel, Bureau of Employee Relations to Irvin C. Caverly, Jr.; letter of December 6, 1990 from Paul Stern, Assistant Attorney General, to Irvin, C. Caverly, Jr.; and letter of January 29, 1991 from Rodney L. Scribner, State Auditor, to Attorney General Michael Carpenter)

3.3.2 Rules and Regulations (3)

September 16, 1975

Sarah Redfield, Staff Attorney

Adoption of Winter Regulations

May 13, 1976

Assistant Attorney General Sarah Redfield's response to request for information of April 30, 1976 from the Committee on State Government, 107th Legislature

Rulemaking procedure for the BSPA

September 3, 1985

Rufus E. Brown, Deputy Attorney General

Carrying concealed weapons within BSP boundaries

3.3.3 Miscellaneous (3)

March 16, 1973

E. Stephen Murray, Assistant Attorney General

Land Use Regulation Commission - Law of conflicts of interest

April 9, 1979

Sarah Redfield, Assistant Attorney General

Inter-departmental memorandum to incoming Attorney General Richard S. Cohen on legal issues relevant to the operation of BSP (Attachment – Inter-departmental memorandum of July 5, 1977 from Sarah Redfield, Assistant Attorney General, to Attorney General Joseph E. Brennan reviewing the BSPA master plan)

March 25, 2002

Memorandum from Paul Stern, Deputy Attorney General, to Herbert Hartman, Director, Bureau of Parks and Land

Penobscot River Corridor

3.4 Snowmobiles and Motor Vehicles (5)

April 22, 1975

Sarah Redfield, Staff Assistant

Motorcycle use in BSP

April 1, 1976

Sarah Redfield, Assistant Attorney General

Snowmobile opinions—interdepartmental memorandum to Attorney General Joseph Brennan summarizing views of eight individuals who might have had recollections of Governor Baxter's views in regard to snowmobiles (Attachments – associated correspondence)

May 20, 1976

Sarah Redfield, Assistant Attorney General

Use of snowmobiles within BSP — Pertaining to the proposed 1976 revision of the Rules and Regulations (Attachments- letter of May 11, 1965 from Governor Baxter to Helon N.Taylor, Park Supervisor; letter of April 18, 1966 from Governor Baxter to Austin H. Wilkins, Forest Commissioner; and letter of January 15, 1970 from Austin H. Wilkins, Forest Commissioner to Senator Edmund S. Muskie)

May 23, 1980

Memorandum of Law from the Department of the Attorney General

Petitioning for Instructions on the Extent of the Authority's Discretion to Regulate Snowmobiles and Other Motor Vehicles in the Park—Procedural Requirements and Substantive Issues (Attachment - Petition for Instructions)

September 11, 1980

Supplemental Memorandum of Law from the Department of the Attorney General

Petitioning for Instructions on Snowmobile Usage in the Park (Attachments -Exhibit A Supplemental Memorandum of Law, Petition for Instructions; and comments on the May 23, 1980 draft Memorandum of Law from the Natural Resources Council of Maine; the Appalachian Mountain Club – Maine Chapter; Edward Myers; and Jon R. Doyle, Esq.)

3.5 Scientific Forestry (6)

January 12, 1973

Lee M. Schepps, Assistant Attorney General

BSPA contract with Great Northern Paper Company

April 13, 1973

Jon A. Lund, Attorney General

Letter from the Attorney General to Governor Kenneth M. Curtis in the aftermath of mooted Great Northern Nekossa Corporation "timberland permit" litigation - Governor Baxter's intentions, viz., "scientific forestry"

May 9, 1975

Inter-departmental memorandum from Attorney General Joseph E. Brennan to Donald F. Mairs, Pesticides Control Board

Aquatic Application Permits – Spruce Budworm Program

April 23, 1976

Sarah Redfield, Assistant Attorney General

General provisions concerning the responsibilities of the Maine Forest Authority (Attachment – Draft Maine Forest Authority Regulations). See also inter-departmental memorandum dated April 9, 1979 from Assistant Attorney General Sarah Redfield to Attorney General Richard S. Cohen that appears above under 3.3.3 "BSP Administration-Miscellaneous"

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Sarah Redfield, Assistant Attorney General

Road construction in the scientific forestry area of BSP

October 1, 1985

Paul Stern, Assistant Attorney General

Austin Carey Tree Farm Forestry Demonstration (Town of Harpswell) (Attachments – "A Proposal for Management of Austin Carey Tree Farm," including map and agreement)

3.6 Court Jurisdiction and Dispute Resolution (5)

May 9, 1975

Foahd J. Saliem, Assistant Attorney General/Criminal Division

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August 2, 1977

Sarah Redfield, Assistant Attorney General

Horse Mountain Lookout Tower - ME Tort Claims Act

March 16, 1978

Sarah Redfield, Assistant Attorney General

Park's liability for visitor activities - ME Tort Claims Act

July 10, 1978

Sarah Redfield, Assistant Attorney General

Fines collected for violations of BSPA Rules and Regulations

October 2, 1998

Investigator's Report—Maine Human Rights Commission ruling in complaint filed by Robert Boutaugh v. Bowater (PA97-0315) and Baxter State Park Authority (PA97-0316)

Complaints of unlawful discrimination in public accommodation against both parties were dismissed

OVERVIEW

Attorney General opinions are submitted to the Governor, the legislature, or state administrative agencies in response to questions of law. These opinions provide guidance to the official or agency that requested them. Most courts will take judicial notice of such opinions, although they are not legally binding on them. An Attorney General may withdraw an opinion or it can be overruled by a court decision. An opinion may be reversed by a subsequent Attorney General only if extraordinary circumstances warrant it.

As noted in Volume I, there have only been a handful of judicial opinions regarding the Baxter trusts and the administration of the park by the BSPA. Consequently, the opinions of the Attorney General are an important vehicle for resolving questions of law that have arisen in the administration of the park by the Authority. Respective Attorneys General rely heavily on judicial precedent and use extrinsic evidence in those instances where the trust documents are either ambiguous or silent on the particular question of law.

Approximately four dozen Attorney General opinions have been promulgated on a range of legal questions since Percival P. Baxter's death in 1969. The annotator has arranged the opinions in five categories: Trust Fund Administration; Baxter State Park Administration; Snowmobiles and Motor Vehicles; Scientific Forestry; and Court Jurisdiction and Dispute Resolution. The Attorney General opinions in the second category, Baxter State Park Administration, have been further divided into three subcategories, i.e., Separate Identity; Rules and Regulations; and

Miscellaneous. The annotations are by category or subcategory. They are not exhaustive treatments of each individual document, but rather a selective examination of the Attorney General's treatment of the range of legal issues that arise therein. The annotations emphasize those opinions that shed light on Baxter's intentions for the administration of the park. Not all documents that appear within any given category are discussed.

ANNOTATIONS

3.1 "Boston Trust" and "State Trust" Documents (3)

The principal trust documents are reproduced for reference purposes. They consist of the *inter vivos* trust created by Governor Baxter in 1927, as amended through 18 May 1966, wherein he donated the residuary of his trust estate to BSP, and the 1961 and 1965 Private and Special Laws creating and funding the Baxter State Park Trust Fund.

3.2 Trust Fund Administration (10)

3.2.1 Introduction

The Baxter State Park Authority has three principal sources of income. First, the so-called "Boston Trust" consisting of income and principal from Baxter's *inter vivos* trust created in 1927, as amended through 18 May 1966. Second, the Baxter State Park Trust, the so-called "State Trust," created by gifts of corporate stock from Baxter in 1961 and 1965. And, thirdly, revenues resulting from the operation of the park, e.g., entrance and user fees. The documents, herein reproduced, focus on the first two of these income sources. At the outset, one should note that in all three trust documents Baxter specified that the income therefrom was to be used for the "care, protection and operation" of Baxter State Park. In these documents respective Attorneys General examine the intent of these trust instruments, especially the "care, protection and operation" language, and in doing so seek assurances that the trust monies and interest therefrom remain segregated from the State of Maine's General Fund. The 14 November 1967 opinion by Attorney General James S. Erwin is illustrative of this practice. This is the only document in this compilation that pre-dates Percival P. Baxter's death.

3.2.2 Separation of Income from the General Fund

It was not until the 17 July 1972 opinion by Assistant Attorney General Charles R. Larouche, that there was a detailed examination of the expenditure of income produced by the Baxter State Park Trust Fund. More specifically, Larouche concluded that any income, including short-term earnings, is not to be diverted to the state's General Fund. Such diversions would constitute a breach of trust. In reaching this conclusion he examined both the 1961 and 1965 legislation accepting the gifts, and Baxter's correspondence in 1961 to Governor Reed and State Treasurer Carpenter. Also, he cited Baxter's letter of 8 February 1968 to the State Comptroller, regarding the closure of the Mackworth Island Deaf School Fund. This use of extrinsic evidence would become commonplace in subsequent Attorney General opinions. This particular opinion would be echoed later by Rufus E. Brown on 14 March 1985 and Paul Stern on 29 May 1992. Brown's opinion in 1985 cites *Fitzgerald v. Baxter State Park* (1978) to reaffirm the State's obligation to act in a manner consistent with both the aforementioned "Boston" and "State" trusts.

3.2.3 Permissible Uses

The opinions regarding "trust fund administration" differentiate between permissible and impermissible uses of trust fund monies. In an opinion of 8 March 1973, Deputy Attorney General Benoit held that income from the Baxter State Park Trust Fund could be used to purchase timber rights in T2 and 3 R9 from Great Northern Paper Company (GNP) in order to prevent the cutting of mature trees. Such an acquisition would protect and preserve BSP within the meaning of the "care, protection and operation" language of the trust fund.

Another permissible use includes the construction of a new headquarters without the Governor's approval (31 July 1975 opinion of Deputy Attorney General Wilk). However, Rufus E. Brown's opinion of 8 April 1980 held that John Hakola's history of BSP could not be funded from trust income because the history was not incidental to the

"operation" of the park. Brown concluded that the trust instruments provided an unambiguous answer to the question, but if extrinsic evidence were to be relied upon, he would have come to the same conclusion. The correspondence cited indicates Baxter's desire to be cautious in the expenditure of Baxter State Park Trust Fund monies and that he did not approve of advertising of the park.

3.2.4 Acceptance of Grants and Donations

There are also three opinions regarding the acceptance of grants from the federal government or private organizations. The trust instruments neither prohibit nor authorize the use of funds from such sources. Assistant Attorney General Sarah Redfield on 25 August 1977 wrote that although the Authority may not seek or accept such grants, it might wish to consider methods whereby the Governor or other state agencies might do so on its behalf. Once again, extrinsic evidence is introduced in an attempt to provide guidance on the question of expenditure of funds from outside sources. Redfield cites Baxter's refusal, in August of 1965, to permit the acceptance of money from the Appalachian Mountain Club for bunkhouses and rescue equipment (in memory of Ranger Heath who had died in a rescue attempt) as the most specific indication of his intent to preclude outside support. However, Redfield states that if grant money is available through proper acceptance procedures, the Authority may spend the funds consistent with its fiduciary responsibilities. In doing so, however, it may not violate Baxter's intentions, as stated during the Appalachian Mountain Club episode, by accepting funds for the erection of structures or the purchase of equipment.

A follow-up opinion, also by Redfield on 23 October 1979, outlined procedures whereby donations, accepted by the Governor's Office, may be used for the publication of the park history. Further clarification of the issues surrounding donations to BSP came in an 11 December 1986 opinion by Assistant Attorney General Paul Stern. A 1981 amendment to the statutory provisions dealing with acceptance of gifts by the Governor (P. L. 1981, Chap. 53) made it possible for the Governor to accept gifts expressly restricted for use by BSP and also enabled the state's Chief Executive to empower the Authority to accept gifts. Stern stated, "[I]n this matter, the grant of express power to the Governor to accept gifts or authorize an agency to accept gifts also carries with it the implied power to utilize the gift as the donor desired or to empower the agency to do so, unless, of course, such utilization otherwise conflicts with law or the trust." (p. 2)

After reviewing extensive Baxter correspondence, Stern concluded, "[S]imply put, if someone wishes to make a gift, grant or donation to the Park, it should be an irrevocable gift to the Authority to use in conformance with the Trust and intent of Governor Baxter." (p. 4) Such gifts, however, may not be commingled with the trust funds.

3. 3 Baxter State Park Administration (19)

3.3.1 Separate Identity (13)

These Attorney General Opinions, spanning the years 1967 to 1991, address the BSPA's unique relationship within the governmental structure of the State. The legislative grant of "full power in the control and management" of Baxter State Park to the Authority has given rise to periodic questions of its legal relationship with other agencies of state government, including the Governor.

Two of the earliest analyses of this unique relationship occur in the opinions of Charles R. Larouche, Assistant Attorney General, and George C. West, Deputy Attorney General, in 1972 and 1973, respectively. Larouche in an opinion, dated 21 June 1972, concluded that the Authority could purchase land and build a house in Millinocket without Governor or Executive Council approval. With respect to the normal approval processes for such "public improvements," Laurouche described the Authority as "an instrumentality of the State that must truly be deemed as sui generis." (p. 2) He concluded by stating that "the Legislature intended Baxter State Park Authority to be a unique authority and that the effectiveness of the discharge of its fiduciary responsibility should not be diluted by the encroachment of any other State agency." (p. 3)

The George C. West opinion, dated 2 January 1973, dealt with the question of whether Maine's Land Use Regulation Commission (LURC) had the authority to require GNP to obtain a development permit from the Commission before

exercising cutting rights in Baxter State Park. In concluding that LURC lacked the authority to require that GNP obtain a development permit, West stated that the "Baxter State Park Authority has paramount jurisdiction as to the management and control of the Park, subject only to court review of the correctness of the Authority's action interpreted in light of the terms of the deeds of Trust." (p. 3) West also referred to Baxter's letter to Governor Sumner Sewall, in which he spoke of the successive grants in trust as establishing "a long list of precedents" resulting in "solemn pacts that create a succession of irrevocable trusts." (p. 4)

Two opinions further clarified the Authority's autonomy from the Governor. An opinion by Jerome S. Matus, Assistant Attorney General, on 15 December 1967 held that the Authority may purchase personal property located on leased state land in Baxter State Park without Governor or Executive Council approval. Likewise, Deputy Attorney General John W. Benoit's opinion of 17 September 1975 exempts the maintenance and operation of the Authority's motor vehicles, pursuant to an executive order, from supervision by the Commissioner of Finance and Administration.

Assistant Attorney General Redfield's opinion of 28 July 1977 regarding the sale of the Medway garage facilities deserves special attention. At issue was the park's intention to sell the Medway garage and use the proceeds of the sale to purchase the Vincent garage property in Millinocket. Redfield held that the Authority may proceed with the sale, with or without the approval of other state agencies or the Governor, provided that it acts in a manner consistent with its fiduciary responsibilities. In reaching this conclusion, she stated that "[t]here appear to be no specific statutory requirements applicable to the sale of land by the Authority, . . . as to the limitation sale of land by the Bureau of Public Lands to sale only with the approval of the Legislature." (p. 2) Despite the silence of the statute and trust instruments on the question of the power to sell, Redfield concluded that it may be implied. In conclusion, Redfield acknowledged that the trust instruments preclude the BSPA from selling any park lands.

A series of additional opinions upheld the separate identity of the BSPA from other state agencies:

- The proposed Department of Natural Resources (Erwin, 18 August 1971)
- Department of Inland Fisheries and Wildlife (Redfield, 11 March 1977)
- Bureau of Public Improvements (Stokes, 12 April 1988)
- Bureau of Purchases (Brennan, 23 February 1989)

Attorney General Michael E. Carpenter's letter of 21 February 1991 to State Auditor Rodney L. Scribner regarding the use of contractors at the Kidney and Daicey Pond facilities provides yet another illustration of the park's separate identity. Carpenter concludes that the state Civil Service Law did not preclude the Authority from utilizing contractors at these unique campground facilities. He attached correspondence, dating back to December of 1990, that provides additional background to this employee/contractor issue.

The final two documents in this subcategory of separate identity are an outgrowth of a proposal by the Joint Legislative Audit and Program Review Committee to change the membership of the Authority by substituting the Commissioner of the Department of Conservation for the Director of the Bureau of Forestry. Deputy Attorney General Rufus E. Brown was the author of the two documents dated 28 November 1983 and 6 December 1983. Brown provides valuable historical background on the Authority, since its creation in 1939. Brown relies heavily on the *Fitzgerald* case and extrinsic evidence to support his conclusion that the present membership of the Authority is reflective of Baxter's intent. Although the Bureau of Forestry is within the Department of Conservation, it is headed by a Director who is required to be "qualified by training, experience and skill in forestry." No such statutory requirement is stipulated for the Commissioner of the Department of Conservation, and even if it were, he argued that the diffuse responsibilities of the Commissioner would preclude the focus on forestry intended by Governor Baxter.

3.3.2 Rules and Regulations (3)

The first two documents in this subcategory, both written by Assistant Attorney General Sarah Redfield in 1975 and 1976, provide the specifics of the BSPA's rulemaking powers under Section 903 of Title 12 of the M.R.S.A. In brief, the governing statute mandates that prior to the promulgation of rules and regulations, the Attorney General must certify that they are in conformity with the law and public notice requirements. In the 13 May 1976 document, Redfield,

in response to a legislative inquiry, detailed the statutory requirements under Section 903, including the purpose of such rules and regulations:

> [T]he Park Authority may promulgate such rules and regulations as it deems necessary for the protection and preservations of the Park and of the monumental structures therein, for the protection and safety of the public, and for the proper observance of the conditions and restrictions expressed in the deeds of trust of Baxter State Park to the State of Maine. (p. 1)

It should be noted, that no specific regulations govern the procedure for the adoption of rules, but, as a matter of practice, the Authority holds public hearings prior to the adoption of rules. The other Redfield document further explicates the public notice requirements by noting that they include the posting of the last two paragraphs of Section 903 that detail the punishments for violations of the rules and the destruction of park property, including structures, markers, and notices of park rules and regulations.

Deputy Attorney General Rufus E. Brown's 3 September 1985 opinion outlines the particulars of Rule 21 relating to firearms. He concludes that the rule is applicable to all kinds of firearms, not just concealed weapons. According to Brown, Rule 21 is designed to regulate hunting in the park, and it is not a licensing scheme for the carrying of concealed weapons.

3.3.3 Miscellaneous (3)

The lone document in this subcategory that warrants attention here is a memorandum designed to acquaint incoming Attorney General Richard S. Cohen with a range of legal issues circa 1979 pertaining to his *ex officio* responsibilities as a member of the BSPA. Assistant Attorney General Sarah Redfield provides a brief overview of the development of the Park and the unique features of the Baxter trust as interpreted in the *State of Maine v. Fin & Feather Club* (1974) and *Fitzgerald v. Baxter State Park Authority* (1978) cases. Redfield attaches a copy of her comments regarding the Authority's 1977 management plan. That earlier memorandum had been written for Attorney General Joseph E. Brennan's personal use, however, it was subsequently distributed to the Attorney General's staff and Authority, hence Redfield's decision to share it with incoming Attorney General Cohen.

3.4 Snowmobiles and Motor Vehicles (5)

With one exception, the five documents in this category deal with one of the most contentious issues in the history of the park: recreational snowmobiles use. That issue, as noted in the annotations of the case law in Volume I, Part 2, was litigated in *In the Matter of Baxter State Park* (Superior Court, Kennebec Country, 1981), *Cartwright, et al. v. Baxter State Park Authority* (Superior Court, Kennebec County, 1985), and *Normand, et al. v. Baxter State Park Authority* (Supreme Judicial Court of Maine, 1986).

The first document, a lengthy inter-departmental memorandum of 22 April 1975 by Sarah Redfield, was drafted in response to Attorney General Joseph E. Brennan's inquiry regarding proposed legislation to allow the use of motorcycles in BSP. According to Redfield, the central issue was the legislation's potential conflict with the terms of the Baxter Trust. She acknowledged at the outset that it was difficult to reconcile the seemingly disparate concepts "sanctuary" and "wilderness preservation" on the one hand, and "public recreation" on the other. While she noted that the deeds of trust and the legislative acts of acceptance were the primary sources for determining the donor's intent, she did attribute considerable significance to the 1955 law in which Baxter interpreted the terms "natural wild state" and "sanctuary for wild beasts and birds." In that interpretative document, Baxter stipulated that "[t]his area is to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be 'Forever Wild'." (p. 5) Redfield also cited extrinsic evidence to support the interpretative statement and concluded that "Baxter created a complementary relationship between wilderness and such public recreation as is dependent upon, oriented toward, and compatible with wilderness values." (p. 7)

The core issue of motorcycle use in the park, according to Redfield, turned on the "interrelationship of public access and recreation with wilderness and sanctuary preservation." (p. 7) Redfield concluded that the exclusion of

motorcycles would not "lock up the park." In her judgment, activities involving motorcycles were incompatible with wilderness values. Her conclusion was further supported by Baxter's responses, as seen in extrinsic evidence, to problems created by motor vehicles, e.g., road construction, airplanes, motorboats, snowmobiles. While acknowledging that it was more difficult to document the donor's intent in the areas of BSP set aside for hunting and scientific forestry, Redfield, nevertheless, concluded that motorcycle use in those areas would also violate the terms of the trust.

The remaining four documents in this category all pertained to issues surrounding the Authority's regulation of the use of recreational snowmobiles. Rule 19, the first regulation regarding snowmobile use in the park, was promulgated in 1968. It permitted snowmobiles to travel on the so-called perimeter road, some of the connecting roads, logging roads and some trails. In 1970 the rule was amended to restrict snowmobile use to just the perimeter road. In 1976, when a further revision to Rule 19 was being contemplated, the Authority requested an opinion from the Office of the Attorney General as to whether the proposed revision was consistent with the trust that created the park. In a detailed opinion, Assistant Attorney General Sarah Redfield concluded that the proposed revision of Rule 19 was "not consistent with the trust, and snowmobile use within the natural wild state areas of the Park should be limited to use of Park personnel in emergency situations." (p. 9) The opinion was informed by an in-depth examination of the creation of the park, the trust instruments, and extrinsic evidence that might clarify the donor's intent. This evidence included extensive reference to Baxter's correspondence, including two letters dating from 1965 and 1966 that were attached to the opinion, and a handful of letters from former associates regarding their knowledge of the Governor's views on snowmobile use in the Park. (See, Redfield, Inter-departmental Memorandum to Attorney General Joseph E. Brennan, 1 April 1976). The final attachment is a letter of 15 January 1970 from the Authority's Chairman, Austin H. Wilkins to Senator Edmund S. Muskie in which he described the circumstances surrounding the promulgation of Rule 19 in 1968 and its subsequent amendment to restrict use to only the perimeter roads.

The Authority subsequently amended its regulations to comply with the Attorney General's ruling and that rule remained in effect until 1981. In the meantime, the Authority petitioned to the courts for trustee instructions on the extent of its authority to regulate recreational snowmobiles in the park. The final two documents in the category are lengthy memoranda of law, and accompanying petitions for instructions, prepared by the Attorney General's office in advance of the 1980-1981 *In the Matter of Baxter State Park* litigation before the Superior Court, Kennebec County. The lengthy 23 May 1980 document examines the procedural requirements and substantive issues related to such a petition for instructions. The treatment of the substantive issues is rich in content, in particular, its discussion of the existence of ambiguity in the trust documents and alternative approaches to resolve it.

The Supplemental Memorandum of Law of 11 September 1980 and the accompanying Petition for Instructions reflect public comments on the earlier draft memorandum and petition. The newly drafted portions of the petition were underlined for the reader's convenience. The four letters received from the public, i.e., the Natural Resources Council of Maine, the Maine Chapter of the Appalachian Mountain Club, Edward Myers, and Jon R. Doyle, Esq., were also attached.

3.5 Scientific Forestry (6)

These six documents deal with a range of issues pertaining to forestry practices, most notably in the Scientific Forestry Management Area (SFMA) of BSP. The initial document, an inter-departmental memorandum dated 12 January 1972, examined the BSPA's contract of 29 November 1972 that permitted harvesting by the GNP in the SFMA in the northwest area of the Park. The SFMA (T6, R9 and 10) was created by Governor Baxter in 1955. Lee M. Schepps, Assistant Attorney General, was asked by the Attorney General to determine if the harvesting plan and road map agreed upon by both GNP and the Authority measured up to the standards of scientific forestry and reforestation as required by the Baxter trust. Schepp's report to the Attorney General relied heavily upon the detailed analyses of the plan and map by two professional foresters, Messrs. W. R. Dineen and Cliff Swenson. Both concluded, albeit for somewhat different reasons, that the plan and map were seriously deficient in terms of scientific forestry management. Their lengthy critiques were summarized by Schepps, as were the provisions of the two 1955 deeds of trust that created the SFMA and Baxter's letter of 17 March 1955 to Governor Muskie.

Subsequently, the Office of the Attorney General brought suit against the BSPA and the Great Northern Nekoosa Corporation to set aside the "timberland permit" which would have permitted the harvesting of 109,000 cords in T6

R10. Since that litigation was rendered moot prior to trial, there was no judicial determination of Baxter's intent regarding scientific forestry practices in the SMFA. However, on 13 April 1973 Attorney General John A. Lund wrote Governor Kenneth M. Curtis to share his department's observations during the course of the litigation. Lund's letter was a detailed critique of the failure of the state to develop a management plan for the forests in the northern townships of BSP and public lots elsewhere in the State. Lund also contrasted the state's forestry practices with the more robust practices of the U.S. Forest Service and several major private landowners in the state. As a result of preparation of the case, the Attorney General's office concluded "'Scientific Forestry' as requiring, at the very least, first-class, professional, sophisticated forest land management and we found the State seriously deficient even in this respect with regard to Baxter State Park." (p. 6) He also stated that in the case of BSP, funds for such forestry management were available and they should be used in a manner commensurate "with the generosity of our benefactor and the significance of his gift." (p. 8)

An additional opinion of direct application to the SFMA is Assistant Attorney General Sarah Redfield's letter of 28 March 1979 to George M. Ruopp regarding road construction. In answering Ruopp's inquiry, Redfield acknowledged that where the deeds of trust were silent and ambiguous "it is necessary to attempt to ascertain the intent of the settlor of the trust by reference, not only to the legal instruments themselves, but also to such extrinsic evidence as may be relevant." (p. 2) With respect to the extrinsic evidence, she found Baxter's letters to Governor Muskie that accompanied both conveyances in 1955 (letters of 17 March and 2 May) to be helpful. Since the deeds stated that the SFMA was to be managed for the production and harvesting of timber, it followed that Baxter must have contemplated a network of roads for the removal of the timber. However, those roads must be constructed in a manner consistent with high standards of forestry practices and not conflict with the management plan's multiple-use accommodation of forestry and recreation values.

The last three documents in this category do not deal specifically with BSP. In an opinion, dated 9 May 1975, to Donald F. Mairs of the Pesticides Control Board, Attorney General Joseph E. Brennan concluded that the Bureau of Forestry was not required to obtain an aquatic application permit before carrying out their spruce budworm control program. And finally, two documents examined the statutory authority of Maine Forest Authority (MFA) and one of its demonstration projects on the Austin Carey Tree Farm in the Town of Harpswell. The MFA was established in 1970 as an agency designated to receive certain monies from the Baxter trust funds for the acquisition of land to be used "for recreational and reforestation purposes." The responsibilities of the MFA paralleled those of the BSPA; however, the forest lands in question were not a part of BSP.

3.6 Court Jurisdiction and Dispute Resolution (5)

The final documents address issues of court jurisdiction and alternative mechanisms for dispute resolution. They include opinions clarifying state court jurisdiction in prosecutions for violations committed in BSP (Saliem, 9 May 1975) and the disposition of fines collected by the state court system for violations of the rules and regulations of the BSPA (Redfield, 10 July 1978). In the former instance, persons committing alleged violations in that portion of BSP that lies in Piscataquis County may be prosecuted in the Millinocket District Court, Northern Penobscot Division. In the latter instance, fines are not "miscellaneous income" derived from the operation of the Park, consequently payment is to be made to the Treasurer of the State of Maine and credited to the General Fund.

Another two documents concern the scope of the BSPA's immunity under the Maine Tort Claims Act, 14 M.S.S.A., Section 1801, et seq (Redfield, 2 August 1977 and 16 March 1978).

The final one is an Investigator's Report of 2 October 1998 in *Boutaught v. Bowater* and *Boutaught v. BSPA*, a proceeding before the Maine Human Rights Commission. The Commission dismissed the complaint of unlawful discrimination in public accommodations.

3.1 "Boston Trust" and "State Trust" Documents

AMENDMENT of MAY 18, 1966 to TRUST of JULY SIXTH, 1927.

This AMENDMENT made the eighteenth day of May, 1966 by and between PERCIVAL PROCTOR BAXTER of Portland, Maine, and BOSTON SAFE DEPOSIT AND TRUST COMPANY, a corporation duly organized and existing under the Laws of the Commonwealth of Massachusetts and having a usual place of business in the City of Boston, Massachusetts.

WITNESSETH that

WHEREAS under the Trust Indenture dated July 6, 1927 as amended on January 20, 1956, August 1, 1956, January 3, 1957, March 29, 1957, March 10, 1958, July 25, 1958, April 23, 1959, January 30, 1960, May 23, 1960, April 28, 1961, August 2, 1961, September 28, 1961, October 14, 1961, January 13, 1962, November 8, 1962, May 7, 1963, June 10, 1964, August 28, 1964, and March 25, 1966, the latter being the last Amendment, said PERCIVAL PROCTOR BAXTER transferred certain property to said BOSTON SAFE DEPOSIT AND TRUST COMPANY as TRUSTEE upon the Trusts therein set forth for the benefit of MADELEINE BAXTER TOMLINSON (now deceased) and others, and did by Article TENTH of said Amended INDENTURE reserve the right to change, alter, modify or amend the TRUST by agreement in writing of said PERCIVAL PROCTOR BAXTER and the Trustee hereunder, and

WHEREAS the said BOSTON SAFE DEPOSIT AND TRUST COMPANY is now the SOLE TRUSTEE under said Indenture.

NOW THEREFORE, the parties hereto hereby agree that said Indenture of Trust dated July 6, 1927, as amended by said agreements of January 20, 1956, August 1, 1956, January 3, 1957, March 29, 1957, March 10, 1958, July 25, 1958, April 23, 1959, January 30, 1960, May 23, 1960, April 28, 1961, August 2, 1961, September 28, 1961, October 14, 1961, January 13, 1962, November 8, 1962, May 7, 1963, June 10, 1964, August 28, 1964, and March 25, 1966, the latter being the last Amendment, is further changed, altered, modified and amended as follows:

FIRST: The "GIFTS" described in List A and List B as presently amended heretofore, are now cancelled and made of no effect and the following "GIFTS" described in List A and List B are hereby substituted therefore:

LIST OF GIFTS A

JAMES P. BAXTER, 3rd New York City, N.Y.	200 shares Fraternity Company and	Twenty-five Thousand ($25,000.) Dollars
JOHN L. BAXTER Brunswick, Maine	200 shares Fraternity Company and	Twenty-five Thousand ($25,000.) Dollars
LYDIA B. DURNEY Bath, Maine	200 shares Fraternity Company and	Twenty-five Thousand ($25,000.) Dollars
MARY B. WHITE Brunswick, Maine	200 shares Fraternity Company and	Twenty-five Thousand ($25,000.) Dollars
ELLEN B. MOYER Cape Elizabeth, Maine	200 shares Fraternity Company and	Twenty-five Thousand ($25,000.) Dollars
Totaling . .	1,000 shares	

DOROTHY K. TOMLINSON Portland, Maine	Twenty-five Thousand ($25,000.) Dollars
VICTORIA TOMLINSON KEMP Cumberland, Maine	Twenty Thousand ($20,000.) Dollars
HELON N. TAYLOR Millinocket, Maine	Twenty-five Thousand ($25,000.) Dollars
ARTHUR G. ROGERS Waterville, Maine	Twenty-five Thousand ($25,000.) Dollars
W. ROWE ROWLINGS Boston, Massachusetts	Fifty Thousand ($50,000.) Dollars
JOHN E. WILLEY Falmouth Foreside, Maine	Fifty Thousand ($50,000.) Dollars
RAY W. BURGESS South Portland, Maine	Five Thousand ($5,000.) Dollars
ANNIE M. PEABODY Dover-Foxcroft, Maine	Five Thousand ($5,000.) Dollars
JOSEPH H. LEE Portland, Maine	Twenty Thousand ($20,000.) Dollars
MRS. LUCY C. SULLIVAN Portland, Maine	Thirty-five Thousand ($35,000.) Dollars
MISS LUCY E. SULLIVAN Portland, Maine	Fifteen Thousand ($15,000.) Dollars
M. RUTH HODGDON Portland, Maine	Fifteen Thousand ($15,000.) Dollars
MRS. HAZEL B. CONARY Portland, Maine	Five Thousand ($5,000.) Dollars

In the event of the death of any of the beneficiaries herein named in List A prior to the death of PERCIVAL PROCTOR BAXTER said Gift shall lapse.

All estate, inheritance, succession, transfer and other taxes of a like nature and all death duties which may be levied or assessed against the property held in TRUST hereunder at the death of said PERCIVAL PROCTOR BAXTER on account of the Gifts to those persons named in List A above shall be paid from the trust property as a general charge and expense of administration of

the TRUST and shall not be charged against nor be deemed to reduce in any way the amount of said List A Gifts as stated in this Amendment.

LIST OF GIFTS B

1. To the PORTLAND PUBLIC LIBRARY, Portland, Maine, the sum of Two Hundred Thousand Dollars ($200,000.00) to be used for the general purposes of said Library; the grandfather clock now in my office in the Trelawny Building, together with the Benziger portrait of my father now in my home at 92 West Street, Portland, Maine, the same to be hung in said Library. I suggest that said portrait be hung in the Reference Room in place of the large marine painting now there.

2. To the CITY OF BOSTON, a body corporate and politic in the Commonwealth of Massachusetts, the sum of Two Hundred Thousand Dollars ($200,000.00) to be held by said CITY OF BOSTON as Trustee in TRUST in accordance with the terms and conditions of, and for the purposes expressed in, that portion of sub-paragraph "FIRST" of item "THIRTEENTH" of the Will of my late father, James Phinney Baxter, dated October eighth, nineteen hundred nineteen, and the Codicil thereto dated October eighth, nineteen hundred twenty, wherein he bequeathed the sum of Fifty Thousand Dollars ($50,000.00) to the said CITY OF BOSTON in TRUST toward the erection of "A SUITABLE BUILDING TO BE ERECTED IN THE CITY OF BOSTON, TO COMMEMORATE THE LIVES AND DEEDS OF THE FOUNDERS OF NEW ENGLAND."

I make this bequest in TRUST in order to add to and increase the said Trust created by my said father for the above-named purposes as expressed in his Will.

3. To the MAINE MEDICAL CENTER, Portland, Maine, the sum of Two Hundred Thousand Dollars ($200,000.00).

4. To the MERCY HOSPITAL, Portland, Maine, the sum of Two Hundred Thousand Dollars ($200,000.00).

5. To GOVERNOR BAXTER SCHOOL FOR DEAF, Falmouth, Maine, the sum of Two Hundred Thousand Dollars ($200,000.00).

6. To the CITY OF PORTLAND, State of Maine, a body corporate and politic, the sum of Two Hundred Thousand Dollars ($200,000.00) to be held forever in TRUST by the said City and the principal thereof to be invested and reinvested, and the income therefrom to be paid over, at least annually, to the PORTLAND

CITY HOSPITAL to be used solely for the general purposes and expenses of said Hospital.

7. To the said CITY OF PORTLAND the sum of Fifty Thousand Dollars ($50,000.00), the same to be held in TRUST by said City to be invested in securities legal for Maine savings banks, the income therefrom to be used by said City in caring for and maintaining "Mayor Baxter Woods" in the Deering District of said Portland.

8. To the said CITY OF PORTLAND the sum of Five Thousand Dollars ($5,000.00) to be held forever in TRUST by the said City and invested in securities of the highest standing, the income therefrom to be used by said City in keeping in good repair, order and condition the following:

(a) The Cemetery Monuments on the Baxter family lot in said Evergreen Cemetery;

(b) The Bronze tablet and boulder in "MAYOR BAXTER WOODS";

(c) The JAMES PHINNEY BAXTER BOULEVARD MEMORIAL of granite and bronze construction on said Baxter Boulevard and accepted by said City.

9. To the ANIMAL REFUGE LEAGUE of Portland, Maine, the sum of Twenty-five Thousand Dollars ($25,000.00) for the purposes of carrying on its humane work within said Portland, and the surrounding municipalities.

10. To the TOWN OF GORHAM, MAINE, the sum of Twenty-five Thousand Dollars ($25,000.00) to be held in TRUST, and the income therefrom to be used for the general purposes of the Baxter Memorial Library; also the grandfather clock from the Proctor family, light mahogany, now at my home at 92 West Street, Portland, Maine, for the entrance hall of the Baxter Memorial Library at said Gorham, Maine.

11. To the SAINT AGATHA SCHOOL, which is operated by the Daughters of Wisdom and located in the Town of Saint Agatha, Aroostook County, State of Maine, the sum of Twenty-five Thousand Dollars ($25,000.00).

12. To the STATE OF MAINE for the State Library, Augusta, Maine, the metal files and their contents now in my office in Portland. These are the metal mahogany-stained files, three (3) sections of four (4) drawers each; the bound and unbound printed pamphlets of my Addresses 1921-1925 in my home and office; the bound and unbound printed pamphlets and manuscripts of the Addresses of JAMES PHINNEY BAXTER; the large wooden box now in the State Library safe at the State House in Augusta containing the clipping books and manuscripts collected by me from 1921-1925, and my other clipping books collected since 1920; the

large volume of "RARE MAPS AND PLANS" collected by my father which I upon request allowed the Library of Congress to photograph and copy; the large bound volumes of the original "BAXTER MANUSCRIPTS", twenty (20) in number, collected by my father and now stored in the State Library safe at Augusta; and all my other manuscripts, scrap books, clippings and documents; and I request that the State Librarian employ some competent person to go over these documents and papers carefully and to retain, bind and preserve those worthy of preservation, the others to be destroyed.

My TRUSTEE is hereby directed to pay the said STATE OF MAINE the sum of Five Thousand Dollars ($5,000.00) to be used in marking, arranging, binding and preserving said gifts above described under the direction of the State Librarian.

13. To the STATE OF MAINE the following personal property:

(a) Small mahogany 18th Century clock "Fugit Hora Ora" to be kept in the Blaine House.

(b) Grandfather clock, mahogany, to be kept in the Executive Department in the State House. (Clock is now in my home at 92 West Street, Portland, Maine.)

SECOND: The parties hereto further agree that the AMENDMENTS and AGREEMENTS dated April 28, 1961 and March 25, 1966 to the Trust Indenture of July 6, 1927, are hereby cancelled, revoked and made of no effect.

THIRD: Upon and after the death of said PERCIVAL PROCTOR BAXTER and after complying with the provisions of Paragraph FIRST hereof, the Trustee shall continue to hold the remainder of the trust property and shall manage, invest, reinvest, and administer the same for the following purposes:

1. To pay the net income therefrom at least as often as quarterly to the "BAXTER STATE PARK TRUST FUND" created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the care, protection and operation of the forest land known as BAXTER STATE PARK, and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes.

2. To pay over from the principal thereof whenever and as often as the State of Maine shall determine the desirability of the purchase or other acquisition of additional lands for said Baxter State Park or other lands for recreational or reforestation purposes, such sums as shall be requested in writing by the Treasurer of the State of Maine and shall be certified to be

used for these purposes by the Governor and Executive Council of the State of Maine, and the members of the Baxter State Park Commission and the Trustee may require that any such certification contain a statement that the purchase price or acquisition cost of such lands is in their opinion fair and reasonable under all the circumstances.

3. In the State of Maine there are large areas of unproductive forest lands, burned over, cut and rocky, which are of little or no market value and which may be purchased at a low figure and allowed to reforest itself or remain as it is for scenic, recreational purposes, and for experimental scientific forestry.

All of the lands so purchased under this Trust Agreement are to be forever held by the said STATE OF MAINE in TRUST for the benefit of the People of Maine for development, improvement, use, reforestation, scientific forestry, and the production of timber and sale thereof.

I hope some of the forest land acquired by the State under this provision of my TRUST will become model forests similar to those of Germany, Scandinavia and elsewhere, producing a crop of wood to be sold by the State. The STATE OF MAINE is given full power to harvest the crop, reforest and protect these lands against damage by insects, fire or otherwise. All revenue acquired by the sale of timber shall by the State of Maine be used for the care, extension and management of said lands.

I shall be pleased if some portion of the lands purchased with my funds be made a "SANCTUARY FOR WILD LIFE", but this I must leave to the judgment of others.

FOURTH: In the event that said BOSTON SAFE DEPOSIT AND TRUST COMPANY or any successor banking corporation thereto should at any time and for any reason cease to serve as TRUSTEE hereunder, then a successor Corporate Trustee or a Board of not less than three Trustees which may be or include a banking corporation organized under the laws of the Commonwealth of Massachusetts or the State of Maine, shall be appointed by the Governor and Executive Council of the State of Maine and the members of the Baxter State Park Commission, and such successor Trustee or Board of Trustees, as the case may be, shall upon its written acceptance of the Trust have all the powers, duties and discretions herein or heretofore conferred upon the original Trustee.

FIFTH: Notwithstanding anything hereinbefore contained in the

original Trust instrument or in any instrument of amendment thereto, after the death of said PERCIVAL PROCTOR BAXTER, the present Trustee or any succeeding Trustee or Board of Trustees shall be entitled to 5% of the gross income received by the Trust as compensation for its services. If the Trust principal should be reduced substantially by the expenditures of principal for the purposes provided for in this Trust, and if the limited compensation herein referred to should be considered inadequate for the duties performed by the Trustee, it would be my wish that said Trustee negotiate with the Governor and Executive Council of the State of Maine for a new basis of compensation for the Trustee which may be agreed upon between them.

Except as herein expressly changed, altered, modified or amended, said Indenture of Trust dated July 6, 1927, as amended January 20, 1956, August 1, 1956, January 3, 1957, March 29, 1957, March 10, 1958, July 25, 1958, April 23, 1959, January 30, 1960, May 23, 1960, April 28, 1961, August 2, 1961, September 28, 1961, October 14, 1961, January 13, 1962, November 8, 1962, May 7, 1963, June 10, 1964, August 28, 1964, and March 25, 1966, remains in full force and effect.

IN WITNESS WHEREOF said PERCIVAL PROCTOR BAXTER has hereunto set his hand and seal and said BOSTON SAFE DEPOSIT AND TRUST COMPANY has caused its corporate seal to be hereto affixed and these presents to be signed in duplicate in its name and behalf by ~~William W. Welbach, its President~~ Robert E. Dobbyn, its Vice President thereunto duly authorized the day and year first above written.

Signed in the presence of

Ernest M. White

Percival Proctor Baxter

Edward C. Cook

BOSTON SAFE DEPOSIT AND TRUST COMPANY

By

Vice President

The city clerk shall prepare the required ballots, on which he shall reduce the subject matter of this act to the following question: "Shall the Act Relating to Revenues for Lewiston Parking District, passed by the 100th Legislature, be accepted?" The voters shall indicate by a cross or check mark placed against the words "Yes" or "No" their opinion of the same.

This act shall take effect for all the purposes hereof immediately upon its acceptance by a majority vote of the legal voters voting at said election; provided that the total number of votes cast for and against the acceptance of this act at said election equaled or exceeded 20% of the total vote for all candidates for Governor in said city at the next preceding gubernatorial election.

The result of such election shall be declared by the municipal officers of the City of Lewiston and due certificate thereof shall be filed by the city clerk with the Secretary of State.

Effective September 16, 1961

Chapter 21

AN ACT Accepting from Percival Proctor Baxter a Gift of One Thousand Shares of the Capital Stock of the Proprietors of Portland Pier and Creating the Baxter State Park Trust Fund.

Emergency preamble. Whereas, in the judgment of the Legislature the acceptance of the gifts as offered by the Honorable Percival Proctor Baxter creates an emergency within the meaning of the Constitution of Maine, and requires the following Legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine, as follows:

WHEREAS, the State of Maine by several acts of the Legislature approved by the several Governors, 1930-1955, has accepted as gifts from Percival Proctor Baxter, former Governor of the State of Maine, an area of forest land in Piscataquis and Penobscot Counties totaling 193,254 acres known as Baxter State Park, the same now being held by said State IN TRUST for Public Park, Public Forest and Public Recreational Purposes; and

WHEREAS, the said Baxter wishes to share with the State in part the cost of caring for, protecting and operating said area of land in accordance with the conditions in the several acts of the Legislature accepting said gifts as recorded in the laws of Maine 1930-1955.

NOW THEREFORE, the State of Maine hereby accepts from said Percival Proctor Baxter all of the one thousand (1000) shares of stock of the Proprietors of Portland Pier Corporation, a Maine corporation also known as Portland Pier the same being all the outstanding shares of said corporation all owned by said Baxter, all taxes paid, free from all claims and encumbrances and said corporation is the owner of municipal bonds, corporation shares and cash, to the value of $488,942.64 as of January 1, 1961 which constitutes all of the assets of said corporation; to be held IN TRUST forever for the benefit of the people of the State of Maine and to be known as Baxter State Park Trust Fund the principal thereof

to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of said 193,254 acres of forest land known as BAXTER STATE PARK.

Emergency clause. In view of the emergency cited in the preamble, this act shall take effect when approved.

Effective February 16, 1961

Chapter 22

AN ACT Relating to Tolls on Bridge Across Jonesport Reach.

Be it enacted by the People of the State of Maine, as follows:

P. & S. L., 1955, c. 198, § 2, amended. The last 2 sentences of section 2 of chapter 198 of private and special laws of 1955, as enacted by chapter 152 of private and special laws of 1959, are repealed as follows:

~~'At the end of a period of 2 years from the effective date of the reduction of tolls above provided for, the State Highway Commission shall certify to the Secretary of State the amount of tolls collected up to the effective date of the said reduction of tolls and the amount of tolls collected in the ensuing 2 years. If the amount collected in the 2 year period is not equal to at least 2 times the amount collected in the year preceding the said effective date, the tolls to be collected thereafter shall revert to the original rates.'~~

Effective September 16, 1961

Chapter 23

AN ACT Relating to Name and Powers of Augusta Mutual Plate Glass and Insurance Company.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. P. & S. L., 1907, c. 138, § 1, amended. Section 1 of chapter 138 of the private and special laws of 1907 is amended to read as follows:

'Sec. 1. Corporators; corporate name; purposes. George E. Macomber, Charles R. Whitten, Frank E. Smith, Edwin C. Dudley, Guy P. Gannett, Charles P. Paine, Royal H. Bodwell, Charles H. Howard, Lester B. Howard and Eugene C. Carll are hereby made a corporation under the name of the Augusta Mutual ~~Plate Glass~~ Insurance Company, for the purpose ~~only~~ of carrying on business as a mutual insurance company for insuring against breakage or damage to plate glass, local or in transit, with all the powers, rights, and privileges and subject to all the duties, liabilities and restrictions set forth in all the general laws of the State relating to such insurance corporations, except as ~~herein~~ provided.'

'Appropriation for construction of addition to Edmunds elementary school. There is appropriated the sum of $35,000 from the Unappropriated Surplus of the General Fund to be added to the Unorganized Territory Capital Working Fund as described in the Revised Statutes of ~~1954~~, ~~chapter 41~~, ~~sections 167 to 176~~ **1964, Title 20, sections 1462 to 1471**, except that in lieu of the 1% tax described in section ~~169~~ **1464** the Town of Dennysville **and other towns or plantations agreeing to share the cost and facilities** will increase the sum paid for tuition of ~~its~~ **their** students attending Edmunds School by ~~$3,500~~ **a total of $3,332.23** per year for 10 years. When the tuition ~~from Dennysville~~ is received, the Treasurer of ~~the~~ State will credit the ~~$3,500~~ $3,332.23 per year to the Unorganized Territory Capital Working Fund.'

Effective September 3, 1965

Chapter 30

AN ACT Accepting from Percival Proctor Baxter a Gift of One Thousand Shares of the Capital Stock of Congress Realty Company to be Added to Baxter State Park Trust Fund which was Established by Laws of Maine (1961), Chapter 21, and Administered According to the Provisions of said Baxter State Park Trust Fund.

Emergency preamble. Whereas, in the judgment of the Legislature the acceptance of the gifts as offered by the Honorable Percival Proctor Baxter creates an emergency within the meaning of the Constitution of Maine, and requires the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine, as follows:

Whereas, the State of Maine by several Acts of the Legislature approved by the ~~several~~ Governors, 1930-1963, has accepted as gifts from Percival Proctor Baxter, former Governor of the State of Maine, an area of forest land in Piscataquis and Penobscot Counties totaling 201,018 acres known as Baxter State Park, the same now being held by said State IN TRUST for Public Park, Public Forest and Public Recreational Purposes; and

Whereas, the said Baxter wishes to share with the State in part the cost of caring for, protecting and operating said area of land in accordance with the conditions in the several Acts of the Legislature accepting said gifts as recorded in the Laws of Maine 1930-1963.

Now, therefore, the State of Maine hereby accepts from said Percival Proctor Baxter all of the one thousand (1,000) shares of stock of the Congress Realty Company, a Maine Corporation, the same being all the outstanding shares of said corporation all owned by said Baxter, all taxes paid, free from all claims and encumbrances and said corporation is the owner of municipal bonds, corporation shares and cash, to the value of $1,106,213.42 as of February 2, 1965, which constitutes all of the assets of said corporation; to be held IN TRUST forever for the benefit of the people of the State of Maine and to be added to Baxter State Park Trust Fund the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of said 201,018 acres of forest land known as BAXTER STATE PARK as provided in Laws of Maine (1961), Chapter 21, and administered according to the provisions of said Baxter State Park Trust Fund.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

Effective March 2, 1965

Chapter 31

AN ACT Relating to Dissolution of York Sewer District.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. P. & S. L., 1951, c. 63, § 23, additional. Chapter 63 of the private and special laws of 1951 is amended by adding a new section 23, to read as follows:

'Sec. 23. Trustees authorized to receive and accept money. The trustees of the district are authorized and empowered, from time to time, to receive and accept any and all sums of money which the Town of York may vote to turn over to the district to aid it in carrying out its purposes hereunder.'

Sec. 2. P. & S. L., 1951, c. 63, § 24, additional. Chapter 63 of the private and special laws of 1951 is amended by adding a new section 24, to read as follows:

'Sec. 24. Dissolution. The trustees of the district are authorized and empowered at any time to enter into negotiations with the Town of York for the purpose of dissolving the district and transferring its entire assets and liabilities to the Town of York. If an agreement to dissolve the district is reached with the municipal officers of the Town of York, the district may be dissolved upon the unanimous vote of the trustees, and upon a referendum vote being taken at the next annual town meeting in the Town of York. The town clerk of the Town of York shall reduce the subject matter to the following question: "Shall the York Sewer District be dissolved and all of its assets and liabilities assumed by, and become the responsibility of, the Town of York?" The voters shall indicate by a cross or check mark placed upon their ballots against the words "Yes" or "No" their opinion of the same. The result shall be declared by the selectmen and due certificate thereof filed by said town clerk with the Secretary of State, and if said result so filed shows that a majority of the voters is for the approval of the dissolution of the York Sewer District, it shall take complete effect upon filing with said town clerk, of an attested copy of the unanimous vote of the trustees of the district to dissolve the district according to the terms hereof; provided that the total vote cast for and against the dissolution of the York Sewer District equals, or exceeds, 25% of the total vote for all candidates for Governor cast at the last, previous gubernatorial election.'

Effective September 3, 1965

Chapter 32

AN ACT to Increase Borrowing Capacity of Topsham Sewer District and to Provide a Lien for Charges.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. P. & S. L., 1957, c. 128, § 9, amended. The first sentence of section 9 of chapter 128 of the private and special laws of 1957, as amended by section 1 of

3.2 Trust Fund Administration

November 14, 1967

Henry L. Cranshaw, State Controller — Accounts and Control

James S. Erwin, Attorney General — Attorney General

Transferral of Trust Funds

In your memorandum of November 2, 1967, you state that there is a possibility that ex-Governor Baxter may request that the balance of the M ackworth Island Trust Fund be transferred to the Baxter State Park Trust Fund, and that the latter fund be transferred to the Forestry Department. Each possibility will be treated separately.

MACKWORTH ISLAND TRUST FUND

The corpus of this Fund is composed of three separate gifts by Governor Baxter, one of $10,000 accepted by P. & S. L. 1943, Chapter 1; one of $675,000, accepted by P. & S.L. 1953, Chapter 44; and one of $25,000, given in May, 1954, which was not the subject of legislative action.

The first was to be held in trust to be used "for some state public purpose in connection with Mackworth Island." In 1953, the Governor and Council ordered that the balance of this fund be restored to its original amount, plus accrued interest. Under the terms of this gift neither the fund nor its income may be used, except as stipulated.

The second gift consisted of $500,000 for the establishment on Mackworth Island of a new State School for the Deaf; $125,000 for the construction of a bridge to the island, and an additional sum of $50,000 for said bridge, as offered by letter to Governor Cross dated March 9, 1953, no copy of which has been found. A large part of these funds were invested in 1953, and earnings from that date until June 30, 1967 have accumulated so that as of that date, including the $25,000 gift, there was a balance in the Fund of $96,631.69.

Undoubtedly, the fact that the corpus of these funds was intended to b e spent for construction, accounts for the fact that there was no restriction with regard to the use of any income derived therefrom. It is my opinion, therefore, that these income monies may be used in accordance with Governor Baxter's wishes.

BAXTER STATE PARK TRUST FUND

The corpus of these funds came from two gifts by Governor Baxter, one of 1,000 shares of Proprietors of Portland Pier Corporation (accepted by P. & S. L. 1961, Chapter 21) and one of 1,000 shares of Congress Realty Co. (accepted by P. & S. L. 1965, Chapter 30). The condition of these gifts is that the State hold them in trust to be invested and reinvested, the income to be used by the State "for the care, protection and operation of Baxter State Park." Use of such income for a different purpose would not accord with the conditions of the Trust Fund.

James S. Erwin
Attorney General

STATE OF MAINE

Inter-Departmental Memorandum Date July 17, 1972

To James S. Erwin, Attorney General Dept. Attorney General

From Charles R. Larouche, Assistant Dept. Attorney General

Subject Baxter State Park Trust Fund Income

SYLLABUS:

All income, produced in any manner and however characterized, from the Baxter State Park Trust Fund, must either be expended solely "for the care, protection and maintenance" of Baxter State Park or accumulated in that Fund pending such expenditure. Allocation of any such income to any other purpose, including to the General Fund, is improper.

FACTS:

It appears that subsequent to the gift in trust of certain land known as Baxter State Park to the People of the State of Maine, the Honorable Percival Proctor Baxter made a gift in trust to said people of one thousand shares of the capital stock of the Proprietors of Portland Pier Corporation. That gift was accepted by said people by enactment of Chapter 21, Private and Special Laws of 1961, in the following pertinent words:

> ". . . to be held IN TRUST forever for the benefit of the people of the State of Maine and to be known as Baxter State Park Trust Fund the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of said 193,254 acres of forest land known as BAXTER STATE PARK."

It further appears that Governor Baxter subsequently made a gift in trust to said people of one thousand shares of stock of the Congress Realty Company. That gift was accepted by said People by enactment of Chapter 30, P & S Laws of 1965, in the following pertinent words:

> "to be held IN TRUST forever for the benefit of the people of the State of Maine and to be added to Baxter State Park Trust Fund the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of said 201,018 acres of forest land known as BAXTER STATE PARK as provided in Laws of Maine (1961), Chapter 21, and administered according to the provisions of said Baxter State Park Trust Fund."

Paragraph 1 of the Third Clause of the Governor Baxter Trust reads:

> "1. To pay the net income therefrom at least as often as quarterly to the 'BAXTER STATE PARK TRUST FUND' created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the care, protection and operation of the forest land known as BAXTER STATE PARK, and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes." (Emphasis supplied).

On July 12, 1961, Governor Baxter wrote the following letter to State Treasurer Carpenter:

> "Will you please keep in mind that I want the 'BAXTER STATE PARK TRUST FUND' recently created by the Legislature to be kept as a separate and distinct Fund with the securities and income therefrom to be held together and not mixed or involved in any way with other State Trust Funds. Also I ask you to have none of this Fund used for any purposes until I am consulted and approve.
>
> "After my decease of course the State will carry on as best it can in accordance with my wishes.
>
> "I write this letter so that you will have a definite record of my wishes and am sending a copy to Governor Reed and our Executive Councilors for their record." (Emphasis supplied.)

On July 12, 1961, Governor Baxter wrote the following letter to Governor Reed and Executive Councillors:

> "The 'BAXTER STATE PARK TRUST FUND' recently created by the Legislature will produce and accumulate income from time to time and that with maturing securities will need to be wisely re-invested..
>
> "I am enclosing you a copy of my letter to Treasurer Carpenter so that he will understand my wishes in this matter.

"There will be no need of using this Fund at present. Before any purchases or payments are made I should like to be consulted.

"This Fund will grow and I want to keep in close touch with it. Please have both these papers inscribed on the Council records." (Emphasis supplied.)

On February 8, 1968, Governor Baxter sent the following letter to State Comptroller Cranshaw:

"In regard to the naming on the States' books of the charitable funds that came from me and of which you have charge, I make the following suggestions so there will be no confusion.

"I understand you have Ninety Thousand Dollars ($90,000.) more or less, which you now carry as 'Mackworth Island Deaf School Fund'. This fund came as a gift from me and I want to close it for I consider the Deaf School as complete except for one item of Eight Thousand Dollars ($8,000.) which I have already approved for some special equipment which will not occur again.

"Hereafter my gifts will go to one account only which you now have 'Baxter State Park Fund', a project which I intend to increase from time to time.

"In other words, I want to build up the 'Baxter State Park FunD' and drop the other 'Macworth Island Deaf School Fund'. This leaves just one account for my gifts."

QUESTION:

Whether any of the income, including short term earnings, accruing from the Baxter State Park Trust Fund while in the custody of the State of Maine can lawfully be deposited in the General Fund of the State for general State expenditure?

ANSWER:

Negative.

REASONS:

It is clear that the Baxter State Park Trust Fund was established for one purpose only, i.e., for the care, protection and operation of the forest land known as Baxter State Park. The special Acts of 1961 and of 1965 expressly acknowledge this limited purpose in accepting the gifts of Governor Baxter to the Baxter State Park Trust Fund. Each Act also expressly declares that the principal is to be "invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of said 201,018 acres of forest land known as BAXTER STATE PARK as provided in Laws of Maine (1961) Chapter 21, and administered according to the provisions of said Baxter State Park Trust Fund." Chapter 30, P & S L., 1965. Governor Baxter anticipated that this Fund would "produce and accumulate income from time to time." Letter to Governor Reed, July 12, 1961.

Black's Law Dictionary, Fourth Edition, defines the word "income" as follows:

> "The return in money from one's business, labor, or capital invested; gains, profits, or private revenue. In re Slocum, 169 N.Y. 153, 62 N.E. 130.
>
> "The gain derived from capital, from labor or effort, orboth combined, including profit or gain through sale or conversion of capital; income is not a gain accruing to capital or a growth in the value of the investment, but is a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and coming in, being derived, that is, received or drawn by the recipient for his separate use, benefit, and disposal. Goodrich v. Edwards, 41 S.Ct. 390, 255 U.S. 527, 65 L.Ed. 758. The true increase in amount of wealth which comes to a person during a stated period of time. Commissioner of Corporations and Taxation v. Filoon, 310 Mass. 374, 38 N.E.2d 693, 700."

"Short term" income produced from the Trust Fund investment income isclearly "produced" by and "derived" from the Trust Fund. The donor of the Trust impressed upon this Trust the requirement to expend the "income" from this Trust Fund, produced in any manner and however characterized, for the one expressed purpose only and to "accumulate" the income produced by that Fund pending such expenditure.

Accordingly, it is clear beyond cavil that none of the "income" produced by such Trust Fund, whether it be termed direct investment income, short-term income, or by any other characterization, can be diverted to any other purpose, including to the General Fund of the State. Such diversion to the General Fund is neither an application for the sole expressed purpose of this Trust Fund, nor is it an "accumulation" in a "separate and distinct Fund" as required by the donor of this Trust. Such diversion would constitute a breach of trust.

CHARLES R. LAROUCHE
Assistant Attorney General

CRL:mfe

Filed Sept 12, 1975

STATE OF MAINE

Inter-Departmental Memorandum

Date August 16, 1972

To James S. Erwin, Attorney General — Dept. Attorney General

From Marie H. Mitchell, State Controller — Dept. Bureau of Accounts and Control
Rodney L. Scribner, State Budget Officer — Bureau of Budget

Subject Accounting and Budgeting for the Baxter State Park Authority

Pursuant to our discussions with Charles Larouch, we offer the following:

1. The establishment of a special revenue account for the Authority was done to conform to generally accepted governmental accounting principles. No diversion of trust fund assets will be made as a result of this change. Also, we can assert that no interest will be earned by the General Fund of the State on any trust fund assets.

2. The filing of budget forms and work programs by the Authority will not result in the exercise of financial controls by the Bureau of the Budget. These forms are for the recording of financial data and estimates only.

We intend to comply with the letter and the spirit of 12 MRSA 901 which states " - - - - the Forest Commissioner, the Commissioner of Inland Fisheries and Game and the Attorney General, and the said commissioners and Attorney General shall have full power in the control and management of the same (Baxter State Park), under the title of Baxter State Park Authority".

Marie H. Mitchell
State Controller

Rodney L. Scribner
State Budget Officer

MHM:RLS:dc
cc:M.F.W.

Inter-Departmental Memorandum Date March 8, 1973

To Maynard F. Marsh, Commissioner Dept. Inland Fisheries and Game

John W. Benoit, Jr., Deputy Dept. Attorney General

Subject Baxter State Park Trust Fund; Purchase of Rights to Cut and Remove Ti

SYLLABUS:

The income from the Baxter State Park Fund may legally be used to purchase rights to cut and remove timber in T. 2 and 3, R. 9 in Baxter State Park.

FACTS:

In 1961, the Maine Legislature enacted legislation accepting from Percival Proctor Baxter a gift of corporate stock and creating the Baxter State Park Trust Fund. P. & S.L. 1961, c. 21 (Effective February 16, 1961). The Act specified that the income of the fund " * * * be used by said State for the care, protection and operation" of Baxter State Park. Later, in 1965, the Maine Legislature enacted a Private and Special Law accepting from Percival Proctor Baxter another gift of corporate stock, supplementing the gift accepted by the Legislature in 1961. P. & S.L. 1965, c. 30. This additional gift was accepted for use on identical terms as were specified in the 1961 Act; "for the care, protection and operation" of Baxter State Park.

In 1954 and 1962, Percival Proctor Baxter conveyed lands in T. 3, R. 9 and T. 2, R. 9, respectively, to the State subject to the right of Great Northern Paper Company to cut and remove timber until December 1, 1973.

QUESTION:

Whether the income from the Baxter State Park Fund may legally be used to purchase the rights to cut and remove timber in T. 2 and 3, R. 9 from Great Northern Paper Company?

ANSWER:

Yes.

REASONS:

The answer to the question turns on the meaning of "care, protection and operation", in the legislation creating the Baxter State Park Trust Fund; specifically whether purchase of rights to cut and remove timber is an expenditure of trust income for the "care, protection and operation" of the Park.

Definition of the terms: "Care", "protection", "operation".

"Care" may be defined as responsibility, charge, watchful regard and attention. Hervey v. Metropolitan Life Ins. Co. (1905), 100 Me. 523, 62 A. 600; Black's Law Dictionary, 4th ed., "care".

> " * * * "Care' is not a word of rigid and inflexible meaning but is one of broad comprehension admitting of a variation in its application to different persons and circumstances. It has no fixed and limited significance in law. Bless v. Blizzard, 86 Kan. 230; nor in its common use. An accepted definition is 'responsibility, charge or oversight, watchful regard and attention.' * * * ." Emery v. Wheeler (1930), 129 Me. 428, 152 A. 624.

"Protect" means to defend, guard against and conserve. Keystone Tankship Corp. v. Willamette Iron & Steel Co., 222 F. Supp. 320, 322. The term has been defined to mean preserve in safety; intact; to keep safe and to take care of. Levin v. Mede, 189 Misc. 852, 72 N.Y.S.2d 669.

"Operation", when used intransitively, means to work, act or unction, New York S. & W. R. Co. v. U.S., 200 F. Supp. 860; the oing or performing of work. Sohner v. Mason, 136 C.A.2d 449, 288 P.2d 616.

Nothing in the legal definitions of "care", "protection" and "operation" requires an interpretation that Baxter Park Trust Fund income may not legally be used to preserve and conserve Baxter Park resources. On the contrary, to conserve is to protect. To purchase standing timber, otherwise scheduled to be cut, is to conserve it; to protect it.

The purchase of rights to cut and remove timber in the Park, under the stated situation, means the expenditure of trust income would be confined to the Park.* No funds would be spent for acquisition of realty beyond the boundaries of the Park. While the purchase of standing timber in the Park is an acquisition of realty, it is in reality more. It is self-evident that such a purchase foreclosing the cutting and removal of mature trees, would have a meaningful ecological result. Preservation of sound timber, by purchase or otherwise, would guard against damage from erosion. Conservation would be realized; and to conserve is to protect.

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* We do not mean to intimate what our decision would be if the trust income was proposed to be spent for acquisition of realty outside the Park. That is not a question presented at this time.

There exists a pre-eminent public purpose in the State's preservation of forest areas. No words better describe the principle than those in State ex rel. Owen, Attorney General v. Donald, Secretary of State (1915), 160 Wis. 21, 151 N.W. 331:

" * * * .

"First, the acquisition, preservation, and scientific care of forests and forest areas by the state, as well as the sale of timber therefrom for gain in accordance with the well-understood canons of forest culture, is pre-eminently a public purpose. It would be a mere affectation of learning to dwell upon the value to a state of great forest areas. That has been established long since and is not open to question. The lamentable results which have followed the cutting of forests over large areas, the serious effects of such cutting upon climate, rainfall, preservation of the soil from erosion, regularity of river flow, and other highly important things which go to make up the welfare of the state, are matters of history. They need not be descanted upon." 151 N.W. at 377.

The State, as trustee of the Baxter State Park, has the ordinary duty to protect and preserve the Park. It has been judicially decided that a trustee may make and incur expenditures reasonably requisite to the protection and preservation of the trust estate, including the payment of an "encumbrance." Pratt v. Thornton, 28 Me. 355, 48 Am. Dec. 492; Racine & M. R. Co. v. Farmers' Loan & T. Co., 49 Ill. 331, 95 Am. Dec. 595. In the present situation, Great Northern Paper Company has the right to cut and remove timber in a specific area of the Park. As such, a burden exists upon certain of the land in the Park. That which constitutes a burden upon land, depreciative of its value, which, though adverse to the interest of the landowner, does not conflict with his conveyance of land, is an "encumbrance." Snohomish County v. Seattle Disposal Company, 70 Wash. 2d 668, 425 P.2d 22; and Tenbusch v. L. K. N. Realty Co., 107 Ohio App. 133, 149 N.E.2d 42. It has been noted earlier herein that the expenditure of funds will not result in the purchase of realty outside the Park. The "encumbrance" exists within the Park and satisfaction thereof directly results in protection and preservation of Park realty. State ex rel Owen, Attorney General v. Donald, Secretary of State, supra. See also: Union P. R. Co. v. Durant, 95 U.S. 576, 24 L.Ed. 391; Walden v. Bodley, 14 Pet. (U.S.) 156, 10 L.Ed. 398; and Petrie v. Badenoch, 102 Mich. 45, 60 N.W. 449. (decisional law supporting a trustee's expenditure of trust funds for the purchase of an outstanding title against the trust property in order to protect it.)

In conclusion, the income from the Baxter State Park Fund may legally be used to purchase rights to cut and remove timber in T. 2 and 3, Range 9, in Baxter State Park. Such acquisition protects and preserves Baxter State Park.

John W. Benoit, Jr.

JOHN W. BENOIT, JR.
Deputy Attorney General

JWBJr./ec

STATE OF MAINE

Inter-Departmental Memorandum Date July 31, 197

To A. Lee Tibbs, Director Dept. Baxter State Park

From Martin L. Wilk, Deputy Dept. Attorney General

Subject Baxter State Park Authority

SYLLABUS:

The Baxter State Park Authority has the authority to utilize the Baxter State Park Trust Fund income, without seeking the prior approval of the Governor, to construct a new headquarters building or such other facilities as may be necessary for the maintenance and operation of Baxter State Park when such construction is consistent with the provisions of the deeds of trust from Percival Proctor Baxter to the State of Maine.

FACTS:

Percival Proctor Baxter gave the 201,018 acres of Baxter State Park (hereinafter "the Park") to the State of Maine to be held in trust for state forest, public park and public recreational purposes.

Baxter also provided the State with trust funds for the care, protection and operation of the Park, see Private and Special Laws of 1961, Chapter 21; Private and Special Laws of 1965, Chapter 30; Clause THIRD of Intervivos Trust dated July 6, 1927, as amended.

The Baxter State Park Authority (hereinafter "the Authority") consists of the Director of the Bureau of Forestry, the Commissioner of Inland Fisheries and Game, and the Attorney General. The Authority has authority over the control and management of the Park, and is designated by statute to receive "moneys available

from trust funds established by the donor of the park" and other income derived from the Park for "maintenance and operation of the Park," 12 M.R.S.A. § 901.

The Authority proposes to utilize Baxter Park Trust Fund income to construct an "administration building" in the Millinocket area to serve as a general administrative headquarters providing office space for the Park staff. The building would also serve as a convenient place for the public to obtain information concerning the Park.

QUESTIONS AND ANSWERS:

1. Is the Authority required to seek the approval of the Governor or Legislature of the Park budget? No.

2. Is the Authority required to seek the approval of the Governor to utilize Baxter State Park Trust Fund income to construct a new headquarters building or other facility which the Authority properly considers necessary for the maintenance and operation of the Park? No.

REASONING:

The State of Maine is the Trustee of the lands of Baxter State Park, and of the Baxter State Park Trust Fund established to provide for the "care, protection and operation of the Park," pursuant to Private and Special Laws of 1961, Chapter 21. The State is also a beneficiary of the Intervivos Trust of Percival Proctor Baxter dated July 6, 1927, as amended, which provides funds to be used in part for "the care, protection and operation of the forest land known as Baxter State Park. . . . " The

State has delegated its powers and responsibilities under these trusts to the Baxter State Park Authority by the enactment of specific legislation establishing the Authority and setting forth its powers and responsibilities, see 12 M.R.S.A. § 900, et seq; Public Laws of 1931, Chapter 281.

From the inception of the Authority's existence, there has been no specific statutory provision requiring that its budget for the use of trust funds must be approved by either the Governor or the Legislature. In 1973, the Legislature adopted certain new general budgetary provisions. These included a requirement that a "Part 3" budget be submitted to the Legislature which was to include information regarding "Special Revenue Fund allocation bills as may be needed to authorize all operating expenditures of the State Government," 5 M.R.S.A. § 1664, P.L. 1973, c. 744, as well as a provision for gubernatorial review of "all budgets regardless of source of funds," for purposes of preparing a budget document for transmittal to the Legislature, 5 M.R.S.A. § 1666, P.L. 1973, c. 732. Had these provisions remained in effect, it is arguable that the Authority would be required to submit its budget to the Governor for review on the theory that its budget involved a "Special Revenue Fund."

However, in 1975 the 107th Legislature amended § 1664 by deleting the reference to "Special Revenue Fund" appropriations and substituting in its place a specific listing of those appropriations which were to be included in Part 3 of the budget document, P.L. 1975, c. 515. This amendment does not

refer to or include any fund under the supervision and control of the Authority.

Pursuant to this revision, it is clear that the Baxter State Park budget does not require legislative approval; nor does it require gubernatorial review. Although section 1666 still provides that the Governor shall review all budgets regardless of the source of funds, when this section is read in the context of the budget provisions as a whole and of the specific legislation dealing with the Park Authority's powers, it is evident that this review does not include the Baxter budget. The Governor's review is concerned with "budgetary recommendations made to the Legislature" in the "Budget document in the form required by law," see P.L. 1975, c. 515. Furthermore, the Governor's authority to revise the budget estimates is predicated on his alterations being necessary "in view of the needs of the various departments and agencies and the total anticipated income of the State Government during the ensuing biennium," 5 M.R.S.A. § 1666. Because the income from the Baxter trust is different in kind from other state income and its potential use is specifically directed to purposes related to the Park, there is no need for the Governor to review the Park budget in relation to the needs of other state agencies or the general income level of the State. Moreover, the general requirements of Title 5 M.R.S.A. § 1664 and § 1666, even though enacted later in time, would not supersede the authority of the Park Authority pursuant to pre-existing specific legislation dealing with the financial

and managerial control of the Park, see generally Finks v. Maine State Highway Commission, 328 A.2d 791 at 795 (1974); Opinion of the Justices, 311 A.2d 103, 108 (1973). Accordingly, the budget of the Park Authority does not require gubernatorial or legislative approval.

Similarly, the decision of the Park Authority to utilize the Baxter Trust Fund income to construct a headquarters building necessary to the operation of the Park does not require gubernatorial concurrence or approval. The Authority's decisions are governed by the terms of the trust establishing the Park and its funding; the Governor has no role in the administration of the trust.

MARTIN L. WILK
Deputy Attorney General

MLW/ec

Copies to:
William Cross, Business Mgr., Baxter State Park
Fred E. Holt, Commissioner, Foresty
Maynard F. Marsh, Commissioner, Inland Fisheries & Game

Baxter State Park / Acceptance of grants & Contribs
Federal grants to state
Contributions to state

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GE

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 25, 1977

To: Lee Tibbs, Baxter State Park Authority

From: Sarah Redfield, Assistant Attorney General

This is in response to your request of June 20, 1977 as to the Baxter State Park Authority's acceptance of grants from the federal government or private organizations to finance educational programs in the Park. Specifically you have inquired as to whether such grants could be used for programs at Park headquarters and/or within the Park and as to whether they are to be restricted as to equipment, supplies or personnel. The Baxter State Park Authority is without the appropriate statutory authorization to accept such grants. Where such funds may be properly available and accepted, the Authority's use thereof would be limited by the terms of the Trust and the intent of the settlor.

The operation of the Park is governed by the provisions of Title 12 M.R.S.A. § 900 et seq. and the various trust instruments involving both land and funds. Specifically, funds for the Park are derived from two trust funds. The first, known as the Baxter State Park Trust Fund, was established by the legislature's acceptance in Chapter 21 of the Private and Special Laws of 1961 of the gift from Governor Baxter of the assets of the Proprietors of Portland Pier Corporation; see also P. & S. L. of 1965, c. 30. The second trust fund is held by the Boston Safe Deposit and Trust Co. pursuant to the terms of the Baxter intervivos trust dated July 6, 1927, as amended. The income from this fund is paid at least quarterly into the Baxter State Park Trust Fund; the principal is available to the Baxter State Park Authority and the Maine Forest Authority for the purchase of additional Park or forest lands, see 12 M.R.S.A. §§ 901, 1701. The principal of Baxter State Park Trust Fund is to be invested and reinvested and the income used for "the care, protection and operation" of Baxter State Park. The intervivos trust instrument contains a similar provision. The trust instruments neither prohibit nor authorize the use of funds from additional sources.

The statute, which provides that the Authority "shall have full power in the control and management" of the Park lands is more specific as to funds:

> "The authority shall receive moneys available from trust funds established by the donor of the park and shall include fees collected, income from park trust funds invested by the Treasurer of State and other miscellaneous income derived from the park for maintenance and operation of the park.
>
> "The authority is further designated the agency of the State to receive such sums as are, from time to time, paid to the State by the trustee under clause THIRD of a certain inter vivos trust dated July 6, 1927, as from time to time amended, created by said Baxter for the purchase or other acquisition of additional land for said Baxter State Park, and the authority is authorized to expend such sums so received for such purposes." (emphasis supplied) 12 M.R.S.A. § 901.

Given the specific provisions as to funds, and lacking any authorizatic to accept outside grants either within the statutes or the trust instruments, the Authority may not properly seek or accept grants as indicated in your request, 12 M.R.S.A. § 901 Cf. eg. 12 M.R.S.A. § 685: see also 2 M.R.S.A. § 4. The Authority may, however, wish to consider methods whereby the Governor or other appropriate state agencies may accept such funds for the Park, pursuant to existing statutory provisions.* In this regard, the Authority may wish to consider the

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* Title 2 M.R.S.A. §4 now provides regarding federal funds: "The Governor is authorized and empowered to accept for the State any federal funds or any equipment, supplies or materials apportioned under federal law and to do such acts as are necessary for the purp of carrying out such federal law. The Governor is authorized and empowered to authorize and direct departments or agencies of the State, to which are allocated the duties involved in the carrying out of such state laws as are necessary to comply with the terms of the Federal Act authorizing such granting of federal funds or such equipment, supplies or materials, to expend such sums of money and do such acts as are necessary to meet such federal requirements." As of October 24, 1977 this section applies to the Treasurer of the State and is limited by the terms of Title 5, C.150, see P.L. 1977, C. 583;

and regarding other gifts:

"The Governor is authorized to accept in the name of the State any and all gifts, bequests, grants or conveyances to the State of Maine.", 2 M.R.S.A. § 5.

possible limitations on the use of funds which arise by virtue of the trust relationship and the law as to the interpretation of trusts. As previously indicated, the trust instruments themselves are silent as to the use of other funds for Park programs.

Where the trust contains no express provision, reference may be made to extrinsic evidence to determine the terms of the trust and the intent of the settlor, see generally II Scott on Trusts, §§ 164.1 and cases cited therein. In regard to your question there is, however, little guidance available. Records do indicate that during his lifetime, Baxter himself paid directly for many aspects of the Park's operations; see, e.g. letters from Baxter dated May 30, 1960 offering to pay for part of a Park road; dated February 28, 1961 offering funds in addition to State appropriation; September 22, 1965 authorizing expenses for gate house. The State of Maine itself also appropriated funds for the operation of the Park, see, e.g. Resolves 1953, c. 102, Resolves 1963, c. 70. See also letters from Baxter dated September 27, 1962 asking that money for the rangers come from State appropriations and not his special trust fund; and March 25, 1968 objecting to the use of trust fund moneys for the purchase of personal property at Kidney Pond Camps.

The most specific statement of the settlor regarding the expenditure of funds from outside sources was his adamant refusal to have the Park accept the money provided by the Appalachian Mountain Club (in memory of a ranger who had died in a rescue attempt) for bunkhouses and rescue equipment. Baxter sent the Authority a check for the amount involved, which funds were then returned to the Executive Secretary of the Appalachian Mountain Club, see letter from Austin Wilkins dated August 27, 1965. In sending this money, Baxter wrote that "any building or Memorial that is erected in my Park will be paid for by myself after my approval," letter to Austin Wilkins dated August 27, 1965.

From the available documentation, it appears to have been Baxter's intention that he provide the funds for the Park. In particular, he wished to assure that, at least during his lifetime, no buildings be erected other than with his approval and financial support. It is not clear, however, that he intended to preclude all outside support. Where there is no express provision and where no evidence as to the intent of the settlor is ascertainable, the trustee may act in accordance with the equitable principles established by the courts. The trustee may exercise its discretion so long as it does not violate the established duties incumbent on trustees including the duty of loyalty, the duty not to delegate, the duty to keep and render accounts, the duty to exercise reasonable care and skill in administration to preserve the trust property. See Scott, supra, § 164.

In conclusion, the general pricnciples of trust law, when read together with the statutory creation of powers of the Authority, indicates that the Authority itself may not accept grants from the federal government or from other sources. Where, however, such money is available through proper acceptance, the Authority may exercise its discretion consistent with its fiduciary responsibilities and with the broad grant of administrative power, see 12 M.R.S.A. § 901, State v. Fin & Feather Club, 316 A.2d 351 (Me. 1974). The discretion of the Authority should, however, be limited by the expression of Baxter's intent concerning the Appalachian Mountain Club gift, to the acceptance of funds for purposes other than the erection of structures or the purchase of equipment for use within the Park.

This opinion is a broad response to your request. If a specific proposal arises, you may wish to inquire further.

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR:jg

cc: Baxter Park Authority Members
Bill Cross

STATE OF MAINE

Inter-Departmental Memorandum

Date October 23, 1979

To Lee Tibbs, Director — Dept. Baxter State Park Authority

Sarah Redfield, Assistant — Dept. Attorney General

Subject Contributions for Park History

This is in response to your oral request for advice as to how to proceed to accept donations for possible publication of the Baxter Park history. This advice is supplementary to that provided in an opinion to you dated August 25, 1977, concerning the Baxter State Park Authority's acceptance of grants from the federal government or private organizations to finance educational programs in the Park. (A copy of this opinion is attached for your information.

As long as the Park Authority has determined that acceptance of donations for the publication of the Park history is consistent with the August 25, 1977 opinion, the procedure to be followed seems to be fairly straightforward. As you are aware, the Governor's Office is authorized to accept, in the name of the State, any and all gifts, bequests, grants or conveyances to the State of Maine pursuant to Title 2 M.R.S.A. § 5. Dick Ericson, in Rod Scribner's office, indicates that this may best be accomplished by your having Pete Madeira prepare an order increasing revenues under a given appropriation number and asking the State Controller to isolate and use these funds only for the intended purpose. The request to the State Controller should be accompanied by a copy of a memo to the Governor's Office (David Flanagan) indicating the nature of the donations involved and the limitations to be placed on their use. It is my understanding that once the Governor has accepted the donation, the financial order will be processed allotting the funds to the Baxter State Park Authority's existing operating account subject to the limitations previously discussed.

If you should have further questions, please feel free to call or contact Dick Ericson directly. His number is 289-2881.

Sarah

SARAH REDFIELD
Assistant Attorney General

SR/ec
cc: Peter Madeira

STATE OF MAINE

Inter-Departmental Memorandum Date April 8, 1980

To Baxter State Park Authority Dept.

From Rufus E. Brown, Senior Assistant Dept. Attorney General

Subject Funding for Publication of Baxter State Park

On March 7, 1980, the Baxter State Park Authority (the Authority) authorized its staff to examine the possibility of funding the editing and publication of John Hakola's "History of Baxter State Park," at a projected cost of $26,707, from the Baxter State Park Trust Fund (the BSP Trust Fund) or the Governor Baxter Trust.

The purpose of this memorandum is to determine whether either trust is in a position to finance the Park history. For reasons to be explained more fully below, we have concluded that neither are. The income from both trusts are limited to expenditures for the "care, protection and operation" of the Park. The publication of the history of the Park is not remotely related to either the "care" or the "protection" of the Park. Nor would the cost of publication constitute an expenditure incurred directly for or incidental to the "operation" of the Park as that term is used in its ordinary sense and also as viewed against the background of Governor Baxter's expressions of how the trust funds should be used.

Background

The BSP Trust Fund was initially created in 1961 by a gift to the State of Maine of 1000 shares of stock of the Proprietors of Portland Pier Corporation, valued at $488,942.64. Private and Special Laws, 1961, chapter 21. Baxter made a similar gift to the State in 1965 consisting of 1000 shares of stock of the Congress Realty Company, valued at $1,106,213.42. Private and Special Laws, 1965, chapter 30. In both cases, the Private and Special Laws accepting the gifts recited that "Baxter wishes to share with the State in part the cost of caring for, protecting and operating" Baxter State Park. The terms of the trust, as specified in Private and Special Laws, 1961, ch. 21 ~~is~~ are stated as follows:

> to be held IN TRUST forever for the benefit of the people of the State of Maine and to be known as Baxter State Park Trust Fund the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of . . . . forest land known as BAXTER STATE PARK. (Emphasis added]

The 1965 gift provided that the gift would be added to the Baxter State Park Trust Fund to be used for the same purposes.

The Governor Baxter Trust was initially established in 1927 as a revocable trust to be administered by the Boston Safe Deposit and Trust Company. Pursuant to an amendment to this trust dated May 18, 1966, Governor Baxter provided that, after his death and after payment of specific bequests provided for, the remainder of the Trust would be managed, invested, reinvested and administered by the Boston Safe Deposit and Trust Company as follows:

> To pay the net income therefrom at least as often as quarterly to the "BAXTER STATE PARK TRUST FUND" created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the care, protection and operation of the forest land known as BAXTER STATE PARK and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes. [Emphasis added]

The Trust further provides that the principal of the Trust is restricted to acquisition of additional lands for the Park. Accordingly, as in the case of the BSP Trust Fund, the income from the Governor Baxter Trust Fund may only be used for the "care, protection and operation" of the Park.

Consistent with the terms of both trusts, 12 M.R.S.A. §901 provides:

> The authority shall receive monies available from trust funds established by the donor of the park and shall include fees collected, income from park trust funds invested by the Treasurer of the State and other miscellaneous income derived from the park for maintenance and operation of the park. [Emphasis added

Analysis

It is clear from the foregoing that income from both the BSP Trust Fund and the Governor Baxter Trust may only be used for the "care, protection and operation" of the Park. Also see, Op. Atty. Gen., November 14, 1967 and Op. Atty. Gen., July 17, 1972. Obviously, the publication of a history of the Park is not remotely related to either the "care" or the "protection" of the Park. So the issue to be examined is whether the publication of the Park history can be considered as arising out of the "operation" of the Park.

The term "operation" has been defined both by the dictionary (Webster's Third New International Dictionary) and by case law to mean the "work" or "function" of an organization. See, e.g., New York S.&W.R. Co. v. United States, 200 F.Supp. 860 (D.NJ. 1961); Memorandum of John W. Benoit to Maynard F. Marsh, March 8, 1973

concerning the Baxter State Park Trust Fund. Thus the ordinary use of the term "operation" suggests, especially when used in conjunction with the words "care" and "protection," that it is intended to limit the use of income from the trust fund to the actual functioning or work of the Park, such as for personnel and maintenance and other activities incidental to such purposes.

Because a fair reading of the trust instruments appear to provide an unambiguous answer to the question being considered, it is unnecessary to look to extrinsic evidence to interpret the trusts. Compare, Fitzgerald v. Baxter State Park, Me., 385 A.2d 189, 199 (1978). But even if we were to look at Governor Baxter's expressions of intent and conduct in relation to the trusts, we would come to the same conclusion.

A review of his correspondence reveals that Governor Baxter was conservative in his view of the purposes of the BSP Trust. He did not want interest of the Trust expended during his lifetime without his consent, and on those occasions where he did consent to the use of the trust income he usually reimbursed the Trust. See, e.g., Feb. 15, 1962 letter from Governor Baxter to Austin Wilkins[1/] and June 1, 1967 memorandum from Austin Wilkins to Messrs. Erwin, Speers and Cranshaw.[2/] Baxter's purpose was for the BSP Trust Fund to accumulate during his lifetime so that the Park could eventually be independent from State appropriations for its operations. See August 30, 1961 letter from Governor Baxter to M. C. McDonald, President of Great Northern Paper.[3/] Very soon after making the first gift constituting

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1/ In this letter Governor Baxter stated that he would repay the BSP Trust Fund the sum of $3,032.16 expended for the salary of two rangers. He also indicated that he would repay the trust fund the sum of $850 used to pay for the snowmobile of Helon Taylor. He concluded the letter by stating that "I want to keep the TRUST FUND intact without withdrawals so please keep this in mind for I want to be consulted."

2/ This memorandum advises that Baxter rescinded the prior authorization permitting the use of interest from the BSP Trust Fund to construct headquarters for the Park Supervisor. Also see letters of Baxter to Frank S. Carpenter, State Treasurer, July 19, 1961 and letter to Governor Reed and Executive Council, July 12, 1961.

3/ Also see, July 24, 1961 letter from Wilkins to Roland H. Cobb and Frank Hancock and July 31, 1968 letter from Austin Wilkins to David Stevens, Chairman, Maine State Highway Commission indicating that "It was quite apparent to me and has been for some time that Governor Baxter does not wish any moneys to be taken from the Baxter State Park Fund, either interest or principal, until sufficient time is permitted an accumulation of interest to permit regular operations and expenses of the Park."

the BSP Trust Fund Governor Baxter explained that:

> My object in giving the State this substantial fund is to provide additional funds apart from and in addition to the usual legislative appropriations. This income may be used for lean tos, camping places . . . plumbing, trails and other matters that are not provided for by legislative action . . . .

Letter from Governor Baxter to Earl W. Davis, February 28, 1961.[4/]

Not only does this correspondence indicate that Baxter desired to be conservative with the BSP Trust Fund, preserving it for essential operating expenses for the Park, but additional correspondence indicates that, as a general proposition, he did not approve of advertising of the Park.[5/] Nor did Governor Baxter want the Park to be held out as a memorial to himself.[6/]

In 1963 Governor Baxter did approve the cost of a publication entitled "A Guide to Baxter State Park" (copy attached) and later he approved the cost of republication of the booklet.[7/] The publication was paid from the Maintenance and Improvement Fund, established on November 7, 1945 from rentals of park land for the purpose of development and maintenance of the Park.[8/] Even though the purposes of the

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4/ Also see letter from Wilkins to Baxter, September 13, 1961 and from Baxter to Wilkins dated September 18, 1961 indicating that the BSP Trust Fund should be used principally in the future for personnel, and letters of Baxter to Wilkins dated September 27, 1962 and from Baxter to Frank E. Hancock, October 9, 1962, indicating that the BSP Trust Fund should be used for "future emergencies."

5/ See, e.g., October 13, 1959 letter from Baxter to Attorney General Frank E. Hancock disapproving of cutting of a Christmas Tree from the Park for the White House. In this letter he rejected the notion that the tree would be a good advertisement for the State. "In my opinion it is best not to advertise the Park because it sufficiently advertises itself by those who visit it."

6/ In an August 30, 1965 letter to Ronald T. Speers, Commissioner of Inland Fish and Game, he stated that "This park is not to be used in Memorial to anybody not even to myself."

7/ See letters of Wilkins to Henry Cranshaw, February 14, 1963 and November 4, 1965 and Cranshaw to Baxter, January 20, 1967.

8/ See Baxter letter to Joseph McGillicuddy, September 10, 1945 and Council Order #281, November 7, 1945.

Maintenance and Improvement Fund are analogous to the BSP Trust Fund, Baxter's approval of the publication of the guidebook does not establish precedent for publication of the Baxter history because there is a fundamental difference between the two publications. The guidebook describes the Park itself and how to use it. It is in a practical sense a publication which is incidental to the actual "operation" of the Park and accordingly is the type of publication which might well be funded from the BSP Trust Fund. The same cannot be said for the Park history which, of course, is a history which does not facilitate the use of the Park.

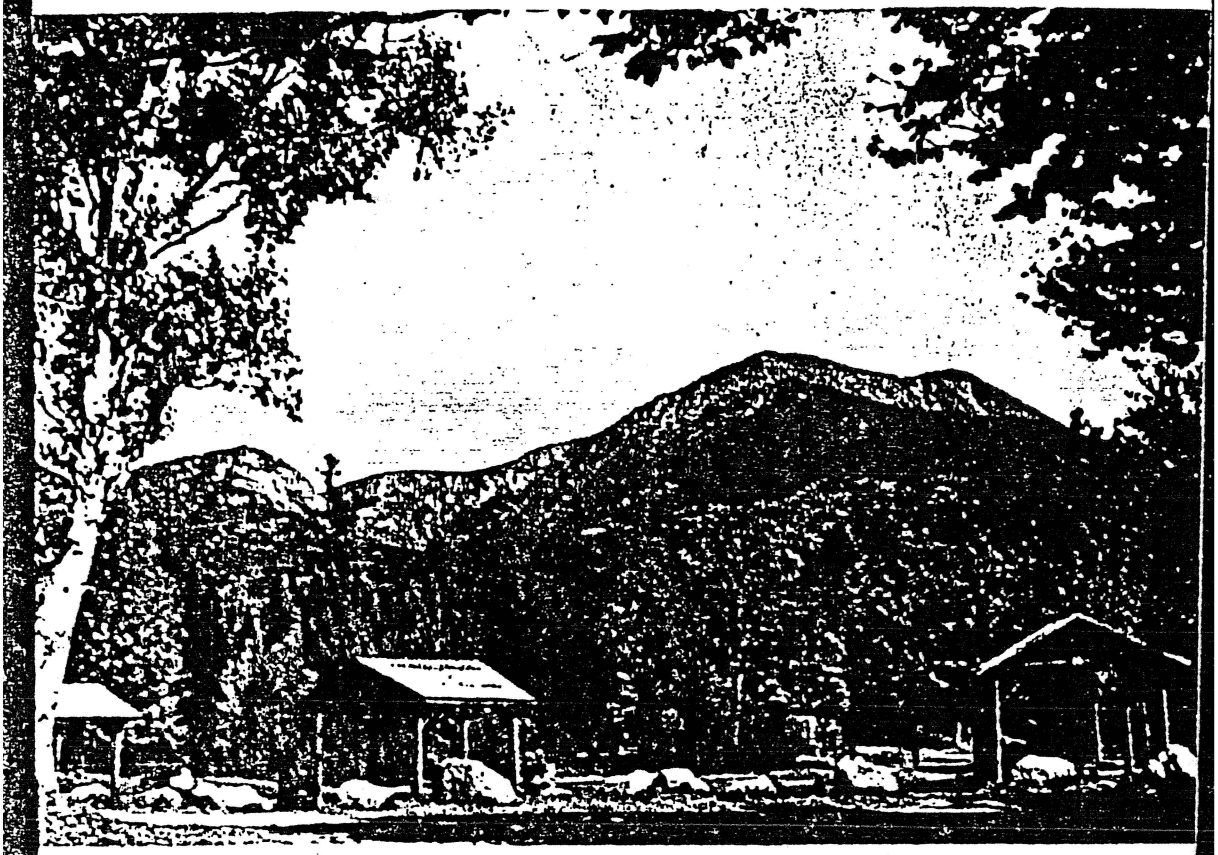
We conclude, therefore, that at least in the absence of obtaining approval from the courts pursuant to a petition for instructions, the Park history cannot be funded either directly from the BSP Trust Fund or indirectly from income received by that fund from other sources, including the Governor Baxter Trust Fund, because the history is not incidental to the "operation" of the Park.[9/] This conclusion does not preclude the Authority, however, from seeking alternative ways to publish the history. Although the Park possesses no independent borrowing power, and therefore cannot incur a direct obligation to repay loans for the publication, there may be a publishing house willing to recover its fees from the proceeds of the sale of the book. Alternatively, there may be a benefactor who would be willing to advance monies for the publication under similar arrangements.

RUFUS E. BROWN
Senior Assistant Attorney General

REB:jg

9/ A recent communication from the Boston Safe Deposit and Trust Company indicates that their in-house counsel, after examination of the question examined here, concurs completely with this conclusion.

A Guide to BAXTER STATE PARK *and* MOUNT KATAHDIN *in* MAINE



"Katahdin in its grandeur will forever remain the Mountain of the people of Maine."
P. P. BAXTER

Published by
BAXTER PARK AUTHORITY and
MAINE DEPARTMENT of ECONOMIC DEVELOPMENT

PERCIVAL P. BAXTER
PORTLAND, MAINE

THE PROMISE OF THE STATE OF MAINE

The PEOPLE OF MAINE by Legislative Acts (1930-1963) signed by several Governors have accepted my gifts of 201,018 acres of land known as BAXTER STATE PARK and by these enactments these acres have been dedicated for use of the PEOPLE OF MAINE,

"FOREVER TO BE HELD BY THE STATE OF MAINE IN TRUST FOR PUBLIC PARK, PUBLIC FOREST, PUBLIC RECREATIONAL PURPOSES, AND SCIENTIFIC FORESTRY, THE SAME ALSO FOREVER SHALL BE HELD IN ITS NATURAL WILD STATE AND EXCEPT FOR A SMALL AREA FOREVER SHALL BE HELD AS A SANCTUARY FOR WILD BEASTS AND BIRDS."

Percival P. Baxter

Front Cover: Katahdin Stream Campground and Mt. Katahdin.

More than forty years ago Percival P. Baxter, then a young member of the Maine Legislature, became keenly aware of the wild, unspoiled beauty of the Katahdin region. In his mind's eye, he saw this region preserved for all time as a retreat for Maine's citizens and visitors; a spot that would stand forever as a natural barrier to encroaching civilization.

Through five legislative sessions and two terms as Governor, he worked unceasingly to have the State purchase and set aside at least a portion of this incomparable region. Invariably, however, his plan met defeat. He was not able to convince his contemporaries of its worth. Returning to private life in 1925, he resolved that action could be put off no longer. He decided to use his own funds to create a Katahdin Park.

In 1930 he made his first land purchase, a 6,690 acre tract which included most of Mt. Katahdin. The land was deeded to the State with the stipulation that "it be held by the State as Trustee, in Trust for the benefit of the People of Maine," and that it "forever be left in its natural wild state, forever be kept as a sanctuary for wild beasts and birds and forever be used for public forest, public park and public recreational purposes." Additional purchases since have raised the total Park area to 201,018 acres.

By resolve of the Maine Legislature in 1931, the area was officially designated as "Baxter State Park." The summit of Mt. Katahdin was named "Baxter Peak" in his honor.

Park administration is under the Baxter Park Authority, comprising the State Attorney General and Commissioners of Forestry and of Inland Fisheries and Game.

Maine Governor John H. Reed and Mr. Baxter at Katahdin Stream Campground.

There are three major highway approaches to Baxter State Park; from the west, south and northeast.

The route from the west is from Greenville over the Greenville-Millinocket Road, a private road, open to public use. Approximately forty miles from Greenville, at Ripogenus Dam, the road forks. The northern fork is the shortest route to campgrounds in the western and northern areas of the Park. (Nesowadnehunk and South Branch Pond.) The fork leading to the east is the shortest route to southern and eastern areas of the park. (Katahdin Stream, Abol and Roaring Brook Campgrounds.)

The route from the south begins at Millinocket, 24 miles from Mattawamkeag via Maine Highway 157 (63 miles from Bangor on U. S. Route 2). At 16.2 miles from Millinocket the dirt road to Roaring Brook branches to the right, leading to Park headquarters at Togue Pond and beyond to a terminus at Roaring Brook, 26 miles from Millinocket. Those wishing to reach the southwestern or northern areas of the Park should continue on the main road to a point 20 miles from Millinocket, where the Nesowadnehunk Tote Road branches right to Abol, Katahdin Stream and Nesowadnehunk Campgrounds.

From the northeast the approach to the Park is from Patten via the Grand Lake Road, which branches toward the Millinocket-Greenville road at Nesowadnehunk Campground (the route to Greenville) or continues toward Millinocket via the Nesowadnehunk Tote Road. The road leading to South Branch Pond campground branches south from the Grand Lake Road approximately 30 miles from Patten.

The portions of these roads within Baxter Park are often narrow and winding. Drive with care and obey speed limits. An automobile accident, no matter how slight, could spoil your trip.

Camping in Baxter State Park

GENERAL INFORMATION *Season: May 15 to October 15.*

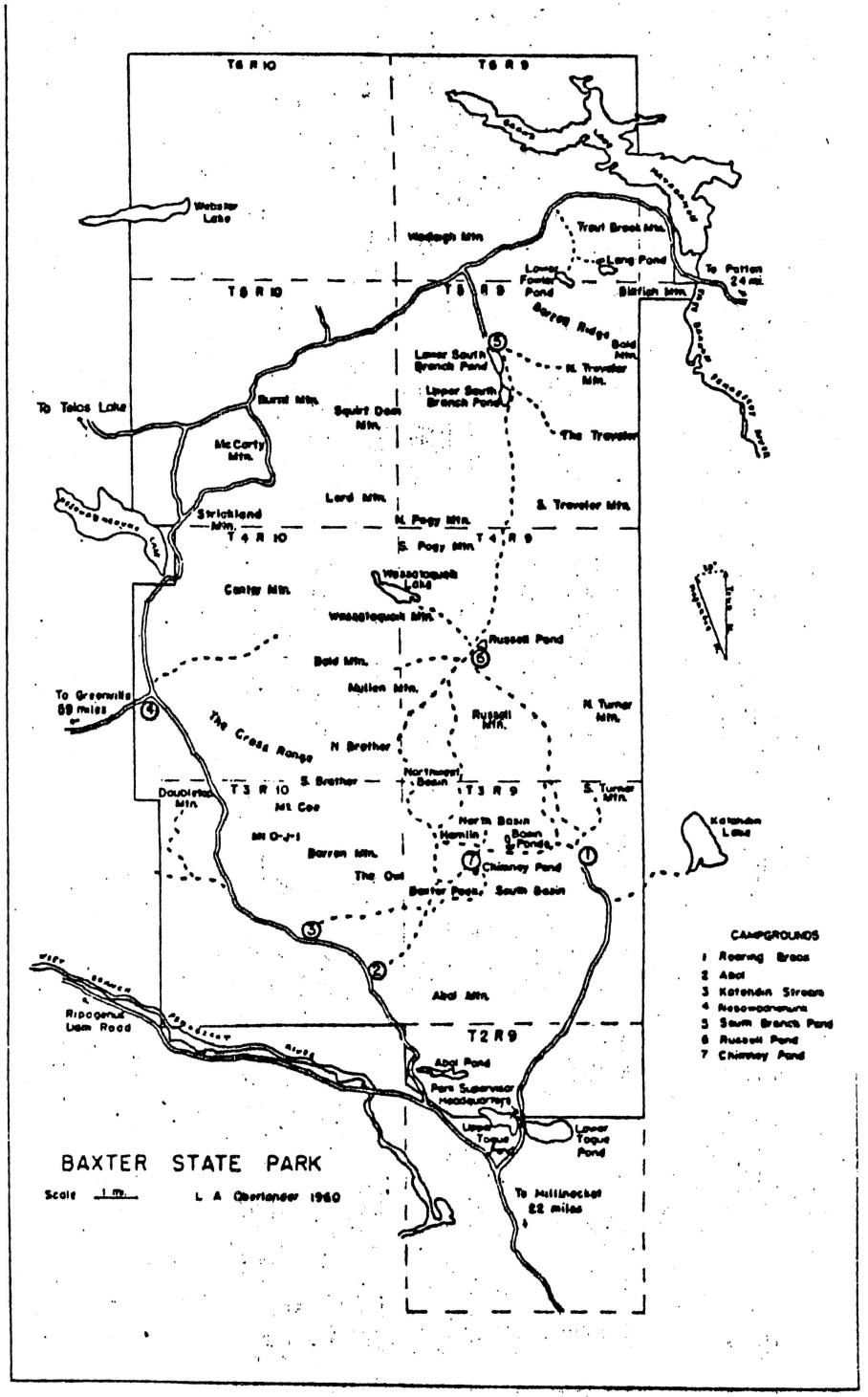
Camping is restricted to designated campsites or campgrounds. A ranger is in charge of each campground and assigns space to campers. Camping or the use of fires along the trail, on the tableland or the summit of Mt. Katahdin is prohibited.

No pets are allowed in the Park.

Reservations are recommended to assure accommodations. Reservations must be paid in advance and confirmed. Contact reservation clerk, Millinocket, Maine. Telephone Park 3-5201.

Fees:	Bunkhouse	$1.50 per person per night
	Shelters (lean-tos)	.75 per person per night — minimum $1.50
	Trailer or tent space	.25 per person per night — minimum $1.00 per site.

No charge for children under 6 years of age.



... beauty of ... Please abide by them.

(Several smaller campsites are located within the Park, marked by yellow signs. These sites are designed primarily to handle overflow from the major campgrounds.)

Baxter Park Campgrounds

(Listed in same numerical order as shown on map, page 5)

Campgrounds Accessible by Automobile

1. ROARING BROOK CAMPGROUND

This campground is located on the south bank of Roaring Brook, on the southeast side of the Park, 26 miles by automobile road from Millinocket. The area around it is in natural wilderness, but the several cleared and marked foot trails make it possible to enjoy and explore it readily. Some of the trails ascend mountains; others are along streams or through more or less level wooded areas, so vary in the effort required, but all are rewarding.

Moose are frequently seen at Sandy Stream Pond, ½ mile on the Sandy Stream Pond Trail. This trail also provides a circuit trip from camp of 2½ miles. The South Turner Trail (2 miles) is steep and rugged, but the view of the Katahdin basins and Baxter Peak from the summit of South Turner is unsurpassed. Ed's Lookout, only ½ mile, is a nice climb for children or beginners. There is a splendid view east. The trails to Chimney Pond (3.3 miles) and Russell Pond (7 miles) have interesting features and are easily reached from the campground. Across Roaring Brook is a bog which attracts many interested in natural features.

Moose are frequently seen feeding at Sandy Stream Pond.

... especially popular with family groups, natu... lovers, bird watchers, and those who are merely looking for a place ... camp in woodland surroundings.

It is the nearest automobile approach to the Chimney Pond a... Russell Pond campgrounds and is particularly suitable as a stop-ov... for a night or some days for those coming or going to those cam... grounds intending to climb the mountain from Chimney Pond or ... plore the center of the Park from Russell Pond.

Facilities: 12 leantos, 14 tent sites, 12-person bunkhouse, 3 sh... tered picnic tables.

2. ABOL CAMPGROUND

This campground is on the southwest side of the Park, 24 mil... from Millinocket by automobile road. It is the newest of the cam... grounds, the smallest reached by automobile, and is located in ... wooded area at the foot of the Abol Trail.

This trail is the oldest and most historic of all the Katahdin trai... It utilizes a landmark, the Abol Slide, which came down in 1816. F... many years climbers from the West Branch of the Penobscot Riv... reached the summit by way of this slide.

The Abol Trail provides a direct ascent to the summit of Katal... din, 2¼ miles to the Tableland and another mile to Baxter Peak.

Many trails lead off the Nesowadnehunk road (the approach roa... to ponds and along streams in the area and to the Appalachian Tra... leading down Nesowadnehunk Stream to the Penobscot West Branch

The campground is particularly suitable for those who wish t... spend most of their time on the Tableland or slopes of the mountain... those who like a secluded woodland camping area, those who wish... more quiet and privacy than can be found in larger campgrounds, o... who wish a quiet base from which to explore the many trails to moun... tains and ponds on the south and west side of Katahdin which may b... reached by car on the Nesowadnehunk tote road.

Facilities: 12 leantos, 8 tent spaces.

3. KATAHDIN STREAM CAMPGROUND

This campground is on the southwest side of the Park, 26 miles... from Millinocket by automobile road. It is the oldest and probably... best known campground in the Park. It occupies the site of an old... lumber camp, which accounts for the grassy, open space and apple tree... Katahdin Stream flows through the campground where washing and... bathing are allowed. There is a splendid view of the mountain from... the campground.

The Appalachian Trail goes through the campground and follows... the Hunt Spur to the Tableland (3½ miles) and on to Baxter Peak... (5.2 miles). A mile up this trail are beautiful Katahdin Falls. From... many points along this trail are outstanding views of the lakes and... streams below.

The Appalachian Trail leads south by Grassy and Daicey Ponds... and along Nesowadnehunk Stream with its numerous waterfalls and... rapids, to the Penobscot West Branch (5½ miles). It continues down...

campground, so use of a car to return eliminates the ascent on the return trip. There are trails to Grassy and other ponds in the area. O-J-I, Doubletop, and Sentinal Mountains may also be reached by trails leading from the approach road.

The campground is one of the largest in the Park, and due to size and open space is particularly suitable for groups of campers or family parties where some members prefer to take their ease in camp, rather than spend it on wooded trails or ascents (such as where small children are in the party). It is also a good base for a hiker with a car who wishes to explore the numerous trails to summits and ponds on the south and west side of the mountain, as the majority of such trails leave from the Nesowadnehunk tote road (the approach road).

Facilities: 15 leantos, 17 tent spaces (10 with sheltered tables) and a 4 and a 6-person bunkhouse.

4. NESOWADNEHUNK CAMPGROUND

This campground is on the west side of the Park, 36 miles from Millinocket (9½ miles beyond Katahdin Stream campground) and 55¼ miles from Greenville by automobile road. It occupies part of the extensive Nesowadnehunk Field, the site for many years of successive lumber camps, at the crossing of Nesowadnehunk Stream by the Nesowadnehunk tote road.

There are splendid views of the outlying mountains here. The campground affords a good base for exploration of the western peaks and ranges, such as the Brothers, the Cross Range, and Doubletop, and the valley of Nesowadnehunk Stream.

The stream is a particularly attractive feature. There is good fishing in the stream (fishing license is required).

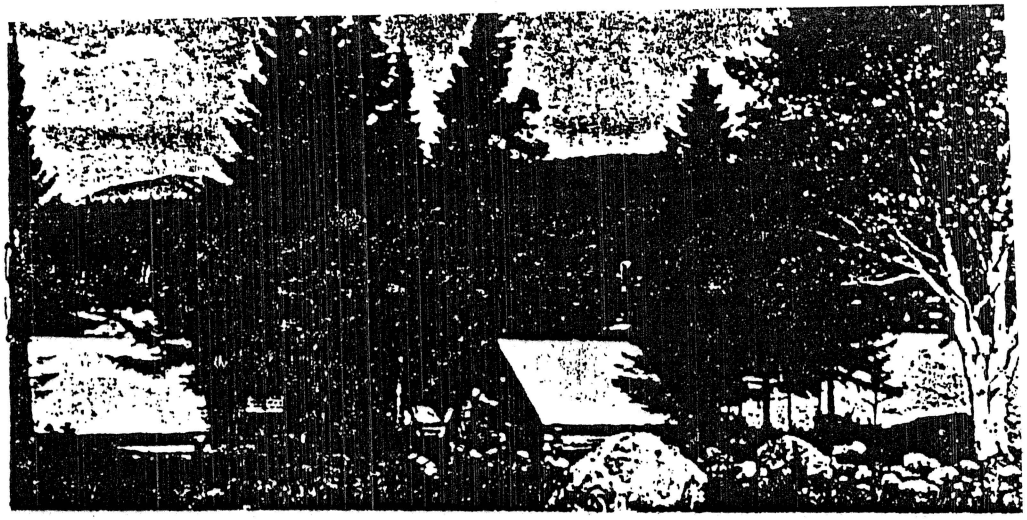
This campground is especially popular with family parties, with those who want to loaf and fish, and with those who are familiar with the more frequented trails on Katahdin and wish to explore the lesser known western ranges.

Facilities: 12 leantos, 11 tent spaces, and a 12-person bunkhouse.

5. SOUTH BRANCH POND CAMPGROUND

This campground is located in the northern portion of the Park, on Lower South Branch Pond. It is 35¼ miles from Patten via the Grand Lake and South Branch Ponds roads. The view down the ponds toward Katahdin is impressive and in the autumn the foliage is outstanding.

This campground is the base for a climb of The Traveler, one of the outstanding and trailless mountains of the Park. There is a marked trail to the summit of North Traveler (3 miles). The Pogy Notch Trail, leading 9½ miles to Russell Pond campground, makes accessible by trail the delta and ravine of Howe Brook, the Upper South Branch Pond, and other interesting areas. For those with cars, there are many trails leading from Grand Lake road to mountains and ponds in the northern section that are well worth a visit. Moose, bear, and other game are frequently seen.



Appalachian shelters are provided at major Park campgrounds.

The ponds afford opportunities for swimming and boating. Fishing is permitted (license required). Boats and canoes are available for rent.

This campground is preferred by those who want to explore the northern section of the Park. It is suitable for the rugged hiker who wants to climb the trailless Traveler and also for those who like canoeing, the short and nearby trails, and the beautiful view.

Facilities: 15 leantos, 19 tent spaces and a 6-person bunkhouse.

Campgrounds Accessible by trail only.

6. RUSSELL POND CAMPGROUND

This campground is in the center of the Park. It is reached only by foot trails, 7 miles north from Roaring Brook campground or 9½ miles south from South Branch Pond campground. It is small and isolated and an ideal place to see game and birds. Moose often feed in the bog adjacent to the camp or may be seen at dusk at Turner Deadwater near by. Beaver have a long dam at the foot of the pond and may be watched, with glasses, swimming about their house. Numerous varieties of birds and small game are often seen.

The Lookout Trail leads 1½ miles to ledges giving far-flung views of the North Peaks, Turner, and the Wassataquoik Valley.

Russell Pond is the focal point of trails leading to Wassataquoik Lake (2.5 miles); the Wassataquoik tote road with its Grand Falls and Inscription Rock; the Pogy Notch Trail (9½ miles) to South Branch Pond campground; the Old Pogy road (10½ miles to McCarty Field); the North Peaks and the Northwest Basin Trails leading on to Katahdin; and the Russell Pond Trail through Wassataquoik South Branch Valley to Roaring Brook campground; all affording access to interesting areas enroute.

Pamola Peak, the Knife Edge and Baxter Peak tower above the campground at Chimney Pond.

There is fishing (license required) in Russell Pond. Canoes are available for rent. This campground is a favorite for those who can carry their own food and equipment sufficient for the entire time of their stay, and who enjoy rough trails and rugged country.

Facilities: 4 leantos, 3 tent spaces and an 8-person bunkhouse.

7. CHIMNEY POND CAMPGROUND

This campground is in the Great Basin of Katahdin. It is reached only by foot trails. The shortest and most usual route is from Roaring Brook, 3.3 miles, and 1,425 feet in elevation. Above it rise the 2,000 to 2,500-foot cliffs of Pamola, South Peak, and Baxter Peak, enclosing it in a half circle.

A list of trails leading onto Katahdin from this campground is found on page 11.

This campground is the base for those who can carry in food and equipment for the entire length of their stay and who want to see the Great Basin and its cliffs, traverse the Knife Edge, and see more of the summits of Katahdin than Baxter Peak and the portion of the Tableland between it and the Abol Slide and the Hunt Spur. If transportation facilities permit, a fitting end to a stay at Chimney Pond is to ascend once more to the Tableland and go out by way of The Appalachian Trail to Katahdin Stream campground.

Facilities: 11 leantos, 7 tent spaces and a 24-person bunkhouse.

Mt. Katahdin

Rising to an elevation of 5,267 feet above sea level, Mt. Katahdin is the highest point in the State of Maine. No nearby mountains challenge Katahdin in height or size; it stands in scenic domination of a

[illegible] forests. So too has th majestic mountain dominated the imagination of men since the fir redmen called this region home. Indian legend says that Mt. Katahdi was created by the Council of Gods to serve as their sacred meetir place. Pamola, one of the lesser Gods, became angry when refused place at the Council and retreated to Pamola peak where he has sinc made his home. The Indians believed that those who ventured on th mountain could expect to incur Pamola's wrath and be seen no mor Even today, when storm clouds swirl around the summit and the wir whistles across the Knife Edge, the blame is placed at Pamola's doo

The first recorded ascent of the Mountain was made in 1804 by party of land surveyors under the leadership of Charles Turner. A lumbering operations moved to the vicinity of the mountain, acce became easier and ascents more frequent. In 1846, philosopher-naturalist Henry David Thoreau reached the Tableland by way of Abol slid In the late 1800's, sporting camp owners began to advertise climbs c Katahdin as an attraction for guests. In this way, several trails to th peak were first established.

Baxter Peak, summit of Katahdin, is the northern terminus of th famed Appalachian Trail, a two-thousand mile foot trail reaching fron Maine to Georgia. The Trail ascends the mountain from Katahdi Stream Campground over a route also known as the Hunt Trail.

Geologically speaking, Mt. Katahdin is the result of an intrusion of granite rock which has been sculptured to its present form by 300 million years of erosion and glacial action. ("The Geology of Baxter State Park and Mt. Katahdin", by Dabney Caldwell, a 51 page illustrated booklet, is suggested for those interested in Park geology.)

Principal land features of the mountain are: Pamola Peak, the Knife Edge, Baxter Peak (highest point), the Tableland, the Saddle Hamlin Peak, the Northwest Plateau, and the North Peaks. Lying below these features are the Great Basin, the North Basin, The Northwest Basin and the Klondike Plateau.

TRAILS ON KATAHDIN

Baxter State Park is intersected by approximately 75 miles of trails, many of them centering around or on Mt. Katahdin. The following is a brief description of the main trails in use today on the mountain.

From Chimney Pond Campground: Dudley Trail, up steep rocky ridge to Pamola Peak, (1.3 miles); .3 miles from campground, side trail leads ¼ mile to Pamola Caves. Knife Edge Trail leads from Pamola Peak to Baxter Peak, 1.1 miles across a narrow rocky ridge of moderate steepness. Cathedral Trail leads from campground to base of Cathedral Rocks, then climbs steeply up the rocky slope to the Tableland and junction with Saddle Trail to Baxter Peak (1.7 miles). The Saddle Trail leads from campground to the lowest point in the wall of the Great Basin, ascending an old rockslide to the Tableland and junction with trails to Baxter Peak, Katahdin Stream and Abol Campground, Northwest Basin, Hamlin Peak, and North Peaks Trail. Chimney Pond to Saddle at head of slide, 1.2 miles; to summit of

[illegible] mostly along the open ridge, a distance of 1.9 miles to Hamlin Ridge and 2.2 miles to Caribou Spring, junction with trails to Saddle, North Peaks and Northwest Plateau. Various combinations of these trails provide a series of interesting round-trip hikes from Chimney Pond to Baxter Peak and return.

From Abol Campground the Abol Trail leads steeply up the south slope of the mountain 2.6 miles to a junction with the Appalachian Trail at Thoreau Spring. From there it is 1.1 miles further to Baxter Peak over a moderate slope. This is believed to be the oldest route up the mountain.

From Katahdin Stream, the Appalachian Trail (Hunt Trail) climbs through timbered lower slopes to boulder strewn Hunt Spur and then to the Tableland. From campground to Tableland is 3.7 miles, with Baxter Peak 1.5 miles further across a moderate slope. Lovely Katahdin Falls is located on this trail 1.1 miles from the campground.

The Baxter Peak Cut-Off Trail runs between Thoreau Spring and the Saddle, offering a route from one side of the tableland to the other without having to ascend to Baxter Peak.

From the Saddle, trails run northerly to the Northwest Plateau and thence into the Northwest Basin and down the Wassatquoik to Russell Pond Campground (8 miles from Saddle to Russell Pond) or across the North Peaks (Howe) Trail to Russell Pond, (7.7 miles from Saddle to Russell Pond).

MOUNTAIN CLIMBING GUIDE BOOKS

Two excellent publications are available for those wishing complete and accurate trail information for Mt. Katahdin and surrounding peaks. These are: Appalachian Mountain Club Maine Mountain Guide, First Edition, 1961, pocket-size, 200 pages with maps. Covers entire state. Available from the Appalachian Mountain Club, 5 Joy Street, Boston, Massachusetts. Cost $3.50.

Katahdin Section of Guide to The Appalachian Trail in Maine, Fifth Edition, 1961, pocket size, 246 pages with maps. Available from The Appalachian Trail Conference, 1916 Sutherland Place, N. W., Washington 6, D. C. Cost $1.25.

These guides may also be purchased at Baxter Park headquarters or at the Ranger Stations.

SUGGESTIONS FOR YOUR COMFORT AND SAFETY

1. If you plan to climb the mountain or do any extensive hiking, wear proper footwear. High top hiking shoes or boots are recommended.
2. Black flies and other insects are prevalent during the summer months. Carry an ample supply of repellent.
3. Nights can be cool even during the summer, so bring warm sleeping gear. When windy, the summit can be chilly and a sweater is often worth the trouble needed to carry it on a climb.

4. Several of the ranger stations carry a small inventory of suppli for sale. However, it is best for the camper to come fully equippe with food, fuel, sleeping equipment and cooking utensils.
5. Wood is not plentiful at the well-used automobile campground and you can save much time and effort by bringing your ow wood if possible.
6. If you plan to hike unmarked trails, bring a compass and kno how to use it. Topographic maps of the Park are available fro sporting goods stores in Millinocket and Greenville and usually the ranger stations.
7. For hiking the summit trails during hot weather a small cantee of water will assure ample water.
8. Do not undertake trips beyond your capacity. If caught by dar ness on a trail, stay where you are until searchers find you or da light makes safe travel possible. The rugged character of th mountain terrain makes night-time travel without a light extrem ly hazardous.
9. The careless discarding of litter is not only a violation of Par regulations, it is a violation of out-door decency and commo sense. Save your papers and other trash until you can put them i a trash container.

Animals in Baxter Park

Baxter State Park is richly endowed with animal life. Perhap more than any other section of the State, this area offers the wildlif observer opportunities to enjoy both northern and southern Main animal forms.

Few places offer a better chance to observe and photograph th lordly Moose. These animals, once very abundant in Maine, are sti represented in good numbers on the Park. Whitetail deer, Maine most sought-after game animal, are also numerous and occasionall quite friendly to patient campers.

The black bear is a permanent resident of the park, and this timi fellow can be rather cantankerous when he becomes half-tame an used to getting handouts. *Treat him with respect* and he will do yo no harm.

... interesting, because there are some songbird visitors which are rarely seen in southern Maine. An interesting bird is the Canada Jay, which is common in northern Maine and Canada. The ruffed grouse, or partridge, is a common resident of the park, along with its cousin, the lesser known spruce grouse. Ornothologists have long been interested in the bird life of the Park because of its variety and north-south characteristics.

There are dozens of smaller mammals living in the Park, many of which are rarely seen by the untrained observer. Two species of marten, the fisher and the smaller pine marten are common inhabitants. Mink, weasels, snowshoe hare, and many smaller animals are abundant.

Perhaps the most restricted animals are the fish species, which are represented chiefly by the eastern brook trout and lake trout. Most Baxter Park waters are clear and cold, and capable of supporting the fish species common to northern climates. By far the most abundant of these is the eastern brook trout, which may be found in every section of the Park.

The Plant Life of Baxter State Park

Two distinct vegetation zones are found in Baxter State Park. These are the forest zone which occupies most of the park and the alpine zone which is limited to the upper slopes and the tableland of Mt. Katahdin.

A very small part of the park area is occupied by the northern hardwood forest in which beech, birch, and maple are the dominant plants; found on scattered areas at lower elevations and often mixed with spruce and fir.

In much of the park the northern coniferous forest is the dominant type of vegetation, extending from the valleys up the slopes to timberline. The dominant black spruce and balsam fir trees form a dense evergreen canopy. The forest floor is covered with an almost continuous carpet of mosses, liverworts, lichens and clubmosses. Painted trillium, wild-lily-of-the-valley, starflower, yellow clintonia, goldthread, bunchberry, rose twisted-stalk, pink wood sorrel are common herbaceous flowering plants of this spruce-fir forest.

Where logging and fire have removed large areas of the virgin spruce-fir forest in the park, a vegetation has developed consisting predominantly of aspen and paper birch with some pin cherry, red maple and mountain ash. Spruce and fir seedlings are able to develop under the shade of the open canopy and will eventually replace the short-lived aspen and birch.

On the steep upper slopes and tableland of Mt. Katahdin are extensive areas exposed to strong winds where the spruce and fir are greatly stunted and gnarled forming a dense growth only a few feet high. This low matted forest, known as " Krummholz " is very difficult to traverse.

Perhaps the most interesting zone of vegetation is the alpine zo found on the steep upper slopes and tableland of Mt. Katahd Growing here are a number of arctic plants which are believed to ha survived here since the arctic flora migrated northward following t last continental ice sheet. Plants found here include the alpine azal alpine bearberry, bog-bilberry, dwarf bilberry, Cassiope, Phyllodo mountain cranberry, Lapland rosebay and Diapensia. Black crowber purple crowberry, dwarf birch, bearberry willow and the herb-li willow are arctic shrubs of the alpine zone which form low mat-li growths of vegetation.

One of the most common herbaceous plants is the mountain-san wort. Other common herbaceous plants include several species sedges, grasses and rushes. Much of the ground cover in the alpir zone is made up of mosses and lichens. Crustose lichens are pione plants on bare rock and by secreting acids they aid in the disintegr tion of the rock to form soil on which mosses and fruticose liche might grow.

Back Cover: Mt. Katahdin from the South.

A Guide to BAXTER STATE PARK *and* MOUNT KATAHDIN *in* MAINE

"Katahdin in its grandeur will forever remain the Mountain of the people of Maine."
P. P. BAXTER

Published by
BAXTER PARK AUTHORITY and
MAINE DEPARTMENT of ECONOMIC DEVELOPMENT

JAMES E. TIERNEY
ATTORNEY GENERAL

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

March 14, 1985

Commissioner Glenn H. Manuel
Chairman, Baxter State Park Authority
Department of Inland Fisheries and Wildlife
State House Station #41
Augusta, ME 04333

Re: Interest on the Operating Account of the Baxter State Park Authority

Dear Commissioner Manuel:

You have asked for an opinion as to whether funds held in State Treasury Account No. 04580.1, the Operating Account of the Baxter State Park Authority (the "Authority"), should be earning interest for the benefit of Baxter State Park. For the reasons set forth below, I have concluded that the State's trust obligations to the Park require that interest earned on the Authority's Operating Account be so credited.

Baxter State Park was created, as you know, by a series of gifts over a 31-year period by Governor Percival P. Baxter. Each gift was made by a deed of trust, submitted to the Legislature for acceptance by Private and Special Act, conveying lands to the State of Maine as trustee to be held for the benefit of the people of the State of Maine subject to the restrictions set forth in the deeds. By these arrangements, Governor Baxter created a charitable trust. "The State is specifically named trustee of the land, as well as the associated [trust] funds," Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 194 (Me. 1978), and accordingly the State has assumed fiduciary obligations with regard to the administration of the Park and the trust funds created for the benefit of the Park. Id. at 202.

The State has designated the Authority to act as its agent for purposes of fulfilling these trust obligations. 12 M.R.S.A. § 901 (Supp. 1984-1985). However, to the extent that there are State-created mandates on how the Authority operates, the State must accept responsibility for them as the named trustee of the Park. One such mandate, which is the subject of this opinion, is that all moneys available for the operation of the Park must be deposited with the State Treasurer, 5 M.R.S.A. § 131 (1979), and are available for expenditure by the Authority only by voucher submitted to the State to be drawn against such deposited funds.

The way this works is as follows. There are three principal sources of funds available to the Authority for operational expenses. One is the so-called "Boston Trust," consisting of the income and principal of the inter vivos trust created by Governor Baxter in 1927, as amended through May 18, 1966, wherein Governor Baxter donated the residuary of his trust estate to the Park, with instructions to Boston Safe Deposit and Trust Company, as trustee:

> To pay the net income therefrom at least as often as quarterly to the "BAXTER STATE PARK TRUST FUND" created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the care, protection and operation of the forest land known as BAXTER STATE PARK and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes.

The second source of funds available to the Park is the Baxter State Park Trust Fund (the so-called "State Trust") created by gifts of Governor Baxter in 1961 and 1965, see P. & S.L. 1961, ch. 21 and P. & S.L. 1965, ch. 30:

> to be held IN TRUST forever for the benefit of the people of the State of Maine . . ., the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of . . . BAXTER STATE PARK. Id.

Income distributions are automatically made from the State Trust on a semi-annual basis. Income from the Boston Trust is distributed on an as-needed basis. Both income distributions

are deposited in the State Treasurer's "Cash Pool" or the so-called "8200 Accounts" of the Authority and while so held such income earns interest which is credited for the benefit of the Park. I have no difficulty with this arrangement from the standpoint of the State's trust obligations.

A third source of income to the Park is from revenues resulting from the actual operation of the Park, such as Park entrance and user fees. These revenues are deposited with the State, resulting in a credit to the State Treasury Account 04580.1, the Authority's Operating Account. The Authority draws against this account by voucher to pay salaries and other operating expenses of the Authority. To the extent that Park revenues are insufficient to cover Park expenses, the Authority draws on the State Treasurer's 8200 Accounts, that is from the Boston Trust and the State Trust, with the result that the needed funds are credited to the Authority's Operating Account for use by the Authority.

The problem giving rise to this opinion is that Park revenues and trust income credited to the Authority's Operating Account do not earn income for the Park while sitting on the Operating Account awaiting expenditure. Interest on funds in this account, which is estimated at approximately $4,000 a year, is instead credited to the General Fund, pursuant to 5 M.R.S.A. § 135 (Supp. 1984-1985). This statute authorizes the Treasurer to invest moneys on deposit with the State, including trust funds of the State, and further provides that:

> Interest earned on such investments of moneys shall be credited to the respective funds, except that interest earned on investments of special revenue funds shall be credited to the General Fund of the State. Interest earned on funds of the Department of Inland Fisheries and Wildlife shall be credited to that fund.

The State Treasurer considers the Authority's Operating Account as a "special revenue account" for purpose of Section 135, and therefore considers himself to have no authority to credit this account with earned interest in the absence of an exception, such as that created in the statute for the Department of Inland Fisheries and Wildlife. His position appears to be that income distributions from the Boston Trust and the State Trust, once deposited in the Operating Account, together with Park revenues on that account, are not trust property and therefore the State has no responsibility to the Park for interest earned on that income. I disagree.

The point to be stressed is that when the State receives moneys for the use of the Park, it does so as trustee of the Park. Revenues received from the operation of the Park are trust revenues received by the State as the named trustee of the Park. Income distributed to the State Trust from the Boston Trust and income of the State Trust itself are received by the State as the named trustee of the State Trust. The State voluntarily assumed the role as trustee in both cases and, having done so, is obligated to act consistent with its trust obligations. The State "must administer the trust like any private truste[e] of a charitable trust . . . ." Fitzgerald v. Baxter State Park Authority, supra, 385 A.2d at 202. I therefore turn to principles of trust law to determine the extent of the State's responsibilities with regard to interest earned on the Authority's Operating Account.

It is well recognized that a "trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive, and, in the case of money, this means he should invest it so that it will produce an income. See, Restatement, Second, Trusts, § 181 and Comment c; 2 Scott on Trusts, § 181 at 1463-66; Bogert, Trusts and Trustees, § 611 at 3-7. Scott raises the question as to whether funds awaiting investment or distribution should be made productive if the delay is temporary, as it is in the case of funds deposited in the Authority's Operating Account. See 2 Scott, supra, § 181 (Supp. 1983) at 115-17. He concludes that in modern times there are no practical impediments to making such income productive and therefore it would not be unreasonable to require the trustee to do so. Id. Given the fact that funds credited to the Authority's Operating Account for purposes of expenditure by the Authority are in fact earning interest, albeit for the benefit of the General Fund, I have little difficulty in concluding that the State has the trust obligation to earn interst on the funds so held and that this interst should be credited for the benefit of the Park and not the General Fund. I can see no persuasive reason, either in practice or in theory, why the State should avoid these responsibilities by declaring that trust property loses its status as such once it is deposited in the Authority's Operating Account.

The same conclusion can be reached through an alternative analysis of another principle of trust law that operates here: "A trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust." Restatement, supra, § 203. As explained in Scott, supra, § 203 at 1659-60:

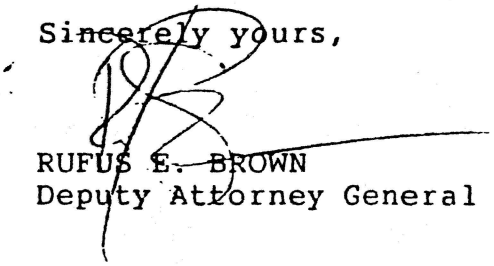
> A trustee who makes a profit through a breach of trust is accountable to the beneficiaries for the profit. Even though the profit is not made through a breach of trust, however, the trustee is accountable for it if it was made in the administration of the trust. Thus where a trustee deposits trust funds in a bank and receives interest on the deposit, he is accountable for the interest received even though he was not under a duty to make the money productive.

An exception to this principle is recognized when a trustee enters into a transaction not connected with the administration of the trust. See, Restatement, supra, § 203, Comment e. Scott cites as an example of this exception a situation where a trust company is permitted to deposit trust funds awaiting investment in its own commercial department, under the theory that the funds so deposited cease to be trust funds and become the individual property of the trust company, provided such a deposit is not a breach of the trust. Scott, supra, § 203 at 1661-62. Again, this appears to be the position of the State Treasurer.

Many statutes and common law decisions which allow bank trustees to deposit trust funds in their own commercial departments require such commercial departments to pay interest on deposited trust funds. See, Scott, supra, § 170.18 and Bogert, supra, § 598 at 487-498. In any event, I do not consider the exception applicable here. For one thing, the State is not in the business of making money like a commercial bank, and, therefore, it would seem inappropriate to borrow on the bank analogy (to the extent valid) to construe the State's trust obligations with regard to the Park to allow a profit to be made on the Park's trust funds for the benefit of the General Fund just because the State is in the business of making the best of tax dollars it holds. I certainly doubt whether Governor Baxter, who created the trusts at issue here, would have approved of such a practice. The correspondence reveals that Governor Baxter intended the State Trust to allow the Park to be independent of State appropriations, see his Feruary 18, 1961 letter to Mr. McDonald, not to increase the General Fund at the expense of the State Trust. Also, he was extremely conservative about how these trust funds should be expended. See, e.g., his letter of February 15, 1962 to Austin Wilkins and the June 1, 1967 memorandum from Austin Wilkins to Messrs. Erwin, Speers, and Cranshaw. Finally, it hardly can be argued that the State should keep a profit from its investment of the Park's trust funds, when the State allows the Department of Inland Fisheries and Wildlife to retain investment profits from its funds. See 5 M.R.S.A. § 135.

In conclusion, while there might be room for a debate in other circumstances, here, where the State in fact earns interest on Park trust moneys and where in less compelling circumstances it credits another Department of State Government with income earned on its trust funds, the State Treasurer should certainly be accountable for interest earned on the moneys deposited in the Authority's Operating Account. This is how 5 M.R.S.A. § 135 should be interpreted, and, in any event, this is how the State Treasurer should act regardless of statute in view of the State's trust obligations.

Sincerely yours,



RUFUS E. BROWN
Deputy Attorney General

REB:mfe

cc: James E. Tierney
Kenneth Stratton
Samuel Shapiro
Irvin Caverly, Jr.

FIRST REGULAR SESSION

ONE HUNDRED AND TWELFTH LEGISLATURE

Legislative Document **No.**

H.P. House of Representatives,

EDWIN H. PERT, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-FIVE

AN ACT to Provide Revenue to Baxter State Park from Interest Earned from Funds Donated by Governor Percival P. Baxter for the Protection and Operation of Baxter State Park.

Be it enacted by the People of the State of Maine as follows:

5 MRSA §135, first ¶, as amended by PL 1983, c. 588, §1, is further amended to read:

The Treasurer of State may deposit the moneys, including ~~trust~~ funds of the State, in any of the banking institutions or trust companies or state or federal savings and loan associations or mutual savings banks organized under the laws of this State or in any national bank or banks or state or federal savings and loan associations located therein. When there are excess moneys in the State Treasury which are not needed to meet current obligations, he may, with the concurrence of the State Controller or the Commissioner of Finance and Administration and with

the consent of the Governor, invest such amounts in bonds, notes, certificates of indebtedness or other obligations of the United States of America which mature not more than 24 months from the date of investment or in repurchase agreements secured by obligations of the United States of America which mature within the succeeding 24 months, prime commercial paper or banker's acceptances. The Treasurer of State may participate in the securities loan market by loaning state-owned bonds, notes or certificates of indebtedness of the Federal Government, provided that the loans are fully collateralized by treasury bills or cash. The Treasurer of State shall seek competitive bids for investments except when, after a reasonable investigation, it appears that an investment of the desired maturity is procurable by the State from only one source. Interest earned on such investments of moneys shall be credited to the respective funds, except that interest earned on investments of special revenue funds shall be credited to the General Fund of the State. Interest earned on funds of the Department of Inland Fisheries and Wildlife shall be credited to that fund. Interest earned on funds of the Baxter State Park Authority shall be credited to the Baxter State Park Fund. This section shall not prevent the deposit for safekeeping or custodial care of the securities of the several funds of the State in banks or safe deposit companies in this State or any other state, nor the deposit of such state funds as may be required by the terms of custodial contracts or agreements as may be hereafter negotiated in accordance with the laws of this State. All custodial contracts and agreements shall be subject to the approval of the Governor.

STATEMENT OF FACT

The intent of this bill is to change the practice of the State Treasury whereby interest earned on funds in the Baxter State Park operating account 04580.1 are credited each month to the General Fund and to provide legislation whereby the interest earned on these funds will be credited to Baxter State Park.

Governor Percival P. Baxter donated 201,018 acres of land known as Baxter State Park to the people of the State of Maine to be protected as a wilderness area to be kept in its "forever wild" state to be used for recreational purposes consistent with the "forever wild" concept and a portion of which to be used as a demonstration area for scientific forestry management.

Governor Percival P. Baxter also donated substantial funds to be held in trust and to be used for the purposes of protecting, maintaining, providing recreational use and forestry management of lands known as Baxter State Park and also for the acquisition of other lands for these purposes.

Some of the revenues from the trusts established by Governor Percival P. Baxter are deposited in the State Treasury account 04580.1 and are used to pay the operating costs of Baxter State Park. Interest on funds in this account are currently credited to the General Fund. As the gifts of funds from Governor Baxter were for specific purposes which are not related in anyway to the General Fund, interest earned on those funds in the State Treasury should be credited to Baxter State Park. The amount of interest earned is estimated to be $4,000 per year.

9008111384

JAMES E. TIERNEY
ATTORNEY GENERAL

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

December 11, 1986

Irvin C. Caverly, Jr., Director
Baxter State Park Authority
64 Balsam Drive
Millinocket, Maine 04462

Re: Donations to Baxter State Park

Dear Buzz:

I have been asked to provide advice regarding the legality of the Authority accepting grants, gifts or donations for Baxter State Park. Generally, the Trust instruments present no bar to such gifts, so long as the use thereof is limited by the terms of the Trust and the intent of Governor Baxter. Under the present statutory scheme, the Governor of the State may accept gifts or empower the Authority to accept gifts for the benefit of the Park.

The legality of the Authority accepting gifts for the benefit of the Park is governed by the provisions of 12 M.R.S.A. §§ 900, et seq., as well as the intent of Governor Baxter as expressed in the various Trust documents and, perhaps, extrinsic evidence. Pursuant to its statutory authority, the Park Authority has power to receive and expend monies only from the trust funds and the income derived from the Park. 12 M.R.S.A. § 901 (1981). In 1981, the Legislature amended the statutory provision dealing with acceptance of gifts by the Governor of the State. Prior to the amendment, the legislation provided as follows:

> "The Governor is authorized to accept in the name of the State any and all gifts, bequests, grants or conveyances to the State of Maine." 2 M.R.S.A. § 5 (1979).

In 1981, the following language was added:

> "No other state official or any member of any other branch of State Government may accept any gift, grant or conveyance to the State or to that branch of government . . . unless specifically authorized to do so by statute or by clear implication, or unless empowered to do so by the Governor." P.L. 1981, c. 53 (emphasis added).

Thus, it is possible now for the Governor of the State to accept gifts expressly restricted to be used for Baxter Park, and to utilize such gifts as State appropriations for the Park. Governor Baxter did not appear to object to State appropriations. Indeed, at least in one instance, Governor Baxter encouraged State appropriations to pay for Park rangers (letter of September 27, 1962, from Baxter to Austin Wilkins).

In addition, and significantly, the Governor can generally empower the Authority to accept gifts.[1/] Although one can argue that the applicable legislation does not empower the Governor or the Authority to expend or utilize such gifts, such power appears to be implied from the legislation so long as such expenditure is otherwise in conformance with the Authority's mission. "The grant of an express power carries with it the authority to exercise all other activities reasonably necessary to carry it into effect . . ." 3 Sands, Sutherland Statutory Construction [3d ed.], § 65.03. In this matter, the grant of express power to the Governor to accept gifts or authorize an agency to accept gifts also carries with it the implied power to utilize the gift as the donor desired or to empower the agency to do so, unless, of course, such utilization otherwise conflicts with law or the trust. There appears no conflict with any applicable statute nor, as discussed below, Governor Baxter's trust.

[1/] Of course, a legislative amendment to 12 M.R.S.A. § 901, specifically empowering the Authority to accept and expend outside gifts would make it unnecessary for the Governor to be involved in this issue and would clarify the situation.

With regard to any trust restriction on acceptance of gifts, Governor Baxter's intention on this matter must be determined first by analyzing the language of the Trust documents. Mooney v. Northeast Bank & Trust Co., 377 A.2d 120 (Me. 1977); Fiduciary Trust Co. v. Brown, 152 Me. 360 (1957). Charitable trusts are favorites of the law, and the court construes the language thereof liberally to permit charitable intentions to shine through. Grigson v. Harding, 154 Me. 185 (1958); Bates v. Schillinger, 128 Me. 14 (1929). I have reviewed Governor Baxter's deeds of land to the State, and they are silent regarding gifts from third parties. The documents creating the Trust funds are also silent on this issue. These Trust instruments, therefore, neither prohibit nor authorize the use of funds from additional sources.

Since the Trust documents are silent on the issue and charitable trusts are liberally construed to achieve the intentions of the settlor, it can be said that acceptance of gifts to achieve the purposes of the settlor not only fails to conflict with the Trust but, moreover, is in furtherance and conformity therewith. The Trustees have such powers as are expressly or impliedly given them by the settlor or are vested in them by statute. Bogert, Trustee & Trustees [2d ed. rev.], § 391. Although Trustees might not be authorized to accept any and all gifts from third parties to the Trust, it has been held that "a gift which does not change the nature of the trust, unreasonably enlarge its scope, or thwart or defeat its essential purpose, and which in amount is in reasonable proportion to the requirements of the Trust, is within the authority of the trustees" to hold and use in accordance with the trust instrument. Danaldson v. Borough of Madison, 213 A.2d 33, 46 (N.J. Sup. Ct. 1965). In Danaldson, the New Jersey court approved a bequest from the husband of the settlor to cover increased costs in maintenance of a building which was the object of the trust. With respect to the Park, so long as a gift does not attempt to change the nature or purpose of the Trust, it would appear a gift could be received because of the size of the Park and magnitude of the Authority's mission.

Governor Baxter's actions and statements regarding gifts from third parties do not appear to evince a prohibition on such. Where the Trust contains no express provision, it can be argued that reference may be made to extrinsic evidence to determine the intent of the settlor, see generally II Scott on Trusts, § 164.1. Records do indicate that during his lifetime, Baxter himself paid directly for many aspects of the Park's operations. See, e.g., letters from Baxter dated May 30, 1960 offering to pay for part of a Park road; dated February 28,

1961 offering funds in addition to State appropriation; dated September 22, 1965 authorizing expenses for gate house. The State of Maine itself also appropriated funds for the operation of the Park. See, e.g., Resolves 1953, c. 102, Resolves 1963, c. 70. See also letters from Baxter dated September 27, 1962 asking that money for the rangers come from State appropriations and not his special trust fund.

The correspondence and actions of Governor Baxter indicate he was deeply concerned that no one be allowed to use the Park as a memorial and that he be involved in major park decisions during his lifetime. (Letters of August 27, 1965 from Baxter to Austin Wilkins, and of August 30, 1965 from Baxter to Richard J. Dubord.) As you may recall, Governor Baxter strongly objected to the acceptance of funds from the Appalachian Mountain Club for the erection of bunkhouses and purchase of rescue equipment. The concern raised by Governor Baxter with respect to the Appalachian Mountain Club bunkhouse matter appears to be twofold: that Governor Baxter be involved, during his lifetime, with any major decisions, and that the Park not be used as a memorial to anyone who wanted to provide money for such.

With Governor Baxter's death, the administration of the Park is in the hands of the Authority whose broad powers and discretion are limited by the terms of the Trust and intent of Governor Baxter. Normand v. Baxter State Park Authority, 509 Me. 640 (1986); State v. Fin & Feather Club, 316 A.2d 351, 355 (Me. 1974). Obviously, no gift should be accepted if it is conditioned on being used as a memorial or for a memorial structure. Further, as discussed above and to avoid entanglement and conflict between the conditions of Baxter's Trust and any conditions attached to outside gifts, the Authority should accept gifts and donations only if such are irrevocable and, at most, conditioned on conformance with the Trust and intent of Governor Baxter, with no additional restrictions. In this way, there will be no question that the Authority's actions regarding the use of the gift is dictated solely by the Trust, the donors will not become involved in the management of the Park, there will be no memorials in the Park, and the Authority would not have to address conflicts each time a gift is presented to it for acceptance. Simply put, if someone wishes to make a gift, grant or donation to the Park, it should be an irrevocable gift to the Authority to use in conformance with the Trust and intent of Governor Baxter.

Finally, if such gifts are accepted, it appears that they should not be comingled with Governor Baxter's trust funds. The trustee for a charity owes a duty to keep his trust funds separate. Bogert, supra at § 396.

If I can be of any further assistance, please do not hesitate to call on me.

Sincerely,

PAUL STERN
Assistant Attorney General

PS:msg
cc: Baxter State Park Authority Members

State of Maine

DEPARTMENT OF ATTORNEY GENERAL

M E M O R A N D U M

To: Crombie Garrett, Deputy Attorney General

From: Paul Stern, Assistant Attorney General

Date: May 29, 1992

Subject: Baxter Park

I have discussed the issue of the effect of Part KKK of the Budget Bill on Baxter Park funds with Jim Clair of the Office of Legislative Analysis. Clair has become involved because Jack Nicholas appears to be fishing about for an opinion contrary to that of this office. Clair indicated that he agreed that Part KKK did not apply to trust fund monies but asserted it did apply to a special dedicated account that consisted primarily of user fees and the sale of timber from Baxter State Park.

Following some legal research, I told Clair that Part KKK also does not apply to the special dedicated account. The reason I gave is the generally accepted proposition that the trust follows the trust property, and attaches to any products of that trust property. 90 CJS, Trusts § 437. In effect, all property belonging to the trust, however it may be changed or altered, and all the fruits of such property, continues to be subject to or affected by the trust. Bogert, Trust & Trustees [2nd ed. rev.], § 866. The monies in the special dedicated account all arise from or are products of Baxter State Park itself. As such, Governor Baxter's conditions on Park-land itself, i.e. to be used for recreational purposes only, apply to these products as well. Therefore, Part KKK cannot cause the transfer of portions of these funds over to the General Fund.

Upon explaining this to Clair, he seemed to agree. He indicated that Jack Nicholas would be calling you on Monday. I am providing this short memo to you in the hopes that it may be helpful in your discussions, or may form the basis of a memo from you to Nicholas to resolve these issues. If I can be of any further assistance, please call on me.

PS/lw

3.3 Baxter State Park Administration

3.3.1 Separate Identity

December 15, 196

BAXTER STATE PARK AUTHORITY

Jerome S. Matus, Assistant Att. Gen.

Power of Baxter State Park Authority to Purchase Property Located on Leased State Land Within Baxter State Park

FACTS:

A request has been made for an opinion concerning the prerogative or lack of prerogative of the Baxter State Park Authority to purchase property located on leased State land within the confines of the Park without Governor and Executive Council approval.

QUESTION:

May the Baxter State Park Authority purchase at a negotiated price without Governor and Executive Council approval certain tangibles, capital improvements, inventory, as well as other personal property, all of the foregoing being located on State land within the confines of the Baxter State Park leased to the seller by the State?

ANSWER:

Yes.

OPINION:

All of the tangible property, capital improvements and inventory located on the leased State land is personal property and not realty. It is assumed for purposes of this opinion that the Baxter State Park Authority is either a party to, or has actual notice of, an agreement that the buildings at the time they were erected upon the land, were to be considered personal property.

It is well-established law in the State of Maine that an agreement that a building erected with the consent of the land owner, by one not the owner of the land upon which it is erected, shall be and remains personal property. Tapley v. Smith, 18 Me. 6. (Shep.12). Adams v. Goddard, (1859) 48 Me. 212. Without such an agreement, the building becomes annexed to the realty. Bonney v. Foss, 62 Me.

248. Such an agreement is effective as to the owner of the land, his heirs, devisees, and all persons having actual notice of the agreement; but to be effective against others, the agreement must be in writing and signed by the land owner or a duly authorized person and acknowledged and recorded. 33 M.R.S.A. § 455. It should be noted that for tax purposes buildings erected on the land of another are considered real property. 36 M.R.S.A. § 551 as amended by Public Laws of 1967, Chapter 271, § 1.

12 M.R.S.A. § 901 as repealed and replaced by the Public Laws of Maine 1965, Chapter 225, § 17, confirmed that all of certain specified lands donated and conveyed, and all lands within certain specified areas to be donated and conveyed to the State of Maine by Percival Baxter, have been and will be in trust for state forest, public park and public recreational purposes, and will be named Baxter State Park in honor of Percival Baxter. The reference section then establishes the supervision, control and management of the Baxter State Park by reading in pertinent part as follows:

> "They shall be under the joint supervision and control of, and shall be administered by the Forest Commissioner, the Commissioner of Inland Fisheries and Game and the Attorney General, and the said commissioners and Attorney General shall have full power in the control and management of the same, under the title of Baxter State Park Authority."

As the administrating body, the Baxter State Park Authority has been given full power and management over Baxter State Park. It must follow that the Baxter State Park Authority has power and control sufficient to purchase personal property within the confines of the Park without obtaining approval of the Governor and Executive Council; especially since the funds used to purchase the personal property are trust funds managed and controlled by the Baxter State Park Authority.

The only limitation on the powers and duties of the Baxter State Park Authority in its control and management of the Park is stated in 12 M.R.S.A. § 906 as amended by the Public Laws of Maine, 1965, Chapter 226, § 20, which reads as follows:

> "The powers and duties of the Baxter State Park Authority shall not be so construed as to interfere or conflict in any way with the powers and duties of the Maine State Park and Recreation Commission, Department of Inland Fisheries and Game or the Forestry Department and their duly appointed wardens or rangers, and the enforcement of the inland fisheries and game and forestry laws in respect to Baxter State Park or to the State generally."

Thus, it is clear that nothing in the foregoing section requires the Governor and Council to approve a purchase of personal property by the Baxter State Park Authority; nor have we found any other reference in Maine law requiring such approval.

Jerome S. Matus
Assistant Attorney General

JSM:H

DIRECTOR ___
MAINTENANCE ___
NATURALIST ___
FORESTER ___
BUSINESS MGR. ___
NORTH DISTRICT ___
SOUTH DISTRICT ___
FILE ___

August 18, 1971

Lawrence Stuart, Director
Park and Recreation Commission
State House
Augusta, Maine

Dear Larry:

Because I am unable to attend your meeting on August 19, covering the proposed Department of Natural Resources, I am writing this letter.

I would like to go on record as Chairman of the Baxter Park Authority proposing that Baxter Park should maintain its separate identity.

There are several good reasons for this, but for the sake of brevity, I would like to emphasize two:

1. The late Governor Baxter on more than one occasion expressed his desire that the Park be treated and managed separately from the State Park system. It was his intent and, clearly, his wish that his unique gift be uniquely administered.

2. The gift of the land to the State, the restrictions, and the multi-million dollar trust fund created are all trusts in the highest fiduciary sense. None of the terms of the gift, nor of the uses of the money are subject to change by the State. The Park is wholly self-supporting and requires nothing now from General Fund revenues.

I would be happy to make a formal presentation if you desire, expanding this letter and the reasons for my position if you so desire.

Since the reorganization of State Government is designed to bring about greater efficiency and economy, the exclusion of Baxter Park from a Department of Natural Resources will not affect the aim

of reorganization. The Park is uniquely different in the State, it is unique in the country and may well be unique in the whole world. It should be so treated.

Kind personal regards.

Sincerely yours,

James S. Erwin
Attorney General

JSE:m

cc: Mr. Wilkins
Mr. Bucknam

STATE OF MAINE

Inter-Departmental Memorandum Date June 21, 1972

To James S. Erwin, Attorney General Dept.

From Charles R. Larouche, Assistant Dept.

Subject Baxter State Park Authority

In accordance with an instructional memorandum of Deputy Attorney General George West, dated June 14, 1972, I submit this opinion on the following questions:

> Can the Baxter State Park Authority build a house in Millinocket without Governor and Council approval?
>
> Can the Baxter State Park Authority buy land in Millinocket for the above house to set on without Governor and Council approval?

Answer: Affirmative to both questions, subject to the limitations stated hereunder.

Paragraph 1 of the Third Clause of Governor Baxter's Trust reads:

> "1. To pay the net income therefrom at least as often as quarterly to the 'BAXTER STATE PARK TRUST FUND' created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the care, protection and operation of the forest land known as BAXTER STATE PARK, and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes." (Emphasis supplied).

12 M.R.S.A. § 901 describes Baxter State Park and provides in pertinent part:

> "They shall be under the joint supervision and control of, and shall be administered by the Forest Commissioner, the Commissioner of Inland Fisheries and Game and the Attorney General, and the said commissioners and Attorney General shall have full power in the control and management of the same, under the title of Baxter State Park Authority. The authority shall make payments to the Maine Forestry District in lieu of taxes on the basis of 6¢ per acre per year for all land within the Baxter State Park area for the prevention, control and extinguishment of forest fires. The

NOT A FORMAL OPINION

> authority shall receive moneys available from trust funds established by the donor of the park and shall include fees collected, income from park trust funds invested by the Treasurer of State and other miscellaneous income derived from the park for maintenance and operation of the park." (Emphasis supplied)

It appears from the foregoing Trust provision that the Baxter State Park Trust Fund is to be used for the "care, protection and operation" of that Park. It appears from the foregoing statutory provision that the Baxter State Park Authority is the agency empowered to receive the funds for such purposes. It finally appears from the quoted statute that Baxter State Park Authority has been given "full power in the control and management" of that Park. It would seem, therefore, that Baxter State Park Authority can expend the Trust funds in its unfettered discretion, subject to no requirement of prior approval by anyone. Such expenditures must, of course, be for the purposes enumerated in the Trust, i.e. "care, protection and operation" of that Park.

Accordingly, if the Baxter State Park Authority concludes that a house in Millinocket will effectuate the purpose of either caring for, protecting or operating that Park, it can lawfully purchase the land which it deems required for that purpose and thereupon erect the requisite house, expending therefor such of the moneys which it has received pursuant to the foregoing Trust and statutory provisions as it deems appropriate.

However, prior to a final determination of the questions posed, we must consider whether or not sections 1741-1750 of 5 M.R.S.A., which impose restrictions upon "public improvements", are applicable to the Baxter State Park Authority. The definition of "public improvement" contained in 5 M.R.S.A. § 1741 is capable of including the Baxter State Park Authority, if that definition is given a broad, literal construction, i.e., "buildings . . . hereafter constructed . . . by the State of Maine or . . . any agency thereof . . ." This statute provides no definition for the word "agency." If the word "agency" is given its broadest meaning, it would certainly include Baxter State Park Authority, since it is an agency of the State to administer that Park. However, it is most extraordinary agency in that it exists solely to carry out the terms of a Trust. It is an instrumentality of the State that must truly be deemed sui generis. Accordingly, it cannot be lightly inferred that the Legislature intended to include it within the sweep of the term "agency" as used in 5 M.R.S.A. § 1741. The thrust of that statute seems to be toward instrumentalities of the State which either utilize public funds or conduct public business; Baxter State Park Authority does neither.

These circumstances require a close examination of a statute which expressly governs Baxter State Park Authority. 12 M.R.S.A. § 900 repeatedly stresses the unique nature of the Park created by this Trust and the correlative uniqueness of the Authority created to administer this unusual Trust. For example, 12 M.R.S.A. § 900 emphatically declares that this Park:

> ". . . . is to 'be separately administered free from any connection with the larger State Park Commission'
> . .
>
> "Solemly cognizant of the responsibility, it shall always be the purpose of the authority to satisfy the terms of the Trust."

It seems clear from this that the Legislature intended Baxter State Park Authority to be a unique authority and that the effectiveness of the discharge of its fiduciary responsibility should not be diluted by the encroachment of any other State agency. Accordingly, it is clear to me that when the Legislature, in the ensuing section (12 M.R.S.A. § 901) said that the Baxter State Park Authority "shall have full power in the control and management" it meant precisely "<u>full power</u>" and not "shared power" nor "subject to Bureau of Public Improvement supervision."

Therefore, when these two statutes are read together, as they must since they are in pari materia, it is clear that the word "agency" as used within 5 M.R.S.A. § 1741 does not include Baxter State Park Authority.

Accordingly, it is my opinion that the approval of the Governor and Council is not necessary for the purchase of land on which to build a house or for the construction of such house by the Baxter State Park Authority.

CHARLES R. LAROUCHE
Assistant Attorney General

CRL:mfe

January 2, 1973

John L. Martin, Chairman — Land Use Regulation Commissi

George C. West, Deputy — Attorney General

Baxter State Park Authority Has Control and Management of Baxter State Park Paramount to Another State Agency.

SYLLABUS:

The Maine Land Use Regulation Commission has no authority to require Great Northern Paper Company to obtain a development permit from the Commission prior to exercising cutting rights in Baxter State Park. Moreover, the Baxter State Park Authority has paramount control and management of the Park.

FACTS:

"Baxter State Park", named in honor of the generous donor of all the lands that comprise the Park - Honorable Percival Proctor Baxter - consists of Townships 2, 3, 4, 5 and 6, Range 9 W.E.L.S. and Townships 3, 4, 5 and 6, Range 10 W.E.L.S., Piscataquis County, and Township 6, Range 8 W.E.L.S., Penobscot County. (See 12 M.R.S.A. § 901 and paragraph Sixth of Mr. Baxter's Will dated September 9, 1966). The 201,018 acres making up Baxter State Park were granted "in Trust for the benefit of the people of Maine" in various deeds. The successive grants were accepted by the Legislature in the form of Private and Special Laws.

When Mr. Baxter conveyed certain of the Park lands to the State in Trust, the deeds excepted and reserved to Great Northern Paper Company the right to cut and remove merchantable timber and standing growth in specified southern areas of the Park. Recently, Baxter State Park Authority entered into an agreement with the paper company transferring the company's cutting rights to a northern area of the Park considered by the Authority to be in the best interests of the people of Maine.

In 1969, the "Maine Land Use Regulation Commission" was created by the Legislature. P.L. 1969, c. 494. The Commission views cutting operations as "developments" for which a permit is required from the Commission. That being so, the Commission asks whether it has jurisdiction to require Great Northern Paper Company to obtain a development permit before exercising cutting rights under the beforementioned agreement with the Authority.

QUESTION:

Does the Maine Land Use Regulation Commission have authority to require Great Northern Paper Company to obtain a development permit from the Commission before exercising cutting rights in Baxter State Park?

ANSWER:

No. Moreover, the Baxter State Park Authority has paramount control and management of the Park.

REASONS:

1. The Maine Legislature recognizes that the Baxter State Park Authority exists to preserve the terms of the deeds of Trust creating the Park. The legislative expression to that effect appears in P.L. 1971, c. 477, § 1, amending the laws relating to the Authority in Title 12, Chapter 211, Sub-chapter III. That amendment added a new section, § 900, to the reference Title. The section is extensive and meaningful; some excerpts are as follows:

> "Seldom has a more generous gift been presented to a people than has been given by Percival Proctor Baxter to the people of the State of Maine. It is incumbant upon them, the recipients, to preserve the trust impressed upon them, to ensure for themselves and for future generations the fullest use of Baxter State Park consistent with the desires of the donor.
>
> " * * * .
>
> "While this area bears the name park, it is not to be confused with the existing park system and is to 'be separately administered free from any connection with the larger State Park Commission'. That system, purchased with the funds of the people, must change from time to time to accommodate changing circumstances and the varying desires of its proprietors; not so, Baxter State Park, purchased by the generosity of one man, richly endowed, and presented to the people with specific stipulations
>
> "'While I am living I fear no encroachments on the park, but as time passes and new men appear upon the scene, there may be a tendency to overlook these restrictions and thus break the spirit of these gifts.'
>
> "Solemnly cognizant of the responsibility, it shall always be the purpose of the authority to satisfy the terms of the Trust." (Emphasis supplied) P.L. 1971, c. 477, § 1.

Additionally, the Legislature intends that no State statute encroach upon the terms of Mr. Baxter's deeds of Trust.

> " * * * Nothing in section 900 or any other law shall be interpreted or construed to modify, nullify or affect in any way any of the provisions in any deed of trust made by Percival Proctor Baxter conveying land in Baxter State Park to the State of Maine." P.L. 1971, c. 477, § 3.

The above statutory excerpts recognize the supremacy of the Authority as to management of Baxter State Park in accordance with the terms of the Trust. The Park is not administered by the Park Commission subject to changing desires of the people. Clearly, the Authority has full power, not shared power, as to Park management and control.

> " * * * full power in the control and management of the same, under the title of Baxter State Park Authority." 20 M.R.S.A. § 901.

The Land Use Regulation Commission has no authority to require Great Northern Paper Company to obtain a development permit prior to cutting for the reason that the paper company's cutting rights were preserved in Mr. Baxter's deeds to the State in Trust. The Commission's power to grant a development permit includes the power to deny the permit altogether. If such a permit were legally required of the paper firm before exercising its cutting rights, then the terms of the Baxter deeds of trust would be affected, possibly even nullified, contrary to legislative intent pointedly expressed in 20 M.R.S.A. § 906. What Mr. Baxter asked be honored in his grants in Trust cannot be altered by the Land Use Regulation Commission.

Although the foregoing reasons answer the specific question in your interdepartmental memorandum, it seems appropriate to define the extent of the jurisdiction of the Baxter State Park Authority in light of Mr. Baxter's concern over (1) future encroachments on the park, and (2) the appearance of "new men * * * upon the scene" who may have "a tendency to overlook these restrictions and thus break the spirit of these gifts." P.L. 1971, c. 477, § 1. Baxter State Park Authority has paramount jurisdiction as to the management and control of the Park, subject only to court review of the correctness of the Authority's action interpreted in light of the terms of the deeds of Trust. Baxter State Park Authority is intended by the Legislature to be a unique Authority managing and controlling a unique gift from Mr. Baxter. The important fiduciary responsibilities reposing

in the Authority are not to be diluted by the encroachment of any State agency. The Authority has, as direction for its action, the deeds in Trust from Mr. Baxter. On plural occasions, Mr. Baxter's communications to different Governors of Maine expressed the great importance attached to the Trust provisions and to the solemn pacts creating "a succession of irrevocable trusts." Note, for example, the meaningful and moving words written January 12, 1942 by Mr. Baxter to then Governor Sumner Sewall outlining the intention of making successive grants in Trust to the State so as to establish a "long list of precedents" resulting in "solemn pacts that create a succession of irrevocable trusts."

On the basis of the foregoing, the Baxter State Park Authority has exclusive control and management jurisdiction of Baxter State Park to the exclusion of State agencies, subject, however, to court review as to the correctness of the Authority's action interpreted in light of the terms in the deeds of Trust of Mr. Baxter.

GEORGE C. WEST
Deputy Attorney General

GCW/ec

STATE OF MAINE

Inter-Departmental Memorandum

Date September 17, 1975

To A. Lee Tibbs, Director — Dept. Baxter State Park Authority

From John W. Benoit, Jr., Deputy — Dept. Attorney General

Subject Question of Applicability of Executive Order #10 to Baxter State Park Authority

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This is a response to your request for an opinion as to the applicability of Executive Order #10 to the Baxter State Park vehicles. Specifically, the Commissioner of Finance and Administration, pursuant to the Executive Order, has declined to grant an exception from Executive Order #10 to the Baxter State Park Authority (hereinafter "Authority") concerning two of the Authority's motor vehicles. As indicated by the discussion herein, Executive Order #10 does not control the decision of the Authority concerning motor vehicle use.

1. The Executive Order concerning the Authority's motor vehicles is inapplicable because of the unique nature of the Authority. The State of Maine is the trustee of the lands of Baxter State Park and of the Baxter State Park Trust Fund for the control and management of the Park. The State is the beneficiary of the inter vivos trust of Percival Proctor Baxter of July 6, 1927, as amended, which provides funds to be used, in part, for the operation of the Park. The State, through legislative enactment, has designated the Authority as the agency of the State authorized to maintain and operate the Park and to have full power in the control and management of the lands comprising the Park.

> " * * * They (the lands comprising the Park) shall be under the joint supervision and control of, and shall be administered by the Director of the Bureau of Forestry, the Commissioner of Inland Fisheries and Game and the Attorney General, and the said commissioner, director and Attorney General shall have full power in the control and management of the same, under the title of Baxter State Park Authority." 12 M.R.S.A. Sec. 901 (Parenthesis and emphasis supplied.)

The Authority's decisions are governed by the terms of the trust instruments and by the statutes enacted by the Legislature. The administrative control and management of the Park may not be limited by an Executive Order such as Executive Order #10 concerning the maintenance and operation of the Authority's motor vehicles. The Maine Supreme Judicial Court in State v. Fin & Feather Club, (Me., 1974) 316 A.2d 351, noted that the Legislature had granted general powers to the Authority which were of a broad nature and greatly dependent on the discretion of the Park Authority members. The Authority is exclusively responsible for carrying out the terms of the Baxter Trust.

> "The grant of power to the Park Authority in § 901 for the management and control of Baxter State Park is broad and greatly dependent on the discretion of the Park Authority members. * * * .
>
> " * * * The statute contemplates the terms of the donor's trust being most effectively accomplished by giving broad powers of control to three State officers, who would be exclusively responsible for seeing that the terms of the trust are strictly satisfied. 12 M.R.S.A. §§ 901-906." 316 A.2d at 355. (Emphasis supplied.)

2. Executive Order #10 is also not applicable to the Authority because the Legislature reserved to itself the supervision of State-owned motor vehicles. Title 5 M.R.S.A. § 7 now provides:

> "The State may provide motor vehicles for the travel of state employees in a number to be determined by the Legislature. Each state department or commission head shall promulgate written policy concerning the use of state-owned motor vehicles, assigned to his department or commission, which shall include but not be limited to, a definition of the use of state-owned motor vehicles which constitute use in the conduct of state business and which distinguishes such use from private use. . . . The Legislative Council shall biennially study and review state motor vehicle needs and uses and shall report its findings to the Legislature. Department and agency heads shall justify the purchase of motor vehicles as part of request for appropriations before the Joint Standing Committee on Appropriations and Financial Affairs." (Emphasis supplied.)

This section indicates that control of State-owned motor vehicles rests ultimately with the Legislature; with policy being set by State department and commission heads. Prior to 1970, Maine law provided that the Governor and Council control State-owned motor vehicles. That law read as follows:

> "The State shall provide no automobiles for travel of state employees. This shall not apply to the Governor, the State Police, the Department of Inland Fisheries and Game, the Department of Sea and Shore Fisheries, supervisors in the Maine Forestry District, the State Highway Commission nor to such other agencies, boards, commissions and departments of the State Government as the Governor and Council may from time to time designate.
>
> "All state owned cars shall display a marker or insignia, approved by the Secretary of State, plainly designating them as state owned vehicles.

> The Governor and Council may designate the use of certain state owned cars without the said insignia thereon."

The statutory provision quoted immediately above was repealed and replaced by the 104th Legislature at the 1970 special legislative session. P.L. 1969, c. 544. Now, Maine law evidences a legislative intention that the Governor and Council no longer control State motor vehicle policy, but rather that function be exercised by "each State department or commission head," subject to review by the Legislative Council and the Legislature.

In conclusion, Executive Order #10 does not pertain to vehicles of the Baxter State Park Authority due to the unique nature of the Authority and for the further reason that the Legislature has reserved to itself the supervision of State-owned motor vehicles.

John W. Benoit, Jr.

JOHN W. BENOIT, JR.
Deputy Attorney General

JWBJr./ec
cc: Honorable James B. Longley, Governor of Maine
John P. O'Sullivan, Commissioner of Finance and Administration

STATE OF MAINE

Inter-Departmental Memorandum Date March 11, 1977

To A. Lee Tibbs, Director Dept. Baxter State Park Authority

From Sarah Redfield, Assistant Dept. Attorney General

Subject Fisheries and Wildlife Management of Baxter State Park

This is in response to your request for an opinion as to whether the Baxter State Park Authority or the Department of Inland Fisheries and Wildlife would have the authority to make a final decision concerning fish and wildlife resources within the Park. The ultimate authority for such decision rests with the Baxter State Park Authority pursuant to Title 12 M.R.S.A. § 901 which provides in pertinent part that the Park lands

> "shall be under the joint supervision and control of, and shall be administered by the Director of the Bureau of Forestry, the Commissioner of Inland Fisheries and Game and the Attorney General, and the said commissioner, director and Attorney General shall have full power in the control and management of the same, under the title of Baxter State Park Authority."

For further discussion concerning the authority of the Baxter State Park Authority, you may wish to refer to the opinions of the Attorney General's Office from George C. West to John L. Martin dated January 2, 1973; from Martin Wilk to you dated July 31, 1975; and from John Benoit to you dated September 17, 1975, (copies of which are attached hereto.)

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR/ec
Enclosures

STATE OF MAINE

Inter-Departmental Memorandum Date July 28, 1977

To William Cross Dept. Baxter State Park

From Sarah Redfield, Assistant Dept. Attorney General

Subject Medway Garage

This is in response to your request for an opinion as to the proper procedure for the sale of the Medway garage facilities. It is my understanding that this property was originally purchased with monies from the Baxter State Park Trust Fund and that it is the intention of the Baxter State Park Authority (hereinafter "BSPA" or "Authority") to apply the proceeds from this sale to its purchase of the Vincent garage property in Millinocket. In the case of each garage, the property is used to facilitate the administration and management of Baxter State Park (hereinafter "the Park"). After reviewing the relevant provisions of the trust and statutes, it is my opinion that the Authority may proceed with the sale of the Medway garage, with or without the approval of other state agencies or the Governor, so long as the Authority acts in a manner consistent with its fiduciary responsibilities.

The Trusts.

The lands of Baxter State Park were given to the State through a series of deeds to be held in trust forever for the benefit of the people of the State. In addition to gifts of land, Governor Baxter provided the State with monies from two trust funds.

The first trust fund, known as the Baxter State Park Trust Fund, was established pursuant to Chapter 21 of the Private and Special Laws of 1961, see also P. & S.L. of 1965, c. 30. Monies were given to the State as trustee for the benefit of the people of the State, "the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection, and operation" of Baxter State Park, P. & S.L. 1961, c. 21.

The second trust fund was established by the terms of an inter-vivos trust dated July 6, 1927, and subsequently amended. The Boston Safe Deposit and Trust Company is trustee and the State of Maine a beneficiary. Pursuant to this instrument, funds from the trust principal may be used for the acquisition of additional park lands; the income is to be paid into the Baxter State Park Trust Fund "for the care, protection and operation of the forest land known as BAXTER STATE PARK. . . . "

The Statutes.

The Legislature created the Baxter State Park Authority to supervise and administer Baxter State Park. The Authority has "full power in the control and management of the Park," see generally 12 M.R.S.A. § 901. The Authority is designated to receive monies "available from trust funds established by the donor of the park and shall include fees collected, income from park trust funds invested by the Treasurer of the State and other miscellaneous income derived from the Park maintenance and operation of the park." In addition, the Authority is designated as the state agency to receive funds pursuant to the Baxter intervivos trust "for the purchase or other acquisition of additional land for said Baxter State Park, and the Authority is authorized to expend such sums so received for such purposes." In essence, this statutory provision reiterates the trust provisions and authorizes the BSPA to exercise full control in operating the Park in accordance with the various trust instruments.

There appear to be no specific statutory requirements applicable to the sale of land by the Authority, cf. 12 M.R.S.A. § 4169, as to the limitation sale of land by the Bureau of Public Lands to sale only with the approval of the Legislature.

Authority to Buy and Sell Land.

The power of the BSPA is derived from statute and in turn from the trust instruments. Its power to control and manage the Park is paramount to powers of other state agencies in relation to the Park. (See the previous opinions of this office as follows: December 15, 1967, from Jerome S. Matus to the BSPA defining the Authority's power to purchase certain property without the approval of the Governor and Executive Council; January 2, 1973, from George C. West to John L. Martin as to the paramount jurisdiction of the BSPA over other state agencies, in this instance, LURC; July 31, 1975, from Martin L. Wilk to A. Lee Tibbs as to the power of the BSPA to utilize Baxter State Park Trust Fund income to construct a headquarters building without gubernatorial concurrence or approval; September 17, 1975, from John W. Benoit to A. Lee Tibbs as to the inapplicability of the executive order concerning motor vehicles to the BSPA.) Nevertheless, the power of any state agency is limited to that conferred upon it by the Legislature. In this instance, the power of the Authority is further limited by the trust provisions.

Although the statute is silent in regard to the sale of property, it may be implied that the Authority has such power where the property involved was acquired for administrative and management purposes. Pursuant to the second paragraph of § 901 the Authority is specifically authorized to expend sums to acquire additional Park lands. (See also 12 M.R.S.A. § 1701 concerning the Maine

Forest Authority powers in this regard.) There is no authorization here to sell lands, 12 M.R.S.A. § 901. The statute is appropriately silent in this regard inasmuch as it was clearly the intent of this section that Park lands be held "forever," see e.g., P. & S.L. of 1931, c. 23.

The garage property, however, is not Park property in the same sense as the lands now within the Park. It is property used by the Authority and its staff to facilitate the maintenance and operation of the Park. As such, it is logically subject not to the mandates imposed by the second paragraph of § 901 but to the requisites of the first paragraph thereof. Again, there is no explicit statement of power to sell administrative facilities (or, for that matter, power to purchase). The issue is, then, whether such authority may be implied. Given the particular statute in question, the power to sell property purchased for administrative purposes may be implied. In State of Maine v. Fin & Feather Club, 316 A.2d 351 (Me., 1974), the Maine Supreme Judicial Court construed the power of the Authority in regard to its ability to negotiate and terminate leases within the Park. In upholding this power, the Court provided the following guidance:

> "Public bodies may exercise only that power which is conferred upon them by law. The source of that authority must be found in the empowering statute, which grants not only the expressly delegated powers but also incidental powers necessary to the full exercise of those invested. . . . An authorizing statute grants such powers as may be fairly implied from its language. These powers are:
>
> "1. those necessarily arising from powers expressly granted
>
> "2. those reasonably inferred from powers expressly granted
>
> "3. those essential to give effect to powers expressly granted.
>
> "The public body may employ means appropriate for the purpose of carrying out the authority directly conferred upon it. Lynch v. Commissioner of Education, 317 Mass. 73, 56 N.E.2d 896 (1944) (statute conferring 'general management' of institution upon state department confers authority to deal with all details of control and administration of such institution)." 316 A.2d 351, 355.

The Court then concluded that

> "The grant of power to the Park Authority in § 901 for the management and control of Baxter State Park is broad and greatly dependent on the discretion of the Park Authority members. . . .
>
> "The administration of Baxter State Park was specifically exempted from any supervision or connection with the State Park Commission. Id. The statute contemplates the terms of the donor's trust being most effectively accomplished by giving broad powers of control to three State officers, who would be exclusively responsible for seeing that the terms of the trust are strictly satisfied. 12 M.R.S.A.. §§ 901, 906." 316 A.2d 351, 355.

The Court found that the Authority's negotiation and termination of leases were managerial decisions consistent with the broad delegation of power and as such were decisions with which the Court would not interfere:

> "The grant of authority to the members of the Baxter State Park Authority is broad with emphasis on the goals of management rather than the methods. A general grant of power, unaccompanied by definite directions as to how the power is to be exercised, implies the right to employ means and methods necessary to comply with statutory requirements. . . . " 316 A.2d 355, 356.

In view of the broad grant of supervisory and administrative control and the court's approval thereof (albeit in the context of a lease of park land rather than the sale of facilities and property outside of the Park), it appears that the power to sell the garage and use the funds to replace it with another such facility may be implied from the statute.

The power to sell such property pursuant to the trust instruments may also be implied. The applicable trust documents are silent as to both purchase and sale of administrative properties. Where there is no express authorization or prohibition and where the trust instruments do not use language which is interpreted to authorize or prohibit the sale of property, resort is had to the intent of the settlor and to analysis of the purposes of the trust to determine whether there is a power of sale, see generally III Scott on Trusts §§ 190-190.2 (3d edition, 1967). In this case, the trust's purpose was to provide funds for the care, operation and management of the Park. The settlor of the trust repeatedly expressed his approval of and faith in the decisions of the BSPA as created by the Legislature. (See, e.g., the letter

from Baxter to the BSPA of February 16, 1967, in which he expressed his adamant opposition to L.D. 460 which would have changed the structure of the Authority.) With these factors in mind, it appears that a decision by the Authority to sell the Medway garage and to purchase another facility adjacent to its headquarters would be consistent with the purposes of the trust.

In summary, although the Authority would be completely without power to sell any park lands, its decision to sell the Medway garage, a facility in Millinocket purchased and used solely for administrative purposes and convenience, is consistent with the trust and within the powers implied by the statutory direction to administer this trust. Accordingly, it may proceed on its own to sell the Medway garage in a manner consistent with its fiduciary responsibilities, i.e., consistent with the duty of the trustee to use reasonable care and skill, see III Scott, supra, § 190.6.

This opinion is limited to the particular facts and in the somewhat unique context of operations of the Baxter State Park Authority. Its reasoning would not necessarily apply to a regular state agency with no trust responsibility. Such agencies can only take actions specifically authorized by statute.

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR/ec

STATE OF MAINE

Inter-Departmental Memorandum

Date November 28, 1983

To James E. Tierney, Attorney General Dept. Attorney General

From Rufus E. Brown, Deputy RB Dept. Attorney General

Subject Membership of Baxter State Park Authority

This memorandum responds to your request of November 1, 1983, that I comment on the proposal of the Performance Audit Committee that Ken Stratton, Director of the Bureau of Forestry, be replaced by Dick Anderson, Commissioner of the Department of Conservation, on the Baxter State Park Authority. My conclusion is that such a proposal, if implemented, would seriously contradict the Trust purposes for Baxter State Park as expressed by Governor Baxter.

As you know, the Baxter State Park Trust consists of a series of gifts transferred to the State of Maine as trustee between 1931 and 1962 by deeds of trust submitted to various Legislatures for acceptance by Private and Special Acts. Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 191-92 (Me. 1978). These trust instruments, by their terms, do not refer to the Baxter State Park Authority. The Authority was created in 1939 to act as trustee for the State of Maine for purposes of Baxter's Trust. P.L. 1939, ch. 6. This Act, which Baxter "undoubtedly had a major role" in planning and introducing to the Legislature, J. W. Hakola, Legacy of a Lifetime, at 139, specified that the membership of the Authority should consist of the Attorney General, the Commissioner of Inland Fisheries & Game, and the State Forest Commissioner. Of course, that membership has remained consistent to the present date. 12 M.R.S.A. § 901.

Although, as just noted, the trust instruments themselves do not refer to the Authority, in 1955 Governor Baxter executed a formal instrument interpreting his Trust and in that year the Legislature evidenced its concurrence by enacting the interpretative declaration into law. P. & S. L. 1955, ch. 2 (the 1955 Interpretation Act). See Fitzgerald, supra, 385 A.2d at 198. The 1955 Interpretation Act specifically refers to the Baxter State Park Authority as the entity to exercise control over the Park and further refers specifically to the Departments of Forestry and Fish and Game. In addition, several of Governor Baxter's formal communications refer to both the Authority and some of its specific members. See e.g., January 11, 1955 letter to Governor Muskie, which makes reference to the 1955 Interpretation Act:

> In consultation with our Forest and Game officials and with the Attorney General's Department it seems desirable to provide for an understanding as to what is required under the Trust Deeds.

Also see Governor Baxter's March 17, 1955 letter to Governor Muskie, commenting on the creation of the SMFA in which Governor Baxter

said that "It long has been my purpose to create in our forests a large area wherein the State may practice the most modern methods of forest control, reforestation and production under the management of our able Forest Commissioner Mr. Nutting and his associates." (emphasis added) One of the most emphatic letters on the subject of the membership of the Authority was written by Governor Baxter on February 16, 1967 to the Park Authority in reference to a proposal to enlarge the Authority to include State Representatives from Millinocket and Greenville. Governor Baxter strongly opposed this change in the membership, writing:

> The present Commission of three members has worked without salary and has taken extra good care of the Park. Only those who seek to gain some advantage, which I do not understand, are behind this movement.
>
> After my donating in excess of 200,000 acres of land and money in the amount of more than one and one-half million dollars, it would seem that my wishes in this matter should be recognized. There is no need for a change because the present system is working satisfactorily and carrying out my plans. I regard this bill as a personal attack against what I have done in creating Baxter State Park.
>
> The members of the present commission are familiar with the Park and I want them to carry on without any change being made. As a matter of fact, we have no finer public officials than these three men. They are consciencious and there is no such thing as politics in their work.
>
> I do not go into details because this proposal lacks any merit and would bring into the Park system elements which would ruin harmony. I hope the time does not come when the wishes of one who has created the most unique park in the country, would be disregarded.
>
> The citizens of our State, if this matter were placed before them, would not think of making any changes. Such an action would break the Trust which I established and I should be humiliated if I were ever called upon to go before a Legislative Committee to try to stop passage of this proposed bill.

This letter was read to the State Government Committee by Austin Wilkins, and the proposal was defeated following opposition by several present and former members of the Authority.

Further evidence of Governor Baxter's intent with regard to membership of the Authority is found in a letter of Albert D. Nutting, former Commissioner of the Forestry Department and later head of the School of Forestry at the University of Maine, a man who was particularly close to Governor Baxter. Mr. Nutting drafted a proposal for a multiple use state forest and for the continuance of the Baxter Park Authority, such proposals being transmitted to Governor Baxter in a letter dated December 11, 1967. In the proposal concerning the Park Authority, Nutting wrote:

> The present administrative organization of the Park is a separate unit of State government. I believe strongly that the Baxter Park Authority is the best administrative body to assure that my desires for a wilderness park will be continued. As a citizen of Maine, I greatly appreciate the accomplishments of the State Park and Recreation Commission in providing areas and facilities for out-of-door recreation for Maine people and their visitors. However, they are subject to political pressures to provide a different kind of recreation than I have long worked for in Baxter Park. My 50 years of effort to provide a wilderness park has been to establish an area where nature can take its course with a minimum of disturbance from man. I want everyone who appreciates such an area to have a chance to visit Baxter Park, but I don't want it ruined by the masses of people who go to areas just to see something new to them. State and national parks are filled with such problems. Mass recreation areas have their values, but aren't what I want. There are local people surrounding Baxter Park who would like to exploit it for their own benefits. They have often tried to do this. I want them to have fair treatment, but no special privileges.
>
> The present Baxter Park Authority provides the kind of governing body I believe the best fitted to continue Baxter Park as I want it to be. The three men who comprise the Authority are State employees. I don't believe their

> services on the Authority have, or will have, any effect on their salary costs to the State. The Forest Commissioner provides the Authority with a person informed in forest land management, the Inland Fisheries and Game Commissioner with an interest and informed person in the management of fish and game in forested areas, and the Attorney General with the person interested and knowledgeable in the law and all are interested in people. They have successfully administered Baxter Park in conformity with my ideas for many years. I want to see their type of administration continued long after I passed from the scene.

On December 28, 1967 Governor Baxter wrote to Mr. Nutting referring to his letter and commenting that "You outlined what I have in mind and I appreciate the thought and time you have put in to get these ideas together."

All of this background lends strong support for the conclusion of our own Law Court in Fitzgerald, supra, 385 A.2d at 202-203:

> The membership in the Authority, obviously selected by Governor Baxter himself and ratified by him by his subsequent gifts, consists of the State's principal officers in the professions of the law, forestry, and fish and wildlife management. Both Governor Baxter and the legislature placed their confidence in the judgment and integrity of those high State officials.

With this background, it appears clear that the present membership of the Authority was that intended by Governor Baxter and by such membership Governor Baxter intended to draw upon the expertise and the judgment of particular State officials. The position of the Director of the Bureau of Forestry was particularly important, in view of the need for expertise in forest management and also in light of the history of Governor Baxter's reliance upon former Commissioners of the Department of Forestry, Albert Nutting and Austin Wilkins. The Department of Conservation has a much larger constituency than the Bureau of Forestry and the interest of forestry, including the Land Use Regulation Commission, the Bureau of Public Lands, Geology and the Parks and Recreation Commission. Indeed, there is reason to believe that Governor

Baxter would be particularly concerned about the substitution of the Commissioner of Conservation for the Director of the Bureau of Forestry on the Park Authority because such a Commissioner not only lacks focus and expertise in forestry, but his constituency includes the State park system, which Governor Baxter was careful to distinguish from the Baxter State Park. See 12 M.R.S.A. § 900:

> While this area bears the name park, it is not to be confused with the existing state park system and is to "be separately administered free from any connection with the larger State Park Commission" (Bureau of Parks and Recreation). That system, pu-chased with the funds of the people, must change from time to time to accommodate changing circumstances and the varying desires of its proprietors; not so, Baxter State Park, purchased by the generosity of one man, richly endowed, and presented to the people with specific stipulations.

Given Governor Baxter's strong views about the membership of the Park Authority, as expressed in various documents and recognized by our own Law Court, it is my conclusion that the proposal of the Performance Audit Committee in regard to a change in the Authority's membership would be contrary to the Baxter Trust.

RUFUS E. BROWN
Deputy Attorney General

REB:mfe

JAMES E. TIERNEY
ATTORNEY GENERAL

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

December 6, 1983

Honorable G. William Diamond
Honorable Neil Rolde
Chairmen, Audit and Program Review Committee
Room 425
State House
Augusta, ME 04333

Re: Baxter State Park Authority

Dear Senator Diamond and Representative Rolde:

Commissioner Glenn H. Manuel, Chairman of the Baxter State Park Authority (the "Authority"), has requested the opinion of this office concerning the legal ramifications of a proposal by the Joint Legislative Committee of Audit and Program Review to change the membership of the Authority by substituting the Commissioner of the Department of Conservation for the Director of the Bureau of Forestry. Our conclusion is that this proposal, if implemented, would appear to contradict the terms of the trust for Baxter State Park as expressed by Governor Percival Baxter.

As you know, Baxter State Park is held in trust for the people of the State of Maine and it is therefore the legal obligation of the State of Maine, as trustee, to adhere to the terms of the trust. This obligation extends to the Legislature as well as to the administrators of the Park.

There is no single trust instrument for Baxter State Park. The Baxter State Park Trust consists of a series of gifts (30 conveyances in all) by Governor Baxter between 1931 and 1962. In accordance with Governor Baxter's desire to solemnize the grand design he envisioned and the terms of the trust pursuant to which the gifts were made, each gift was conveyed by a deed of trust which was transmitted to the incumbent Governor who

then formally submitted it to the Legislature for acceptance by Private and Special Act. In addition, Governor Baxter accompanied his gifts with formal transmittal letters which were published in the Laws of Maine. As explained in his communication to Governor Sewall and the Maine Legislature on January 12, 1942:

> In this manner a long list of precedents is being established; precedents which, as time passes, will show that eight or ten different Governors and as many Legislatures, by laws duly passed and signed by these Governors, have entered into solemn pacts that create a succession of irrevocable trusts.

Thus the trust pursuant to which Baxter State Park is held and administered was created over a thirty-one year period by Governor Baxter and is principally evidenced by the deeds of trust pursuant to which these gifts were made.

These trust instruments, by their terms, do not refer to the Baxter State Park Authority. The Authority was created in 1939 to act as trustee for the State of Maine for purposes of Baxter's Trust. P.L. 1939, ch. 6. This Act, which Baxter "undoubtedly had a major role" in planning and introducing to the Legislature, J. W. Hakola, Legacy of a Lifetime, at 139, specified that the membership of the Authority should consist of the Attorney General, the Commissioner of Inland Fisheries & Game, and the State Forest Commissioner. The Commissioner of Inland Fisheries & Wildlife, and the Director of the Bureau of Forestry have since been substituted for their predecessors. 12 M.R.S.A. § 901.

The issue raised by the proposal to alter the membership of the Authority is whether the trust obligations of the State of Maine include a requirement that the present membership of the Authority be maintained in its present form in the absence of any further reorganizations of State Government. As indicated, the trust instruments themselves are silent on the point. To resolve this issue, it is necessary in the first place to refer to general principles of trust law.

It is well established that if there are no instructions or if an ambiguity exists in the terms of a trust, the courts will look to evidence extrinsic to the trust to resolve uncertainties in how to interpret a trust. Canal National Bank v. Noyes, 348 A.2d 232, 234 (Me. 1975); Mooney v. Northeast Bank & Trust Co., 377 A.2d 120, 122 (Me. 1977); Maine National Bank v. Petrlik, 283 A.2d 660, 664 (Me. 1971); II Scott, Law of Trusts, § 164.1 at 1258 ("Where the instrument contains no express provision or where a provision is ambiguous

or uncertain in its meaning, resort may be had to extrinsic evidence to determine the terms of the trust."). Our Law Court has applied this principle to the Park Trust in Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 199 (Me. 1978):

> Given the ambiguity that plainly exists in the language of the trust deeds, due to the inherent tension among the several Park purposes, the Superior Court correctly sought help from a document extrinsic to the trust instruments.

Such extrinsic evidence is designed to elicit the intent of the settlor of the trust at the time the trust was created. Mooney v. Northeast Bank & Trust Co., supra, 377 A.2d 122; Canal National Bank v. Noyes, supra, 348 A.2d at 234; National Newark & Essex Bank v. Hart, Me., 309 A.2d 512, 518 (1973); II Scott, Law of Trusts, § 164.1 at 1260. Therefore, it is appropriate to examine such extrinsic evidence as can be found which bears on the intent of Governor Baxter with regard to the membership of the Authority.

In 1955 Governor Baxter executed a formal instrument interpreting his Trust and in that year the Legislature evidenced its concurrence by enacting the interpretative declaration into law. P. & S.L. 1955, ch. 2 (the "1955 Interpretation Act"). See Fitzgerald, supra, 385 A.2d at 198. The 1955 Interpretation Act specifically refers to the Authority as the entity to exercise control over the Park and further refers specifically to the Departments of Forestry and Fish and Game. In addition, several of Governor Baxter's formal communications refer to both the Authority and some of its specific members. See e.g., the January 11, 1955 letter to Governor Muskie, which makes reference to the 1955 Interpretation Act:

> In consultation with our Forest and Game officials and with the Attorney General's Department it seems desirable to provide for an understanding as to what is required under the Trust Deeds.

Also see Governor Baxter's March 17, 1955 letter to Governor Muskie, commenting on the creation of the Scientific Management Forest Area, in which Governor Baxter said that "It long has been my purpose to create in our forests a large area wherein the State may practice the most modern methods of forest

control, reforestation and production under the management of our able Forest Commissioner Mr. Nutting and his associates." (emphasis added).

One of the most emphatic letters on the subject of the membership of the Authority was written by Governor Baxter on February 16, 1967 to the Park Authority in reference to a proposal to enlarge the Authority to include State Representatives from Millinocket and Greenville. Governor Baxter strongly opposed this change in the membership writing:

> The present Commission of three members has worked without salary and has taken extra good care of the Park. Only those who seek to gain some advantage, which I do not understand, are behind this movement.
>
> After my donating in excess of 200,000 acres of land and money in the amount of more than one and one-half million dollars, it would seem that my wishes in this matter should be recognized. There is no need for a change because the present system is working satisfactorily and carrying out my plans. I regard this bill as a personal attack against what I have done in creating Baxter State Park.
>
> The members of the present commission are familiar with the Park and I want them to carry on without any change being made. As a matter of fact, we have no finer public officials than these three men. They are consciencious and there is no such thing as politics in their work.
>
> I do not go into details because this proposal lacks any merit and would bring into the Park system elements which would ruin harmony. I hope the time does not come when the wishes of one who has created the most unique park in the country would be disregarded.
>
> The citizens of our State, if this matter were placed before them, would not think of making any changes. Such an action would break the Trust which I established

> and I should be humiliated if I were ever called upon to go before a Legislative Committee to try to stop passage of this proposed bill. [Emphasis added].

This letter was read to the State Government Committee by Austin Wilkins, and the proposal was defeated following opposition by several present and former members of the Authority. March 3, 1967 letter of Austin Wilkins, Forest Commissioner, to Governor Baxter.

Further evidence of Governor Baxter's intent with regard to membership of the Authority is found in a letter of Albert D. Nutting, former Forest Commissioner and later head of the School of Forestry at the University of Maine, a man who was particularly close to Governor Baxter. Mr. Nutting drafted a proposal for a multiple use state forest and for the continuance of the Baxter State Park Authority, such proposals being transmitting to Governor Baxter in a letter dated December 11, 1967. In the proposal concerning the Park Authority, Nutting wrote:

> The present administrative organization of the Park is a separate unit of state government. I believe strongly that the Baxter Park Authority is the best administrative body to assure that my desires for a wilderness park will be continued. As a citizen of Maine, I greatly appreciate the accomplishments of the State Park and Recreation Commission in providing areas and facilities for out-of-door recreation for Maine people and their visitors. However, they are subject to political pressures to provide a different kind of recreation than I have long worked for in Baxter Park. My 50 years of effort to provide a wilderness park has been to establish an area where nature can take its course with a minimum of disturbance from man. I want everyone who appreciates such an area to have a chance to visit Baxter Park, but I don't want it ruined by the masses of people who go to areas just to see something new to them. State and national parks are filled with such problems. Mass recreation areas have their values, but aren't what I want. There are local people

> surrounding Baxter Park who would like to exploit it for their own benefits. They have often tried to do this. I want them to have fair treatment, but no special privileges.
>
> The present Baxter Park Authority provides the kind of governing body I believe the best fitted to continue Baxter Park as I want it to be. The three men who comprise the Authority are state employees. I don't believe their services on the Authority have, or will have, any effect on their salary costs to the state. The Forest Commissioner provides the Authority with a person informed in forest land management, the Inland Fisheries and Game Commissioner with an interested and informed person in the management of fish and game in forested areas, and the Attorney General with the person interested and knowledgeable in the law and all are interested in people. They have successfully administered Baxter Park in conformity with my ideas for many years. I want to see their type of administration continued long after I passed from the scene. [Emphasis added].

On December 28, 1967 Governor Baxter wrote to Mr. Nutting referred to his letter and commented that "You outlined what I have in mind and I appreciate the thought and time you have put in to get these ideas together."

All of this background lends strong support for the conclusion of our own Law Court in Fitzgerald, supra, 385 A.2d at 202-203:

> The membership in the Authority, obviously selected by Governor Baxter himself and ratified by him by his subsequent gifts, consists of the State's principal officers in the professions of the law, forestry, and fish and wildlife management. Both Governor Baxter and the legislature placed their confidence in the judgment and integrity of those high State officials.

It thus appears clear that Governor Baxter intended that the Forest Commissioner should be and remain as a member of the

Authority and that Governor Baxter considered such membership to be an important aspect of the trust relationship he created when the Park was created. The position of the Forest Commissioner was particularly important to Governor Baxter in view of the need of the Park for expertise in forest management and also in light of the history of Governor Baxter's reliance upon former Commissioners of the Department of Forestry, Albert Nutting and Austin Wilkins.

Of course, in 1973 (after Governor Baxter's death), the Legislature eliminated the Department of Forestry, creating a new Department of Conservation, and incorporated in the new Department the former Forestry Department, the Parks and Recreation Department, the Maine Forest Authority, the Maine Mining Bureau, and the Land Use Regulation Commission, among others. P.L. 1973, ch. 460, now 12 M.R.S.A. § 5011 (1981). The Bureau of Forestry, within the Department of Conservation, is headed by a Director who is required to be "qualified by training, experience and skill in forestry." 12 M.R.S.A. § 8003 (1981).

It is reasonable to conclude, given the foregoing discussion, that Governor Baxter's insistence that the Forest Commissioner be a member of the Authority should be tranferred to the Director of the Bureau of Forestry, as indeed the Legislature itself acknowledged during the reorganization in 1973 when it provided that the Director should remain as a member of the Authority, rather than the newly created Commissioner of the Department of Conservation. Although the Commissioner holds a position in State government superior to that of the Director of the Bureau of Forestry, there is no statutory requirement that he possess expertise in the field of forestry and, even if there were such a requirement, the Commissioner would still lack the focus on forestry relied upon by Governor Baxter because of the Commissioner's many other responsibilities for activities and bureaus within the Department other than forestry. Indeed, there is reason to believe that Governor Baxter might be particularly concerned about the substitution of the Commissioner of Conservation for the Director of the Bureau of Forestry on the Authority because the Commissioner's constituency includes the State park system, which Governor Baxter was careful to distinguish from the Baxter State Park. See 12 M.R.S.A. § 900:

> While this area bears the name park, it is not to be confused with the existing state park system and is to "be separately administered free from any connection with

> the larger State Park Commission" (Bureau of Parks and Recreation). That system, purchased with the funds of the people, must change from time to time to accommodate changing circumstances and the varying desires of its proprietors; not so, Baxter State Park, purchased by the generosity of one man, richly endowed, and presented to the people with specific stipulations. [Emphasis added].

Also see Governor Baxter's letter of May 20, 1960 to Governor Reed and the Executive Council.

Given Governors Baxter's strong views about the existing membership of the Authority, as expressed in various extrinsic documents and as recognized by our own Law Court, there are sufficient grounds to conclude that the maintenance of the existing membership constitutes a trust obligation which should not be altered.

Please let me know if I can be of further assistance to you in this matter.

Sincerely yours,

RUFUS E. BROWN
Deputy Attorney General

REB:mfe

cc: Glenn H. Manuel, Commissioner
Kenneth Stratton, Director
James E. Tierney, Attorney General
Richard Anderson, Commissioner

CHIEF RANGER ✓ Cmo
BUSINESS MANAGER ✓ EMG
RESOURCE MANAGER ✓ DG
NATURALIST
OTHER Hold for Further Info

Department of Attorney General

MEMORANDUM

To: Francis Ackerman, Assistant Attorney General

From: William R. Stokes, Assistant Attorney General

Date: April 12, 1988

Subject: Baxter State Park - Bureau of Public Improvements Approval

---

This will acknowledge receipt of the March 29, 1988 memorandum to you from Dale Doughty, Director of the Bureau of Public Improvements asking for your advice with respect to a letter dated March 28, 1988 from Irvin (Buzz) Caverly, Director of the Baxter State Park, asking for confirmation that the Baxter State Park is not subject to BPI approval.

I have a very vivid recollection of discussing this subject with Paul Stern who represents the Baxter State Park, sometime ago and I am quite confident that it was our mutual opinion that the Baxter State Park should not and is not subject to BPI approval. I don't recollect that we ever put anything in writing concerning this but I know it came up and I know that I did discuss the matter with Paul and I believe with Carl Silsby of the Bureau of Purchases and, I believe with Rod Scribner who was the Commissioner of Finance and Administration at the time. My recollection is that it involved the purchase of a truck by the Baxter State Park and whether that purchase had to go through the Bureau of Purchases.

I believe Paul and I were both of the view that in view of the fact that the Baxter State Park was formed as a result of gifts made by Governor Baxter and since the Park was to be managed by an Authority established pursuant to the instructions of Governor Baxter, it would make absolutely no sense to apply BPI and Bureau of Purchases approval to the operation of the Park. Indeed, I do not believe that the Baxter State Park Authority is a department or agency of the State as that term is used in the context of BPI and Bureau of Purchases approval. I do agree with Buzz Caverly's assessment that it is

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an independent authority created by virtue of Governor Baxter's Deeds of Trust and funded from its own independent trust account and it was intended that the Authority make decisions regarding the operation of the Park without being subject to the bureaucratic requirements of the Executive Department of State Government.

I hope this information is helpful to you and please don't hesitate to contact me if I can be of further assistance.

WILLIAM R. STOKES
Assistant Attorney General

WRS/dm

cc: Paul Stern, Assistant Attorney General ✓

John R. McKernan, Jr.
Governor

Dale F. Doughty
Director

Department of Administration
BUREAU OF PUBLIC IMPROVEMENTS

Telephone (207) 289-4000

April 27, 1988

Irvin C. Caverly, Jr., Director
Baxter State Park Authority
64 Balsam Drive
Millinocket, Maine 04462

Dear Buzz;

This is to acknowledge your phone call of April 26, relating to whether or not projects undertaken by the Baxter Park Authority fall under Title 5, and more specifically are they a "public improvement".

This past week, Frank Ackerman informed me that he concurred with the Attorney General's opinion that you forwarded to me. That opinion is that projects undertaken by the Baxter Park Authority are not "public improvement". Based upon the direction given me, I do not anticipate that this Bureau will need to approve future projects of the Authority.

Sincerely,

Dale F. Doughty, Director
Bureau of Public Improvements

DFD:smc

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APR 28 1988

Department of Attorney General

MEMORANDUM

To: Philip Ahrens, Deputy Attorney General

From: Jeffrey Pidot, Assistant Attorney General

Date: June 16, 1988

Subject: Utility Line Installation in LURC Jurisdiction

With apologies for the delay, I wanted to get back to you on your question regarding whether a permit is required from LURC for the installation of a new electric utility line to serve premises lying just south of Baxter Park. My understanding from you was that the line involved would be several miles in length.

As expected, LURC regulations generally provide that such a major new utility installation requires a permit. However, LURC is not the final arbiter of this issue. The Legislature has provided an exemption from any such regulatory permit where the installation will be undertaken by an electric utility company in accordance with 35-A M.R.S.A. §§ 2305 and 2501, et seq. Of particular application here are §§ 2502 and 2503. These sections require that, where a utility line is to be strung along a "public way", approval must be obtained from the State Department of Transportation when the public way is a state, state aid or federal aid highway, from the municipal officers when the public way is a city street or town way (not at issue here) and from the county commissioners for all other public ways. Generally, § 2503(3) contemplates objection to the issuance of such a permit only by a person owning property which abuts the public way involved. Indeed, my sense of § 2503, in its entirety, is that it is designed to provide a maximally facilitated process for obtaining such permits. To nail the coffin shut, § 2503(20) makes this permitting process exclusive and exempts the utility involved from having to comply with any other licensing requirement in order to locate a utility line along a public way.

In sum, much depends upon whether the utility line involved will lie along a so-called public way. If only a small portion of the line will not be within the public way, it may be possible for the utility to argue that whatever small extension is required beyond the public way (in order to serve the premises involved) is a "service drop" which is also exempt

from LURC permitting requirements. If this be the case, it would appear that one's only recourse is to attempt to object under the provisions of § 2503, and consequently probably not even be heard on the matter. If, on the other hand, a significant portion of the utility line involved will not be along a public way, a LURC permit will be required.

I hope that this has been an enjoyable experience.

/d

Department of Attorney General

MEMORANDUM

To: Ron Lord, Bureau of Purchases

From: Terrance J. Brennan, Assistant Attorney General

Date: February 23, 1989

Subject: Baxter State Park Purchases

At the request of Assistant Attorney General Paul Stern who represents the Baxter State Park Authority, I have recently researched the issue as to whether the Baxter State Park Authority must have the approval of the Bureau of Purchases prior to making purchases of equipment and services.

I have concluded that the Authority is not required to seek such approval. I base this conclusion upon 12 M.R.S.A. § 901 which states that the Commission "shall have full power in the control and management" of the Park, upon the clearly expressed intent of Governor Baxter in establishing the trust, and upon the fact that State funds are not used for such purposes. I also concur with Paul Stern and Bill Stokes of this office who have reached the same conclusion reasoning that the Baxter State Park Authority is an independent Authority and not a "department or agency" of the State and that therefore 5 M.R.S.A. § 1816 does not apply.

Should you have further questions or comments regarding this matter, please do not hesitate to contact me.

TERRANCE J. BRENNAN
Assistant Attorney General

TJB:sw

cc: Paul Stern

MICHAEL E. CARPENTER
ATTORNEY GENERAL

FEB 2 6 1990

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

DIRECTOR ✓
CHIEF RANGER ✓
BUSINESS MANAGER
RESOURCE MANAGER ✓
NATURALIST ✓
OTHER RETURN TO ROXIE

February 21, 1991

Rodney L. Scribner, CPA
State Auditor
Department of Audit
State House Station #66
Augusta, Maine 04333-0066

Dear Rod:

I am in receipt of your letter of January 29, 1991, regarding Baxter State Park's practice of utilizing contractors at Kidney Pond and Daicey Pond facilities. I agree with the conclusions of Paul Stern in his letter of December 6, 1990, as well as those of Leslie D. Bloom at the Bureau of Employee Relations in a letter dated December 4, 1990.

In your letter, you indicate that the Park "intends to expand its use of this type of contract." My staff has informed me that in conversations with Park Director Caverly, he indicated quite clearly that the Park does not intend to utilize contractors for services beyond that which presently exist. With respect to the use of contractors for the Daicey Pond and Kidney Pond facilities, clearly that is permitted under 12 M.R.S.A. § 904.

Section 904 states that agents and representatives of the Park shall be hired pursuant to the Civil Service Law. In no way does section 904 prevent the Park from utilizing contractors where appropriate. The Kidney Pond and Daicey Pond facilities are unique in the Park; contemplating the rental and upkeep of numerous cabins and diverse grounds. The Park utilizes contractors there because this allows the Park to hire someone who can perform the varied numerous tasks to run the facilities without constant supervision.

Historically, Kidney Pond's cabins have never been run by Park employees. Kidney Pond cabins were leased to a private party until relatively recently. As a result of a policy change, this facility came more directly under the purview of the Park, with the Park utilizing a contractor rather than a lessee. Contractors have been used at Daicey Pond camps for nearly 10 years. No employees were replaced or laid off as a result of Daicey Pond camps going to contractors. Moreover, everyone agrees that the contractors at Daicey Pond have done a magnificent job.

You asked for specific guidelines in other areas. Because the Baxter State Authority is unique within State government, it is probably not productive to generalize based upon situations which exist at the Park. Further, each situation encountered has to be looked at on a case-by-case basis. The analysis includes many factors. For example, the degree of employer control is vital to determining whether an employer-employee or independent contractor relationship exists. Clearly, because of the enormous leeway and relative lack of control, we do not believe that the contractors at Daicey Pond or Kidney Pond are employees, i.e., agents or representatives under § 904. If you have a particular case you wish to present to us for our guidance, we would be happy to assist you.

I hope that this letter has been helpful to you.

Sincerely,

Mike

MICHAEL E. CARPENTER
Attorney General

MEC/tt

cc: Irvin C. Caverly, Jr., Director
Baxter State Park

STATE OF MAINE
DEPARTMENT OF AUDIT
STATE HOUSE STATION 66
AUGUSTA, MAINE 04333
Area Code 207
Tel. 289-2201

RODNEY L. SCRIBNER, CPA
STATE AUDITOR

RECEIVED
ATTORNEY GENERAL
JAN 30 1991

January 29, 1991

Mr. Michael Carpenter
Department of the Attorney General
State House Station 6
Augusta, Maine 04333

FEB - 4 1990

Dear Mike:

Welcome you to your new role as Attorney General. My staff and I look forward to continuing the good working relationship that our departments have enjoyed over the years. I've enjoyed our personal acquaintanceship as well.

I'm sure that you have a number of important matters to address. However, I would appreciate your consideration of an employee/contractor issue at Baxter State Park (BSP). It is far reaching because other departments have similar situations and we feel important legal considerations are being overlooked.

Recently, my staff questioned BSP's practice of hiring contractors to run Daicey Pond cabins. Assistant Attorney General Paul Stern advised BSP that there was no violation of statute. This matter is still troubling to me and to my staff. We believe that Mr. Stern's response did not fully address the employee versus contractor issue.

We have two principal concerns. First, are these individuals agents or representatives of BSP? Second, should BSP withhold income tax from payments made to them?

In our discussion with BSP management, they stated that a major reason for treating the individuals as contractors was to limit BSP expenses for employee fringe benefits. We also noted that BSP does not withhold income taxes from the individuals. BSP intends to expand its use of this type of contract. It is therefore particularly important that they receive authoritative, accurate guidance in this matter.

For your consideration, we have highlighted what we believe to be relevant information in the accompanying attachments.

Attachment 1 - Paul Stern Letter of December 6, 1990
Attachment 2 - 5 MRSA §7032
Attachment 3 - 12 MRSA §904
Attachment 4 - IRS Circular E Employer's Tax Guide
Attachment 5 - IRS Publication 937 Business Reporting
Attachment 6 - BSP Standard Operating Procedures Manual
Attachment 7 - Contract for Special Services

The individuals in question are dressed in official uniforms similar to those worn by BSP employees; are perceived as representatives of BSP; serve in a capacity similar to park rangers; work on BSP premises; and appear to meet IRS employee criteria. We believe that there should be no question that legally they are employees of BSP and the contract relationship is a matter of form and not substance.

If you do finally conclude that these individuals are not BSP agents or representatives, we would appreciate specific, written guidance explaining your conclusion. Such guidance would be very helpful to us as we encounter similar situations on other audits.

Best personal regards,

Rodney L. Scribner, CPA
State Auditor

RLS:lg
Attachments

JAMES E. TIERNEY
ATTORNEY GENERAL

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

December 6, 1990

Irvin C. Caverly, Jr., Director
Baxter State Park
64 Balsam Drive
Millinocket, Maine 04462

Re: Audit

Dear Buzz:

We are in receipt of an inquiry relating to the Park's contracting out certain services. In particular, at a recent audit, the Park's practice of hiring contractors to run Kidney Pond and Daicey Pond cabins has been questioned under 12 M.R.S.A. § 904. Based upon my understanding of the facts, there appears to be no violation of that particular provision.

Section 904 provides that the agents and representatives of the Park shall be hired pursuant to the Civil Service Law. In effect, section 904 requires only that Park employees be hired pursuant to the normal personnel laws and, therefore, the collective bargaining agreement of the State. Section 904 does not speak to and, therefore, does not limit the Park's authority to retain contractors to provide services. Consequently, the questioned practice of engaging contractors at Kidney Pond and Daicey Pond is outside the scope of section 904. Whether or not the practice violates the State Employees Labor Relations Act is a question that must be, and has been, answered by the Bureau of Employee Relations. This advice is consistent with, and complementary to, the conclusions contained in the December 4, 1990 letter from the Bureau of Employee Relations.

If you need any further assistance, please feel free to contact me.

Sincerely,

PAUL STERN
Assistant Attorney General

PS/tt

John R. McKernan, Jr.
Governor

Kenneth A. Walo
Director

Department of Administration
BUREAU OF EMPLOYEE RELATIONS
Telephone (207) 289-4447

December 4, 1990

Irvin C. Caverly, Jr.
Director
Baxter State Park
64 Balsam Drive
Millinocket, Maine 04462

RE: Use of contractors at Kidney Pond and Daicey Pond Campgrounds

Dear Buzz:

As you have requested, I have reviewed the State Employees Labor Relations Act (26 M.R.S.A. §979 et seq.) to determine whether or not the use of contractors to provide services at the Kidney Pond and Daicey Pond Campgrounds violates the SELRA. It is the position of this office that the use of contractors as you have described currently exists does not constitute any violation of the SELRA.

If you need further information or assistance, please advise.

Sincerely,

Leslie D. Bloom
Counsel
Bureau of Employee Relations

/mlw

DEC 6 19

3.3.2 Rules and Regulations

STATE OF MAINE

Inter-Departmental Memorandum Date September 16, 197

To Bill Cross Dept. Baxter State Park

from Sarah Redfield, Staff Attorney SR Dept. Attorney General

Subject Adoption of Winter Regulations

Director
Supervisor
Asst. Supervisor
Other
File

I just wanted to remind you that §903 of the statute governing Baxter State Park provides that before the Authority promulgates rules and regulations they must be certified by the Attorney General and published once a week for two successive weeks in a newspaper in either Penobscot or Piscataquis County. They must also be posted in at least two places within the Park. The publication and posting of the rules must include not only the text of the regulations, but also the last two paragraphs of Title 12 M.R.S.A. §903:

> " Whoever violates any of the rules and regulations of said park authority, promulgated in conformity with this section, shall be punished by a fine of not more than $100 and costs or by imprisonment for not more than 30 days, or by both.
>
> Whoever willfully mutilates, defaces or destroys any structure, monument or marker lawfully erected within the boundaries of said park, or any notice, rule or regulation of said park authority, posted in conformity with this section, shall be punished by a fine of not more than $100 and costs or by imprisonment for not more than 30 days, or by both."

The rules become effective only after adoption by the Authority and completion of these public notice requirements.

cc: A. Lee Tibbs
Joseph E. Brennan

SR/cmb

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BAXTER STATE PARK HEADQUARTERS
MILLINOCKET, MAINE

May 13, 1976

Committee on State Government 107th Legislature

Sarah Redfield, Assistant Attorney General

Request for Information Dated April 30, 1976

BAXTER STATE PARK AUTHORITY

I. Adoption of Rules.

The procedures for adoption of rules by the Baxter State Park Authority (BSPA) are indicated in Section 903 of Title 12. This section provides the Park Authority may promulgate such rules and regulations as it deems necessary for the protection and preservation of the Park and of the monumental structures therein, for the protection and safety of the public, and for the proper observance of the conditions and restrictions expressed in the deeds of trust of Baxter State Park to the State of Maine.

Before promulgating any rules the statute provides that the BSPA shall submit such rules to the Attorney General. If the Attorney General certifies the rules to be in conformity with the law, the rules must then be published once a week for two successive weeks in a newspaper in either Penobscot or Piscataquis County. They must also be posted in at least two places within the Park. Upon such publication, the rules take effect. In addition, a certificate of publication and posting, executed by a majority of the BSPA is to be filed with the Secretary of State. The BSPA does not have any specific regulations governing the procedures for the adoption of rules. However, as a matter of practice, the Authority does hold a public hearing prior to the adoption of rules in addition to the requirements for publication provided in the statute.

II. Final Action in an Adjudicatory Proceeding.

The BSPA does not conduct any adjudicatory proceedings.

III. Final Action on a Licensing Application.

The BSPA does not act on any licenses.

IV. Rights and Duties of Parties.

Technically, there are no parties in a proceeding for the adoption of rules of the BSPA. However, members of the public have the opportunity to comment at any public hearing which may be held.

V. Practice.

Attached for your information is a copy of the rules and regulations of the BSPA for 1976.

enclosure

SR/cmb

Department of Attorney General

MEMORANDUM

To: Irvin C. Caverly, Jr., Director, Baxter State Park

From: Rufus E. Brown, Deputy Attorney General

Date: September 3, 1985

Subject: Carrying Concealed Weapons Within Park Boundaries

This memorandum confirms my oral advice to you that Rule 21 of the Park's Rules relating to firearms is applicable to and enforceable against individuals who are licensed to carry concealed weapons pursuant to 25 M.R.S.A. §§ 2031-2035 (Supp. 1984-1985).

Rule 21 of the Park's Rules provides, in relevant part that:

> Hunting, trapping or the use or possession of any firearms . . . or pistol within the boundaries of the Park is prohibited, provided, however, firearms may be transported through the Park, but must be kept in the car trunk or completely enclosed in a case. All firearms must be inaccessible to use. Firearms may be kept for protection with the written permission of the Authority by sporting camps located within the Park. A record of such firearms, indicating serial numbers and the name of persons authorized to use them, shall be kept open to inspection at all times by Park Rangers or Inland Fisheries and Wildlife Wardens. Firearms may be used only by Park personnel or law enforcement officers on official duty.

This regulation, issued pursuant to the Authority's rulemaking powers, 12 M.R.S.A. § 903, is applicable to all kinds of firearms, not just concealed weapons, and is obviously intended to implement the hunting restrictions contained in the Park's trust deeds which the Authority is obligated to enforce.

State law relating to concealed weapons is aimed at an entirely different purpose. Section 2031 of Title 25 generally prohibits a person from wearing under his clothes or concealing about his person a firearm unless excepted by a provision of law. Section 2031.1 then provides for an exception to the prohibition for persons who are licensed to carry a concealed weapon as provided by law. Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1900). Section 2032 specifies that municipalities may license a person to carry a concealed weapon provided that the criteria set forth in the statute are met. Section 2032.8 further provides that "permits issued authorize the person to carry such concealed weapons throughout the State."

At first blush it may appear that Section 2032.8 authorizes persons with licenses to carry concealed weapons at any time at any place notwithstanding any regulations of any state agency of the State to the contrary. However, in my view such would not be an accurate reading of the law.

The general intent of the licensing provisions of the concealed weapons statute clearly is to create an exception to what otherwise is a blanket prohibition against the carrying of concealed weapons. Accordingly, a person who is issued a permit to carry a concealed weapon stands in the same position as if there were no prohibition against concealed weapons in the first place. Such a person is not given affirmative rights to ignore other valid state regulations relating to firearms. The concealed weapon statute no more authorizes unrestricted carrying of concealed weapons in the Park than it does in a courtroom just as a fishing license hardly authorizes a person to fish in any lake or stream in the State. Such being the obvious thrust of the licensing provisions generally, I would likewise conclude that section 2032.8, which is part of that statutory scheme, does no more then define the territorial scope of the permit to carry concealed weapons (i.e., even though the license is issued by a municipality, it is good only within the state) and does not define affirmative rights to carry a weapon where other restrictions are applicable. See Schwanda v. Bonney, supra, 418 A.2d at 166.

In summary, the Park's Rule 21 is designed to regulate the hunting in the Park; it is not a licensing scheme for the carrying of concealed weapons. Therefore in my opinion there is no irreconciable conflict between State law and the Park's regulations that would justify the conclusion that State law concerning concealed weapons prevents the Park's rules on firearms from being enforced.

If you have any further questions about this matter, please do not hesitate to call me.

RUFUS E. BROWN
Deputy Attorney General

REB:mfe

cc: James E. Tierney
Glenn H. Manuel

3.3.3 Miscellaneous

STATE OF MAINE

Inter-Departmental Memorandum Date March 16, 1

To John L. Martin, Chairman Dept. Land Use Regulation Com

From E. Stephen Murray, Assistant ESM Dept. Attorney General

Subject Maine Land Use Regulation Commission; Conflicts of Interest.

I. Problem:

There has been considerable discussion of the issue of the law as to conflicts of interest and the statutory and actual membership of the Maine Land Use Regulation Commission (hereinafter sometimes called "L.U.R.C.") and how the law of conflicts of interest applies to decisions of L.U.R.C., if at all. This discussion has been of both a public and a private nature and has involved members of the citizenry, the press, conservation organizations, the regulated and L.U.R.C. Commissioners themselves.

As a result of this widespread discussion, former Attorney General James S. Erwin authorized me to research the issues and report the results to the L.U.R.C. Commissioners.

At the outset it should be noted that while the Legislature, the judiciary and the commentators all agree upon the acceptability of the principle that "no man can serve two masters", the application of that principle is more often difficult than not, and in most cases seems to be left to the honest discretion of those who might have a conflict of interest. This fact is evidenced by the frequently stated unwillingness of courts to set forth a specific rule, by the fact that there are few cases of gross violation of the principle, by the unwillingness or failure of legislature to set forth a rule, and finally by the ability of the courts to find their way around this easily-accepted but hard-to-apply principle.

II. Statutory Duties of L.U.R.C.:

L.U.R.C.'s jurisdiction extends to approximately one-half of the State encompassing that area defined as "unorganized and deorganized areas" (12 M.R.S.A. § 682.1), hereinafter called "the wildlands." The wildlands are, for the most part, owned by timber and paper companies, many of whom compete, directly or indirectly, with each other. 12 M.R.S.A. Chap. 206-A requires L.U.R.C. to (1) establish standards for zoning the wildlands; (2) establish uses permitted within each type of zone; (3) zone the wildlands; (4) act upon individual petitions to rezone areas in the wildlands; (5) act upon petitions to amend land use guidance standards in the various zones; (6) act upon applications to use zoned areas in a manner otherwise prohibited by the L.U.R.C. standards; (7) act upon applications to engage in or undertake virtually any land, air or water use

in the wildlands,[1] and (8) prepare a comprehensive plan for the wildlands.

III. Statutory Makeup of L.U.R.C.:

12 M.R.S.A. § 683 provides for a 7 member board consisting of 3 permanent members, (1) "the Commissioner of Parks and Recreation", (2) "the Forest Commissioner" and (3) "the State Planning Director" and 4 term members, each one of whom shall "represent" (4) "the public", (5) "conservation interests", (6) "forest products industry interests" and (7) "general landowner interests."

A quorum is 4 and no action can be taken by the Commissioners except upon the approval of 4 members.

The Commissioner of Parks and Recreation has jurisdiction, custody and control in, over and upon all state parks and memorials, some of which are located in the wildlands.[2]

The Forest Commissioner has supervision and control of all state-owned lands, not otherwise provided for, much of which is locate in the wildlands.[3]

The State Planning Director is responsible for providing technical assistance to the executive, the legislature and others and to prepare State comprehensive plans.[4] He has no regulatory or proprietary powers.

While the statute, 12 M.R.S.A. § 683, states that the term members shall "represent" various interests, we must assume that it simply requires members to either be drawn from among those persons involved or identified with the various interests set forth or that the members simply be knowledgeable of the attributes, problems and desires of each identified interest group. As public officers each member is required to act in the public interest, as fiduciaries of that interest. To assume that the statute permits or requires each member to act only on behalf of the interest which he "represents" would be to assume a statutorily authorized or required failure of fundamental due process.

No case can be found which approves of a statutory authorization for a public official to act only on behalf of special interests, but cases can be found which do not get to the issue because the court held invalid the statute authorizing a board or commission consisting of special interests, or specifically found that there was no denial of due process because of the nature of the board or commission's powers or the statutory scheme for judicial review.

For example, in Miami Laundry Co. v. Florida Dry Cleaning & L. Board, 183 So. 759 (1938), the court upheld a statute

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1/ No permits are required to engage in forest product uses in areas zoned "management." 12 M.R.S.A. § 685-A.5.

2/ 12 M.R.S.A. § 602.

3/ 12 M.R.S.A. § 504.

4/ 5 M.R.S.A. § 3305

establishing a board of 7 members to regulate the cleaning, dyeing, pressing and laundry industries. Although the board consisted of 3 members from the cleaning industry, 3 members from the laundry industry and only one member from the public, the court stated:

> ". . . we do not understand the act to do more than require that 3 members of the board must have had experience in the laundry business and 3 members must have had experience in the cleaning business. In other words, all the act does is to prescribe certain qualifications for those appointed to it. . . " 183 So. at 764.

In refusing to invalidate a statute providing for a state regulatory board of funeral directors and embalmers to consist of members of the industry, in State Board of Funeral Directors and Embalmers v. Cooksey, 4 S.2d 253 (1941), the court found its way around the knotty problems of due process and the constitutional requirements of a fair hearing by basing its decision on the fact that the board had no power to fix standards of conduct or prescribe or fix fees and charges or to establish rules of fair practice or in any way to regulate or dictate the conduct or the business of any funeral director or embalmer, but rather was authorized only to issue certificates of qualifications or licenses to those who met statutory requirements. While the court's decision here may be seen as a "distinction without a difference," the case does illustrate the fundamental assumption that regulatory boards consisting of members of the regulated are, at the least, troublesome and the courts will at times circumscribe the assumptions implicit in such statutes by narrowing the scope of their inquiry.

However, as illustrated in Johnson v. Michigan Milk Marketing Board, 295 Mich. 644, 295 N.W. 346 (1946)[1/], some courts will not hesitate to reach the issue of fundamental fairness. In Johnson, a large milk distributor attacked the statutory makeup of the state milk commission which consisted of the Commissioner of Agriculture[2/], 2 milk producers, 1 milk distributor and 1 consumer. The court forthrightly held that

> "The Board, as constituted under the statute, is of such a nature that Johnson was not, and would not have been, accorded that impartial hearing which satisfies the requirement of due process."[3/] 295 N.W. at 353.

1/ criticized in 54 Harv. L. Rev., 872 (1941)

2/ The Commissioner of Agriculture also happened to be a milk producer.

3/ The dissent, citing Miami Laundry, supra, would not so hold on the basis that the board's functions were legislative and not administrative in nature.

While the court in Board of Supervisors of Elizabeth City County v. State Milk Commission, 191 Va. 1, 60 S.E.2d 35 (1950), upheld the makeup of a milk commission consisting of a producer, a distributor and a consumer in a case involving an attack on the commission's decision to fix the minimum price of milk in a certain marketing area, the court took pains to point out that unlike Johnson, here the appeal section of the statute guaranteed due process by providing for a full court review of the commission's decision.[1] In addition, by finding that the "technical problem of fixing milk prices is wisely left to an experienced and informed tribunal", the court seemed to be making a distinction between "legislative" and "quasi-judicial" decisions, discussed herein, infra.[2]

In State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 254 P.2d 29 (1953), the court invalidated a state board setup to regulate dry cleaning plants which consisted of 1 member from the public, 2 owners of retail dry cleaning plants, 2 owners of wholesale dry cleaning plants and 2 owners of dry cleaning shops, on 3 b ases, one of which was that the makeup of the board violated the due process requirements of the Fifth Amendment to the United States Constitution.

Finally, Southeast Milk Sales Association Incorporated v. Swaringen, 290 F. Supp. 292 (1968) emphasized the fundamental basis of the Johnson case, supra. In Southeast, a person aggrieved by a decision of the commission had a right of appeal to be heard de novo and thus was entitled under the act to a full hearing with all rights of due process, whereas in Johnson, the board's findings were conclusive and review was limited to questions of law.[3]

It should be noted that there are a number of cases holding that a board consisting in part or in whole of members of a profession to be regulated by the board is not unconstitutional per se. These decisions appear to be based upon the "rule of necessity."

1/ Court review of an L.U.R.C. decision in any matter upon which there was a hearing is confined to the record and the substantial evidence rule. 12 M.R.S.A. § 689.

2/ The so-called "milk commission cases" may all be distinguishable for reasons such as the common legislative assumption that milk requires extraordinary regulation because it is a commodity which is a necessity to the health and life of the citizenry and partakes of the nature of a public utility, or milk regulation requires expertise which lies only in the hands of the distributors and producers.

3/ See note 1, supra.

While the foregoing discussion does not have any direct inference upon the makeup of the L.U.R.C. and their discussion should not be seen as indicating an opinion on the writer's behalf that the makeup of the L.U.R.C. is constitutionally deficient, the cases cited are valuable to indicate that the L.U.R.C. makeup can be seen as troublesome unless it is assumed that L.U.R.C. members are required only to be knowledgeable in the fields of interest which the statute requires them "to represent."

IV. Present Membership of L.U.R.C.:

Aside from the 3 permanent members, L.U.R.C. consists of (1) an attorney who represents "conservation interests," (2) a professor who represents "the public", (3) an officer-employee of a corporation which has substantial holdings in the wildlands and which is in the timber and paper business as well as the "second-home" recreational business who "represents" "forest products industry interests", and (4) an officer-employee of a multi-disciplined corporation which has land holdings in the wildlands and which is involved in a variety of interests, including the "second-home" and recreational development industry, who represents "general landowner interests."1/

Whether or not, in a given situation, a conflict of interest is present, is dependent, in great part, upon the meaning of "interest" within the phrase "conflict of interest." The cases dealing with this issue appear to assume that "interest" in this context means something other than philosophical bent or opinion, that it involves a direct or indirect pecuniary interest, not necessarily capable of specific demonstration but on the other hand not solely within the realm of fanciful hypothesizing. This definition of interest is demonstrated in the cases cited herein, infra, as well as in the following two Maine cases.

Friend, Appellant from the decision of the Penobscot County Commissioners, 53 Me. 387 (1866) involved the appeal of one Friend of a decision of the county commissioners in laying out a road. Pursuant to the statutory procedure provided for in such cases, the county commissioners appointed "a committee of 3 disinterested persons", to wit, a committee, the majority of which were stockholders of the railroad corporation owning the fee of the land over which the road would run. In throwing out the decision and report of the committee, the court stated:

1/ It should be noted that the writer has no information of a personal nature about any of the present members which is relevant to this memorandum.

". . . it is well settled that any interest, however small, is sufficient to render one who is required to act in a judicial capacity incompetent. (emphasis the court's) . . .

"It was decided in State v. Delesdernier, 2 Fairf., 473, that the owner of land over which a road was located was incompetent to act in laying out the same. The owner of stock in a corporation which owns the land is equally so." 53 Me. at 388.

Opinion of the Justices, 108 Me. 545, 82 A. 90 (1912) involved the validity of a printing contract awarded by the State to a corporation of which the Secretary of State was a stockholder and Treasurer. Even though the corporation was the lowest bidder in a competitive bidding process, and even though the Secretary of State had nothing to do with the award of the contract or the auditing or payment of the bills presented on account thereof, the court held the contract void.[1] The significance of the case lies in the court's statement that where a state officer is a stockholder and officer of a company, the "clear implication" is that his "financial interest in the company is an appreciable and substantial one." 108 Me. at 548.

V. General Principles of Conflicts of Interest:

The general principles applicable to the issue of conflicts of interest can best be understood by a review of some of the cases dealing with the issue and a reading of some of the commentators.

In 1610 the English courts held "no man shall be a judge in his own case." Bonham's Case, 8 Co., 113b., 118 a., 77 Eng. Rep. 646, 652 (K.B. 1610). This statement of the basic principle is the essence of the American cases dealing with the issue.

As previously pointed out, in 1866, the Maine court ruled that a stockholder in a corporation cannot perform his duty as a public official with regard to a matter involving the corporation without being guilty of a conflict of interest.[2]

In Selectmen of Andover v. Board of Comm's. of Oxford County, 86 Me. 185, 29 A. 982 (1893) the court applied the principle to a situation in which the lower court appointed a committee to submit a report concerning a dispute over the location of a road.

1/ The case involved a statute prohibiting a state official from being directly or indirectly interested in any State awarded contract.

2/ Friend, supra, page 5 .

One of the members of the committee was a large landowner in the town in which the road would not be located. While the court held that the rule of necessity would prevent disqualifying the landowner from serving on the committee, because if paying taxes were the test of disqualification, no citizen could act as a municipal officer, the case is noteworthy for what the court says about "interests."

> ". . . any direct interest, however small, will disqualify a judicial officer, 'for no man can lawfully sit as a judge' in his own case. An interest that disqualifies from judicial action may be small, but it must be an interest, direct, definite, and capable of demonstration; not remote, uncertain, contingent, or unsubstantial, or merely speculative and theoretic." 29 A. at 983.

In Lessieur v. Inhabitants of Rumford, 113 Me. 317 (1915), Lessieur made a contract with the local board of health, of which he was a member, to care for a smallpox patient. There was no statutory provision against such a contract and the court assumed that the substantive terms of the contract were equitable. Nevertheless, the court voided the contract and stated:

> ". . . if it clearly appears to be in violation of some well established rule of law, or that its tendency will be harmful to the interests of society, it is against the policy of the law to uphold and enforce it.
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> "It is well established as a general rule that one acting in a fiduciary relation to others is required to exercise perfect fidelity to his trust, and the law, to prevent the neglect of such fidelity, and to guard against any temptation to serve his own interests to the prejudice of his principles disables him from making any contract with himself binding on his principle. . . The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result." 113 Me. at pages 319-320.
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> "One who stands to gain or lose personally by a decision either way is disqualified by reason of interest to participate in the exercise of judicial functions." 2 Davis Administrative Law Treatise § 12.03, p. 153.

Tuscan v. Smith, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344 (1931) was a case involving a lease of a town building to a selectman's brother. The lease was held unlawful because of the selectman's interest therein as his brother's creditor. In the course of its decision, the court stated:

> "It is unnecessary to discourse on the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. . . No definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful. In the words of this court in the case of Lessieur v. Inhabitants of Rumford (citation omitted) the question really is whether the town officer by reason of his interest is placed 'in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official'. . . ."
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> "Gauged by the common and accepted standards defining the obligations of public officials, the lease. . . was unconstitutional and unlawful. To hold otherwise would be to repudiate the doctrine that he who holds public trust is in a position of public trust."1/

Hughes v. Black, 156 Me. 69 (1960), was an appeal from a decision by the lower court judge not to disqualify himself in an action in which the judge was an uncle of the plaintiff's attorney. The case is useful in its statement of the principles, thus:

> "A cardinal principle inherent in American jurisprudence is that no judge shall preside in a case in which he is not wholly free, disinterested, impartial, and independent, to the end that litigants may have a hearing or determination by an impartial tribunal. The law is justly zealous of the absolute disinterestedness of tribunals. Due process of law requires a hearing before an impartial and disinterested tribunal. Next in importance to the duty of rendering a righteous judgment is that

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1/ While the case involved a statute prohibiting conflict of interest as to cities, the court held it not applicable to this case because no city was involved. Thus the case went off on common law principles.

> of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.
>
> . . .
>
> "In any event, there has never been any doubt about the principle that no judge or tribunal should sit in any case in which he or it is directly or indirectly interested. The interest which is meant is a pecuniary one and such a pecuniary interest disqualifies a judge no matter how small it may be. . . ." 156 Me. at pages 73-74.

In Griggs v. Borough of Princeton, 33 N.J. 207, 162 A.2d 862 (1960), discussed infra page 17 , the court in vacating the vote of a municipal body because the employer of 2 of the 4 members of the body had an interest in the vote, the court, quoting Van Itallie v. Borough of Franklin Lakes[1], stated:

> "'. . . the decision as to whether a particular interest is sufficient to disqualify is necessarily . . . factual . . . and depends upon the circumstances of the particular case. . . . No definitive test can be devised.'" 162 A.2d at page 869.

The court went on to say:

> "The potential of psychological influences cannot be ignored. . . . We perceive the rule to be that the mere existence of a conflict, and not its actual effect, requires the official action to be invalidated." 162 A.2d at page 870.

In Buell v. City of Bremerton, 80 Wash.2d 518, 495 P.2d 1358 (1972), discussed infra page 20 , the court stated:

> "Members of commissions with the role of conducting fair and impartial fact finding hearings must, as far as practicable, be open-minded, objective, impartial, free of entangling influences and capable of hearing the weak voices as well as the strong. . . . It is important not only that justice be done but that it also appear to be done. . . ."

1/ 28 N.J. 258, 268, 146 A.2d 111, 116 (1958).

> "The importance of the appearance of fairness has resulted in the recognition that it is necessary only to show an interest which might have influenced a member of the commission and not that it actually so affected him. . . . " 495 P.2d at pages 1361, 1362.
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> ". . . the common law rule of disqualification applicable to judges extends to every tribunal exercising judicial or quasi-judicial functions." 1 Am. Jur.2d, Administrative Law, § 63 at page 859.1/
>
> "A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public." 43 Am. Jur., Public Officers, § 266 at page 81.
>
> "It has been recognized that whether in a particular case, a disqualifying interest exists, is a factual question governed by the circumstances of each case, so that a definitive rule is not possible (citations omitted). However, the courts have usually taken the view that it is necessary only to show the existence of an interest which might have influenced the officer and that the person objecting need not go further and show that the influence actually operated (citations omitted)." 10 A.L.R.3d at page 696.

The court in Aldom v. Roseland, 42 N.J. Super. 495, 127 A.2d 190 (1956) sets forth a good summary of the principles of conflicts of interest. In disqualifying a council vote on an amendment to a zoning ordinance because one of the councilmen was employed by a corporation which stood to benefit from the amendment, the court stated:

> "A public office is a public trust. Borough councilmen, as fiduciaries and trustees of the public interest, must serve that interest with the highest fidelity. The law tolerates no

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1/ hereinafter cited as "1 Am. Jur.2d Ad. L.".

mingling of self interest it demands exclusive loyalty. . . The theory is that a public officer assumes the same fiduciary relationship toward the citizens of his community as a trustee bears to his cestui que trust. . . . They have the right to expect that in everything that appertains to their business or welfare, he will exercise his best judgment, unaffected and undiluted by anything which might inure to his own interest as an individual. . . . . " 127 A.2d at page 193.

"The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of particular importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach is recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action. . . .

. . . .

"The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. . . . but in appraising the interest there is no essential difference between cases arising under prohibitory statutes and those necessitating application of the common law. And it may be noted as a factor that the validity of the officer's action does not rest upon proof of fraud, dishonesty, loss to the municipality or whether he was in fact influenced by his personal interest, or whether the contract or other type governmental step was desirable or undesirable from a public standpoint." 127 A.2d at page 194.

. . . .

> "The personal or private interest which disqualifies may be identified generally as one which is different from that which the public officer holds in common with members of the public." 127 A.2d at page 196.
>
> . . . .
>
> "It was argued that establishment of the principle we are announcing would disservice the public interest because it might operate to influence substantial and civic minded citizens, who have outside business connections, against membership in an elective or appointive public agencies. That result is extremely doubtful. The rule disqualifies only where personal and public loyalties come into conflict. In those rare instances such high-minded persons undoubtedly will welcome the disqualification.
>
> "It might be added that, as a matter of ethical practice under a statute. . . and quite apart from the obligations of the law, whenever a substantial question is raised as to the disinterestedness of one of several officials sitting on a matter, and the other officials can't take care of the case, it usually is just as well for the official in question to withdraw therefrom so that not the faintest shadow be cast on the integrity of the determination." 127 A.2d at page 197.

VI. The Rule of Necessity:

The so-called "rule of necessity" to the rule against conflicts of interest should be noted in passing, more for its existence than its direct relevance to L.U.R.C.

The rule of necessity is "an exception based upon necessity, to the rule of disqualification of an administrative officer. Disqualification will not be permitted to destroy the only tribunal with power in the premises." 1 Am. Jur.2d Ad. L. § 65 at page 862.

In Andover, supra, page 6 , the Maine Court applied this rule to prevent the disqualification on a board of a taxpayer in the Town of Andover, concerning a decision which could affect the Andover property taxes. The Court found that to apply the rule on conflicts of interest would result in no citizen being able to act as a municipal officer.

In Griggs, supra, page 9 , where the court disqualified 2 votes which were necessary for a quorum and thus the municipal body's action failed, and no action could thereafter be taken by the body upon the particular application, the court refused to apply the rule of necessity saying that there was no "stern" necessity and the municipal body could withhold action until the voters or the legislature remedied the disability.

Finally, there are a number of cases holding that a board consisting in part or in whole of members of a profession to be regulated by the board is not unconstitutional and does not present a conflict of interest. For example, see Kachian v. Optometry Examining Board, 44 Wis.2d 1, 170 N.W.2d 743 (1969) and People v. Murphy, 364 Mich. 363, 110 N.W.2d 805 (1961). Those decisions appear to rest on the rule of necessity. As pointed out in Kachian, at page 748, "If the indirect interest deriving from membership in the profession or occupation being regulated disqualifies an individual from serving on a regulatory board, the result would be dentists could not examine dentists, attorneys could not serve on bar examiner board, pharmacists could not give pharmacy examination. Would it be preferable, or even workable, to have dentists giving bar examinations and optometrists giving pharmacy tests? The gain in presumed purity would be matched by a loss in knowledge and experience in drafting and administering professional and occupational rules and regulations."

VII. The Distinction between Legislative and Quasi-Judicial Administrative Action:

In applying conflict of interest rules, courts have often made a distinction between legislative and quasi-judicial administrative actions. In other words, where an action taken by an administrative body was "legislative" in nature, the rules prohibiting conflicts of interest were held not to apply.[1/] In State v. Board of Public Works of City of Camden, 29 A. 163 (N.J. 1894), the court set forth a good statement of the rule. The case concerned the validity of the vote of the Board of Public Works on a petition requesting permission to lay a street railway. The Board adopted an ordinance granting permission to the Camden Horse Railway Company to lay its tracks upon any street in the city. One of the members of the Board voting for the ordinance was a stockholder in the company. While the court found the Board action to be judicial in nature and thus applied the rule against conflict of interest,

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1/ See Griggs v. City of Elizabeth, 69 N.J.L. 190, 55 A. 248 (1903) and Van Gilder v. Board of Freeholders of Cape May, 83 N.J.L. 139, 83 A. 500 (1912).

the court did describe the distinction between judicial and legislative actions thus:

> "'The distinction' it was said, 'is between those ordinances which adopt a general system of policy, affecting all the inhabitants of the city or town, or all the property situated within corporate limits, directing the execution of their public duties, the burden of which is borne by all equally, and those which provide the making of a particular improvement affecting property in one locality, the cost of which is to be defrayed by specified individuals'. This general demarkation of the two orders of municipal acts was made with special reference to ordinances designed to accomplish improvements of the kind then before the court. In all cases, I think, a legislative act must be regarded as one which prescribes a general rule of conduct, while a judicial act is one which imposes burdens or confers privileges in specific cases, according to the finding of some person or body, whether the facts exist which make a general rule applicable to the specific case or according to the discretionary judgment of such person or board as to the propriety of imposing the burden or granting the privilege in the specified case. An ordinance prescribing the conditions upon which streets should be laid out or improved, and the procedure to be adopted in accomplishing these purposes, would, I suppose, be clearly legislative in character. An ordinance, however, laying out a particular street, or ordering it to be paved, would be judicial in its quality." 29 A. at page 165.

Stevens, ex rel. Kuberski v. Haussermann, 113 N.J.L. 162, 172 A. 738 (1934), was a case involving the seating of a councilman. The court, in deciding the issue of conflicts of interest, explained the distinction, in its mind, between legislative and judicial administrative actions. The court defined a legislative act as

> "One which prescribes a general rule of conduct, while a judicial act is one which imposes burdens or confers privileges in specific cases, according to the findings

> of some person or body, whether the facts exist which make a general rule applicable to the specific case, according to the discretionary judgment of such person or board as to the propriety of imposing the burden or granting the privilege in a specified case." 113 N.J.L. at page 168.

The court cited as an example of a legislative act, an ordinance fixing the qualifications of applicants for licenses to sell liquor and the general conditions upon which licenses should be granted, whereas the actual granting of a license was an administrative act of a judicial nature.

In Aldom v. Roseland, supra, page 10, where the court applied the rule against conflict of interest to the vote of a councilman who was an employee of a corporation which stood to benefit from the passage of the ordinance upon which the councilman voted, the court discussed the distinction between a legislative act and a judicial act.

> "The Borough argues further that the adoption of the ordinance was a legislative act which should not be interfered with by the judicial branch of the government 'unless tainted with fraud, or palpably not in the service of the public interest, or otherwise a clear perversion of power'. . . It is true that review of a purely legislative act of a local governing body is normally beyond the judicial orbit except in the instances stated. However, here the function is not exclusively legislative; it partook sufficiently of the quasi-judicial to warrant examination by the courts." 127 A.2d at page 194.

While the distinction made between legislative and judicial activities is considered by the courts, the writer would suggest that "the fact that for purposes of review, the preceding is regarded as legislative in nature, it does not prevent a court from enforcing the right to an impartial tribunal." 1 Am.Jur.2d Adm.L. § 63 at page 860.

VIII. Conflicts of Interest Arising from an Employee, Officer or Stockholder Relationship:

While the discussion as to the general rule as to conflicts of interest would seemingly answer the question of the conflict of interest status of an employee, officer or stockholder of a corporation, there are cases which specifically rule on such status.

In Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 89 A.2d 1 (1952), citizens brought suit against the Mayor and Council to have two ordinances relating to traffic upon certain streets thrown out. The court held the ordinances were voidable and set them aside because out of four of the Councilmen voting in favor of the ordinances, two were disqualified by reason of private interest. The ordinances here were passed at the request of Art Color Tint Co. and would have had the effect of allowing it to expand its plant. The Council vote was four in favor, two against, with two of the affirmative votes cast by employees of Art Color Tint. The court stated:

> "The process calling for the exercise of discretion by the governing body according to the weight of conflicting public considerations is judicial in quality. Therefore the ordinances are voidable if any one of the councilmen who participated as quasi-judges was at the time disqualified by reason of private interest at variance with the impartial performance of his public duty . . . It is an ancient principle of Anglo American justice that 'no man shall be judge in his own cause. . . ' citing Bonham's case, supra, page 6 ." 89 A.2d at page 4.

While the court found it unnecessary to state a general rule, because one of the two Councilmen-employees had, for the record, admitted his personal interest, the court did state

> "However, it is most doubtful that participation by a councilman in a municipal action of particular benefit to his employer can be proper in any case."

In Aldom v. Roseland, supra, page 10 , the court voided the vote of a Councilman who was in the employ of a corporation which stood to benefit from the passage of an ordinance for the reason that he had such personal or private interest as to disqualify him from acting in regard to such ordinance.

> "A public office is a public trust. . . The law tolerates no mingling of self-interest. It demands exclusive loyalty. . . ." 127 A.2d at page 193.

> "The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of particular importance. . . Basically the question is whether the officer by reasn of a personal

> interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official." 127 A.2d at page 194.
>
> "The personal or private interest which disqualifies may be identified generally as one which is different from that which the public officer holds in common with members of the public." 127 A.2d at page 196.

Finally, in Mills v. Town Plan and Zoning Commission of the Towr of Windsor, 144 Conn. 493, 134 A.2d 250 (1957), the court ruled that the Commission's action in denying an application to rezone a residential area for industrial use was invalid because some of the Commission members had a disqualifying conflict of interest. In that case, one of the Commission members had previously acted as a "dummy" in purchasing land proposed for industrial use on behalf of a stockholder of a corporation which was interested in developing a regional shopping center near the plaintiff's property. Another Commission member had discussed the matter of reducing the size of the plaintiff's shopping center with the town planner so that it would not injure a nearby shopping center in which he was interested. The court stated:

> "Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy. . . public policy cannot tolerate these proceedings." 134 A.2d at page 253.

It is clear from the general principles of conflicts of interest set forth in pages 6 through 12 , supra, and the foregoing cited cases that the interest of an employee, officer or stockholder of a corporation in that corporation is sufficient to disqualify him from acting in a public capacity upon any matter which could benefit or harm the corporation.1/

IX. Conflict of Interest Rule as Applied to Zoning:

Whether or not the rule as to conflicts of interest applies to zoning-type decisions is primarily a function of whether or not the court recognizes the distinction between legislative and judicial-type administrative actions and if so, how they apply that distinction to the particular zoning-type decision.

1/ See also Griggs v. Borough of Princeton, supra, page 9 , concerning the invalidity of votes of public officials who were employees of Princeton University who stood to benefit from certain decisions made by the Board of which those public officials were members.

In State v. Board of Public Works of City of Camden, supra, page 13, the court found that the grant of a petition to the Camden Horse Railway Company to lay its tracks on any street in the city was a judicial-type administrative action. The court said:

> "An ordinance prescribing the conditions upon which streets should be laid out or improved, and the procedure to be adopted in accomplishing these purposes, would, I suppose, be clearly legislative in character. An ordinance, however, for laying out a particular street, or ordering it to be paved, would be judicial in its quality." 29 A. at page 165.

In Mills v. Town Plan and Zoning Commission of the Town of Windsor, supra, page 17, the rezoning of a residential area for industrial use was held to be a judicial-type administrative action. The court stated:

> "The modification of zoning regulations partakes of the nature of a legislative proceeding; nevertheless, it is not legislative in the broad sense; on the contrary, the power emanates from a specific grant and the manner of its exercise is limited. The mode of exercising the power thus expressly granted must be reasonable. The exercise of power of that nature, whether it be denominated legislative or quasi-judicial, should command the highest public confidence, since zoning restrictions limit a person's use of his real estate in the interest of the general public good. Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy. . . public policy cannot tolerate these proceedings." 134 A.2d at page 253.

In Aldom v. Roseland, supra, page 10, the court invalidated an ordinance amending a zoning ordinance which amendment would have established five use districts, the most open being light industrial consisting of about 275 acres. The ordinance amendment would have included approximately 13% of the total land area in the Town of Roseland. The court held that this administrative action was not exclusively legislative, and applied the rule against conflict of interest to an employee of a corporation which would benefit from the amendment.

Hochberg v. Borough of Freehold, 40 N.J.S. 276, 123 A.2d 46 (1956), involved an amendment to a zoning ordinance by a planning board which included among its members a party who operated a "horseman's kitchen" at a racetrack. The amendment to the zoning ordinance would have rezoned a portion of the land and thus allowed the racetrack to enlarge its facilities. The court held that the vote was in violation of the common law rule against conflict of interest.

S. & L. Associates, Inc. v. Township of Washington, 61 N.J.S. 312, 160 A.2d 635 (1960), was an action contesting the validity of a zoning ordinance. A planning board with authority to study the zoning of areas of the township as yet unzoned and authority to make recommendations to the municipal officers held a hearing on a plan which included among its recommendations the recommendation that plaintiffs' land be zoned industrial. At the hearing, land owned by one Guerin and land owned by one Hemmings were proposed to be zoned industrial. Both Guerin and Hemmings were members of the planning board. After the hearing, the planning board voted to remove the plaintiffs' land from that area to be designated industrial. Thereafter, the plaintiffs' petitioned the board to have its land zoned industrial, and the petition was unanimously rejected. The plaintiffs argued that the ordinance should be set aside because it was tainted by the self-interest of the officials who participated in the preparation and adoption of the ordinance with the result that they could not discharge their duties in a completely impartial manner.

After citing Aldom v. Roseland, supra, page 10, for the proposition that "a public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official acts by any private interest or motive whatsoever. . . ", the court stated:

> "In considering whether the participation of Guerin and Hemmings in the proceedings leading to the ordinance under attack invalidated it, a distinction should be drawn between the decision to place their own properties in the industrial zone and the decision to exclude plaintiffs' track therefrom. If only the former were implicated, the conclusion to condemn the ordinance on grounds of self-interest would be questionable. It is to be emphasized that original zoning was being effectuated. Of necessity, this involved giving every parcel of property in the municipality a zoning status it never had before. . .

> "We need not decide whether, without more, the placement of the Guerin and Hemmings properties in the industrial zone would of itself have been fatal to the ordinance on the grounds of conflict of interest. However, insofar as the exclusion of plaintiffs' property from the industrial zone is concerned, we conclude that their participation did involve invidious self-interest, calling for disqualification of the resulting official action. Once it was officially decided that the Guerin and Hemmings parcels were to be zoned industrial, those individuals had a natural economic state in the exclusion of a track like plaintiffs' from that category." 160 A.2d at page 646.

> "We conclude that since the participation of Guerin and Hemmings in the action of the planning board affected or may have affected the recommendation of that body in a material respect, the recommendation must be set aside . . . . upon any future consideration of a zoning ordinance by the planning board, Guerin and Hemmings should refrain from participation in its deliberations or recommendations." 160 A.2d at page 647.

Finally, in Buell v. City of Bremerton, supra, page 9 , the court overturned the rezoning of a 5-acre parcel from residential to commercial on the basis of conflict of interest on the part of the chairman who presided over the hearing which was held on the matter. The rezoning was challenged, and overturned, on the basis that the chairman of the planning board was indirectly benefitting from the rezoning; i.e., he owned adjoining property and there was a possibility that the value of his property would increase as a result of the rezoning. The court stated:

> "The appearance of fairness doctrine has received recent emphasis in our decisions regarding zoning. Basic to this is our recognition that restrictions on the free and unhampered use of property imposed by planning and zoning compel the highest public confidence in governmental processes bringing about such action. Members of commissions with the role of conducting fair and impartial factfinding hearings must, as far as practicable, be open-minded, objective, impartial, free of

> entangling influences and capable of hearing the weak voices as well as the strong. . . It is important not only that justice be done but that it also appear to be done. . . " 495 P.2d at page 1361.
>
> . . . .
>
> "These by-laws (by-laws of the planning board which prohibited participation by one to whom some benefit may come) give recognition to existing law relating to the right to challenge a member of an administrative tribunal exercising judicial or quasi-judicial functions. . . At least three types of bias have been recognized as grounds for disqualification of persons performing quasi-judicial functions. These are prejudgment concerning issues of fact about parties in a particular case, particularly evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and . . . an interest whereby one stands to gain or lose by a decision either way." 495 P.2d at page 1362.

X. Legal Effects of Conflicts of Interest:

The courts have gone both ways in determining the legal effects of conflicts of interest. That is, some courts have ruled that the conflict of interest merely voids the vote of the member or members of the administrative body who has the conflict of interest, while other courts have ruled that the conflict affects the total vote of the administrative body and thus the administrative body's action is void. The great weight of authority appears to be that a conflict of interest effects the total vote of the administrative body.

> "Participation in a determination by one disqualified member of a tribunal affects the action of the whole body. It is generally held that if a disqualified member of an administrative agency participates in the hearing and determination, it makes the decision void or voidable at the instance of the party aggrieved who has made timely protest, even though his presence was not required to constitute a quorum, or a majority of the board could

> have acted legally without him (citations omitted).
>
> "A determination made or participated in by a disqualified officer is merely voidable where only the common-law rule as to disqualification is violated (citations omitted) and the proceeding is reviewable (citations omitted)." 1 Am. Jur.2d Ad.L. § 69.

In Pyatt v. Mayor and Council of Donnellan, supra, page 16, the court set aside ordinances promulgated by a 6-man council which voted 4 to 2 in favor of the ordinance. Only one of the four councilmen voting in favor of the ordinances was specifically disqualified by reason of private interest.

In Stevens ex rel. Kuberski v. Haussermann, supra, page 14, the court set aside the vote of a 6-member council. Only four out of the six councilmen voted on the matter and all voted in favor of accepting the resignation of one of the council members. The resigning member was one of the four voting in favor of acceptance. In setting aside the vote, the court stated:

> "And it is likewise a firmly established rule that it is immaterial that the result reached is not produced by a vote of the disqualified member. 'The infection of the interested person spreads, so that the action of the whole body is voidable.' . . . This is the general rule. . . It is supported by the two-fold reason, viz.,: the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision." 172 A. at page 741.

In Aldom v. Roseland, supra, page 10, the court set aside a zoning ordinance for which a councilman with a conflict of interest voted in favor, despite the fact that there were sufficient affirmative votes to pass the ordinance without the participation of the councilman with the conflict. The court stated:

> "A quasi-judicial action of a municipal body is rendered voidable by the voting participation of a member thereof who is at the time subject to a direct or indirect private interest which is at variance with the impartial performance of his public duty." 127 A.2d at page 193.

The court further stated:

> "The fact that the measure had sufficient affirmative votes to pass without his participation did not save it from being voided. . . 'The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable.'" 127 A.2d at page 197.

In Buell v. City of Bremerton, supra, page 9 , the court set aside a rezoning amendment, saying:

> "The fact that the action carried without the necessity of counting his (the chairman who had a conflict) vote is not determinative. The self-interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness." 495 P.2d at page 1362.

Thus, it would appear that caution would dictate acceptance of the principle that the vote of an administrative body which includes a single member with a conflict of interest whose vote is unnecessary to the end result, affects and voids the total vote. Likewise, caution would dictate that a member of an administrative body with a conflict of interest should not participate in any hearing upon the matter.

Finally, as pointed out in the cases, it would seem that caution dictates that a member of an administrative body with a conflict of interest not even participate in discussion of the matter concerning which he has a conflict.

XI. Conclusions:

While no definitive rule can be set forth, because of the possibility that actions and decisions of the Land Use Regulation Commission could, in the proper forum, when attacked by the proper parties, be set aside as a result of conflicts of interest on behalf of the L.U.R.C. Commissioners, I would recommend to the Commission the following conclusions to be drawn from the foregoing discussion:

1. The rule as to conflict of interest does not apply to situations where the Commission is adopting standards for determining zone boundaries and standards for uses within zones, all of which are intended to apply throughout the wildlands, because this function is legislative in nature.

2. The owner or the employee, officer or stockholder of a corporation which is the owner of land within any particular area to be zoned should not participate in the discussion, hearing or vote on the actual zoning of that land. This does not mean, of course, that the owner of the land cannot make his views known through the proper process by way of public hearing or written materials which are public information to be submitted to the Commission in accordance with the Commission rules;

3. The permanent members of the Commission should not be considered to have a conflict of interest with regard to matters relating to their duties provided for in their other official positions. However, good sense might dictate that they refrain from participating in discussions, hearings and votes on such matters;

4. "Interests" in the term "conflicts of interest" should be held by the Commission to include situations not only in which the member himself or the corporation of which the member is an employee, officer or stockholder, stands to benefit, directly or indirectly, from an administrative decision of the Commission, but should also be held to include situations in which the member or the interested corporation could, directly or indirectly, stand to be harmed. An example of this latter situation is where a competing corporation is applying for a subdivision permit in such a location that the development would detract from or harm a real or planned development of the corporation; and

5. That "quite apart from the obligations of the law, whenever a substantial question is raised as to the disinterestedness of one" of the Land Use Regulation Commissioners, the Commissioner in question should "withdraw therefrom so that not the faintest shadow be cast on the integrity of the determination."

Initially, the Commissioner himself who may have a conflict of interest must be the one to determine whether the rule applies. In case of any question on a matter of conflict of interest, this office would be pleased to render its opinion.

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STATE OF MAINE

Inter-Departmental Memorandum Date April 9, 1979

To Richard S. Cohen, Attorney General Dept. Attorney General

Sarah Redfield, Assistant SR Dept. " "

Subject Baxter State Park

The purpose of this memo is to acquaint you with some of the legal issues which are relevant to the operation of Baxter State Park. The discussion is admittedly superficial, but should provide you with an overview of the Park's potential legal problems and with a basis for further discussion as particular matters arise.

As you know, Baxter State Park was given to the people of the State of Maine by former Governor Percival Proctor Baxter. Baxter deeded to the State various parcels of land in Penobscot and Piscataquis Counties which now total the approximately 200,00 acres known as Baxter State Park.

The land was deeded in separate conveyances, each accepted by the incumbent Legislature and Governor, and each recorded with accompanying communications in the Private and Special Laws of the State of Maine. Each of the deeds provided explicitly that the land be held in trust by the State as trustee for the benefit of the people of Maine. Each of the deeds established certain conditions for the use of the land. In the majority of the deeds, the land was given subject to the following conditions:

> "Said premises shall forever be used for state forest, public park and recreational purposes, shall forever be left in a natural wild state, shall forever be kept as a sanctuary for wild beasts and birds. . . . "

Most of the land is also subject to the restriction that airplanes not be allowed to land and to a prohibition against the use of firearms. In addition, some of the earlier conveyances prohibited the construction of additional roads and reserved to Governor Baxter the right to place and maintain markers within the Park. The final conveyances carried different restrictions and subjected the land to the condition that it be used for the practice of "scientific forestry."

The method of conveyance was unique and presents some problems of interpretation in light of the generally accepted principles of trust law. Additionally, because of the variations in the conditions of the conveyances, there are certain areas in the Park where, for example, hunting is allowed and other areas where hunting is not allowed; and, similarly areas in the Park where the practice of forestry is to be allowed and other areas where presumably it is not.

As a legal matter, the variations stand in direct contradiction of two basic principles of trust law: first, that the settlor of a charitable trust may not modify or amend that trust unless he has expressly reserved the power to do so; and second, that a legislature may not impair the original contract by altering the terms or purposes of a charitable trust. Where each deed of trust includes the explicit provision that the land be held in trust "forever," it is difficult to argue that the settlor reserved the power to modify the trust. Nevertheless, review of the behavior of the parties involved in the Baxter Trust makes clear that Governor Baxter believed he retained the power to modify the trust, as did the Legislature.

Over the 40-year period from 1931 until his death, Baxter purported to amend certain prior trust documents by later enactments. For example, Private and Special Laws of 1945 stated that the conditions in that deed "shall apply to the premises herein donated and conveyed to the State of Maine together with all of the lands heretofore donated. . . . " Similarly, there were documents which,on their face, declared themselves to be amendatory of previous trust documents. For example, the Private and Special Laws of 1949, Chapter 2, is entitled "An Act to Amend by Mutual Consent of Percival Proctor Baxter and the State of Maine the Two Deeds of Gifts of Land in Piscataquis County. . . . " Some of these instruments recite for their very consideration for the present gift and its acceptance, modification of previous gifts; see, e.g., Private and Special Laws of 1955, Chapter 4. Still other instruments simply recite that they represent a mutual amendment deemed in the best interest of the public by both the grantor and the Legislature. For example, the introductory clause of Chapter 2 of the Private and Special Laws of 1949 provides:

> "Wherefore, it now appears to be in the public interest and for the benefit of the people of the State of Maine to whom these several gifts were made and for whose benefit the trust and said deeds are created, that the above-mentioned restrictions, limitations and conditions as to roads and ways in each of said deeds, as enumerated herein be removed and cancelled. . . . "

By way of example, the significance of these amendments may be demonstrated by a close review of Private and Special Laws of 1945, Chapter 1, which added a restriction against hunting and aircraft to

prior deeds. The first ten conveyances of land in Baxter to the State contained no prohibition of hunting, trapping, firearms or the landing of airplanes. However, these restrictions were added, as indicated above, by Chapter 1 of the Private and Special Laws of 1945. If we are to say that the 1945 amendment, mutually agreed upon by the settlor, the Legislature and Governor of Maine, is not a trust document of equal significance to those which preceded and followed it, we would open some 80,000 additional acres of the Park to hunting and trapping.

Another example of the legal and administrative problems which might arise involves the question of roads within the Park. The provisions of the trust documents as they pertain to roads were subject to rethinking and revision as the development of the Park progressed and its size increased. The original gift prohibited road construction. The gifts between 1933 and 1945 were silent as to roads. Chapter 1 of the Private and Special Laws of 1947 prohibitied roads, but Chapter 1 of the Private and Special Laws of 1949 did not. Finally, Chapter 2 of the Private and Special Laws of 1949 removed previous restrictions on roads. Such restrictions did not appear in subsequent conveyances. Once again, to say the explicit modification in Chapter 2 of the Private and Special Laws of 1949 of the road restriction is not a trust document of equal relevance with those which preceded it will leave the road question in a state of confusion and may ultimately interfere with the State's ability to continue to provide an adequate road network for access to the Park.

In addition to these amendatory instruments, there is an "interpretive" document which has proved to be of particular significance in construing the State's obligations as trustee. Enacted as Chapter 2 of the Private and Special Laws of 1955, the document is entitled, "An Act Interpreting the Trust Deed of Percival Proctor Baxter to State of Maine. . . and Interpreting the Phrases 'Natural Wild State' and 'Sanctuary for Wild Beasts and Birds' in Deeds from Said Baxter to Said State of Maine." (A copy is attached hereto for your reference.) You will note that it is this provision which provides the authority for the State to remove blowdown, to spray for insects, and the like. There was certainly an argument to be made that Chapter 2 of the Private and Special Laws of 1955 was not an interpretation, but rather a direct modification of the deeds of trust in that the actions envisioned therein are inconsistent with the concept of "forever wild."

The problems of applying the classic principles of trust law to the creation of Baxter State Park were at least partially addressed in the Fitzgerald litigation. To uphold the Baxter State Park Authority's decision to remove the blowdown, it was necessary that the Court take cognizance of the authority granted to the State by Private and Special Laws of 1955, Chapter 2, discussed above. Because we were aware of the potential problem of validity and applicability of other instruments not raised by Fitzgerald (which were not "mere interpretations" but direct modifications,) we were anxious that the Court not simply recite the black letter law of trusts concerning amendments and modifications. We anticipated that the Court would, consistent with

the general principle of trust law that a court may look for evidence of the intention of the settlor where there is an ambiguity in the trust, take cognizance of Private and Special Laws of 1955 as an interpretive statement by the settlor. We were concerned that in so doing, the Court's opinion might be overly broad and pose problems for the continuing efficacy of other trust instruments. Accordingly, we proposed to the Court a theory of a continually evolving trust commencing in 1931 and terminating with Baxter's death. The theory was not necessary for the decision in Fitzgerald, and the Court did not rely on it. However, the issue was placed before them and the opinion in Fitzgerald was sufficiently narrowly drawn so that should an issue come up involving those areas of the Park where there were explicit modifications, the Court has not precluded itself from taking special cognizance of the unique nature of the trust. Indeed, at oral argument, Justice Wernick suggested that perhaps a more appropriate way to view the matter was as a contractual relationship between Governor Baxter and the State subject to amendment while Governor Baxter lived, and converted upon his death to a classic charitable trust relationship. It is an interesting theory, which necessarily ignores the fact that each deed says on its face that it is a trust instrument.

In summary, the nature of the creation of the trust was not simple and appears to be unique in trust law in the country. Accordingly, each decision which is made as to litigation posture has to take into account one overriding concern which I believe is and must be, to maintain the trust as Governor Baxter intended it to be, even where that trust and that intention appears to conflict with the established principles of trust law. I suspect from

the reception which we have received there that the Maine Law Court will itself be sympathetic to these goals and should the necessity of the construction of the amendatory trust instruments arise, they will seek to decide in a manner recognizing Baxter's intent.

A second legal issue presented by the method of creation of the trust involves the issue of the responsibility of the State as trustee. The lands in Baxter State Park were given to the State of Maine as trustee. Needless to say, there is no definition of the State of Maine. The people of the State of Maine are the beneficiaries of the trust, but again, there is no specifically named representative of the people. Presumably it was as representative of the people that the Legislature accepted each gift and, as representative of the people, that it accepted the terms of each gift. This admittedly presents an unusual situation with the same body which represents the people as recipient and beneficiary also represents the trustee.

Governor Baxter did not himself state how the State was to administer the Park. The Legislature established a Baxter State Park Authority with a mandate to "satisfy the terms of the trust" and to have "full power in the control and management" of the Park. In addition to its management responsibilities, the Authority is also designated as the agency of the State to receive and expend for the maintenance, operation and expansion of the Park certain trust moneys from the funds established for such purposes by Governor Baxter. The Authority, which was first established in 1933, is now comprised of the Attorney General, the Director of the Bureau of Forestry, and the Commissioner of the Department of Inland Fisheries and Wildlife. It employs a director and such other personnel as it deems necessary to carry out its statutory responsibility. Contrary

to popular belief, the structure of the Authority was not mandated by any deed of trust of Governor Baxter. He did, however, during his lifetime, often express his satisfaction with the existing makeup of the Authority.

The existence of the sovereign trustee and the delegation of authority of that trustee to a state agency presents another legal issue as to the propriety of delegation by a trustee to another. It seems obvious that the Legislature itself could not manage the everyday responsibility of governing Baxter State Park. It seems equally obvious that the creation of the state agency to do this must have been within the contemplation of the settlor of the trust and indeed met with his approval during his lifetime. Nevertheless, the Legislature has bound the Authority to act only in a manner consistent with the trust. Accordingly, any action by the Authority not consistent with the trust is not only a breach of the State's fiduciary duty but also beyond the scope of the authority of the administrative agency. This is not, however, determinative of the question of the fiduciary responsibility of the Authority. Thus, it is necessary to refer to the general rules of trust law which permit delegation of discretion where such delegation: (1) is not unlimited and is not inconsistent with the principal responsibility of the trustee for trust administration; (2) is limited to management of matters in distant places; and (3) involves professional skills not possessed by the trustee; see, generally, 2 Scott § 171.2 for a more detailed discussion of delegation. These parameters must be kept in mind when the Authority itself further delegates responsibility and when it makes final decisions concerning the implementation of the trust.

More generally, the power of the Baxter State Park Authority, except with respect to the Legisalture, has been viewed as complete and extensive. Opinions of this office have indicated that various other state agencies, such as the Land Use Regulation Commission, do not have jurisdiction to control actions within the Park. The Maine Supreme Court, in discussing the question of termination of a lease within the Park, stated that the power of the Authority was evidenced by a broad delegation of power authorized by statute and trust instrument. The Court further indicated that "A general grant of power unaccompanied by definite directions as to how the power is to be exercised implies the right to employ the means and methods necessary to comply with statutory requirements" and that the delegation of power to the Authority included those powers "necessarily arising from powers expressly granted; those reasonably inferred from powers expressly granted; those essential to give effect to the powers expressly granted," State v. Fin and Feather Club, 316 A.2d 351 (Me. 1974).

In Fitzgerald, the Court elaborated on its views of the power of the Authority. The Court held that while the power of the Baxter State Park Authority is plenary and extensive, the standards for review of their decisions is not that of a typical administrative agency, where the agency action is presumed to be correct and will be upheld so long as there is substantial evidence therefor, but rather is the more stringent fiduciary test of prudence established by trust law. Accordingly, the Court in Fitzgerald felt at liberty to substitute its judgment for the decision of the Authority, notwithstanding substantial evidence to support the Authority's decision.

In addition to the general issue of legal standards governing the creation and actions of the Baxter State Park Authority, there is a specific issue concerning the Attorney General's role. As we have discussed previously, the Attorney General is an administrator of Baxter State Park; he is also the enforcer of all charitable trusts as well as the attorney for all State agencies. As you know from reading the Fitzgerald brief, this causes some difficulty where an action of the Baxter State Park Authority is challenged. In fact, on one occasion the Attorney General has sued the Authority challenging a decision of the Baxter State Park regarding certain then-existing timber rights of Great Northern Paper Company in the Park. Indeed, it has previously been discussed in the office, and you may wish to consider, whether under the circumstances, the Attorney General ought to properly be a member of the Authority at all.

The preceding is a general review of the creation of the Baxter State Park and some of the legal problems which are involved in its background. More generally, I would point out a few of the areas of substantive concern which you may wish to consider. First, it is important to note the parameters of the financial trusts for the Park. Specifically, there are two trust funds for the management of Baxter State Park; the first, known as the Baxter State Park Trust Fund, was established by the Legislature's acceptance in Chapter 21 of the Private and Special Laws of 1961 of the gift from Governor Baxter of the stock of the Proprietors of Portland Pier Corporation; see, also, Private and Special Laws of 1965, Chapter 30; the second trust fund is held by the Boston Safe Deposit & Trust Company pursuant to the terms of the Baxter Intervivos Trust, dated July 26, 1927, as amended. The income from the second fund is paid

at least quarterly into the Baxter State Park Trust Fund. The principal is available to the Baxter State Park Authority and the Maine State Forest Authority for the purchase of additional park or forest lands, see 12 M.R.S.A. § 901, § 1701. The principal of the Baxter State Trust Fund is to be invested and reinvested and the income used for "the care, protection, and operation" of Baxter State Park. The Intervivos Trust Instrument contains a similar provision.

You will note from reference to the financial trust instruments that there is the possibility that the Baxter State Park Authority, acting through the Maine Forest Authority, might choose to acquire additional land for the Park either for recreational purposes or for addition to its forestry area. In the past, only two pieces of land have been purchased in this manner. This is not something which I in any way advocate, but point it out to you for your consideration as a long-range possibility which the Authority may wish to consider.

Second, you should note that you are also a member of the Maine Forest Authority. The Maine Forest Authority was established in 1970 for the explicit purpose of acquiring and holding lands purchased with Baxter funds. As far as I know, the Maine Forest Authority has not been active for several years. Attached hereto you will find a memorandum from me to them dated April 23, 1976, discussing their viability and suggesting that they adopt rules and regulations. No action has been taken on this.

Third, in terms of the overall direction of the Park, the Baxter State Park Authority adopted a management plan for the Park, of which I assume you have a copy. You will also find a

copy of my comments on that plan which at the time were written for Joe Brennan's personal use. However, he ultimately made them public and distributed them to the staff and to the Authority. In the redraft, many of the concerns raised by my comments were not addressed. These issues, I believe, reflect the difficult issues which the Park Authority is going to face, and the fact that they have not been addressed by now will only prolong and intensify the need for their decision at some future time.

A further substantive area which will be of immediate concern to you is the issue of "scientific forestry." As indicated above, Governor Baxter gave two pieces of land to the State of Maine to be used for the practice of "scientific forestry." He did not define the term "scientific forestry." However, his various communications at the time indicate that he had traveled extensively abroad and had seen the forests of Germany and Scandanavia which he felt to be well-managed and cared for and that he desired that an example of such careful forestry be provided within the State of Maine. As early as 1973, Lee Schepps, writing for Jon Lund to Governor Curtis, discussed the responsibilities of the Park Authority in the management of this part of the Park.

No specific action was taken concerning this area until recently. The Authority has hired a forester who is now in the process of writing a plan for the "scientific management" of the area. There are many major forestry questions which must be considered before such a plan can be finally adopted by the Authority. However, it is likely that before the plan is completed, the Authority may well have to decide whether any action at all should be authorized in the area

(e.g., cutting, budworm spraying) absent or pending the plan's completion.

Fourth, the question of whether or not there should be spruce budworm spraying in the Park this year is one which will have to be resolved prior to the completion of such a plan.

As a matter of legal analysis, the provisions of Private and Special Laws of 1955 which authorized the Authority to take actions to protect the Park from damage done by acts of nature, including insect infestations, would be applicable for the majority of the Park (though not for the "scientific forestry" section which is discussed further herein.) The decision of the Maine Supreme Judicial Court in Fitzgerald indicates that the Authority may rely on the authority provided in this provision of law in making its decisions as to whether or not to spray. However, the court decision further indicates that any action which the Authority takes must be done according to the "best forestry practices." This creates an inherent problem for the Authority. As I am sure you are aware, there is considerable dispute as to the efficacy of spraying for budworm, as whether it is sound forestry practice or simply a necessary commercial expedient, or whether aerial spraying is a sound method of application. On the one hand, there are those who insist that if we do not spray for budworm, our forests will die. On the other hand, there are those who insist, equally vociferously, that the continued spraying for budworm is postponing the disaster, is not providing any realistic solution to the problem, and is creating its own set of environmental hazards. As regards the Park, which, unlike other forest land, is not a commercial enterprise, the question becomes even more involved. From all the

foregoing case law analysis, it would appear that the Authority must decide whether spraying is in fact the best forestry practices for the Park given the overall priority for wilderness. For the scientific forestry area, the highest and best forestry practices standard would presumably be the same, though the "wilderness" limitation would not apply.

In the scientific forestry area the argument against spraying would seem to run as follows: if spraying is necessary to preserve the trees so that scientific forestry might be practiced in the Park, no such action should be taken until there is an overall master plan for the management of that area; absent such a plan, any intermediate action could hardly be termed "scientific."

With this background in mind concerning the budworm, I would suggest to you tentatively that this be something that the Authority may choose to consider fairly quickly. Specifically, I would suggest you consider the possibility of having the experts from the Bueau of Forestry meet with the Authority and discuss with you and George Roupp the viability of the trees in both areas of the Park (scientific forestry area and remainder of the Park) with or without spraying, the effects of spraying on each area and on adjacent areas. Once that is done, I would suggest that the Authority issue its decision in a fairly detailed manner, making findings of fact and concluding what its course of action will be. I would further suggest that if the Authority intends to spray part of Baxter State Park for budworm, that we consider in this office the possibility of seeking court approval of such action consistent with the court's equitable powers to provide instructions to trustees. This is a common approach for more typical trustees who are in doubt as to how to proceed.

In most cases, the instructions involve simply the expenditure or not of certain funds. In this case, it would involve a question of environmental expertise. However, it might be a better posture for us than agreeing to the spraying and at the last minute having a suit filed against us to enjoin it, as was the case in Fitzgerald. This is only a suggestion, and I would be happy to discuss it with you further at your convenience.

I hope this memorandum will provide you with a general background and hope you will feel free to ask for further information on any issue which concerns you. I will be looking forward to discussing it with you further.

Sarah

SARAH REDFIELD
Assistant Attorney General

SR/ec
cc: Stephen Diamond
John Paterson

STATE OF MAINE

Inter-Departmental Memorandum Date July 5, 1977

To Joseph E. Brennan, Attorney General Dept. Attorney General

From Sarah Redfield, Assistant Dept. Attorney General

Subject Master plan

I have reviewed the master plan with much interest and enthusiasm. It is certainly well-organized, thoughtful and a commendable start, thou I believe many of the major issues likely to confront the Authority are not decided.

I would note that I have had the opportunity to review Lloyd Irland comments dated June 13, 1977. I am basically in agreement with many of points he raises, particularly in paragraphs 4 and 5. There appears to a tendency to avoid difficult issues. For example, I don't think the lo term value of the lease of Kidney Pond Camps is addressed. Similarly, t question of closing (or opening) of roads is not explored fully. Nor is there any discussion of future acquisition of additional lands for the Park or for related purposes. Also, the impact on the Park of possible adjacent uses is not discussed; for example, the Bureau of Public Lands now owns the townships on the northern boundary, is this relevant?

One of my major concerns centers around the concept of carrying capacity. It is not clear to me in each instance where this term is used whether it refers to camping capacity, biological/ecological capaci aesthetic capacity, or just the current capacity. This seems to me to be a vital issue for the Park and I would suggest that the discussion of current and potential use levels be more open and explicit. To the exte possible, I'd suggest a discussion of alternatives, including increased, same, decreased levels for park as a whole, for each zone, for different seasons, for specified periods of time, etc.

A second major concern arises in relation to that part of the plan which deals with "scientific forestry." Although I am aware that we wil eventually have a separate plan for this part of the Park, I think that the master plan should set the tone for what is to come. The current draft seems to be saying that this part of the Park will be managed the way other forest lands of the State are. I do not believe this was Baxte intent. It seems that this section should state explicitly that the goa is not short term economic gain, but rather long term exemplary managem I do not feel that the fact Baxter mentioned revenues derived from the s of timber is to be construed as the major goal of this area. In this regard, I would, however, suggest that the Authority consider whether it feels that monies derived from these forestry operations should be used for the Park as a whole or for further development of the forestry conce

In addition to these overall comments, I have various specific questions and comments which are listed here in order of their appearanc in the draft.

Page 3, ¶2. The Park was completed in 1962 insofar as direct gifts from Governor Baxter; however, there is still the continuing possibility of further acquisition pursuant to the applicable trust instruments.

Page 4, ¶2. Although he approved of the Authority, Governor Baxter did not provide for the Park's administration by the Authority. The Authority is a creation of the legislature, not of the trust.

Page 5. ¶1. There is at least some question as to whether the 1955 instrument is a "revised deed of trust."

Page 6. ¶3. The trust also provides the potential for additional purchases, see above.

Page 6. Perhaps it would be appropriate for this section to bring the reader up to date, e.g. a very brief review of the park's history since Baxter's death. It might be a good place to mention some of the controversial issues in which the Park has been involved, e.g. budworm spraying, blowdown restoration, snowmobiles, Indians.

Page 7. Objective #3. I find myself wondering about fire as part of ecological succession. Also, the concept of land use zones appears here almost out of nowhere. It might be easier for the reader if this section simply referred to "different areas of the Park" and the zones were explained more fully later.

Page 7. Objective #4. What is "unnecessary"?

Page 8. 2nd ¶. I think it would be helpful to explain "unfeasible" in more detail since its apparently the basis for the entire "zoning" idea

Page 8. 3rd ¶. It would be easier to follow if there were a summary description here of each of the zones.

Page 8. 4th ¶: Why 1/8th of a mile? Are there some areas where more/less might be appropriate?

Page 8. ¶7. This paragraph, if my numbers are correct, seems to contemplate doubling the amount of roads (from 1.5 to 3%). Is this what the Authority plans to do? The whole issue seems to be inadequately addressed; the problem is not so much the land area occupied or to be occupied by roads, as it is with the uses that roads connote. Also, is it desirable from a planning standpoint to have more day use facilities, more parking lots, more administrative facilities, or do we get to this later? Also, "flexibility" in management is fine, but the plan should be addressing these management decisions so as to provide guidance for is and future Authorities.

Page 9#1 I'd suggest "so as not to disturb the natural wild state. Will "ample" and "reasonable" mean more/less turnouts, wider/narrower r

Page 9.#2. What improvements are contemplated? Does this mean no more roads?

Page 9. #3. "Small park areas" brings me back to the basic philosophical question about roads discussed earlier. I think the plan shoul address the possible alternatives re: roads in a general sense and reach a decision as to their advisability, increase, etc.

Page 9. #4. There is too much jumbled in together here. Certain activities are allowable only in connection with certain circumstances pursuant to P. & S. L. 1955, c.2. The State is authorized to clean, protect and restore areas of the park damaged because of acts of nature. It is not clear to me that this contemplates chemical spraying to mainta: roadside visibility. This paragraph refers to many of the most controve aspects of the Park; these deserve more careful analysis and attention.

Page 9. #4, 2d ¶. This paragraph is confusing. If its not an obje why do it?

Page 9. #5. What are the contemplated unusual circumstances ?

Page 10, ¶ 1. This is very hard to understand. Why were these siz chosen?

Page 10. #1. What does modernization mean here?

Page 10. #3. This is important. Is it a policy that belongs in beginning? What might these "exceptional" circumstances be? Who will do the"extensive" study? When?

Page 10. #5. No matter what the "zone" we are still bound by the trust. I have some questions as to how "small dams" and modest "communic structures" relate to this and to the earlier statement of the priority o wilderness.

Page 11. #9. How does this relate to #3?

Page 11. ¶3. I have a problem with the joint use of the terms manag ment and unimpeded.

Page 11. #1 How many campsites? How many people?

Page 11. #2. Is it "appearances" v. "reality"?

Page 11. #3. Is there anything else that is "absolutely necessary?' I assume this paragraph precludes budworm suppression.

Page 11. #4. Protected from what?

Page 12. #5a: What emergency involves resource protection? Fire? If so, why not say so?

Page 12. #5b: I think there should be some discussion of the alternative of no structures, no communications facilities. If the Authority wishes to reject the alternative, fine; but I think it should be considered.

Page 12. #10. This seems to be self-contradictory.

Page 12. #13. Is this consistent with the concepts expressed in #1, #7.

Page 12. #14. The idea of individual unit master plans seems to ha appeared here for the first time. When are these to be done? What will be in them that cannot be in this? Again, these are major decisions re: limitations on use and alternatives should be discussed.

Page 12. #16. This is consistent with P. & S. L. 1955. c.2; howeve I think since it is discretionary with the Authority there should be mor detailed discussion of when "control" will occur.

Page 13. Zone IV: See general comments above

Page 14. Zone V ¶3. This paragraph isn't clear. I'm confused by the overlapping(?) of zones?

Page 14. #2 and #4. Why? What is the Park's goal here?

Page 17, 2nd ¶. See general comments above re: carrying capacity. What is the meaning or significance of the last sentence of this paragra

Page 17. Natural Resources #1. Who will do the inventory? When?

Page 17. Air and Water #1. Where will state and federallaw be appropriate? Shouldn't there simply be an explicit policy of nondegrada Why will a pond be reclaimed? This is a significant issue in relation t the natural wild state concept and should perhaps be addressed in more d

Page 18. Geology #2. This implies more such facilities. I'm not s we've ever said this before.

Page 18. #4. See #2 above. How rare? Is the natural geologic con figuration enough reason not to locate a road or whatever there?

Page 18. #5. The problem is everywhere - is natural wilderness a priority over man made facilities?

Page 18. Vegetation #2. Why? Is this applicable in all zones, cf. Zone III #3. What else is to be included by "not limited to."

Page 18. #3. What methods do you contemplate by "least impact" v. "best possible?" Is there ever a time when fires will be left to burn? Again, this is a major issue subject to debate and the alternatives shou perhaps be discussed in greater detail though the 2d paragraph is a good start. Also #4 seems to be getting at the point.

Page 18. #4. Prescribed burning is not natural. There are two separate ideas in this section.

Page 18. #5. This avoids the decision almost entirely.

Page 18. #6. What is this for?

Page 20. Chemicals. Investigation by whom? Health of people or fo

Page 21. All this seems to imply more roads but is that "the plan" Page 22, #1 doesn't seem to say so, but what does "in general" mean. See comments above.

Page 22. #3. This may be another controversial issue, the moving o logging equipment through the Park. It merits at least a discussion of alternatives.

Page 22. #4. See comments above, re: capacity

Page 22. #5. Is this bad?

Page 22. #7. See comments above re: "management unit plans"

Page 22. #9. Restoration of gravel pits should be required.

Page 23. #1. This is perhaps the most important point and yet is ve unclear. See comments above re: carrying capacity.

Page 23. #2. Doesn't this overlook the idea that good planning migh mean closing a trail?

Page 23. #3. I am concerned about the use of the "most modern techr I suspect this means at the highest point of the art, but it should be cl that it will not include any materials not consistent with a wilderness p

Page 23. #4. Add: If normal maintenance does not maintain stabilit use will be reduced.

Page 23. #6. Will better design justify <u>increased</u> use?

Page 23. #8. Is this a policy, i.e. to have more even use without creasing overall use? If so, how does it relate to Zone III policies.

Page 23. #10. Even use may preclude variety.

Page 24. There may be some value in discussing "mountaineering" t rock or ice climbing. Also, are there any criteria for where new trails will

Page 25. See general comments above.

Page 28. ¶ 3. I thought you were concerned about a conflict betwee BSPA and IFW.

Page 28. ¶ 2. The use of the word priority in so many contexts has me confused.

Page 28 #4. Where is the authority for the judicious alteration of vegetation? What are the limits?

Page 29. #6. But not a priority over the sanctuary for the wildlife

Page 29. #8. What does this mean?

Page 29. #9. Yes. How does this fit in with #2? (Also, perhaps #13

Page 29. #13. Is this the interpretation of maintaining the balanc of nature? It seems to me that the 1955 interpretation talks about maintaining the balance of nature among wildlife, not wildlife in relatio to man's hunting thereof. This merits more discussion.

Page 30. #14. See above. Why shouldn't ponds be allowed to evolve? Admittedly Baxter allowed fishing, but it was not <u>the</u> priority, was it?

Page 31. This may be a good place to discuss the feasibility of acq sition and/or use of neighboring lands for certain recreational experienc See earlier comments as to public lands and also as to potential for acquisition.

Page 31. #2. How will automobile sightseeing be discouraged? Will short routes across Park be eliminated?

Page 32. Capacities. See all previous comments in this regard. I assume all procedures suggested by #5 are subject to the proviso that wilderness and ecology will not be adversely effected; presumably one can engineer anything.

Page 32. #4. What are special areas? C.f. "zones"?

Page 33. #10 #2. Do not forget the statutory mandate of 12 MRSA § 9 that BSPA duties not be construed so "as to permit the collection of a fee f entering the premises of the park by residents of the State."

Page 33. Perhaps there should be some detailed discussion here about day use. What if anything is the policy re: buses?

Page 34. #2 "and consistent with natural wild state, etc."

Page 35, Facilities #2. Is the use of "facilities" here facilities i the Park. If so, "consistent with the plan" should be added.

Page 36. It might be helpful to the general reader to include a brief description of the Park administration, i.e. who is the Authority, when do they meet, what is the director's role and what is the advisory committee, etc.

Page 37. Adjacent land. But what does this mean for us? What is the Authority likely to do if a campsite is opened just outside the park, ten campsites?

Page 37. Public relations. What is the plan for improving public relations?

Page 37. Use trends. Is there anything we can do? Should we? Should we stop the brochures about Baxter? Stop helping people do stories about it? These alternatives at least merit discussion.

Page 38. Economics ¶ 2. I don't know what the point of this is. Is the Park Authority going to make its decisions on economic impact? What level priority is this?

Page 40. I am very concerned with the problems inherent in separate "unit management plans". They will be difficult to assess unless all can be viewed together. For example, "carrying capacity" of a trail in Zone III will influence parking in zone I and facilities in zone II.

SR:jg

STATE OF MAINE

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

TO: Herbert Hartman, Director, Bureau of Parks and Lands

FROM: Paul Stern, Deputy Attorney General

DATE: March 25, 2002

SUBJECT: Penobscot River Corridor

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You have asked me to provide a memorandum setting forth my views regarding the oversight of the Baxter Park Authority over that portion of the Penobscot River Corridor within the boundaries of the Park. It is my view that Governor Baxter's intent, as memorialized in his deeds of trust, was that all activities, including recreational activities, falling within the Park be managed by the Baxter State Park Authority. Therefore, I believe that it is both appropriate and necessary for the Authority to manage and oversee activities anywhere in the Park, including any portion of the Corridor within Park boundaries.

I hope this has been helpful to you. If you have any further questions, please call on me.

PAUL STERN
Deputy Attorney General

PS:mhs
cc: Irvin C. Caverly, Jr.

RECEIVED
MAR 26 2002

3.4 Snowmobiles and Motor Vehicles

File BSP-1975

STATE OF MAINE

Inter-Departmental Memorandum Date April 22, 197!

To Joseph E. Brennan Dept. Attorney General

From Sarah Redfield Dept. Staff Assistant

Subject Motorcycle use in Baxter State Park

This is in response to your request of February 7, 1975 concernii proposed legislation which would allow the use of motorcycles within Baxter State Park.

Such legislation would be contrary to Rule #18 of the Baxter State Park Authority's Rules and Regulations, Revision, 1975. This contradiction would not itself invalidate the proposed legislation. Baxter named the State of Maine as Trustee for the Park. As Trustee, through its Legislature, the State has delegated the supervision and control of the trust property to the Authority, 12 M.R.S.A. §901.1/ This delegation includes the power to establish rules and regulations concerning the Park, 12 M.R.S.A. §903. To the extent the Legislature wishes to modify or limit this delegation to the Park Authority, it may appropriately do so by subsequent legislation, so long as the proposed modification is itself in keeping with the terms of the Trust (See e.g. Ch. 477 of Public Laws of 1971 providing an additional restriction on the powers of the authority; compare with Ch. 226, §20 of Public Laws of 1965.)

The central issue, then, is not the potential conflict of the proposed legislation with the Park Authority's regulations, but rather the potential for conflict with the terms of the Trust itself. It is clear that these terms may not be changed by unilateral legislative action, see Cary v. Bliss, 151 Mass. 364 at 378, 25 N.E. 92 (1890); Trustees of Dartmouth College v. Woodward, 4 Wheat 518 at 647-50 (1819); IV Scott, The Law of Trusts, §§367.3, 399.5 (1907). Any legislative action in breach of the terms of the trust may result in court proceedings to remove the Trustee or to compel the Trustee's

1/ Originally the legislature created a five-member Baxter State Park Commission to "have the supervision, direction and control" of the area, P.L. 1933 C.281; subsequently, the State Forest Commissioner, the Commissioner of Inland Fisheries and Game and the Attorney General were given the "full power in the control and management", P.L. 1939, C.6; P.L. 1941, C.25, P.L. 1949, C.78, P.L. 1965, C.226, P.L. 1971, C. 477, P.L. 1973, C. 625.

proper performance, see IV Scott, The Law of Trusts §§387,392 (1967).[2] Ultimately, should the Legislature enact a statute which would make impossible the continuation of the Trust in keeping with the donor's restrictions, the Trust property may revert to the heirs of the donor; see Evans v. Newton, 220 Ga. 280, 138 S.E. 2d 329 (1964), rev'd 382 U.S. 296 (1966) (Constitutional impossibility for city to be trustee of segregated Park), 221 Ga. 810, 148 S.E. 2d 329 (1966) (holding trust fails and property reverts). Nor is it likely that in the Baxter situation the reversion of the trust property could be averted by the courts through the application of the doctrine of cy pres [3]

In view of the possible consequences of legislative action contrary to the Trust and the unlikelihood of court modification thereof, the proposed legislation should be carefully measured against the Trust provisions. The Trust encompasses the lands now named Baxter State Park, deeded to the State in various conveyances from 1931 to 1963. As Baxter desired, these deeds were accepted by the incumbent Legislature, and recorded, together with accompanying communications,

2/This discussion is included only to briefly indicate the possible consequences of a breach of the Trust, without discussing some of the inherent problems of these remedies, e.g. questions of interpretation, standing, policy. Also note, that in 1949 there was legislation proposed which would have allowed hunting in a small area of the Park in violation of the existing deeds of trust. Baxter's response implied that such a breach of trust could lead to his stopping any further gifts, and asked the Senate, "Shall a few hunters bringing pressure in the Legislature upset my plans and thus perhaps deprive the State of benefactions that will be of material advantage to our People?" Letters of Percival Proctor Baxter to John F. Ward, April 16, 1949; also see, e.g., Letters to Attorney General Ralph W. Farris January 26, 1949 and April 15, 1949 and to Senator George B. Barnes, January 26, 1949 and April 14, 1949. The proposed legislation was not adopted.

3/Typically, this doctrine allows the court to apply the trust property to similar purposes where, because of changes in circumstances or conditions, the exact terms of the trust may no longer be carried out, see, generally, IV Scott Law of Trusts, §§399, 399.1. This doctrine would not be appropriately applied in the Baxter case where Baxter absolutely intended that the Park remain forever as it was, "in the good old days" no matter what the change in circumstances or what new pressures develop for its use, see all deeds to the State; also, letter from Baxter to the Honorable Sumner Sewall and the 90th Legislature, January 17, 1939.

in the Private and Special Laws of the State of Maine. Each of these deeds provided that the lands be held in trust by "the State as trustee for the benefit of the people of Maine." 4/

Each deed set out certain restrictions on the use of the land. The land was generally granted to the State subject to the conditions that "said premises shall forever be used for State forest, public park and recreational purposes, shall forever be left in the natural wild state, shall forever be kept as a sanctuary for wild beasts and birds," Private and Special Laws of 1933, C.3.5/ Two additional conditions, that airplanes not be allowed to land and that the use of firearms be prohibited, were also generally included.6/

These conditions cover the majority of lands in the Park includir those deeded in 1931, 1933, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1947, 1949, 1953, 1954 (re: 8000 acres), and 1962. In the remaining conveyances these conditions were modified in order to accomplish specific purposes. In an area of some 15,000 acres where hunting is allowed, those conditions concerning the use of firearms, the landing of aircraft, and the sanctuary of wild beasts and birds were not included, see Private and Special Laws of 1955, C.1, C.3 and C.4,

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4/ See deeds and acceptances in Private and Special Laws of Maine: 1933, C.3; 1939, C.1; 1941, C.1; C.122; 1943, C.95, C.1; 1945, C.91; C.1; 1947, C.1; 1949, C.1; 1955, C.1; C.3, C.61, C.171; 1963, C.1. Note that the first gift, Private and Special Laws of 1931, C.23, does not explicitly provide that the State is to hold the lands in trust. However, subsequent communications indicate that all of the Park land was to be so held, see, e.g. Laws of Maine of 1939, Communications, 1939 to "Honorable Lewis O. Barrows, Governor," 12 M.R.S.A. §900 et seq.

5/ These conditions were present, with slight variations in language, in all conveyances with the exception of those discussed in the text and of that of August 6, 1962 which did not include the conditions concerning wildlife sanctuary or the prohibition of hunting, Private and Special Laws of 1963, C.1. Note that the provision concerning State forest was not originally present in the 1931 deed, but was added by virtue of the transactions of 1945, see Private and Special Laws of 1945, C.1.

6/ These conditions were added to previous deeds by the provisions of Private and Special Laws of 1945, C.1, and are present in all subsequent deeds except those discussed in the text and that of 1962, Private and Special Laws of 1963, C.1, which prohibited aircraft but not hunting.

amending the conveyance of January 12, 1954 re: 14,005 acres. In another area of some 28,000 acres conveyed in 1955 there is specific provisions for the practice of scientific forestry and thus only the provision concerning public recreation is applied, see Private and Special Laws of 1955, C.61, C171.

For the majority of the Park, the proposed allowance of motorcycles is appropriate only to the extent it does not contradict the three basic concepts of public recreation, wilderness preservation and maintenance as a sanctuary. As the proposed use by motorcycles suggests , however, there is some ambiguity, in distinguishing between the concepts of sanctuary and wilderness preservation on the one hand and public recreational use in its modern sense on the other.

The clarification of any ambiguity or inconsistency in the terms of the Trust is dependent upon the intention of the donor, see IV Scott, The Law of Trusts §164.1 (1967); see also 12 M.R.S.A. §900. To clarify ambiguity or to determine Baxter's intention concerning matters not expressly covered, reference may be made not only to the legal instruments themselves but also to the conduct of the parties including prior and subsequent communications, see Little Rock Junior College v. George W. Donaghet Foundation, 224 Ark. 895, 277 S.W. 2d 70 (1955) (subsequent statements), Debrabant v. Commercial Trust Co. (prior statements), compare with Tibbetts v. Curtis 116 Me. 336, 101A. 1023 (1917).

There are various sources available for determining this intention including the official Communications which accompanied each deed of gift, the agreed upon statements of interpretation, and the various other communications of the parties, as well as evidence of the conduct of the parties regarding the Trust. The significance of such documentation is dependent upon the application of certain principles of the law of trusts and contracts. The deeds and statutory acceptances thereof are, of course, of primary significance. Also of particular significance is the statement mutually agreed upon by both Baxter and the State in which Baxter himself interpreted the terms "natural wild state" and "sanctuary for wild beasts and birds."7/ This interpretation was then enacted into law as Chapter 2 of the Private and Special Laws of 1955 providing; in part:

> Now therefore it is mutually understood by the grantor and grantee in said Park deeds that the following paragraphs express the intents of the parties as to the interpretation of said phrases, and the same are accepted as applying to all the said Deeds and conveyances. . .

7/This instrument, which does not vary earlier conveyances but only clarifies their meaning, would be admissible evidence in determining the donor's intention, see IV Scott, Law of Trusts §164.1 (1967).

In this interpretation of "natural wild state", Baxter authorized the State to clean, protect, and restore the forest when damaged by Acts of Nature. It is also authorized to build trails and access roads, shelters and lean-tos for "mountain climbers and other lovers of nature in its wild state." But,

> This area is to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be 'Forever Wild'.

According to this interpretation of "Sanctuary for wild beasts and birds" the State is authorized to maintain the balance of nature, to control predators and disease. This is to be done "having in mind that the sole purpose of the donor in creating this Park is to protect the forests and wildlife therein as a great wilderness area unspoiled by Man."

This interpretive statement, then, orders the priorities for the Park by providing that wilderness preservation is primary and recreational use "secondary". As a complete or integrated expression of the parties' understanding of these terms "applying to all the said Deeds and Conveyances", this interpretation would preclude any weight given to prior statements which vary or contradict this writing, see 3 Corbin on Contracts §573 (1960 ed). However, analysis of other statements of the parties does not indicate any actual inconsistencies with the wilderness priority.

Many of Baxter's communications clearly support the direction of the interpretive statement. For example, in his communications accompanying the offer of land to the State, Baxter wrote:8/

> I want no hard surfaced roads in this Park, my object being to have it remain as nearly as possible in its natural wild state unimproved by man. . .

8/Although not necessarily of equal legal significance with the instruments discussed above, the official communications such as those cited here, which accompanied each offer of land, were intended by the parties to be given particular weight as indicated by the typical legislative order:

> "ORDERED. . . that in order that the Records of the gift by PERCIVAL PROCTOR BAXTER to the STATE OF MAINE as Trustee in Trust of. . .(BAXTER STATE PARK) be complete and in enduring form, the communication dated July twenty-second 1940, . . . together with the message of Governor transmitting the said communication to the Legislature be printed in the Laws of Maine. . ." (Private and Special Laws of 1941 at p. 699); see also IV Scott. Law of Trusts §164.1 (1967 ed).

> Everything in connection with the Park must be left simple and natural and must remain as nearly as possible as it was when only the Indians and the animals roamed at will through these areas. . . (Communication to the Honorable Horace A. Hildreth . . . and the 92nd Legislature, January 2, 1945)

> In the years to come when civilizalation has encroached upon the land we now refer to as "Wild Land" this Park will give the people of succeeding generations a living example of what the State of Maine was in "the good old days" before the song of the woodsman's axe and the whine of the power saw. . . (Communication to the Honorable Edmund S. Muskie and. . . the 97th Legislature, January 11, 1955).

Other communications indicate that Baxter was also very concerned with the public's having access to the Park. However, as the foregoing language indicates, Baxter was creating an essentially wilderness Park. This Park was for those who could and would appreciate its wilderness nature. For example, in a communication discussing road access Baxter wrote:

> "I also want this area to be reasonably accessible to those persons who enjoy the wilderness and who wish to go there for rest and recreation. That of course is my principal reason for creating this Park. (Communication to the Honorable Frederick Payne and. . . the 94th Legislature, January 3, 1949).

And in a later letter to Governor Reed and the members of the Executive Council:

> All work in connection with the above (construction of trails, lean-tos, etc) should be undertaken having in mind that the sole purpose is to protect the public's right and use of the forest under the restrictions of the Trust Deeds. . ." (Letter to Governor Reed and the members of the Executive Council, May 20, 1960) 9/

9/This communication was solicited by the Park Authority to aid in the interpretation of the Trust restrictions. It was Baxter's intent that this communication be given particular recognition:

> "Because of this request, I am pleased to give you a statement and I should like to have it incorporated in the records of the Governor and Executive Council in order to explain to future generations my thoughts as to this Park."

However, even thoughBaxter states here that recreational use is his "principal" or even "sole" purpose, these statements are not unqualified. His concern is not with the Park's availability for all recreational use but rather with its availability for those "persons who enjoy the wilderness." That is, he does not want the Park "locked up and made inaccessible", but, still its use must be "in the right unspoiled way," (see Communication, January 2, 1945, supra), in keeping with the Trust restrictions. In other words, Baxter created a complementary relationship between wilderness and such public recreation as is dependent upon, oriented toward and compatible with wilderness values.

The interrelationship of public access and recreation with wilderness and sanctuary preservation is the core issue of the question of allowing motorcycle use within Baxter State Park. In answering this question it is necessary to consider what purpose would be accomplished by allowing this use and whether this purpose is dependent upon and compatible with the wilderness nature of Baxter State Park.

Motorcycles would, of course, provide greater access to the Park. However, their exclusion would not "lock up the Park" but rather would tend to limit its use to those "willing to walk to make an effort to get close to nature," see Title 12 M.R.S.A. §900. Further, activities involving motorcycles are in no way dependent upon the unique wilderness values established for the Park by Governor Baxter; nor are they compatible with these values and the uses necessarily dependent thereon, e.g. hiking, wildlife observation, camping. Because of their noise and ultra-mobility (as compared with the average automobile for example) motorcycles may adversely affect wildlife in the Park and may also disturb those users of the Park who wish to "get close to nature" 10/ Accordingly, the use of motorcycles in the Park does not seem appropriate.

This conclusion is further supported by consideration of Baxter's own specific responses to the problems created by various motor vehicles. Originally, Baxter required that there be no further road construction and thus no increased vehicle use within the Park, see, e.g. Communication to Horace A. Hildreth and the 92nd Legislature, January 2, 1945. This requirement was removed in 1949, see Private and Special Laws of 1949, c.2 and Communication to Frederick G. Payne and the 94th Legislature, January 3, 1949. The removal of the restriction on roads was a "considerable concession" on Baxter's part (see letter to George B. Barnes, January 26, 1949) made in reliance on the good faith of the State "that no roads or ways shall be constructed or maintained that will interfere with or detract from the 'natural wild state' of this region," see Communication to Frederick G. Payne, supra.

10/See United States Environmental Protection Agency, Effect of Noise on Wildlife and Other Animals, NTID 300.5, Dec. 1971. See also , footnote 11.

Presumably, in allowing such roads as would be compatible with the natural wild state of the Park, Baxter contemplated their use by certain motor vehicles. But he did not intend that the Park be open to all vehicles. This is clear both from his continuing prohibition against airplanes, which are in many ways analogous to motorcycles, and also from his specific writings responding to the growing popularity of such vehicles as motorcycles and motorskis.

By the terms of the Trust deeds Baxter specifically prohibited the landing of airplanes on the majority of waters or land of the Park, see deeds of 1945 (applying to all previous deeds); 1947, 1949, 1953, 1954, 1963. When the restrictions against roads were removed, those against planes were not, Private and Special Laws of 1949, C.2. At that time Baxter wrote to Governor Hildreth and the 92nd Legislature:

> "With the protection of wild life and deer, the moose and the birds no longer will fear man and gradually they will come out of their forest retreats and show themselves. I want hunting with cameras to take the place of hunting with guns. Aircraft frighten wild life and disturb the peace and solitude of the wilderness. Would that the day may come when all of Maine will become a sanctuary for the beasts and birds of the forest and field and when cruelty to the humbler orders of life no longer stalks the land."

The preceding language appears applicable to the use of motorcycles within the Park. By allowing the continuation or creation of certain roads, Baxter implicitly accepted automobiles. Likewise, by continuing to prohibit planes, he sought to at least limit vehicular traffic to such roads. Motorcycles, like planes, would not be so limited; and motorcycles, like planes may "frighten wildlife and disturb the peace and solitude of the wilderness." 11/

Baxter himself viewed the use of motorcycles an intrusion on the wilderness nature of the Park. In April of 1966, he wrote to Austin Wilkins, then Forest Commissioner and head of the Park Authority:

> "I understand that there are several motor scooters and motorcycles in Millinocket that may be taken to the Park. These machines are so noisy and numerous, they should be forbidden to go into the Park area. If unrestrained, these noisy machines would frighten

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11/ Restriction of motorcycles to roads while avoiding the problem of their extensive mobility does not eliminate the disturbance of "peace and solitude". The level of noise for a motorcycle at 50 feet is 90 decibels, calculated by the Council of Environmental Quality to be "annoying" to humans, compared with 110 decibels for a chainsaw; 100 for muffled snowmobile; 70-80 for an automobile; see Society of Automotive Engineers, Noise Facts and Accoustic Terms, 1970; Council of Environmental Quality, Sound Levels and Human Response, New York Times, September 3, 1972.

the wild life." 12/

This position was in keeping with his views concerning other motor vehicles including motorboats and snowmobiles:

> In regard to the Motor Skis, I have thought this over and have this suggestion to make. These skis should be prohibited in the Park

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12/ Because of the parole evidence rule, the legal significance of this and similar letters is somewhat less clear than the source discussed previously. This rule maintains that any matter expressly covered by the instrument, if unambiguous, is determined by the terms of the instrument and in such a case extrinsic evidence is inadmissible to vary or add to the terms thereof, Cutting v. Haskell, 122 Me. 454, 10A. 618 (1923).

Although it may be demonstrated that under the terms of the instruments themselves preservation of the wilderness was Baxter's primary intent, the exact meaning of these terms in the given situation is not clear. In such a case parole evidence is admissible for the purpose of interpretation and clarification where the issue is not expressly covered, see, generally, 3 Corbin on Contracts §§579,573,539 (1960).

While these letters are to be accorded less weight than the more formal communications between Baxter and the State, their significance is not to be ignored, especially in view of the consistency with which Baxter's wishes were observed by the State representatives, see e.g. letter from Attorney General, James S. Erwin to Baxter, June 19, 1968, letter from Forest Commissioner Austin Wilkins to Baxter, June 26, 1968; letter from Attorney General Frank Hancock to Baxter, October 7, 1959. Baxter himself also viewed his actions as particularly significant in providing precedent for the Authority: "What action is taken nowadays will serve as precedent for the future. . . I realize that in the future, pressure will be brought to bear to break down the Trust conditions. Now is the time to take a firm stand which will give solid backing to the Authority", letter from Baxter to Forest Commissioner, Albert D. Nutting, August 18, 1958; see also letter from Baxter to Attorney General Frank E. Hancock, October 13, 1959. The conduct of the parties in these situations is basic to an understanding of their interpretation of the Trust provisions, se IV Scott, Law of Trusts §164 (1961 ed).

> except for one for you as Supervisor to use in case of emergencies. I feel strongly about this for they will frighten away the wild animals and we certainly would not see a caribou again. This same reason prompted us to forbid the use of of motor boats on our lakes. I can see the damage they would cause." 13/

In summary, from analysis of the various sources for determining Baxter's intention, it is clear that Baxter intended that wilderness preservation be the primary concept governing the majority of the Park and that the allowing of motorcycles would not be consistent with this intention.

As to the remaining areas of the Park set aside for hunting and scientific forestry, the basis for precluding motorcycles is not so clearly documented. Of course, the letters quoted above which explicitly reject the use of motorcycles and snowmobiles do not distinguish among the areas of the Park. However, not all of the other sources of evidence discussed concerning the majority of the Park are of equal application in these special-use areas. Nevertheless, examination of the specific restrictions applied, as well as Baxter's overall intentions for the Park, would tend to indicate the appropriateness of an overall exclusion of motorcycles.

The provisions governing the remaining area of the Park are of three types. First, in the area deeded to the State on August 6, 1962, Baxter did not exclude firearms and hunting. However, all of the other restrictions including those concerning public recreation, the natural wild state, and the prohibition of aircraft landings were included, see Private and Special Laws of 1963, c. 1. Since all of these limitation were included, it would seem that the donor's intentions were basically the same as those indicated for the majority of the Park; and, thus, the motorcycle question would be resolved in the same way.

In a second area encompassing lands covered by the deeds of December 1, 1954 and January 12, 1954 as amended by chapter 4 of Private and Special Laws of 1955, the provisions concerning public recreation and preservation of the wilderness are present but the restrictions concerning hunting or the landing of aircraft were omitted for specified reasons (as discussed below). That the omission of these restrictions was designed to achieve certain purposes suggests that its effect be limited to uses necessary to accomplish these purposes.

13/In researching this opinion Governor Baxter's papers as they appear in the State Library in folders #57 - #76 were reviewed as was the collection of letters concerning the Park prepared by the Natural Resources Council of Maine. It is possible that other communications relevant to this issue were not discovered.

Because the two basic concepts of wilderness and recreation are present, it seems that, other than the analogy of motorcycles to airplanes, the analysis concerning the majority of the Park would still be applicable. Its applicability is especially relevant in that the deviation of these deeds from the general pattern of Baxter's gifts did not represent a change in his overall objectives but rather a "distinct concession on his part in regard to the 'No Hunting' or 'Sanctuary' provisions" ,made only because the closing of the area to hunters "might be detrimental to the citizens of Patten and surrounding territory who operate stores and camps." As such a "distinct concession," it would seem that its effects should not be expanded as a justification for allowing motorcycle use, which presumably will not substantially affect the number of hunters in the area.

In the third section of the Park, set aside by the deeds of March 17, 1962 and May 2, 1962 for the practice of "Scientific Forestry", the provisions concerning preservation of the natural wild state, maintenance of a sanctuary for wild beasts and birds and prohibiting firearms and aircraft were not included. Instead, the land is to be held for "State Forest, Public Park, Public Recreational Purposes and Scientific Forestry, for the practice of and the production of forestry wood products", Deed of March 17, 1955, Private and Special Laws of 1955, c.6. 14/ Baxter intended that the area

> "become a show place for those interested in forestry. A place where a continuing timber crop can be cultivated, harvested and sold; where reforestation and scientific cutting will be employed; an example and inspiration to others."

Letter to the Honorable Edmund S. Muskie. . . and the 97th Legislature, May 2, 1955. He also intended that recreational activities be allowed because "many citizens who live in northern Maine depend for their livelihood largely upon the business hunters bring to them," Letter to the Honorable Edmund S. Muskie. . . and the 97th Legislature, March 17, 1955, accompanying the deed of that date.

14/The deed of May 2, 1955 provides similar restrictions for "State Forest, Public Park, and Public Recreational Purposes and for the Practice of Scientific Forestry and Reforestation." The trees harvested may be cut and yarded on the premises but no manufacturing operations shall be carried on or within said township. . . See Private and Special Laws of 1955, C.171.

Based on these statements of Baxter's intentions as well as the preceding discussion concerning hunting areas, it appears that motorcycles would appropriately be allowed in this third area only to the extent that they would enhance or at least not threaten these purposes. It is not clear that motorcycle use would in any way enhance forestry operations in the areas. There is also some evidence that certain motor vehicles may actually injure plant and tree growth in an area. 15/

In conclusion, then, it seems that allowing motorcycle use is not in keeping with the terms of the Trust for any of the area of Baxter State Park.

15/Proceedings of the 1971 Snowmobile and Off the Road Vehicle Research Symposium, East Lansing, Michigan, June 1971 at 117-119, 139.

STATE OF MAINE

Inter-Departmental Memorandum Date April 1, 1976

To Joseph E. Brennan Dept. Attorney General

From Sarah Redfield, Assistant SR Dept. Attorney General

Subject Snowmobile opinion

Pursuant to our earlier conversation, I have contacted the following persons concerning their recollection of Governor Baxter's statements in regard to snowmobiles:

Austin Wilkins, BSPA, 1963-1972*
Jim Erwin, BSPA, 1967-1970*
Buzz Caverly, Park Ranger*
Ronald Speers, BSPA, 1963-1970*
Helon Taylor, Park Supervisor
Arthur Rogers, Game Warden
Joseph Lee, Baxter's Chauffeur
Rodney Sargent, Park Ranger

Austin Wilkins stated that he vividly recalls that Baxter wanted people to enjoy the Park in the winter and summer. In response to a question about the letters, Wilkins stated that Baxter always changed his mind from one day to the next. He further stated that he was sure that the Authority had spoken with Baxter about allowing snowmobiles in the Park.

Ron Speers indicated that he had not been part of any specific discussion of snowmobiles with Baxter; but pointed out, in any case, that Baxter's views were very changeable in his later years. Speers, however, personally felt that snowmobiles were appropriate for winter access.

Jim Erwin did not recall any specific discussion with Baxter concerning snowmobiles. He personally believed that Baxter did not want snowmobiles in the Park.

Buzz Caverly reported that Baxter bought the Park's first snowmobile for use by Helon Taylor. He had no specific recollections of statements by Baxter.

Helon Taylor indicated that the use of snowmobiles on the perimeter road was with Baxter's approval. He also stated that Governor Baxter was "a little bit changeable" at the time. However, Helon could recall no specific conversation which he had with Baxter on which to base his opinion, other than the 1965 letter.

*Contacted by telephone; others by correspondence, attached.

Joseph Lee indicated that the letters correctly expressed Baxter's view on snowmobiles. He said nothing about any change in Baxter's position.

Rodney Sargent had never communicated with Baxter on the question of snowmobiles.

Arthur Rogers had no specific letters from Baxter concerning snowmobiles, but it was his view that Baxter was against the public use of snowmobiles in the Park.

I do not believe that anything which these people stated is in any way sufficient to change the opinion as written. There was no specific information to contradict the 1965 and 1966 written communications. Although some of the people contacted felt Baxter approved of the use of snowmobiles, others felt he did not. In either case these "feelings" are of limited significance in comparison to Baxter's written statement precisely on point.

I would like to suggest you schedule another meeting for discussion of the opinion now that the research is completed.

cc: Marty Wilk
Gordon Scott
Don Alexander
John Paterson

w/ SOLICITOR'S OPINION

February 5, 1976

Mr. Helon Taylor
Goliad State Park
P. O. Box #727
Goliad, Texas 77963

Dear Mr. Taylor:

I am writing to you to ask for a little help. I am now the Attorney for the Baxter State Park Authority and am trying to write an opinion concerning the use of snowmobiles in Baxter State Park. In researching this question, I have found a letter from the Governor to you written in 1965. In that letter the Governor stated that he thought snowmobiles should not be allowed in the Park. Subsequently, as I'm sure you know, the Authority passed a regulation allowing snowmobiles on the perimeter road of the Park.

To make my research as complete as possible, I have been trying to talk to people who may have spoken with Baxter about snowmobiles. I am most anxious to have the opportunity to discuss the question with you and see what recollections, if any, you may have concerning Baxter's wishes on this subject.

In this connection, I would appreciate it if you would call me (collect) as soon as you have a chance so that we might discuss it. My number is 207-289-3051.

I have read with interest many of Governor Baxter's letters in praise of you and am looking forward to speaking with you. The number given above is my office number. If it is inconvenient for you to call during office hours, please feel free to call me collect at my home: 207-781-3904.

Thank you in advance for your help.

Sincerely,

SARAH REDFIELD
Assistant Attorney General
Natural Resources Division

Goliad, Texas
Feb., 12, 1976

Sarah Redfield
Assistant Attorney General
State House
Augusta, Maine 04333

Dear Sarah Redfield:

I have yours of February 5th. Sorry not to have called you by phone but I am quite deaf and it is almost impossible for me to carry on a telephone conversation.

As to the use of snowmobiles on Baxter State Park, We had quite a lot of discussion about it at the time and it was decided that they could be used on the perimeter road. This was with the governors understanding and approval.

Confidentially. The Good Governor was starting to get a little bit changible at that time and it seems that some of his good friends around Portland had talked him into not wanting the snowmobiles on the Park. However when he came to consider it with the Park Authority, myself and some of the Rangers, he changed his mind. A few years before it would not have bothered him.

All my papers, letters from the Governor, records etc. were burned in a fire that burned my camp at Togue Pond the winter of 1967. I would suggest you get in touch with Austin Wilkins, Ex Forestry Commissioner. I beleive he lives on Blaine Street in Augusta. I beleive he would know as much about this as anyone as He was Chairman of the Baxter State Commission at the time and very close to the Governor.

Sorry I can not be of more assistance to you and if there is anything more I can do to help you in your research be sure to let me know. We will be here in Texas, at this address until late April when we will move back to Farmington, Maine, R.F.D.# 1 04938

Thanks for your letter and sorry I can not be of more help to you.

Sincerely

Felix W. Taylor

February 23, 1976

Mr. Helon Taylor
Goliad State Park
P. O. Box #727
Goliad, Texas 77963

Dear Helon:

Thank you very much for your letter of February 12, 1976. I had been looking forward to talking with you; perhaps we can arrange to get together in the Spring.

Meanwhile, I would like a little more information concerning snowmobiles. Specifically, I am concerned about two letters which the Governor wrote on the subject of snowmobiles and motorcycles. I have enclosed copies for your information. As you can see, in 1965 and 1966 Governor Baxter was opposed to the use of such vehicles within the Park. I believe that the regulation allowing the use of snowmobiles on the perimeter road was first adopted in 1969. I wonder if you can personally recall any time subsequent to the letters when Baxter himself explicitly changed this opinion. The written letters are the most specific information we currently have, but I thought that in your conversations with Governor Baxter he might have said something to the contrary. If you do recall some such statement, do you have any thoughts as to how this could be reconciled with the letters?

As you suggested, I have spoken with Austin Wilkins about this, but in order to have my research as complete as possible I wanted to get as much information as I could from anyone who may have worked closely with the Governor. Accordingly, if it wouldn't be too inconvenient to you, could you please write again and expand on your earlier letter by letting me know your recollections of any specific statements of the Governor to you on the subject of snowmobiles or of the manner in which the Governor approved the use of such vehicles in the Park.

Once again, thank you for your letter and I am looking forward to hearing from you again.

Sincerely,

Sarah Redfield,
Assistant Attorney General
Natural Resources Division

SR/bls

enclosures

Goliad, Texas
March, 4, 1976

Dep't of the Attorney General
Augusta
Maine 04333

Att. Sarah Redfield

Dear Ms. Redfield:

I have yours of the 23rd February and thanks for your letter I am very sorry but I do not remamber any of the remarks made to me by Governor Baxter regarding the snow mobiles on the Park. As I recall it was pretty well up to the Park Authority after he wrote me that letter dated May, 11, 1965 of which you sent me a copy. I guess my memory is not very good.

I do know that it was not the snow mobiles that drove the caribou away from Katahdin. In my beleife it was the jet fighters from Bangor Air Base buzzing them from fifty feet over their backs after they were asked to stay at least 1000 feet above them. I saw this being done. In fact the snow mobiles could not get up to the Table Land where the caribou were anyway.

As to the moose and deer, they are not afraid of the snow mobile: as long as they go along and mind their own business. I have passed by on my snow mobile within 75 feet of both moose and deer and they would just watch me go by. If one stopped they would run away. As for chasing them in their yards. I have owned and operated snowmobiles ever since they were made and I have never yet seen one that could operate in a deer or moose yard with any success. They would be bogged down most of the time.

Others who were close to the Governor at that time were, Arthur G. Rogers, 20 Edgewood Street, Waterville, Maine 04901. Joe Lee. Portland, Maine. (I do not know Joe's address. He was the Governor's chauffer at that time.) Irvin C. Caverly, Park Supervisor, Millinocket, Maine. and Rodney H. Sargent, P.O. Box # 125, Freedom, Maine. Rodney was a Ranger on Baxter State Park at the time and so was Caverly.

I was away in other parts of Texas when your letter came. Hence the delay in answering. We cruise around a lot but plan to make this our head quarters and plan not to be gone from here over a week at a time. We will be starting back to Maine in mid or late April.

Sincerely

Helon N. Taylor

Helon N. Taylor

[illegible] Burgess and Joseph Lee on same date.

March 18, 1975

Arthur G. Rogers
Box 151
Waterville, Maine 04901

Dear Mr. Rogers:

I am the Attorney for the Baxter State Park Authority and am trying to research and write an opinion concerning the use of snowmobiles in Baxter State Park. To ensure that my research is as complete as possible, I have been trying to get in touch with people who may have communicated with Governor Baxter about snowmobiles. In this connection, Helon Taylor suggested I contact you.

I am specifically interested in any information or recollections you may have concerning two letters which the Governor wrote on the subject of snowmobiles and motorcycles. I have enclosed copies for your information. As you can see, in 1965 and 1966 Governor Baxter was opposed to the use of such behciles within the Park. I believe that the regulation allowing the use of snowmobiles on the perimeter road was first adopted in 1969. I wonder if you can personally recall any time subsequent to the letters when Baxter himself explicitly changed this opinion. The written letters are the most specific informationwwe currently have, but I thought that in your conversations with Governor Baxter he might have said something to the contrary. If you do recall some such statement, do you have any thoughts as to how this could be reconciled with the letters?

I would appreciate it if you could write me or call me and let me know if you recall any specific statements that Governor Baxter may have made to you on the subject os snowmobiles or of the manner in which the Governor may have approved the use of such vehicles in the Park. If it is at all possible, could you please try to get in touch with me one way or another within two weeks? Thank you for your anticipated cooperation and I will be looking forward to hearing from you.

Sincerely,

Sarah Redfield
Assistant Attorney General
Natural Resources Division

enclosures
SR/bls

35 Frederic St.
Portland Me
Mar. 23, 1976

Dear Miss Redfield,

In regards to the letter I recieved from you on Saturday last week I think Gov. Baxter letters were quet clear as to "No Snowbiles In Baxter's Park", Also he didnt want any motors on boats in the lakes and no motorcycles in the Park. T

The much talked about "Blow down" he would want cleaned up as he did back a few years ago, to him that would spoil the beauty of the park as well as be a bad fire hazard.

I can tell you that Gov. Baxter bought the first snowobile for Melon Taylor to snowshoe to all the campsite's and check them all winter. He would start out at 6 A.M in the morning and not get back until 6 P.M. As Melon was getting along in years the Gov. thought it make easier on Melon with a snowobile and that was why

the first snowobile was brought into the Baxter State Park, It had to be hid in the summer in the tote barn so no one would see it and get any ideas.

Gov. Baxter gave the park to the People of the State of Maine and not the Baxter Family. Gov. Baxter appointed Attorney General, Fish & Game Commissioner, and the Forest Comm. to watch over the Park and make any necessary decisions and no one else. I hope this will be helpfull to you as I was very close to Gov. Baxter and I know of his wishes, I can only pray that they be carried out.

Sincerely
Joseph H Lee

Snowmobiles

March 30, 1976
Freedom, Maine

Sarah Redfield
Assistant Attorney General
Natural Resources Division
Augusta, Maine 04333

Dear Miss Redfield:

I have never communicated with Governor Baxter about the use of snowmobiles, motorcycles or any matters concerning the restriction or use of same within the boundary of Baxter State Park.

I am very sorry I can not be of help to you in this respect nor do I wish to express an opinion concerning the use of snowmobiles or like vehicles within the park.

Sincerely,

Rodney H. Sargent

rs.

RECEIVED
STATE OF MAINE
ATTORNEY GENERAL
APR 0 1 1976
STATE HOUSE AUGUSTA, MAINE

Mar. 24th, 1976

Sarah Redfield, Ass't Attorney General
Natural Resources Division
Department Of The Attorney General
State House
Augusta, Me.

Dear Sarah Redfield:

Your registered letter of March 18th at hand.

I have a 4 draw file full of correspondenc and documents from Govenor Baxter which I have retained over the twenty-one years that I was closely associated with him.

I regret to say that I have no letters regarding snow-mobiles in the park. I saw Govenor Baxter at least twice a month the many years, matters pertaining to the Park which was always the main topic (at it was his life) were discussed in his presence with the exceptions of some documents which I was sent copies of.

I can advise you however, that Govenor Baxter was against the public use of snow-mobiles in the Park with the exceptions of Park Rangers and State Game Wardens.

No.#1 Baxter State Park is a state game preserve where, hunting, pursuing and harassment of all wildlife is prohibited. Governor Baxter feared that were the public allowed to take snow-mobiles into the park there would no longer be any refuge and sanctuary for the deer and moose that are closel yarded there in the winter months. When deer and moose are yard up in the deep snows they are very munerable and easily accessab to man. The Govenor feared that many good well meaning people would seize upon this opportunity to see deer and moose close u and would be charging into the deer yards with their snow-mobil chasing, pursuing and routing the deer and moose and where poachers are concerned-killing these animals. This has already happened in places in the North Country.

No.#2 Were the park open to snow-mobilers Govenor Baxter feared it would be deluaged with good well meaning peopl out for fun and sport and relaxation and that in their enthusia over reach themselves and become victims of accidents, breakdow and lost persons in a wild wilderness area where without help fast, spells grief and fatalities. Such accidents have happened all over the state-but the Govenor feared a large concentration of snow-mobiles in the park might produce many such unfortunate situations and certainly the state is not geared to adequately patrol and protect the wildlife and the public on a scale necessary to meet the problems that could develope.

I am a retired Supervisor of State Game Wardens and was in Warden Service from 1932 to 1968

In 1941 I was Warden Supervisor of the Moosehead Division and at that time included a large part of Baxter State Park.

I retired in 1968 and since that time I have been working as a Bank Courier for the Bank Of Maine in Augusta. Every morning I go to Treasury and the Computer Center in the State Office Building. If I can be of service to you in any way please advis

I could call at your office any morning as I am already at the State Office Building after 9 A.M.

Sincerely,

Arthur G.Rogers
20 Edgewood St
Waterville, Maine 04901

STATE OF MAINE

Inter-Departmental Memorandum Date May 20, 1976

To Baxter State Park Authority Dept. Baxter State Park Authority

From Sarah Redfield, Assistant Dept. Attorney General

Subject The Use of Snowmobiles Within Baxter State Park as Contemplated by the 1976 Revision of the Rules and Regulations

This is in response to your request for an opinion as to whether the use of snowmobiles within Baxter State Park (hereinafter "the Park") as contemplated by the proposed 1976 revision of the Rules and Regulations governing Baxter State Park is consistent with the trust which created the Park. These regulations, as proposed provide:

> "19. SNOWMOBILES: All persons using snowmobiles are restricted to the unplowed portions of the regular road system currently maintained by the Department of Transportation for vehicular traffic in the summer including the roads into South Branch Pond and Roaring Brook, but excluding those roads into Daicey Pond and Kidney Pond. The only exceptions are the tote road into Katahdin Lake from Avalance Field, a one-half mile section over the easterly projection of Baxter Park in Township 6, Range 8 along the west side of the East Branch of the Penobscot River in Township 6, Range 9 from the westerly end of Second Lake Grand Matagamon, the Telos cut-off road from the Telos Gatehouse to the Park perimeter road via Morse Mountain. Use of all other roads and trails is prohibited except by authorized personnel on Park business.
>
> Operators travel at their own risk and must comply with all requirements of State laws and drive safely at all times. Operation by persons under 10 years of age is prohibited."

Essentially this regulation allows the operation of snowmobiles on the so-called "perimeter" road of the Park and on a few connecting road segments, (all of which are indicated on the attached map). It also apparently contemplates the use of snowmobiles on certain of the lakes within the Park.

The mandate of the Baxter State Park Authority is "to subordinate its own wishes to the intent of Governor Baxter. . . (and) to satisfy the terms of the trust," 12 M.R.S.A. §900. Governor Baxter's intent must be the essential reference point in any decision concerning the Park.

The trust instruments themselves are silent on the specific subject of snowmobiles. There is also some ambiguity in the general trust provisions. However, a review of the available evidence concerning Governor Baxter's intention in creating the Park indicates that he did not intend the use of snowmobiles, as contemplated by the proposed regulations, for purposes other than necessary use by employees of the Authority in emergency situations. The intent of the settlor of the trust is necessarily . . determinative of the question. This intent is ascertained by analysis of the method of the creation of the trust, the trust instruments and other expressions of intent as follows:

The Creation of the Trust. Historically, Baxter State Park was created by an extended series of gifts of land from Percival Proctor Baxter to the State of Maine. From the outset, it was Baxter's intention that the State own Mount Katahdin and its environs. As his concept of and acquisition for the Park developed, Governor Baxter deeded to the State various parcels of land in Penobscot and Piscataquis Counties which now total the approximately 200,000 acres known as Baxter State Park, 12 M.R.S.A. §901. From 1931 to 1963 there were over thirty such conveyances to the State[1/]. As Baxter desired there was formal acceptance by the incumbent Legislature of the documents creating the trust in the Private and Special Laws of the State of Maine;[2/] similarly Baxter's formal letters to the incumbent Governor and Legislature concerning the

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1/ In addition to the actual conveyances of land discussed herein, Baxter also provided the State with trust funds for the "purchase or other acquisition of additional lands for said Baxter State Park. . ." These lands, if acquired, are to forever be held by the "State of Maine in Trust for the benefit of the people of Maine for development, improvement, use, reforestation, scientific forestry, and the production of timber and sale thereof. . ." and may be "made a SANCTUARY FOR WILD LIFE". See clause THIRD of the Baxter intervivos trust dated July 6, 1927 as amended from time to time.

2/ The deeds appear in the Private and Special Laws as follows: 1931, c. 23; 1933, c. 3; 1939, c. 1; 1939, c. 122; 1941, c. 1, c. 95; 1943, c. 1, c. 91; 1945, c. 1; 1947, c. 1; 1949, c. 1, c. 2; 1955, c. 1, c. 3, c. 4, c. 61, c. 171; 1963, c. 1. Two additional deeds were accepted by the Forestry Commissioner and Governor; one dated October 7, 1931 conveying the remainder previously divided interests conveyed by the deed of March 3, 1931; the other deed dated November 9, 1938 is apparently incorporated within the deed in P.& S.L. 1939, c. 1. Unless otherwise indicated, references herein to deeds are in terms of the applicable chapters of the Private and Special Laws.

Park were ordered published in the Laws of Maine "in order that the Records of the Gift by PERCIVAL PROCTOR BAXTER to the STATE OF MAINE as Trustee in Trust. . . be complete and in enduring form".[3] This method of conveyance was deliberately adopted by Baxter:

> "In this manner a long list of precedents is being established; precedents which, as time passes will show that eight or ten different Governors and as many Legislatures, by laws duly passed and signed by these Governors, have entered into solemn pacts that create a succession of irrevocable trusts." [4]

Through this series of laws evolved the Baxter State Park trust, the creation of which was commenced in 1931 and was completed in 1963.[5]

3/ e.g. Private and Special Laws of 1941, at 699.

4/ Communication of Percival Proctor Baxter dated January 12, 1942 addressed to the Honorable Sumner Sewall, Governor, and the Honorable Senate and House of Representatives of the Ninetieth Legislature, printed with the Laws of 1941-42.

5/ That Baxter viewed the creation of the Park as a continually evolving trust is indicated by the introductory paragraphs of the deeds and acceptances indicated in note 2 herein. See also, the expression of this long-range approach in such communications as those of Percival Proctor Baxter dated March 3, 1931 addressed to The Honorable William Tudor Gardiner, Governor and the Senate and House of Representatives of the State of Maine, Laws of 1931 at 725; January 17, 1939 addressed to the Honorable Lewis O. Barrows, Governor and the Honorable Senate and House of Representatives of the Eighty-ninth Legislature, Laws of 1939 at 846; January 8, 1941 addressed to the Honorable Sumner Sewall, Governor, and Honorable Senate and House of Representatives of the Ninetieth Legislature, Laws of 1941 at 760-761; April 17, 1944 addressed to the Honorable Sumner Sewall, Governor and the Honorable Senate and House of Representatives of the Ninety-first Legislature of the State of Maine, Laws of 1945 at 982-983; January 4, 1945 addressed to The Honorable Horace A. Hildreth, Governor of Maine, Augusta, Maine, Laws of 1945 at 984-985; and January 8, 1947 addressed to The Honorable President of the Senate and the Honorable Speaker of the House and the Ninety-third Legislature, Laws of 1947 at 1244.

The Trust Documents. The trust documents provide that the majority of the Park be used as State forest, for public park and public recreational purposes, forever to be left in its natural wild state[6] and as a sanctuary for wild beasts and birds.[7] In those areas which are sanctuaries, firearms, hunting, trapping and the landing of aircraft are prohibited.[8] An area of some 28,000 acres is not covered by the provisions as to natural wild state and sanctuary, but instead is devoted to the practice of scientific forestry.[9]

In the majority of the Park, then, the use of snowmobiles is appropriate only to the extent it does not contradict the basic concepts of State forest, public park and recreation, natural wild state, and, in most instances, wildlife sanctuary.

6/ These provisions appear in the Private and Special Laws as follows: 1931, c.23; 1933, c.3; 1939, c.1, c.122; 1941, c. 1, c. 95; 1943, c. 1, c. 91; 1945, c. 1; 1947, c. 1; 1949, c. 1; 1955, c. 1, c. 3; 1963, c. 1; they also appear in the deeds dated October 7, 1931 and November 9, 1938 accepted by the Governor and Forest Commissioner. The first deed does not specifically refer to "State forest" but this is included in P.& S.L. 1945, c. 1.

7/ The sanctuary provisions appear in all the deeds cited in note 6 herein except P.& S.L. 1955, c. 1; 1955, c. 3 (re: 14005 acres) as modified by P.& S.L. 1955, c. 4 and P.& S.L. 1963, c. 1. Hunting is allowed in these areas and in the scientific forestry area, a total of approximately 44,000 acres. Because the basic trust provision at issue is that mandating "natural wild state", instrume where the "sanctuary" provisions are absent are not separately discussed.

8/ See, particularly P.& S.L. 1945, c. 1 and references in note 6 herein. In P.& S.L. 1963, c. 1, hunting is allowed, but the landing of aircraft is prohibited.

9/ See P.& S.L. 1955, c. 61, c. 171. The snowmobile regulations proposed would not authorize snowmobiles within these areas and this memorandum does not attempt to render an opinion on such use. In view of Baxter's expressed desire that these areas be a showplace for the State and be managed with the most approved practices of scientific forestry, it would seem that a decision as to the appropriateness of snowmobile use within this area of the Park might be better addressed in the context of the plan for the management thereof.

To ascertain the meaning of these terms and their interrelationship, it is necessary to review the trust documents and, when ambiguity exists, other information available to clarify Baxter's intent. In an instrument written in 1955 Baxter outlined his view of the interrelationship of recreation, wilderness and access. He stated that the "area is to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be "forever Wild."[10] Baxter also expressed his concern that the public have adequate access to the recreational potential of the Park.[11] This concern, however, is not unqualified; it is not with the Park's availability for all recreational use, but with its availability for "those persons who enjoy the wilderness" who will use the Park "in the right unspoiled way."[12]

The same interrelationship between access and natural wild state is indicated by an historical review of the expressions of the trust instruments concerning roads and ways. Baxter had originally intended to prohibit the construction of roads within the Park.[13] Ultimately these restrictions were removed and the State empowered to construct and maintain

> "such roads and ways as the State as such Trustee shall deem to be in the public interest and for the proper use and enjoyment of those citizens of said State who may visit the area known as BAXTER STATE PARK, subject however, to the conditions, limitations and restrictions that said roads and ways be constructed and maintained in a manner not to interfere with the natural wild state now existing in said areas."[14]

10/ P.& S.L. 1955, c. 2. See also, Communication from Percival Proctor Baxter to the Honorable Horace A. Hildreth, Governor and the Honorable Senate and House of Representatives of the Ninety-second Legislature, January 2, 1945, Laws of 1945 at 985-989.

11/ See e.g. Communication of Percival Proctor Baxter to the Honorable Frederick G. Payne, Governor and the Honorable Senate and House of Representatives of the Ninety-fourth Legislature of January 3, 1949, Laws of 1949 at 1368-1370.

12/ See Communication of January 2, 1945 cited in note 10 herein; 12 M.R.S.A. §900.

13/ P.& S.L. 1931, c. 23; 1933, c. 3; 1945, c. 1; 1947, c. 1.

14/ P.& S.L. 1949, c. 2.

Presumably, in deciding to allow such roads as would be compatible with the natural wild state in the Park, Baxter contemplated their use by certain motor vehicles. But the trust documents, with the exception of the prohibition of airplanes, are themselves silent as to the specific nature and extent of such vehicles. The allowance of roads, the emphasis on natural wild state, and the silence on the specific subject of snowmobiles create an inherent ambiguity in the trust documents as to the appropriateness of snowmobile use. The clarification of any such ambiguity is dependent upon the intention of the settlor of the trust. 15/

Clarification of Intent. To ascertain the settlor's intention concerning ambiguous matters, reference may be made not only to the legal instruments themselves, but also to such extrinsic evidence as may be relevant. 16/ In this context, inasmuch as the popular use of such vehicles is a relatively recent phenomenon, 17/ it is not unusual that the trust itself, largely completed by 1955, should contain no specific reference to snowmobiles. Indeed, as the growth in use began, Baxter did respond. Of primary relevance in this regard is Baxter's own expression of his views concerning snowmobiles in relation to natural wild state. On May 11, 1965 Baxter wrote to Helon N. Taylor, then Supervisor of the Park as follows:

> "In regard to the Motor Skis, I have thought this over and have this suggestion to make. These skis should be prohibited in the Park except for one for you as Supervisor to use in case of emergencies. I feel strongly about this for they will frighten away the wild animals and we certainly would not see a caribou again. This same reason prompted us to forbid the use of motor boats on our lakes. I can see the damage they would cause.

15/ See IV Scott, The Law of Trusts §164.1 (1967); see also 12 M.R.S.A. §900

16/ See Scott, supra. Also see Little Rock Junior College v. George W. Donaghet Foundation, 224 Ark. 895, 277 S.W. 2d 70 (1955).

17/ The industry has grown from 10,000 units sold nationally in 1963 to 500,000 units in 1971. In Maine, snowmobile registration has increased from 19,986 in 1968-69, the first year registration was required, to 73,737 in 1974-75; (figures from the Bureau of Parks and Recreation.)

> "I would be much pleased if the Authority would add this to the list of what is forbidden in the regulations. Would you please bring this to the attention of the Authority members for this is the time to kill it." (Full text of letter attached).

Almost a year later, on April 18, 1966, Baxter wrote to Austin Wilkins, then Forest Commissioner and Chairman of the Baxter State Park Authority, expressing his intent concerning motorcycles, vehicles in many ways similar to snowmobiles:

> "I understand that there are several motor scooters and motorcycles in Millinocket that may be taken to the Park. These machines are so noisy and numerous, they should be forbidden to go into the Park area. If unrestrained, these noisy machines would frighten the wild life." (Full text is attached).

While these letters are to be accorded less weight than the formal legislative communications (and certainly less weight than the trust documents), their significance is not to be ignored. 18/

18/ In addition to letters discussed herein, the following individuals who knew and worked with Governor Baxter were contacted to ascertain whether the statements of the 1965 and 1966 letters were, to their knowledge, subsequently modified or contradicted Helon Taylor; James S. Erwin; Ronald Speers; Austin Wilkins; Irvin Caverly; Rodney H. Sargent; and Joseph H. Lee. The information provided by each of these individuals, except Austin Wilkins, confirmed the Baxter statements of 1965-66. Austin Wilkins orally reiterated his position as stated in his correspondence of January 15, 1970 to Senator Muskie. In explaining the regulations allowing snowmobiles Wilkins wrote:

> "The decision of the Authority, in spite of public protest, to permit snowmobiles was on the basis that Governor Baxter did not intend to prohibit people from using the Park in the wintertime. . ." (full text of letter attached).

The Wilkins letter is not a statement of intent by Governor Baxter, as are the letters previously discussed; it is at best a synthesis by Wilkins of his understanding of Baxter's views. As such, it is of questionable legal significance. In any case, the weight to which this letter is entitled, if any, is far less than that of the letters written by Baxter with the clear indication that he was expressing his view of the precise subject at hand.

They are part of an extensive pattern of interaction between Baxter and the administrators of the Park which both parties knew would serve as guidelines in the future. 19/ From the records available, it appears that Baxter's desires concerning the Park were observed consistently and that he relied on such observance as a mechanism for continuing his influence and clarifying his position on various matters. 20/

On a more general level, beyond these specific written statements, Baxter's intention concerning snowmobiles can be determined by considering what purpose would be accomplished by allowing the proposed use, and whether this purpose is dependent upon and compatible with the basic wilderness nature of the area of the Park in question.

Snowmobiles would, of course, provide greater access to the park in winter. However, their exclusion would not "lock up the park" but rather would tend to limit its use to those "willing to walk to make an effort to get close to nature," see Title 12 M.R.S.A. §900. Activities involving snowmobiles are in no way dependent upon the unique wilderness values established for the Park by Governor Baxter; nor are they compatible with these values and the uses necessarily dependent thereon, such as hiking or wildlife observation. This potential incompatibility forms a rational basis for the distinction which Governor Baxter apparently intended between automobiles and snowmobiles and motorcycles. It is the potential for noise and ultramobility which may adversely affect wildlife in the Park and may also disturb those users of the Park who "love nature" 21/ and seek the

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19/ See the letter from Percival Proctor Baxter to Albert Nutting, Forestry Commissioner, dated August 18, 1958 in which Baxter states "what action is taken nowadays will serve as precedent for the future . . . I realize that in the future, pressure will be brought to bear to break down the Trust conditions. Now is the time to take a firm stand which will give solid backing to the Authority."

20/ The consistency with which the Authority responded to Baxter and with which he relied on them to do so is evident in such letters and those from Attorney General James S. Erwin to Baxter, June 19, 1968; letter from Forest Commissioner Austin Wilkins to Baxter, June 26, 1968; letter from Attorney General Frank Hancock to Baxter, October 7, 1959.

21/ 12 M.R.S.A. § 900.

"peace and solitude" 22/ with which Baxter was concerned. Even under this general analysis, the use of snowmobiles does not appear consistent with the general trust precepts.

Conclusion. The clearest available expression of Baxter's intention concerning the use of snowmobiles in relation to the trust conditions concerning natural wild state appears in the 1965 and 1966 letters cited herein. This expression is confirmed by a more general analysis of the trust's terms. Accordingly, the use of snowmobiles as proposed by the 1976 Revision of the Baxter State Park rules and regulations is not consistent with the trust, and snowmobile use within the natural wild state areas of the Park should be limited to use by Park personnel in emergency situations.

22/ Communication from Percival Proctor Baxter to Honorable Horace A. Hildreth, Governor and the Honorable Senate and House of Representatives of the Ninety-second Legislature dated January 2, 1945, Laws of 1945 at 985-989.

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR/bls

Mr. Helon N. Taylor,
Park Supervisor,
Baxter State Park,
Millinocket, Maine.

MAY 11, 1965

Dear Helon:-

Your report came this morning and I am sure all is coming along well for the season.

In regard to the Motor Skis I have thought this over and have this suggestion to make. These skis should be prohibited in the Park except for one for you as Supervisor to use in case of emergencies. I feel strongly about this for they will frighten away the wild animals and we certainly would not see a caribou again. This same reason prompted us to forbid the use of motor boats on our lakes. I can see the damage they would cause.

I would be much pleased if the AUTHORITY would add this to the list of what is forbidden in their regulations. Will you please bring this to the attention of the AUTHORITY members for this is the time to kill it.

I am looking forward eagerly to being with you with the same party we usually have.

Cordially,

Percival P. Baxter

Percival P. Baxter

B/c

Objects To Vehicles

To the Editor:

The article "A Day on the Mount in Maine and our intent to live up Baxter in regard to its generous gift use of a powered vehicle on the trail direct violation of the terms of the gi citizens of Maine.

It was specified that it would "for ness area. Motor boats, airplanes an have been banned. It doesn't seem name the different types of vehicles th

up with and ban each type as they modifications there is no reason to d monsters can penetrate remote area sider almost sacred.

There will be little satisfaction in paradise and making camp beside infernal gasoline engine. It is also travelers with large soft tires for sur

Acadia Park has all the beauty those who want to drive and see i wilderness for those who want to see

PERCIVAL P. BAXTER
PORTLAND, MAINE

April 18, 1966.

Hon. Austin H. Wilkins,
Forest Commissioner,
State House,
Augusta, Maine.

Dear Austin;-

I have your letter of the 13th giving me the account of the "blow-down" receipts. You did well to collect this money. I am interested to seejust what was done and look forward to coming to the Park sometime next month.

I understand that there are several motor acooters and motor cycles in Millinocket that may be taken to the Park. These machines are so noisy and numerous, they should be forbidden to go into the Park area. If unrestrained these noisy machines would frighten the wild life. I should like you to discuss this matter with the other members of the AUTHORITY and Helon Taylor and pass a vote putting this restriction into effect.

Hoping that I shall be able to make my spring visit to the Park.

Sincerely,

Percival P. Baxter

Percival P. Baxter

B/c

STATE OF MAINE
Baxter State Park Authority

January 15, 1970

The Honorable Edmund S. Muskie
United States Senator
Washington, D.C. 20510

Dear Ed:

For some unexplained reason, your letter of inquiry about the use of snowmobiles in Baxter State Park was misplaced in the volume of mail received on this subject. I take full responsibility for this inadvertent act.

The following appears to be the facts as the Baxter State Park Authority knows them relative to the use of snowmobiles in Baxter Park. The use of snowmobiles in the Park is nothing new but the recent phenomenal sale and use of snowmobiles in the last few years has brought this subject into sharp public focus and particularly with reference to Baxter Park.

For over 8 or 9 years Park Rangers have used snowmobiles for patrol purposes and law enforcement of which Governor Baxter was fully aware. A few years ago, due to the impact of the use of snowmobiles, a new Baxter Park Regulation was passed which permitted snowmobiles to travel in the Park on the perimeter State road but did include travel on the trail from the Roaring Brook Campground to Chimney Pond and also woods roads on Rum Mountain. As chairman of the Authority and my close association with Baxter, this was reviewed with him and I am sure that in his declining years he still understood what was meant by this snowmobile regulation.

However, due to public pressure and those who felt that the Governor's wishes were being violated under the "forever wild" concept, the Baxter Park snowmobile regulation was amended and an amended copy is attached. The revision restricted the use of snowmobiles to just the so-called perimeter road excluding any trails or other roads. The decision of the Authority, in spite of public protest, to permit snowmobiles was on the basis that Governor Baxter did not intend to prohibit people from using the Park in the wintertime. Therefore, the snowmobile regulation was adopted as a public access into the Park using the perimeter road to enjoy the beauty of the Park in the wintertime as well as those who are privileged to use the Park in the summertime with recreation, in the former, as purely secondary.

The Honorable Edmund S. Muskie — January 15, 1970

I believe the amended regulation is on trial and that for this year it remains to be seen how strongly enforcement can be carried out in restricting use of snowmobiles to the perimeter road. As part of our enforcement program, we have extensively circulated the new regulation, prominently posted the road as to "ski road," additional rangers have been put on for patrol purposes, people will be required to check in and register at the gatehouses, and all violators when apprehended will be prosecuted.

It was the thinking of the Authority that from evidence produced thus far there were no dangers of disturbing wildlife, causing a litter problem, destruction of any forest growth, and noise factor of little consequence.

Another point I should call your attention to is the fact that the perimeter road is a so-called public road and the Snowmobile Law provides that these snow traveling units may be used on public roads which are unplowed and unused during the winter months.

I am sure that you can appreciate that I have received a tremendous volume of mail. While most of it does run strongly in protest of using snowmobiles in the Park, there was considerable mail supporting the use but under some form of strict regulation and enforcement. We will certainly await the results of our enforcement program and then if there is a change necessary, we will take action.

Very truly yours,

AUSTIN H. WILKINS
Forest Commissioner
Chairman, Baxter Park Authority

AHW:as

Attach.

May 23, 1980

DRAFT

Memorandum of Law

To: Baxter State Park Authority

From: Department of the Attorney General

Re: Petitioning for Instructions on the Extent of the Authority's Discretion to Regulate Snowmobiles and Other Motor Vehicles in the Park -- Procedural Requirements and Substantive Issues

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APPENDIX

Petition For Instructions

May 23, 1980

DRAFT

Memorandum of Law

To: Baxter State Park Authority

From: Department of the Attorney General

Re: Petitioning for Instructions on the Extent of the Authority's Discretion to Regulate Snowmobiles and Other Motor Vehicles in the Park -- Procedural Requirements and Substantive Issues

This memorandum has been prepared in response to the request of the Baxter State Park Authority (the "Authority") on November 2, 1979 that the Department of the Attorney General prepare a memorandum of law concerning procedural requirements and substantive issues involved in the process of petitioning for judicial instructions on the extent of the Authority's discretion to regulate snowmobiles and other motorized vehicles in Baxter State Park (the "Park").

I. Procedural Requirements

The conclusions reached in this memorandum about the procedural aspects of petitioning for such instructions may be summarized as follows:

(i) The Superior Court has jurisdiction to issue instructions to a trustee regarding his fiduciary duties under both the general equity jurisdiction statute, 14 M.R.S.A. §6051, and the Declaratory Judgments Act, 14 M.R.S.A. §5951, et seq.

(ii) Both jurisdictional avenues are available to the Authority.

(iii) As a general proposition, the courts have not appeared to recognize any procedural differences between a proceeding under the Declaratory Judgments Act and one initiated under the equity jurisdiction statute.

(iv) In both cases, the Law Court now appears to require a petition for instructions to meet constitutional standards of justiciability, which limit the exercise of judicial power to adjudication of actual cases or controversies involving issues which are judicially "ripe" for determination between parties with adverse legal interests. Initially, the proposed petition may lack the requisite degree of adversariness but, in the case of the narrow snowmobile question, this requirement eventually should be satisfied after interested parties representing opposing views join the proceedings as intervenors. However, the broader issues of the Authority's discretion to regulate motor vehicles other than snowmobiles appear to lack the requisite degree of adversariness and, in the case of planning issues, the necessary degree of immediacy. Accordingly, it is recommended that the Authority limit its petition to a request for instructions on the snowmobile issue.

(v) A related requirement is that all persons whose rights and interests are involved should be made parties to the proceedings. The proposed petition names only the Governor and members of legislative leadership as parties in their capacities as representatives of the "State of Maine", the principal trustee of the Park. However, it is also recommended

that the Authority publish notice of its petition so that all interested members of the public will have an opportunity to intervene.

(vi) Although there are no formalities mandated by statute, the courts have generally required a petition to contain a sufficient statement of facts, specific questions to be answered by the court, and a copy of the relevant trust instrument.

(vii) Finally the Authority, acting as trustee of the Park, cannot be regarded as a mere stakeholder or neutral bystander as to the outcome of the instructions petitioned for.

A. Jurisdictional Bases For a Petition For Instructions

Since 1857, Maine courts have been vested by statute with jurisdiction "to grant appropriate equitable relief" in cases where the court is petitioned "[t]o determine . . . in cases of doubt, the mode of executing a trust . . . ." 14 M.R.S.A. §6051(10). The courts have also assumed jurisdiction to instruct fiduciaries under their general equity powers, 14 M.R.S.A. §6051(13), as an adjunct to their control over trusts. See, Hichborn v. Bradbury, 111 Me. 519, 90 A.325 (1914); Moore v. Emery, 137 Me. 259, 18A.2d 781 (1941); and Porter v. Porter, 138 Me. 1, 20A.2d 465 (1941). In addition, since 1941, the courts have had the power under the Declaratory Judgments Act, "[t]o determine any question arising in the administration of [an]

estate or trust, including questions of construction of wills and other writings." 14 M.R.S.A. §5956(3)

B. The Right of the Authority to Petition For Instructions

Even though the Authority is a governmental entity, it has been held to be accountable to the more stringent standards of a private trustee, and correspondingly to possess the rights of a private trustee to petition for instructions in appropriate circumstances. In Fitzgerald v. Baxter State Park Authority, Me., 385 A.2d 189, 202 (1978) the Law Court declared that:

> [T]he members of the Authority acting for the State of Maine must administer the trust like any private trustees of a charitable trust, exercising their best judgment, informed by the Attorney General's advice on any legal question and, where necessary, by instructions from a court of equity. See 14 M.R.S.A. §6051(10)(1964). [Emphasis added]

In light of the holding in Fitzgerald, there can be little doubt that the Authority may petition the Superior Court for instructions even though it is a governmental entity and as such has available to it the advice of the Attorney General. Such being the case, the fact that the Attorney General's office has written an opinion on the use of snowmobiles in the Park should not preclude the availability of the petition process, where, as here, the opinion has not put to rest doubt and controversy about the proper resolution of this issue.

C. The General Similarity of Requirements Under the Declaratory Judgments Act and the Equity Jurisdiction Statute

There is a substantial body of law in Maine concerning the

requirements for bringing a petition or bill for instructions. The early cases, of course, were brought under the equity jurisdiction statute; the modern cases cite either the Declaratory Judgments Act or the equity jurisdiction statute, or both. See, e.g., Maine National Bank v. Petrlik, Me., 283 A.2d 660, 664 (1971). With the exception of some historical differences in the treatment of the requirement for justiciability, discussion next below, none of the cases of which we are aware establish different procedural requirements for a petition for instructions depending upon which jurisdictional statute is involved. Indeed to the contrary, it was recently observed in Desmond v. Persina, Me., 381 A.2d 633, 638 (1978) that a petition for instructions under the Declaratory Judgements Act is limited to the kind of equitable relief available under the equity jurisdiction statute.

D. The Requirement of Justiciability

The advent of the Declaratory Judgements Act not only has failed to expand the circumstances under which a trustee may petition for instructions but has had the opposite effect. As shall be demonstrated below, the traditional requirements of justiciability, always applicable to cases brought under the Declaratory Judgements Act, have recently been applied to petitions brought under the equity jurisdiction statute which previously had been subject to less restrictive standards.

(1) Under Declaratory Judgements Act

Since the very first case under Maine's Declaratory Judgements Act, Maine Broadcasting Co. v. Banking Co., 142 Me. 220, 49 A.2d 224 (1946), it has been established that "[e]very party seeking declaratory relief must address at the threshold a question of justiciability." Allstate Ins. Co. v. Lyons, Me., 400 A.2d 349, 351 (1979); Randlett v. Randlett, Me., 401 A.2d 1008, 1011 (1979).

As in the case of its federal analogue, this requirement is said to be founded on constitutional considerations. "Declaratory judgements are not exceptions to the Court's lack of jurisdiction to render advisory opinions except as mandated by Me. Constit., art. VI, §3." Shapiro Bros Shoe Co., Inc. v. Lewiston-Auburn S.P.A., Me., 320 A.2d 247, 251, N.7 (1974); Jones v. Maine State Highway Commission, Me., 238 A.2d 226, 228 (1968); and Chandler v. Dubey, Me., 378 A.2d 1096, 1099 (1977); Bar Harbor Banking & Trust Co. v. Alexander, Me., 411 A.2d 74, 78 (1980). The Law Court has articulated the standards for justiciability in a variety of ways, but a common point of reference has often been the classic definition in Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937):

> A justiciable controversey is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.*** The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.*** It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

This and other expressions of the requirement will be further considered below more specifically in the context of the proposed petition.

(2) Under the Equity Jurisdiction Statute

Until recently, Maine cases have made no reference to the need for a justiciable controversy for petitions brought under the equity juristiction statute.* The Law Court, however, has restricted the circumstances in which it will entertain such petitions. Trustees petitioning for instructions must have standing, usually defined as a real and immediate interest in the subject of the controversy. See, Burgess v. Shepherd, 97 Me. 522, 55 A. 415 (1903); Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025 (1905); Huston v. Dodge, 111 Me. 246, 88 A. 888 (1913); Webb v. Dow, 120 Me. 519, 115 A. 279 (1921). Nor will the courts entertain a petition on a question which is not "ripe" for judicial consideration. See, e.g., Huston v. Dodge, supra; Moore v. Emery, supra, 137 Me. at 271, 18 A.2d at 787 (1941) ("A glance at [the] cases will indicate the reluctance of courts to construe a will in order to decide any question which does

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*/ Indeed one commentator has recommended that a prudent fiduciary should resort to the traditional bill for instructions (rather than the declaratory judgments act) in the large number of cases where he is in doubt but is unopposed by an interested person resulting in the absence of a justiciable controversy. Comment: "Executors' and Trustees' Bill For Instructions," 44 Yale L.J. 1433, 1437 (1935).

not relate to some certain and immediate problem facing either a beneficiary or a fiduciary of an estate.") Also see, Fiduciary Trust Co. v. Brown, 152 Me. 360, 131 A.2d 191 (1957); Gannett v. Old Colony Trust Co., 155 Me. 248, 153 A.2d 122 (1959); and First Portland Nat'l Bank v. Rodrique, 157 Me. 277, 172 A.2d 107 (1961). Still a third requirement is that the petition presents a question as to which there is reasonable doubt. See Haseltine v. Shepherd, supra; In Re Estate of Cassidy, Me., 313 Me. 435 (1973); Rogers v. Walton, 141 Me. 91, 39 A.2d 409 (1944).

These restrictions usually have been regarded as expressions of "judicial policy," see Gannett v. Old Colony Trust Co., supra, 155 Me. at 251, 153 A.2d at 123, rather than jurisdiction. Also it has been said that the court's equity jurisdiction should be "liberally interpreted" so as "not [to] be too rigid in limiting [its] authority" to entertain petitions. Rogers v. Walton, supra, 141 Me. at 95-96, 39 A.2d at 411 (1946). Also see, Baldwin v. Bean, 59 Me. 481, 482 (1871) ("[I]n all cases of doubt, the parties should be allowed to have the opinion of the court, whether any actual controversies have arisen or not."); and Haseltine v. Shepherd, supra; and First Portland Nat'l Bank v. Rodrique, supra.

Recently, however, the Law Court has explained that the same standards of justicability required for declaratory judgements apply as well to traditional petitions for instructions under the equity jurisdiction statute.

This view was first expressed in Desmond v. Persina, supra, 381 A.2d at 638 (1978) where the court ruled that a petition for instructions must demonstrate the existence of a justiciable controversy (which is absent if the petitioner does not have standing) whether brought under the Declaratory Judgements Act or the equity jurisdictions statute. The subject was addressed again a few months later in Ziehl v. Maine National Bank, Me., 383 A.2 1364 (1978). In this case the court attempted to bring about "a clarification of the Maine law" as to when the courts will issue instructions on issues which are contingent on future events. "[T]he principle which really" governed prior decisions on this subject under the equity jurisdiction statute, the court explained, is one "deriving both from the constitutional conception of the nature of judicial power and policy considerations. . ." -- namely the courts will refrain from taking jurisdiction over the petition if the result will be an "advisory opinion rather than [a] decision of an active case or controversy." Id. at 1367.

At this juncture, then, it appears that the Maine courts require the existence of a judiciable case or controversy whether instructions are sought under the Declaratory Judgements Act or the equity jurisdiction statute. With this background, we proceed to address two aspects of the proposed petition which may be

troublesome in terms of justiciability.

(3) Requirement for Adverse Parties

(a) Generally

As indicated above, the existence of adverse parties is necessary for a justiciable controversy. "The plaintiff must set forth a claim of right or obligation . . . and assert it against a defendant having an adverse interest in contesting it." Allstate Ins. Co. v. Lyons, supra, 400 A.2d at 351. [Emphasis added] Also see, Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) and Golden v. Zwickler, 394 U.S. 103, 108 (1969). As further explained in 13 C. Wright & A. Miller, Federal Practice and Procedure, §3530 at 164 - 165:

> All models of cases and controversies assume the presence of at least two genuinely adversary parties. Adversariness is desired both to establish the need for any adjudication, and to provide the foundation for sound adjudication. Judicial power is not exercised to offer advice to a single party . . . . Nor is judicial power exercised when courts doubt the existence of sufficient adversary interest to stimulate the parties to a full presentation of the facts and arguments, which in our adversary system is available only from the parties. [Emphasis added]

To our knowledge the only occasion on which a court has directly addressed the requirement for adverse parties in the context of a petition for instructions has been the Louisiana Supreme Court's decision in In Re Gulf Oxygen Welder's Supply Profit Sharing Plan and Trust Agreement, La, 297 So.2d 663 (1974). This case analyzed the constitutionality of a Louisiana statute

authorizing a trustee to petition for instructions on an ex parte basis. By statute the court's instructions issued on an ex parte petition would protect third parties relying on them, but would not exonerate the trustee from liability to a settlor or beneficiary, either or both of which would in most cases be joined as necessary parties. A divided court upheld the constitutionality of the statute on the grounds that the requirement for justiciability as applied to declaratory judgments is based on statute and that nothing in the constitution of Louisiana prohibits the type of proceeding authorized. The dissenting opinion argued that judiciability is a matter of jurisdiction, without which the judiciary cannot act and the presence of which is required by the Louisiana constitution.

Based on the Maine cases reviewed above, and especially those which refer to the constitutional underpinnings for the requirement of justiciability, it appears that the dissent in the Louisiana case more nearly reflects Maine law than the majority view. Moreover, Maine, unlike Louisiana, has no statute authorizing ex parte petitions for instruction.

Because of the nature of the issues and the circumstances under which they have arisen, the proposed petition does not name any adverse parties.* The extent to which this is likely to affect the willingness of the courts to consider the proposed

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* For reasons to be explained below, the proposed petition does name the Governor and legislative leadership as parties in their capacities as representatives of the "State of Maine," the principal trustee of the Park. Even if these parties are "necessary," which is far from clear, they certainly are not "adverse" to the Authority which is itself acting as the agent of the State of Maine for purposes of administering the trust.

petition differs as between the narrow issue of snowmobile usage, on the one hand, and the broader issue of the Authority's discretion to regulate motor vehicles generally, on the other. Accordingly both set of issues will be addressed separately.

(b) The narrow issue of snowmobile usage

A brief review of the snowmobile issue makes it clear that the absence of a named adverse party in the petition in relation to this issue is not because the petition is inherently non-justiciable.

Ever since snowmobiles have become popular, their use in the Park has been the subject of intense controversy. Under pressure from both sides of the issue, the initial regulation of the Authority in 1968 limited the operation of snowmobiles to the so-called perimeter road, some of the connecting road segments, logging roads, and some trails. The regulation was "undoubtedly the single most controversial issue in the history of the park up to that point."*/ Public concern about such extensive access by snowmobiles and whether such use was consistent with the Park's trust documents soon led to an amendment of the regulations restricting snowmobiles only to the perimeter roads in 1970.**/ Even this restriction was protested by those opposed

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*/ J. Hakola's unpublished "History of Baxter State Park" at 441 (1979)

**/ See letter of Austin H. Wilkins, Forest Commissioner and Chairman of the Authority to Senator Edmund S. Muskie, dated January 15, 1970. "The outcry and criticism mounted while snowmobile clubs and owners defended the policy." J. Hakola, supra, at 442.

to all snowmobile use in the Park. Between 1970 and 1975 there were more changes in the regulations, generally permitting use of a few of the connecting ridge roads in addition to the perimeter roads. Then in 1976 the Authority banned all uses of snowmobiles in the Park, with minor exceptions, as a result of an opinion of the Attorney General's Office, dated May 20, 1976, concludi that their use was inconsistent with the Park's trust documents as interpreted in light of Governor Baxter's perceived intent. This decision was, in turn, immensely unpopular and contested by individuals and groups desiring to use snowmobiles in the Park.

Continued opposition by snowmobiles led to a presentation by the Maine Snowmobile Association at the September 1979 meeting of the Authority urging the Authority to revise its restrictions to permit snowmobiles on the perimeter roads. When the Authority decided on November 2, 1979 to consider a petition to the courts for trustee instructions, the Natural Resources Council of Maine formally expressed its strong opposition to the use of snowmobiles in the Park. In addition the Authority has recently received a number of letters since its November 2, 1979 meeting from those both opposed and supporting a change in the Park regulations.

This summary of the history of this issue confirms the statement of the Attorney General at the Authority's November 2, 1979 meeting that the snowmobile issue will be a continuing source of debate and uncertainty for the Authority until

judicially resolved. While in most circumstances, the weight of an opinion from the Attorney General's Office would resolve legal issues confronting the Authority, here such is not the case both because of the intensity of the views of opposing parties and because of the complexity of the issues. In short, it is clear that for all practical purposes the issue is justiciable in the sense that there is a continuing active and immediate dispute between parties with adverse interests.

Accordingly the absence of a formal adversary when the petition is initially filed should not constitute a bar to adjudication. The only reason why there is no named adverse party is that it is the Authority which is initiating the litigation to resolve the dispute (which is of course entirely appropriate in the case of a petition for trustee instructions) rather than a member of the public affected by the Authority's regulations. Surely there would be no objection on grounds of justiciability if the Maine Snowmobile Association sued the Authority instead of petitioning it for reconsideration of its regulations.*/ A petition filed by the Authority followed by intervention of interested parties brings about the same result, the only difference being the initial alignment of the parties.

Indeed, on the few occasions when the courts have addressed this issue they have held that the intervention of adverse parties may impart justiciability to a lawsuit that might otherwise lack it. See, Associated General Contractors of America v. Laborers Int'l Union of No. America, 476 F.2d 1388, 1403 (E.C.A. 1973)

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*/ In fact on January 17, 1980 the attorney for the Maine Snowmobile Association, Jon R. Doyle, informed the Attorney General that the Association would be "prepared to raise the question on its own, should the Authority decline to pursue the matter" in court.

and Adams v. Morton, 581 F.2d 1314, 1319 (9th Cir. 1978). Thus, on the assumption that parties with adverse interests as to the resolution of the issue join the litigation as intervenors after the petition is filed, the petition should not be dismissed because of the initial absence of an adverse party.

(c) The broader issue of regulation of all motor vehicles in the Park

There are a number of broader or related issues that also could be addressed in the petition concerning the Authority's discretion to regulate all motor vehicles in the Park

The Authority could petition for instructions concerning the Authority's discretion to regulate the use of motorcycles, trail bikes and similar all-terrain vehicles.*/ The petition could also request instructions on the Authority's ban of large trailers, such as Winnebagos, as opposed to tent trailers, vans and pick-up truck trailers.**/ There is also a question about the public use of logging roads in the section of the Park set aside for Scientific

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*/ Motorcycles have been prohibited in the Park by regulation since 1970. Legislation was proposed in 1975 to allow their use in the Park, resulting in an opinion from the Attorney General's office on April 22, 1975 concluding that their use would not be in keeping with the terms of the Park trust instruments.

**/ Large trailers have been banned since 1970, on the rationale that they cannot be safely used on the narrow Park roads and because their use would be inconsistent with the Park's trust instruments.

Forestry.*/

Other questions arise out of planning discussions of the Authority concerning the long range use of the roads in the Park such as whether the roads must be maintained as they presently exist and whether it may be desirable to close the roads altogeth and provide for alternative means of public access into the Park. No concrete proposals now exist in this connection.

As in the case of the snowmobile question, a petition for instructions on any one of the "broader" issues could be challenged on grounds of justiciability because of the absence of an adverse party. In this case, there is a substantial likelihood that the challenge would be successful.

In terms of justiciability, the broader issues are fundamentally different than the snowmobile question. The Authorit has not been pressed, at least in any formal way, to reconsider its ban on motorcycles and large size trailers. There is no reason to anticipate that the validity of these regulations, which have been continuously in effect for the last decade, will be raised every time there is a change in the membership of the Authority. Nor is there any reason to anticipate that a decision by the Authority to restrict the public from use of newly constructed roads in the Scientific Forestry area will be challenged

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*/ In the past the public was not excluded from these roads, but they were not maintained and eventually became unsuitable for public use. The Authority is planning on constructing new logging roads in the near future and plans to ban their use to the public.

or be troublesome to the Authority, and it is too early to determine what opposition may arise in connection with long range planning for the roads in the future. Presumably there are individuals of the public who have differing views on all of these issues, but it presently appears unlikely that interested parties representing all sides would seek to join in the petition process allowing the court to formulate instructions on the broader issues as a result of records built and arguments presented in a genuinely adversary context.

In summary, the broader issues appear to lack the requisite degree of adversariness necessary for a justiciable case or controversy, not for technical reasons arising out of the manner in which the petition process was initiated, but for the more basic reason that there does not seem to be an actual dispute of sufficient immediacy and reality to justify intervention by interested parties.

An attempt could be made to satisfy the requirement of adversariness for the broader issues by requesting the court to appoint a guardian ad litem to represent the public beneficiaries of the trust.*/ The Attorney General normally serves this function as the one designated by statute with the responsibility for preventing a trustee of a charitable trust from breaching the terms of his trust. See, 5 M.R.S.A. §194; IV Scott on Trusts, (3d ed. 19 §394 at 3019. In this case, however, the Attorney General is "disabled from fulfilling his statutory duty" because he is a member of the Authority and also acts as its counsel.

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*/ See, Field, McKusick & Wroth, Maine Civil Practice, §17.6 at 357 explaining that the court's power to appoint a guardian under M.R.C.P. 17(b) "may be used when, in the court's judgment, adversary representation is necessary for full presentation of the issues."

Fitzgerald v. Baxter State Park Authority, supra, 385 A.2d at 195. Even if a court, under these circumstances, could be persuaded to appoint a guardian ad litem as a substitute for the Attorney General, it is by no means clear that the nominal presence of an adverse party would satisfy requirements of justiciability where, for all practical purposes, the need for a guardian arises from the absence of a real and substantial controversy.

(4) The Requirement of Ripeness

As pointed out previously, the courts will not entertain disputes of a hypothetical, abstract or remote character lacking sufficient immediacy and reality to warrant judicial relief. See, e.g., Maine Turnpike Authority v. Brennan, Me., 342 A.2d 719, 723 (1975); Berry v. Daigle, Me., 322 A.2d 320, 325 (1974); Aetna Life Ins. Co. v. Haworth, supra; Golden v. Zwickler, supra.

Cases involving contingent future events, not requiring adjudication to resolve immediate problems, are particularly susceptible to dismissal on these grounds. This was true for petitions for instructions even prior to the time when such petitions were analyzed for justiciability. Thus, for example, it was said in Huston v. Dodge, supra, 111 Me. at 248, 88A. at 889 that:

> [W]e do not think it wise, nor within the intent of the statute, to assume jurisdiction to advise trustees, and to construe wills for their guidance until the time comes when they need instructions. The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until

> the anticipated contingency arises, or at least until it is about to arise,*** until it is imminent. *** Then the parties interested in the issue can be heard under the circumstances as they may exist at that time. [Emphasis added]

Also see, Moore v. Emery, supra; and First Portland Nat'l Bank v. Rodrique, supra.

Applying these standards to the proposed petition, it would appear that those broader issues involving future planning may be too remote and contingent to justify present adjudication. This is particularly true in the case of question of the Authority's discretion to change the nature of existing roads or eliminate their present use altogether. These issues probably should not be the subject of litigation until a concrete proposal is under consideration susceptible to resolution in an adversary co

(5) Recommendation to Confine Petition to Narrow Issue of Snowmobile Usage

We are not in a position to conclude as a matter of law that all issues other than the snowmobile question lack the requisite degree of justiciability to be entertained by the courts. In many respects, the questions of justiciability as applied to the issues addressed here would be novel for the courts. In addition to the device of requesting the Court to appoint a guardian ad litem to supply an otherwise lacking adverse party, it could be argued, with some support from the older cases, that present day standards of justiciability as developed in the context of declaratory judgment cases should not be rigorously applied to a traditional petition for instructions under the equity jurisdiction statute, especially when the court is asked to construe a charitable trust.

Nevertheless it is recommended that the petition request instructions only on the question of snowmobile usage. This issue, as explained above, should survive scrutiny as to its justiciability standing alone. If lumped together with other issues which, in varying degrees, may well lack justiciability, there is a danger that a court may be disposed to dismissing the entire case, without adequately distinguishing the issues. Moreover, as will appear in subsequent discussions in this memorandum, the resolution of the issues presented by the snowmobile question will inevitably serve as guidance, if not a complete answer, to questions posed by the broader issues. Finally, quite apart from whether the petition would satisfy judicially imposed standards of justiciability, the Authority may wish, as a matter of policy, to confine the scope of the proposed litigation to issues which are immediate, actively disputed, and as to which parties with differing views will participate by joining the suit as intervenors.

E. Joinder of Necessary Parties

Related to justiciability is the requirement that "all persons whose rights and interests are involved should be made parties [to a request for judicial construction of a will or trust] so that they or their representatives may see to the due protection of their respective rights and interests." Desmond v. Persina, supra, 381 A.2d at 639; Hitch v. Hitch, Me., 261 A.2d 858, 860 (1970); In Re Estate of Cassidy, supra.

For reasons already discussed in this case the Attorney General is disabled from fulfilling his statutory duty to represent the beneficiaries of a charitable trust. It is possible under these circumstances that the court might require the appointment of a guardian ad litem as a substitute 'necessary party' to represent the public.*/ Yet to do so would seem to be unnecessary if individuals and organizations with adverse interest in the petition join the suit as intervenors. If a guardian is nevertheless required by a court, the Authority could request appointment after the petition is filed.

The draft petition is accompanied by a draft motion for a court order to approve service by publication of a notice of the petition on all people of the State of Maine, who are the beneficiaries of the Park trusts. See M.R.C.P. Rule 4(d)(1). Like the appointment of a guardian, such notice is probably unnecessary as a technical matter. The advantage in giving published notice of the petition, of course, is to encourage participation in the proceedings by all those who have an interest in the matter.

The petition also names the Governor and legislative leadership as parties on the theory that they represent the principal trustee of the Trust (the State of Maine) more directly than the Authority which is the designated agent of the State for purposes of administering the Park. It was the Legislature and various Governors which accepted the various conveyances of land comprising the Park on behalf of the State of Maine. To say that it is advisable to

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* See n. at p. 17.

join the Governor and the legislative leadership, however, is once again not to say they are necessary parties. Obviously they are not because neither was joined or their absence even mentioned in the two previous cases involving the Park. State v. Fin & Feather Clubs, Me., 316 A.2d 351 (1974) and Fitzgerald v. Baxter State Park, supra.

F. Other Formal Requirements

Neither the equity jurisdiction statute nor the Declaratory Judgements Act specify the form for a petition for instructions. However, the courts have required that it contain a sufficient statement of facts, Moore v. Emery, supra, and set forth the requested instructions with specificity, Bartlett v. Pickering, 113 Me. 96, 92 A. 1008 (1915) and the practice has been to attach the trust instrument about which doubt is expressed, Fiduciary Trust Co. v. Brown, supra. See generally, Comment: "Executors' and Trustees' Bill for Instructions," 44 Yale L.J. 1433 (1935) and 96 C.J.S., Wills, § 1078d.

G. The Role of the Authority in the Proceedings

Although not a procedural requirement, it is appropriate to examine the role of the Authority in the course of the proceedings in relation to the substantive issues raised. Assuming that interested individuals or organizations join the proceedings representing various points of view, should or must the Authority adopt a position of neutrality?

Maine recognizes the rule that when a trust is created for more than a single beneficiary, the trustee represents all

beneficiaries and thus his duty is to deal impartially with them, not taking sides in an adjudication between them. In Re Estate of Morine, Me., 363 A.2d 700, 704 (1976) and Desmond v. Persina, supra, 381 A.2d at 638. Also see, Restatement of the Law of Trusts Second, § 183; II Scott on Trusts (3d ed. 1967), § 183 at 1471; In Re Estate of John C. Ferrall, 33 Cal.2d 202, 200 P.2d 1, 2-3 (1948) (as between conflicting claims of beneficiaries, the trustee may only act as a "stakeholder"); and Cudahy v. First Wisconsin Trust Co., 26 Wisc.2d 153, 131 NW 2d 882, 884 (1965):

> In a dispute between two beneficiaries concerning a construction of the terms of a trust, a trustee is under no duty to take sides. It performs its duty as trustee in seeking a construction of the documents relating to the trust so that it may carry out its terms. If such matter is not fully presented to the court by the interested parties, it may be proper or even the right of the trustee to present its views to the court.

But the situation is entirely different when the adjudication is not merely a contest between beneficiaries but affects the totality of the trust. As pointed out by Justice Traynor, in In Re Ferrall's Estate, supra, 200 P.2d at 3 relied upon by the Law Court in In Re Estate of Morine, supra, a trustee cannot be required to remain neutral under these circumstances because otherwise all beneficiaries could consent to "completely disregard the provisions of the trust, even though there is no justification for a deviation from its terms." In Re Ferrall's Estate, supra, 200 P.2d at 3. Where, as here, there is a request for a construction of the trust affecting all beneficiaries, the Authority, as trustee, occupies a special position as the legal representative of the Park, giving rise to a responsibility to seeing that the Trust is

properly construed. See Brown v. Peters, 39 Ill. App. 3d. 962, 350 NE 2d 565 (1976).

Accordingly it cannot be said here that the Authority is required to act as a neutral bystander in the development of the factual record and briefing of the issues presented to the court. That is not to say that the Authority should act as an advocate in the ordinary sense. It is entirely possible for the Authority to fulfill its affirmative responsibilities as representative of all the beneficiaries of the Park Trust by actively participating in the proceedings with the view towards presenting all reasonable views on the issue to the court together with the Authority's own views on the issues.

II. Substantive Issues

If the Authority adopts the recommendation contained in this memorandum (pp. 19-20, supra) to limit the request for instructions to the snowmobile issue, there is really only one substantive issue that will be addressed in the petition: to what extent does the Authority have discretion to regulate snowmobiles in the Park? To restate the issue, does the Authority have discretion under the Park Trust to allow limited and regulated use of snowmobiles in the Park, or does the Trust require the prohibition presently contained in Park Rule No. 19?

The purpose of this memorandum is not to resolve this issue. That is for the court to do. Instead, the remaining discussion will attempt to outline the framework for analyzing the issue, beginning with a general statement of principles of trust interpretation.

A. General Principles of Trust Interpretation

There are a number of principles of trust interpretation which will guide a court in resolving the issue presented in the petition for instructions. For the most part it is believed that these principles will not be subject to serious disagreement.

First of all, in construing a trust, "the cardinal rule is to give effect to the intention of the [settlor] gathered from the language of the [instrument . . . ." Maine National Bank v. Petrlik, supra, 283 A.2d at 664 (1971) (interpretation of a will); Mooney v. Northeast National Bank & Trust Co., 377 A.2d 120, 122 (1977) (interpretation of a trust), cases cited therein; and Bar Harbor Banking and Trust Co. v. Preachers' Aid Society, Me., 244 A.2d 558 (1968) (trust). Indeed the statute creating the Authority specifically adopts this rule of construction by creating a mandate that the Authority "subordinate its own wishes to the intent of Governor Baxter" in administering its duties as trustee of the Park. 12 M.R.S.A. §900.

Second, the settlor's intent must be determined "first by analyzing the entire instrument", Mooney v. Northeast Bank & Trust Co., supra, 377 A.2d at 122; Iozapavichus v. Fournier, Me. 308 A.2d 573, 574 (1973); New England Trust Co. v. Sanger, 151 Me. 295, 118 A.2d 760 (1955); II Scott, Law of Trusts, § 164.1 at 1257.

Third, if an ambiguity exists in the terms of the trust, the courts will look to evidence extrinsic to the trust to resolve such ambiguities. Canal National Bank v. Noyes, Me., 348 A.2d 232, 234 (1975); Mooney v. Northeast Bank & Trust Co., supra, 377 A.2d at 122; Maine National Bank v. Petrlik, supra, 283 A.2d at 664; II Scott, Law of Trusts, § 164.1 at 1258 ("Where the instrument contains no express provision or where a provision is ambiguous or uncertain in its meaning, resort

may be had to extrinsic evidence to determine the terms of the trust."). The Law Court has applied this principle to the Park Trust in Fitzgerald v. Baxter State Park, supra, 385 A.2d at 199;

> Given the ambiguity that plainly exists in the language of the trust deeds, due to the inherent tension among the several Park purposes, the Superior Court correctly sought help from a document extrinsic to the trust instruments.

Fourth, such extrinsic evidence is designed to elicit the intent of the settlor of the trust at the time the trust was created. Mooney v. Northeast Bank & Trust Co., supra, 377 A.2d 122; Canal National Bank v. Noyes, supra, 348 A.2d at 234; National Newark & Essex Bank v. Hart, Me., 309 A.2d 512, 518 (1973); II Scott, Law of Trusts, §164.1 at 1260. The rationale for this rule is that once a trust is created it may not be subsequently modified unless the settlor has reserved the right to do so, as is the case of revokable trusts. IV Scott, Law of Trusts § 367.2 at 2844. Accordingly, directions given by the settlor subsequent to the creation of the trust or other expressions of intent following the creation of the trust are not admissible to vary the terms of the trust. II Scott, Law of Trusts § 164.1 at 1260. That is not to say that subsequent expressions of intent or other acts or deeds following the creation of the trust are always inadmissible. They may be admissible to illuminate the settlor's intention at the time the ambiguous instrument was created. Canal National Bank v. Noyes, supra, 348 A.2d at 234; II Scott, Law of Trusts §164.1 at 1260 - 61.

This last principle of interpretation was at issue in the Fitzgerald case where the court was asked to interpret the Authority's power under the Park Trust to implement a plan to remove dead or dying trees damaged by an extensive "blowdown" in the Park. The area of the Park affected by the blowdown was conveyed by Governor Baxter by deeds of trust accepted by the Legislature between 1939 and 1949. The Authority argued that the blowdown plan was permitted by the Park Trust when read together with the 1955 Act of the Maine Legislature in which the State formally acknowledged Governor Baxter's interpretation of prior deeds to permit cleanups of blowdowns. P.&S.L. of 1955, ch. 2 (the "1955 Interpretation Act").

The Authority argued the 1955 Interpretation Act justified its actions on two theories:

- the interpretation Act, enacted after the conveyances of the land in question constituted an integral part of an evolving trust pursuant to which Governor Baxter implicitly reserved the power to modify and expand the Trust. Brief of Baxter State Park Authority at 24-33.

- alternatively, the Authority argued that the 1955 Interpretation Act was controlling as "extrinsic evidence" resolving ambiguities in the restrictions of the Trust as previously created. Id. at 34-41.

The Fitzgerald decision appeared to reject the "evolving trust theory" by holding that when the 1955 Interpretation Act was enacted, the Legislature was "interpreting the prior deeds of trust . . . not modifying them." 385 A.2d at 199 [Emphasis original]. The Court did not explicitly pin its ruling on the traditional view that the 1955 Interpretation Act constituted extrinsic evidence reflecting Baxter's original intent. However, it did point out that Governor Baxter later made gifts containing the same terms as the earlier deeds "interpreted" by the 1955 Act. To apply the 1955 Interpretation Act only to the later trusts, using identical restrictions as the earlier deeds, would be "anomalous" the Court ruled. It held that the same restrictions to mean the same thing whether used in the pre-1955 or the post-1955 deeds, further commenting that:

> In view of the ambiguity arising from the inconsistent phrases in the deeds of trust, we must seek help outside the deeds, and no better help can be found than Governor Baxter's own formal interpretation at a time when he was still actively implementing his vision for Baxter State Park. Id.

This decision certainly may be read as affirming the traditional rule of construction admitting extrinsic evidence arising subsequent to the creation of a trust to reflect the settlor's original intention. However, it also may be read, especially in light of the significance attribued by the Court to Governor Baxter's views while he was "still actively implementing his vision," to adopt, at least in part, the evolving trust theory.

B. Identifying the Trust

The next step in the analysis is to identify the Trust.

As explained in the Fitzgerald decision, Governor Baxter deeded a total of 201,018 acres of land, in Penobscot and Piscataquis Counties to the State of Maine over a period of 31 years. 385 A.2d at 191.*/ From 1931 until 1962 there were over 30 conveyances, the first consisting of the higher areas of Mt. Katahdin and the slopes of all four sides of the mountain. Id. In accordance with Governor Baxter's desire to solemnize the grand design he envisioned and the terms of the trust pursuant to which the gifts were made, each deed of trust was transmitted to the incumbent governor who then formally submitted it to the Legislature for acceptance by Private and Special Acts. Id. at 192.**/ In addition, Baxter's transmittal letters were published in the Laws of Maine.

One of many statements explaining Governor Baxter's plan and his method of conveyance is contained in his 1955 communication to the Governor and the Legislature:

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*/ Governor Baxter also made a gift of approximately $1.5 million in 1961 and 1965 for the care, protection and maintenance of the Park. P.&S.L.'s 1961, c. 21 and 1965, c. 30. Additional funds were provided for this purpose and to purchase additional land for the Park by an inter vivos trust. See clause THIRD of the Baxter Inter Vivos Trust dated July 6, 1927, as amended from time to time.

**/ See P.&S.L.'s 1931, c. 23; 1933, c. 3; 1939, c.1, c.122; 1941, c.1, c. 95; 1943, c. 1, c.91; 1945, c. 1; 1947, c. 1; 1949, c. 1, c.2; 1955, c.1, c.3, c.4, c. 61, c. 171; 1963, c. 1. Id. at Note 6.

> In 1917 I first proposed that the State make a beginning in creating a Park at Katahdin. From that date until now I have worked diligently and patiently upon this project. . . . [T]his park will give the people of succeeding generations a living example of what the State of Maine was "in the good old days" before the song of the woodman's axe and the whine of the power saw was heard in the land. . . . I know the conscience and the Soul of Maine. The word of this state as given in Acts passed by its Legislatures and signed by its Govenors is as sacred a pledge and trust as Man can make.

1955 Laws, p. 1144, Id. at N. 7. */

In each case, Governor Baxter conveyed lands in the State of Maine in trust for the benefit of the people of Maine. Id. The conditions of the trusts, as typically stated in the majority of the deeds, were that the land -

> forever shall be kept . . . as a state forest and public park and for public recreational purposes;
>
> [and]
>
> - forever shall be kept in their natural wild state and as a sanctuary for wild beasts and birds.

See, e.g., P.&S.L. 1945, c. 1; Id. [emphasis added] **/

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*/ Also see communication of Governor Baxter dated January 12, 1942 addressed to Honorable Sumner Sewall, Governor, and the Legislature. Laws of Maine 1941-42:

> In this manner a long list of precedents is being established; precedents which, as time passes will show that eight or ten different Governors and as many Legislatures, by laws duly passed and signed by these Governors, have entered into solemn pacts that create a succession of irrevocable trusts.

**/ Approximately 28,000 acres of the Park were devoted to the practice of scientific forestry and not covered by these restrictions. See, P.&S.L. 1955, c. 31, c. 171

C. Existence of an Ambiguity

The issue to be presented in the petition for instructions accordingly can be narrowed to whether (or the extent to which) the principal trust restrictions just quoted permit the use of snowmobiles in the Park.

Many of the deeds of trust specifically prohibit firearms, hunting, trapping and the landing of aircraft.*/ But none refer to snowmobiles, not surprisingly at least for deeds conveyed before snowmobiles became a popular form of recreation.

It would be reasonable to seek guidance to Governor Baxter's intent with regard to snowmobiles by examining how the trust instruments treat the related question of access in the Park through roads. Yet here too the Trust provides no clear answers. Some of the early deeds in fact prohibited the construction of additional roads in the Park.**/ In 1949 the earlier restrictions were removed by "amending" the prior deeds to allow, in the discretion of the State as trustee, the construction and maintenance of roads to permit access "for the proper use and enjoyment of those . . . who visit the Park" but subject to the requirement that:

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*/ See deeds referred to in Note -, supra, except P. & S.L. of 1955, c. 1; 1955, c. 3, as modified by 1955, c. 4 and 1963, c. 1.

**/ See P.&S.L. 1931, c. 23; 1933, c. 3, 1945, c.1, 1947 c. 1.

> said roads and ways be constructed and maintained in the manner not to interfere with the natural wild state now existing
> . . . .

P.&S.L. 1949, c. 2.

This analysis leads one to ask whether the use of roads for snowmobiles as access for "enjoyment" of the Park "interferes" with its "natural wild state." This question is probably no more focused than that based on the principle trust restrictions themselves - viz., whether the use of snowmobiles as access to the "public park" and for "public recreational purposes" is consistent with the requirements that the Park remain in its "natural wild state" and as a sanctuary for wild beasts and birds."

Here, as in the Fitzgerald case,"[W]e are hard put to say that there is one obvious and exclusive meaning for the combination of the phrases [Governor Baxter] used." 385 A.2d at 198. In short,"[W]ith only the language of the deeds of trust as our guide" (385 A.2d at 198), there is an obvious ambiguity as to the permissible use of snowmobiles in the Park.

D. Resolving the Ambiguity

The first step in determining how to apply the principal trust restrictions to the use of snowmobiles has already been taken in the Fitzgerald case. That case, although involving the Authority's power to conduct cleanup activities for a blowdown, looked to the same trust restrictions at issue here, and after

finding an ambiguity, determined it was appropriate to seek help from "extrinsic evidence" in the form of the 1955 Interpretation Act. 385 A.2d at 197-99. This legislation originated from a formal instrument of Govenor Baxter purporting to interpret the principal trust restrictions in prior deeds. 385 A.2d at 198. Among other things, the 1955 Interpretation Act sets priorities between the recreational purposes of the Park and the requirement that it should remain "forever wild." Governor Baxter stated that the:

> area is to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be 'forever Wild.'

P.&S.L. 1955, c. 2 [emphasis added].

Even this additional evidence of Governor Baxter's intent, however, clearly does not resolve the question of whether the use of snowmobiles for recreational purposes or simply for access to the Park for all of its purposes is inconsistent with the principal objective of preserving the Park in its "forever wild" state. What direction one goes next to complete the analysis is one of the more important issues to be presented in the petition for instructions. Two approaches are suggested below.

1. The Traditional Approach

The conventional approach to resolving the outstanding ambiguities would be to search for additional extrinsic evidence

of Governor Baxter's intent in accordance with the principles of trust interpretation discussed above.

The case law supporting this approach does not appear to set any particular limits on the type of extrinsic evidence that would be admissible to prove Governor Baxter's intent. Presumably the Court would be guided by the Rules of Evidence, which provide that generally all "relevant" evidence is admissible except as otherwise provided (e.g. by the hearsay rule). Rule 402. Thus, subject to evidentiary objections, "Any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" would be admissible. Rule 401.

In addition to the trust instruments and the 1955 Interpretation Act, other written communications of Governor Baxter would be offered in the proceedings. These would include, but not be limited to, the formal communications to the State accompanying the gifts. Letters written to Park officials, other state officials in connection with Park business, to friends and relatives would be offered. Presumably the Court would also take testimony from those who knew Governor Baxter about what he said or thought about snowmobiles. Admissible evidence would also include conditions existing at the time of the creation of the Park Trust, such as the state of the art of the snowmobile machine. Finally the Court would probably admit evidence of various practices in the operation of the Park with regard to snowmobiles during Governor Baxter's lifetime as indications of

his intent.

Even in the absence of case law on the subject, the Court probably would tend to give greater weight to some forms of evidence, such as formal communications, over others such as testimony about what Governor Baxter said to friends and relatives. Still the traditional approach is prone to ending up as a "swearing match" as to Governor Baxter's intent.

Another drawback to the traditional approach, as applied to the circumstances of the snowmobile issue, is the absence of a clear focus on the point of time in the evolution of the Park as to which Governor Baxter's intent governs. As in the case of roads, Governor Baxter may have intended to prohibit snowmobiles altogether in the beginning stages of the Parks development, but may have later changed his mind. If such a hypothetical example were proved to be factual from various forms of evidence, which "intent" would govern the interpretation of the Park trust? The general rules explained above (pp. 27-29, supra), is that the settlor's intent at the time of the creation of the trust governs. However, the Fitzgerald case suggests that Governor's intent while he was "still actively implementing his vision" is material, without specifically stating that such intent must reflect his original intent.

Still a third difficulty with the traditional approach is that its adoption for the snowmobile issue would, by judicial sanction, establish an impractical model for future resolutions of uncertainties and interpretations of the Trust. Obviously the Authority cannot bring a petition

for instructions every time uncertainty arises as to how to interpret the trust with regard to particular circumstances not specifically addressed in the trust instruments. Nor is it practical for the Authority to resolve such disputes on its own by conducting an equivalent proceeding or analysis attempting to "divine" Governor Baxter's intent.

2. A Modified Approach

The deficiencies in the conventional approach lead to the possibility of a modified analysis, one in fact suggested in several different ways by the Fitzgerald decision itself.

In the Fitzgerald decision the Court recognized that the 1955 Interpretation Act did not resolve all ambiguities about the Authority's plan to clean up the blowdown. To the contrary, the Court declared that the Interpretation Act "generates its own ambiguities, only slightly more focused than those of the deeds." 385 A.2d at 200. [emphasis original]. Rather than look for further extrinsic evidence as to Governor Baxter's intent, the Superior Court took testimony from those trained or expert in the field of forest management and ecology on whether the actual clean up plan met the general objectives of the Trust, as interpreted by the 1955 Act.

While not articulating any alternative analysis, the Fitzgerald decision is at least arguably consistent with a modified approach to resolving ambiguities. The approach begins with

the recognition that a long term trust inevitably will fail to provide specific answers to a wide spectrum of problems which its creator either never thought of or may have changed his mind about as circumstances varied. The Baxter Trust was intended to govern the Park "forever" and thus, like a political constitution, was necessarily cast in general terms -- terms which must be "interpreted" on a regular basis in relation to actual facts and changing conditions. The need for such interpretations under this approach are not attributable to "ambiguities" in the traditional sense that they can or should be resolved by reference to the specific intent of the settlor. Instead, the focus of the modified approach is on whether the trustees have acted in the fashion that exceeds the limits of the discretion granted by the trust instruments.

The specific discussion in the Fitzgerald decision on the role of the Authority in administering the Baxter Trust and of the nature of the Trust itself provides further support for this modified approach. The Court ruled that "there can be no doubt" that the Baxter Trust is a "charitable trust" (385 A.2d at 194), but that it is also "more than just a charitable trust." 385 A.2d at 195. Referring to the fact that the Authority was created by statute, the Court pointed out that any action by the Authority constitutes "governmental action" as well as action by a trustee of a charitable trust. Id. The Court proceeded to rule that the Authority's governmental status did not convert the Baxter

Trust into a "discretionary trust" and that the Authority was accountable to the more "stringent standard" of a trustee function 385 A.2d at 202. "At the same time," the Court said:

> [E]ven though the Baxter Trust is not a discretionary one, the expert judgment of the members of the Park Authority, created as it was in 1933, at the outset of Governor Baxter's gift program, should generally be accorded great weight in choice of methods for carrying out the donors intent. The membership in the Authority, obviously selected by Governor Baxter himself and ratified by him by subsequent gifts, consists of the state's principal officers in the professions of the law, forestry, and fish and wild life management. Both Governor Baxter and the legislature placed their confidence in the judgment and integrity of those high state officials.

385 A.2d at 202 - 203.

The uniqueness and the public nature of the Baxter Trust, even among charitable trusts, the governmental character of the Authority as its trustee, coupled with the weight to be given to Governor Baxter's intent that the Park be administered by the Authority, all recognized by the Law Court in Fitzgerald, suggest that it may be more appropriate to rely upon the judgment of the members of the Authority as to how best to carry out Governor Baxter's intent than in other cases. This suggestion is not intended to conflict with the ruling in Fitzgerald that the Trust should not be viewed as entirely "discretionary." Rather, it is to propose that in cases where the Trust instruments, together with such significant "interpretations" as the 1955 Interpretation Act, provide guidance but not all the answers to a particular

situation, it may be more meaningful to rely upon the judgment of the Authority to resolve "ambiguities" in accordance with Governo Baxter's underlying objections and less important to attempt to divine what Governor Baxter may have thought or said about the subject at any given time.

The approach suggested is really the same as that adopted by the Supreme Court of the United States in interpreting the United States Constitution. There, like here, the cardinal rule of construction is to reflect the intent of the framers of the Constitution. See, e.g., Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 453 (1934); Tom v. Sutton, 533 F.2d 1101, 1105 (9th Cir. 1976), citing Whitman v. National Bank of Oxford, 176 U.S. 559 (1900). See, generally, Antieau, "Constitutional Construction: A Guide to the Principles and Their Application," 51 Notre Dame Law 358 (1976). At the same time it has been recognized that there will be situations where the Constitution must be interpreted to subject matters with which the original framers were unfamiliar. In such cases it has been said that the framers of the Constitution intended to "se[t] up an enduring framework of government" in order to:

> carry out for the indefinite future and in all vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read [the Constitution's] words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.

United States v. Classic, 313 U.S. 299, 316 (1941). And "more importantly" according to Profession Antieau, "[E]ven when the

intent of the persons responsible for a constitutional phrase seems apparent, this is only the beginning of the constitutional construction" because otherwise to do would be to "deny that potential for growth that must be inherent in constitutions intended for later generations . . . ." 51 Notre Dame Law at 392. In his analysis, Professor Antieau refers, among other things, to the views of Justice Holmes that "[t]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions . . . ." Gompers v. United States, 233 U.S. 604, 610 (1914); Id. at 393.

This last comment has a familiar ring because in the Fitzgerald decision the Court likewise observed that the "deeds of trust do not constitute a mathematical formula which applied to the variables in this case leads inevitably to one and only one solution." 385 A.2d at 198. While this comment was used by the Court as the foundation for determining the existence of an "ambiguity" justifying consideration of "extrinsic evidence," it should be recalled that the only extrinsic evidence that the court did rely upon was the 1955 Interpretation Act.

In summary, the thrust of the modified approach suggested here is not radically different from the traditional method of resolving ambiguities in trust documents. It is a difference more of emphasis than in concept. In both cases the intent of Governor Baxter, as reflected in the trust instruments and such formalized communications as the 1955 Interpretation Act,

control the snowmobile question. The difference in emphasis lies in where you go next to interpret the Park Trust. The traditional approach is to focus more on different expressions of Governor Baxter's intent during his lifetime; the modified approach would take such expressions into account, but would place greater weight on the judgment of the Authority in applying general Trust principles to particular circumstances.

E. Conclusion

Ultimately, the substantive issues presented by the petition may be significantly affected by which approach is taken to resolve "ambiguities." Both approaches outlined above appear to have merit and there may be additional approaches that may be proposed by others.

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO._____

IN THE MATTER OF)
BAXTER STATE PARK)

PETITION FOR INSTRUCTIONS

NATURE OF THE CASE

1. This case is brought by the Baxter State Park Authority (the Authority) in order to seek instructions from the Court concerning the resolution of questions which now exist as to the extent of the Authority's discretion to regulate the use of snowmobiles in Baxter State Park.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to the provisions of Title 14 M.R.S.A. §§ 5953, 5956.2, 5956.3, 6051.10 and 6051.13.

PARTIES

3. The State of Maine is a sovereign state of the United States.

4. The State of Maine is trustee of the approximately 201,018 acres of land in Piscataquis and Penobscot Counties known as "Baxter State Park." The State of Maine has delegated its authority to administer Baxter State Park to the Authority pursuant to the provisions of Title 12 M.R.S.A. § 900, et seq.

5. The Authority consists of the Attorney General, the Direc of the Bureau of Forestry, and the Commissioner of the Department Inland Fisheries and Wildlife. It is an agency of the State of Ma with an office in Millinocket, County of Penobscot, State of Maine

6. Pursuant to Title 12 M.R.S.A. §901, the Authority has "ful power in the control and management" of the Park, subject to the limitations in the deeds of trust conveying land in Baxter State Park to the State of Maine. Pursuant to Title 12 M.R.S.A. §903, th Authority is authorized to establish rules and regulations as it deems necessary for the protection and preservation of the Park and for the proper observance of the restrictions in the deeds of trust creating the Park.

PERSONS AFFECTED BY OR INTERESTED IN THIS MATTER

7. Persons affected by the relief sought in this petition include all those people of the State of Maine, in their capacity as the beneficiaries of Baxter Park Trust, hereafter identified, who wish to use or may wish to use snowmobiles in Baxter State Park, and all those people of the State of Maine, in a like capacity, whose use and enjoyment of Baxter State Park may be adversely affected by the use of snowmobiles in Baxter State Park.

8. Other persons and bodies who may be interested in these proceedings include the Legislature of the State of Maine and the Governor of the State of Maine.

9. The Authority seeks, through a separate motion, to notify those persons and bodies of this proceeding, as more fully set out in that motion.

THE BAXTER PARK TRUST

10. Former Governor Percival Proctor Baxter deeded a total of 201,018 acres of land, located in Penobscot and Piscataquis counties and known as "Baxter State Park" to the people of the State of Maine. Between 1931 and 1962, Governor Baxter made over 30 conveyances.

11. In each case Governor Baxter transmitted to the incumbent Governor his deed of trust which was then duly submitted to the Legislature for formal acceptance by a Private and Special Act.

12. Such deeds and their acceptances are set forth in the following Private and Special Laws: 1931, ch. 23; 1933, ch. 3; 1939, ch. 1, ch. 122; 1949, ch. 1, ch. 95; 1943, ch. 1, ch. 91; 1945, ch. 1; 1947, ch. 1; 1949, ch. 1, ch. 2; 1955, ch. 1, ch. 3, ch. 61, ch. 171; 1963, ch. 1.

13. In addition Governor Baxter's letters to the successive governors transmitting said deeds were published in the Laws of Maine for the following years at the designated pages: 1931, pp. 725-26; 1933, p. 859; 1939, p. 846-47; 1941, pp. 760-61; 1943, pp. 698-708; 1945, pp. 982-90; 1947, pp. 1244-45; 1949, pp. 1368-70; 1955, pp. 143-50; 1963, p. 1473.

14. In each case Governor Baxter conveyed the lands to the State of Maine, as trustee, to hold in trust for the benefit of the people of Maine.

15. The conditions of the trust, as typically stated in a majority of the deeds, require that the land "forever shall be

kept . . . as a state forest and public park and for public recreational purposes;" and "forever shall be kept in their natural wild state and as a sanctuary for wild beasts and birds."

16. Pursuant to chapter 2 of the Private and Special Laws of 1955, the State of Maine formally joined in a declaration by Governor Baxter interpreting the terms "natural wild state" and "sanctuary for wild beasts and birds," as these terms were used in the deeds of trust. Such declaration provided in part that Baxter State Park "is to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be 'forever Wild.'"

17. The foregoing deeds of trust, as interpreted inter alia by the formal transmittal letters and the formal declaration of interpretation, constitute the Baxter Park Trust which is the subject of this petition.

THE DISPUTE

18. Many of the trust instruments specifically prohibit firearms, hunting, trapping and the landing of aircraft. The Baxter Park Trust is silent on the subject of the allowable use of snowmobiles.

19. Prior to 1968 the Authority's Rules and Regulations did not permit or restrict the use of snowmobiles in Baxter State Park.

20. In 1968 the Authority promulgated Rules and Regulations limiting the operation of snowmobiles to the so-called "perimeter road," some of the connecting road segments, logging roads, and some trails. Operation of snowmobiles on other roads or trails in Baxter Park was prohibited.

21. Such regulations were revised from time to time in subsequent years.

22. In 1976 the Authority proposed to revise its Rules and Regulations to read as follows:

> "19. SNOWMOBILES: All persons using snowmobiles are restricted to the unplowed portions of the regular road system currently maintained by the Department of Transportation for vehicular traffic in the summer including the roads into South Branch Pond and Roaring Brook, but excluding those roads into Daicey Pond and Kidney Pond. The only exceptions are the tote road into Katahdin Lake from Avalanche Field, a one-half mile section over the easterly projection of Baxter Park in Township 6, Range 8 along the west side of the East Branch of the Penobscot River in Township 6, Range 9 from the westerly end of Second Lake Grand Matagamon, the Telos cut-off road from the Telos Gatehouse to the Park perimeter road via Morse Mountain. Use of all other roads and trails is prohibited except by authorized personnel on Park business.
>
> Operators travel at their own risk and must comply with all requirements of State laws and drive safely at all times. Operation by persons under 10 years of age is prohibited."

23. Before promulgating such revised Rules and Regulations, the Authority requested an opinion from the Maine Department of the Attorney General as to their legality. On May 20, 1976 the Attorney General's Office issued an opinion concluding that the use of snowmobiles in Baxter State Park in accordance with the proposed Rules and Regulations would be inconsistent with the Baxter Park Trust.

24. Following this opinion the Authority issued a new rule providing as follows:

> 19. SNOWMOBILES: Snowmobiles are prohibited in Baxter State Park, except on Matagamon and Webster Lakes, provided however, that snowmobiles may be used (1) for administrative purposes as authorized by the Baxter State Park Authority and (2) for emergency purposes.

25. The 1976 revision to the Authority's Rule and Regulations prohibiting the use of snowmobiles in Baxter State Park has remained in effect and is presently in force.

26. The regulation of the use of snowmobiles in Baxter State Park has been and remains one of the most controversial issues in the history of the Park. The original regulation in 1968 was opposed both by those who considered the regulation to unreasonably restrict the use of snowmobiles and by those that considered the permitted use to be inconsistent with the Baxter Park Trust.

27. The 1976 revision to the Authority's Rules and Regulations generally prohibiting the use of snowmobiles was likewise subject to intense controversy, notwithstanding the legal opinion of the Attorney General's office on the subject.

28. At the September 1979 meeting of the Authority, a representative of the Maine Snowmobile Association petitioned the Authority to revise its Rules and Regulations to permit the use of snowmobiles on the perimeter roads of Baxter State Park.

29. At its November 1979 meeting, the Authority concluded that the snowmobile question would continue to trouble the members of the Authority until finally resolved. At that meeting the Authority adopted a resolution requesting the Department of the Attorney General to draft a petition to be filed in the Maine Superior Court requesting instructions on the extent of the Authority's discretion to regulate the use of snowmobiles in Baxter State Park.

THE NEED FOR INSTRUCTIONS

30. The Authority, as trustee of the Baxter Park Trust, is uncertain about the extent of its authority to regulate the use of snowmobiles in Baxter State Park in view of the restrictions contained in the Trust and is therefore uncertain of the nature of the proper discharge of its duties under the Trust.

31. Until this doubt and uncertainty is resolved there will continue to be a real, immediate and substantial dispute among the beneficiaries of the Baxter Park Trust as well as its trustees, on the subject of snowmobile usage, no matter what rule is adopted.

REQUEST FOR INSTRUCTIONS

WHEREFORE, the Authority seeks to invoke the equitable jurisdiction of this Court and asks this Court to instruct the Authority as to:

1. Whether, under the Baxter Park Trust, the Authority has discretion to allow limited and regulated use of snowmobiles in the Park for purposes in addition to use incident to the maintenance and operations of the Baxter State Park?

2. If so, whether the type of regulation as proposed in the 1976 revision to the Authority's Rules and Regulations is consistent with the Baxter Park Trust?

Respectfully submitted,

BAXTER STATE PARK AUTHORITY

By and through

RICHARD S. COHEN, Attorney General

_____

Dated:

September 11, 1980

Supplemental Memorandum of Law

To: Baxter State Park Authority

From: Department of the Attorney General

Re: Petitioning for Instructions on Snowmobile Usage in the Park

The purpose of this memorandum is to supplement the earlier draft Memorandum of Law and Petition for Instructions dated May 23, 1980 on this subject, especially in view of the public comments received on the draft memorandum and petition.

(1) Summary of Comments Received

The Authority has received a number of comments on the draft memorandum and petition. Some were directed at the desirability of allowing snowmobiles in the Park, as a general proposition. These comments were considered premature because the principal purpose of the petition is not to resolve this issue but rather the scope of the Authority's legal power to decide the issue. There were other comments directed at the procedural aspects of the petition process and these comments merit review and additional analysis.*/

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*/ The only comments received on the petition itself came from Jon Doyle, Esq., attorney for the Maine Snowmobile Association in a memorandum dated June 19, 1980. Many of the suggestions, principally of a technical nature, were incorporated in a new draft of the Petition for Instructions, which is attached hereto as Exhibit A. Newly drafted portions of the Petition are underlined for the convenience of the reader. Comment letters which are summarized in this section are attached as Exhibits B through E.

The Natural Resources Council of Maine ("NRC") suggested, in a letter dated June 24, 1980, that an alternative to the proposed petition would be for the Authority to proceed with rule-making on the snowmobile question. NRC does not necessarily advocate such action, but points out that through rule-making the Authority could exercise its expert judgment on the subject, which the Court in Fitzgerald v. Baxter State Park, Me., 385 A.2d 189, 202 (1978) said should be accorded "great weight". The corresponding disadvantage of petitioning the Court for instructions without prior rule-making, according to NRC, is that the Court may decline to give instructions as requested on the grounds that it is not in a position to do so until the Authority exercises its own independent judgment. Above all else, NRC recommends that, if the Authority proceeds with the petition, the issue be limited to the question of snowmobile usage and not the broader question of the powers of the trustees of the Park.*/

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*/ NRC's concern that the petition not focus on the procedural question of the powers of the trustees, as an abstract proposition, but rather focus on the substantive issue of snowmobile usage, appears to be a reaction to the lengthy discussion in the draft memorandum on the various approaches to resolving ambiguities in the Baxter Park Trust. The draft petition does pose the question of whether the Authority has discretion to permit some form of snowmobile usage in the Park. This question does not raise abstract procedural issues; it seeks guidance on whether the Authority is precluded, as a matter of law, from promulgating a rule allowing some form of snowmobile usage in the Park. The wording and the intent of the issue framed by the draft petition thus appears entirely consistent with that proposed by NRC -- viz, "whether the use of snowmobiles in the Park is inconsistent with the purposes of the trust."

The Appalachian Mountain Club ("AMC"), in a letter dated July 2, 1980, takes a position which is almost the opposite to that of NRC. AMC believes that the Authority should not engage in rule-making because of the 1976 opinion of the Attorney General's Office concluding that the use of snowmobiles in the Park is inconsistent with the Trust. AMC also opposes the proposed petition to the court for instructions on this issue because it believes that the petition may be dismissed and that, in any event, the Authority should rely upon the existing legal opinion until challenged by some third party. Edward Meyers, in his June 22, 1980 letter, essentially agrees with AMC.

The Maine Snowmobile Association, in a memorandum from its counsel dated June 19, 1980, comments that the Authority should indicate its intention to reconsider the snowmobile question unless the Court precludes consideration of this issue as a matter of law. It believes that such a statement by the Authority as to its intentions, which could be incorporated in the draft petition, would "assist the Court in concluding that the present controversy is a justiciable issue and should indicate that once the Court reaches a decision, the Authority will in fact act in accordance with the Court's conclusion."

(2) Supplemental Legal Analysis

All of the comments reviewed above focus in one way or another on the issue of whether the proposed petition is "ripe" for review. This issue, together with the related doctrine of "primary

jurisdiction," would thus appear to deserve further analysis than was given in the original draft memorandum.

(a) Ripeness

The draft memorandum at page 18 did point out that "the courts will not entertain disputes of a hypothetical, abstract or remote character lacking sufficient immediacy and reality to warrant judicial relief," citing various cases. However, there was little analysis of the circumstances when a controversy is not considered "ripe" and there was no discussion of this requirement in relation to the narrow issue of snowmobile usage as opposed to other issues which could have been contained in the petition.

The problem deserving more attention arises from the fact that the Authority has not exercised its independent judgment on the method of carrying out Governor Baxter's intent in relation to snowmobiles even though, as pointed out in the Fitzgerald case, the Authority's "expert judgment" on subjects of this type "should generally be accorded great weight in choice of methods for carrying out [Governor Baxter's] intent." (385 A.2d at 202) The Authority has not proposed a change in its present rule No. 19 which prohibits the non-administrative and non-emergency use of snowmobiles. Nor has it even stated that it would propose a rule change for consideration if, as a result of the petition for instructions, the Court concludes that a rule change is within the legal power of the Authority. Under these circumstances, there appears to be a substantial uncertainty as to whether the proposed petition poses a sufficiently concrete and immediate dispute to satisfy the requirements of ripeness.

The issue of ripeness was addressed in the case of Maine Turnpike Authority v. Brennan, Me., 342 A.2d 719 (1975) where the Maine Turnpike Authority sought a declaratory judgment concerning its legal power to contruct additional lanes for the Maine Turnpike. The case was brought to court following the issuance of an opinion by the Maine Attorney General's Office concluding that the Turnpike Authority was exceeding its powers by financing the building of additional lanes out of revenues obtained from tolls. The Court ruled that as a result of the Attorney General's opinion, there was a controversy which was "real and substantial," one which "admits of an immediate and definite determination of legal rights of the parties." Id. at 723. The Court reasoned that the Turnpike Authority was not required to await official enforcement action by the State before presenting the controversy for judicial resolution.

The point which distinguishes the Turnpike Authority case from the present one is that the Turnpike Authority's assertion of legal rights was much more concrete than in the case of the proposed petition on snowmobiles. The Maine Turnpike Authority not only had announced its intention of constructing additional lanes but was actually building several miles of new lanes and was continuing to build before the Attorney General's opinion was issued. The possibility of future rule-making on the question of snowmobiles, which forms the basis for the proposed petition for instructions, is much more contingent and remote.

This distinction, however, is not necessarily dispositive of the question of ripeness. See, e.g., Ziehl v. Maine National Bank,

Me., 383 A.2d 1364, 1367 (1978) ("[T]he presence of a future contingency factor does not per se impair subject-matter jurisdiction.") Nevertheless, "[t]he central concern" of most cases explicating the doctrine of ripeness "is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §3532 at 238.

In this case the principal uncertainties and contingencies relate to events within the control of the Park Authority, namely -- if allowed to, will the Authority propose altering the present prohibition on snowmobiles and, if so, what kind of rule would be adopted? These uncertainties would be removed entirely if, as suggested by NRC as one course of action, the Authority were to initiate rule-making on the snowmobile question before going to court. The Authority, however, has decided not to take this course of action in light of the 1976 opinion of the Attorney General, concluding that the Authority would have no power to adopt any different rule, a point emphasized by AMC.

Even though the proposed petition would present issues which involve future contingencies, and even though the Authority controls these contingencies, the petition may still be ripe for review. See 13 Wright, Miller & Cooper, supra at 248. ("Ripeness may be found as well when the plaintiff controls the happening of the contingent events whose occurence would solidify the issue.") While it is extremely difficult to state any rule of general applicability on the subject, the courts have tended to focus on three considerations in determining if the controversy is ripe for adjudication under these circumstances.

The first is an evaluation of the practical probabilities that the issue presented to the courts will actually affect the parties in a concrete way. "The most general theme in denying adjudication is that the plaintiff's control means that the future events that would raise the offered questions may never happen." 13 Wright, Miller & Cooper, supra., at 251. One significant uncertainty involved in this case could be easily removed if, as suggested by the Maine Snowmobile Association, the Authority were to make a decision before petitioning to the Court that it actually intends to initiate rule-making on the snowmobile question unless instructed by the Court that it had no power to do so. Such a decision, of course, would not commit the Authority to adopting a new rule but the commitment to consider a new rule if allowed to would be most helpful in persuading a court that the issue is ripe for review.

Both the second and third considerations were articulated in Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967):

> Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. [Emphasis added]

Also see, Wright, Miller & Cooper, supra, 1980 Cum. Supp. at 184.

Whether the proposed petition for instructions raises issues which are properly framed for judicial review depends upon which issue is presented to the Court. One issue in the draft Petition is whether the Authority is precluded from adopting a rule allowing any uses for snowmobiles in the Park other than for administrative or emergency uses. This request for instructions presents essentially a legal issue and as such probably is appropriate for judicial resolution. See Abbott Laboratories, supra., 387 U.S. at 149. Still it must be recognized that a court, without too much difficulty, could conclude that even this issue resolves too little, because it is always possible to limit the recreational uses of snowmobiles so much that it could comply with the Park Trust. Thus the court could conclude that the real issue is what kind of regulation is consistent with the Baxter Park Trust and that this issue is not ripe for review until some rule regulating snowmobiles is at least proposed.

The other issue presented in the draft Petition -- whether the 1976 draft regulation allowing snowmobiles on the perimeter roads is consistent with the Baxter Park Trust -- probably is not "fit" for review. The reason is that this issue probably is too abstract and hypothetical. It makes little difference to anyone, including the Authority and the proposed intervenors in the forthcoming legal proceedings, whether the regulations for snowmobiles proposed in 1976 are legal or not unless the Authority plans to propose the same regulations now. The best argument to be made to persuade a court to render instructions on this issue, assuming that the Authority

does make a commitment to propose some kind of rule on recreational uses of snowmobiles if allowed to, is that the most likely type of rule to be proposed is one permitting use of the perimeter road.

This brings us to the third consideration on ripeness, the hardship to the parties of withholding court consideration. Here it can be argued that it would be inappropriate at best and indeed an exercise in futility for the Authority to consider a rule allowing snowmobiles in the Park in light of the 1976 opinion of the Attorney General's office declaring such a rule to be inconsistent with the Baxter Park Trust. It would also be a hardship, at least to those strongly favoring snowmobile usage, to deny consideration of such a rule given the degree of public uncertainty of the correctness of the 1976 ruling.

(B) The Doctrine of Primary Jurisdiction

The question of whether proposed agency action is ripe for review also raises the question of whether a court will decline to resolve the issue presented on the basis of the related doctrine of "primary jurisdiction." This doctrine expresses a "judicial policy" of "not decid[ing] an issue concerning which an administrative agency has decision capacity until after the agency has considered the issue." State ex rel Brennan v. R. D. Realty Corp., Me., 349 A.2d 201, 207 (1975); Bar Harbor Banking & Trust Co. v. Alexander, Me., 411 A.2d 74, 77 (1980). As explained in Woodcock v. Atlass, Me. 359 A.2d 69, 71 (1976):

> The doctrine is designed to resolve the question of who should act first. Where the administration of a particular statutory scheme has been entrusted to an agency, the Court will postpone consideration of an action until the agency has made a designated determination if such postponement will protect the integrity of the statutory scheme.

There are several arguments that can be made to persuade a court that it should not apply this doctrine as a reason for declining review of the proposed Petition for Instructions, but in each case there are counter-arguments that must be borne in mind as well.

First of all, while the Authority is a governmental agency, it also performs the functions of a private trustee and in this capacity is "held accountable to [the] more stringent standards" applicable to private trustees. Fitzgerald v. Baxter State Park, supra, 385 A.2d at 202. Second, because it is functioning as a trustee, the Authority is entitled to petition for instructions in accordance with the procedures available to trustees. Id. For both of these reasons, the Authority can argue that the doctrine of primary jurisdiction should not apply because that doctrine only governs review of ordinary governmental action and should not be allowed to block access to the courts pursuant to procedure which has been held to be available to the Authority because of its non-governmental responsibilities.

The countervailing arguments are that the Authority, while performing somewhat unique functions, is still a governmental agency. More significantly, regardless of its technical legal status, the

Authority's "expert judgment" is entitled to "great weight," according to the Fitzgerald case, and thus the same policy considerations that form the basis of the doctrine of primary jurisdiction should apply at least by analogy to the proposed Petition by the Authority.

A third argument for not applying the doctrine of primary jurisdiction is that here, as authorized by the Fitzgerald case, the Authority is affirmatively seeking judicial guidance. Under these circumstances it can be said that there is no occasion to render judicial deference to the administrative process because the proposed petition is designed by the administrative agency itself to promote the ultimate resolution of the snowmobile question. Some doubt about the validity of this argument, however, is cast by the recent decision of the law court in Bar Harbor Banking & Trust Co. v. Alexander, supra, 411 A.2d at 78, where the Court said that:

> Although the doctrine of primary jurisdiction, expressing a preference for initial agency action, is bottomed on judicial deference to administrative expertise, it also furthers other important policy considerations such as avoiding advisory opinions and untoward disruption of the administrative process.

The extent to which the doctrine of primary jurisdiction would further the "important policy consideration" of "avoiding advisory opinions" in this case, takes us back to an earlier discussion on this subject under the heading of "ripeness." Thus, whether discussed in terms of the requirement of ripeness or the doctrine of primary jurisdiction, it must be recognized that the Court may decline to render instructions to the Authority in the absence of a determination by the Authority itself on the snowmobile question.

A fourth argument for not applying the doctrine is that it would be futile to the parties to proceed with the administrative process given the doubts about the Authority's power to promulgate a new regulation, which is essentially a legal question which the courts must ultimately decide. In such circumstances, the courts have recognized an exception to the doctrine of primary jurisdiction. See Churchill v. S.A.D. #49, 380 A.2d 186, 190 (1977); Stanton v. Trustees of St. Joseph's College, Me., 233 A.2d 718, 724 (1967). This "exception," of course, would only apply to the issue of the Authority's power to consider some type of rule allowing anowmobile usage; it would not cover the question of what type of rule would be legal.

(3) Conclusions and Recommendations

On the basis of the foregoing considerations, it appears that there are indeed serious doubts about whether the proposed petition will be entertained by the courts. At the same time it is recognized that there are equally serious policy problems for the Authority taking action to insure that the petition will be heard.

At a minimum, the Authority should formerly announce its intention of proceeding with rule-making to consider, although not necessarily adopting, a rule allowing some form of recreational use of snowmobiles in the Park unless prohibited from doing so by instructions from the Court. For the reasons discussed above, a court would probably dismiss the Petition for Instructions entirely for not being "ripe" in the absence of such a commitment that would guarantee that the instructions will have some practical impact on the parties. On the other hand, such a commitment by the Authority

still would not guarantee the court will accept the petition. But it would at least put all affected parties in a position of urging to the Court that the question of the Authority's basic power to adopt some form of regulation allowing snowmobile usage is ripe for review.

Such action probably would not affect the Court's willingness to consider what type of regulation may be within the Authorities discretion to adopt. It is unlikely, for example, that the courts will pass on the question in the current draft petition as to whether the 1976 proposed regulation allowing snowmobiles on the perimeter road is ripe or survives primary jurisdiction doctrine principles unless the Authority were to propose now that such a regulation will in fact be considered for adoption. There are arguments set forth above that can be made to the court for considering this question, and therefore the issue remains in the draft Petition. Yet it should be recognized that even proposed regulations would not satisfy possible objections by the court, based on either ripeness or primary jurisdiction, that it is premature to consider what type of regulation is consistent with Governor Baxter's intent in the absence of a determination by the Authority itself as to what kind of regulation it thinks is appropriate.

The foregoing conclusions, of course, put the Authority in a difficult position given the 1976 ruling of the Attorney General's office that any proposed rule allowing recreational uses of snowmobiles is inconsistent with the Baxter Park Trust. Because of the awkwardness and possible futility of proceeding with a proposed rule in the face of the Attorney General's Opinion, the Authority

may well conclude that it is not in a position to take further action to improve the judiciability of the issues beyond the basic question of the Authority to adopt some form of snowmobile rule. If the Authority does in fact reach this conclusion, however, it should appreciate the risks and limitations of proceeding as planned.

In addition to the risks of not having any type of snowmobile regulation reviewed, and indeed the risk of having the entire petition dismissed, the Authority should be aware of the limitations of the instructions which it might receive. It is possible that the Court will conclude that any recreational uses of snowmobiles in the Park is inconsistent with the Baxter Park Trust. In this event the entire subject matter is closed and thereby resolved. On the other hand, if the Court merely concludes that some form or recreational use may be consistent with the Park Trust, the issue still remains what type of regulation is permissible and this issue may well have to be the subject of additional litigation, by way of petition for instructions or otherwise, after rule-making by the Authority.

DEPARTMENT OF THE ATTORNEY GENERAL
RICHARD S. COHEN, Attorney General

By _____
Rufus E. Brown
Senior Assistant Attorney General

REB:jg

EXHIBIT A to
SUPPLEMENTAL MEMORANDUM OF LA

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

IN THE MATTER OF)
BAXTER STATE PARK)

PETITION FOR INSTRUCTIONS

NATURE OF THE CASE

1. This case is brought by the Baxter State Park Authority (the Authority) in order to seek instructions from the Court concerning the resolution of questions which now exist as to the extent of the Authority's discretion to regulate the use of snowmobiles in Baxter State Park.

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to the provisions of Title 14 M.R.S.A. §§ 5953, 5956.2, 5956.3, 6051.10 and 6051.13.

PARTIES

3. The State of Maine is a sovereign state of the United States.

4. The State of Maine is trustee of the approximately 200,000 acres of land located in the State of Maine and known as "Baxter State Park" and sometimes referred to herein as the "Park."

5. The State of Maine has delegated its authority to administer Baxter State Park to the Authority pursuant to the provisions of Title 12 M.R.S.A. § 900, et seq.

6. The Authority consists of the Attorney General, the Director of the Bureau of Forestry, and the Commissioner of the Department of Inland Fisheries and Wildlife. It is an agency of the State of Maine with an office in Millinocket, County of Penobscot, State of Maine.

7. In accordance with 12 M.R.S.A. § 900, the Authority is required "to subordinate its own wishes to the intent of Governor Baxter." Pursuant to Title 12 M.R.S.A. § 901, the Authority has "full power in the control and management" of the Park, subject to the conditions and restrictions expressed in the deeds of trust conveying land in Baxter State Park to the State of Maine. Pursuant to Title 12 M.R.S.A. § 903, the Authority is authorized to establish rules and regulations as it deems necessary for the protection and preservation of the Park and for the proper observance of the restrictions in the deeds of trust creating the Park.

PERSONS AFFECTED BY OR INTERESTED IN THIS MATTER

8. Persons affected by the relief sought in this petition include all those people of the State of Maine, in their capacity as the beneficiaries of Baxter Park Trust, hereinafter identified, who wish or may wish to use snowmobiles in Baxter State Park for recreational purposes, and all those people of the State of Maine, in a like capacity, whose use and enjoyment of Baxter State Park may be adversely affected by the use of snowmobiles in Baxter State Park for such purposes.

9. Other persons who may be interested in these proceedings include Joseph E. Brennan, Governor of the State of Maine, John L. Martin, Speaker of the House of Representatives, and Joseph Sewall, President of the Senate, all in their respective capacities as representatives of the State of Maine, trustee of the Baxter Park Trust.

10. The Authority seeks, through a separate motion, to notify all persons affected by or interested in the proceeding, as more fully set out in that motion.

THE BAXTER PARK TRUST

11. Between 1931 and 1962, former Governor Percival Baxter deeded in over 30 conveyances a total of 201,018 acres of land, located in Penobscot and Piscataquis counties, State of Maine, and known as "Baxter State Park" to the people of the State of Maine.

12. In each case Governor Baxter transmitted a deed of trust to the incumbent Governor which was then duly submitted to the Legislature for formal acceptance by Private and Special Act.

13. Such deeds and their acceptances, attached hereto as Exhibit A, are set forth in the following Private and Special Laws: 1931, ch. 23; 1933, ch. 3, 1939, ch. 1, ch. 122; 1941, ch. 1, ch. 95; 1943, ch. 1, ch. 91; 1945, ch. 1; 1947, ch. 1; 1949, ch. 1, ch. 2; 1955, ch. 1, ch. 3, ch. 4, ch. 61, ch. 171; 1963, ch. 1.

14. In addition Governor Baxter's letters to the successive governors transmitting said deeds, also attached hereto as

Exhibit A, were published in the Laws of Maine for the following years at the designated pages: 1931, pp. 725-26; 1933, p. 859; 1939, pp. 846-47; 1941, pp. 760-61; 1943, pp. 698-708; 1945, pp. 982-90; 1947, pp. 1244-45; 1949, pp. 1368-70; 1955, pp. 1143-50; 1963, p. 1473.

15. In each case Governor Baxter conveyed the lands to the State of Maine, as trustee, to hold in Trust for the benefit of the People of Maine, subject to certain conditions for the use of the land.

16. The conditions of the trusts, as typically stated in a majority of the deeds, require that the land "forever shall be kept . . . as a State forest and public park and for public recreational purposes;" and "forever shall be kept in their natural wild state and as a sanctuary for wild beasts and birds . . . ."

17. Pursuant to chapter 2 of the Private and Special Laws of 1955, the State of Maine formally joined in a declaration by Governor Baxter interpreting the terms "natural wild state" and "sanctuary for wild beasts and birds," as these terms were used in the deeds of trust. Such declaration provided in part that Baxter State Park "is to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be 'Forever Wild.'"

THE DISPUTE

18. Many of the trust instruments specifically prohibit firearms, hunting, trapping and the landing of aircraft in Baxter State Park.

19. The deeds of trust, the formal transmittal letters, and the formal declaration of interpretation identified in paragraphs 13, 14 and 17 are completely silent on the subject of the use of snowmobiles in the Park.

20. During the 1960's, as the use of snowmobiles by the public gained popularity, snowmobiles were used within the boundaries of Baxter State Park.

21. Prior to 1968, the Authority's rules did not regulate the use of snowmobiles in the Park, which became a matter of increasing public concern by those who considered the recreational use of snowmobiles in the Park to be inconsistent with Governor Baxter's intent about the proper use of the Park.

22. In 1968 the Authority promulgated Rules and Regulations limiting the operation of snowmobiles to the so-called "perimeter road," some of the connecting road segments, logging roads, and some trails. Operation of snowmobiles on other roads and trails in Baxter Park was prohibited.

23. Such regulations were revised from time to time in subsequent years.

24. In 1976 the Authority proposed minor revisions to its Rules and Regulations relating to snowmobiles, to read as follows:

19. SNOWMOBILES: All persons using snowmobiles are restricted to the unplowed portions of the regular road system currently maintained by the Department of Transportation for vehicular traffic in the summer including the roads into South Branch Pond and Roaring Brook, but excluding those roads into Daicey Pond and Kidney Pond. The only exceptions are the tote road into Katahdin Lake from Avalanche Field, a one-half mile section over the easterly projection of Baxter Park in Township 6, Range 8 along the west side of the East Branch of the Penobscot River in Township 6, Range 9 from the westerly end of Second Lake Grand Matagamon, the Telos cut-off road from the Telos Gatehouse to the Park perimeter road via Morse Mountain. Use of all other roads and trails is prohibited except by authorized personnel on Park business.

Operators travel at their own risk and must comply with all requirements of State law and drive safely at all times. Operation by persons under 10 years of age is prohibited.

25. In the course of a public hearing on January 7, 1976 on the proposed revisions to the Authority's Rules and Regulations for 1976, including the proposed revisions to Rule No. 19, concerns were expressed that the snowmobile regulation, both as it then existed and in its proposed revised form, was inconsistent with the terms of the Baxter Park Trust.

26. As a result of this concern, the Authority requested an opinion from the Maine Department of the Attorney General as to whether the use of snowmobiles within Baxter State Park as contemplated by the proposed 1976 revision of the Authority's Rules and Regulations would be consistent with the Baxter Park Trust.

27. On May 20, 1976 the Attorney General's Office issued an opinion, a copy of which is attached hereto as Exhibit B,

concluding that the use of snowmobiles in Baxter State Park in accordance with the proposed Rules and Regulations would be inconsistent with the Baxter Park Trust.

28. Following this opinion on September 7, 1976 the Authority voted unanimously to issue a new rule providing as follows:

> 19. SNOWMOBILES: Snowmobiles are prohibited in Baxter State Park provided, however, that snowmobiles may be used (1) for administrative purposes as authorized by the Baxter State Park Authority and (2) for emergency purposes.

29. The 1976 revision to the Authority's Rule and Regulations prohibiting the use of snowmobiles in Baxter State Park has remained in effect and is presently in force.

30. The regulation of the use of snowmobiles in Baxter State Park has been and remains one of the most controversial issues in the history of the Park. The original regulation in 1968 authorizing limited use of snowmobiles in the Park was opposed both by those who considered the regulation to unreasonably restrict the use of snowmobiles and by those that considered the permitted use to be inconsistent with the Baxter Park Trust.

31. The 1976 amendment to the Authority's Rules and Regulations generally prohibiting the use of snowmobiles was likewise subject to intense controversy, notwithstanding the legal opinion of the Attorney General's office on the subject.

32. In the course of a routine reconsideration of the 1979 Rules and Regulations of the Baxter Park Authority, the staff of the Authority recommended a revision to Rule 19 to allow the use of

snowmobiles on Webster Lake and Lake Matagamon, the boundaries of which are only partially within the Park.

33. At the Authority meeting on September 6, 1979 the Authority determined that any proposed revision to Rule 19 was out of order at that time because of the 1976 ruling of the Attorney General's office.

34. At the same meeting of the Authority, the Maine Snowmobile Association petitioned the Authority to revise its Rules and Regulations to permit the use of snowmobiles on the so-called "perimeter roads" of the Baxter State Park.

35. At the next meeting of the Authority, November 2, 1979, the Authority concluded that the snowmobile question would continue to trouble the members of the Authority until finally resolved. At that meeting the Authority adopted a resolution requesting the Department of the Attorney General to draft a petition to be filed in Superior Court requesting instructions on the extent of the Authority's discretion to regulate the use of snowmobiles in Baxter State Park.

36. At a meeting of the Authority on September 11, 1980, the Authority voted that, if it is determined by way of instructions from the Court that the Authority has the power to promulgate regulations permitting recreational uses of snowmobiles within the Park, it would initiate rule-making procedures to determine the appropriate use of snowmobiles for such purposes within the Park.

THE NEED FOR INSTRUCTIONS

37. The Authority, as trustee of the Baxter Park Trust, is uncertain about the extent of its authority to regulate the use of snowmobiles in Baxter State Park in view of the restrictions contained in the Baxter Park Trust and is therefore uncertain of the nature of the proper discharge of its duties under the Trust.

38. Until this doubt and uncertainty is resolved there will continue to be a real, immediate and substantial dispute among the beneficiaries of the Baxter Park Trust as well as its trustees, on the subject of snowmobile usage, no matter what rule is adopted.

REQUEST FOR INSTRUCTIONS

WHEREFORE, the Authority seeks to invoke the equitable jurisdiction of this Court and asks this Court to instruct the Authority as to:

1. Whether the Authority is prohibited by the Baxter Park Trust from permitting the use of snowmobiles within the Park for recreational purposes as presently provided by Rule 19 of the Authority's Rules and Regulations?

2. Whether the use of snowmobiles in the Park for recreational purposes on the so-called "perimeter roads" of the Park is consistent with the Baxter Park Trust?

3. Whether the use of snowmobiles in the Park for recreational purposes on connecting road segments, logging roads, and some trails, as permitted by the Rules and Regulations of the Authority between 1968 and 1976, is consistent with the Baxter Park Trust?

4. Whether the use of snowmobiles in the Park for recreational purposes on Matagamon and Webster Lakes is consistent with the Baxter Park Trust?

5. Whether the use of snowmobiles for recreational purposes on the logging roads for the portion of the Park known as the Scientific Forest Managment Area is consistent with the Baxter Park Trust?

Respectfully submitted,

BAXTER STATE PARK AUTHORITY

Through the
Department of the Attorney General
RICHARD S. COHEN, Attorney General

By: _____
RUFUS E. BROWN
Senior Assistant Attorney General

State House, Augusta, Maine 04333
Tel (207) 289-3661

Dated:

EXHIBIT A

NATURAL RESOURCES COUNCIL OF MAINE
335 Water Street Augusta, Maine 04330 207-622-3101

June 24, 1980

Rufus Brown, Esq.
Attorney General's Office
State House
Augusta, ME 04333

Dear Rufus:

The Natural Resources Council of Maine appreciates not only this opportunity to comment on the Attorney General's draft memo with respect to the Baxter State Park Authority's Petition, but also the time you have taken to discuss this issue with us. We will attempt to summarize the content of these discussions in this letter.

NRCM views the controversy over whether a "traditional" or "modified" approach should be adopted to resolve the snowmobile issue as a moot question. The fact that the Authority does have the power to interpret the deeds of trust and that their judgment will be accorded great weight is not only a settled principle of trust law, but also is a question which was specifically addressed and resolved in Fitzgerald v. Baxter State Park Authority, Me., 385 A. 2d 189 (1978). In the Fitzgerald case the Supreme Court stated that, while Baxter's trust is not "discretionary" in the sense that the State or the Authority cannot do what they deem best, "the expert judgment of the Park Authority . . . , should generally be accorded great weight in choice of methods for carrying out the donor's intent," id., 202.

Jon A. Lund, President Chris Ayres, Vice President Elizabeth M. Brown, Secretary Charles M. Sexton, Treasurer
Robert H. Gardiner, Jr., Executive Director Virginia E. Davis, Counsel

The Court concludes by saying that if two or more solutions to a problem are equally consistent with Baxter's instructions, the Authority's method would normally be "controlling," provided that the Authority follows the procedures required by state law in arriving at its decisions.

Since the Fitzgerald case seems to resolve the controversy over which approach should be adopted - in effect by adopting a modified approach - NRCM thinks that only the snowmobile issue remains to be addressed. Furthermore, as we noted in our discussion, we are concerned that the procedural issue if combined with the snowmobile issue will needlessly complicate the proceeding.

The Authority has two options open to it: 1) it could initiate a rulemaking proceeding and address the snowmobile regulation issue, or 2) it could petition the Court for instructions on the narrow question of snowmobiles in Baxter State Park. Because the Maine Court has decided that the judgment of the Authority is to be given great weight, a logical starting point is for the Authority to exercise its power by making a decision on this issue through a rulemaking proceeding. Obviously, as the Court pointed out in Fitzgerald, the Authority is not to do what it deems best, but must act within the parameters set forth by Governor Baxter in his deeds of trust. If the deeds of trust alone are insufficient for resolving the snowmobile issue, then extrinsic evidence must be looked into.

The second possible starting point is to petition the Court for instructions on snowmobiles. This question should be narrowly worded to focus directly on the issue of snowmobiles and to seek instructions with respect to interpretation of the trust instruments. One possible wording

of the issue might be: Whether the use of snowmobiles in the Park is] ? inconsistent with the purposes of the trust.

The next step would obviously depend on the Court's answer to this question. Answering the question "yes" or "no" requires the Court, not the Authority, to examine the trust documents and extrinsic evidence and to interpret the trust. Furthermore, if the Authority takes no position, the Court may decline to answer the question, based on the Fitzgerald ruling, and send the question directly back to the Authority to address. This would then mandate a rulemaking proceeding.

However, if the Court does decide to address the question, a "yes" answer would end the controversy. A "no" answer, however, also would throw the ball back into the Authority's court and would require a rule-making proceeding at that point to implement the Court's decision.

NRCM can see disadvantages and advantages to both methods of resolving this issue. NRCM definitely believes that the trustee's powers are not in issue. We further think that as long as the public and all interested parties are given an opportunity to get involved, as long as notice of all hearings is given, and as long as the Authority acts within the parameters set down in Fitzgerald, the differences between the two approaches is minimal.

Thank you for this chance to give comments. We look forward to being kept informed and becoming involved in all future proceedings with respect to this matter.

Very truly yours,

VIRGINIA E. DAVIS
Counsel

BETH A. NAGUSKY
Legal Intern

VED:cc

NATURAL RESOURCES COUNCIL OF MAINE

INCORPORATED 1959

OUR OBJECTIVES

TO PROTECT AND CONSERVE MAINE'S NATURAL RESOURCES AND TO ENCOURAGE THEIR WISE ECONOMIC AND RECREATIONAL USE; TO TEACH THE INTERDEPENDENCE OF ALL LIVING THINGS; AND THUS TO PRESERVE FOR THIS AND FUTURE GENERATIONS THE FOUNDATION FOR A HEALTHY AND ABUNDANT LIFE.

Statewide Affiliates

The Allagash Environmental Institute
American Association of University Women, Maine Division
Appalachian Mountain Club, Maine Chapter
Coastal Resources Action Committee
Congress of Lake Associations
Friends of Intelligent Land Use
Friends of the Earth
Garden Club Federation of Maine
League of Women Voters of Maine
Maine Appalachian Trail Club
Maine Association of Conservation Commissions
Maine Audubon Society
Maine Coast Heritage Trust
Maine Lung Association - Clean Air Committee
Maine Organic Farmers and Gardeners Association
Maine Snowmobile Association
The Nature Conservancy, Maine Chapter
New England Wildflower Society
Penobscot Paddle and Chowder Society
Pine Tree State Rifle and Pistol Association
Sam Ely Community Land Trust
Small Woodland Owners Association of Maine
Society of American Foresters, Maine Chapter
State Biologists' Association
Trout Unlimited, Ducktrap Chapter
Trout Unlimited, Sunkhaze Chapter

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Samuel S. Butcher, South Harpswell
Duncan Howlett, Center Lovell
Peter K. Heimann, Rockport

Regional and Local Affiliates

Abnaki Ski and Outing Club
Annabessacook Lake Improvement Association
Arnold Expedition Historical Society
Aroostook River Fish and Game
Augusta Nature Club
Bangor Nature Club
Bates Outing Club
Bath Garden Club
Berwick Conservation Commission
Biddeford Pool Improvement Association
Boothbay Region Garden Club
Brooklin Garden Club
Camden Garden Club
Chewonki Foundation
Citizens Who Care
Cobbossee Yacht Club
Colby Environmental Council
Damariscotta Lake Association
Damariscotta River Association
Down East Chapter of Maine Audubon Society
Fin and Feather Club
Friends of Nature, Inc.
Harpswell Conservation Commission
Harpswell Garden Club
Kennebec Valley Conservation Association
Keyes Pond Association
Kezar Lake Association
Knox County Fish and Game Association
Lakes Environmental Association
Lisbon Fish and Game Association
Longfellow Garden Club
Lovell Conservation Commission
Maine Outing Club
Megunticook Lake Association
Merrymeeting Audubon Society
Mid-Coast Audubon Society
Mooselookmeguntic Improvement Association
Mousam River Protection Association
Northeast Audubon Society
North Kennebec Regional Planning Commission
Orono Conservation Commission
Oxford Conservation Commission
Pemaquid Watershed Association
Penobscot Valley Chapter, Maine Audubon Society
Piscataqua Garden Club
Rockport Garden Club
Saco River Corridor Association
Saco Valley Fish and Game
Save Our Environment
Sheepscot Valley Conservation Association
Somerset County Soil and Water Conservation District
Special Committee of the Restoration of Ogunquit Dunes
Sports Unlimited of Maine
Sportsmen, Inc.
Thomaston Garden Club
Thompson Lake Environmental Association
Waterford Conservation Commission
Western Maine Chapter, National Audubon Society
Westport Conservation Commission
Wildlife Society, U of M Orono Chapter
York Conservation Commission

Designated Directors and Officers of NRCM serve without salary.

EXHIBIT B

APPALACHIAN MOUNTAIN CLUB
MAINE CHAPTER

P. O. BOX 8526
PORTLAND, MAINE 04104

July 2, 1980

RECEIVED
STATE OF MAINE
ATTORNEY GENERAL
JUL 7 1980
STATE HOUSE AUGUSTA, MAINE

Assistant Attorney General
Rufus Brown
State House
Augusta, Maine 04333

Dear Mr. Brown:

I am writing as Chairman of the Maine Chapter of the Appalachian Mountain Club. I am responding to your draft memorandum of law regarding snowmobiling in Baxter State Park and to your recent telephone conversation with attorney James Lansing.

Historically the Chapter has had a general interest in the management of Baxter State Park and we feel a strong interest in the specific issue being raised at this time. We would like to be kept informed of any developments regarding the snowmobiling issue and the proposed Petition. In the event that a court proceeding is commenced, the Chapter hopes to be formally represented and to intervene.

Without addressing any opinion on the substantive issue of snowmobiling in the park or the proper extent of the Authority's discretion, I would like to express the Chapter's concerns about several matters raised in your memorandum and your conversation with Mr. Lansing. We are particularly troubled by the suggestion that the Authority may engage in rule making to make the issue of the Authority's discretion to interpret the trusts a more real issue. It appears to us that the Authority has the 1976 legal opinion of the highest non-judicial legal authority in the state and that it should abide by and uphold that opinion rather than ignore the opinion merely to create a dispute or to increase its own powers. The Authority is an arm of the State and should not be in the position of even appearing to violate the law for whatever reason.

Your memorandum deals at length with the issues of justiciability and ripeness, and we are concerned that it is the Authority which is making every effort to find arguments and procedures to make the snowmobile issue a real one. We wonder whether the best procedure, and the one least likely to cause a court to dismiss a case, would not be for the Authority to rely on its own existing legal opinion and to wait until a truly aggrieved party, presumbably a snowmobiler, brings suit for an interpretation of the trusts.

Having addressed our two primary concerns, we would also like to comment on two other matters raised in your memorandum. In describing your "modified approach" you liken the Authority's role to that of the U.S. Supreme Court. We are concerned about the analogy because of the very differing nature of the two institutions and because the Authority is a changing and politically influenced body. We wonder whether it is not the courts, here the courts of Maine, that should be interpreting Baxter's deeds of trust in light of changing social circumstances. If the Authority did not currently have the benefit of a legal opinion and had adopted the regulation proposed in 1976, should not the courts have had the final review of the legality of the regulations in the light of Baxter's deeds of trust and intent? Finally, if the Authority is to remain neutral, as your memorandum suggests it would like to, we are concerned about the manner its "Request for Instructions" is phrased. Rather than asking if the Authroity has discretion to allow snowmobile use, should not the request ask if the Authority has discretion to regulate snowmobiles (implying discretion to ban or to permit their use)?

In conclusion, we would like to stress our belief that the Authority should not be taking the position of creating a case, particularly by engaging in rule making in contradiction of an existing legal opinion. Rather it should let the case develop on its own by waiting for an aggrieved party to commence action.

Thank you for your consideration.

Yours truly,

Jonathan Burns

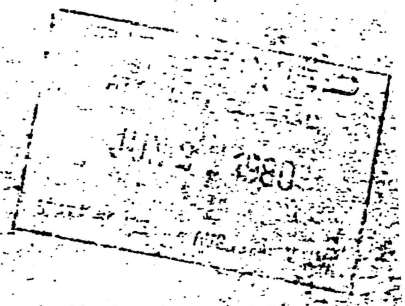
Jonathan Burns
Chapter Chairman

cc: Charles Burnham
Thomas Deans
Jay Madiera
Preston Saunders, Esq.
James Lansing, Esq.
Richard Trafton, Esq.

EXHIBIT C

ABANDONED FARM, INC.
Damariscotta, Maine 04543/U.S.A. 207-563-3935

729-0121



June 22, 1980

Baxter State Park Authority
Department of the Attorney General
Aggusta, Maine 04333

Gentlemen:

The draft Memorandum of Law and the draft Petition for Iestruction dated May 23, 1980, require some comment based on the realities of the situation.

In all seriousness, it is necessary to go behind the Memorandum of Law (which should be retitled "Three Plaintiffs in Search of an Adversary") and in the phfase from the Episcopal Litany consider "the right use of the riches of creation" as æeembled over the years by Governor Baxter.

While there can be only admiration for the exquisite intricacy of text and citation in attempting to qualify the issue of justiciability, it is sufficient to credit Mr. Bfown and his henchpersons with a nice try on a difficult assignment. By the nature of the assignment, they perforce overlpoked two items of significance:

1. The powers of the authority. The last word is defined by the Oxford English Dictionary as I. Power to enforce obedience; 1. Power or right to enforce obedience; moral or legal supremacy; the right to command, or give an ultimate decision (emphasis added). (The OED then supplies sources, beginning in A.D. 1393, in support of the prime definitions over nearly seven centuries.)

2. The responsibilities of a trustee. If the donor's intent is pellucid throughout the subsequent evolution of change and throughout the buffeting of subsequent special interests, there is no need for a trustee, But the donor intensely felt the need for a trustee, and it is therefore incumbent upon the latter to invoke the strictest of constructions and indeed to bend over backwards to ensure that the wishes of the donor be rigidly met.

The Memorandum of Law's page 26 makes the order of compulsion simple and ineluctable, first in the general body of law and then in the statute creating the Authority:

a. " .... in construing a trust,'the cardinal rule is to give effect to the intention of the (settlor)'"

b. " .... by creating a mandate that the Authority 'subordinate its own wishes to the intent of Governor Baxter' in administering its duties as trustee of the Park."

The Authority's job then equally becomes as simple as it is ineluctable: It is primarily a trustee to make sure that the settlor's intent is carried out; it is secondarily but contemporaneously given the power to do so, completely.

It is a chore of the utmost supererogation to posit on page 4, section 18 of the petition that "The Baxter Park Trust is silent on the subject of the allowable use of snowmobiles." (Such a statement has the same relevance as a statement that the Magna Carta is silent on the use of semi-automatic rifles.) The same page has in line 2 "forever shall be kept in their natural wild state and as a sanctuary for wild beasts and birds" and utters the primacy of wilderness over recreation as a formal joint declaration by the State of Maine and Governor Baxter, the settlor.

Governor Baxter's intent shines through the citations, quotations, and text in both the memorandum and the petition. Whether he ever quoted "In wilderness is the preservation of the world" and then proceeded to define "wilderness" is immaterial. "Many of the trust instruments specifically prohibit firearms, hunting, trapping, and the landing of aircraft." He specifically cites that the park should be as it was before the whine of the chain saw. My own acquaintance with him confirms his concept of the need for silence, in the clear sense of protection from mechanical sounds.

He foresaw clearly the day, perhaps not in specifics, when the Attorney General would be running for Governor, when the Commissioner of Inland Fish and Game would be running for

Congress, and the Commissioner of Forestry subject with the other two to the supposed bloc-vote thumbscrews of special interests. His iterated and reiterated statements accompanying and within the deeds of trust, all ratified by the Legislature as solemn undertakings, looked to such melancholy coincidences of political life and sought unequivocally to have the government of his park the government of laws and not of men.

How -- seriously how -- can there be a question whether or not Governor Baxter wished to preserve the silence of the wilderness? The wilderness is never completely silent, as he knew and as everyone does who listens, quiet himself and straining for the natural sounds. He knew also, when he placed recreation in a secondary position but nonetheless there, that one would hear in his wilderness the shouts and laughter of other humans, part of the fauna, as they descended from a successful transit of the Knife Edge or slid down the mossy stones into South Branch Pond -- or any number of the myriad of wilderness experiences he meant to give us and to our successors forever.

But he never meant -- and the Authority knows it full well -- that mechanical devices, whether thirty-ought-sixes or leg traps or aircraft or snowmobiles or machinery not yet invented should disturb the quality of the wilderness as it can be experienced by humans, on foot, on skis, on snowshoes. And the Authority has not only the power but also the absolute requirement to enforce this.

From which I conclude that the "manufactured" issue is far from justiciably ripe, and indeed even an ungerminated seed (if it had not been artifically forced), but is rather weary, stale, flat, and unprofitable. I cannot help but feel that the court, with five minutes of deliberation after reading the memorandum and the petition, will with justifiable petulance toss the matter back to the Authority, tell it to pull up its collective socks, and fulfill the duties laid upon it with clarity and vigor.

The argumentum ad nivomobilem is nugatory and insufficient.

As an obiter dictum, let it be urged upon the snowmobilers a realization that the issue is not one concerned with their machines, but one concerned with the integrity of the State of Maine. If there is a reasonable doubt bf adherence to Governor Baxter's intent, continuation of this doubt will have an effect far beyond the temporal controversy which has existed since 1968. It is essential that that precedent should not, in Disraeli's phrase, "embalm a principle."

As snowmobiles, but not snowmobilers, are estopped from the park, it is not unlikely that someone moved by the same magnificently generous impulses as Governor Baxter will establish a park primarily for snowmobiles. It is not implausible, given the rush of events these days, that during the decade a new terrain machine will come into general use -- PVP let's say a photovoltaicly powered sled which rides on a curtain of warm air. Its only drawback is that its passage melts a foot of snow in a ten-foot wide swath. One can then inquire if the settlor of the trust would be content that the Snowmobile Park Authority allow the PVPs to use the perimeter roads and trails.

The issue, then as now, would not be the machine, but the measure of reliance and confidence which could be placed on the State of Maine as trustee for all the people of Maine.

Respectfully submitted,

Edward Myers.

Edward Myers:

EXHIBIT D

LAW OFFICES OF
DOYLE, FULLER & NELSON
ONE COMMUNITY DRIVE
P. O. BOX 2709
AUGUSTA, MAINE 04330

JON R. DOYLE
ROBERT C. FULLER, JR.
CRAIG H. NELSON
ALAN P. KELLEY

207-622-6126

MEMORANDUM

TO: RICHARD COHEN, ATTORNEY GENERAL

FROM: JON R. DOYLE, ESQ.

RE: IN THE MATTER OF BAXTER STATE PARK PETITION FOR INSTRUCTIONS

This office has reviewed the Petition for Instructions which was appended to the draft Memorandum of Law dated May 23, 1980. I herewith submit the following observations and suggestions for your consideration prior to submission of the Petition for Instructions to the Superior Court:

1. Paragraph 17. I have not found authority for the conclusion in paragraph 17 delineating certain instruments as constituting the Baxter Park Trust. I would suggest that what instruments do constitute the Baxter Park Trust is a conclusion which should be arrived at by the Court and the appropriate relationship between the deeds of trust, the formal transmittal letters, the formal declaration of interpretation and other documents which involved both Governor Baxter and the State of Maine should be left open at this point.

2. Paragraph 18. Paragraph 18 should be revised to say that the deeds of trust, the formal transmittal letters, and the formal declaration of interpretation are silent on the subject of the use of snowmobiles.

3. Paragraph 19. Paragraph 19 should be revised to indicate that prior to 1968 the Authority's rules and regulations were silent on the use of snowmobiles in Baxter State Park. As a consequence thereof, during the 1960's as the use of snowmobiles by the public became more prevalent, there was also an expanded use of snowmobiles within the areas of Baxter State Park and that use was unrestricted.

4. Paragraph 22. I agree that the proposed regulation found in paragraph 22 needs to be set out in toto but I am concerned that the regulation is not sufficiently identified so that references to this regulation in subsequent parts of the petition will be clear.

5. Paragraphs 28 and 29. I would suggest that paragraphs 28 and 29 be rephrased to indicate that the Baxter Park Authority fully intends to reconsider the snowmobile issue unless the Court precludes any consideration of this issue as a matter of law. I believe that this rephrasing will assist the Court in concluding that the present controversy is a justiciable issue and should indicate that once the Court reaches a decision, the Authority will in fact act in accordance with the Court's conclusion. I would suggest that the following be included within the petition:

"A. That in the course of a routine reconsideration of the rules and regulations of the Baxter Park Authority, the staff of the Park recommended a revision to Rule 19 regarding the use of snowmobiles in order to allow the use of snowmobiles on Webster Lake and Lake Matagamon.

"B. That at the Baxter Park Authority meeting on September 6, 1979 Chairman Richard Cohen ruled that any proposed revision to Rule 19 was out of order at that time.

"C. That at the September 6, 1979 meeting of the Baxter Park Authority, the Maine Snowmobile Association petitioned the Authority to revise its rules and regulations to permit the use of snowmobiles on the so-called "Perimeter Roads" of the Baxter State Park.

"D. That the minutes of the November 2, 1979 meeting of the Baxter Park Authority reflect that during that meeting Chairman Cohen voiced the opinion that the Authority's reconsideration of the rules and regulations pertaining to snowmobiles was inappropriate at this point.

"E. At the meeting on November 2, 1979 the Authority adopted a resolution requesting the Department of the Attorney General to draft a petition to be filed in the Maine Superior Court requesting instructions on the extent of the Authority's discretion to regululate the use of snowmobiles in Baxter State Park.

"F. The Baxter Park Authority, if allowed the discretion by the Court, would consider staff recommendations, public interests and the deeds of trust in determining the appropriate use of snowmobiles within Baxter State Park.

6. Request for Instructions. I would suggest that the REQUEST FOR INSTRUCTIONS be rephrased in order to allow for the following:

A. Is the use of snowmobiles, including use for administrative and emergency matters, prohibited from Baxter State Park by the Baxter Park Trust?

B. Is the prohibition presently contained in Rule 19 required by the Baxter Park Trust?

C. Is the regulation as proposed in 1976 and set out in paragraph 22 of the foregoing petition consistent with the Baxter Park Trust? NO

June 19, 1980.

JRD/ew
cc: Mr. Glenn H. Manuel
Mr. Kenneth G. Stratton
Rufus Brown, Esq.

3.5 Scientific Forestry

STATE OF MAINE

Inter-Departmental Memorandum Date January 12, 197

To Hon. A. Lund, Attorney General Dept. Attorney General

From Lee M. Schepps, Assistant Dept. Attorney General

Subject Baxter Park Authority Contract with Great Northern Paper Company

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Governor Baxter gave Township 6 Range 10 W.E.L.S. (T. 6 R. 10) to the State of Maine to be forever "held for and as a State Forest, Public Park and Public Recreational Purposes and for the practice of Scientific Forestry and Reforestation." In Chapter 171 of the Private and Special Laws of 1955, the Legislature repeated the language contained in the deed in accepting the gift. In a Communication from Governor Baxter dated March 17, 1955 and, by Order of the Legislature, reprinted at page 1149 in the Public Laws of 1955, as an appendix to those laws, Governor Baxter stated that he wanted "this township to become a show place for those interested in forestry, a place where a continuing timber crop can be cultivated, harvested and sold; where reforestation and scientific cutting will be employed; an example and an inspiration to others. What is done in our forests today will help or harm the generations who follow us." In that same letter, Governor Baxter said that the terms of the gift of T. 6 R. 10 are identical with those of the 3,569 acre gift given to the State by Governor Baxter approximately two months prior to the gift of T. 6 R. 10. In the gift of the 3,569 acres (located in Township 6 Range 9 W.E.L.S.), the deed stated that the land was "to be forever held by said State for State Forests, Public Park, and Public Recreational Purposes and for the practice of Scientific Forestry, reforestation and for the production of forestry wood products. All harvesting of said products shall be done according to the most approved practices of Scientific Forestry and all revenue derived from the sale of said products shall be used by the State for the care, management and protection of Baxter State Park." As in the case of T. 6 R. 10, the Legislature repeated the language contained in the deed in the Private and Special Act accepting the gift. In addition, Governor Baxter wrote a Communication to then Governor Muskie, dated March 17, 1955, and, by a Special Order of the Legislature, reprinted as an appendix to the Public Laws of 1955 at page 1146, et seq. explaining the terms of his gift of the tract of 3,569 acres in T. 6 R. 9. In that letter, he stated that the acreage would "be available both for recreation and for scientific forestry management and can be made to produce a continuing crop of timber to be harvested and sold as are potatoes or any other product of the soil." In addition, the letter stated that it had long been Governor Baxter's purpose "to create in our forests a large area wherein the State may practice the most modern methods of forest control, reforestation and production under the management of our able Forest Commissioner Mr. Nutting and his associates." Finally, Governor Baxter recalled that in his travel to foreign lands, he had "seen beautiful great forests that for centuries had been producing a crop of wood without depletion. In Sweden, Norway, Finland, Germany, Chili, Russia and elsewhere what has been done by scientifically controlled forestry can be done in Maine. I now make it possible for the State to try a major experiment here at home, an experiment that can mean much for our future timber supply, which all admit as is the chief natural resource of our State."

As you know, certain lands in the southern portion of the Park were given to the State by Governor Baxter subject to certain cutting rights owned by Great Northern Paper Company ("GNP"). Those cutting rights were to expire toward the end of 1973. At some point, a proposal was made for the Baxter Park Authority to "swap" cutting rights with GNP in order to allow them to cut elsewhere in the Park, ostensibly because the cutting in the southern Township could have occurred in an area heavily used by tourists and campers and near Mt. Katahdin. At that time (approximately October, 1972) I made clear to James Erwin and to Don Perkins, attorney for GNP, that it was my opinion that the Authority had no power to allow a "swap" because there were no other lands which respect to which the Authority had the power to grant cutting rights. It was, and is, my opinion, however, that the Authority has the power to permit GNP to engage in the practice of Scientific Forestry in T. 6 R 10 and to accept from GNP as consideration a relinquishment of GNP's cutting rights in the southern Township. Based on that opinion, the contract dated November 29, 1972 was executed. I wrote the first draft of the agreement but the form in which it was signed deleted, among other things, a termination provision and a liquidated damages provision. The agreement provided that GNP could cut no trees and build no road unless and until it had obtained the approval of the Authority of a cutting plan and road plan and, of course, the agreement provided that the cutting and road plan were to be in accordance with "the latest and most highly developed scientifically approved forest practices applicable to the terrain, soils and waters of [T. 6 R. 10] and to the species of trees to be cut . . ." A "harvesting plan" and a "road plan and map" were signed by GNP and by all members of the Authority on December 27, 1972.

I have undertaken to determine whether or not, in the opinion of a cross section of presumably competent foresters, the harvesting plan and road map signed by GNP and the Authority measure up to the standard of the "latest and most highly developed scientifically approved forest practices" and amount to the practice of "Scientific Forestry and Reforestation" as those terms are used and amplified hereinabove. On January 11, 1973, I spoke with Mr. W. R. Dinneen, Director of the Forest Management Division of the Department of Forestry. He has had a number of years experience and his background qualifications can be supplied upon request. In addition, he has some degree of familiarity with this particular transaction by virtue of having participated in a meeting of foresters, called for the express purpose of developing a cutting plan which would meet the standards of the Trust. Mr. Dinneen stated that it was his unqualified opinion that the harvesting plan and road plan and map do not meet the standard of Scientific Forestry and Reforestation as he believes those terms to have been used in the Trust. He made the following observations and comments and expressed the following opinions to me:

1. There is in existence no management plan for T. 6 R. 10 or for the other northern Township in Baxter State Park in which cutting is permitted. It is critical, in his opinion, that this plan be developed and that it precede the preparation or execution of any cutting plan or road plan. In the management plan, the Authority could take into consideration, and effect a balance between, recreation, wildlife, forest products production, insect and disease control, species of growth to be encouraged and other factors. A cutting plan and a road plan are not only functions of, but are the implementation of a management plan. Major decisions affecting the long range use of property should not be made subject to or contemporaneously with a cutting plan. The failure to have had a comprehensive management plan prior to the adoption of a cutting plan underlies a number of comments by Mr. Dinneen listed hereinbelow. For example, Bureau of Land Management and the U.S. Forest Service, which have such plans in existence, design the layout of roads on their lands. In this deal, GNP laid out their roads on a map, submitted it to the Authority and without the Authority having independently verified the map against what actually exists on the ground or having analyzed the road plan in light of long range plans for the Township, the Authority approved the road plan. This road plan is extremely significant because it will establish what roads are to exist in the Township for the foreseeable future.

2. In the opinion of Mr. Dinneen, the road plan should have been submitted to the Highway Department in order to obtain an independent analysis of the specifications of the road contained in that plan. This was not done. In addition, in the opinion of Mr. Dinneen, the road plan should have been submitted to the Department of Parks and Recreation in order to determine whether or not the roads proposed to be constructed are suitable for a public park taking into consideration whether they are straight or curving and where they go in the Township. This was not done.

3. Page 1 of the road plan provides for the disposal of slash, stumps and other debris outside of the right of way limit at intervals of 200 feet or more, but does not specify how far back from the roads the disposal areas are required to be. This can make a substantial difference in the scenic impact of the debris areas.

4. Item 1 on page 2 of the road plan requires roads to be located on "soils which are least susceptible to erosion." Mr. Dinneen stated that there is no way to know in the winter time, with any degree of certainty, what soils lie beneath the ice and snow. It is my understanding that GNP is prepared to commence road construction immediately and has no intention of waiting until spring or summer in order to analyze the soil. In addition, Mr. Dinneen queried whether or not a soils map had been consulted and, even if it had, noted that soils maps have a wide margin for error and that it was highly desirable, especially in Maine where soil types vary greatly over small areas, to analyze the soils on the ground before road construction begins.

5. Item 2 on page 3 of the cutting plan provides that "sand bags or other suitable materials" will be installed to eliminate erosion in the construction of a road. In the opinion of Mr. Dinneen, sand bags are not only ugly but do not last long and do not really prevent erosion. In his opinion, the road embankments should be graded and seeded.

6. In Item 4 on page 3 of the road plan, GNP is required, prior to abandonment of the roads, to install "water bars where necessary or using a method as approved by an agent of the Authority and the Company's agent". In the opinion of Mr. Dinneen, water bars are not adequate by themselves and the road should be brought up to travel specifications by grading and, again, the embankment should be seeded. to prevent erosion.

7. Under the contract and cutting plan, it is contemplated that GNP will mark the trees. Mr. Dinneen stated that neither the U.S. Forest Service, Seven Islands Land Company or any other landowner dealing with his lands in a prudent and responsible manner allows the operator to mark the timber. He stated that good land management absolutely requires the landowner to mark the timber to be cut. In this connection, Mr. Dinneen pointed out that the cutting plan provides on page 3 that the Authority's representative "shall inspect the marking operation and shall be authorized to stop cutting if in his opinion the selection is not consistent with scientific forestry practices." This provision does not cure the basic assumption that good land management requires the landowner to mark and he submitted that unless we are going to have our own personnel keeping up with each of GNP's markers, we will, in effect, have no control over marking and he further pointed out that the cutting plan provides that our only power in the event of a disagreement is to stop cutting and not marking operations yet cutting operations follow substantially behind the marking operations. Even in the event that we should not mark, we should have the power to stop marking on the spot and not wait until marking is accomplished and cutting has commenced.

8. The best marking operations (including Maine and United States public forests) provide for marking the trees in two spots, one at breast high for the operator to see and one on the stump near the ground for the landowner to be able to verify, after the cutting operation is completed, that only marked trees were cut. No provision is made in the cutting plan for this protection and, of course, it only exacerbates the problem of GNP marking the timber.

9. The contract itself limited cutting to spruce, fir and poplar of specified sizes, based on the assurance from Mr. Wilkins that this was compatible with the practice of scientific forestry. This is apparently not the case and, it was in that spirit that the cutting plan was written to provide that notwithstanding the diameter limits, "trees below these limits and species other than those designated may be cut if approved by the Authority's designated agent for the purpose of achieving scientific forest management and re-forestation." In the opinion of Mr. Dinneen, this is inadequate to elevate the agreement to the standard of scientific forestry. To the extent that the species and diameters represent even guidelines in the cutting operation, they are incompatible with the concept of scientific forest management. Moreover, other species exist in T. 6 R. 10, including pine and hardwood and no provision is made for their proper management under this cutting plan. The foregoing language should not authorize the cutting of other species but should require the cutting of other species where designated by our forester in order to achieve scientific forest management. Mr. Dinneen noted that the species were included in the first place because GNP's nearby mill did not take hardwoods. Good forest land management requires that the owner of the land locate markets for all managed species of timber and frequently the timber operator is required, as a part of the deal to cut timber for which that particular operator has no use and to locate a market for it. Mr. Dinneen also said that he thought Oxford Paper Company ould buy hardwood from T. 6 R. 10 but under the existing arrangement, che Authority is powerless to force GNP to cut or manage those species.

10. In the Method of Harvest provision of the cutting plan, provision is made for "leaving reasonable visual cover" near roads. This vague language does not insure that the Authority will be able to leave dense cover where it is required and does not take into consideration that, in some areas, no cover may be desirable if there is a scenic lookout. This is another aspect in which the lack of a management plan and our own road plan makes this cutting plan fall short of scientific forestry.

11. The first paragraph of the Method of Harvest section of the cutting plan provides for clear cutting areas 25 acres in size. Mr. Dinneen says that this is too big from a scientific forestry standpoint because it permits large areas of bare ground to be exposed to the sun. Elsewhere in the cutting plan, provision is made for leaving seed bearing trees in order to promote revegetation in the clear cut areas but there is no assurance that the trees which are left will be in sufficient quantities (i) to prevent blowdowns resulting from isolated trees left standing and (ii) to provide some shade cover for the ground in order to keep the ground temperature low. These are further indications of the necessity that the Authority mark the trees, not GNP. Furthermore, he noted that 25 acre clear cuts will create slash accumulations for which .o disposal provision is included in the cutting plan and which can create a substantial fire hazard. Where good selective cutting is employed, there need be no particular slash disposal methods employed

cause the slash is evenly scattered through the woods but a different result can obtain where there are 25 acre clear cuts. Finally, he noted that from a game management standpoint, the figure of 25 acres should be submitted to a game biologist for his opinion as to the desirability of that size.

12. Mr. Dinneen expressed the opinion that purely from a forestry standpoint, without economic considerations, skidders are not desirable because they cause a large amount of damage to growth which is not cut and to the terrain. It is his opinion that if the Authority were to consider allowing a long time in which to cut and were perhaps willing to accept slightly less than top dollar for the sale of the stumpage, the Authority could attract responsible operators to cut wood in T. 6 R. 10 using "bombardier" or other tractors which do far less damage to the terrain and other growth than skidders. If one's focus is on the maximum economic return from one's land, as is the case with many paper companies, skidders are an economic necessity in that framework. If this is not the predominant goal (and such decisions are properly a part of a management plan) Mr. Dinneen is of the opinion that responsible timber operators can be attracted to cut timber without the use of skidders. This opinion was backed up by Mr. Joseph Lupsha, Utilization Forester for the State of Maine and an employee of the Department of Forestry.

13. The Method of Harvest section of the cutting plan provides that it is to be a tree length operation "except where considerations of scientific forestry make it necessary to cut shorter lengths." It is unclear how this will be implemented on the ground but the reverse presumption is preferable according to Mr. Dinneen. That is to say, he recommends that in all cutting operations on State forests, to the extent feasible, operators employ log length or even two log length hauling in order to avoid excessive damage to the land and to the other growth. This distinction is perhaps better understood by visualizing the difference between hauling a sixty foot tree around a curve in the woods, knocking over all growth in its path, and hauling a twelve foot or other short log around the same curve.

14. Mr. Dinneen noted that although it was perfectly permissible, it was odd to use the "Holland Rule" in measuring saw logs rather than the International Rule which the Legislature has declared to be the official rule for the measurement of such timber in this State.

15. Mr. Dinneen pointed out that he did not know how many personnel the Authority planned to have on the ground during the cutting operation but it was his understanding from Austin Wilkins that the Authority would have only one man. This single man, under the contract and cutting plan as presently written, would be responsible for scaling and inspecting cutting operations and inspecting marking operations, all of which could be occurring (and likely will be occurring) simultaneously. The job should be performed by a team of foresters representing the Authority and not GNP.

16. Mr. Dinneen stated that since T. 6 R. 10 was given to the State in 1955, no forester from the Forestry Department (and there are twenty-five of them) has gone on to T. 6 R. 10 for the purpose of examining the growth thereon or developing any management plan or for any other purpose with the sole exception that one forester surveyed the lines in the whole of Baxter Park a few years ago, but not in connection with forest management.

17. Mr. Dinneen noted that, although it was not strictly a function of scientific forestry, he was surprised that the agreement contained no termination provision and he noted that, as a matter of common sense, it will be difficult to enforce the agreement without a termination provision.

18. Finally, although this again does not bear directly upon the issue of scientific forestry, he noted that according to Forestry Department statistics, the Authority traded pulpwood in the southern Township, which, assuming it was otherwise economically operable, was worth $12 per cord, for saw logs in T. 6 R. 10, which is worth $18 a cord and he seriously questions whether the Authority received full value in the exchange.

On January 15, 1973, I had a lengthy telephone conversation with Mr. Cliff Swenson, Chief Forester for the Seven Islands Land Company, and a participant in the meeting called by Austin Wilkins in order to develop a cutting plan under the subject agreement, and referred to hereinabove. Mr. Swenson informed me that he had assumed that future meetings of that group would be held before the signing of the cutting plan and road plan and that he had mixed feelings about being asked, as he felt, to approve a contract after it had already been entered into and its terms and conditions set. I did not disclose to Mr. Swenson that Mr. Dinneen's comments had already been solicited in this matter but instead, asked him to give me his opinions about the contract and cutting plan and road plan, and he had the following comments to make:

A. Mr. Swenson reiterated, as he had done at the meeting, that it is absolutely imperative that the Authority mark the trees and stated that Seven Islands Land Company and other responsible forest land managers mark their own trees.

B. Mr. Swenson stated that he perceived this Township to be an area where the State had an opportunity to demonstrate first-class proper forest management. He stated that this was an area inappropriate for the kind of contract entered into which basically provides for a woods operator to go in and cut a specified number of cords of wood. He stated that the 109,000 cords of wood to be cut is merely an economic exchange, not proper management of the woodlands. There is much more wood than that in the Township and the cordage to be cut should be a function of a sustained yield plan. He stated that in his opinion, the cutting of 109,000 cords of wood was not cutting on a sustained yield basis and, in fact, probably bears no relationship to the amount

of wood on the ground, which, from the standpoint of professional forest management, should be cut.

C. He stated that it is universally accepted practice to have a management plan taking into account a number of factors affecting the long range use of forest lands, before cutting is commenced, and, in fact, that a cutting plan and a road plan should be am implementation of the management plan.

D. Mr. Swenson stated that to the extent that species and diameter limits specified in the contract represent guidelines for what is to be cut, it does not represent scientific forestry. Moreover, Mr. Swenson emphasized that all species should be managed and that to the extent the Authority has no power to require GNP to harvest birch, pine and all other species, the arrangement does not reflect scientific forestry. He stated that markets are available for all species and they should be located as part of a management plan. Mr. Swenson's comments about clear cutting differed slightly from Mr. Dinneen's comments. Mr. Swenson said that the twenty-five acre maximum size should have been left out of the agreement, because, in fact, any numerical maximum or minimum is irrelevant to the practice of scientific forestry because areas should be clear cut in accordance with the requirements of scientific forestry as determined on the ground by professional foresters. He stated that this is another respect in which it is critical for the Authority to have marked the trees. The Authority would have marked those trees without imposing upon itself any maximum or minimum sizes and that professional standard should obtain in the marking of the trees. While Mr. Swenson's comments differ from Mr. Dinneen's, it is apparent that neither forester regarded the existing arrangement as a reflection of scientific forestry.

E. Mr. Swenson's comments about skidders also differed from Mr. Dinneen's comments. Mr. Swenson sees nothing wrong with the use of a skidder per se. He emphasized, however, that this contract calls for the cutting of 109,000 cords of wood within two and one-half years and that because of those limitations, skidders would be employed on a wide scale and in great numbers. This use of skidders he regards as less than the standard required in order to employ the latest and most highly developed techniques of scientific forestry. He would recommend that approximately 10,000 cords of wood be harvested per year. If that quantity of wood were harvested, Mr. Swenson pointed out that skidders could be used on an extremely limited scale and that their operations could be closely supervised. With these two conditions, he would authorize the use of skidders in cutting on T. 6 R. 10. It is apparent that while Mr. Swenson's opinion concerning the use of skidders differs from Mr. Dinneen's opinion, both apparently agree that the use of skidders contemplated by the contract and cutting plan with GNP does not represent scientific forestry.

F. Swenson pointed out to me that it was his understanding from remarks made at the meeting with representatives from GNP, that GNP was not itself going to mark fir trees but was going to cut it all. He stated that this was not an approach to the marking or management of forest lands which could be characterized as scientific forestry.

G. Mr. Swenson stated that a major factor in the type of cutting which would occur under this contract depended upon the quantity and quality of personnel which the Authority put on the ground in order to supervise and observe marking and cutting operations. He had understood that the Authority may put only a single forester on the ground and he felt this was inadequate. He stated, however, that even if an adequate number of competent foresters representing the Authority were placed on the ground, he would still have "serious reservations" about expressing the opinion that the cutting authorized and contemplated by the contract and cutting plan with GNP represent scientific forestry, because of those factors listed hereinabove which could not be realistically cured by supervisory personnel at this point and time. When I asked him whether or not he thought that the Authority was using T. 6 R. 10 "to become a show place for those interested in forestry, a place where a continuing timber crop can be cultivated, ' rvested and sold; where reforestation and scientific cutting will employed; and example and an inspiration to others", he said "absolutely not".

Both Messrs. Dinneen and Swenson have some degree of familiarity with this particular transaction and, of course, had already read the contract and cutting plan when I approached them for their comments and opinions. There are other foresters whose opinions can and perhaps should be obtained, including at least one academician from the University of Maine. It will take some time to familiarize others with the existing arrangement between the Authority and GNP and to obtain their opinion, however, and in the interest of time I am submitting this report to you now. At your request, this project can be pursued further.

Let me reiterate that as far as I am concerned, this memo may be submitted to any interested parties for their comments, including Messrs. Wilkins and Erwin. It is, of course, desirable that you have the benefit of many viewpoints before you decide upon a course of action.

LEE M. SCHEPPS
Assistant Attorney General

LMS:mfe

JON A. LUND
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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04330

April 13, 1973

Governor Kenneth M. Curtis
Executive Department
State House
Augusta, Maine 04330

Dear Governor Curtis:

In January of this year, this office brought suit against the Baxter State Park Authority and the Great Northern Nekoosa Corporation to set aside a "Timberland Permit" by which the Authority had granted to Great Northern Nekoosa Corporation the right to cut 109,000 cords of spruce and fir from Township 6, Range 10, W.E.L.S., in the northwest corner of Baxter State Park. That township, together with certain other lands in the northern end of Baxter State Park, is held by the State subject to the terms of a gift from Governor Baxter which permits the "practice of Scientific Forestry and Reforestation." In our suit, we maintained that the "Timberland Permit," so-called, did not represent or contemplate the practice of Scientific Forestry and Reforestation.

Because our litigation was rendered moot prior to trial, there has been no judicial determination of what Governor Baxter meant by the term "Scientific Forestry." As we prepared the case, however, we had occasion to observe and learn something of forest management practices and procedures which are being conducted by the federal government and by certain private companies in this area, and to compare those practices and procedures with what is being done by certain agencies of this State. The State did not come out well in the comparison. We write this letter, therefore, for two reasons. First, the settlement of the litigation precluded our bringing much of this to light in a public forum and it is information which should, in our view, be brought to your attention. Second, and perhaps more important we feel that there is a legitimate need to enhance and improve the posture and performance of the State in the management of its public lands. We fully recognize that everyone may not agree with all we have to say and that we have no special training in the field of forestry or forest land management. Nevertheless, we feel obliged to pass along to you our observations and to give you the benefit of our thoughts. After all, the power to authorize cutting in Baxter Park remains, and we have no court decision upon which to rely.

Governor Baxter left an indication of what he meant by the expression "Scientific Forestry." In official communications to the Governor and the Legislature, Governor Baxter stated that he had been extremely impressed with the beautiful forests he had seen in certain foreign countries and that he was making it possible for the State to try a major experiment here at home, one that he said "would mean much for our future timber supply, which all admit is the chief natural resource of our State." He said that he wanted those portions of Baxter State Park where forestry is permitted "to become a show place for those interested in forestry, a place where a continuing timber crop can be cultivated, harvested and sold; where reforestation and scientific cutting will be employed; an example and an inspiration to others." He noted that what is "done in our forests today will help or harm the generations who follow us." In our opinion, while the expression "Scientific Forestry and Reforestation" does not necessarily have any fixed and absolute definition, nevertheless the expression contemplates and requires, at the very least, an approach to forest land management and harvesting characterized less by short term economic considerations than by more balanced, long-range and professionally sophisticated considerations. The expression also connotes the use of highly developed and methodical techniques in the management of forest lands for the purposes for which they are to be managed.

Governor Baxter left the northern end of Baxter State Park to the State to be used not only for "Scientific Forestry and Reforestation" but also for park and recreational purposes. In addition, he allowed hunting in those areas of the park. Although he did not use the expression, it is our view that he intended for those portions of the park in which forestry is permitted to be managed under the principles of "multiple use." That is to say, those areas should be managed for <u>all</u> of the various renewable surface resources of the forest (including recreation, timber production, aesthetics, watershed protection, wildlife management, etc.), making the most judicious use of the land for some or all of these resources. Multiple use of forest resources contemplates that some land is used for less than all of the resources and it also contemplates the harmonious and coordinated management of the resources in a manner which will not impair the productivity of the land. We believe that Governor Baxter intended that those lands be managed under the principles of multiple use and that the management under those principles should be carried on by the use of the most sophisticated and highly developed techniques.

The expression "Scientific Forestry" also contemplates, in our view, the management of forest resources for a sustained yield of the several products and services produced by forests. In fact, although he did not use the expression "sustained yield," that is what we believe Governor Baxter intended when he made reference to the production of "a continuing crop of timber" and to the future supply of timber. Not only should the lands in the northern end of Baxter State Park be managed for a sustained yield of the various renewable products and services obtainable from a forest, therefore, but that

management should be carried on by the use of the most sophisticated and highly developed techniques available.

In order to scientifically manage forest lands under the principles of multiple use for a sustained yield of the products and services of a forest, a fundamental prerequisite is an adequate inventory of the land involved. This inventory should begin with an analysis of the land to discover and to catalog those attributes of the land which lend themselves to the various multiple uses for which the land is being managed and with a view toward effecting a balance between those uses. That is to say, those areas with significant recreational potential, if any, should be defined, those areas with unique natural characteristics, if any, should be defined, those areas which are significant for purposes of wildlife management, if any, should be defined, and those areas requiring peculiar precaution for watershed management, if any, should be defined. In addition, there should be a thorough inventory of the timber growing on the land and the rate at which it is growing, an inventory which is not only the product of an aerial cruise of the specific lands involved but, more significantly, is the product of an on-the-ground evaluation by forester through the use of ground plots, soil evaluation and the like. This inventory should precede, and not follow, the cutting, or commitment to cut, large quantities of timber from the land. Otherwise, the values which should be preserved or protected through no cutting or through coordinated cutting will be lost or impaired before they are known.

In addition to an adequate and meaningful inventory of the lands to be managed, and partially based upon that inventory, the scientific management of forest lands under principles of multiple use and for a sustained yield requires the preparation of a management plan. In general, the larger the tract of land involved, ~~the more~~ sophisticated the management plan ought properly to be and, in view of Governor Baxter's expressed desire that only the most highly developed techniques be employed, the management plan for Baxter State Park, including particularly the northern end where forestry is permitted, ought to be both sophisticated and comprehensive. The management plan establishes the management goals for the land and sets down the guidelines for the accomplishment of those goals and the framework within which they are to be accomplished.

Although management plans should be flexible enough to respond to fluctuations in the demand for the products and services of the forest and similar variables, and although it must be subject to major changes to cope with unforeseeable natural disasters and the like, nevertheless it is the "bible" for the day-to-day and month-to-month management of a forest. It usually identifies and establishes, among other things,

(i) the sizes of timber for which the land is to be managed (sawlogs or pulpwood),

(ii) the species of timber which are to be preferred, if any (softwood, hardwood, pines for aesthetic purposes, yellow birch for higher long range profitability or even non-marketable species for certain game management purposes),

(iii) the projected long-range recreational uses of the land, including the areas where recreation is to be channelled and promoted or avoided,

(iv) the cutting cycle (which is critically important in the selection of what trees to cut during any given harvest),

(v) the criteria for road lay-out, design and construction in order to facilitate future timber harvests, provide recreational access, protect deer yards and other wildlife areas, preserve areas which are to be left intentionally inaccessible by road, etc.,

(vi) known mineral resources and the extent to which they are being or will be developed (this would, of course, be inapplicable in the case of Baxter State Park),

(vii) wildlife management objectives, which may vary from area to area (particularly in Baxter State Park where hunting is permitted in certain areas only),

(viii) applicable watershed protection objectives,

(ix) existing markets for timber production from the land involved, as well as future markets which may develop by economic forces or which the landowner wishes to attempt to develop and

(x) applicable economic objectives (which may include providing steady employment or a steady supply of timber, etc.).

Scientific Forestry requires, in our opinion, that a management plan be prepared and that it precede the cutting, or commitment to cut, significant quantities of timber from the land being managed. Otherwise, decisions as to what sizes or species of trees are to be cut, from what areas they are to be cut, how often they are to be cut, where the roads and bridges are to be put and how the roads and bridges are to be designed and built are all made without regard to the other uses for the land and not as an implementation of a carefully thought out management plan.

If cutting for a sustained yield means the regular, periodic cutting of only what is grown, then a fundamental piece of information which must be known about a given tract of forest to be managed for sustained yield is what is being grown. Only when one knows what is being grown and at what rate can a decision be made (in a scientific manner) as to what quantities of wood to cut. This piece of information is commonly referred to as an "allowable annual cut" or an "allowable periodic cut." Without this information, the decision as to how much timber to cut (or to sell) is, at best, a guess.

Before one decides whether to cut, much less what species to cut and where and when to cut, a scientific approach to forest land management requires a cruise of the land to determine what can and should be cut. In general, the more intensive the cruise, the more scientific and sophisticated is the decision-making process. After a cruise, the decision as to whether, what, when and where to cut should be made in accordance with and subject to management objectives and policies as set forth in a management plan. Once these decisions are made, then timber can be sold to a timber operator. The inventory, the management plan and all other scientific techniques used to arrive at a sound decision as to what, when and where to cut are all for naught, however, unless the timber harvesting operation is closely supervised. With modern logging techniques, significant damage can be done quickly unless there is close, professional supervision of the men on the ground. Proper supervision is of such importance that it should ordinarily be a limitation on the size of some harvesting operations (and therefore the rate at which timber is cut), for the supervisory capacity of the landowner should be commensurate with the scope and size of the harvesting operation.

In those areas which are to be managed for the production of timber, all species and the total area involved should receive the benefits of careful planned management not just the species or fraction of an area which a particular operator wishes to cut at a particular time. Moreover, the forest should be enhanced and improved by cutting and not degraded. That is to say, it is desirable to cut poor quality trees and other trees that are an impediment to the vigorous growth of preferred species and sizes and, quite often, to leave the best to grow for future cutting and to reseed the forest. Taking the best and leaving the worst is called "high grading." It results in the continual downgrading of the quality of the residual stand of timber and such a practice is not, based upon our observations, the most approved or scientific approach to forestry, though it has undisputed advantages from the standpoint of short term profits. Finally, the selection and marking of trees to be cut is ordinarily done by the landowner, who is presumed to know best what he desires to have harvested for the enhancement of the forest and the accomplishment of his management objectives.

The litigation between this office and the Authority is over. Farmore facts were involved in the transaction which was the subject of that litigation (both in favor of and against the Authority) than are pertinent here. Moreover, there is far more involved in the management of forest lands than the rather fundamental considerations we have discussed above and even those considerations must be responsive to unforeseeable special situations. What is pertinent is that in preparing for trial, we discovered that an inventory, a management plan, the development of allowable annual cuts and the other practices mentioned above are not esoteric or prohibitively expensive. In fact, the U.S. Forest Service and several major private landowners in the State, to varying degrees, employ these practices as a matter of course in the management of their forest lands. These things are considered merely to be good forest land management.

It seemed then and seems now that Governor Baxter could not have intended less for the Park. We therefore came to regard "Scientific Forestry" as requiring, at the very least, first-class, professional, sophisticated forest land management and we found the State seriously deficient even in this respect with regard to Baxter State Park. No inventory of the type described above has ever been undertaken for Baxter State Park in general or for the northern townships in particular. In fact, so far as we could learn, no forester has been on the ground at all for the purpose of evaluating the timber. All that has been done to date in the northern townships is a rough estimate of volumes of timber, based entirely upon statistical information none of which was derived from the townships involved and none of which was derived from on-the-ground evaluation. No "allowable cut" figures have been scientifically calculated for any portion of the northern townships. Future recreational uses of that area have not been decided and, in fact, areas suitable for future recreation have not been delineated. No management plan has ever been prepared for Baxter State Park in general or for the northern townships in particular, though the State has owned much of the park for as long as forty years and has owned the northern townships for eighteen years. No realistic appraisal has been made by the Authority of its own supervisory limitations as evidenced by its embarkation upon a massive cutting operation (109,000 cords in two years from approximately 15,000 acres) with the part time services of a single forester and without thorough and effective advance arrangements for close and proper supervision. Rather than a broad look at all species which it would be desirable to manage, the Authority purported to allow the harvesting only of spruce and fir (with a small volume of poplar), largely, we believe, because those species were preferred at the time by the timber operator, and not because of any scientific analysis of what timber should or could be managed. Finally, the Authority permitted the timber operator to mark,

select, which trees were to be cut, and from where they were to be cut (an unusual and possibly imprudent approach to forest land management), retaining the right to "approve" or "disapprove" marking after trees had been marked (an unusual and somewhat impractical approach to controlling the selection of trees).

In short, we believe that the quality of forest land management of the northern townships in Baxter State Park was substantially beneath the degree of competence and sophistication exhibited by the U.S. Forest Service in the management of national forests and by several private companies in this State in the management of their own lands. To that extent, therefore, regardless of the legal merits of our case, we decry the situation as a matter of principle and feel that it is undesirable, unprofessional and unworthy of the State.

Unfortunately, the lack of sophistication applied to the management of the forest lands in the northern townships of Baxter State Park is not unique in the management of public lands. Of the approximately 400,000 acres of public lots, the State owns unquestioned clear title to the timber on at least 90,000 acres. These 90,000 acres are managed by the Forestry Department. (There has been, for all intents and purposes, no management by the State of the remainder of the public lots). These 90,000 acres are scattered across several counties and are mostly in tracts of approximately 1000 acres each. No management plan exists for any or all of the public lots. No allowable annual or periodic cut figures are calculated with respect to public lots. Little or no effort is made to manage all species or all of the land. In fact, the public lots are "high-graded," and have been "high-graded" for many years, which is to say that the overall quality of the residual stand of timber on these public lots has been steadily degraded (rather than enhanced) over the years. Consideration of whether to cut a given public lot is typically not initiated by the Forestry Department but by inquiry from timber operators in the area. The decision as to whether and what to cut is based, at most, upon an aerial cruise with a cursory visual inspection, not including the use of ground plots or similar preferred, scientific techniques. It is both ironic and informative that the public lots have been required to be managed under the principles of multiple use since at least 1965 (Title 12 M.R.S.A. § 501-A), yet no inventory of the type above described has been made of any or all of the public lots in order to discover and delineate areas suitable or significant for any of the multiple uses of the forest. There has been practically no management for wildlife or public recreational purposes (except the annual leases of camp lots to specific individuals). It is probably fair to say that the public lots on which the grass and timber was sold have, in many instances, received a higher quality of forest land management by private companies than those which have been managed by the State.

There is a reason, even to a large extent an excuse, for the low quality of management given to these public lots. The average sums available to the Forestry Department to manage 90,000 acres of forest land in 8 counties has been from $13,000 to $15,000 per year for the past 13 years and approximately $5,000 per year prior to that. A persuasive argument can be made that much, if not all, that could be done within the limitation of these funds, has in fact been done. No such explanation can be tendered for the Baxter State Park Authority, which had accumulated approximately $1,000,000 of earned but unspent income and has generally had a surplus of income over expenses for a number of years.

We believe that there is a solution to both of these situations and that while the solution requires the expenditure of public funds, these funds are, to a significant extent, already available. In the case of Baxter State Park, these lands should be administered in a first-class and exemplary manner, commensurate not only with the dignity of the State, but with the generosity of our benefactor and the significance of his gift. Penurious management of these lands is tantamount to second-rate management, and it will prevent their full use and enjoyment by the public. Funds for these purposes were provided to the State by Governor Baxter. They should be used.

Though the Forestry Department has had only paltry sums available o it to manage the public lots, the 90,000 acres which it manages produced a yearly average of more than eight times the amount available for management of the lands over the past several years. The excess has been added to the principal in the trusts comprising the Unorganized Temitory School Fund and the Organized Territory School Fund, where it is presently required by law to remain until the incorporation as a town of the various wildland townships involved, at which time it goes to the people in the town, and can be sold by them, for school purposes. Any rational re-evaluation of the priorities and aspirations of the State should lead to the conclusions that this arrangement is obsolete. There is every reason to expect that income to the State from the public lots will increase over the coming years. Funds generated by the public lots should be used, to the extent necessary and feasible, to manage the public lots in a manner more appropriate for, and beneficial to the long range interests of the State.

As population and other forces place increasing pressure upon us to make the most of what we have, and to do it in a manner that preserves what we have for future generations, it seems imperative that we abandon the view that our natural resources are unlimited and that they can be utilized and managed in a casual or haphazard manner without serious consequences. What seems most compelling about this particular reform, however, is that significant funds for its accomplishment already exist. To the extent that the State does not itself exemplify the spirit and

practice of first-rate land management, it only undermines public efforts to inculcate and encourage such practices in the private sector.

We hope that you will give some thought to this subject and we feel that, to the extent there is open and honest public discussion of the issue, the State of Maine will be the better for it.

Yours very truly,

JON A. LUND
Attorney General

JAL:mfe

cc: Maynard Marsh, Chairman
Baxter State Park Authority

Fred E. Holt, Commissioner
Forestry

Senator Harrison L. Richardson, Chairman
Joint Special Legislative Committee on
Public Lands

STATE OF MAINE

Inter-Departmental Memorandum Date May 9, 1975

To Donald F. Mairs Dept. Pesticides Control Board

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject Aquatic Application Permit; Spruce Budworm Control Program

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This is a reply to your memorandum dated April 25, 1975, asking whether the Maine Bureau of Forestry is required to obtain an aquatic application permit from the Pesticides Control Board prior to carrying out the spruce budworm control program. The answer is no.

The provisions of 22 M.R.S.A. § 1454-A state that:

> "No person, firm, corporation or other legal entity shall apply pesticides to or in any river or stream or tributary thereof, or any great pond, without a permit from the board."

It is our opinion that the proposed spruce budworm spraying project does not constitute an application of pesticides to or in any river or stream or tributary thereof or any great pond, within the meaning of the quoted statutory provision. The application of the pesticides will be by spray planes operating over the forest canopy in the project area, and it is foreseeable that accidental pesticide introductions might occur in the case of airborn spray drift. However, it is our opinion that such an application of pesticides does not amount to an application to or in rivers, streams or ponds, within the meaning of § 1454-A.

> "We are ascertaining here not what the Legislature may have meant by what it said but rather are deciding what that which the Legislature said means." State v. Millett, 160 Me. 357, 360.

Additional support for the conclusion is evidenced by the fact that the Act appropriating funds for the State's share of the spruce budworm control program (P.L., 1975, c. 162), enacted as an emergency measure, provides as follows:

> "Whereas, a severe outbreak of spruce budworm has developed in the forests of Maine, threatening the destruction of one of Maine's outstanding natural resources, threatening further destruction by fire and damage to wildlife and other environmental damage, and threatening the economy and employment of the State; and

"Whereas, the following legislation is vitally necessary to control this outbreak so as to save the 3,500,000 acres of Maine forest to be sprayed and the other Maine forest lands which are vulnerable to the spread of this infestation; and . . . . "

In view of the foregoing, we conclude that the Maine Bureau of Forestry is not required to obtain an aquatic application permit from the Pesticides Control Board prior to carrying out their spruce budworm control program.

s/ Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB/ec

STATE OF MAINE

Inter-Departmental Memorandum Date April 23, 1976

To Joseph E. Brennan Dept. Attorney General

From Sarah Redfield, Assistant Dept. Attorney General

Subject General Provisions Concerning the Responsibilities of the Maine Forest Authority

The Statutory Provisions.

The Maine Forest Authority (hereinafter "MFA") was established in 1970 and consists of five members: the Director of the Bureau of Forestry, the Commissioner of Inland Fisheries and Wildlife, the Director of the Bureau of Parks and Recreation, the Attorney General, and a member of the public (currently Hartley Baxter), see 12 M.R.S.A. §1701.

The MFA is designated as the State agency to receive certain monies from the trust funds established by Governor Baxter, 12 M.R.S.A. §1701. The MFA is authorized by statute to purchase, with these funds and with funds realized by the sale of timber from MFA lands, or to receive gifts of land "for recreational and reforestation purposes". Any real property so acquired is to be held in trust for the benefit of the people of the State "for development, improvement, use, reforestation and scientific forestry and the production of timber and sale thereof", 12 M.R.S.A. §1702.

The MFA is also specifically authorized by statute to sell timber from its lands and to establish fees for the use of the area by the public, 12 M.R.S.A. §§1703, 1704. Revenues from timber sales are to be used for the timber management of the property; revenues from use fees are to be used for the maintenance and protection of of the property and for salaries of personnel. The fee revenues are to be shared with the municipality or county in which the land is located, 12 M.R.S.A. §1705.

The Trust Provisions.

The funds for the MFA are derived from three sources:

(1) pursuant to the THIRD clause of the intervivos trust of Percival Proctor Baxter dated July 6, 1927, as amended;

(2) pursuant to the Baxter State Park Trust Fund, 12 M.R.S.A. §1701;

(3) revenues.

The first category of funds involves principal of the funds held by the Boston Safe Deposit and Trust Company as trustee. The principal may be used by the State of Maine for the purchase of additional lands in Baxter State Park or for the purchase of "other lands for recreational or reforestation purposes". The intervivos trust particularly mentions

> "large areas of unproductive forest lands, burned over, cut and rocky, which are of little or no market value and which may be purchased at a low figure and allowed to reforest itself or remain as it is for scenic, recreational purposes and for experimental scientific forestry."

Baxter stated it was his hope that these lands would become "model forests" harvested and reforested by the State.

The second category of MFA funds involves the income from the funds held in trust by the Boston Safe Deposit and Trust Company. The income is to be paid, at least quarterly, to the Baxter State Park Trust Fund as created by Chapter 21 of the Private and Special Laws of 1961. These funds are to be used for the care, protection and operation of Baxter State Park and for other forest lands acquired by the State with funds and for the purposes indicated in the first category.

The revenues from the operation of the forest lands acquired by the MFA are the third category of funding. Pursuant to the trust, this money is to be used for the care, extension, and management of MFA lands. The revenues from fees, as discussed above, are provided for by statute and not specifically by the terms of the trust instrument.

The responsibilities of the MFA, then, parallel those of the Baxter State Park Authority.

The Baxter intervivos trust provides that the principal of the fund may be used for acquisition of Baxter State Park land or forest land. The income is to be used for the maintenance of both categories of land. Baxter himself did not specify a State agency which should administer the funds; these agencies were created by the Legislature and the responsibilities divided according to type of land: funds for purchase and maintenance of Baxter State Park land under the control of the Baxter State Park Authority; and funds for purchase and maintenance of forest land under the control of the MFA. Of course, as a practical matter, the Baxter State Park Authority constitutes the majority of the MFA.

Current Status.

It is my understanding that the MFA has pruchased two parcels of land: one parcel of 200 acres in Mount Chase Plantation and another of 200 acres in Harpswell. Apparently the MFA had not formally met since 1973.

Recommendations.

(1) Convene a meeting of the MFA and elect a chairman and secretary, 12 M.R.S.A. §1707.

(2) Adopt regulations governing the use of MFA lands, 12 M.R.S.A. §1704 (draft attached).

(3) Have staff of the member agencies

(a) prepare an analysis of the current financial status of the trust funds and determine the availability of funds for acquisition of MFA lands.

(b) prepare a management plan for the existing MFA lands and an analysis of potential income therefrom.

(c) prepare a set of guidelines for the purchase of additional MFA lands consistent with the trust provisions and availability of financing.

(d) develop a list of possible sites for acquisition.

SR;cmb

DRAFT
MAINE FOREST AUTHORITY
REGULATIONS

1. General

1.00 Statutory Authority. These regulations are adopted pursuant to 12 M.R.S.A. §1704.

2. Rules of Practice (Reserved)

3. Public Access

3.00 Authority representative. For the purposes of these regulations the Director of Baxter State Park shall be considered the representative of the Maine Forest Authority.

3.01 Permit required. Unless otherwise provided herein, no person shall enter the lands of the Maine Forest Authority without a permit from the representative thereof.

3.02 Day use. Access to the Maine Forest Authority lands, on foot, for day use for hiking, fishing, picnicing, snowshoeing or skiing is permitted except when the area is posted as "closed" by the representative of the Maine Forest Authority.

3.03 Camping. Camping is permitted within the lands of the Maine Forest Authority with permission from the representative thereof upon payment of a fee of $2.00 per person per day; provided however that no camping permit shall exceed two weeks in length.

3.04 Fires. No person shall build or light fires except at authorized areas and then only in those places provided or designated for such purposes and shall before leaving such fire, totally extinguish same. "Fires" shall include without limitation, open fires and gasoline, propane and other types of stoves or heating devices.

No person shall throw away or discard any burning cigarettes, cigars, matches, or any other burning material on Maine Forest Authority lands. State laws with regard to fire control shall be strictly enforced. Any fire not contained as herein provided shall be reported to the nearest ranger or State authority at once.

3.05 Washing. Washing of the person or articles shall be prohibited in any waters except where expressly authorized.

3.06 Litter. No trash, waste or other litter shall be deposited or caused to be deposited in any place within the Maine Forest Authority lands other than in official containers or at authorized dumps. All refuse, litter and waste must be packed out. Plastic or similar tarpaulin as used for shelters shall be removed from the site as any other litter.

3.07 Wildlife. No person shall feed any wildlife within the Maine Forest Authority lands.

3.08 Pets. No pets or other domestic animals are allowed within Maine Forest Authority lands.

3.09 Fishing and hunting. Fishing and hunting are allowed in Maine Forest Authority lands consistent with the general laws and regulations thereof of the State of Maine.

3.10 Liquor and drugs. General laws of the State pertaining to alcoholic beverages and drugs apply within the confines of the Maine Forest Authority lands.

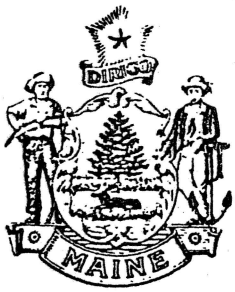
3.11 Property. No person shall deface, paint, damage, mutilate or remove any structure, marker, fauna, flora or any other natural feature of the Maine Forest Authority lands. Possession of paint or marking materials without authorization or the tampering, altering or removal of any signs or markers is prohibited.

3.12. Special Research Studeis. Request for research studies in ecology, flora, fauna, geology and other projects such as survival, testing of clothing and mountain climbing equipment must be submitted in writing to the Authority in Augusta, Maine for approval.

Requests for specimen collections will be reviewed in relation to the forestry management of the land and the scientific values involved. Approval for such collections may require that specimens shall only become a part of public collections.

4. Forest Management (Reserved)

RICHARD S. COHEN
ATTORNEY GENERAL



STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

#79-64

March 28, 1979

George M. Ruopp, Forester
Baxter State Park
Millinocket, Maine 04462

Dear Mr. Ruopp:

This is in response to your request for an opinion as to whether or not any limitations exist on the construction or use of roads in the scientific forestry area of the Baxter State Park. The deeds of trust contain no specific limitations on road construction or use, but any road constructed within this area of the Park would be subject to the overall requirement of the best available planning, methodology and construction, consistent with the concept of "scientific forestry."

The majority of Baxter State Park is subject to the provisions that the land be held as a State forest, for public recreational purposes, forever to be left in its natural wild state, and as a sanctuary for beasts and birds. See, e.g., P. & S.L. 1931, c. 23; P. & S.L. 1933, c. 3; 1939, c. 1; c. 122; 1941, c. 1, c. 95; 1943 c. 1; c. 91; 1945, c. 1; 1947, c. 1; 1949, c. 1; 1955, c. 1; c. 3; 1963, c. 1. In the so-called "scientific forestry" area of the Park, however, the restrictions of the deeds of trust are somewhat different. By deed published as P. & S.L. of 1955, c. 61, Percival Proctor Baxter gave to the State of Maine to be held in trust 3,569 acres in Township 6, Range 9, W.E.L.S., Piscataquis County, subject to the following conditions:

> "The same to be held by such state forever as TRUSTEE IN TRUST for the benefit of the PEOPLE OF MAINE, the same to be forever named BAXTER STATE PARK, the same to be forever held by said state for State Forest, Public Park, and Public Recreational Purposes and for the practice of Scientific Forestry, reforestation and for the

> production of forestry wood products. All harvesting of said products shall be done according to the most approved practices of Scientific Forestry and all revenue derived from the sale of said products shall be used by said State for the care, management and protection of Baxter State Park as now or hereinafter defined. . . . "

Similarly, in conveying to the State the deed dated May 2, 1955, Governor Baxter set aside 25,025 acres in Township 6, Range 10, W.E.L.S., Piscataquis County, subject to the following conditions:

> "The same to be held by said state as TRUSTEE IN TRUST for the benefit of the PEOPLE OF MAINE the same to be forever named Baxter State Park, the same to be forever held by said State for State Forest, Public Park, and Public Recreational Purposes, and for the Practice of Scientific Forestry and Reforestation. The trees harvested may be cut and yarded on the premises but no manufacturing operations shall be carried on within said township. All revenue derived from the sale of timber shall be used by the State IN TRUST for the care, management and protection of Baxter State Park as now or hereinafter defined, ... "

The deeds for the "scientific forestry" area of Baxter State Park are silent as to the question of roads. Where the deeds are silent and some ambiguity is seen to exist, it is necessary to attempt to ascertain the intent of the settlor of the trust by reference, not only to the legal instruments themselves, but also to such extrinsic evidence as may be relevant. See, generally, 4 Scott, The Law of Trusts, § 164.1 (1967); see also, 12 M.R.S.A. § 900.

In this context, the formal letters which Governor Baxter wrote to the Legislature with each conveyance of land in the Park provide at least some guidance as to his intention for this area of the Park. In conveying the first piece of land for the practice of scientific forestry, Governor Baxter wrote that the area

> "will be available both for recreation and for scientific forestry management and to be made to produce a continuing crop of timber to be harvested and sold as are potatoes or any other products of the soil."

> "It has long been my purpose to create in our forests a large area wherein the state may practice the most modern methods of forest control, reforestation and production under the management of our able Forest Commissioner, Mr. Nutting and his associates. This new 3,569 acres is an excellent location for this purpose.
>
> "In my travels in foreign lands I have seen beautiful great forests that for centuries have been producing a crop of wood without depletion. In Sweden, Norway, Finland, Germany, Chile, Russia and elsewhere what has been done by scientifically controlled forestry can be done in Maine. I now make it possible for the state to try a major experiment here at home, an experiment that can mean much for our future timber supply, which already is the chief natural resource of our state. . . ." Letter from Percival Proctor Baxter to the Honorable Edmund S. Muskie, Governor, and the Honorable Senate and House of Representatives of the 97th Legislature of the State of Maine, March 17, 1955. Laws of 1955, p. 1146.

Similarly, in conveying an additional 25,025 acres for similar purposes, Governor Baxter wrote:

> "The terms of this gift are identical with those of the three thousand five hundred sixty nine (3,569) acre gift; Public Park, Public Forest, Public Recreational and Scientific Forestry Purposes and Reforestation. I want this township to become a show place for those interested in forestry, a place where continuing timber crop can be cultivated, harvested and sold; where reforestation and scientific cutting will be employed; an example and an inspiration to others. What is done in our forest today will help or harm the generations who follow us." Letter from Percival Proctor Baxter to the Honorable Edmund S. Muskie, Governor, and the Honorable Senate and House of Representatives of the 97th Legislature of the State of Maine, dated May 2, 1955, P.L. 1955, p. 1149.

These letters read together with the deeds indicate the intention that this area of the Park be managed for production and the timber harvested. Unlike other areas of the Park, where Governor Baxter's views concerning roads were explicitly articulated,* none of the documents concerning this area mention roads. Nevertheless, while Baxter did say that there could be no manufacturing within the Park, he did want the land harvested. In this context, it appears that the accomplishment of Governor Baxter's intent must necessarily have contemplated the construction of a road network for removal of timber from this part of the Park. However, any such construction would be limited by the high standard of forestry practices suggested, not only in the deeds themselves, but in the accompanying communications which further explain his intent.

I hope the preceding analysis has been of some help to you in clarifying the trust restiction on road construction in the scientific forestry area of the Park. You, as a professional forester, are more qualified than I to understand the meaning of the terms "scientific forestry" and "best forest practice" and to understand the limitations which these concepts might provide on the construction or limitation of use of a road network. In this regard, I would, however, refer you to the letter from Jon Lund to Kenneth M. Curtis, Governor, dated April 13, 1973, which discussed this matter.

In regard to your question as to whether there could be a limitation by administrative policy on the use of any roads in this area, such limitation would necessarily depend on the provisions of the management plan for the area, which will presumably reflect a multiple-use accommodation of forestry and recreational values.

---

* See, e.g., P. & S.L. 1947, c. 1, prohibiting roads. Cf. P. & S.L. 1949, c. 2, removing prohibition of roads and enunciating standards that the trustee might construct such roads as it "shall deem to be in the public interest and for the proper use and enjoyment of those citizens of said State who may visit the area known as Baxter State Park, subject however to the conditions, limitations and restrictions that said roads and ways be constructed and maintained in a manner not to interfere with the natural wild state now existing in said areas."

If I can be of further assistance to you, please feel free to let me know.

Sincerely,

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR/ec
Enclosure
cc: Richard S. Cohen
Temple Bowen
William Peppard
A. Lee Tibbs

Department of Attorney General

CHIEF RANGER ✓ Cmo
NATURALIST ✓
FORESTER ✓
BUSINESS MGR. ✓ GMM
OTHER ✓
FILE

MEMORANDUM

To: Glenn Manuel
Kenneth Stratton
James E. Tierney

From: Paul Stern, Assistant Attorney General PS

Date: October 1, 1985

Subject: Austin Carey Tree Farm Forestry Demonstration

The Authority has inquired whether a proposed forestry demonstration project involving a biomass harvesting operation is permissible on the Austin Carey Tree Farm in view of the restrictions in the deed to the Maine Forest Authority. It is my opinion that the demonstration project, as proposed, does fall within the parameters of the deed.

The Austin Carey Tree Farm, so-called, is a 200 acre parcel of land located in the Town of Harpswell. The parcel was received by the Maine Forest Authority by means of two deeds. The first, dated December 20, 1973, is from Virginia Hamilton Bailey and Patricia Hamilton Bousfield, which conveyed to the Maine Forest Authority a 5/6 in common and undivided interest. In this deed, the following restriction is present:

> The fractional interest in the above-described property is being conveyed to the State of Maine (Maine Forest Authority) on condition that the land be used for a demonstration forest, wildlife management area or for other educational and scientific uses and this condition shall run with the land for a period of ninety-nine years from the date of this instrument. (Emphasis added.)

Clearly, therefore, it was the intent of the grantors to permit, indeed encourage, forestry demonstration activities on this parcel of land.

In a subsequent deed dated March 26, 1974, Virginia Hamilton Bailey conveyed to the Maine Forest Service the remaining 1/6 in common and undivided interest remaining in the Austin Carey parcel. The conveyance was without the restriction set out above in the 1973 deed.

The demonstration project proposed on the Austin Carey lot is described in a proposal which is attached hereto. The proposal, as written, calls for two phases: first, a biomass harvest demonstration scheduled for October 11 and 12, 1985 in a 33 acre area that is crosshatched on Map #1, which is attached to the proposal; and, second, a harvesting and thinning operation. The biomass operation, as written, also calls for a five acre area to be sprayed with herbicides and hand-planted in the summer of 1986. I have discussed the proposal with Kim Kolman, who has informed me that herbicide use is no longer part of the proposal, and the second phase is not being presented for approval to the Authority at this time. Mr. Kolman intends to study this second phase more thoroughly and, thereafter, report his findings and recommendations to the Authority. The biomass harvesting demonstration would be conducted under the supervision of the Department of Conservation, and the harvesting itself would be done by Howard's Pulp and Logging, Box 112, Curtis Road, Freeport, Maine 04032 (865-3290).

Biomass harvesting is a forestry method that is relatively new and, many hope, growing in acceptance and use. Use of the Austin Carey Tree Farm to demonstrate this forestry method, and its related technologies, in my opinion, is exactly the type of activity permitted by the covenants in the 1973 deed.

There is a question as to the location on the ground of the western boundary line abutting the lots, shown in red on Map #1. Since the biomass project will not be near this line, there should be no problem with this project.[1/]

[1/] There is a claim to a "town" road coming off of the right-of-way and going to the north. This is an issue that does not need to be resolved in the context of your consideration of this demonstration project. However, "down the road," it will be necessary for the Authority to consider it.

The Authority should consider a Release and Hold Harmless Agreement between the Department of Conservation and the Authority. It is my understanding that a large group of people, including school children, will be at this demonstration. Therefore, it is wise to assure the Authority will not be held liable for injury to any of them. The enclosed draft Agreement would protect the Authority while, at the same time, grant permission to the Department of Conservation to conduct the project. I recommend it to you.

If you have any questions, please call on me.

PS:msg
Enclosures

cc: Irvin C. Caverly, Director
Kim Kolman, Bureau of Forestry

A PROPOSAL FOR MANAGEMENT OF AUSTIN CARY TREE FARM

THE ISSUE:

The Austin Cary Tree Farm has value for scientific forest management, forest/water interrelation studies and recreation. This 200 acre ocean front property has stands of mixed growth, white pine plantations and old-field white pine stands. Two saltwater marshes are on the property and drain into Doughty's Cove.

Great potential exists for forestry demonstration within this tree farm. Its location, four miles south of Brunswick, and its proximity to the local school, offer excellent exposure. Some thinning and harvest cutting is necessary within the lot.

METHODS:

This fall a biomass harvest demonstration can be conducted in the area just north of the high school lot. This would be conducted under the supervision of the Department of Conservation and contracted out. The 33 acre location (see map #1) would show all phases of biomass harvesting systems, and would be a part of a statewide system of demonstration forests.

The second phase would be integrated harvest and thinning conducted in a thirty-five acre part of the lot and would be to the west of Doughty's Cove (see Map #2).

An estimate of volume harvested and potential income from these endeavors is:

35 Acre Cut (Map #2)

white pine	100 cords	300,000 bfm	$24,000-$30,000
red oak		20,000 bfm	$ 3,000
hardwood	150 cords		$ 1,050
spruce-fir	70 cords		$ 850

33 Acre Cut (Map #1)

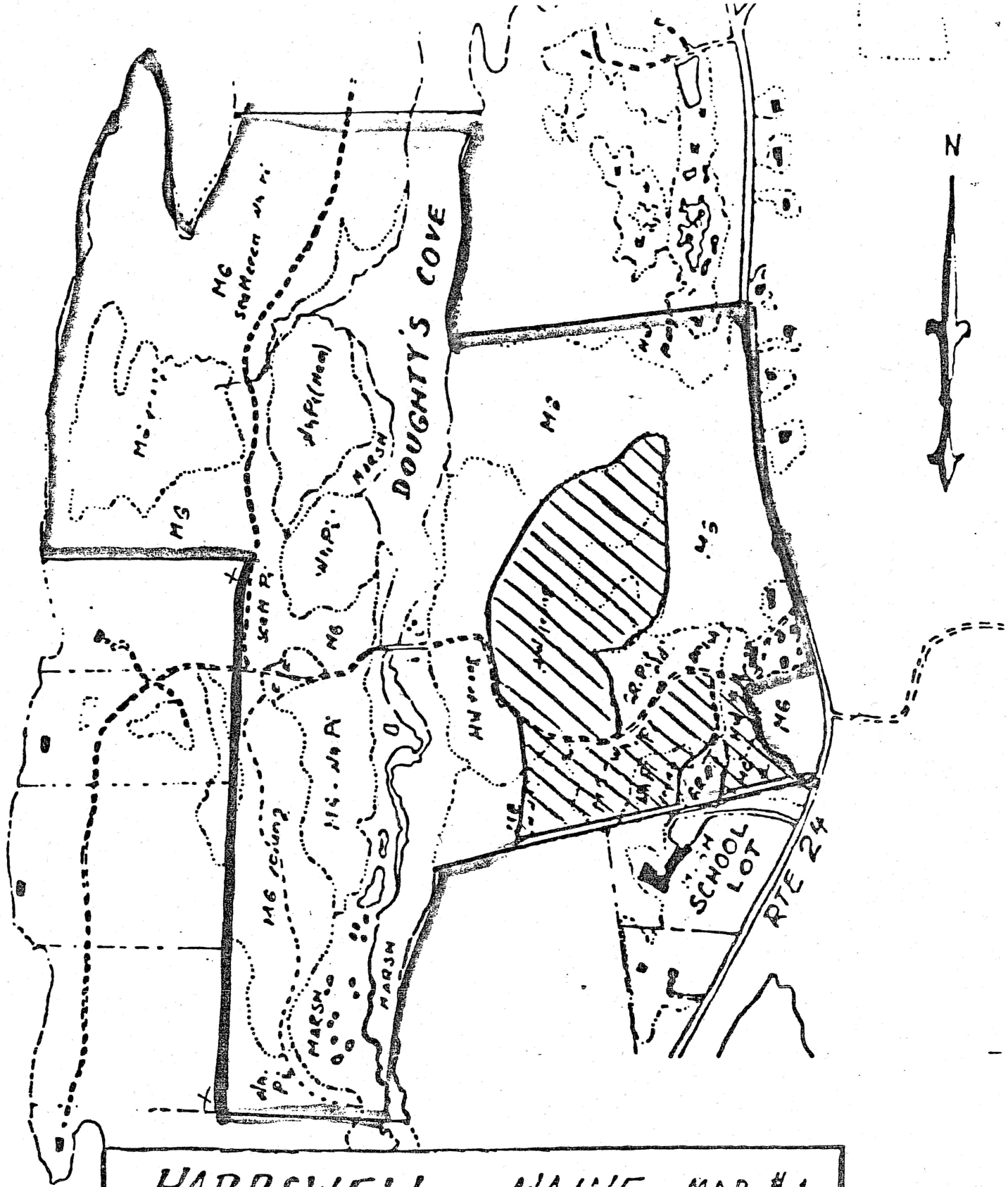
softwood	400 tons chips	15 cords	20,000 bfm	$3,100
hardwood	650 tons chips	30 cords	20,000 bfm	$3,650

Estimated range of income $34,620-$40,620

The biomass cutting will be mostly thinnings. An area of five acres will show species conversion. This area will be cleared and a new forest of pine planted. To complete the task, the 5 acres will be treated with a herbicide in June of 1986 and hand planted to pine the following August.

An estimate of cost for species conversion is:

planting stock	(8/86)	$300
hand planting	(8/86)	$225
herbicide spray treatment	(6/86)	$345
		$870



HARPSWELL - MAINE MAP #1

CUMBERLAND COUNTY

SCALE 1" = 100' (GLE)	FOREST TYPE MAP	DRAWN BY V. Kamin.
DATE 8-1-1985		REVISED

AUSTIN CARY TREE FARM & VICINITY

BAXTER STATE PARK AUTHORITY

From photo 359L (L10-L) - 23023-879 on file ASCS Westbrook, Me.

DRAWING NUMBER

AGREEMENT

WHEREAS, the State of Maine Department of Conservation wishes to conduct a forestry demonstration project, in particular relating to biomass harvesting techniques, on the Austin Carey Tree Farm, in Harpswell, Maine, to occur on October 11 and 12, 1985;

WHEREAS, such a project falls within the conditions of the deed dated December 20, 1973, from Virginia Hamilton Bailey and Patricia Hamilton Bousfield to the Maine Forest Authority, which conditions the conveyance on the land being used for, inter alia, a demonstration forest; and

WHEREAS, the Baxter State Park Authority, which now has supervision and control over the Austin Carey Tree Farm, finds the proposed Department of Conservation project conforms with the purposes of the Austin Carey Tree Farm;

NOW, WHEREFORE, for good and valuable consideration extended by both parties, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. Baxter State Park Authority grants a revokable license to the Department of Conservation to conduct a biomass harvesting demonstration on a 33 acre parcel of land, set forth in the crosshatched area on the map attached hereto as Exhibit A and incorporated herein, which demonstration will show all

phases of biomass harvesting systems. The demonstration project may occur during the daylight hours of October 11 and 12, 1985. A designated representative of the Baxter State Park Authority may be present during the demonstration, and shall have the authority to revoke this license and immediately cease any or all activities hereunder at any time.

2. The Department of Conservation shall have full responsibility and supervision for the biomass demonstration project to occur on the Austin Carey Tree Farm on October 11 and 12, 1985. The Department of Conservation releases, acquits, and forever discharges the Baxter State Park and the Baxter State Park Authority, and their employees, officers, agents, members, trustees, contractors, and representatives, of and from any and all actions, causes of action, claims or demands for damages, costs, expenses, loss of services, contribution, indemnification, interest or any other claims whatsoever under whatever theory relating to or in any way arising out of the use of the Austin Carey Tree Farm pursuant to this license. Further, the Department of Conservation hereby covenants not to sue the Baxter State Park or the Baxter State Park Authority, or their officers, agents, trustees, employees, officials, contractors, members or representatives, for any claims relating to or in any way arising out of the use of the Austin Carey Tree Farm pursuant to this license.

3. The Department of Conservation, further, covenants and agrees to indemnify, defend and save and hold harmless the Baxter State Park and the Baxter State Park Authority, and their officers, employees, trustees, agencies, members, representatives and contractors, of and from any and all actions, causes of action, claims or demands for damages, costs, expenses (including attorney's fees and court costs), loss of services, contribution, indemnification, interest and any other claims whatsoever under whatever theory in any way relating to or arising out of the use of the Austin Carey Tree Farm pursuant to this license.

The undersigned further state that they have carefully read the foregoing and note the contents thereof and execute the same.

Dated this _____ day of October, 1985.

WITNESS:

DEPARTMENT OF CONSERVATION

_____

By: _____
Richard B. Anderson
Its Commissioner

BAXTER STATE PARK AUTHORITY

_____

By: _____
Its

3.6 Court Jurisdiction and Dispute Resolution

STATE OF MAINE

Inter-Departmental Memorandum

Date May 9, 1975

To William Cross, Business Manager — Dept. Baxter State Park

From Foahd J. Saliem, Assistant F.J.S. — Dept. Attorney General/Criminal Div.

Subject

SYLLABUS:

Prosecutions for violations committed in Baxter State Park are, by statute, authorized in the District Court in the division nearest to where the offense is alleged to have been committed, or in the District Court in adjoining divisions.

FACTS:

Mr. A commits a violation in Baxter State Park which is subject to prosecution. Baxter State Park is for the major part situated within Piscataquis County and a minor portion in Penobscot County. District Court is located in Dover-Foxcroft, Piscataquis County and another District Court is located in Millinocket, Penobscot County. The two Courts are in adjoining divisions with the Millinocket District Court nearest to Baxter State Park.

QUESTION:

May the persons committing the alleged violations in that portion of Baxter State Park which lies in Piscataquis County be prosecuted in the Millinocket District Court, Northern Penobscot Division?

ANSWER:

Yes, provided it is the division nearest to where the offense is alleged to have been committed.

REASON:

Chapter 211, Title 12 M.R.S.A. Section 903 et sequitur, Subchapter III, sets forth the authority governing the administration of Baxter State Park.

Section 905 grants the park authority power to exercise police supervision over Baxter State Park.

Section 907 defines the Jurisdiction of the courts in all prosecutions under this subchapter as follows:

> "The District Court shall have original and concurrent jurisdiction with the Superior Court in all prosecutions under any provisions of this subchapter. Any person, arrested as a violator of said subchapter, shall with reasonable diligence be taken before the District Court in the division nearest to where the offense is alleged to have been committed for a warrant and trial, and in such case jurisdiction is granted to the District Court in adjoining divisions to be exercised in the same manner as if the offense had been committed in that division."

The statutory language is clear and unambiguous.

FJS/jo

Tort Claims Public Records Act
14 MRSA 8103-2-F

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERA

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 2, 1977

To: Lee Tibbs, Baxter State Park Authority

From: Sarah Redfield, Assistant Attorney General

Re: Horse Mountain Lookout Tower

This is in response to your request of June 20, 1977, for an opinion as to the advisability of the Baxter State Park Authority's acquiring the Horse Mountain Lookout Tower in Township 6, Range 8 and as to the responsibility and liability of the Authority for the safety of persons using the tower. You have indicated that the tower is the property of the Bureau of Forestry, was originally erected by that Bureau for fire protection purposes, that the Bureau no longer uses it for such a purpose and now wishes to divest itself of ownership. For purposes of this opinion, I have assumed the ownership pattern to be as you have described. It is my understanding that the Authority would maintain the structure for its historic interest as well as for its value to Park visitors as a unique observation point for viewing the Park.

You have also indicated that an agreement now exists between the Bureau of Forestry, the Baxter State Park Authority and the Boy Scouts of America whereby the Boy Scouts agree to maintain the tower. Inasmuch as no copy of this agreement appears to be available for review, this opinion does not address the current or potential relationship between the Authority and the Boy Scouts or any liability or removal from liability which might result to the Authority pursuant to such an agreement. However, I would suggest that if the Authority intends to have the Boy Scouts continue to maintain the tower, there should be a written agreement to that effect, which agreement indicates the respective rights, responsiblities, and liabilities of the parties. It should be noted that the State's immunity would not protect the Boy Scouts against tort claims.

As to the general question of the advisability of the tower's becoming the property of the Authority, this is primarily a policy question to be addressed by the Authority though their decision should be guided by the applicable trust provisions. Should the Authority wish to retain the tower, it would, of course, as a matter of public responsiblity be obligated to safely maintain and operate the structure. However, pursuant to the provisions of the Maine Tort Claims Act, 14 M.R.S.A. § 8101, et seq., it would be immune from liability for claims resulting from its ownership and maintenance of the structure.

The land on which the Horse Mountain Lookout Tower was erected was deeded to the State by Governor Baxter as indicated by the provisions of Chapter 1 of the P. & S.L. of 1949 and Chapter 3 of the P. & S.L. of 1955. This land is subject to the following trust restrictions:

> "TO HAVE AND TO HOLD the above described premises with all the privileges and appurtenances thereto to the State of Maine as TRUSTEE to be forever held in Trust for the PEOPLE OF MAINE upon the following conditions, that the premises herein donated and conveyed to the State of Maine, 1-- shall forever be kept for and as a State Forest and Public Park and for Public Recreational Purposes, 2--shall forever be kept in their natural wild state and as a sanctuary for wild beasts and birds, 3--that the use of fire-arms, trapping and hunting, not including fishing, shall forever be prohibited upon or within the same, 4--that air-craft forever be forbidden to land on the ground or on the waters within the same, ... "

In interpreting these provisions, Governor Baxter has indicated in pertinent part,

> "The State is authorized to build trails and access roads to camp sites, to use timber from this area for fire control and firewood and to construct shelters and lean-tos for mountain climbers and other lovers of nature in its wild state.
>
> "This area is to be maintained primarily as a Wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be 'Forever Wild.'"
> P. & S.L. 1955, c. 2.

These priorities have been confirmed by the Legislature's statement of purpose for the Authority, see generally 12 M.R.S.A. § 900. The Authority, as the agency charged with the maintenance and control of the Park, should be guided by these principles in deciding whether the maintenance of a structure such as the fire tower is consistent with the terms and intent of the trust, see 12 M.R.S.A. §§ 901, 906.

Should the Authority determine it is appropriate to maintain the tower, its liability is governed by the Maine Tort Claims Act. As a governmental entity, as that term is defined by Title 14 M.R.S.A. §§ 8102.2, 8102.4, the Authority is immune from liability for any claim which results from the construction, ownership, maintenance or use of unimproved land, 14 M.R.S.A. § 8103.2.F(1). It is similarly immune from any claim resulting from the construction, ownership, maintenance or use of "land, buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation," 14 M.R.S.A. § 8103.2.F(3).

While the tower was apparently not originally designed for use primarily by the public in connection with public outdoor recreation, the Authority now plans or intends to retain the structure for this purpose. The common meaning of the word "design" includes such planning, intention or purpose, see, e.g., American College Dictionary. In interpreting a statute "words are to be interpreted in the sense in which they are commonly understood, according to the common meaning of the language. . . taking into consideration the context and the subject matter relative to which they are employed." Merchants Case, 106 A. 117, 118 Me. 96, 97 (1919). In the present context, where the use of land is contemplated and where the State is likely to have acquired structures formerly designed or used for one purpose with the intent to use them to facilitate outdoor recreation, such an interpretation is appropriate. Accordingly the use of the tower as contemplated by the Authority would be within the immunity provision.

If you should require any further advice in this matter, please let me know.

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR/ec

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 16, 1978

A. Lee Tibbs, Director
Baxter State Park
Millinocket, Maine

Re: Park's liability for Visitor Activities

Dear Lee:

This is in response to your request dated February 15, 1978, for an opinion as to the liabilities of the Baxter State Park Authority (hereinafter "the Authority") for accidents which may occur in the climbing of Mount Katahdin under adverse weather conditions. You have indicated in your memo that it is the current policy of the Authority to close certain areas of Mount Katahdin under adverse weather conditions for reasons of safety. You have also indicated that it is the current policy to close all trails for certain periods of the year because of the unpredictable nature of the storm activity, to close trails during the winter only to those who do not satisfy the winter climbing requirements, and to close certain trails during the summer in periods of bad weather conditions and at times which will involve climbing after dark.

For a previous discussion of the Park's liability for certain activities, please refer to my opinion to you dated August 2, 1977, concerning Horse Mountain Lookout Tower.

As a general matter, the liability of the State is now governed by the Maine Tort Claims Act, Title 14 M.R.S.A. § 8101, et seq. The Maine Tort Claims Act provides for immunity from suit for governmental entities as defined by Title 14 M.R.S.A. § 8102.2 and § 8102.4. Title 14 M.R.S.A. § 8103 provides that

> "Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages. * * * Notwithstanding § 8104, a governmental entity shall not be liable for any claim which results from:

> "F. The construction, ownership, maintenance or use of: (1) Unimproved land; . . . [and] (3) land, buildings, structures, facilities, or equipment designed for use primarily by the public in connection with public outdoor recreation; * * *"

That is, pursuant to State statute, the Authority as an agency of the State is immune from liability for claims which result from the climbing of Mount Katahdin, an area of unimproved land.

You have also asked whether the Authority would be able to adopt an advisory warning policy whereby the Authority would warn prospective visitors to the Park of adverse weather conditions and then require that such persons reimburse the Authority for any necessary rescue costs which are incurred after such a warning. This is primarily a policy decision for the Authority. If the Authority is interested in pursuing this matter, it appears to me that it would be necessary for some sort of written agreement to be signed whereby a person still wishing to climb Katahdin after an adverse warning would indicate his/her agreement to hold the State harmless and to reimburse the State for expenses for rescue.

If I can be of further assistance, please let me know.

Sincerely yours,

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR:mfe

Baxter Park: Disposition of Fine Proceeds
12 MRSA 903
4 MRSA 163

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

July 10, 1978

To: Elizabeth D. Belshaw, State Court Administrator

From: Sarah Redfield, Assistant Attorney General

Re: Fines Collected for Violations of 12 M.R.S.A. § 903

This is in response to your request for an opinion to Attorney General Joseph Brennan regarding the proper disposition of fines collected by the Court System for violations of the rules and regulations of the Baxter State Park Authority pursuant to Title 12 M.R.S.A. § 903. While the question is not entirely free from doubt, it appears that the most appropriate disposition of these fines is for payment to the Treasurer of the State for payment to the General Fund.

Title 4 M.R.S.A. § 163 provides, in pertinent part, that:

> "Except as otherwise provided by law, all fines. . . collected in the District Court . . . shall be paid to the clerk thereof, who shall deposit them in a special account . . . . Once each month he shall submit such funds to the Treasurer of the State, who shall credit them to the General Fund.
>
> "2. Expenses. The Treasurer of the State shall pay all sums of money produced by cases in the District Court which shall become due to State departments and agencies, municipalities and State, county and municipal officers." (emphasis supplied)

Title 12 M.R.S.A. § 900 establishes the Baxter State Park Authority and gives this Authority "full power in the control and management of" Baxter State Park. Title 12 M.R.S.A. § 901 further provides that:

> "The Authority shall receive monies available from trust funds established by the donor of the Park and shall include fees collected, income from Park trust funds invested by the Treasurer of the State and other miscellaneous income derived from the Park for maintenance and operation of the Park." (emphasis supplied)

Title 12 M.R.S.A. § 903 provides the authority for the Baxter State Park Authority to establish rules and regulations governing the Park. That section further provides:

> "Whoever violates any of the rules and regulations of said Park Authority, promulgated in conformity with this section, shall be punished by a fine of not more than $100 and costs or by imprisonment for not more than 30 days, or by both.
>
> "Whoever willfully mutilates, defaces or destroys any structure, monument or marker lawfully erected within the boundaries of said Park, or any notice, rule or regulation of said Park Authority, posted in conformity with this section, shall be punished by a fine of not more than $100 and costs or by imprisonment for not more than 30 days, or by both."

Title 12 M.R.S.A. § 904 provides for the jurisdiction of the District Court for prosecutions under these provisions of the Baxter State Park Authority statute.

The financial trusts created by Governor Baxter in relation to Baxter State Park were accepted by the Legislature in the Private and Special laws of 1961, c. 21, and Private and Special Laws of 1965, c. 30. In addition, another trust held by the Boston Safe Deposit and Trust Company was established pursuant to the terms of the Baxter inter vivos trust dated July 6, 1927, as amended. The terms of these trusts speak directly to income derived from the trust funds and, accordingly, the conditions established for the governing of these funds apply only to such income. The Legislature, however, in enacting the statutes of the Bax er State Park Authority, broadened the scope and restrictions as to its finances by including "other miscellaneous income which may be derived from the operation of the Park."

If the fines in question are "miscellaneous income," they may be properly payable to the Baxter State Park Authority. However, this does not appear to be the case. They are not derived from trust funds or from use fees for the Park, but rather from the imposition of State statutory and regulatory power. By comparison with other statutes, it does not appear that the Legislature intended such fines to be paid to the Baxter State Park Authority. (Compare, e.g. 7 M.R.S.A. § 956 specifically designating payment to the Department of Agriculture.) Accordingly, without a more explicit statement of legislative intent otherwise, fines for violations of Baxter State Park Authority regulations should be handled in the same manner as other court assessed fines.

Please excuse the delay in responding to your request. I hope the above has been of some help. If you should have further questions, please feel free to contact me.

Sarah Redfield

SARAH REDFIELD
Assistant Attorney General

SR/ec

cc: A. Lee Tibbs

October 2, 1998

Robert Boutaugh (Medway)

v.

Bowater (Millinocket (PA97-0315)

and

Baxter State Park Authority (PA97-0316)

MAINE HUMAN RIGHTS COMMISSION
51 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0051

Executive Director
PATRICIA E. RYAN

Commission Counsel
JOHN E. CARNES

I. COMPLAINANT'S CHARGES:

Robert Boutaugh, who is disabled and also has a disabled child, alleges that the gating the road that leads to Rum Brook in Baxter State Park discriminates against persons with mobility impairments who cannot walk to Rum Brook. Persons without mobility impairments park at the gate and walk to Rum Brook for recreational purposes. He and his son cannot because of their mobility impairments. He seeks to have the gate opened.

II. RESPONDENT'S ANSWERS:

Officials of both Bowater and the Baxter State Park Authority deny that the gating of the road in question constitutes unlawful discrimination against persons with mobility impairments.

III. JURISDICTIONAL DATA:

1. Date of alleged unlawful discrimination: May, 1997 and continuing

2. Date complaint was filed with the Maine Human Rights Commission: July 3, 1997

3. Baxter State Park makes its facilities available to the general public. Bowater has responsibility for the maintenace of the road in question, which is on Baxter State Park property.

4. The matter was not resolved. Baxter State Park Authority is represented by Asst. Attorney General Paul Stern. Bowater is represented by attorney John Woodcock Jr.

IV. DEVELOPMENT OF FACTS:

1. Investigation reveals the following:

a) Baxter State park Authority (BSP) purchased some land on the edge of the Park from Bowater which contains the road in question. When Bowater sold the land to BSP , Bowater maintained an easement that gave Bowater use of and maintenance responsibilities for the road in question. Bowater employees use this road to access Bowater lands for wood harvesting and other business-related purposes.

b) Logan Pond, which can be accessed by the road in question, is designated by the State of Maine as a "Recreation Protection SubDistrict ." (An area which the state wishes to protect from recreational use). Such subdistricts are subject to regulation by the State's Land Use Regulation Commission (LURC). LURC mandates that any road in such a subdistrict near a body of water "shall be discontinued, gated, (emphasis added) obstructed or otherwise made impassable to two-wheel drive vehicles within three years of the construction of the road."

c) BSP officials cite nineteen other fishing spots in the park which are accessible to the public by car (see file).

V. CONCLUSIONS AND RECOMMENDATIONS:

1. The road in question is not a "place of public accommodation", made available to the general public for recreational purposes. It is a road restricted to persons needing access Bowater's land and operations for business purposes. By gating the road, Bowater is trying to keep the general public out of that area and comply with LURC's regulations. The fact that some people foil Bowater's efforts to restrict public access by going around the gate on foot does not create an obligation on Bowater's part to open up the road to general public use.

2. In the federal Dept. of Justice's Technical Assistance manual the following guidance is provided "Public entities are not necessarily required to make each of their existing facilities accessible...Services of a public entity must be made usable and accessible ...when viewed in their entirety." Baxter State Park maintains a number of spots along the road system where people can drive to fish. The Park is not required by the Maine Human Rights Act or the ADA to make each and every fishing spot in the park accessible by car.

3. Based on the above it is recommended that the Maine Human Rights Commission issue the following finding:

a) that there are no reasonable grounds to believe that unlawful discrimination in public accommodation has occurred against Robert Boutaugh by the Baxter State Park Authority;

b) that there are no reasonable grounds to believe that unlawful discrimination in public accommodations has occurred against Robert Boutaugh by Bowater; and

c) that the complaint be dismissed in keeping with ss 4612.

Patricia E. Ryan, Executive Director

Susan Clark, Investigator