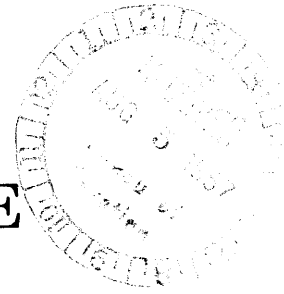
STATE OF MAINE



REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1955 - 1956

OPINIONS

January 3, 1955

To Honorable Carroll Peacock

Re: Compatibility

Your inquiry relative to your right to continue as a Commissioner on the Atlantic States Marine Fisheries Commission after your acceptance of the office of Governor's Councilor has been received.

The Constitution of Maine, Article V, Part Second, Section 4, provides as follows:

> "Persons disqualified; not to be appointed to any office.—No member of Congress, or of the legislature of this state, nor any person holding any office under the United States, (post officers excepted) nor any civil officers under this state (justices of the peace and notaries public excepted) shall be counsellors. And no counsellor shall be appointed to any office during the time, for which he shall have been elected."

It is the opinion of this office that the position of Commissioner on the above-mentioned Commission is a civil office within the meaning of the Constitution of the State of Maine and specifically the section above quoted. Therefore by your acceptance of the position of Governor's Councilor you will automatically vacate the office of Commissioner on the Atlantic States Marine Fisheries Commission.

ROGER A. PUTNAM
Assistant Attorney General

January 4, 1955

To Robert L. Dow, Director of Marine Research

Re: Seed Quahogs

We have at hand your memo in which you inquire as to the legal responsibilities of the Commissioner of Sea and Shore Fisheries in granting permits for the handling of seed quahogs and the utilization of seed quahogs in Maine flats. The question is raised because of the existence of a provision in Section 90 of Chapter 34 of the Revised Statutes, following a determination of the legal size of quahogs and clams:

> "Provided, however, it shall not be unlawful to take seed quahogs or seed clams or have the same in possession under the authority of a permit therefor, which the commissioner is hereby authorized to grant, for replanting in waters or flats within the state or for any other purpose."

With respect to this law you ask three questions:

"1. Is granting Mr. X a permit by the Commissioner discretionary or mandatory?"

Answer. Unquestionably, as seen in several provisions of the law, the legislature contemplated that under certain conditions it would be permissible for a person to have seed quahogs or seed clams. The authority is placed in the Commissioner for issuing a permit for that purpose. It would seem to us that after the

Commissioner has determined that the permit is to be used for the purposes enumerated in the statutes, then such permit should issue. We do not feel that it is within the discretion of the Commissioner to refuse such permit without just cause.

"2 (a) If Mr. X is granted a permit to 'take' or 'have' seed, are we authorized to give him seed quahogs dredged by the *Venus M.?*

(b) Are we authorized to sell seed to him?"

We answer both parts of this question in the negative.

"3. If we are not authorized to give or sell seed to Mr. X dredged by the *Venus M.,* can he or his agents come into Bridgham's Cove and take seed quahogs with his own equipment to be put in the flats leased by him from the town of Phippsburg?"

We answer this question in the affirmative, always conditioned upon the fact that the proper licenses and permits have been obtained.

Our answers are based on the premise that the request concerns giving or selling seed quahogs to a private individual for his own business purposes. It is our opinion that before the State can give or sell property, which belongs to the State as a whole, to a private individual for commercial purposes, an act of the legislature would be necessary.

JAMES GLYNN FROST
Deputy Attorney General

January 4, 1955

To Roland H. Cobb, Commissioner, Inland Fisheries and Game

Re: Moosehorn Refuge, Beaver Trapping

. . . We understand that the Moosehorn Refuge is wholly owned by the Government of the United States, excepting a certain portion which is the railroad right of way and which was made a game preserve under the provisions of Chapter 34 of the Public Laws of 1953.

Mr. de Garmo informs me that there are various reasons why it is necessary for the Refuge manager to remove the beaver on this game refuge. They are flooding out certain areas which are important to the woodcock studies that are being carried on by the U. S. Fish and Wildlife Service.

From all that I can ascertain there is reasonable ground for opening up the area for the taking of beaver. The question arises as to whether or not this federally owned area is subject to the provisions of Section 100 of your chapter. This section provides for the opening of a limited season on beaver, for the various reasons why this trapping may be allowed, and for the marking of the skins, along with certain other provisions. It is the opinion of this office that this law has no application in this particular instance, where the United States Government owns and operates this Refuge. In many instances a State has sought to enjoin the very acts which are here complained of and in every instance has been rebuffed by the federal courts. See *Hunt* v. *U. S.,* 278 U. S. 96, 19 F 2d, 634; also *Chalk* v. *U. S.,* 114 F. 2d, 207.

A check of the federal statutes shows that the United States Government has prescribed certain laws relating to game preserves of this nature. See Section 683 of Title 16, U. S. Code Annotated. Paraphrasing: This provision allows the President to designate areas on lands taken and held by the United States for