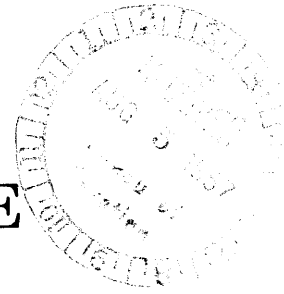
STATE OF MAINE



REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1955 - 1956

loans, mortgage property, and segregate income from that property to pay indebtedness.

All questions may be answered by a determination of whether or not this District has the power to mortgage its property.

In a prior, unofficial opinion rendered to Mr. C. Wilder Smith, State Director, Farmers Home Administration, under date of November 17, 1954, we indicated to him that the District was not empowered to mortgage its property.

We have had an opportunity to check this opinion and we are still of the opinion that, in the absence of legislative authority to mortgage its property or to pledge income from its property to repay a loan, a conditional sales agreement or what have you, a quasi-municipal corporation such as this District does not have the power to mortgage or pledge its property.

Municipal corporations receive their powers from two sources: from their charters or special legislation dealing with the corporations and from the Constitution of Maine and the general statutes. We do not find any power from any of these sources, and therefore will have to answer your questions in the negative.

We would suggest that, in order to broaden the function of the District and in order to pass on to the farmers the benefit of some liberal farm legislation by the Congress, this matter of mortgaging and purchasing be presented to the next legislature, so that the power of the District may be broadened within the discretion of the legislature.

ROGER A. PUTNAM
Assistant Attorney General

January 4, 1956

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

Re: Embden Lake Property

We have your memo of December 12, 1955, in which you ask a question which has arisen as a result of a contemplated gift of property at the foot of Embden Lake, North Anson, for a salmon rearing station.

The Devereux Foundation, riparian owner, owns a dam site and dam on a river running out of the lake. The dam has not been kept in a state of good repair and is presently not in use as a mill dam.

"Question: What are the riparian rights of the Devereux Foundation who own the dam and operate a children's summer camp on the lake? If the station goes in and the water level should be lowered, would they have legal cause for complaint?"

Answer. If the salmon rearing station is built and the water necessary to maintain the station causes the water level of the lake to be lowered, or the water level in the river to be lowered, there would, in our opinion, be no legal cause for complaint against the State. We consider your question to be: "Would the State be liable for damages to riparian owners if it caused the waters of the lake to be lowered in maintaining the fish rearing station?" and the answer to that question is, No.

In *Auburn* v. *Water Power Co.,* 90 Maine 576, a case where the city was diverting water from Wilson Pond for public purposes under Special Act of the legislature and in so doing took water that the water company claimed was due it as natural flow, the Court was considering a question similar to that presented here.

The Court adopted the law set down in a Massachusetts case (*Watuppa Reservoir Co.* v. *Fall River,* 147 Mass. 548), which held that the State could authorize such taking without the taker being liable to pay damages to those who want the water for the use of mills.

It is interesting to note that the Massachusetts case was quite evidently a test case, because in the charter authorizing the City of Fall River to take the water for domestic uses, it was provided that the taking should be without liability to pay any other damages than the State itself would be legally liable to pay.

The wording was recognized by our Court as intending

> "to test the authority of the legislature to confer upon towns and cities the right to take water from great ponds for domestic purposes without being liable for damages."

In a similar case, *Woolen Co.* v. *Water District,* 102 Maine 153, our Court stated the following:

> "In an elaborate opinion it was held in effect that under the Colonial Ordinance, except as to grants made prior to the ordinance, the State had full propriety in, and sovereignty over, the waters of great ponds, and could at discretion divert the waters and authorize their diversion for public uses without providing compensation to riparian owners injured thereby; that riparian lands on a river or stream flowing out of a great pond are subject to this right of the State to authorize a diversion of the water of the pond for public purposes and must bear without compensation any damage caused by the exercise of that right by the State unless the State shall choose to make compensation; that where the State, in granting authority to divert the water, has not required compensation to be made to riparian owners for damages sustained, none need be made. . . In *Auburn* v. *Union Water Power Co.,* 90 Maine 576, the same doctrine in all its extent was without dissent declared to be the law of this State."

This law seems to be reasonably extended as set out in an Opinion of the Justices, 118 Maine 505:

> "While the State may hold the waters of great ponds in trust for the people and may regulate them as it sees fit, while the littoral proprietors may use them for their private purposes as hereinafter stated, while the Legislature may grant their use to water power companies to be controlled for manufacturing and industrial purposes, or to municipalities for domestic and other uses regardless of damages to millowners on the outlet streams (*American Woolen Co.* v. *Kennebec Water District,* 102 Maine, 153, 66 Atl., 316), yet it has never been suggested that the State had the right to compel either the littoral proprietor to pay for the uses to which he may lawfully put the water of such pond by reason of his having access to its shore, as distinguished from that of the general public, nor that the millowner on the outlet stream could be com-

pelled to pay for the use of the waters that constitute the natural flow of the stream. We think such millowner is entitled to that use without paying compensation therefor, although in some cases its full enjoyment may be secondary to that of the domestic needs of a municipality or other public uses."

While our Court recognizes that private property cannot be taken for public uses without making compensation for it, it also clearly states that the waters of great ponds and lakes are not private property.

> "They are owned by the state; and the state may dispose of them as it thinks proper."
>
> *Auburn* v. *Water Power Co., supra,* at 587.

Our conclusion is based upon the premise that water taken by the Department of Inland Fisheries and Game for the purpose of supplying a fish rearing station, under a Legislative Act authorizing the Department to construct and maintain such a station, would be for a public purpose. It would in any event be a taking of the water by the State for a State purpose, and a taking of its own property. See Chapter 37, Section 19, R. S. 1954, authorizing the Commissioner of the Department to perform such function as above contemplated.

Further evidence to the effect that such a taking would be a public purpose for which no damages would be payable can be seen in Section 15 of Chapter 37. Section 15 authorizes the Commissioner, after hearing, and for the use of the State for prosecution of the work of fish culture and scientific research relative to fish, to set aside any inland waters for a term not exceeding 10 years.

JAMES GLYNN FROST
Deputy Attorney General

January 10, 1956

To Honorable Edmund S. Muskie, Governor of Maine

Re: Trustee Process

In response to your memorandum in regard to the request of Mr. Gallahan of the Internal Revenue Service to have the State recognize trustee process, I submit the following information:

Approximately a year ago we had one or two conferences with local officials of the Internal Revenue Service and one conference with Regional officials. These conferences were at their request and were for the same purpose as their letter of November 18th to you, namely to have a former opinion of this office overruled.

It has been, and is, the ruling of this office that our State laws prohibit the service of trustee process upon the State. It is the contention of the officials of the Internal Revenue Service that a federal law permits service of such process. We have denied that this is so and suggested that they bring an action against us in order to obtain a court ruling.

I note that Mr. Gallahan's request to you is that you take action that will permit State fiscal officers to honor levies made by the Internal Revenue Service.