

# MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1959 - 1960

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April 7, 1959

To: Fred A. Clough, Jr., Commissioner of Economic Development

Re: Lease — Waiver of sovereign immunity of the State; Purchase of Liability Insurance.

We are returning the lease between Company A and the Department of Economic Development, without our approval.

We would advise that the department cannot comply with the requirements of Section 5, as that section is written.

The first portion of Section 5 provides that the Lessee shall indemnify Company A against claims that may, in fact, have been caused by the negligence of Company A's servants, agents, or representatives, and whether or not the injury occurred in an area in the custody of the Lessee.

"Section 5. It is hereby understood and agreed throughout the initial and any additional term hereof, that Company A shall have no liability for, and Lessee hereby waives, and indemnifies Company A, its employees, agents and representatives, against any and all claims of Lessee or Lessee's agents, employees or customers for any death or injury or loss or damage of any kind or character sustained or suffered in or upon or about the Leased Space from any cause whatsoever, . . ."

We would point out initially that a State Department is powerless, without statutory authorization, to enter into contracts whereby the Department agrees to indemnify any person. Such indemnification would be an ineffectual attempt to waive the sovereign immunity of the State.

With respect to the last portion of Section 5, liability insurance may be purchased by a State Department if such purchase is approved by the Governor and Council.

Perhaps the lessor would feel that its interests are sufficiently protected if the lessee purchases liability insurance without further agreements. We would suggest that Section 5 be amended so as to provide only for the purchase of such insurance.

We offer the following as a suggested amendment to Section 5:

"Lessee shall procure and maintain throughout the leasing period or periods at its own expense in responsible insurance companies acceptable to Company A, adequate amounts of insurance, satisfactory to Company A, for liability for death or injury, or loss or damage, caused by the negligence of lessee, its employees, agents, or servants, sustained or suffered in, on, or about the Leased Space."

JAMES GLYNN FROST  
Deputy Attorney General

April 15, 1959

To: Ronald W. Green, Commissioner of Sea and Shore Fisheries

Re: Building Fishway on the Aroostook River

We have your memo of March 6, 1959 having reference to Chapter 171, Private and Special Laws of 1957. Your memo states that along

with present budget request, the combined sums authorized under this law will be \$45,000 for the purpose of building a fishway on the Aroostook River. The fishway, if constructed, will be in New Brunswick. If the fishway is built, you state a contract will be necessary between the dam owner in New Brunswick and the Atlantic Sea Run Salmon Commission. You ask the following question:

“Does the law provide for such a contract? In the event that it does not, what legislation is necessary to provide for such a contract?”

In orally discussing this matter with you it is indicated that your question is very limited — “Does the Atlantic Sea Run Salmon Commission have the right under the provisions of the act to turn over the sums appropriated by the legislature to the person finally selected to build the fishway?”

We answer your question in the affirmative.

The legislative appropriation contained in Chapter 171 is not for the purpose of the construction of the fishway by the Commission, but is a sum to be contributed by the Commission in its discretion in order to defray a portion of the cost of such fishway. We think that the statute contemplates that the actual work of construction be carried on by someone other than the State and that the State should share in such costs, because the benefits of the fishway would accrue to the citizens of Maine.

There have been numerous instances when the Legislature has appropriated funds to be expended on the Aroostook River for the purpose of aiding in the construction or maintenance of a fishway in the vicinity of the proposed fishway (in Tinker Dam location).

One of the first such appropriations is to be found in Chapter 205, P. & S. 1927, where \$4,000.00 was appropriated from the funds of the Department of Inland Fisheries and Game,

“to aid in the construction of a fishway at Aroostook Falls on the Aroostook River in the province of New Brunswick; provided the same can be constructed with the consent and co-operation of the Canadian government, and the balance necessary for such construction is furnished by said government, or interested persons.”

See also, Chapter 71 Resolves of 1935

“	88	“	1941
“	41	“	1945
“	146	“	1947

In the absence of a proper compact consenting to this State’s building such a fishway in Canada, we assume that such funds will be expended as they have in the past — that is, a contribution to a project which the State approves, and which will, in the wisdom of the Legislature, benefit the State of Maine.

There appears to be adequate discretion lodged in the Atlantic Sea Run Salmon Commission to determine when and if payment of the sum would be proper.

JAMES GLYNN FROST  
Deputy Attorney General