STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1959 - 1960

specifications must be prepared, and a title examination made. Occasionally, a person says that upon approval of a project by Maine School Building Authority, he will donate land to the municipality involved. However, the necessity of having a site plan and other material prohibits the Authority from giving its approval until a definite piece of land is either conveyed, or an option given, so that the Maine School Building Authority knows it is dealing with a known quantity; title searched, etc.

In reference generally to the authority of a State agency to execute options, we are of the opinion that either express authority, or, as in the instant case, compelling implied authority, should be present in a statute before land can be purchased or an option executed.

We hope the above fully answers your question.

Very truly yours,

FRANK E. HANCOCK
Attorney General

March 25, 1960

To: Roland H. Cobb, Commissioner of Inland Fisheries & Game

Re: Flowage of State Lands

We have your letter of February 23, 1960, in which you ask if a public utility company has the right to flow state-owned land. Your inquiry deals specifically with the possibility of a dam being built on the Saco River, between Hiram and East Brownfield, and the possible resulting flowage of over 3,000 acres of land owned by the State. Such land is to be developed for duck marshes.

We assume that your question relates to such flowage under "Mill Acts" Chapter 180, Revised Statutes of 1954, as is authorized to certain persons who erect mills and dams to raise water for working it.

It is our opinion that the public utility company does not have the right to flow lands owned by the State and in the control of your department for the purposes of development for duck marshes.

The ordinary method authorized by the legislature by which land, or the use of land, may be taken, is eminent domain. Private property may be taken for a public use upon payment of compensation, and when public exigencies require it. Article I, section 21, Maine Constitution. The procedure known as eminent domain has as its authority the above-mentioned constitutional provision.

Our court, in its early years, justified the Mill Acts as being based on the power of eminent domain. *Ingram v. Maine Water Co.*, 98 Me. 566. In later years our court has said the Mill Acts are not based on the principle of eminent domain, but such acts are an adjustment and regulation to assure development of reasonable use of such lands among riparian owners. *Bean and Land Co. v. Power Co.*, 133 Me. 9, 27-28.

As stated in *Brown v. deNormandie*, 123 Me. 535, 541 —

> "It is too late now to challenge the constitutionality of the Mill Act. Whether its validity rests upon its great antiquity and long

acquiescence; . . . or upon the principles of eminent domain. . . or upon the adjustment and regulation of riparian rights on the same stream, so as to best serve the public welfare, having due regard to the interests of all and to the public good . . . the fact of its validity is settled."

So, whatever its justification now, certainly in the beginning the Mill Acts were based upon the principles of eminent domain. And eminent domain is a process whereby *private* lands are taken. The treatises and cases appear to be in accord that lands in the public domain are not subject to condemnation or appropriation in the absence of a statute authorizing it. 18 Am. Jur. 713, § 83.

We would draw to your attention, with respect to flowage under the Mill Acts, existing statutes which clearly indicate that the Legislature believed the same exclusion of public lands applies to the Mill Acts as well as to eminent domain:

Chapter 36, section 39, Revised Statutes of 1954:

"Real estate subject to flowage. — All real estate acquired under the provisions of sections 33 to 39, inclusive, shall be and remain subject to flowage under the provisions of the Mill Act, so called, or under any special charter heretofore or hereafter granted by this state, notwithstanding title thereto may be in the state."

Chapter 36, section 12, Revised Statutes of 1954:

"Granting rights to cut timber; leasing camp sites and mill privileges; preference to Maine people. — The commissioner, under the direction of the governor and council, shall sell at public or private sale and grant rights to cut timber and grass belonging to the state, and may lease camp sites, mill privileges, dam sites, flowage rights, the right to set poles and maintain utility service lines and the right to construct and maintain roads, on lands belonging to the state, on such terms as they direct; also the right to cut timber and grass and lease camp sites, mill privileges, dam sites, flowage rights, the right to set poles and maintain utility service lines and the right to construct and maintain roads, on public reserved lots in any township or tract of land until the same is incorporated, on such terms as they direct. Preference in such sales or leases shall be given to persons, firms or corporations of this state."

If it were assumed that a public utility had the right to take land belonging to the State under any theory, eminent domain or otherwise, then it must be assumed that the utility's right is superior to that of the State. This cannot be. The eminent domain power of a State, like certain of its other principal powers required to carry on its sovereign function, is inalienable. *West River Bridge Co. v. Dix*, 6 How. 507 (1848).

We are of the opinion, based upon the above discussion, that public lands are not subject to flowage under the Mill Act in the absence of statutory authority for the particular flowage, or in the absence of compliance with existing statutes relating to flowage.

JAMES GLYNN FROST
Deputy Attorney General