STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

October 6, 1972
Parks & Recreation

Lawrence Stuart, Commissioner

Allagash Waterway – Realty Road

As I advised you last week, Jerry Matus has referred this question to the Environmental Protection Division of this office. Since our discussions last Spring regarding the position of the State on the proposed acquisition of the American Realty Road by the County Commissioners of Aroostook County, I have done some research in order that I might more fully advise you as to the options available. My evaluation is as follows:

FACTS:

The American Realty Road is a private way owned by seven land companies. The road runs from Ashland, Maine, to Daaquam, Quebec, Canada, and goes through the Allagash Wilderness Waterway. At the present time it is only a dirt and gravel road. That portion within the Waterway is owned by International Paper Company. On January 4, 1966, the County Commissioners of Aroostook County completed the last of the formalities under Title 23, M.R.S.A. § 4001, necessary to lay out the Realty Road as a public road. In late January, 1966, the land owners involved all filed suit in Superior Court appealing the decision of the County Commissioners. As of this date, those appeals are still pending. Shortly thereafter, February 3, 1966, the Governor signed the Allagash Wilderness Waterway Act, Title 12 M.R.S.A. § § 661-680, P.L. 1965, Chapter 496. Following the effective date of the Act, the Parks & Recreation Commission, the administrative body for the Waterway, acquired the land within the restricted zone in the vicinity of the Realty Road, but left the Road in private ownership.

QUESTIONS:

1. Can the Commission prevent the above eminent domain action which seeks to make the Realty Road a public way?
2. Can the Commission otherwise regulate the use of a public road within the Waterway?

ANSWERS:

1. No.
2. Yes.

REASONING:

1. The first sentence of § 671(2) reads: "Existing private roads within the Waterway shall remain privately owned as existing." This sentence is ambiguous and appears to be subject to two interpretations. The first interpretation would read the sentence as meaning that existing private roads shall not be taken from private ownership for public purposes. The second interpretation could read the sentence as being directed not to the issue of ownership, but rather of use. That is, the sentence would mean that privately

owned roads shall not be altered or relocated by the owner. The ambiguity of this provision and the lack of statutory history on this point would initially cause one to conclude that either interpretation was reasonable.

The report of the Interim Joint Committee on the Allagash – St. John Rivers prepared for the 102nd Legislature used slightly more precise language on this issue when it recommended creation of the Waterway. In that report the Committee recommended that "existing private roads within the Waterway would remain privately owned excepting that the Commission could direct the discontinuance or relocation of such portions of said private roads as lie within the restricted zone." The thrust of that language appears to have been directed toward ownership, not use. The Report of the Interim Committee was submitted to the Legislature at the beginning of the first Special Session and was the basis for the creation of the Waterway in that session.

Further examination of the purpose of the entire Act would lead me to conclude that the provision was designed not only to protect owners of private roads, but also to limit access to the Waterway via public roads. Obviously, state and county roads running through the Waterway would destroy or seriously impair the character and purpose of the Waterway. It seems logical, therefore, to conclude that the Legislature desired to prohibit new public roads into and through the Waterway. The legislators were probably aware that existing private roads would likely carry less people to the heart of the Waterway than public roads. The whole purpose of the Act is to preserve the Waterway as a wilderness area. Public roads would obviously be inconsistent with that purpose.

Furthermore, the Legislature is assumed to have known the conditions to which the Act would apply. Except to the extent discussed below, at the time of creation of the Waterway no public roads existed in the area. All the roads were privately owned. As to all such existing private roads, the Legislature determined that they should remain private. Public roads, presumably new ones, would be subject to complete regulation and approval by the Commission under §§666(2) and 671(1) of the Act. It should be noted that § 671(2) specifically provides for a method by which private roads could be relocated. Since there is no similar provision for public roads, we can probably conclude that the Legislature (1) knew that no such roads existed and therefore such procedure was not required and (2) anticipated that no public roads would be created contrary to the authority of the Commission as granted in §671(1).

To allow other governmental entities now to acquire private roads for public use in and through the Waterway would subvert the Act in at least three respects. First, it would allow the destruction of an existing private use which was specifically protected under the Waterway Act. Second, it would allow creation of a public road in the Waterway and increase the prospect of vehicular traffic. Third, it would enable others to do that which the Commission itself was prohibited from doing by the Act, i.e., acquire private roads for public use. Since the Commission was only permitted to relocate existing roads after paying the cost of such relocation, it seems inconsistent to allow other governmental agencies to acquire such roads, particularly without providing for reasonable compensation. The Waterway Act contains numerous safeguards to any regulatory or eminent domain powers, including the requirement of compensation for taking of property. The law under which the Aroostook County Commissioners purported to act contains no such provision for compensation or damages. 23 M.R.S.A. §§4001-4003.

Based on the above analyses, it is my conclusion that the Act prohibits the kind of taking within the Waterway that is being attempted in this case by the County Commissioners of Aroostook County.

Having concluded that the Act prohibits the taking as contemplated in this case, it is

necessary to consider whether the taking as attempted here was completed prior to the creation of the Allagash Wilderness Waterway. The County Commissioners had apparently completed all the formal acts required of them under the statutory requirements of 23 M.R.S.A. § 4001 to lay out the Realty Road as a public way approximately four weeks prior to the passage of the Waterway Act. If these formalities completed the taking prior to the enactment of the Act, then the above discussion is of no consequence since the road would have already been public at the time the Act became effective. If, however, the taking of the road is complete only when all court appeals are final, then the Commission could seek to prevent such taking using the above analysis.

Although the law on this issue is unclear, it appears to be the general rule that a taking by eminent domain is complete as of the time of the completion of legal formalities by the condemning body. In this case, since an appeal is in progress, the effect of such taking or laying out of a road is probably only temporarily suspended and not completely nullified. *Appleton v. Piscataquis County Commissioners,* 80 Me. 284, 14A (1888). Upon completion of the appeal, and assuming it to be resolved in favor of the County Commissioners, it is likely that the taking would relate back to January 4, 1966. Of course, an argument could be made that no taking occurs until all appeals are complete. In such case the Waterway Act could be used to oppose any taking subsequent to the effective date of the law. Although there is no Maine case law on this issue, it is my opinion that such argument would likely be in vain.

The possibility always exists that the procedure followed by the County Commissioners in laying out the road was defective. In such case the order in 1966 laying out the road would be void *ab initio.* Any new attempt by the County Commissioners to acquire the Realty Road by going through the same formalities again could be opposed on the basis of the above rationale. Until such determination is made by an appellate court however, there appears little likelihood that the Commission could successfully oppose the acquisition of the road by the county.

I do not believe that the Commission has any sound legal basis on which it could presently oppose the acquisition of the Realty Road by Aroostook County. If any argument is to be made on the basis of any of the above discussion, I suggest that the landowners be encouraged to make it.

2. The available alternative to control the use of the road within the Waterway is to utilize the provisions of §§666(2) and 671(1).

Section 666(2) requires that new construction within ¼ mile of the restricted zone have the prior approval of the Commission. New construction would, in my judgment, include substantial improvement of existing roads, i.e., surfacing with asphalt or other acts beyond mere maintenance.

Section 671(1) clearly states that all access to the Waterway from public roads shall be controlled by the Commission. The Joint Interim Committee recommended that a proposed Waterway Authority have "control of access from any public road crossing or otherwise within the Waterway to the Waterway." The statutory language in § 671(1), though shorter, has the same thrust as the recommendation of the Interim Committee. The broad language of this section would allow the Commission to prohibit the flow of traffic across the Realty Road through the two-mile Waterway if it found that such requirement was necessary for orderly control of access to the Waterway and preservation of its unique character. This section would allow the Commission to regulate traffic on the road through the Waterway in any fashion which it found reasonably necessary to accomplish such ends.

The issue of how far to go in implementing §§ 666(2) and 671(1) are questions of

policy which must be formulated in the first instance by the Commission. Once a decision is made, I recommend communicating it promptly to the Aroostook County Commissioners, particularly if the Commission anticipates restricting traffic flow or limiting physical changes to the road. A firm stand on the issue of access to and through the Waterway and paving of the road, when combined with the issues on appeal by the landowners, may cause the County Commissioners to abandon the entire plan. If necessary, of course, litigation could be used as a tool to enforce the decision of the Commission regarding access to the Waterway from the Realty Road.

JOHN M. R. PATERSON
Assistant Attorney General

October 19, 1972
Bureau of Alcoholic Beverages

Keith H. Ingraham, Director

Statutory Interpretation of 28 M.R.S.A. § 501

SYLLABUS:

Liquor Manufacturers' License requires payment of both rectifiers' fee and bottlers' fee where neither the rectifying process nor the bottling process is an integral part of the other.

FACTS:

28 M.R.S.A. § 501 authorizes "manufacturers' licenses" to be issued to persons engaged in various liquor processing operations, including the "rectifying" process and the "bottling" process. All manufacturers' licenses authorize the licensees to sell their finished product to the liquor commission, to other licensed Maine manufacturers and to purchasers outside of the State. License fees differ depending upon the particular processes of manufacturer any licensee is engaged in.

Lawrence and Company of Lewiston is engaged in the business of buying alcohol in bulk and rectifying it into whiskey, vodka, gin, and mixed cocktails and also bottling these resulting products in containers that ultimately reach the consumer.

QUESTION:

Is a rectifiers' fee of $500, and additionally a bottlers' fee of $500, required to license a manufacturer who has but one complete operation that engages him in both processes?

ANSWER:

Yes, both fees are chargeable.

REASON:

Generally a business subject to a general occupation tax cannot be divided, and an