

# MAINE STATE LEGISLATURE

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## STATE OF MAINE

Inter-Departmental Memorandum Date January 12, 1971To Jon A. Lund, Attorney GeneralDept. Attorney Generalm Lee M. Schepps, AssistantDept. Attorney GeneralSubject Baxter Park Authority Contract with Great Northern Paper Company

Governor Baxter gave Township 6 Range 10 W.E.L.S. (T. 6 R. 10) to the State of Maine to be forever "held for and as a State Forest, Public Park and Public Recreational Purposes and for the practice of Scientific Forestry and Reforestation." In Chapter 171 of the Private and Special Laws of 1955, the Legislature repeated the language contained in the deed in accepting the gift. In a Communication from Governor Baxter dated March 17, 1955 and, by Order of the Legislature, reprinted at page 1149 in the Public Laws of 1955, as an appendix to those laws, Governor Baxter stated that he wanted "this township to become a show place for those interested in forestry, a place where a continuing timber crop can be cultivated, harvested and sold; where reforestation and scientific cutting will be employed; an example and an inspiration to others. What is done in our forests today will help or harm the generations who follow us." In that same letter, Governor Baxter said that the terms of the gift of T. 6 R. 10 are identical with those of the 3,569 acre gift given to the State by Governor Baxter approximately two months prior to the gift of T. 6 R. 10. In the gift of the 3,569 acres (located in Township 6 Range 9 W.E.L.S.), the deed stated that the land was "to be forever held by said State for State forests, Public Park, and Public Recreational Purposes and for the practice of Scientific Forestry, reforestation and for the production of forestry wood products. All harvesting of said products shall be done according to the most approved practices of Scientific Forestry and all revenue derived from the sale of said products shall be used by the State for the care, management and protection of Baxter State Park." As in the case of T. 6 R. 10, the Legislature repeated the language contained in the deed in the Private and Special Act accepting the gift. In addition, Governor Baxter wrote a Communication to then Governor Muskie, dated March 17, 1955, and, by a Special Order of the Legislature, reprinted as an appendix to the Public Laws of 1955 at page 1146, et seq. explaining the terms of his gift of the tract of 3,569 acres in T. 6 R. 9. In that letter, he stated that the acreage would "be available both for recreation and for scientific forestry management and can be made to produce a continuing crop of timber to be harvested and sold as are potatoes or any other product of the soil." In addition, the letter stated that it had long been Governor Baxter's purpose "to create in our forests a large area wherein the State may practice the most modern methods of forest control, reforestation and production under the management of our able Forest Commissioner Mr. [Name] and his associates." Finally, Governor Baxter recalled that on his travel to foreign lands, he had "seen beautiful great forests that for centuries had been producing a crop of wood without depletion. In Sweden, Norway, Finland, Germany, Chili, Russia and elsewhere what has been done by scientifically controlled forestry can be done in Maine. Now we can make it possible for the State to try a major experiment here at [Name], an experiment that can mean much for our future timber supply, which all admit as is the chief natural resource of our State."

As you know, certain lands in the southern portion of the Park were given to the State by Governor Baxter subject to certain cutting rights owned by Great Northern Paper Company ("GNP"). Those cutting rights were to expire toward the end of 1973. At some point, a proposal was made for the Baxter Park Authority to "swap" cutting rights with GNP in order to allow them to cut elsewhere in the Park, ostensibly because the cutting in the southern Township could have occurred in an area heavily used by tourists and campers and near Mt. Katahdin. At that time (approximately October, 1972) I made clear to James Erwin and to Don Perkins, attorney for GNP, that it was my opinion that the Authority had no power to allow a "swap" because there were no other lands which respect to which the Authority had the power to grant cutting rights. It was, and is, my opinion, however, that the Authority has the power to permit GNP to engage in the practice of Scientific Forestry in T. 6 R 10 and to accept from GNP as consideration a relinquishment of GNP's cutting rights in the southern Township. Based on that opinion, the contract dated November 29, 1972 was executed. I wrote the first draft of the agreement but the form in which it was signed deleted, among other things, a termination provision and a liquidated damages provision. The agreement provided that GNP could cut no trees and build no road unless and until it had obtained the approval of the Authority of a cutting plan and road plan and, of course, the agreement provided that the cutting and road plan were to be in accordance with "the latest and most highly developed scientifically approved forest practices applicable to the terrain, soils and waters of [T. 6 R. 10] and to the species of trees to be cut . . ." A "harvesting plan" and a "road plan and map" were signed by GNP and by all members of the Authority on December 27, 1972.

I have undertaken to determine whether or not, in the opinion of a cross section of presumably competent foresters, the harvesting plan and road map signed by GNP and the Authority measure up to the standard of the "latest and most highly developed scientifically approved forest practices" and amount to the practice of "Scientific Forestry and Reforestation" as those terms are used and amplified hereinabove. On January 11, 1973, I spoke with Mr. W. R. Dinneen, Director of the Forest Management Division of the Department of Forestry. He has had a number of years experience and his background qualifications can be supplied upon request. In addition, he has some degree of familiarity with this particular transaction by virtue of having participated in a meeting of foresters, called for the express purpose of developing a cutting plan which would meet the standards of the Trust. Mr. Dinneen stated that it was his unqualified opinion that the harvesting plan and road plan and map do not meet the standard of Scientific Forestry and Reforestation as he believes those terms to have been used in the Trust. He made the following observations and comments and expressed the following opinions to me:

1. There is in existence no management plan for T. 6 R. 10 or for the other northern Township in Baxter State Park in which cutting is permitted. It is critical, in his opinion, that this plan be developed and that it precede the preparation or execution of any cutting plan or road plan. In the management plan, the Authority could take into consideration, and effect a balance between, recreation, wildlife, forest products production, insect and disease control, species of growth to be encouraged and other factors. A cutting plan and a road plan are not only functions of, but are the implementation of a management plan. Major decisions affecting the long range use of property should not be made subject to or contemporaneously with a cutting plan. The failure to have had a comprehensive management plan prior to the adoption of a cutting plan underlies a number of comments by Mr. Dinneen listed hereinbelow. For example, Bureau of Land Management and the U.S. Forest Service, which have such plans in existence, design the layout of roads on their lands. In this deal, GNP laid out their roads on a map, submitted it to the Authority and without the Authority having independently verified the map against what actually exists on the ground or having analyzed the road plan in light of long range plans for the Township, the Authority approved the road plan. This road plan is extremely significant because it will establish what roads are to exist in the Township for the foreseeable future.

2. In the opinion of Mr. Dinneen, the road plan should have been submitted to the Highway Department in order to obtain an independent analysis of the specifications of the road contained in that plan. This was not done. In addition, in the opinion of Mr. Dinneen, the road plan should have been submitted to the Department of Parks and Recreation in order to determine whether or not the roads proposed to be constructed are suitable for a public park taking into consideration whether they are straight or curving and where they go in the Township. This was not done.

3. Page 1 of the road plan provides for the disposal of slash, stumps and other debris outside of the right of way limit at intervals of 200 feet or more, but does not specify how far back from the roads the disposal areas are required to be. This can make a substantial difference in the scenic impact of the debris areas.

4. Item 1 on page 2 of the road plan requires roads to be located on "soils which are least susceptible to erosion." Mr. Dinneen stated that there is no way to know in the winter time, with any degree of certainty, what soils lie beneath the ice and snow. It is my understanding that GNP is prepared to commence road construction immediately and has no intention of waiting until spring or summer in order to analyze the soil. In addition, Mr. Dinneen queried whether or not a soils map had been consulted and, even if it had, noted that soils maps have a wide margin for error and that it was highly desirable, especially in Maine where soil types vary greatly over small areas, to analyze the soils on the ground before road construction begins.

5. Item 2 on page 3 of the cutting plan provides that "sand bags or other suitable materials" will be installed to eliminate erosion in the construction of a road. In the opinion of Mr. Dinneen, sand bags are not only ugly but do not last long and do not really prevent erosion. In his opinion, the road embankments should be graded and seeded.

6. In Item 4 on page 3 of the road plan, GNP is required, prior to abandonment of the roads, to install "water bars where necessary or using a method as approved by an agent of the Authority and the Company's agent". In the opinion of Mr. Dinneen, water bars are not adequate by themselves and the road should be brought up to travel specifications by grading and, again, the embankment should be seeded to prevent erosion.

7. Under the contract and cutting plan, it is contemplated that GNP will mark the trees. Mr. Dinneen stated that neither the U.S. Forest Service, Seven Islands Land Company or any other landowner dealing with his lands in a prudent and responsible manner allows the operator to mark the timber. He stated that good land management absolutely requires the landowner to mark the timber to be cut. In this connection, Mr. Dinneen pointed out that the cutting plan provides on page 3 that the Authority's representative "shall inspect the marking operation and shall be authorized to stop cutting if in his opinion the selection is not consistent with scientific forestry practices." This provision does not cure the basic assumption that good land management requires the landowner to mark and he submitted that unless we are going to have our own personnel keeping up with each of GNP's markers, we will, in effect, have no control over marking and he further pointed out that the cutting plan provides that our only power in the event of a disagreement is to stop cutting and not marking operations yet cutting operations follow substantially behind the marking operations. Even in the event that we should not mark, we should have the power to stop marking on the spot and not wait until marking is accomplished and cutting has commenced.

8. The best marking operations (including Maine and United States public forests) provide for marking the trees in two spots, one at breast high for the operator to see and one on the stump near the ground for the landowner to be able to verify, after the cutting operation is completed, that only marked trees were cut. No provision is made in the cutting plan for this protection and, of course, it only exacerbates the problem of GNP marking the timber.

9. The contract itself limited cutting to spruce, fir and poplar of specified sizes, based on the assurance from Mr. Wilkins that this was compatible with the practice of scientific forestry. This is apparently not the case and, it was in that spirit that the cutting plan was written to provide that notwithstanding the diameter limits, "trees below these limits and species other than those designated may be cut if approved by the Authority's designated agent for the purpose of achieving scientific forest management and re-forestation." In the opinion of Mr. Dinneen, this is inadequate to elevate the agreement to the standard of scientific forestry. To the extent that the species and diameters represent even guidelines in the cutting operation, they are incompatible with the concept of scientific forest management. Moreover, other species exist in T. 6 R. 10, including pine and hardwood and no provision is made for their proper management under this cutting plan. The foregoing language should not authorize the cutting of other species but should require the cutting of other species where designated by our forester in order to achieve scientific forest management. Mr. Dinneen noted that the species were included in the first place because GNP's nearby mill did not take hardwoods. Good forest land management requires that the owner of the land locate markets for all managed species of timber and frequently the timber operator is required, as a part of the deal to cut timber for which that particular operator has no use and to locate a market for it. Mr. Dinneen also said that he thought Oxford Paper Company could buy hardwood from T. 6 R. 10 but under the existing arrangement, the Authority is powerless to force GNP to cut or manage those species.

10. In the Method of Harvest provision of the cutting plan, provision is made for "leaving reasonable visual cover" near roads. This vague language does not insure that the Authority will be able to leave dense cover where it is required and does not take into consideration that, in some areas, no cover may be desirable if there is a scenic lookout. This is another aspect in which the lack of a management plan and our own road plan makes this cutting plan fall short of scientific forestry.

11. The first paragraph of the Method of Harvest section of the cutting plan provides for clear cutting areas 25 acres in size. Mr. Dinneen says that this is too big from a scientific forestry standpoint because it permits large areas of bare ground to be exposed to the sun. Elsewhere in the cutting plan, provision is made for leaving seed bearing trees in order to promote revegetation in the clear cut areas but there is no assurance that the trees which are left will be in sufficient quantities (i) to prevent blowdowns resulting from isolated trees left standing and (ii) to provide some shade cover for the ground in order to keep the ground temperature low. These are further indications of the necessity that the Authority mark the trees, not GNP. Furthermore, he noted that 25 acre clear cuts will create slash accumulations for which no disposal provision is included in the cutting plan and which can create a substantial fire hazard. Where good selective cutting is employed, there need be no particular slash disposal methods employed

use the slash is evenly scattered through the woods but a different result can obtain where there are 25 acre clear cuts. Finally, he noted that from a game management standpoint, the figure of 25 acres should be submitted to a game biologist for his opinion as to the desirability of that size.

12. Mr. Dinneen expressed the opinion that purely from a forestry standpoint, without economic considerations, skidders are not desirable because they cause a large amount of damage to growth which is not cut and to the terrain. It is his opinion that if the Authority were to consider allowing a long time in which to cut and were perhaps willing to accept slightly less than top dollar for the sale of the stumpage, the Authority could attract responsible operators to cut wood in T. 6 R. 10 using "bombardier" or other tractors which do far less damage to the terrain and other growth than skidders. If one's focus is on the maximum economic return from one's land, as is the case with many paper companies, skidders are an economic necessity in that framework. If this is not the predominant goal (and such decisions are properly a part of a management plan) Mr. Dinneen is of the opinion that responsible timber operators can be attracted to cut timber without the use of skidders. This opinion was backed up by Mr. Joseph Lupsha, Utilization Forester for the State of Maine and an employee of the Department of Forestry.

13. The Method of Harvest section of the cutting plan provides that it is to be a tree length operation "except where considerations of scientific forestry make it necessary to cut shorter lengths." It is unclear how this will be implemented on the ground but the reverse presumption is preferable according to Mr. Dinneen. That is to say, he recommends that in all cutting operations on State forests, to the extent feasible, operators employ log length or even two log length hauling in order to avoid excessive damage to the land and to the other growth. This distinction is perhaps better understood by visualizing the difference between hauling a sixty foot tree around a curve in the woods, knocking over all growth in its path, and hauling a twelve foot or other short log around the same curve.

14. Mr. Dinneen noted that although it was perfectly permissible, it was odd to use the "Holland Rule" in measuring saw logs rather than the International Rule which the Legislature has declared to be the official rule for the measurement of such timber in this State.

15. Mr. Dinneen pointed out that he did not know how many personnel the Authority planned to have on the ground during the cutting operation but it was his understanding from Austin Wilkins that the Authority would have only one man. This single man, under the contract and cutting plan as presently written, would be responsible for scaling and inspecting cutting operations and inspecting marking operations, all of which could be occurring (and likely will be occurring) simultaneously. The job should be performed by a team of foresters representing the Authority and not GNP.

16. Mr. Dinneen stated that since T. 6 R. 10 was given to the State in 1955, no forester from the Forestry Department (and there are twenty-five of them) has gone on to T. 6 R. 10 for the purpose of examining the growth thereon or developing any management plan or for any other purpose with the sole exception that one forester surveyed the lines in the whole of Baxter Park a few years ago, but not in connection with forest management.

17. Mr. Dinneen noted that, although it was not strictly a function of scientific forestry, he was surprised that the agreement contained no termination provision and he noted that, as a matter of common sense, it will be difficult to enforce the agreement without a termination provision.

18. Finally, although this again does not bear directly upon the issue of scientific forestry, he noted that according to Forestry Department statistics, the Authority traded pulpwood in the southern Township, which, assuming it was otherwise economically operable, was worth \$12 per cord for saw logs in T. 6 R. 10, which is worth \$18 a cord and he seriously questions whether the Authority received full value in the exchange.

On January 15, 1973, I had a lengthy telephone conversation with Cliff Swenson, Chief Forester for the Seven Islands Land Company, and a participant in the meeting called by Austin Wilkins in order to develop a cutting plan under the subject agreement, and referred to hereinabove. Mr. Swenson informed me that he had assumed that future meetings of that group would be held before the signing of the cutting plan and road plan and that he had mixed feelings about being asked, as he felt, to approve a contract after it had already been entered into and its terms and conditions set. I did not disclose to Mr. Swenson that Mr. Dinneen's comments had already been solicited in this matter but instead, asked him to give me his opinions about the contract and cutting plan and road plan, and he had the following comments to make:

A. Mr. Swenson reiterated, as he had done at the meeting, that it is absolutely imperative that the Authority mark the trees and stated that Seven Islands Land Company and other responsible forest land managers mark their own trees.

B. Mr. Swenson stated that he perceived this Township to be an area where the State had an opportunity to demonstrate first-class proper forest management. He stated that this was an area inappropriate for the kind of contract entered into which basically provides for a woods operator to go in and cut a specified number of cords of wood. He stated that the 109,000 cords of wood to be cut is merely an economic exchange, not proper management of the woodlands. There is much more wood than that in the Township and the cordage to be cut should be a function of a sustained yield plan. He stated that in his opinion, the cutting of 109,000 cords of wood was not cutting on a sustained yield basis and, in fact, probably bears no relationship to the amount



wood on the ground, which, from the standpoint of professional forest management, should be cut.

C. He stated that it is universally accepted practice to have a management plan taking into account a number of factors affecting the long range use of forest lands, before cutting is commenced, and, in fact, that a cutting plan and a road plan should be an implementation of the management plan.

D. Mr. Swenson stated that to the extent that species and diameter limits specified in the contract represent guidelines for what is to be cut, it does not represent scientific forestry. Moreover, Mr. Swenson emphasized that all species should be managed and that to the extent the Authority has no power to require GNP to harvest birch, pine and all other species, the arrangement does not reflect scientific forestry. He stated that markets are available for all species and they should be located as part of a management plan. Mr. Swenson's comments about clear cutting differed slightly from Mr. Dinneen's comments. Mr. Swenson said that the twenty-five acre maximum size should have been left out of the agreement, because, in fact, any numerical maximum or minimum is irrelevant to the practice of scientific forestry because areas should be clear cut in accordance with the requirements of scientific forestry as determined on the ground by professional foresters. He stated that this is another respect in which it is critical for the Authority to have marked the trees. The Authority would have marked those trees without imposing upon itself any maximum or minimum sizes and that professional standard should obtain in the marking of the trees. While Mr. Swenson's comments differ from Mr. Dinneen's, it is apparent that neither forester regarded the existing arrangement as a reflection of scientific forestry.

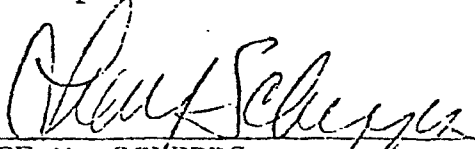
E. Mr. Swenson's comments about skidders also differed from Mr. Dinneen's comments. Mr. Swenson sees nothing wrong with the use of a skidder per se. He emphasized, however, that this contract calls for the cutting of 109,000 cords of wood within two and one-half years and that because of those limitations, skidders would be employed on a wide scale and in great numbers. This use of skidders he regards as less than the standard required in order to employ the latest and most highly developed techniques of scientific forestry. He would recommend that approximately 10,000 cords of wood be harvested per year. If that quantity of wood were harvested, Mr. Swenson pointed out that skidders could be used on an extremely limited scale and that their operations could be closely supervised. With these two conditions, he would authorize the use of skidders in cutting on T. 6 R. 10. It is apparent that while Mr. Swenson's opinion concerning the use of skidders differs from Mr. Dinneen's opinion, both apparently agree that the use of skidders contemplated by the contract and cutting plan with GNP does not represent scientific forestry.

F. Swenson pointed out to me that it was his understanding from remarks made at the meeting with representatives from GNP, that GNP was not itself going to mark fir trees but was going to cut it all. He stated that this was not an approach to the marking or management of forest lands which could be characterized as scientific forestry.

G. Mr. Swenson stated that a major factor in the type of cutting which would occur under this contract depended upon the quantity and quality of personnel which the Authority put on the ground in order to supervise and observe marking and cutting operations. He had understood that the Authority may put only a single forester on the ground and he felt this was inadequate. He stated, however, that even if an adequate number of competent foresters representing the Authority were placed on the ground, he would still have "serious reservations" about expressing the opinion that the cutting authorized and contemplated by the contract and cutting plan with GNP represent scientific forestry, because of those factors listed hereinabove which could not be realistically cured by supervisory personnel at this point and time. When I asked him whether or not he thought that the Authority was using T. 6 R. 10 "to become a show place for those interested in forestry, a place where a continuing timber crop can be cultivated, harvested and sold; where reforestation and scientific cutting will be employed; and example and an inspiration to others", he said "absolutely not".

Both Messrs. Dinncen and Swenson have some degree of familiarity with this particular transaction and, of course, had already read the contract and cutting plan when I approached them for their comments and opinions. There are other foresters whose opinions can and perhaps should be obtained, including at least one academician from the University of Maine. It will take some time to familiarize others with the existing arrangement between the Authority and GNP and to obtain their opinion, however, and in the interest of time I am submitting this report to you now. At your request, this project can be pursued further.

Let me reiterate that as far as I am concerned, this memo may be submitted to any interested parties for their comments, including Messrs. Wilkins and Erwin. It is, of course, desirable that you have the benefit of many viewpoints before you decide upon a course of action.

  
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LEE M. SCHEPPS  
Assistant Attorney General