STATE OF MAINE

Inter-Departmental Memorandum Date October 16, 1974

To Maynard F. Marsh, Commissioner Dept. Inland Fisheries & Game

From Edward Lee Rogers, Assistant Dept. Attorney General

Subject Rights of Private Owners on Designated Wildlife Management Areas

By your memorandum dated December 5, 1973, you asked:

1. Whether a landowner may lawfully restrict public use of his land once it has been lawfully designated as a wildlife management area under 12 M.R.S.A. §1901, sub-§ 8.

2. Whether, in the light of the frequent motivation of landowners to have their land designated as wildlife management areas so as to limit public use thereof, there is a need for clarification of your authority under 12 M.R.S.A. § 2155 to manage wildlife management areas and sanctuaries.

The phone conversations we have had on this subject further established that your primary concern relates to wildlife management areas and the action taken by one owner to post the area. At the same time, you recognize that the situation with regard to sanctuaries is also deserving of clarification. You also advised me that sanctuaries, like wildlife management areas, are only established with the landowner's consent, unless, of course, there is an actual taking or leasing of the land as provided by 12 M.R.S.A. §§1901, sub-§ 8, and 2151 for wildlife management areas.

We believe the correct interpretation of the statute is that because of your management authority under 12 M.R.S.A. §§ 1901, sub-§ 8, and 2155, the authority to restrict or permit public access for the public purposes described in those provisions is vested in you, not in the landowners of such management areas or sanctuaries.

The statutory provisions primarily involved are §§ 1901, sub §§ 7 and 8; 2101; 2107; 2151; 2154; 2154-A and 2155.

Our area of inquiry is limited to the situation where, in accordance with the landowner's consent, the land in question has become either a wildlife management area (§§ 1901, sub-§ 8 and 2154) or a bird or game sanctuary (§ 2101). We are not here concerned with land taken by purchase or lease under § 2151.

The general authority of the Commissioner over wildlife management areas and sanctuaries is set out in § 2155. It is relevant to the inquiry here that under that provision --

> The Commissioner is authorized to regulate hunting, fishing, trapping, boating, camping and other public use on wildlife management areas and sanctuaries as described in section 2101, and is authorized to close such areas to motorcycles, field bikes, all-terrain vehicles and snowmobiles and to close such areas to hunting, fishing, trapping, boating, camping and other public use or to permit the taking of any species which he shall designate for such periods, on such portions of the areas, and under such special regulations as are necessary to insure a desirable effect on wildlife populations and provide for human safety. /Emphasis supplied/

Similarly, the art of wildlife management is defined in §1901, sub-§7, as including the regulation of the harvesting of fish and game and also the "Manipulation of hunting pressure".

The use of such neutral terms in the statute as "desirable effect" and "Manipulation", as well as the more commonly used words such as "regulate", instead of words connotating primary concern only with conservation or preservation, accurately reflects the scientific or objective nature of the regulatory activities that the Commissioner must have the authority to carry out if he is to be able to manage such areas adequately. It has long been the position of the Department of Inland Fisheries and Game that the authority to assure selective harvesting of game species is essential to adequate wildlife management. Indeed, in Holbrook Island Sanctuary v. Brooksville, 161 Me. 476 (1965), a real estate tax exemption was denied the sanctuary corporation because its charitable purpose, including the "preservation and protection of and the prevention of cruelty to * * * wild birds and beasts" by prohibiting all hunting on the sanctuary, was an attempt by the plaintiff (161 Me. at 488) --

> to create a game preserve or at most a game management area with conditions deemed harmful by the regional game biologist of the Fish and Game Department. * * * Such a purpose may not be called a charitable purpose.

If a private landowner of a state managed wildlife management area or sanctuary could impose the same restrictions on hunting by posting his land as were involved in the Holbrook Island Sanctuary

case, the public policy or purpose for establishing such areas or sanctuaries would be substantially undermined. Given the broad statutory authority conferred on the Commissioner in §§ 1901 and 2155, there is little question but that the Commissioner is authorized to permit public access for the public purposes referred to in those provisions.

At the same time, however, nothing in those provisions or the other related statutory provisions cited, supra, in any way authorizes the Commissioner to permit public access on such privately-owned and state-managed properties for any purposes other than those referred to in §§ 1901 and 2155 or essential for the carrying out of those purposes. It therefore follows that the Commissioner could not authorize entry onto such lands, and the landowner could prevent entry onto such lands, by persons wishing to carry out such other activities. Nothing in the statute would preclude the exercise of the landowner's private right to exclude such persons (cf. Clark v. Coburn, 108 Me. 26, 28 (1900)), for their exclusion would in no way vitiate the implementation of the statutory provisions concerning management areas and sanctuaries.

We therefore conclude that with the exception noted, supra, the private landowner of a state established wildlife management area or sanctuary cannot post or otherwise restrict public access to such lands.

You also asked whether clarification of the relevant statutory provisions is desirable and, if so, you ask our assistance in that regard. We think that clarification is most desirable.

Presumably, the problem to which you refer (namely, of landowners wishing to have their lands designated as management areas or sanctuaries to restrict public access) arises because landowners do not understand the import of the statutory provisions involved. Wildlife management, as an art or science, is defined in §1901, sub-§ 7. While that provision is referred to in § 1901, sub-§ 8, which defines wildlife management area, neither of those provisions refers to § 2155. If a landowner focuses only on § 1901, sub-§ 8, and thus also sub-§ 7, and is not aware of the import of § 2155, he may be mislead as to the extent of the Commissioner's authority to permit public access on his land after it becomes a wildlife management area. We therefore suggest that § 1901, sub-§ 8, be amended to read as follows:

8. Wildlife management area. A "wildlife management area" is any tract of land or body of water owned or leased by the Department of Inland Fisheries and Game for the purposes of wildlife management as defined in subsection 7 or created by an Act of the Legislature with the landowner's permission, and subject to the Commissioner's authority under section 2155.

Similarly, the introductory clause under § 2101 should be modified to read as follows:

§ 2101. Designation of sanctuaries

No person shall, ~~except as provided,~~ at any time, trap, hunt, pursue, shoot at or kill any wild animal or any game or other wild birds, except as the Commissioner may otherwise direct pursuant to his authority in chapters 301 to 335, and particularly as provided in section 1901, subsection 8 and section 2155, within the following described territories:

We also suggest that § 2107 be amended to include after "except as provided in chapters 301 to 335," the following: "and particularly as provided in sections 1901, subsection 7, and section 2155, * * *"

Section 2154 should be similarly amended to read as follows:

§ 2154 Classification of wildlife management areas

The following described territories shall be classified as wildlife management areas, to be managed by the commissioner, in accordance with section 1901, subsection 7, and subject to the Commissioner's authority under section 2155:

Finally, the first sentence of § 2155 should be amended by inserting after "wildlife management areas" the following:

> "as described in section 1901, subsection 8, and designated and classified in sections 2154 and 2154-A, * * *".

Section 2155 should also be amended by adding a new third paragraph to be inserted after the second existing paragraph to read as follows:

> The Commissioner's authority under this section includes his authority to authorize all public access to and on such areas for carrying out the public uses described in this section."

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ELR/cmf