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STATE OF MAINE

File BSP-1975

Inter-Departmental Memorandum Date April 22, 1975

To Joseph E. Brennan

Dept. Attorney General

From Sarah Redfield

Dept. Staff Assistant

Subject Motorcycle use in Baxter State Park

This is in response to your request of February 7, 1975 concerning proposed legislation which would allow the use of motorcycles within Baxter State Park.

Such legislation would be contrary to Rule #18 of the Baxter State Park Authority's Rules and Regulations, Revision, 1975. This contradiction would not itself invalidate the proposed legislation. Baxter named the State of Maine as Trustee for the Park. As Trustee, through its Legislature, the State has delegated the supervision and control of the trust property to the Authority, 12 M.R.S.A. §901.^{1/} This delegation includes the power to establish rules and regulations concerning the Park, 12 M.R.S.A. §903. To the extent the Legislature wishes to modify or limit this delegation to the Park Authority, it may appropriately do so by subsequent legislation, so long as the proposed modification is itself in keeping with the terms of the Trust. (See e.g. Ch. 477 of Public Laws of 1971 providing an additional restriction on the powers of the authority; compare with Ch. 226, §20 of Public Laws of 1965.)

The central issue, then, is not the potential conflict of the proposed legislation with the Park Authority's regulations, but rather the potential for conflict with the terms of the Trust itself. It is clear that these terms may not be changed by unilateral legislative action, see Cary v. Bliss, 151 Mass. 364 at 378, 25 N.E. 92 (1890); Trustees of Dartmouth College v. Woodward, 4 Wheat 518 at 647-50 (1819); IV Scott, The Law of Trusts, §§367.3, 399.5 (1907). Any legislative action in breach of the terms of the trust may result in court proceedings to remove the Trustee or to compel the Trustee's

^{1/} Originally the legislature created a five-member Baxter State Park Commission to "have the supervision, direction and control" of the area, P.L. 1933 C.281; subsequently, the State Forest Commissioner, the Commissioner of Inland Fisheries and Game and the Attorney General were given the "full power in the control and management", P.L. 1939, C.6; P.L. 1941, C.25, P.L. 1949, C.78, P.L. 1965, C.226, P.L. 1971, C. 477, P.L. 1973, C. 625.

proper performance, see IV Scott, The Law of Trusts §§387,392 (1967).^{2/} Ultimately, should the Legislature enact a statute which would make impossible the continuation of the Trust in keeping with the donor's restrictions, the Trust property may revert to the heirs of the donor; see Evans v. Newton, 220 Ga. 280, 138 S.E. 2d 329 (1964), rev'd 382 U.S. 296 (1966) (Constitutional impossibility for city to be trustee of segregated Park), 221 Ga. 810, 148 S.E. 2d 329 (1966) (holding trust fails and property reverts). Nor is it likely that in the Baxter situation the reversion of the trust property could be averted by the courts through the application of the doctrine of cy pres ^{3/}

In view of the possible consequences of legislative action contrary to the Trust and the unlikelihood of court modification thereof, the proposed legislation should be carefully measured against the Trust provisions. The Trust encompasses the lands now named Baxter State Park, deeded to the State in various conveyances from 1931 to 1963. As Baxter desired, these deeds were accepted by the incumbent Legislature, and recorded, together with accompanying communications,

^{2/}This discussion is included only to briefly indicate the possible consequences of a breach of the Trust, without discussing some of the inherent problems of these remedies, e.g. questions of interpretation, standing, policy. Also note, that in 1949 there was legislation proposed which would have allowed hunting in a small area of the Park in violation of the existing deeds of trust. Baxter's response implied that such a breach of trust could lead to his stopping any further gifts, and asked the Senate, "Shall a few hunters bringing pressure in the Legislature upset my plans and thus perhaps deprive the State of benefactions that will be of material advantage to our People?" Letters of Percival Proctor Baxter to John F. Ward, April 16, 1949; also see, e.g., Letters to Attorney General Ralph W. Farris January 26, 1949 and April 15, 1949 and to Senator George B. Barnes, January 26, 1949 and April 14, 1949. The proposed legislation was not adopted.

^{3/}Typically, this doctrine allows the court to apply the trust property to similar purposes where, because of changes in circumstances or conditions, the exact terms of the trust may no longer be carried out, see, generally, IV Scott Law of Trusts, §§399, 399.1. This doctrine would not be appropriately applied in the Baxter case where Baxter absolutely intended that the Park remain forever as it was, "in the good old days" no matter what the change in circumstances or what new pressures develop for its use, see all deeds to the State; also, letter from Baxter to the Honorable Sumner Sewall and the 90th Legislature, January 17, 1939.

in the Private and Special Laws of the State of Maine. Each of these deeds provided that the lands be held in trust by "the State as trustee for the benefit of the people of Maine." 4/

Each deed set out certain restrictions on the use of the land. The land was generally granted to the State subject to the conditions that "said premises shall forever be used for State forest, public park and recreational purposes, shall forever be left in the natural wild state, shall forever be kept as a sanctuary for wild beasts and birds," Private and Special Laws of 1933, C.3.^{5/} Two additional conditions, that airplanes not be allowed to land and that the use of firearms be prohibited, were also generally included.^{6/}

These conditions cover the majority of lands in the Park including those deeded in 1931, 1933, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1947, 1949, 1953, 1954 (re: 8000 acres), and 1962. In the remaining conveyances these conditions were modified in order to accomplish specific purposes. In an area of some 15,000 acres where hunting is allowed, those conditions concerning the use of firearms, the landing of aircraft, and the sanctuary of wild beasts and birds were not included, see Private and Special Laws of 1955, C.1, C.3 and C.4,

4/ See deeds and acceptances in Private and Special Laws of Maine: 1933, C.3; 1939, C.1; 1941, C.1; C.122; 1943, C.95, C.1; 1945, C.91; C.1; 1947, C.1; 1949, C.1; 1955, C.1; C.3, C.61, C.171; 1963, C.1. Note that the first gift, Private and Special Laws of 1931, C.23, does not explicitly provide that the State is to hold the lands in trust. However, subsequent communications indicate that all of the Park land was to be so held, see, e.g. Laws of Maine of 1939, Communications, 1939 to "Honorable Lewis O. Barrows, Governor," 12 M.R.S.A. §900 et seq.

5/ These conditions were present, with slight variations in language, in all conveyances with the exception of those discussed in the text and of that of August 6, 1962 which did not include the conditions concerning wildlife sanctuary or the prohibition of hunting, Private and Special Laws of 1963, C.1. Note that the provision concerning State forest was not originally present in the 1931 deed, but was added by virtue of the transactions of 1945, see Private and Special Laws of 1945, C.1.

6/ These conditions were added to previous deeds by the provisions of Private and Special Laws of 1945, C.1, and are present in all subsequent deeds except those discussed in the text and that of 1962, Private and Special Laws of 1963, C.1, which prohibited aircraft but not hunting.

amending the conveyance of January 12, 1954 re: 14,005 acres. In another area of some 28,000 acres conveyed in 1955 there is specific provisions for the practice of scientific forestry and thus only the provision concerning public recreation is applied, see Private and Special Laws of 1955, C.61, C171.

For the majority of the Park, the proposed allowance of motorcycles is appropriate only to the extent it does not contradict the three basic concepts of public recreation, wilderness preservation and maintenance as a sanctuary. As the proposed use by motorcycles suggests, however, there is some ambiguity, in distinguishing between the concepts of sanctuary and wilderness preservation on the one hand and public recreational use in its modern sense on the other.

The clarification of any ambiguity or inconsistency in the terms of the Trust is dependent upon the intention of the donor, see IV Scott, The Law of Trusts §164.1 (1967); see also 12 M.R.S.A. §900. To clarify ambiguity or to determine Baxter's intention concerning matters not expressly covered, reference may be made not only to the legal instruments themselves but also to the conduct of the parties including prior and subsequent communications, see Little Rock Junior College v. George W. Donaghet Foundation, 224 Ark. 895, 277 S.W. 2d 70 (1955) (subsequent statements), Debrabant v. Commercial Trust Co. (prior statements), compare with Tibbetts v. Curtis 116 Me. 336, 101A. 1023 (1917).

There are various sources available for determining this intention including the official Communications which accompanied each deed of gift, the agreed upon statements of interpretation, and the various other communications of the parties, as well as evidence of the conduct of the parties regarding the Trust. The significance of such documentation is dependent upon the application of certain principles of the law of trusts and contracts. The deeds and statutory acceptances thereof are, of course, of primary significance. Also of particular significance is the statement mutually agreed upon by both Baxter and the State in which Baxter himself interpreted the terms "natural wild state" and "sanctuary for wild beasts and birds."^{7/} This interpretation was then enacted into law as Chapter 2 of the Private and Special Laws of 1955 providing; in part:

Now therefore it is mutually understood by the grantor and grantee in said Park deeds that the following paragraphs express the intents of the parties as to the interpretation of said phrases, and the same are accepted as applying to all the said Deeds and conveyances. . .

^{7/}This instrument, which does not vary earlier conveyances but only clarifies their meaning, would be admissible evidence in determining the donor's intention, see IV Scott, Law of Trusts §164.1 (1967).

In this interpretation of "natural wild state", Baxter authorized the State to clean, protect, and restore the forest when damaged by Acts of Nature. It is also authorized to build trails and access roads, shelters and lean-tos for "mountain climbers and other lovers of nature in its wild state." But,

This area is to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be 'Forever Wild'.

According to this interpretation of "Sanctuary for wild beasts and birds" the State is authorized to maintain the balance of nature, to control predators and disease. This is to be done "having in mind that the sole purpose of the donor in creating this Park is to protect the forests and wildlife therein as a great wilderness area unspoiled by Man."

This interpretive statement, then, orders the priorities for the Park by providing that wilderness preservation is primary and recreational use "secondary". As a complete or integrated expression of the parties' understanding of these terms "applying to all the said Deeds and Conveyances", this interpretation would preclude any weight given to prior statements which vary or contradict this writing, see 3 Corbin on Contracts §573 (1960 ed). However, analysis of other statements of the parties does not indicate any actual inconsistencies with the wilderness priority.

Many of Baxter's communications clearly support the direction of the interpretive statement. For example, in his communications accompanying the offer of land to the State, Baxter wrote:^{8/}

I want no hard surfaced roads in this Park, my object being to have it remain as nearly as possible in its natural wild state unimproved by man. . .

^{8/}Although not necessarily of equal legal significance with the instruments discussed above, the official communications such as those cited here, which accompanied each offer of land, were intended by the parties to be given particular weight as indicated by the typical legislative order:

"ORDERED. . . that in order that the Records of the gift by PERCIVAL PROCTOR BAXTER to the STATE OF MAINE as Trustee in Trust of. . . (BAXTER STATE PARK) be complete and in enduring form, the communication dated July twenty-second 1940, . . . together with the message of Governor transmitting the said communication to the Legislature be printed in the Laws of Maine. . ." (Private and Special Laws of 1941 at p. 699); see also IV Scott. Law of Trusts §164.1 (1967 ed).

Everything in connection with the Park must be left simple and natural and must remain as nearly as possible as it was when only the Indians and the animals roamed at will through these areas. . . . (Communication to the Honorable Horace A. Hildreth . . . and the 92nd Legislature, January 2, 1945)

In the years to come when civilization has encroached upon the land we now refer to as "Wild Land" this Park will give the people of succeeding generations a living example of what the State of Maine was in "the good old days" before the song of the woodsman's axe and the whine of the power saw. . . . (Communication to the Honorable Edmund S. Muskie and. . . the 97th Legislature, January 11, 1955).

Other communications indicate that Baxter was also very concerned with the public's having access to the Park. However, as the foregoing language indicates, Baxter was creating an essentially wilderness Park. This Park was for those who could and would appreciate its wilderness nature. For example, in a communication discussing road access Baxter wrote:

"I also want this area to be reasonably accessible to those persons who enjoy the wilderness and who wish to go there for rest and recreation. That of course is my principal reason for creating this Park. (Communication to the Honorable Frederick Payne and. . . the 94th Legislature, January 3, 1949).

And in a later letter to Governor Reed and the members of the Executive Council:

All work in connection with the above (construction of trails, lean-tos, etc) should be undertaken having in mind that the sole purpose is to protect the public's right and use of the forest under the restrictions of the Trust Deeds. . . ." (Letter to Governor Reed and the members of the Executive Council, May 20, 1960) ^{9/}

^{9/}This communication was solicited by the Park Authority to aid in the interpretation of the Trust restrictions. It was Baxter's intent that this communication be given particular recognition:

"Because of this request, I am pleased to give you a statement and I should like to have it incorporated in the records of the Governor and Executive Council in order to explain to future generations my thoughts as to this park."

✓ However, even though Baxter states here that recreational use is his "principal" or even "sole" purpose, these statements are not unqualified. His concern is not with the Park's availability for all recreational use but rather with its availability for those "persons who enjoy the wilderness." That is, he does not want the Park "locked up and made inaccessible", but, still its use must be "in the right unspoiled way," (see Communication, January 2, 1945, supra), in keeping with the Trust restrictions. In other words, Baxter created a complementary relationship between wilderness and such public recreation as is dependent upon, oriented toward and compatible with wilderness values.

The interrelationship of public access and recreation with wilderness and sanctuary preservation is the core issue of the question of allowing motorcycle use within Baxter State Park. In answering this question it is necessary to consider what purpose would be accomplished by allowing this use and whether this purpose is dependent upon and compatible with the wilderness nature of Baxter State Park.

Motorcycles would, of course, provide greater access to the Park. However, their exclusion would not "lock up the Park" but rather would tend to limit its use to those "willing to walk to make an effort to get close to nature," see Title 12 M.R.S.A. §900. Further, activities involving motorcycles are in no way dependent upon the unique wilderness values established for the Park by Governor Baxter; nor are they compatible with these values and the uses necessarily dependent thereon, e.g. hiking, wildlife observation, camping. Because of their noise and ultra-mobility (as compared with the average automobile for example) motorcycles may adversely affect wildlife in the Park and may also disturb those users of the Park who wish to "get close to nature" ^{10/} Accordingly, the use of motorcycles in the Park does not seem appropriate.

This conclusion is further supported by consideration of Baxter's own specific responses to the problems created by various motor vehicles. Originally, Baxter required that there be no further road construction and thus no increased vehicle use within the Park, see, e.g. Communication to Horace A. Hildreth and the 92nd Legislature, January 2, 1945. This requirement was removed in 1949, see Private and Special Laws of 1949, c.2 and Communication to Frederick G. Payne and the 94th Legislature, January 3, 1949. The removal of the restriction on roads was a "considerable concession" on Baxter's part (see letter to George B. Barnes, January 26, 1949) made in reliance on the good faith of the State "that no roads or ways shall be constructed or maintained that will interfere with or detract from the 'natural wild state' of this region," see Communication to Frederick G. Payne, supra.

10/See United States Environmental Protection Agency, Effect of Noise on Wildlife and Other Animals, NTID 300.5, Dec. 1971. See also , footnote 11.

Presumably, in allowing such roads as would be compatible with the natural wild state of the Park, Baxter contemplated their use by certain motor vehicles. But he did not intend that the Park be open to all vehicles. This is clear both from his continuing prohibition against airplanes, which are in many ways analogous to motorcycles, and also from his specific writings responding to the growing popularity of such vehicles as motorcycles and motorskis.

By the terms of the Trust deeds Baxter specifically prohibited the landing of airplanes on the majority of waters or land of the Park, see deeds of 1945 (applying to all previous deeds); 1947, 1949, 1953, 1954, 1963. When the restrictions against roads were removed, those against planes were not, Private and Special Laws of 1949, C.2. At that time Baxter wrote to Governor Hildreth and the 92nd Legislature:

"With the protection of wild life and deer, the moose and the birds no longer will fear man and gradually they will come out of their forest retreats and show themselves. I want hunting with cameras to take the place of hunting with guns. Aircraft frighten wild life and disturb the peace and solitude of the wilderness. Would that the day may come when all of Maine will become a sanctuary for the beasts and birds of the forest and field and when cruelty to the humbler orders of life no longer stalks the land."

The preceding language appears applicable to the use of motorcycles within the Park. By allowing the continuation or creation of certain roads, Baxter implicitly accepted automobiles. Likewise, by continuing to prohibit planes, he sought to at least limit vehicular traffic to such roads. Motorcycles, like planes, would not be so limited; and motorcycles, like planes may "frighten wildlife and disturb the peace and solitude of the wilderness." 11/

Baxter himself viewed the use of motorcycles an intrusion on the wilderness nature of the Park. In April of 1966, he wrote to Austin Wilkins, then Forest Commissioner and head of the Park Authority:

"I understand that there are several motor scooters and motorcycles in Millinocket that may be taken to the Park. These machines are so noisy and numerous, they should be forbidden to go into the Park area. If unrestrained, these noisy machines would frighten

11/ Restriction of motorcycles to roads while avoiding the problem of their extensive mobility does not eliminate the disturbance of "peace and solitude". The level of noise for a motorcycle at 50 feet is 90 decibels, calculated by the Council of Environmental Quality to be "annoying" to humans, compared with 110 decibels for a chainsaw; 100 for muffled snowmobile; 70-80 for an automobile; see Society of Automotive Engineers, Noise Facts and Accoustic Terms, 1970; Council of Environmental Quality, Sound Levels and Human Response, New York Times, September 3, 1972.

the wild life." 12/

This position was in keeping with his views concerning other motor vehicles including motorboats and snowmobiles:

In regard to the Motor Skis, I have thought this over and have this suggestion to make. These skis should be prohibited in the Park

12/ Because of the parole evidence rule, the legal significance of this and similar letters is somewhat less clear than the source discussed previously. This rule maintains that any matter expressly covered by the instrument, if unambiguous, is determined by the terms of the instrument and in such a case extrinsic evidence is inadmissible to vary or add to the terms thereof, Cutting v. Haskell, 122 Me. 454, 10A. 618 (1923).

Although it may be demonstrated that under the terms of the instruments themselves preservation of the wilderness was Baxter's primary intent, the exact meaning of these terms in the given situation is not clear. In such a case parole evidence is admissible for the purpose of interpretation and clarification where the issue is not expressly covered, see, generally, 3 Corbin on Contracts §§579, 573, 539 (1960).

While these letters are to be accorded less weight than the more formal communications between Baxter and the State, their significance is not to be ignored, especially in view of the consistency with which Baxter's wishes were observed by the State representatives, see e.g. letter from Attorney General, James S. Erwin to Baxter, June 19, 1968, letter from Forest Commissioner Austin Wilkins to Baxter, June 26, 1968; letter from Attorney General Frank Hancock to Baxter, October 7, 1959. Baxter himself also viewed his actions as particularly significant in providing precedent for the Authority: "What action is taken nowadays will serve as precedent for the future. . . I realize that in the future, pressure will be brought to bear to break down the Trust conditions. Now is the time to take a firm stand which will give solid backing to the Authority", letter from Baxter to Forest Commissioner, Albert D. Nutting, August 18, 1958; see also letter from Baxter to Attorney General Frank E. Hancock, October 13, 1959. The conduct of the parties in these situations is basic to an understanding of their interpretation of the Trust provisions, see IV Scott, Law of Trusts §164 (1961 ed).

except for one for you as Supervisor to use in case of emergencies. I feel strongly about this for they will frighten away the wild animals and we certainly would not see a caribou again. This same reason prompted us to forbid the use of of motor boats on our lakes. I can see the damage they would cause." 13/

In summary, from analysis of the various sources for determining Baxter's intention, it is clear that Baxter intended that wilderness preservation be the primary concept governing the majority of the Park and that the allowing of motorcycles would not be consistent with this intention.

As to the remaining areas of the Park set aside for hunting and scientific forestry, the basis for precluding motorcycles is not so clearly documented. Of course, the letters quoted above which explicitly reject the use of motorcycles and snowmobiles do not distinguish among the areas of the Park. However, not all of the other sources of evidence discussed concerning the majority of the Park are of equal application in these special-use areas. Nevertheless, examination of the specific restrictions applied, as well as Baxter's overall intentions for the Park, would tend to indicate the appropriateness of an overall exclusion of motorcycles.

The provisions governing the remaining area of the Park are of three types. First, in the area deeded to the State on August 6, 1962, Baxter did not exclude firearms and hunting. However, all of the other restrictions including those concerning public recreation, the natural wild state, and the prohibition of aircraft landings were included, see Private and Special Laws of 1963, c. 1. Since all of these limitation were included, it would seem that the donor's intentions were basically the same as those indicated for the majority of the Park; and, thus, the motorcycle question would be resolved in the same way.

In a second area encompassing lands covered by the deeds of December 1, 1954 and January 12, 1954 as amended by chapter 4 of Private and Special Laws of 1955, the provisions concerning public recreation and preservation of the wilderness are present but the restrictions concerning hunting or the landing of aircraft were omitted for specified reasons (as discussed below). That the omission of these restrictions was designed to achieve certain purposes suggests that its effect be limited to uses necessary to accomplish these purposes.

13/In researching this opinion Governor Baxter's papers as they appear in the State Library in folders #57 - #76 were reviewed as was the collection of letters concerning the Park prepared by the Natural Resources Council of Maine. It is possible that other communications relevant to this issue were not discovered.

Because the two basic concepts of wilderness and recreation are present, it seems that, other than the analogy of motorcycles to airplanes, the analysis concerning the majority of the Park would still be applicable. Its applicability is especially relevant in that the deviation of these deeds from the general pattern of Baxter's gifts did not represent a change in his overall objectives but rather a "distinct concession on his part in regard to the 'No Hunting' or 'Sanctuary' provisions", made only because the closing of the area to hunters "might be detrimental to the citizens of Patten and surrounding territory who operate stores and camps." As such a "distinct concession," it would seem that its effects should not be expanded as a justification for allowing motorcycle use, which presumably will not substantially affect the number of hunters in the area.

In the third section of the Park, set aside by the deeds of March 17, 1962 and May 2, 1962 for the practice of "Scientific Forestry", the provisions concerning preservation of the natural wild state, maintenance of a sanctuary for wild beasts and birds and prohibiting firearms and aircraft were not included. Instead, the land is to be held for "State Forest, Public Park, Public Recreational Purposes and Scientific Forestry, for the practice of and the production of forestry wood products", Deed of March 17, 1955, Private and Special Laws of 1955, c.6. 14/ Baxter intended that the area

"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 inspiration to others."

Letter to the Honorable Edmund S. Muskie. . . and the 97th Legislature, May 2, 1955. He also intended that recreational activities be allowed because "many citizens who live in northern Maine depend for their livelihood largely upon the business hunters bring to them," Letter to the Honorable Edmund S. Muskie. . . and the 97th Legislature, March 17, 1955, accompanying the deed of that date.

14/The deed of May 2, 1955 provides similar restrictions for "State Forest, Public Park, and Public Recreational Purposes and for the Practice of Scientific Forestry and Reforestation." The trees harvested may be cut and yarded on the premises but no manufacturing operations shall be carried on or within said township. . . See Private and Special Laws of 1955, C.171.

Based on these statements of Baxter's intentions as well as the preceding discussion concerning hunting areas, it appears that motorcycles would appropriately be allowed in this third area only to the extent that they would enhance or at least not threaten these purposes. It is not clear that motorcycle use would in any way enhance forestry operations in the areas. There is also some evidence that certain motor vehicles may actually injure plant and tree growth in an area. 15/

In conclusion, then, it seems that allowing motorcycle use is not in keeping with the terms of the Trust for any of the area of Baxter State Park.

15/Proceedings of the 1971 Snowmobile and Off the Road Vehicle Research Symposium, East Lansing, Michigan, June 1971 at 117-119, 139.