Inter-Departmental Memorandum Date April 26, 1976

To Herbert Hartman Dept. Parks and Recreation

From Joseph E. Brennan Dept. Attorney General

Subject Bigelow Referendum

The Bureau of Parks and Recreation, Department of Conservation, has asked for a formal opinion of the Attorney General seeking construction of L.D. 1619, An Act to Establish a Public Preserve in the Bigelow Mountain Area, on five separate issues.

The principal features of this Act are as follows:

(1) A directive to the Departments of Conservation and Inland Fisheries and Wildlife to acquire "40,000 acres of land on an around Bigelow Mountain" without providing any eminent domain powers;

(2) A directive to the Departments above named to "seek and use funds for the acquisition", without raising or appropriating any money by the Act itself; and

(3) A directive that the land should be used for outdoor recreation and timber harvesting, with limitations on vehicle access and a prohibition on ski related development.

L.D. 1619 is direct initiative legislation, as authorized by M.R.S.A. Const. Art. IV, Pt. 3, §18, and will appear on the ballot June 8, 1976. The Bureau needs to plan in advance for implementation of this Act in the event it is approved by the electors and therefore, asks the following questions:

QUESTION NO. 1: In Section 1 of the Act is the word "directed" to be construed to be mandatory?

ANSWER: No. The word "directed" cannot be construed to be mandatory in this context.

REASONING: The Act "authorizes and directs" the Departments to acquire 40,000 acres of land.

I. Direct is a word capable of two interpretations.

The use of the phrase "authorize and direct" is specifically discouraged in Sutherland, Statutory Construction, Vol I-A, p. 497, because of its ambiguity.

"Direct" ordinarily means in this context "to give an order or instructions for; to ask for or order with authority." Webster's New International Dictionary, 2d ed. In Opinion of the Justices 124 Me. 453, 467-8, 126 A 354 (1924), the Supreme Judicial Court said:

> "it is not easy to frame a definition that shall cover all cases, but, broadly speaking, requirements in a statute which are of the very essence of the thing to be done and the ignoring of which would practically nullify the vital purpose of the statute by itself are regarded by the courts as mandatory and imperative; while those directions or details which are not the very essence of the thing to be done, but which are prescribed with a view to the orderly conduct of the business. . . are regarded as directory. . . " See also, Hann v. Merrill, Me., 305A_2 545, 549 (1973); Boynton v. Adams, Me., 331 A_2 370 372 (1975).

Clearly, in this case, failure to acquire all or a substantial part of the land would defeat the purposes of the legislation.

If this portion of the legislation were taken alone, a construction that the acquisition of the land by the Departments is mandatory would be required.

II. Ambiguous words in statutes are to be interpreted in light of the whole act and other pertinent legislation.

The Courts have determined that in construing a statute

". . . the whole system of which it forms a part and all legislation on the same subject matter must be viewed in its overall entirety in order to reach a harmonious result which we presume the Legislature intended." Finks v. Maine State Highway Commission, Me., 328 A_2 791, 795 (1974).

In this case, the pertinent consideration is not what the other legislation on the same general subject matter says, but what it does not say. That is, the lack of legislation authorizing the Departments of Conservation and Inland Fisheries and Wildlife to exercise their powers of eminent domain in connection with a taking of this magnitude and particular purpose.

The only division of the Department of Conservation with eminent domain powers is the Bureau of Parks and Recreation under 12 M.R.S.A. 602(1). That statute limits Parks to taking no more than 200 acres for any one park, far short of the 40,000 acres contemplated by this Act.

The Department of Inland Fisheries and Wildlife is empowered to take any amount of land, but it is severely restricted as to the purposes for which it might take land. Only land the Commissioner finds necessary for "wildlife management area, fish hatcheries or feeding stations" qualifies under 12 M.R.S.A. 2151.

Though concedly there is an overlap between the uses contemplated for the proposed "Bigelow Preserve" and a "wildlife management area" under 12 M.R.S.A. 2155, there has been neither certification by the Commissioner as to need, nor any declaration in L.D. 1619 that the bill is meant to establish a "wildlife management area" circumscribed to the narrow uses allowed therefor. Under other circumstances, the overlap that does exist might justify a different interpretation, but

"Statutes authorizing the taking of private property against the will of the owner must be construed strictly against the donee of the right. The power so granted is not to be extended beyond the plain, unmistakable meaning of the language used. Words in the statute fairly susceptible of a meaning limiting the power are to be so construed if the facts will permit." In re Bangor Hydro-Electric Company Me., 314 A_2 800 (1974).

See also, Clark v. Coburn, 108 Me., 26, 78 A 1107 (1911); Hamor v. Bar Harbor Water Co., 78 Me. 127, 3 A 40 (1886); Spofford v. Bucksport and Bangor R. R., 66 Me. 26 (1876).

Consequently, the eminent domain provisions available for the ordinary acquisitions of land by Fisheries and Wildlife are not available to implement L.D. 1619.

III. The absence of eminent domain authority compels a construction that the Act is not mandatory.

In the absence of authority to compel owners to convey their land to the State to establish a Bigelow Preserve, State Officials cannot be ordered to carry out the provisions of this Act.

Landowners in the Bigelow area remain free, by the terms of this Act, to do as they wish with their land. Some owners may hold out for a price unconscionably greater than the fair market value of their land; others may be unwilling to sell at any price. To do either would be entirely lawful and subject to no penalty, see 33 M.R.S.A. 151.

In this context, in determining whether "directed" ought to be construed to be mandatory or hortatory, the governing rules is

> "If the statute were susceptible of two interpretations we should adopt the interpretation which sustains rather than that which defeats it." Hamilton v. Portland Pier Site District 120 Me. 15, 24, 112 A 836 (1921).

In dealing with the facts of this case, the analagous rule of construction for contracts is perhaps even more appropriate than the rule for statutory construction, since the relevant issue here is not constitutionality, but impossibility of performance. Legal impossibility is a valid defense to an action for breach of contract. American Mercantile Exchange v. Blunt, 102 Me. 128, 66 A. 212, 10 Ann. Cas. 1022 (1906).

In Maine,

> "If the language of a contract is reasonably susceptible of two constructions, that interpretation should ordinarily be adopted which gives the words some meaning rather than another which leaves them meaningless." Metcalf Auto Company v. Norton, 119 Me. 103 104, 109 A 38 4 (1920).

Likewise the Supreme Judicial Court has held:

> "The court looks to substance rather than to form, and is reluctant to construe a contract so as to render it unenforceable if that result can be avoided." Towne v. Larson, 142 Me. 301, 51 A_2 51 53 (1947).

Employing the same rule here, it can be seen that if the word "directed" is to be mandatory, then it must be meaningless and unenforceable, since the Commissioners have not the power to carry out the command in the absence of a willingness on the part of owners who are not obliged to be willing. On the other hand, if "directed" is construed as adivsory, then the provision makes sense, since it may then be effected upon the mutual agreements of the Commissioners and the owners from time to time at their mutual convenience.

By this latter construction, the Commissioners are authorized to purchase land at Bigelow, and have guidance from the electorate that it favors the acquisition of land there. But the Commissioners are not compelled to do what they cannot, as a matter of law, do as a mandatory construction would have it.

QUESTION NO. 2: In Section 1 of the Act, specifically what land is to be acquired?

ANSWER: Since "authorized and directed" is held to be advisory, then the Departments may acquire such lands in T.4, R.3, B.K.P., W.K.R., also known as Wyman Township; T.4, R.3, B.K.P., W.K.R., also known as North One Half Township; and T.3, R. 3, B.K.P., W.K.R., also known as Dead River Township, as they deem reasonable.

REASONING: Since the enabling legislation is advisory, the Departments are under no duty to acquire any parcel in particular. As set out in response to Question No. 1, this Act represents a preference for acquisition of land in the Bigelow Mountain area by the electors, with the restriction that land within the boundaries described in the bill is to be used by the Departments for certain purposes only. So long as the enabling legislation is construed to be advisory, no particular acres need be acquired by the Departments.

QUESTION NO. 3: How are the costs and duties of the Departments of Conservation and Inland Fisheries and Wildlife to be apportioned?

ANSWER: The Commissioners may agree between themselves as to what division shall be made, and in the absence of such agreement, supplementary legislation will be essential to provide an answer to this question.

REASONING: Section 2 of the Act provides "The Preserve shall be administered by the Departments of Conservation and Inland Fisheries and Game." The two departments have different Commissioners, different administrative structures, and operate under entirely separate statutes.

This Act is absolutely silent as to how the duties and costs are to be apportioned between them.

An analogy may be drawn to the Baxter State Park Authority, 12 M.R.S.A. 901, which is operated by the heads of three separate agencies of the government. The Supreme Judicial Court has ruled with respect to this Authority that:

> "Public bodies may exercise only that power which is conferred upon them by law. The source of that authority must be found in the empowering statute, which grants not only the expressly delegated powers, but also incidental powers necessary to the full exercise of those invested. * * * The grant of power to the Park Authority in §901 for the management and control of Baxter State Park is broad and greatly dependent on the discretion of the Park Authority members." State v. Fin and Feather Club, Me., 316 A_2 351, 355 (1974).

In the instant Act, other than particular restrictions on certain activities and a passing allusion to the Bureau of Forestry, the management is vested in the Departments with even fewer parameters than 12 M.R.S.A. 900, et seq. impose on the Baxter Authority.

Consequently, it seems reasonable to assume that the two Commissioners are empowered to agree between themselves as to how to apportion the burdens of the management of the "Preserve". However, unlike the three member Baxter Authority, only two Commissioners have decision-making power for Bigelow. In the event they cannot reach agreement, either the Governor or the Legislature must provide direction to break an impasse, the resolution of which the Act does not provide for.

QUESTION NO. 4: In Section 2, the Act calls for funding from bonds and appropriations, federal funds and other sources. Must all such funds available be spent to acquire land for the Preserve, to the exclusion of all other acquisitions?

ANSWER: No.

REASONING: The Act provides that "the Departments shall seek and use funds for the acquisition of the land necessary." This language is mandatory; but it is not exclusive. The Act nowhere says that all moneys available must be devoted to this "Preserve" exclusively. Instead, it identifies sources of funds which may be utilized for this venture.

Moreover, some bond issues, by their own terms, may preclude their use for acquisitions such as those contemplated here. This is not the proper time to render an opinion with respect to which bond issues may be used for the purposes of this Act; suffice it to say that the terms and conditions for the expenditures of money in each of the recent land acquisition bond issues (P.& S.L. 1967, c. 167; P.& S.L. 1969, c. 184; P.& S.L. 1971, c. 140; P.& S.L. 1973, c. 118 and 138) differ from each other one.

Finally, it should be noted that there is no deadline established by the Act to create a time by which the acquisitions shall have been made. Therefore, following the doctrine of State v. Fin and Feather Club, supra, the Commissioners may reasonably decide to integrate purchases at Bigelow into an overall program for the acquisition of lands for the benefit of the public over a period of time.

QUESTION NO. 5: Can the Legislature subsequently modify the provisions of the Act, if it becomes law?

ANSWER: Yes.

REASONING: M.R.S.A. Const. Art. IV. Pt. 3, §18 provides that in the event the Legislature does not enact direct initiative legislation exactly as it was presented, then the legislation is to be voted upon by the electorate. In construing this provision, the law court said:

> "The right of the people. . . to enact legislation and approve or disapprove legislation enacted by the legislature is an absolute one and cannot be abridged directly or indirectly by any action of the Legislature. * * * Neither by action nor by inaction can the Legislature interfere with the submission of measures as so provided by the Constitution." Farris ex rel. Dorsky v. Goss, 143 Me. 227, 231, 60 A_2 908 (1948). See also, Opinion of the Justices Me., 275 A_2 800 (1971).

Any Act approved by a referendum election "shall take effect and become a law in thirty days" and may not be vetoed by the Governor, M.R.S.A. Const. Art. IV, Pt. 3, §19.

Once the referendum legislation becomes law, it must be regarded as having the same posture as any law enacted by the Legislature. That is, the Legislature in a subsequent action or the electorate in a subsequent referendum may amend or repeal it. The court also said:

> "Section 18 of the article. . . does not in any manner encroach on the prior power of the Legislature to enact legislation." Id.

Murchie, J., in dissent, expressly raised the question of the Legislature's subsequent authority to enact legislation on the same subject as a referendum enactment. He noted that the Arizona Constitution denies the legislature the power to repeal or amend any law enacted by a majority vote of the electors. Farris ex rel. Dorsky v. Goss, supra at 239.

In the absence of any such provision in the Maine Constitution, and in view of the provision that "the Legislature . . . shall establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution . . ." M.R.S.A. Const. Art. IV, Pt. 3, §1, it must be concluded that the Legislature is not forever thereafter stripped of its authority to make laws on a subject which had been submitted to referendum at some previous time.

This conclusion is buttressed by the decision of the Supreme Judicial Court in the case of Jones v. Maine State Highway Commission, Me., 238 A_2 226 (1968) dealing with closely analogous circumstances. There the Court held that the Legislature could subsequently amend an act initially approved by a referendum vote without resubmitting the legislation to referendum.

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