Public Lands; Leasing Authority 12 MRSA § 514-A 30 MRSA § 4162 (2) (A)

STATE OF MAINE

Inter-Departmental Memorandum

Date September 9, 1976

To Richard Barringer, Commissioner Dept. Conservation

From Joseph E. Brennan Dept. Attorney General

Subject: Proposed Lease of Certain Submerged Lands to the Pittston Company

This memorandum is in response to yours of August 20 in which you request me to set forth any questions or comments this office might have respecting the proposed lease of state-owned, submerged lands by the Bureau of Public Lands ("BPL") to the Pittston Company.

Your memorandum poses, expressly or by implication, two issues with respect to the BPL's proposed course of action: whether it is lawful and/or appropriate for the BPL to grant a lease option to Pittston by which the BPL would bind itself in advance to a determination by an independent appraiser or appraisers of the amount of rental to be paid by Pittston under the lease; and, more fundamentally, whether there should be any threshold inquiry and determination by the BPL as to whether the public lands involved should be dedicated to the uses proposed by Pittston. Because several attorneys from this office have already had considerable discussions with you and Lee Schepps regarding these issues, my comments will be limited to briefly articulating in writing the legal issues posed. If you desire a more exhaustive written legal analysis, we will be happy to furnish the same.

1. The Lease Option (Binding Appraisal) Format.

Although the payment by Pittston of an option price of $50,000 for the right to enter into a lease may be attractive to the State, I would caution that there is a significant risk, from a business point of view, in trading the State's bargaining position with respect to negotiating the highest reasonable rent available in return for a one-time payment by Pittston. This risk is underlined by the fact that, due to the unusual characteristics of the land involved, there is no basis for knowing in advance even the roughest approximation of the amount of rental a group of private appraisers might determine. In fact, because the land involved is presently close to valueless, it is conceivable that the appraisers might select a rent which is nominal. Therefore, although it would appear prudent for the State, for its own purposes, to have an appraisal made of the property, some question arises as to whether it is in the best interests of the State, exercising its proprietary functions, to become bound in advance to a rent level determined by another which might fall far below a rental freely negotiated by the parties. This is not to say that the State should unreasonably demand an excessive amount of rent for the land involved, but that, because the unique quality of the land might give rise to a broad range of reasonable rental structures, the State should exercise extreme caution before binding itself to a determination of such rent by third parties.

Moreover, a question arises whether the Director of the BPL may lawfully delegate to private parties the powers granted to him by statute to determine "such terms and conditions and. . . such consideration as he deems reasonable" for leases by the State of its submerged lands. See 12 M.R.S.A. §514-A(2)(A). Furthermore, the Director is obligated to first "consult with the Commissioners of Conservation, Marine Resources and Inland Fisheries and Game and such other agencies or organizations as he may deem appropriate in developing and implementing terms, conditions and consideration" for such leases. An argument exists that, particularly where the BPL cannot know within even broad parameters what rent private appraisers might select, it cannot abdicate its final discretionary function, as well as the consultation powers of the other agencies, to such appraisers. Thus, although it is clear that the BPL, in establishing the rent for the property, may choose to reasonably rely upon the results of an independent appraisal, legal doubts arise where the BPL is, in advance, binding itself to such appraisal, sight unseen.

2. The Process of Determination as to Whether State-Owned Lands Should be Dedicated to the Uses Proposed.

The submerged lands in question are owned by the State of Maine in trust for the people. 1 M.R.S.A. §3; See State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); State of Maine v. Tamano, 357 F. Supp. 1097 (D. Me. 1973); Cf. Opinion of the Justices, 118 Me. 503 (1920). Formerly, while the Forestry Department had jurisdiction over the State's submerged lands (pursuant to 12 M.R.S.A. §504, repealed and replaced by P.L. 1975, c. 339), only the Legislature could take action with respect to the use and disposition of those lands. See Opinion of the Justices, supra. Although the Legislature, pursuant to 12 M.R.S.A. §514-A, delegated to the BPL the authority to lease such lands on behalf of the State, such delegation did not alter the original status of the submerged lands as public trust property. On the contrary, the BPL's authority to convey rights in such lands is shaped and limited, not only by its obligation to determine, after consultation with other State agencies, reasonable terms and conditions respecting such conveyances (12 M.R.S.A. §514-A), but also by the general laws governing all dispositions of public lands entrusted to the BPL (12 M.R.S.A. §551). Thus, the BPL is directed by statute to comply with certain statutory standards in its management and disposal of all the public lands within its jurisdiction:

> ". . . [The BPL] shall carry out the responsibilities of the State Government relating to public lands planning and management. Said planning and management shall proceed in a manner consistent with the principles of multiple land use and shall produce a sustained yield of products and services in accordance with both prudent and fair business practices and the principles of sound planning."

30 M.R.S.A. §4162(2)(A) defines the concept of "multiple use" as follows:

> "'Multiple use' shall mean the management of all of the various renewable surface resources of the [public lands], including outdoor recreation, timber, watershed, fish and wildlife and other public purposes; it means making the most judicious use of the land for some or all of these resources over areas large and diverse enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; it means that some land will be used for less than all of the resources; and it means harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."

In sum, the BPL is directed to manage those lands entrusted to it in accordance with principles of sound planning, prudent business judgment and multiple land use.* It appears, then, that before the BPL agrees in principle to the lease to Pittston, these standards must be applied with due diligence to the circumstances of the Pittston proposal. It is not our view that such a required effort need entail an inquiry more extensive than is reasonable and feasible, given the limited resources available to the BPL and the Department of Conservation. However, at a minimum, there should be a good faith effort to ascertain from available sources the present and potential alternative uses of the State's lands involved and the impact of the Pittston development upon such uses and upon the other State-owned lands which might be affected thereby, all with a view to determining whether the use as proposed by Pittston is consistent with the statutory standards.

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*That these standards are applicable to leases by the BPL of the State's submerged lands is further supported by your testimony, as the then Director of the BPL, before the Joint Select Committee on Public Lands (March 26, 1975), concerning L.D. 703 (the original draft of what is now 12 M.R.S.A. §514-A):

> "The Director of the Bureau of Public Lands is given by this Act the same discretionary authority to lease for terms and consideration he deems appropriate submerged land as he already has with respect to public reserved lands.
>
> He should be subject to the same requirements of multiple use management and of prudent business practices as he is respecting other public lands."

Although Maine decisions could not be found which might offer aid in interpreting the BPL statutes on this issue, it is noteworthy that the "multiple use" standard set forth in 30 M.R.S.A. §4162(2)(A) was derived from the federal standard set forth in 16 U.S.C. §531(a), a substantially similar act dealing with the powers of the U.S. Secretary of Agriculture to administer the national forests and to sell timber therein. In an action to enjoin the Secretary of Agriculture from selling timber in a particular section of national forest, the Court in Parker v. U.S., 307 F. Supp. 685 (D. Colo. 1969), held that while the government agency was given discretion by the statute to decide whether or not to sell timber, it could not act in this regard without making the prerequisite determination:

> ". . . the Secretary must give due consideration to the relative values of the various resources before making his decision, and there is no compromise with this requirement. . . . Agency action taken without fulfilling this mandate would be arbitrary and capricious . . . ." 307 F. Supp. at 688.

The same judicial philosophy was expressed in Dorothy Thomas Foundation v. Hardin, 317 F. Supp. 1072 (W.D.N.C. 1970), where the Court refused to grant an injunction against the sale of timber rights to private parties on the basis that the record showed that the government had in fact engaged in the statutory decision-making process. But the Court stated that an opposite result would obtain if the government had acted without consideration of the statutory standards:

> "[The Multiple Use and Sustained Yield Act] direct[s] the Department of Agriculture as to what factors should be considered in determining how the various national forests are to be developed and administered. . . . The Secretary is required by law to consider all of [the statutory standards] and then render a decision." 317 F. Supp. at 1076.

Of course, some, although not all, of the considerations which should go into the BPL decision-making process with respect to the proposed lease will be environmental in nature. A question, then, arises regarding the extent to which the BPL may rely on the decisions, past and future, of the Board of Environmental Protection ("BEP") with respect to the various Pittston applications for environmental permits required for the building of the proposed refinery. It is not suggested here that the BPL need duplicate the extensive fact-finding efforts of the BEP. However, unlike the BEP, the BPL is not here merely exercising the State's police power regulatory functions respecting the use of private lands, but is determining whether the State shall, by contributing its own lands, actively participate in the proposed venture. Therefore, it would appear improper for the BPL to abdicate to the BEP its powers and obligations to make independent decisions, based upon the foregoing statutory standards, on

matters regarding the proprietary interests of the State in its own lands. Accordingly, although the Director of the BPL may reasonably choose to consider and, unless he finds them faulty, to rely upon the BEP's factual determinations respecting those environmental issues scrutinized by the BEP, his final decision to allow or disallow the private use of public lands must nevertheless be independent of that of the BEP in issuing its regulatory permits.

A final question arises by reason of Chapter 62 of the Private and Special Laws of 1973, which provided to the Eastport Port Authority the power "to acquire, construct, operate, maintain and repair piers, terminal and warehouse facilities on the land and in the waters within the limits of the City of Eastport. . . ." An argument may be asserted that this statute in fact delegated to the City the State's right, title and interest in the submerged lands here at issue. However, in the absence of any express legislative intent, either in the statute or in its legislative history, to the effect that the State intended to convey its interests in its lands to the Eastport Port Authority*, the better view appears to be that this special legislation merely vested in such Authority the legal capacity to acquire and assemble lands for purposes of the facilitation of the economic development of Eastport. Consequently, the existence of this legislation does not appear to affect the BPL's rights or obligations respecting the public land at issue.

It is our hope that the foregoing comments will be of assistance to you in guiding the BPL in its decision-making processes concerning the uses to which these and other submerged lands shall be put. Although this is our first opportunity to address directly the legal issues here involved, it is our view that the BPL should engage in the above described decision-making process with respect to all proposed conveyances of public lands (including submerged lands)**. We appreciate the practical difficulties involved in applying the statutory standards of sound planning and multiple land use to proposed private uses of submerged lands; but we believe that failure to act in accordance with such procedures would be subject to legal attack. In any event, in the foregoing discussion of this issue, we have sought to refrain from making policy judgments but have limited our inquiry to what we believe to be the legal obligations of the BPL.

If you wish to discuss any of these matters further, we, of course, will be happy to do so.

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*When the Legislature has desired to convey the State's title to submerged lands to municipalities, it has done so in the past by clear and unambiguous language. Thus, in Chapter 10 of the Private and Special Laws of 1947, the Legislature provided "The State releases to the City of Bangor all its right, title and interest in and to the present bed of the Kenduskeag Stream. . . ."

**In considering applications by private parties for proposed uses of public lands, the extent of scrutiny which should go into the BPL's decision-making process may, of course, be reasonably tailored to the nature and scope of the proposed use.