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Referendums, Advisory
Advisory Referendums

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 11, 1978

Honorable David R. Ault
Wayne
Maine 04284

Re: Dickey-Lincoln Referendum Proposal.

Dear Representative Ault:

This responds to your request for advice as to whether a citizen-initiated referendum asking the question: "Shall the Dickey-Lincoln Hydroelectric Power Project be Constructed?" would have any binding effect on the decision to build.

I would advise that, while the results of such a citizen-initiated petition would not have any binding effect, I believe that the results of such a referendum would be treated with great respect by any Governor and any other public official who is in a position to make decisions regarding the Dickey-Lincoln Hydroelectric Project.

As you are aware, federal statutes and federal appropriation authorizations will control the construction of the Dickey-Lincoln Hydroelectric Power Project. Theoretically, the federal government could construct the project even over the objection of principal State officials. Arizona v. California, 283 U.S. 423 (1931); Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941). However, as a practical matter, it is my understanding that the federal government proceeds with projects such as Dickey-Lincoln only if the project has the support of the Governor and, in most cases, some members of the State's Congressional delegation.

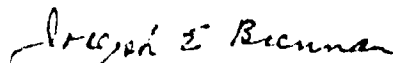
A citizen referendum could not control activities undertaken pursuant to federal law. Further, there is no State law which would control the position of the Governor and other principal State officials regarding the Dickey-Lincoln Hydroelectric Power Project.

If the project does proceed, there are some State statutes which might become involved in certifications which are part of agreements between the Corps of Engineers and the State relating to most Corps of Engineers' projects. For example, on some projects initiated by the Corps of Engineers, the Corps seeks and obtains a certification from the Governor, authorized by 30 M.R.S.A. § 3553, that the State will hold the federal government harmless from certain claims which may arise out of implementation of the Corps of Engineers' project. Whether such a certification, or other certifications which would need statutory authorization would be required in connection with the Dickey-Lincoln Project is not certain at this time. However, a referendum limited to the question: "Shall the Dickey-Lincoln Hydroelectric Project be Constructed?" would not bind a Governor or other State official to grant or deny any particular certificate or approval which would be needed if the Corps decided to proceed.

Thus, the referendum in question would be advisory and non-binding in nature. The Maine Constitution and laws do not presently authorize such a non-binding advisory referendum. Such a referendum would, therefore, have to be specially authorized by legislation. Attached for your interest is a December 19, 1973, opinion discussing advisory referendums in greater detail. Research for that opinion indicated no precedent for an advisory referendum in Maine.

I hope this information is helpful.

Sincerely,


JOSEPH E. BRENNAN
Attorney General

JEB/ec

*attach to Default
Opinion - May 11, 1978*

December 19, 1973

Honorable Kathleen Watson Goodwin
848 Washington Street
Bath, Maine 04530

Dear Representative Goodwin:

This will acknowledge receipt of your letter of December 5 asking for an opinion of this office as to the legal and constitutional implications of an advisory referendum on the Equal Rights Amendment. The first problem is:

"The invalidity of such a vote in view of the U. S. Constitution's expressed restrictions on the methods of ratification. I believe there is a reference to this in the Revised Statutes Annotated in regard to a Maine Supreme Court ruling."

The answer is the Federal Constitution sets out two methods to ratify a Federal Constitutional Amendment. First, by vote of the legislature and second, by a Constitutional Convention held within the State. I believe this was answered by the Supreme Judicial Court of Maine in an Opinion of the Justices, 118 Me., page 544. I am attaching hereto pages 544 and 545. It is my belief that the passages which are marked answer this particular problem. I am also attaching an excerpt from an Opinion of the Justices in 132 Me. pages 497 and 498. The particular part is question 6 and the answer thereto.

The second problem is as indicated in your letter as follows:

"An interpretation of Article IV, Part Third, Section 19, of the Maine Constitution, which states that any measure referred to the people and approved by a majority of the votes given thereon shall... take effect and become law. Does this section make an advisory referendum impossible

or would the invalidity of the vote with respect to the U. S. Constitution render such a vote advisory only since the U. S. Constitution is supreme?"

The preceding answer and attached copies indicate that it is a decision for the legislature as to whether or not it will approve a proposed amendment to the Constitution. A referendum, whether advisory or not, has no legal effect upon the legislature. I am also enclosing pages 549 and 550 of 118 Me. which discuss in a general way the fact that the initiative and referendum amendment to the Maine Constitution is not applicable to amendments to the Federal Constitution.

Your third problem is expressed as follows:

"Does there in fact exist a constitutional mechanism for a statewide advisory referendum, or would the Maine Constitution itself have to be amended to allow for such a referendum?"

I can find no provision in the Constitution or in the statutes for a statewide advisory referendum. There is a provision in Article IV, Part Third, Section 18, which states, "The legislature may order a special election on any measure that is subject to a vote of the people." That, however, does not refer to an advisory referendum, but only to such measure to which the legislature may attach a referendum in order for the people to actually enact the bill.

It would be my opinion that the legislature by proper enactment could set up an advisory referendum procedure. Please note Article IV, Part First, Section 1, and Article IV, Part Third, Section 1, which indicate that the law-making power has been given by the people to the legislature. Law-making decision has become the legislature's duty and for it to refer to the people a request for advice as to legislation would require legislation.

The fourth question that you have asked is as follows:

"Is there any precedent in Maine history for a statewide advisory referendum?"

I know of no precedent in Maine history for a statewide advisory referendum and have been unable to find any precedent. I have been referred to P.L. 1858 C. 50. However, I read that Act as setting up a referendum giving the people a choice between two Acts; their vote to determine the Act to be law. It does not appear to be advisory.

If I can be of any further help, I will be very pleased to assist you.

Yours very truly,

Jon A. Lund
Attorney General

JAL:H-CCV
Enclosure