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

March 28, 1979

George M. Ruopp, Forester
Baxter State Park
Millinocket, Maine 04462

Dear Mr. Ruopp:

This is in response to your request for an opinion as to whether or not any limitations exist on the construction or use of roads in the scientific forestry area of the Baxter State Park. The deeds of trust contain no specific limitations on road construction or use, but any road constructed within this area of the Park would be subject to the overall requirement of the best available planning, methodology and construction, consistent with the concept of "scientific forestry."

The majority of Baxter State Park is subject to the provisions that the land be held as a State forest, for public recreational purposes, forever to be left in its natural wild state, and as a sanctuary for beasts and birds. See, e.g., P. & S.L. 1931, c. 23; P. & S.L. 1933, c. 3; 1939, c. 1; c. 122; 1941, c. 1, c. 95; 1943 c. 1; c. 91; 1945, c. 1; 1947, c. 1; 1949, c. 1; 1955, c. 1; c. 3; 1963, c. 1. In the so-called "scientific forestry" area of the Park, however, the restrictions of the deeds of trust are somewhat different. By deed published as P. & S.L. of 1955, c. 61, Percival Proctor Baxter gave to the State of Maine to be held in trust 3,569 acres in Township 6, Range 9, W.E.L.S., Piscataquis County, subject to the following conditions:

"The same to be held by such state forever as TRUSTEE IN TRUST for the benefit of the PEOPLE OF MAINE, the same to be forever named BAXTER STATE PARK, the same to be forever held by said state for State Forest, Public Park, and Public Recreational Purposes and for the practice of Scientific Forestry, reforestation and for the

production of forestry wood products. All harvesting of said products shall be done according to the most approved practices of Scientific Forestry and all revenue derived from the sale of said products shall be used by said State for the care, management and protection of Baxter State Park as now or hereinafter defined. . . . "

Similarly, in conveying to the State the deed dated May 2, 1955, Governor Baxter set aside 25,025 acres in Township 6, Range 10, W.E.L.S., Piscataquis County, subject to the following conditions:

"The same to be held by said state as TRUSTEE IN TRUST for the benefit of the PEOPLE OF MAINE the same to be forever named Baxter State Park, the same to be forever held by said State 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 within said township. All revenue derived from the sale of timber shall be used by the State IN TRUST for the care, management and protection of Baxter State Park as now or hereinafter defined, "

The deeds for the "scientific forestry" area of Baxter State Park are silent as to the question of roads. Where the deeds are silent and some ambiguity is seen to exist, it is necessary to attempt to ascertain the intent of the settlor of the trust by reference, not only to the legal instruments themselves, but also to such extrinsic evidence as may be relevant. See, generally, 4 Scott, The Law of Trusts, § 164.1 (1967); see also, 12 M.R.S.A. § 900.

In this context, the formal letters which Governor Baxter wrote to the Legislature with each conveyance of land in the Park provide at least some guidance as to his intention for this area of the Park. In conveying the first piece of land for the practice of scientific forestry, Governor Baxter wrote that the area

"will be available both for recreation and for scientific forestry management and to be made to produce a continuing crop of timber to be harvested and sold as are potatoes or any other products of the soil."

"It has long been my purpose to create in our forests a large area wherein the state may practice the most modern methods of forest control, reforestation and production under the management of our able Forest Commissioner, Mr. Nutting and his associates. This new 3,569 acres is an excellent location for this purpose.

"In my travels in foreign lands I have seen beautiful great forests that for centuries have been producing a crop of wood without depletion. In Sweden, Norway, Finland, Germany, Chile, Russia and elsewhere what has been done by scientifically controlled forestry can be done in Maine. I now make it possible for the state to try a major experiment here at home, an experiment that can mean much for our future timber supply, which already is the chief natural resource of our state. . . ." Letter from Percival Proctor Baxter to the Honorable Edmund S. Muskie, Governor, and the Honorable Senate and House of Representatives of the 97th Legislature of the State of Maine, March 17, 1955. Laws of 1955, p. 1146.

Similarly, in conveying an additional 25,025 acres for similar purposes, Governor Baxter wrote:

"The terms of this gift are identical with those of the three thousand five hundred sixty nine (3,569) acre gift; Public Park, Public Forest, Public Recreational and Scientific Forestry Purposes and Reforestation. I want this township to become a show place for those interested in forestry, a place where continuing timber crop can be cultivated, harvested and sold; where reforestation and scientific cutting will be employed; an example and an inspiration to others. What is done in our forest today will help or harm the generations who follow us." Letter from Percival Proctor Baxter to the Honorable Edmund S. Muskie, Governor, and the Honorable Senate and House of Representatives of the 97th Legislature of the State of Maine, dated May 2, 1955, P.L. 1955, p. 1149.

These letters read together with the deeds indicate the intention that this area of the Park be managed for production and the timber harvested. Unlike other areas of the Park, where Governor Baxter's views concerning roads were explicitly articulated,* none of the documents concerning this area mention roads. Nevertheless, while Baxter did say that there could be no manufacturing within the Park, he did want the land harvested. In this context, it appears that the accomplishment of Governor Baxter's intent must necessarily have contemplated the construction of a road network for removal of timber from this part of the Park. However, any such construction would be limited by the high standard of forestry practices suggested, not only in the deeds themselves, but in the accompanying communications which further explain his intent.

I hope the preceding analysis has been of some help to you in clarifying the trust restriction on road construction in the scientific forestry area of the Park. You, as a professional forester, are more qualified than I to understand the meaning of the terms "scientific forestry" and "best forest practice" and to understand the limitations which these concepts might provide on the construction or limitation of use of a road network. In this regard, I would, however, refer you to the letter from Jon Lund to Kenneth M. Curtis, Governor, dated April 13, 1973, which discussed this matter.

In regard to your question as to whether there could be a limitation by administrative policy on the use of any roads in this area, such limitation would necessarily depend on the provisions of the management plan for the area, which will presumably reflect a multiple-use accommodation of forestry and recreational values.

* See, e.g., P. & S.L. 1947, c. 1, prohibiting roads. Cf. P. & S.L. 1949, c. 2, removing prohibition of roads and enunciating standards that the trustee might construct such roads as it "shall deem to be in the public interest and for the proper use and enjoyment of those citizens of said State who may visit the area known as Baxter State Park, subject however to the conditions, limitations and restrictions that said roads and ways be constructed and maintained in a manner not to interfere with the natural wild state now existing in said areas."

If I can be of further assistance to you, please feel free to let me know.

Sincerely,



SARAH REDFIELD
Assistant Attorney General

SR/ec

Enclosure

cc: Richard S. Cohen
Temple Bowen
William Peppard
A. Lee Tibbs

April 13, 1973

Governor Kenneth M. Curtis
Executive Department
State House
Augusta, Maine 04330

Dear Governor Curtis:

In January of this year, this office brought suit against the Baxter State Park Authority and the Great Northern Nekoosa Corporation to set aside a "Timberland Permit" by which the Authority had granted to Great Northern Nekoosa Corporation the right to cut 109,000 cords of spruce and fir from Township 6, Range 10, W.E.L.S., in the northwest corner of Baxter State Park. That township, together with certain other lands in the northern end of Baxter State Park, is held by the State subject to the terms of a gift from Governor Baxter, which permits the "practice of Scientific Forestry and Reforestation." In our suit, we maintained that the "Timberland Permit," so-called, did not represent or contemplate the practice of Scientific Forestry and Reforestation.

Because our litigation was rendered moot prior to trial, there has been no judicial determination of what Governor Baxter meant by the term "Scientific Forestry." As we prepared the case, however, we had occasion to observe and learn something of forest management practices and procedures which are being conducted by the federal government and by certain private companies in this area, and to compare those practices and procedures with what is being done by certain agencies of this State. The State did not come out well in the comparison. We write this letter, therefore, for two reasons. First, the settlement of the litigation precluded our bringing much of this to light in a public forum and it is information which should, in our view, be brought to your attention. Second, and perhaps more important, we feel that there is a legitimate need to enhance and improve the posture and performance of the State in the management of its public lands. We fully recognize that everyone may not agree with all we have to say and that we have no special training in the field of forestry or forest land management. Nevertheless, we feel obliged to pass along to you our observations and to give you the benefit of our thoughts. After all, the power to authorize cutting in Baxter Park remains, and we have no court decision upon which to rely.

Governor Baxter left an indication of what he meant by the expression "Scientific Forestry." In official communications to the Governor and the Legislature, Governor Baxter stated that he had been extremely impressed with the beautiful forests he had seen in certain foreign countries and that he was making it possible for the State to try a major experiment here at home, one that he said "would mean much for our future timber supply, which all admit is the chief natural resource of our State." He said that he wanted those portions of Baxter State Park where forestry is permitted "to 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 an inspiration to others." He noted that what is "done in our forests today will help or harm the generations who follow us." In our opinion, while the expression "Scientific Forestry and Reforestation" does not necessarily have any fixed and absolute definition, nevertheless the expression contemplates and requires, at the very least, an approach to forest land management and harvesting characterized less by short term economic considerations than by more balanced, long-range and professionally sophisticated considerations. The expression also connotes the use of highly developed and methodical techniques in the management of forest lands for the purposes for which they are to be managed.

Governor Baxter left the northern end of Baxter State Park to the State to be used not only for "Scientific Forestry and Reforestation" but also for park and recreational purposes. In addition, he allowed hunting in those areas of the park. Although he did not use the expression, it is our view that he intended for those portions of the park in which forestry is permitted to be managed under the principles of "multiple use." That is to say, those areas should be managed for all of the various renewable surface resources of the forest (including recreation, timber production, aesthetics, watershed protection, wildlife management, etc.), making the most judicious use of the land for some or all of these resources. Multiple use of forest resources contemplates that some land is used for less than all of the resources and it also contemplates the harmonious and coordinated management of the resources in a manner which will not impair the productivity of the land. We believe that Governor Baxter intended that those lands be managed under the principles of multiple use and that the management under those principles should be carried on by the use of the most sophisticated and highly developed techniques.

The expression "Scientific Forestry" also contemplates, in our view, the management of forest resources for a sustained yield of the several products and services produced by forests. In fact, although he did not use the expression "sustained yield," that is what we believe Governor Baxter intended when he made reference to the production of "a continuing crop of timber" and to the future supply of timber. Not only should the lands in the northern end of Baxter State Park be managed for a sustained yield of the various renewable products and services obtainable from a forest, therefore, but that

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management should be carried on by the use of the most sophisticated and highly developed techniques available.

In order to scientifically manage forest lands under the principles of multiple use for a sustained yield of the products and services of a forest, a fundamental prerequisite is an adequate inventory of the land involved. This inventory should begin with an analysis of the land to discover and to catalog those attributes of the land which lend themselves to the various multiple uses for which the land is being managed and with a view toward effecting a balance between those uses. That is to say, those areas with significant recreational potential, if any, should be defined, those areas with unique natural characteristics, if any, should be defined, those areas which are significant for purposes of wildlife management, if any, should be defined, and those areas requiring peculiar precaution for watershed management, if any, should be defined. In addition, there should be a thorough inventory of the timber growing on the land and the rate at which it is growing, an inventory which is not only the product of an aerial cruise of the specific lands involved but, more significantly, is the product of an on-the-ground evaluation by foresters through the use of ground plots, soil evaluation and the like. This inventory should precede, and not follow, the cutting, or commitment to cut, large quantities of timber from the land. Otherwise, the values which should be preserved or protected through no cutting or through coordinated cutting will be lost or impaired before they are known.

In addition to an adequate and meaningful inventory of the lands to be managed, and partially based upon that inventory, the scientific management of forest lands under principles of multiple use and for a sustained yield requires the preparation of a management plan. In general, the larger the tract of land involved, the more sophisticated the management plan ought properly to be and, in view of Governor Baxter's expressed desire that only the most highly developed techniques be employed, the management plan for Baxter State Park, including particularly the northern end where forestry is permitted, ought to be both sophisticated and comprehensive. The management plan establishes the management goals for the land and sets down the guidelines for the accomplishment of those goals and the framework within which they are to be accomplished.

Although management plans should be flexible enough to respond to fluctuations in the demand for the products and services of the forest and similar variables, and although it must be subject to major changes to cope with unforeseeable natural disasters and the like, nevertheless it is the "bible" for the day-to-day and month-to-month management of a forest. It usually identifies and establishes, among other things,

- (i) the sizes of timber for which the land is to be managed (sawlogs or pulpwood),

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- (ii) the species of timber which are to be preferred, if any (softwood, hardwood, pines for aesthetic purposes, yellow birch for higher long range profitability or even non-marketable species for certain game management purposes),
- (iii) the projected long-range recreational uses of the land, including the areas where recreation is to be channelled and promoted or avoided,
- (iv) the cutting cycle (which is critically important in the selection of what trees to cut during any given harvest),
- (v) the criteria for road lay-out, design and construction in order to facilitate future timber harvests, provide recreational access, protect deer yards and other wildlife areas, preserve areas which are to be left intentionally inaccessible by road, etc.,
- (vi) known mineral resources and the extent to which they are being or will be developed (this would, of course, be inapplicable in the case of Baxter State Park),
- (vii) wildlife management objectives, which may vary from area to area (particularly in Baxter State Park where hunting is permitted in certain areas only),
- (viii) applicable watershed protection objectives,
- (ix) existing markets for timber production from the land involved, as well as future markets which may develop by economic forces or which the landowner wishes to attempt to develop and
- (x) applicable economic objectives (which may include providing steady employment or a steady supply of timber, etc.).

* Scientific Forestry requires, in our opinion, that a management plan be prepared and that it precede the cutting, or commitment to cut, significant quantities of timber from the land being managed. Otherwise, decisions as to what sizes or species of trees are to be cut, from what areas they are to be cut, how often they are to be cut, where the roads and bridges are to be put and how the roads and bridges are to be designed and built are all made without regard to the other uses for the land and not as an implementation of a carefully thought out management plan.

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If cutting for a sustained yield means the regular, periodic cutting of only what is grown, then a fundamental piece of information which must be known about a given tract of forest to be managed for sustained yield is what is being grown. Only when one knows what is being grown and at what rate can a decision be made (in a scientific manner) as to what quantities of wood to cut. This piece of information is commonly referred to as an "allowable annual cut" or an "allowable periodic cut." Without this information, the decision as to how much timber to cut (or to sell) is, at best, a guess.

Before one decides whether to cut, much less what species to cut and where and when to cut, a scientific approach to forest land management requires a cruise of the land to determine what can and should be cut. In general, the more intensive the cruise, the more scientific and sophisticated is the decision-making process. After a cruise, the decision as to whether, what, when and where to cut should be made in accordance with and subject to management objectives and policies as set forth in a management plan. Once these decisions are made, then timber can be sold to a timber operator. The inventory, the management plan and all other scientific techniques used to arrive at a sound decision as to what, when and where to cut are all for naught, however, unless the timber harvesting operation is closely supervised. With modern logging techniques, significant damage can be done quickly unless there is close, professional supervision of the men on the ground. Proper supervision is of such importance that it should ordinarily be a limitation on the size of some harvesting operations (and therefore the rate at which timber is cut), for the supervisory capacity of the landowner should be commensurate with the scope and size of the harvesting operation.

In those areas which are to be managed for the production of timber, all species and the total area involved should receive the benefits of careful planned management not just the species or fraction of an area which a particular operator wishes to cut at a particular time. Moreover, the forest should be enhanced and improved by cutting and not degraded. That is to say, it is desirable to cut poor quality trees and other trees that are an impediment to the vigorous growth of preferred species and sizes and, quite often, to leave the best to grow for future cutting and to reseed the forest. Taking the best and leaving the worst is called "high grading." It results in the continual downgrading of the quality of the residual stand of timber and such a practice is not, based upon our observations, the most approved or scientific approach to forestry, though it has undisputed advantages from the standpoint of short term profits. Finally, the selection and marking of trees to be cut is ordinarily done by the landowner, who is presumed to know best what he desires to have harvested for the enhancement of the forest and the accomplishment of his management objectives.

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The litigation between this office and the Authority is over. Far more facts were involved in the transaction which was the subject of that litigation (both in favor of and against the Authority) than are pertinent here. Moreover, there is far more involved in the management of forest lands than the rather fundamental considerations we have discussed above and even those considerations must be responsive to unforeseeable special situations. What is pertinent is that in preparing for trial, we discovered that an inventory, a management plan, the development of allowable annual cuts and the other practices mentioned above are not esoteric or prohibitively expensive. In fact, the U.S. Forest Service and several major private landowners in the State, to varying degrees, employ these practices as a matter of course in the management of their forest lands. These things are considered merely to be good forest land management.

It seemed then and seems now that Governor Baxter could not have intended less for the Park. We therefore came to regard "Scientific Forestry" as requiring, at the very least, first-class, professional, sophisticated forest land management and we found the State seriously deficient even in this respect with regard to Baxter State Park. No inventory of the type described above has ever been undertaken for Baxter State Park in general or for the northern townships in particular. In fact, so far as we could learn, no forester has been on the ground at all for the purpose of evaluating the timber. All that has been done to date in the northern townships is a rough estimate of volumes of timber, based entirely upon statistical information none of which was derived from the townships involved and none of which was derived from on-the-ground evaluation. No "allowable cut" figures have been scientifically calculated for any portion of the northern townships. Future recreational uses of that area have not been decided and, in fact, areas suitable for future recreation have not been delineated. No management plan has ever been prepared for Baxter State Park in general or for the northern townships in particular, though the State has owned much of the park for as long as forty years and has owned the northern townships for eighteen years. No realistic appraisal has been made by the Authority of its own supervisory limitations as evidenced by its embarkation upon a massive cutting operation (109,000 cords in two years from approximately 15,000 acres) with the part time services of a single forester and without thorough and effective advance arrangements for close and proper supervision. Rather than a broad look at all species which it would be desirable to manage, the Authority purported to allow the harvesting only of spruce and fir (with a small volume of poplar), largely, we believe, because those species were preferred at the time by the timber operator, and not because of any scientific analysis of what timber should or could be managed. Finally, the Authority permitted the timber operator to mark,

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or select, which trees were to be cut, and from where they were to be cut (an unusual and possibly imprudent approach to forest land management), retaining the right to "approve" or "disapprove" marking after trees had been marked (an unusual and somewhat impractical approach to controlling the selection of trees).

In short, we believe that the quality of forest land management of the northern townships in Baxter State Park was substantially beneath the degree of competence and sophistication exhibited by the U.S. Forest Service in the management of national forests and by several private companies in this State in the management of their own lands. To that extent, therefore, regardless of the legal merits of our case, we decry the situation as a matter of principle and feel that it is undesirable, unprofessional and unworthy of the State.

Unfortunately, the lack of sophistication applied to the management of the forest lands in the northern townships of Baxter State Park is not unique in the management of public lands. Of the approximately 400,000 acres of public lots, the State owns unquestioned clear title to the timber on at least 90,000 acres. These 90,000 acres are managed by the Forestry Department. (There has been, for all intents and purposes, no management by the State of the remainder of the public lots). These 90,000 acres are scattered across several counties and are mostly in tracts of approximately 1,000 acres each. No management plan exists for any or all of the public lots. No allowable annual or periodic cut figures are calculated with respect to public lots. Little or no effort is made to manage all species or all of the land. In fact, the public lots are "high-graded," and have been "high-graded" for many years, which is to say that the overall quality of the residual stand of timber on these public lots has been steadily degraded (rather than enhanced) over the years. Consideration of whether to cut a given public lot is typically not initiated by the Forestry Department but by inquiry from timber operators in the area. The decision as to whether and what to cut is based, at most, upon an aerial cruise with a cursory visual inspection, not including the use of ground plots or similar preferred, scientific techniques. It is both ironic and informative that the public lots have been required to be managed under the principles of multiple use since at least 1965 (Title 12 M.R.S.A. § 501-A), yet no inventory of the type above described has been made of any or all of the public lots in order to discover and delineate areas suitable or significant for any of the multiple uses of the forest. There has been practically no management for wildlife or public recreational purposes (except the annual leases of camp lots to specific individuals). It is probably fair to say that the public lots on which the grass and timber was sold have, in many instances, received a higher quality of forest land management by private companies than those which have been managed by the State.

There is a reason, even to a large extent an excuse, for the low quality of management given to these public lots. The average sums available to the Forestry Department to manage 90,000 acres of forest land in 8 counties has been from \$13,000 to \$15,000 per year for the past 13 years and approximately \$5,000 per year prior to that. A persuasive argument can be made that much, if not all, that could be done within the limitation of these funds, has in fact been done. No such explanation can be tendered for the Baxter State Park Authority, which had accumulated approximately \$1,000,000 of earned but unspent income and has generally had a surplus of income over expenses for a number of years.

We believe that there is a solution to both of these situations and that while the solution requires the expenditure of public funds, these funds are, to a significant extent, already available. In the case of Baxter State Park, these lands should be administered in a first-class and exemplary manner, commensurate not only with the dignity of the State, but with the generosity of our benefactor and the significance of his gift. Penurious management of these lands is tantamount to second-rate management, and it will prevent their full use and enjoyment by the public. Funds for these purposes were provided to the State by Governor Baxter. They should be used.

Though the Forestry Department has had only paltry sums available to it to manage the public lots, the 90,000 acres which it manages produced a yearly average of more than eight times the amount available for management of the lands over the past several years. The excess has been added to the principal in the trusts comprising the Unorganized Territory School Fund and the Organized Territory School Fund, where it is presently required by law to remain until the incorporation as a town of the various wildland townships involved, at which time it goes to the people in the town, and can be sold by them, for school purposes. Any rational re-evaluation of the priorities and aspirations of the State should lead to the conclusions that this arrangement is obsolete. There is every reason to expect that income to the State from the public lots will increase over the coming years. Funds generated by the public lots should be used, to the extent necessary and feasible, to manage the public lots in a manner more appropriate for, and beneficial to the long range interests of the State.

As population and other forces place increasing pressure upon us to make the most of what we have, and to do it in a manner that preserves what we have for future generations, it seems imperative that we abandon the view that our natural resources are unlimited and that they can be utilized and managed in a casual or haphazard manner without serious consequences. What seems most compelling about this particular reform, however, is that significant funds for its accomplishment already exist. To the extent that the State does not itself exemplify the spirit and

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practice of first-rate land management, it only undermines public efforts to inculcate and encourage such practices in the private sector.

We hope that you will give some thought to this subject and we feel that, to the extent there is open and honest public discussion of the issue, the State of Maine will be the better for it.

Yours very truly,

JON A. LUND
Attorney General

JAL:mfe

cc: Maynard Marsh, Chairman
Baxter State Park Authority

Fred E. Holt, Commissioner
Forestry

Senator Harrison L. Richardson, Chairman
Joint Special Legislative Committee on
Public Lands