STATE OF MAINE

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To Richard S. Cohen, Attorney General Dept. Attorney General

Sarah Redfield, Assistant SR Dept. " "

Subject Baxter State Park

The purpose of this memo is to acquaint you with some of the legal issues which are relevant to the operation of Baxter State Park. The discussion is admittedly superficial, but should provide you with an overview of the Park's potential legal problems and with a basis for further discussion as particular matters arise.

As you know, Baxter State Park was given to the people of the State of Maine by former Governor Percival Proctor Baxter. Baxter deeded to the State various parcels of land in Penobscot and Piscataquis Counties which now total the approximately 200,00 acres known as Baxter State Park.

The land was deeded in separate conveyances, each accepted by the incumbent Legislature and Governor, and each recorded with accompanying communications in the Private and Special Laws of the State of Maine. Each of the deeds provided explicitly that the land be held in trust by the State as trustee for the benefit of the people of Maine. Each of the deeds established certain conditions for the use of the land. In the majority of the deeds, the land was given subject to the following conditions:

> "Said premises shall forever be used for state forest, public park and recreational purposes, shall forever be left in a natural wild state, shall forever be kept as a sanctuary for wild beasts and birds. . . . "

Most of the land is also subject to the restriction that airplanes not be allowed to land and to a prohibition against the use of fire-arms. In addition, some of the earlier conveyances prohibited the construction of additional roads and reserved to Governor Baxter the right to place and maintain markers within the Park. The final conveyances carried different restrictions and subjected the land to the condition that it be used for the practice of "scientific forestry."

The method of conveyance was unique and presents some problems of interpretation in light of the generally accepted principles of trust law. Additionally, because of the variations in the conditions of the conveyances, there are certain areas in the Park where, for example, hunting is allowed and other areas where hunting is not allowed; and, similarly areas in the Park where the practice of forestry is to be allowed and other areas where presumably it is not.

As a legal matter, the variations stand in direct contradiction of two basic principles of trust law: first, that the settlor of a charitable trust may not modify or amend that trust unless he has expressly reserved the power to do so; and second, that a legislature may not impair the original contract by altering the terms or purposes of a charitable trust. Where each deed of trust includes the explicit provision that the land be held in trust "forever," it is difficult to argue that the settlor reserved the power to modify the trust. Nevertheless, review of the behavior of the parties involved in the Baxter Trust makes clear that Governor Baxter believed he retained the power to modify the trust, as did the Legislature.

Over the 40-year period from 1931 until his death, Baxter purported to amend certain prior trust documents by later enactments. For example, Private and Special Laws of 1945 stated that the conditions in that deed "shall apply to the premises herein donated and conveyed to the State of Maine together with all of the lands heretofore donated. . . . " Similarly, there were documents which,on their face, declared themselves to be amendatory of previous trust documents. For example, the Private and Special Laws of 1949, Chapter 2, is entitled "An Act to Amend by Mutual Consent of Percival Proctor Baxter and the State of Maine the Two Deeds of Gifts of Land in Piscataquis County. . . . " Some of these instruments recite for their very consideration for the present gift and its acceptance, modification of previous gifts; see, e.g., Private and Special Laws of 1955, Chapter 4. Still other instruments simply recite that they represent a mutual amendment deemed in the best interest of the public by both the grantor and the Legislature. For example, the introductory clause of Chapter 2 of the Private and Special Laws of 1949 provides:

> "Wherefore, it now appears to be in the public interest and for the benefit of the people of the State of Maine to whom these several gifts were made and for whose benefit the trust and said deeds are created, that the above-mentioned restrictions, limitations and conditions as to roads and ways in each of said deeds, as enumerated herein be removed and cancelled. . . . "

By way of example, the significance of these amendments may be demonstrated by a close review of Private and Special Laws of 1945, Chapter 1, which added a restriction against hunting and aircraft to

prior deeds. The first ten conveyances of land in Baxter to the State contained no prohibition of hunting, trapping, firearms or the landing of airplanes. However, these restrictions were added, as indicated above, by Chapter 1 of the Private and Special Laws of 1945. If we are to say that the 1945 amendment, mutually agreed upon by the settlor, the Legislature and Governor of Maine, is not a trust document of equal significance to those which preceded and followed it, we would open some 80,000 additional acres of the Park to hunting and trapping.

Another example of the legal and administrative problems which might arise involves the question of roads within the Park. The provisions of the trust documents as they pertain to roads were subject to rethinking and revision as the development of the Park progressed and its size increased. The original gift prohibited road construction. The gifts between 1933 and 1945 were silent as to roads. Chapter 1 of the Private and Special Laws of 1947 prohibitied roads, but Chapter 1 of the Private and Special Laws of 1949 did not. Finally, Chapter 2 of the Private and Special Laws of 1949 removed previous restrictions on roads. Such restrictions did not appear in subsequent conveyances. Once again, to say the explicit modification in Chapter 2 of the Private and Special Laws of 1949 of the road restriction is not a trust document of equal relevance with those which preceded it will leave the road question in a state of confusion and may ultimately interfere with the State's ability to continue to provide an adequate road network for access to the Park.

In addition to these amendatory instruments, there is an "interpretive" document which has proved to be of particular significance in construing the State's obligations as trustee. Enacted as Chapter 2 of the Private and Special Laws of 1955, the document is entitled, "An Act Interpreting the Trust Deed of Percival Proctor Baxter to State of Maine. . . and Interpreting the Phrases 'Natural Wild State' and 'Sanctuary for Wild Beasts and Birds' in Deeds from Said Baxter to Said State of Maine." (A copy is attached hereto for your reference.) You will note that it is this provision which provides the authority for the State to remove blowdown, to spray for insects, and the like. There was certainly an argument to be made that Chapter 2 of the Private and Special Laws of 1955 was not an interpretation, but rather a direct modification of the deeds of trust in that the actions envisioned therein are inconsistent with the concept of "forever wild."

The problems of applying the classic principles of trust law to the creation of Baxter State Park were at least partially addressed in the Fitzgerald litigation. To uphold the Baxter State Park Authority's decision to remove the blowdown, it was necessary that the Court take cognizance of the authority granted to the State by Private and Special Laws of 1955, Chapter 2, discussed above. Because we were aware of the potential problem of validity and applicability of other instruments not raised by Fitzgerald (which were not "mere interpretations" but direct modifications,) we were anxious that the Court not simply recite the black letter law of trusts concerning amendments and modifications. We anticipated that the Court would, consistent with

the general principle of trust law that a court may look for evidence of the intention of the settlor where there is an ambiguity in the trust, take cognizance of Private and Special Laws of 1955 as an interpretive statement by the settlor. We were concerned that in so doing, the Court's opinion might be overly broad and pose problems for the continuing efficacy of other trust instruments. Accordingly, we proposed to the Court a theory of a continually evolving trust commencing in 1931 and terminating with Baxter's death. The theory was not necessary for the decision in Fitzgerald, and the Court did not rely on it. However, the issue was placed before them and the opinion in Fitzgerald was sufficiently narrowly drawn so that should an issue come up involving those areas of the Park where there were explicit modifications, the Court has not precluded itself from taking special cognizance of the unique nature of the trust. Indeed, at oral argument, Justice Wernick suggested that perhaps a more appropriate way to view the matter was as a contractual relationship between Governor Baxter and the State subject to amendment while Governor Baxter lived, and converted upon his death to a classic charitable trust relationship. It is an interesting theory, which necessarily ignores the fact that each deed says on its face that it is a trust instrument.

In summary, the nature of the creation of the trust was not simple and appears to be unique in trust law in the country. Accordingly, each decision which is made as to litigation posture has to take into account one overriding concern which I believe is and must be, to maintain the trust as Governor Baxter intended it to be, even where that trust and that intention appears to conflict with the established principles of trust law. I suspect from

the reception which we have received there that the Maine Law Court will itself be sympathetic to these goals and should the necessity of the construction of the amendatory trust instruments arise, they will seek to decide in a manner recognizing Baxter's intent.

A second legal issue presented by the method of creation of the trust involves the issue of the responsibility of the State as trustee. The lands in Baxter State Park were given to the State of Maine as trustee. Needless to say, there is no definition of the State of Maine. The people of the State of Maine are the beneficiaries of the trust, but again, there is no specifically named representative of the people. Presumably it was as representative of the people that the Legislature accepted each gift and, as representative of the people, that it accepted the terms of each gift. This admittedly presents an unusual situation with the same body which represents the people as recipient and beneficiary also represents the trustee.

Governor Baxter did not himself state how the State was to administer the Park. The Legislature established a Baxter State Park Authority with a mandate to "satisfy the terms of the trust" and to have "full power in the control and management" of the Park. In addition to its management responsibilities, the Authority is also designated as the agency of the State to receive and expend for the maintenance, operation and expansion of the Park certain trust moneys from the funds established for such purposes by Governor Baxter. The Authority, which was first established in 1933, is now comprised of the Attorney General, the Director of the Bureau of Forestry, and the Commissioner of the Department of Inland Fisheries and Wildlife. It employs a director and such other personnel as it deems necessary to carry out its statutory responsibility. Contrary

to popular belief, the structure of the Authority was not mandated by any deed of trust of Governor Baxter. He did, however, during his lifetime, often express his satisfaction with the existing makeup of the Authority.

The existence of the sovereign trustee and the delegation of authority of that trustee to a state agency presents another legal issue as to the propriety of delegation by a trustee to another. It seems obvious that the Legislature itself could not manage the everyday responsibility of governing Baxter State Park. It seems equally obvious that the creation of the state agency to do this must have been within the contemplation of the settlor of the trust and indeed met with his approval during his lifetime. Nevertheless, the Legislature has bound the Authority to act only in a manner consistent with the trust. Accordingly, any action by the Authority not consistent with the trust is not only a breach of the State's fiduciary duty but also beyond the scope of the authority of the administrative agency. This is not, however, determinative of the question of the fiduciary responsibility of the Authority. Thus, it is necessary to refer to the general rules of trust law which permit delegation of discretion where such delegation: (1) is not unlimited and is not inconsistent with the principal responsibility of the trustee for trust administration; (2) is limited to management of matters in distant places; and (3) involves professional skills not possessed by the trustee; see, generally, 2 Scott § 171.2 for a more detailed discussion of delegation. These parameters must be kept in mind when the Authority itself further delegates responsibility and when it makes final decisions concerning the implementation of the trust.

More generally, the power of the Baxter State Park Authority, except with respect to the Legisalture, has been viewed as complete and extensive. Opinions of this office have indicated that various other state agencies, such as the Land Use Regulation Commission, do not have jurisdiction to control actions within the Park. The Maine Supreme Court, in discussing the question of termination of a lease within the Park, stated that the power of the Authority was evidenced by a broad delegation of power authorized by statute and trust instrument. The Court further indicated that "A general grant of power unaccompanied by definite directions as to how the power is to be exercised implies the right to employ the means and methods necessary to comply with statutory requirements" and that the delegation of power to the Authority included those powers "necessarily arising from powers expressly granted; those reasonably inferred from powers expressly granted; those essential to give effect to the powers expressly granted," State v. Fin and Feather Club, 316 A.2d 351 (Me. 1974).

In Fitzgerald, the Court elaborated on its views of the power of the Authority. The Court held that while the power of the Baxter State Park Authority is plenary and extensive, the standards for review of their decisions is not that of a typical administrative agency, where the agency action is presumed to be correct and will be upheld so long as there is substantial evidence therefor, but rather is the more stringent fiduciary test of prudence established by trust law. Accordingly, the Court in Fitzgerald felt at liberty to substitute its judgment for the decision of the Authority, notwithstanding substantial evidence to support the Authority's decision.

In addition to the general issue of legal standards governing the creation and actions of the Baxter State Park Authority, there is a specific issue concerning the Attorney General's role. As we have discussed previously, the Attorney General is an administrator of Baxter State Park; he is also the enforcer of all charitable trusts as well as the attorney for all State agencies. As you know from reading the Fitzgerald brief, this causes some difficulty where an action of the Baxter State Park Authority is challenged. In fact, on one occasion the Attorney General has sued the Authority challenging a decision of the Baxter State Park regarding certain then-existing timber rights of Great Northern Paper Company in the Park. Indeed, it has previously been discussed in the office, and you may wish to consider, whether under the circumstances, the Attorney General ought to properly be a member of the Authority at all.

The preceding is a general review of the creation of the Baxter State Park and some of the legal problems which are involved in its background. More generally, I would point out a few of the areas of substantive concern which you may wish to consider. First, it is important to note the parameters of the financial trusts for the Park. Specifically, there are two trust funds for the management of Baxter State Park; the first, known as the Baxter State Park Trust Fund, was established by the Legislature's acceptance in Chapter 21 of the Private and Special Laws of 1961 of the gift from Governor Baxter of the stock of the Proprietors of Portland Pier Corporation; see, also, Private and Special Laws of 1965, Chapter 30; the second trust fund is held by the Boston Safe Deposit & Trust Company pursuant to the terms of the Baxter Intervivos Trust, dated July 26, 1927, as amended. The income from the second fund is paid

at least quarterly into the Baxter State Park Trust Fund. The principal is available to the Baxter State Park Authority and the Maine State Forest Authority for the purchase of additional park or forest lands, see 12 M.R.S.A. § 901, § 1701. The principal of the Baxter State Trust Fund is to be invested and reinvested and the income used for "the care, protection, and operation" of Baxter State Park. The Intervivos Trust Instrument contains a similar provision.

You will note from reference to the financial trust instruments that there is the possibility that the Baxter State Park Authority, acting through the Maine Forest Authority, might choose to acquire additional land for the Park either for recreational purposes or for addition to its forestry area. In the past, only two pieces of land have been purchased in this manner. This is not something which I in any way advocate, but point it out to you for your consideration as a long-range possibility which the Authority may wish to consider.

Second, you should note that you are also a member of the Maine Forest Authority. The Maine Forest Authority was established in 1970 for the explicit purpose of acquiring and holding lands purchased with Baxter funds. As far as I know, the Maine Forest Authority has not been active for several years. Attached hereto you will find a memorandum from me to them dated April 23, 1976, discussing their viability and suggesting that they adopt rules and regulations. No action has been taken on this.

Third, in terms of the overall direction of the Park, the Baxter State Park Authority adopted a management plan for the Park, of which I assume you have a copy. You will also find a

copy of my comments on that plan which at the time were written for Joe Brennan's personal use. However, he ultimately made them public and distributed them to the staff and to the Authority. In the redraft, many of the concerns raised by my comments were not addressed. These issues, I believe, reflect the difficult issues which the Park Authority is going to face, and the fact that they have not been addressed by now will only prolong and intensify the need for their decision at some future time.

A further substantive area which will be of immediate concern to you is the issue of "scientific forestry." As indicated above, Governor Baxter gave two pieces of land to the State of Maine to be used for the practice of "scientific forestry." He did not define the term "scientific forestry." However, his various communications at the time indicate that he had traveled extensively abroad and had seen the forests of Germany and Scandanavia which he felt to be well-managed and cared for and that he desired that an example of such careful forestry be provided within the State of Maine. As early as 1973, Lee Schepps, writing for Jon Lund to Governor Curtis, discussed the responsibilities of the Park Authority in the management of this part of the Park.

No specific action was taken concerning this area until recently. The Authority has hired a forester who is now in the process of writing a plan for the "scientific management" of the area. There are many major forestry questions which must be considered before such a plan can be finally adopted by the Authority. However, it is likely that before the plan is completed, the Authority may well have to decide whether any action at all should be authorized in the area

(e.g., cutting, budworm spraying) absent or pending the plan's completion.

Fourth, the question of whether or not there should be spruce budworm spraying in the Park this year is one which will have to be resolved prior to the completion of such a plan.

As a matter of legal analysis, the provisions of Private and Special Laws of 1955 which authorized the Authority to take actions to protect the Park from damage done by acts of nature, including insect infestations, would be applicable for the majority of the Park (though not for the "scientific forestry" section which is discussed further herein.) The decision of the Maine Supreme Judicial Court in Fitzgerald indicates that the Authority may rely on the authority provided in this provision of law in making its decisions as to whether or not to spray. However, the court decision further indicates that any action which the Authority takes must be done according to the "best forestry practices." This creates an inherent problem for the Authority. As I am sure you are aware, there is considerable dispute as to the efficacy of spraying for budworm, as whether it is sound forestry practice or simply a necessary commercial expedient, or whether aerial spraying is a sound method of application. On the one hand, there are those who insist that if we do not spray for budworm, our forests will die. On the other hand, there are those who insist, equally vociferously, that the continued spraying for budworm is postponing the disaster, is not providing any realistic solution to the problem, and is creating its own set of environmental hazards. As regards the Park, which, unlike other forest land, is not a commercial enterprise, the question becomes even more involved. From all the

foregoing case law analysis, it would appear that the Authority must decide whether spraying is in fact the best forestry practices for the Park given the overall priority for wilderness. For the scientific forestry area, the highest and best forestry practices standard would presumably be the same, though the "wilderness" limitation would not apply.

In the scientific forestry area the argument against spraying would seem to run as follows: if spraying is necessary to preserve the trees so that scientific forestry might be practiced in the Park, no such action should be taken until there is an overall master plan for the management of that area; absent such a plan, any intermediate action could hardly be termed "scientific."

With this background in mind concerning the budworm, I would suggest to you tentatively that this be something that the Authority may choose to consider fairly quickly. Specifically, I would suggest you consider the possibility of having the experts from the Bueau of Forestry meet with the Authority and discuss with you and George Roupp the viability of the trees in both areas of the Park (scientific forestry area and remainder of the Park) with or without spraying, the effects of spraying on each area and on adjacent areas. Once that is done, I would suggest that the Authority issue its decision in a fairly detailed manner, making findings of fact and concluding what its course of action will be. I would further suggest that if the Authority intends to spray part of Baxter State Park for budworm, that we consider in this office the possibility of seeking court approval of such action consistent with the court's equitable powers to provide instructions to trustees. This is a common approach for more typical trustees who are in doubt as to how to proceed.

In most cases, the instructions involve simply the expenditure or not of certain funds. In this case, it would involve a question of environmental expertise. However, it might be a better posture for us than agreeing to the spraying and at the last minute having a suit filed against us to enjoin it, as was the case in Fitzgerald. This is only a suggestion, and I would be happy to discuss it with you further at your convenience.

I hope this memorandum will provide you with a general background and hope you will feel free to ask for further information on any issue which concerns you. I will be looking forward to discussing it with you further.

Sarah

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SR/ec
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