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

August 14, 1979

Glenn H. Manuel
Commissioner, Inland Fisheries
and Wildlife
State House
Augusta, Maine 04333

Dear Commissioner Manuel:

I am writing in response to the inquiry of May 23, 1979 of Acting Commissioner J. William Peppard of your Department, asking various questions with regard to the recently enacted statute establishing an experimental moose hunting season in Maine in 1980 (the "Moose Act"). This Act, originally passed as Chapter 56 of the Laws of Maine of 1979, was reenacted as part of a statute which incorporated all 1979 statutes relating to your Department into the recodification of the Department's laws, which was also passed at the 1979 session. Laws of Maine of 1979, ch. 543, § 50 (1979). This legislation becomes effective on January 1, 1980, over eight months in advance of the experimental season. Our answers to Mr. Peppard's questions are as follows:

I. Power of Commissioner to Establish Subdistricts
(Questions 1, 4 and 5)

The Department asks whether the Commissioner has the authority to establish subdistricts within the general moose hunting district described in the Act, and if so, whether he may close such a subdistrict to hunting or direct a hunter to hunt in only one subdistrict. Our answer is that it is doubtful whether the Commissioner has been given this authority, and that it is therefore difficult to answer the remaining two questions.

Section 7463(3) of the Act provides as follows:

"There shall be one moose hunting district described as follows: All of the State north of the Canadian

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Pacific Railroad mainline running from Vanceboro through Brownville, to the Canadian border, except for those areas of the State closed to hunting in chapter 713, subchapter I [relating to Wildlife Sanctuaries and Wildlife Management Areas]" (emphasis added). 12 M.R.S.A. § 7463(3).

In addition, Section 7463(8) provides:

"If, during the open season on moose, it shall be the opinion of the Commissioner that more moose are being killed in the district indicated than is in the best interest of the species, he shall have the authority to terminate that season at once." (emphasis added). 12 M.R.S.A. § 7463(8).

Read literally, these provisions, which are the only ones in the Act relating to the establishment of a moose hunting district or districts, appear to contemplate a single moose hunting district. There is no authority expressly delegated to the Commissioner to create subdistricts, and an examination of the legislative history of the Act reveals no hint of any intention to do so. Indeed, one of the three bills concerning a moose hunting season which was before the Legislature this year contained a provision authorizing the Commissioner to "prohibit or limit hunting of moose in any county or district [under certain conditions]", Legislative Document No. 99, 109th Legis., 1st Sess., § 2355-F(3) (1979). The failure of this provision to pass suggests a legislative intent not to permit the creation of subdistricts.

On the other hand, Section 7463(9) of the Act authorizes the Commissioner to make "all other rules and regulations which he deems necessary for the protection of the moose resource." This section might well be read to authorize the creation of subdistricts by regulation when the moose population in certain areas of the State is endangered. However, such regulatory authority could not be exercised in a manner which is inconsistent with the express terms of the Act. See the provision of the Maine Administrative Procedure Act empowering the Court to invalidate any rule which it finds "exceeds the rule-making authority of the agency." 5 M.R.S.A. § 8058(1). Thus, if the

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Legislature were determined to have considered and rejected the subdistrict concept, the Commissioner could not be found to have been simultaneously granted such authority by Section 7463(9).

In view of this uncertainty, we are hesitant to advise that the Commissioner has been granted the authority in question. Thus, we would suggest that, rather than implementing a subdistrict program, the Commissioner might better take advantage of the fact that the Legislature will be convening before the experimental season and request a clarification.

II. Application Requirements (Questions 2 and 3)

The Department asks whether there is any statutory limitation on the number of applications which a Maine resident may make for a moose permit and whether a subpermittee must be a Maine resident. Our answers are that the Legislature does not appear to have imposed a limit on the number of applications which may be made, but that it did intend that a subpermittee could be a nonresident.

Section 7463(4) of the Act, which governs the issuance of permits, is completely silent as to whether a holder of a Maine resident hunting license may make more than one application for a moose hunting permit. Nor does the legislative history provide any guidance.*/ Under these circumstances, we can see no basis from which to infer that the Legislature intended to limit the number of applications a particular person may make. This view is supported by the fact that the Legislature appears to have contemplated that a permit might be transferred by its holder, since a provision of one of the moose bills before it, attempting to prohibit the transferability of permits once the season started, failed of passage. Legislative Document No. 83, 109th Legis., 1st Sess., § 2355-F(4) (1979). Therefore, since the Legislature apparently contemplated that permits may be transferred at any time, it would seem likely that it also contemplated that a person could make more than one application, since he might succeed in

*/ In the debate on the Act on the floor of the Senate, two Senators (one in favor, one opposed) mentioned that there was no limit on the number of people who might apply, but seem not to have addressed the question of whether a particular person might apply more than once. See Remarks of Senators Conley and Usher, Legislative Record, 109th Legis., 1st Sess., 506, 507 (1979). Moreover, if these observations are taken to address the question, the conclusions to be drawn are consistent with this opinion.

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obtaining more than one permit and could then transfer the excess. However, we would again suggest that in view of the doubtful nature of this response, the Commissioner would be well advised to seek a clarification at the next legislative session before entertaining any applications.

On the question of whether a subpermittee must be a Maine resident, the legislative intention is somewhat more clear. The Act as passed provides that although the applicant "shall hold a valid Maine resident hunting license", the subpermittee is required to possess simply "a valid Maine hunting license." 12 M.R.S.A. § 7463(4). (emphasis added). The omission of the term "resident" from the second phrase is clearly significant, particularly when it is observed that the term was included in both phrases in one of the earlier versions of the Act. Legislative Document No. 83, 109th Legis., 1st Sess., § 2355-F(4) (1979). The Legislature thus appears to have intended that subpermittees need not be Maine residents.

III. Use of Application and Permit Fees (Question 9)

The Department asks whether law enforcement expenses may be counted against the requirement that at least one half of the moose application and permit fees, or \$85,000, whichever is smaller, be used for "moose research and management" 12 M.R.S.A. § 7463(9). This provision was added to the bill reported out of committee by a Senate floor amendment, Senate Document No. 32, 109th Legis., 1st Sess. (1979), but there is no indication anywhere in the record of the intended scope of the term "moose research and management." We think, however, that a fair reading of the term would exclude law enforcement activities, since the distinction between management and enforcement in the wildlife context is one which is widely understood, and is reflected in the Department's organizational structure, which distinguishes between enforcement personnel (Warden Service) and wildlife management staff (Wildlife Research Division). The Department may, therefore, spend at least one half of the proceeds of the moose applications and permits on defraying enforcement costs, but may not count this expenditure against the required allocation to moose research and management.

IV. Scope of Subpermittee Activity (Question 7)

The Department asks guidance as to the scope of the term "accompany" in the requirement that the subpermittee always accompany the permittee when hunting moose. 12 M.R.S.A. § 7463(4).

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This provision was included in all three original bills before the Legislature and was not the subject of any recorded discussion in the legislative process. Legislative Documents Nos. 28, 83, 99, 109th Legis., 1st Sess. (1979). In the absence of such discussion, and in the absence of any specific facts, it is difficult for us to respond to such a general question. The most we can say at the moment is that the provision appears to require that a subpermittee must certainly be hunting at the same time as the permittee, and reasonably within the same space. It would not appear necessary that the two be in sight of one another at all times, so long as their activities manifest a common hunting purpose. This is the sort of problem, however, that can only be resolved in the context of a specific set of facts.

V. Scope of Commissioner's Rule-Making Activity (Question 8)

The Department inquires generally into the scope of the Commissioner's powers to "make all other rules and regulations which he deems necessary, for the protection of the moose resource." 12 M.R.S.A. § 7463(9). Like the question discussed in the preceding section of this opinion, this inquiry can only be answered in the context of a specific factual situation. Thus, for example, in answer to the two specific questions asked, the Commissioner may not have the authority to close certain areas to hunting for the purpose of allowing people to watch moose in safety for the reasons set forth in Section I of this opinion, but he would have the authority to require hunter orange to be worn during the moose season since there is no statutory provision which appears to prohibit that. Beyond this, however, we can offer no guidance except to observe that the resolution of any particular question will turn on whether the issue has been addressed and resolved by the Legislature in advance. Thus, the Commissioner should take care that any rule which he promulgates is not incompatible with any provisions of the Moose Act or of Subchapter I (Hunting) of Chapter 709 of the recodification.

I hope this answers your questions. Please feel free to call on me if further assistance is needed.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/d

cc: Senator Andrew J. Redmond
Representative Charles G. Dow