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Honorable Joseph E. Brennan
Governor of Maine
State House
Augusta, Maine 04333

Dear Governor Brennan:

This responds to your request for advice on several questions concerning Legislative Document 2043 (An Act to Create an Excise Tax on Mining Companies). We take these questions to be essentially two in number: (1) to what extent may the Legislature exempt minerals from the payment of the penalty required by Article IX, Section 8 of the Maine Constitution to be imposed upon lands currently receiving favored tax treatment under that provision, but which are to be withdrawn from the use which accords them such treatment; and (2) are the provisions of L.D. 2043 which seek to include within such terms as "forest land," "timberlands" and "woodlands" lands which are used for exploratory activity violative of the same constitutional provision.

For the reasons which follow, it is our opinion (1) that the Legislature may constitutionally exempt minerals from the payment of the penalty required by Article IX, Section 8, but that it may do so prospectively only and (2) that the provisions of L.D. 2043 which seek to include lands on which exploratory activity is occurring or has occurred within the terms "forest land," "timberlands" and "woodlands" are unconstitutional.

I. The exclusion of the value of minerals from the tree growth penalty.

Article IX, Section 8 of the Constitution requires property taxes to be uniformly assessed according to just value. Subsection 2 of Article IX, Section 8, however, authorizes an

exception to this just valuation scheme. Certain types of real estate can be valued according to the current use[1/] of the real estate, including "farms and agricultural lands, timberlands and woodlands," and open space lands. In implementing a system for current use valuation:

> [T]he Legislature shall provide that any change of use higher than those set forth in paragraphs A, B and C, [the types of real estate for which current use valuation is authorized]. . . shall result in the imposition of a minimum penalty equal to the tax which would have been imposed over the 5 years preceding that change of use had that real estate been assessed at its highest and best use, less all taxes paid on that real estate over the preceding 5 years, and interest, upon such reasonable and equitable basis as the Legislature shall determine.

Sections 2 and 3 of L.D. 2043 provide for the complete exemption from property tax of minerals. Thus, if L.D. 2043 is enacted, the value of minerals will be reduced, for property tax purposes, to zero, regardless of whether the property in which such minerals were contained was previously held for purposes entitling it to valuation on a current use basis.

Notwithstanding this total exemption of minerals from future property taxation, however, the question remains as to how the penalty required by Article IX, Section 8 of the Maine Constitution is to be imposed upon land which at present is being valued on the more favorable current use basis, but which has value attributable to minerals. It is clear, first of all, that there is no constitutional difficulty with statutorily eliminating the penalty for any year or years following the statute's enactment for land valued on a current use basis which becomes converted to another purpose, such as mining, by exempting such property from property taxation. Once the exemption has been enacted, the value of the property for property tax purposes has been reduced to zero, and thus the penalty imposed by Article IX, Section 8 upon the conversion of the property to a "higher use" is also zero. Thus, no constitutional problem arises.

A problem does arise, however, if the Legislature were to attempt to extend the elimination of the penalty to land which enjoyed current use valuation during the five years immediately preceding its becoming exempt. Since that land has actually received the benefits of Article IX, Section 8, it would appear that it cannot be allowed to escape the penalties provided

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1/Current use value is generally less than just value, since the latter is equivalent to the "highest and best" use to which the property may be put, which may or may not be the same as how it is actually being used.

therein if its use is subsequently changed, within the next five years, to something, such as mining, which no longer qualifies it for current use valuation. That this conclusion is correct may be seen from a brief review of the legislative history of Article IX, Section 8.

The relevant provisions of Article IX, Section 8 resulted from the introduction, in the 104th Legislature in 1969, of Legislative Document 1121. That bill provided authorization for the Legislature to implement a current use valuation scheme for certain types of real estate. There was no provision, however, for any penalty for a change of use or withdrawal from the current use valuation. In response to fear that such a current use valuation scheme would benefit the land speculator as much as the legitimate farmer or forester, Senate Amendment "A", S-323, was introduced. This amendment added the above-quoted paragraph, providing for a minimum penalty for a change of use. From the debate on L.D. 1121 in general, and Senate Amendment "A" in particular, it is apparent that the intention of the Legislature was to insure that property which escaped valuation under the proposed amendment, at its "highest and best use," would be subject to a recapture of any tax benefit previously obtained if its use no longer qualified for current use valuation. Representative Susi, for example, stated that current use valuation "would be a change to this extent, that under the Constitution now, tax assessors assessing for tax purposes are specifically charged with assessing on the basis of highest and best use." Legislative Record, June 19, 1969, p. 3965. Representative Hewes stated: "[B]y court interpretation, property must be assessed at its highest and best use, and that is why perhaps farmland would have to be appraised - at the highest and best use rather than for the use to which it is being used." Legislative Record, June 27, 1969, p. 4419. Senator Barnes commented on Senate Amendment "A": "[I]t also protects the community interest so that if land is sold for a higher value the community can collect the proper revenue for a five-year period, plus the interest." Legislative Record, June 25, 1969, p. 4304 (emphasis added). Senator Katz stated that: "[Senate Amendment "A" says] that if any land is just held for appreciation purposes, and is then sold at a price that reflects the fact that it really wasn't properly farmland or coastal property, but was development property, at that time that it is sold there will be a kind of lien against the property for the difference in taxes for the previous five years." Legislative Record, June 25, 1969, p. 4301 (emphasis added).

In view of this manifest legislative intention underlying Article IX, Section 8, it is our opinion that for any year preceding the enactment of L.D. 2043 and its exemption of minerals from property taxation, the constitutional penalty for that year cannot be statutorily eliminated, since any attempt to do so would defeat the penalty's purpose of recapturing any taxes actually avoided. In summary, therefore, the Legislature may prospectively exclude the value of minerals from the computation of the penalty simply by exempting minerals from property taxation entirely. However, in computing the back taxes of any year prior to the effective date of the exemption, the value of the minerals may not be excluded from the just valuation of the property in computing the penalty.

II. Inclusion of exploratory mining activity within definition of forestland.

As indicated above, Article IX, Section 3 of the Maine Constitution allows lands to be valued at their current use if they are used, inter alia, for "timberlands and woodlands." L.D. 2043 proposes to enact a new provision, to be located at 38 M.R.S.A. § 2866, which would prohibit the exclusion of lands used for what it calls "exploratory activity" from those included within "forest land," the term employed in 36 M.R.S.A. § 573(3) to implement the words "timberlands" and "woodlands" in Article IX, Section 8. The effect of this provision would be to delay the date at which the land would be determined to lose its character as forest land until mining actually commences, thus avoiding the payment of part or all of any penalties which might have accrued under Article IX, Section 8, prior to the enactment of L.D. 2043.

"Exploratory activity" is further defined in L.D. 2043 by proposed 36 M.R.S.A. § 2855(6) to mean:

> All activities undertaken by the owner or any person for the purpose of determining the existence of minerals or the quantity, quality or character of the minerals or feasibility of mining those minerals. The activities include, without limitation: Testing and evaluation of the land and sub-surface; taking soil and stream sediment samples; drilling on the land including without limitation, bulk sample drilling or excavation, performance of geophysical tests; and activity incidental to the

> foregoing; notwithstanding that the activity may involve the use of equipment on the land, may alter the character and appearance of the land or result in disturbance of the land, including, without limitation, the creation of trails or roads, removal of trees, the planting of new vegetation or the marking of sample holes.

The question is thus presented as to whether this definition contemplates activities so extensive as to be inconsistent with the use of land for "timberlands and woodlands," and therefore constitutes an unconstitutional attempt to avoid the penalty provisions of Article IX, Section 8.

In our view, such an inconsistency plainly exists. Under proposed Section 2866, a landowner could completely strip his land of all trees and soil for the purpose of exploring for minerals, and still be able to claim the land is "timberland" or "woodland" for purposes of property tax valuation. While the interpretation of a constitutional provision by the Legislature is accorded considerable deference by the courts, Orono-Veazie Water District v. Penobscot County Water Company, 348 A.2d 249 (Me. 1975), we would think that a construction of Article IX, Section 8 to include the activities contemplated by proposed Sections 2866 and 2855(5) as "timberlands and woodlands" would be so strained as to be unlikely to be endorsed by any court. Consequently, we must advise that these provisions, as they stand at present, are very likely unconstitutional.

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I hope this answers your questions. Please feel free to reinquire if further clarification is required.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/d

cc: Honorable Thomas M. Teague
Honorable Bonnie Post