

# MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, MAINE 04333

March 14, 1985

Commissioner Glenn H. Manuel  
Chairman, Baxter State Park Authority  
Department of Inland Fisheries and Wildlife  
State House Station #41  
Augusta, ME 04333

Re: Interest on the Operating Account of the  
Baxter State Park Authority

Dear Commissioner Manuel:

You have asked for an opinion as to whether funds held in State Treasury Account No. 04580.1, the Operating Account of the Baxter State Park Authority (the "Authority"), should be earning interest for the benefit of Baxter State Park. For the reasons set forth below, I have concluded that the State's trust obligations to the Park require that interest earned on the Authority's Operating Account be so credited.

Baxter State Park was created, as you know, by a series of gifts over a 31-year period by Governor Percival P. Baxter. Each gift was made by a deed of trust, submitted to the Legislature for acceptance by Private and Special Act, conveying lands to the State of Maine as trustee to be held for the benefit of the people of the State of Maine subject to the restrictions set forth in the deeds. By these arrangements, Governor Baxter created a charitable trust. "The State is specifically named trustee of the land, as well as the associated [trust] funds," Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 194 (Me. 1978), and accordingly the State has assumed fiduciary obligations with regard to the administration of the Park and the trust funds created for the benefit of the Park. Id. at 202.

The State has designated the Authority to act as its agent for purposes of fulfilling these trust obligations. 12 M.R.S.A. § 901 (Supp. 1984-1985). However, to the extent that there are State-created mandates on how the Authority operates, the State must accept responsibility for them as the named trustee of the Park. One such mandate, which is the subject of this opinion, is that all moneys available for the operation of the Park must be deposited with the State Treasurer, 5 M.R.S.A. § 131 (1979), and are available for expenditure by the Authority only by voucher submitted to the State to be drawn against such deposited funds.

The way this works is as follows. There are three principal sources of funds available to the Authority for operational expenses. One is the so-called "Boston Trust," consisting of the income and principal of the inter vivos trust created by Governor Baxter in 1927, as amended through May 18, 1966, wherein Governor Baxter donated the residuary of his trust estate to the Park, with instructions to Boston Safe Deposit and Trust Company, as trustee:

To pay the net income therefrom at least as often as quarterly to the "BAXTER STATE PARK TRUST FUND" created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the care, protection and operation of the forest land known as BAXTER STATE PARK and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes.

The second source of funds available to the Park is the Baxter State Park Trust Fund (the so-called "State Trust") created by gifts of Governor Baxter in 1961 and 1965, see P. & S.L. 1961, ch. 21 and P. & S.L. 1965, ch. 30:

to be held IN TRUST forever for the benefit of the people of the State of Maine . . . , the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of . . . BAXTER STATE PARK. Id.

Income distributions are automatically made from the State Trust on a semi-annual basis. Income from the Boston Trust is distributed on an as-needed basis. Both income distributions

are deposited in the State Treasurer's "Cash Pool" or the so-called "8200 Accounts" of the Authority and while so held such income earns interest which is credited for the benefit of the Park. I have no difficulty with this arrangement from the standpoint of the State's trust obligations.

A third source of income to the Park is from revenues resulting from the actual operation of the Park, such as Park entrance and user fees. These revenues are deposited with the State, resulting in a credit to the State Treasury Account 04580.1, the Authority's Operating Account. The Authority draws against this account by voucher to pay salaries and other operating expenses of the Authority. To the extent that Park revenues are insufficient to cover Park expenses, the Authority draws on the State Treasurer's 8200 Accounts, that is from the Boston Trust and the State Trust, with the result that the needed funds are credited to the Authority's Operating Account for use by the Authority.

The problem giving rise to this opinion is that Park revenues and trust income credited to the Authority's Operating Account do not earn income for the Park while sitting on the Operating Account awaiting expenditure. Interest on funds in this account, which is estimated at approximately \$4,000 a year, is instead credited to the General Fund, pursuant to 5 M.R.S.A. § 135 (Supp. 1984-1985). This statute authorizes the Treasurer to invest moneys on deposit with the State, including trust funds of the State, and further provides that:

Interest earned on such investments of moneys shall be credited to the respective funds, except that interest earned on investments of special revenue funds shall be credited to the General Fund of the State. Interest earned on funds of the Department of Inland Fisheries and Wildlife shall be credited to that fund.

The State Treasurer considers the Authority's Operating Account as a "special revenue account" for purpose of Section 135, and therefore considers himself to have no authority to credit this account with earned interest in the absence of an exception, such as that created in the statute for the Department of Inland Fisheries and Wildlife. His position appears to be that income distributions from the Boston Trust and the State Trust, once deposited in the Operating Account, together with Park revenues on that account, are not trust property and therefore the State has no responsibility to the Park for interest earned on that income. I disagree.

The point to be stressed is that when the State receives moneys for the use of the Park, it does so as trustee of the Park. Revenues received from the operation of the Park are trust revenues received by the State as the named trustee of the Park. Income distributed to the State Trust from the Boston Trust and income of the State Trust itself are received by the State as the named trustee of the State Trust. The State voluntarily assumed the role as trustee in both cases and, having done so, is obligated to act consistent with its trust obligations. The State "must administer the trust like any private trustee of a charitable trust . . . ." Fitzgerald v. Baxter State Park Authority, supra, 385 A.2d at 202. I therefore turn to principles of trust law to determine the extent of the State's responsibilities with regard to interest earned on the Authority's Operating Account.

It is well recognized that a "trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive, and, in the case of money, this means he should invest it so that it will produce an income. See, Restatement, Second, Trusts, § 181 and Comment c; 2 Scott on Trusts, § 181 at 1463-66; Bogert, Trusts and Trustees, § 611 at 3-7. Scott raises the question as to whether funds awaiting investment or distribution should be made productive if the delay is temporary, as it is in the case of funds deposited in the Authority's Operating Account. See 2 Scott, supra, § 181 (Supp. 1983) at 115-17. He concludes that in modern times there are no practical impediments to making such income productive and therefore it would not be unreasonable to require the trustee to do so. Id. Given the fact that funds credited to the Authority's Operating Account for purposes of expenditure by the Authority are in fact earning interest, albeit for the benefit of the General Fund, I have little difficulty in concluding that the State has the trust obligation to earn interest on the funds so held and that this interest should be credited for the benefit of the Park and not the General Fund. I can see no persuasive reason, either in practice or in theory, why the State should avoid these responsibilities by declaring that trust property loses its status as such once it is deposited in the Authority's Operating Account.

The same conclusion can be reached through an alternative analysis of another principle of trust law that operates here: "A trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust." Restatement, supra, § 203. As explained in Scott, supra, § 203 at 1659-60:

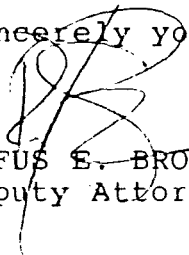
A trustee who makes a profit through a breach of trust is accountable to the beneficiaries for the profit. Even though the profit is not made through a breach of trust, however, the trustee is accountable for it if it was made in the administration of the trust. Thus where a trustee deposits trust funds in a bank and receives interest on the deposit, he is accountable for the interest received even though he was not under a duty to make the money productive.

An exception to this principle is recognized when a trustee enters into a transaction not connected with the administration of the trust. See, Restatement, supra, § 203, Comment e. Scott cites as an example of this exception a situation where a trust company is permitted to deposit trust funds awaiting investment in its own commercial department, under the theory that the funds so deposited cease to be trust funds and become the individual property of the trust company, provided such a deposit is not a breach of the trust. Scott, supra, § 203 at 1661-62. Again, this appears to be the position of the State Treasurer.

Many statutes and common law decisions which allow bank trustees to deposit trust funds in their own commercial departments require such commercial departments to pay interest on deposited trust funds. See, Scott, supra, § 170.18 and Bogert, supra, § 598 at 487-498. In any event, I do not consider the exception applicable here. For one thing, the State is not in the business of making money like a commercial bank, and, therefore, it would seem inappropriate to borrow on the bank analogy (to the extent valid) to construe the State's trust obligations with regard to the Park to allow a profit to be made on the Park's trust funds for the benefit of the General Fund just because the State is in the business of making the best of tax dollars it holds. I certainly doubt whether Governor Baxter, who created the trusts at issue here, would have approved of such a practice. The correspondence reveals that Governor Baxter intended the State Trust to allow the Park to be independent of State appropriations, see his February 18, 1961 letter to Mr. McDonald, not to increase the General Fund at the expense of the State Trust. Also, he was extremely conservative about how these trust funds should be expended. See, e.g., his letter of February 15, 1962 to Austin Wilkins and the June 1, 1967 memorandum from Austin Wilkins to Messrs. Erwin, Speers, and Cranshaw. Finally, it hardly can be argued that the State should keep a profit from its investment of the Park's trust funds, when the State allows the Department of Inland Fisheries and Wildlife to retain investment profits from its funds. See 5 M.R.S.A. § 135.

In conclusion, while there might be room for a debate in other circumstances, here, where the State in fact earns interest on Park trust moneys and where in less compelling circumstances it credits another Department of State Government with income earned on its trust funds, the State Treasurer should certainly be accountable for interest earned on the moneys deposited in the Authority's Operating Account. This is how 5 M.R.S.A. § 135 should be interpreted, and, in any event, this is how the State Treasurer should act regardless of statute in view of the State's trust obligations.

Sincerely yours,



RUFUS E. BROWN  
Deputy Attorney General

REB:mfe

cc: James E. Tierney  
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