

# MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



86-13

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

May 8, 1986

Honorable Harry L. Vose  
Maine House of Representatives  
State House Station #2  
Augusta, ME 04333

Dear Representative Vose:

You have asked several questions concerning Legislative Document 2299, "AN ACT to Amend the Charter of the Passamaquoddy Water District." First, you ask whether the bill is in any way unconstitutional in that it authorizes the taking of water from the Town of Pembroke and the conveying of such water to the Passamaquoddy Water District, whose purpose is to provide water to areas of the State outside of the Town of Pembroke. Next, you ask whether the bill is necessary to enable the District to obtain waters from sources outside its service territory. Finally, you ask whether the bill will effect any change in the common law regarding the power of private persons in Pembroke to convey water drawn from aquifers beneath their land to the District.

For the reasons which follow, it is the opinion of this Department that the bill is not unconstitutional; that it is at least arguably necessary to empower the District to obtain water from outside its territory; and that it does alter the common law regarding the appropriation of water by private persons by placing restrictions on the power of such persons in Pembroke to convey water to the District. In short, the bill allows the District to obtain water from within Pembroke, which it might otherwise not be able to do, but imposes conditions on that purchase to insure the maintenance of adequate water supplies in Pembroke, which would not be the case at common law.

I. Constitutionality of L.D. 2299

As the Supreme Judicial Court of Maine has had occasion to observe many times since the entry of the State of Maine into the Union, "a municipal corporation has no element of sovereignty. It is a mere local agency of the State, having no other powers than such as are clearly and unmistakably granted by the law-making power." Inhabitants of the Town of Frankfort v. Waldo Lumber Co., 128 Me. 1, 4 (1929), quoted with approval in Baxter v. Waterville Sewerage District, 146 Me. 211, 219 (1951). Thus, in the Baxter case, the Court found no constitutional difficulty with the creation of a sewerage district with the identical boundaries of the City of Waterville, and the transfer of various governmental functions previously exercised by the City to the District.

That being the case, there is no constitutional barrier to the Legislature assigning specific powers to a governmental entity such as the Passamaquoddy Water District, even if those powers are to be exercised in part in territory outside that of the governmental entity in question. Consequently, the Legislature would be free simply to authorize the Passamaquoddy Water District to take water from an aquifer located within the Town of Pembroke, without in any way providing protections to the citizens of Pembroke against the consequences of such a transfer.<sup>1/</sup> As indicated above, L.D. 2299 does provide substantial protections to the citizens of Pembroke against hardships occasioned by the loss of the water. In the opinion of this Department, however, such protections are not constitutionally required.

II. Effect of L.D. 2299 on Statutory Authority of the Passamaquoddy Water District

Your second question is whether L.D. 2299 adds anything to the powers of the Passamaquoddy Water District to obtain water which it does not already possess by law. The District was created in 1983 for the purpose of supplying water service to

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<sup>1/</sup> This is not to say that the Legislature could authorize the taking of such water from a private person without the payment of just compensation. Such an action would violate the Fifth Amendment of the United States Constitution, and Art. I, § 21 of the Maine Constitution. This Department understands, however, that the owner of the land over which the aquifer described in the bill is located is willing to sell his rights to the District.

the city and the Pleasant Point Passamaquoddy Indian Reservation, the Town of Perry, the City of Eastport and the customers of the Eastport Water Company. P.&S.L. 1983, ch. 25. For its source of supply, the District was authorized, to obtain water from the Pleasant Point Reservation or from any "source from which the Eastport Water Company is now authorized to take water." P.&S.L. 1983, ch. 25, § 2. The Eastport Water Company, in turn, was created by the Legislature in 1887, P.&S.L. 1887, ch. 22. For its source of water, the Eastport Water Company was authorized

. . . to erect and maintain reservoirs and stand-pipes and lay down and maintain pipes and aqueducts necessary for the proper accumulating, conducting, discharging, distributing and disbursing of water, and forming proper reservoirs therefor, and said corporations may take and hold by purchase or otherwise, any lands or real estate necessary therefor, and may excavate through any lands when necessary for the purposes of this incorporation. P.&S.L. 1887, ch. 22, § 3.

The territorial range of the powers granted by this provision is not known; nonetheless it is at least doubtful that the Eastport Water Company, and therefore the Passamaquoddy Water District, possesses any authority to create reservoirs or excavate for water outside of the boundaries of the Town of Eastport.

In view of this doubt, L.D. 2299 was introduced to permit the Passamaquoddy Water District to take water "from any surface or underground brook, spring or vein of water located on property presently owned by the Lincoln Company on Little Falls Road in the Town of Pembroke." L.D. 2299, § 1 (112th Legis. 1986), amending P.&S.L. 1983, ch. 25, § 2. The bill thus would expressly authorize the District to do what it is possible that it may not do at present: obtain water from a specific source outside of its service territory. Thus it is possible to fairly view the bill as enlarging the powers of the district to obtain water, since those powers may at present be limited to waters found on or beneath such territory.

### III. Effect of L.D. 2299 on Common Law

Your final question concerns the effects which L.D. 2299 will have on the common law. In particular, you inquire whether in the absence of the provisions of the bill providing

various protections to the residents of the Town of Pembroke with regard to their water supply, such residents, or the Town itself, would have any recourse against the District, or the person or persons conveying water to it from aquifers within Pembroke, for the loss of such water.

In general, the common law rule concerning the appropriation of groundwater is that a person drawing water from a well dug on his own land for domestic purposes is not liable in damages to anyone else whose water supply has been depleted thereby. Chesley v. King, 74 Me. 163, 170 (1882); Chase v. Silverstone, 62 Me. 175 (1873). If, however, the water in question is taken off the parcel of land from which it was drawn, such action will oblige the landowner to compensate persons who are damaged thereby. 93 C.J.S. Waters § 93c(1) (1956). Thus, if the owner of the land in Pembroke addressed by the bill were to reduce the water supply of his neighbors by conveying water off the property to the District, he would be liable in damages to them.

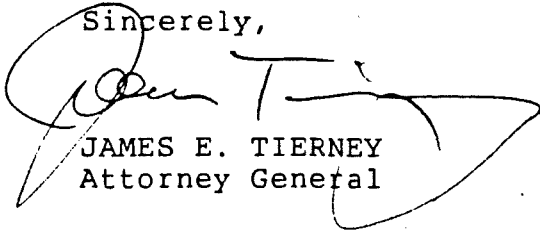
Such liability would not, however, run to the Town of Pembroke. In Kennebunk, Kennebunkport, and Wells Water District v. Maine Turnpike Authority, 147 Me. 149 (1951), the Supreme Judicial Court held that the mere fact that a public body which is not a riparian owner is making use of a body of water for a water supply does not obligate another riparian owner to compensate it for activity which might affect the quality or quantity of the water. Only as a riparian owner would the public body obtain such rights. Thus, if the Town of Pembroke did not actually own land over the aquifer in question, it would have no cause of action against anyone for the removal of the water therefrom.

As indicated above, L.D. 2299 alters this situation by providing various protections to all the residents of Pembroke, both those owning land over the aquifer and residents of the town generally, to insure that the removal of the water will not threaten their water supply. For the reasons just described, these protections are generally not available at common law. Thus, the bill may be viewed as increasing the protections available to the residents of Pembroke with regard to their supply of water.

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I hope this answers your question. Please feel free to re-inquire if further clarification is necessary.

Sincerely,



JAMES E. TIERNEY  
Attorney General

JET:vo

cc: Governor Joseph E. Brennan  
Senator Larry M. Brown  
Co-sponsor of L.D. No. 2299  
Senator John E. Baldacci  
Co-chairman, Joint Standing Committee on Utilities  
Representative Fred W. Moholland