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State of Maine

DEPARTMENT OF ATTORNEY GENERAL

M E M O R A N D U M

To: Tom Morrison, Director, Bureau of Public Lands
Herb Hartman, Director, Bureau of Parks & Recreation

From: Jeff Pidot, Deputy Attorney General

Date: August 5, 1992

Subject: Transfer of Monies to General Fund from Certain
Trust, Donation and Bond Issue Accounts

You have both asked for an opinion from this office regarding the applicability of Part KKK of the budget enacted by the Legislature for FY 1992-3 to certain accounts administered by your agencies. In pertinent part, this section of the budget legislation provides for an across-the-board .9% reduction in state government accounts, with the savings to be transferred as undedicated revenue to the General Fund. Your inquiry relates to the applicability of this provision to a number of accounts with respect to which the State has a fiduciary duty to employ the monies involved for designated trust or trust-like purposes. For the reasons set forth below, it is this office's opinion that the .9% transfer to the General Fund is inapplicable to these particular accounts.

It is important to note that the trust-like nature of these particular accounts distinguishes them from routine, special or dedicated revenue accounts, to which Part KKK's .9% General Fund transfer is otherwise applicable. It is also important to note that Part KKK was not intended by the Legislature to reimburse the General Fund for costs incurred in servicing these fiduciary accounts or in managing the programs for which they are designed. Finally, it is important to note that the enactment of Part KKK was neither explicitly nor, we believe, implicitly intended by the Legislature to be an action taken in furtherance of its trust or other fiduciary responsibilities over these particular accounts and their related trust management activities. Accordingly, the opinion stated here bears only upon the unique situation involved in applying the across-the-board budget reduction and General Fund transfer in Part KKK, intended by the Legislature to close a projected shortfall in the General Fund for FY 1992-3, to these particular fiduciary accounts.

Each of the types of accounts at issue will be separately discussed below.

Bureau of Parks and Recreation Trust Accounts

In Mr. Hartman's memo and its attachments, reference is made to a number of trust accounts established by deeds or other instruments of trust and accepted by the State for purposes of supporting a particular park facility. The monies given under these trust instruments, and accepted by the State for these purposes, cannot be diverted to wholly extraneous purposes. Such a diversion would be a violation of the explicit terms of the trust by which the donor gave the State the monies involved, and which the State accepted and is now responsible for administering. By way of example, funds in trust accounts held by the State for purposes of managing Baxter State Park cannot be diverted to the General Fund for purposes having no relationship to Baxter State Park or management of its trusts or activities. This rule applies not only to the principal amount originally given and accepted under trust but also to income from that trust. Bogert, Trusts and Trustees, § 866. 90 C.J.S., Trusts, § 437.

Charitable Donations Given to Support Certain Park Facilities
But Without Specific Instruments of Trust

Over the years, the Bureau of Parks and Recreation has also received monies designated by the donors, and accepted by the State, to be used for particular park facilities but without an explicit trust instrument. In the cases described by Mr. Hartman, the donor made clear his or her intentions with respect to the uses for which the monies would be spent, and the State accepted the funds with that explicit understanding. In some cases, the State's intention was manifested by a financial order signed by the Governor. In other cases, the State's acceptance of the money, and of the responsibility to spend it for the purposes expressed by the donor, was manifested in correspondence.

Originally, the Bureau of Parks and Recreation accepted these gifts and bequests pursuant to 12 M.R.S.A. § 602(10-A), which gave the Bureau authority for this purpose. Monies were then placed in special accounts to be expended for the purposes designated by the donors and accepted by the State. Recently, the Legislature has enacted a more detailed statutory authority for the Bureau to accept donations for this purpose, and has provided for placing these monies in "dedicated accounts according to the specified purposes and intents of the donors." 12 M.R.S.A. § 605-A; P.L. 1991, c. 591:

Under the circumstances, diversion of these monies to the General Fund pursuant to Part KKK would be unlawful. Where the State, acting pursuant to legislative enablement, accepted

these monies as a charitable donation for a specified purpose, the State placed itself under a duty to use these gifts for the purposes stated. If a charitable organization accepts a gift for a specified purpose, it is bound thereby. 15 Am.Jur.2d Charities, §§ 5, et seq.; Restatement of Trusts, Second, § 348; Bogert, Trusts and Trustees, § 324; St. Joseph's Hospital v. Bennett, 22 N.E.2d 305 (N.Y. 1939); Town of Winchester v. Cox, 26 A.2d 592 (Conn. 1942); American Institute of Architects v. Attorney General, 127 N.E.2d 161 (Mass. 1955). It is the statutory obligation of the Attorney General to enforce the due application of funds given or appropriated to public charities and to prevent breaches of trust in such matters. 5 M.R.S.A. § 194; Scott on Trusts, § 348.1.

In sum, where donations have been made to and accepted by the State for explicitly stated purposes relating to the benefit of a park facility, the State has a legal responsibility to expend the monies for these purposes subject to exceptions not relevant here. The State generally cannot divert these monies to a wholly unrelated purpose.

Bond Issue Accounts

Similarly, monies raised by bond issues cannot be diverted to uses that have no relationship to the authorization voted upon by the electorate. Article IX, § 14 of the Maine Constitution provides that bonded indebtedness may be incurred upon enactment by two-thirds of both houses of the Legislature and ratification by the voters at a general election. In authorizing such a bond issue, the Legislature must specify the purposes for which the proceeds will be used. Once the bond issue has been ratified as provided by this section of the Constitution, the monies cannot be redirected by a legislative budget enactment to some unrelated purpose. See attached Opinion of the Attorney General dated May 16, 1991 to Representative Paul Jacques.

Public Reserved Lands Accounts

Accounts administered by the Bureau of Public Lands for purposes of managing and supporting the State's public reserved lands are likewise impressed with a trust, although its historical origins as well as its purposes are different than the donated charitable trusts described above. Under the Articles of Separation, by which Maine became a State and which are incorporated as Article X of the Maine Constitution, the public reserved lands were set aside for certain designated purposes. These lands are impressed with a public trust, recognized by the State's Supreme Court, that make them

different from lands owned by the State over which it has absolute proprietorship. Opinion of the Justices, 308 A.2d 253 (Me. 1973); Cushing v. Cohen, 420 A.2d 919 (Me. 1980); Cushing v. State, 434 A.2d 486 (Me. 1981). The Legislature has likewise recognized the public reserved lands as comprising a public trust. 12 M.R.S.A. § 556(1). Monies derived from the sale and/or management of these lands are placed in special accounts to be utilized for designated purposes consistent with the trust. 12 M.R.S.A. §§ 581 - 590. Monies in these accounts, being derived from public trust property, are likewise impressed by the trust. 90 C.J.S., Trusts, § 437; Bogert, Trusts and Trustees, § 866.

The Legislature, acting on behalf of the People of the State, has some degree of latitude, subject to judicial review, to actively manage its trust responsibilities over these lands, provided that it does so in a manner which is consistent with the trust purposes. Opinion of the Justices, supra. Thus, acting in its capacity as trustee, twenty years ago the Legislature determined that the public reserved lands, that had been originally set aside in each township for use by the minister and the school, should instead be devoted to a broader base of public uses, and might be traded and consolidated, so as to be more useful to the citizens of the State. In passing upon the validity of this alteration in the uses to which the public reserved lands would be dedicated, the Justices of the Supreme Court emphasized that the newly enacted trust purposes must be compatible with those of the original Articles of Separation. Opinion of the Justices, supra.

By contrast, the across-the-board transfer from all accounts to the General Fund under Part KKK was designed for purposes of closing a projected shortfall in the General Fund. It was not intended to be an exercise by the Legislature of trust responsibilities over the public reserved lands. While, in the Opinion of the Justices, supra, the Court found permissible the Legislature's explicit exercise of its trust responsibilities in providing for a broader array of public uses of the public reserved lands, we believe that a different result would very likely occur were the court to review the broad application to the public reserved lands trust accounts of the across-the-board budget transfer measure in Part KKK. Accordingly, Part KKK should not be applied to the public reserved lands trust accounts.

Submerged Lands Accounts

Also administered by the Bureau of Public Lands is the State's program for management of the publicly owned submerged lands. Like the public reserved lands, submerged lands are

public trust assets. This fact is recognized in the common law, by the courts as well as by the Legislature. Opinion of the Justices, 437 A.2d 597 (Me. 1981); 12 M.R.S.A. § 559(1). By law, monies derived from management of these trust assets are placed in separate accounts to be used in a manner related to their designated public trust purposes. 12 M.R.S.A. §§ 557-A - 558-B.

The Legislature, when explicitly acting in the capacity of trustee, may be capable of making discrete determinations as to how the trust properties will be used, and of even releasing certain properties that are no longer useful to the trust. Opinion of the Justices, *supra*. These legislative determinations are subject to review by the judiciary. Because public trust assets are involved, the courts will apply a "high and demanding standard of reasonableness" to determine compliance with the State's trust responsibilities. *Id.* The application to these trust accounts of Part KKK, as an across-the-board transfer from all accounts to the General Fund, could not, in our opinion, survive that "high and demanding" standard of judicial review. The enactment of Part KKK was not intended by the Legislature to be an exercise of trust responsibilities over these assets. Accordingly, Part KKK should not be applied to the submerged lands trust accounts.

While the types of accounts discussed above are impressed with different fiduciary responsibilities of the State, the conclusion as to each is the same: Part KKK should not be applied to these accounts insofar as it would effect an unrestricted diversion of trust monies to General Fund uses without any articulated relationship to the trust purposes or assets involved.

JP:msg

Attachment

cc: Jack Nicholas, State Budget Officer, Bureau of the Budget
(w/attachment)
C. Edwin Meadows, Commissioner, DOC (w/attachment)