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December 15, 1992

Sawin Millett, Commissioner
Department of Finance
State House Station #78
Augusta, Maine 04333-0078

Re: Transfer of Trust Monies to General Fund under
Part KKK of Legislative Appropriations Bill

Dear Sawin:

As you know, my office has been in contact with yours regarding the applicability to certain trust funds of Part KKK of the appropriations bill enacted in the last legislative session. Part KKK provides an across-the-board transfer of .9% of accounts to the general fund. It is this office's opinion that Part KKK cannot, however, lawfully effect a transfer to the general fund of monies that the State holds in trust for certain legally designated purposes. Such a transfer would either violate the legal trust relationship by which the State holds the monies involved, or would violate constitutional requirements by which bond or other revenues must be held for expenditure. More detailed legal analysis describing the rationale for this opinion is attached.

In the discussions between my office and yours, the suggestion was made that we provide a concise summary of our views on this issue as it pertains to the trust monies that have been brought to our attention. My purpose then is to simply state what we believe to be the law on the matter and to point out the types of trust-type funds, to the extent known by us, to which this opinion applies. Again, as to the funds described below, an across the board transfer to the general fund as envisioned by Part KKK would violate the trust duties under which the State holds these particular funds. This is in contrast to the applicability of Part KKK to other special or dedicated revenue accounts, held by the State in a non-trust capacity, and over which the Legislature has discretion in making allocations for any designated governmental purpose, including reallocation to the general fund.

These are the funds that have been brought to our attention and from which monies should not be reallocated to the general fund under Part KKK:

Monies in Baxter State Park accounts;

Monies in accounts of Bureau of Parks and Recreation of the Department of Conservation, which were donated to and received by the State with the explicit understanding that the monies would be used for certain park facilities;

Monies in accounts of the Bureau of Public Lands of the Department of Conservation, restricted to the public reserved lands or submerged lands;

Monies raised by bond issues designated for a particular purpose;

Monies in or drawn from highway trust fund accounts.

There may be other trust funds, of which we have not been made aware, and we will respond to these circumstances as they arise. In the meantime, if you have any questions, please let me know.

Sincerely,


MICHAEL E. CARPENTER
Attorney General

MEC/tt

Attachments

cc: Michael D. Pearson, Senate Chair
Legislative Appropriations Committee
Lorraine N. Chonko, House Chair
Legislative Appropriations Committee
Jim Clair
Jack Nicholas

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)



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BRIAN MACMASTER
DIRECTOR, INVESTIGATIONS

May 16, 1991

Honorable Paul F. Jacques
House of Representatives
State House Station 2
Augusta, Maine 04333

Dear Representative Jacques:

I am writing in response to your inquiry of May 1, 1991 inquiring into the constitutionality of Section 0-1 of Chapter 9 of the Laws of Maine of 1991, "An Act Making Additional Appropriations From the General Fund and Allocations From Other Funds for the Expenditures of State Government for the Fiscal Year ending June 30, 1991," directing the transfer of funds in the Maine State Park and Recreation Area Fund for other purposes for a 15-month period. For the reasons which follow, it is the opinion of this Department that this provision violates Article IX, Section 14 of the Maine Constitution.

Article IX, Section 14 of the Maine Constitution provides that the Legislature shall not create any debt or liability on behalf of the State in excess of \$2,000,000, unless such debt is approved by two-thirds of both of its houses and ratified by the voters at a general election. In authorizing such a bond issue, the Legislature is required by the section to specify the "times" of issuance and the "amounts" and "purposes" for which the proceeds shall be used. It is implicit in this requirement that the proceeds actually be used for the stated purposes. Otherwise, the requirement of voter approval would be substantially compromised. Thus, this Department has consistently been of the view that the Legislature may not, by ordinary legislation, redirect the proceeds of bond issues to purposes outside of those specified in the authorizing legislation. Op. Me. Att'y Gen. (Dec. 8, 1977); Op. Me. Att'y Gen. (July 18, 1977); Op. Me. Att'y Gen. (Apr. 7, 1976).

The bond issue to which Section 0-1 of the 1991 Supplemental Appropriations Act is directed was authorized by the Legislature and the voters in 1967. P.&S.L. 1967, ch. 167. That Act authorized the Treasurer of the State to issue bonds in an amount not exceeding 4 million dollars and to place the proceeds in the Maine State Park and Recreation Area Fund, for the purpose of the acquisition of lands and waters for outdoor recreation, preservation of sites of historic or scientific interest, highway scenic or picnic areas, wildlife preservation and ecological conservation. P.&S.L. 1967, ch. 167, § 3. Evidently, as of the effective date of the 1991 Supplemental Appropriation Act, some of the proceeds of the authorized bonds remained in the Fund, under the control of the State Treasurer. Section 0-1 amended the 1967 Bond Authorization Act by adding the following sentences:

On or before April 1, 1991, the Treasurer of State shall transfer the unexpended balance in the Maine State Park and Recreation Area Fund and the interest-earning account established for that fund to the debt service account in the Office of the Treasurer of State. By June 30, 1991, the Treasurer of State shall restore to the Maine State Park and Recreation Area Fund and the interest-bearing account established for that fund the amounts transferred to debt service under this section.


In effect, the Treasurer was directed to take the funds remaining in the Fund and transfer them for some other purpose for a period not to exceed 15 months, and then to replace them in the Fund.

In the view of this Department, this action violated Article IX, Section 14 of the Maine Constitution, since the voters approving the bond issue in 1967 are constitutionally entitled to have the proceeds of the issue spent for the purposes stated at the time. Thus, these proceeds may not be used for other purposes, however general or temporary.^{1/}

^{1/}Because of this conclusion, this Department expresses no view on the question of whether Section 0-1 also violates the rights of bondholders protected by the Contract Clauses of the United States and Maine Constitutions. U.S. Const. art I, § 10, cl. 1; Me. Const. art. I, § 11. See generally United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977). We are advised that at least some of the bonds issued pursuant to the 1967 legislation will not be retired until 1993.

I hope the foregoing answers your question. Please feel free to reinquiry if further clarification is necessary.

Sincerely,


MICHAEL E. CARPENTER
Attorney General

MEC/bls

cc: Governor John R. McKernan
President Charles P. Pray
Speaker John L. Martin
Senator Michael D. Pearson
Representative Lorraine N. Chonko
Chairpersons, Joint Standing Committee on Appropriations
Samuel Shapiro
State Treasurer

State of Maine

DEPARTMENT OF ATTORNEY GENERAL

M E M O R A N D U M

To: Jack Hunt, Office of Legal Services, DOT
From: Crombie J. D. Garrett *C.J.D.G.* Deputy Attorney General
Date: December 14, 1992
Subject: P.L. 1991, Ch. 780, Part KKK

I am responding to your memorandum regarding the effect of Part KKK on various funds administered by the Department of Transportation. These funds are numbered 1 through 11. I will address them by group.

With respect to funds 1, 2, 3, and 4, you state that these are funds established to cover the exact costs of certain projects administered by DOT. While you state that these funds are "dedicated" revenue, that would not necessarily protect them from the imposition of the 0.9% surcharge. Without more specific information regarding these funds, it appears that the surcharge may be appropriate.

With respect to item 5, the Transportation Demand Management Project, it is clear that such funds are protected by federal law from the imposition of the surcharge.

With respect to items 6 and 7, it is unclear whether such funds are protected or not. As with items 1 through 4, it appears that they may be subject to imposition of the Part KKK surcharge. If, as suggested by Bob Scott, the same funds may have been subjected twice to the imposition of the surcharge, then there may be a reason to consider protecting them from double imposition of that charge. Otherwise, they appear to be subject to the surcharge.

Items 8, 9 and 10 represent funds that are apparently derived solely from the Highway Fund. Under the circumstances, these funds are protected from the imposition of the surcharge under Part KKK.

With respect to item 11 the Van Pool Services Fund, unless these funds are protected by some law or unspecified common law principle specifically directing their use solely for one purpose and for no other, these funds appear to be subject to the Part KKK surcharge.

Should you have more complete information with respect to any of these funds, it would be useful for us to be able to see it in order to determine whether our original conclusions are correct.

CJDG/vv