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October 26, 2015

Senator Thomas Saviello, Chair
Representative Craig Hickman, Chair
Commission To Study the Public Reserved Lands Management Fund
c/o Legislative Information
100 State House Station
Augusta ME 04333-0100

Dear Senator Saviello and Representative Hickman:

You have asked for guidance from this Office as to whether certain proposed uses of revenue from Public Reserved Lands would be consistent with the public trust limitations on the use of such revenue. These limitations are embodied in Article X of the Maine Constitution. Since courts have not yet had occasion to draw a bright line between permissible and impermissible uses of this trust revenue, and the proposed uses have been presented only conceptually but not yet as draft legislation, it is not possible to reach firm conclusions as to their constitutionality. Even so, I offer the following summary of the two available legal authorities addressing the public trust limitations, together with some analysis as to how these opinions should inform your decision-making.

The 1973 *Opinion of the Justices*

When the Commonwealth of Massachusetts created and sold townships in Maine, it reserved "public lots" within those townships to support the local ministry and public education. When Maine became a state, Article X of the Articles of Separation, which became Article X of the Maine Constitution, designated the public lots "for the benefits of the Schools, and of the Ministry..." *Opinion of the Justices*, 308 A.2d 253, 254 (Me. 1973). Between 1824 and 1850, Maine enacted various legislation governing the use and management of the public lots, all of which specified that these lands were to be used to support the educational and religious uses identified in the Articles of Separation. *Id.* at 254-56.

In 1973 the Legislature considered a bill to direct that, among other things, (1) the public lots be used and managed for the benefit of the State as a whole; (2) the public lots be managed as multiple use state forests, and (3) income from the public lots be used for their management and for the acquisition of addition public lands to be managed under the same principles. *Id.* at 256-57. The Legislature requested an advisory opinion from the Justices of the Maine Supreme

Judicial Court as to whether the bill was consistent with the public trust limitations on the use of the public lots. The Justices issued an Opinion that the two uses designated in the Articles of Separation, "schools" and "ministry," were intended to be "illustrative" of permitted uses, but not "an exclusive listing." *Id.* at 253, 271. The Opinion of the Justices found that the uses of the public lots proposed in the pending legislation – to support the management of the public lots as multiple use forests, and to acquire additional public lands for the same purposes – did not violate the public trust limitations embodied in Article X of the Maine Constitution. *Id.* at 261-64, 270-71. The Justices also opined that the Legislature's foremost obligation is to "hold and preserve" the lands so that they remain available for permitted public uses. *Id.* at 271.

The 1992 *Opinion of the Attorney General*

In 1992 the Legislature enacted an appropriations bill that required an across-the-board transfer of 0.9% of the balance in all state accounts to the General Fund in order to address a budget shortfall. The Commissioner of the Department of Finance sought an Opinion of the Attorney General as to whether this general legislation applied to accounts that the State holds in trust for designated purposes, including the Public Reserved Lots Management Fund. *Op. Me. Att'y Gen. 92-07*, December 15, 1992. The Attorney General opined that the budget bill did not apply to this trust account, both because the Legislature did not express a specific intent to exercise its trust responsibilities in the bill, and because it is doubtful that such an expenditure would be consistent with the public trust limitations. *Id.*

Together, the *Opinion of the Justices* and the *Opinion of the Attorney General* show that: (1) The Legislature's foremost obligation as trustee of the Public Reserved Lands is to "hold and preserve" them for future public use – in effect protecting the trust's principal; (2) The Legislature has some flexibility in determining appropriate uses of the Public Reserved Lands and income derived from them, and is not restricted to the original uses designated in the Articles of Separation; (3) The management of the Public Reserved Lands as multi-purpose forests for recreation, sustainable timber harvesting, and wildlife habitat, as well as the acquisition of additional land for the same purposes, are permitted uses; (4) The Legislature must specifically express its intent to exercise its trust responsibility in legislation that purports to make use of these monies; and (5) Income derived from the Public Reserved Lands is not interchangeable with General Fund revenue, and may not be diverted to the General Fund for undifferentiated use.

In considering possible uses for the public lots, it is useful also to consider the provisions of Art. IX sec. 23 of the Maine Constitution, ratified by the people shortly after the 1992 Opinion of the Justices. This provision narrowly restricts what can be done with the proceeds of the sale of any public lots and requires a 2/3 vote by each House for any proposal to reduce or substantially alter the uses of public lots. While Art. IX sec. 23 may not relate to the specific proposals under consideration by your Commission, it provides a useful backdrop regarding the intent of the Legislature and of the Maine people regarding the preservation of these unique public lands and their current uses.

Uses Now under Consideration

Your letter seeks guidance on three proposed, new uses of this public trust income: (1) the purchase of heating equipment for low-income families in rural areas; (2) the transfer of trust monies to the Bureau of Parks and Lands for state park purposes; and (3) the purchase of other real estate of various types. Drawing upon the legal analysis above, I offer the following observations.

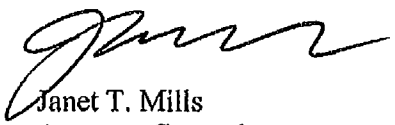
While the purchase of heating equipment for low-income rural families is a laudable goal, as is public assistance for food, shelter and health care, it is not easy to draw a connection between these types of uses and the preservation of the Public Reserved Lands. Under the very limited language of the Opinion of the Justices, this proposed use would likely meet great skepticism from the Court.

The transfer of trust monies to the Bureau of Parks and Lands to administer state parks raises a different concern. The use of trust money for this purpose would displace, dollar-for-dollar, General Fund revenue that is now used for this purpose, effectively making trust money interchangeable with General Fund revenue, which is not permitted.

The validity of purchasing "real estate of various types" as a proposed use of trust money depends on the characteristics of the property and the uses to which it would be dedicated. The *Opinion of the Justices* approved the use of trust money to acquire additional Public Reserved lands to be managed as multiple use forests. *Opinion of the Justices*, 308 A.2d 261-64, 270-71. Acquisition of property that is not designated as Public Reserve Lands, but that is dedicated to the same or substantially similar uses, might also be permitted. However, legislation authorizing the expenditure of trust monies for this purpose would have to include specific fact-finding to address why the property acquisition is consistent with the Legislature's public trust responsibilities, and it would have to ensure that the acquired property will be managed in accordance with public trust principles. Thus narrowed to resemble the proposal before the Court in 1972, such a proposal would have a decent chance to pass constitutional muster, much more so than the other two proposals.

I hope this information is helpful to the Committee.

Sincerely,



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