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CONSERVATION AND LEGAL POLITICS:
THE STRUGGLE FOR PUBLIC WATER POWER IN MAINE
1900-1923

The idea of public ownership and development of water resources gained considerable momentum in early twentieth-century Maine, first under Progressive Republican Governor Bert M. Fernald, and then again under Percival P. Baxter. In this article Christopher S. Beach explores critical turning points in Maine's conservation history and suggests reasons why state leaders failed to grasp the opportunity to develop Maine's water powers publicly. While popular pressures may have influenced resource policies, they could not alter a deeper commitment to decentralized government and private power in the state. Baxter, having generated impressive popular support, was frustrated by powerful constitutional constraints and by the process of legal politics.

Development of water resources was a primary impetus for the rise of the progressive conservation movement. In many parts of the nation, conflicts between the different users of water resources – especially irrigators, navigators, and power producers – created political opportunities for people who believed in centralized planning and efficient utilization. In the West, the federal government retained control of most of the headwaters areas that were the key to water planning, and the navigational and flooding issues in the vast regions of the Mississippi Valley also assured a continuing federal presence. In these circumstances, when political conflict generated interest in water, conservationists had a ready-made base for experiments in federal executive stewardship.¹ The situation was different in New England.



The legal history of Maine is punctuated by conflicts between various water users, such as dam builders and log drivers. In the early twentieth century, these battles centered on the issue of public vs. private hydroelectric power development.

Photo courtesy University of Maine Special Collections Department

With its maritime climate and relatively short, steep rivers, natural conditions in New England vary substantially from those in the arid West and the flat central regions. Irrigation and navigation were not as important as hydropower, so competing interests did not stimulate extensive political conflict. Federal or state governments had never been a major factor in resource development, and private control of the region's rivers and lakes was not seriously challenged. Water was a vital component in New England's development as an industrial center, but typically it did not provide the conditions which underlay the robust conservation debates found elsewhere.² Perhaps because of these circumstances, the politics of conserving water resources in New England has not been subjected to extensive historical analysis.³

Conditions in Maine, however, were more conducive to political controversy. At the beginning of the Progressive period, many of Maine's rivers and lakes were not yet fully developed for hydropower. As the state's potential for hydroelectric development became clear after the turn of the century, conflicts involving traditional users like fish gatherers and lum-

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ber drivers, and the newer manufacturers and resort operators, stimulated substantial interest in water issues. Yet the potential role for Maine's executive branch was limited. Maine's resource development policies were designed to facilitate development by private capital supported by legislative action and judicial oversight. Unlike the federal government, the state retained too little control over its resources to exert an executive presence. This unique combination of circumstances – extensive political conflict over water but no federal or state direction – makes examination of Maine especially interesting for students of conservation history. Progressive conservationists in Maine faced two obstacles: not only were the ideological objections to the “gospel of efficiency” as deeply rooted in Maine as they were across the nation, but the existing political distribution of power precluded a strong role for the state executive. Conservation politics in Maine involved both ideological conflict *and* a structural challenge to the combined dominance of the legislature and judiciary.

In a recent article, Richard Judd focuses on the ideological aspects of the conflict over water resources. He argues that conservation politics in Maine between 1890 and 1929 were generated and conditioned at the grass-roots level by conflict between three interest groups: rural traditionalists, industrial capitalists, and representatives of the state's tourist industry.⁴ His study, however, neglects a second arena of conflict. When Maine's conservationists began advocating that the state replace private capitalists as the primary developer of Maine's water resources, they were also advocating expansion of the executive branch of government. This challenge to the hegemony of the legislature and judiciary could not be resolved solely through ideological compromise. Conservationists had to thread their way through a set of legal obstacles designed to circumscribe political change. For this reason, it is important to examine how Maine's conservation debate was circumscribed by legal rhetoric and legal maneuvering.⁵

Briefly, the idea of public ownership and development of water resources gained considerable momentum in Maine dur-

ing the first decade of the twentieth century, but was determined to be too radical by the legislature. Creation of the Public Utilities Commission in 1913 legitimized the idea of private development and put an end, temporarily, to the question of public power development. A second attempt to establish public control of the state's water resources gained even greater popularity between 1917 and 1923. This time, however, conservationists, notably the popular Governor Percival P. Baxter, ensnared the idea in a challenge to the Judiciary Branch. Despite the popularity of this conservation ideal, legal "opinions" created obstacles to executive stewardship that could not be overcome. When Maine's legal guardians proved themselves more adept at "legal politics" than the state's conservationists, the struggle for public control of water again failed.

WATER CONFLICT AND THE STRUCTURES OF POWER, 1900-1913

After three centuries of logging, Maine was no longer the Pine Tree State: With its potential for industrial growth seemingly locked in its "white gold," its nickname should have been changed to the Water State. Political conflict over the use of Maine's rivers and lakes was particularly intense during the first decade of the new century. Water transportation, in the form of log driving, was subordinated to manufacturing and power, but only after extensive and volatile political debate.⁶ Accommodations between traditional users, manufacturers, and the tourist resort industry were also achieved only after widely publicized political campaigns.⁷ The development of hydroelectric generation and transmission technologies added a new overlay of controversy. After various capitalists from southern New England tried repeatedly to capture Maine's hydroelectric power potential for their factories, conflict was constrained and all of Maine's interests joined in enacting the so-called Fernald Law, which prohibited exporting electricity from the state.⁸

The initial stimulus for water conservation ideas in Maine was the threat posed by outside capitalists. In 1903, Boston



Worried that new long-range electric transmission technologies would allow developers to use Maine resources in rival industrial centers, conservationist Edward P. Ricker lobbied for a law prohibiting the export of hydroelectric power from the state.

POLAND CENTENNIAL (1895)

capitalists asked Portland consulting engineer Everett C. Jordan to provide a list of all water powers within 250 miles of their city. Sensitive to the importance of new long-distance electric transmission technologies, Jordan became “a good deal disturbed” by the request, and feared that Maine would suffer “depopulation” if its water powers were diverted to serve factories outside the state. When the U.S. Geological Survey began studies of Maine’s rivers and power sites the next year, Jordan was even more alarmed. He contacted a prominent resort operator, Poland Springs’ Edward P. Ricker, and the two began garnering support for water conservation measures in Maine.⁹

Like conservationists elsewhere, Jordan, Ricker, and other Mainers they recruited into the nascent movement all believed in the most efficient and most scientific utilization of water resources. Like most Progressive-era conservationists, they endorsed the idea of centralized political power.¹⁰ Convinced that private capital was not capable of achieving the highest levels of utilization, they advocated state control of water resource development. Selling these ideas in Maine’s complex political marketplace would not be easy. The conservationists were challenging both the dominance of private capital and the constitutional distribution of power that secured it.

Maine's political and legal system strongly favored economic development by private capital. The Republican party had dominated the state's political process since the Civil War, with ordinary political power centered in the legislature. During this Republican era, the legislature had transferred the state's forest lands and many of its water powers to private capitalists.¹¹ Governors were generally dependent on party leadership and were prevented from developing excessive power by their brief terms of office. If the legislature seemed to encroach too far into the prerogatives of private capital, the Maine Supreme Judicial Court stood ready to exercise extraordinary political power through its control of constitutional interpretation.¹² Centralization of power in the executive, and the development of bureaucratic means to administer water resources, would entail significant changes in the structure of Maine's government.

The conservationists were just getting organized when Maine's governmental structure was challenged from another quarter. The Maine State Grange and other groups upset about the corruption in enforcement of the prohibition laws sought to limit the legislature's exclusive control over reform legislation. After several years of campaigning, in 1907 they obtained an amendment to the state constitution that permitted direct popular initiation of new legislation and direct popular referenda on existing legislation. This change in the direction of popular democracy would become an important feature of Maine's conservation politics in ensuing decades. A simultaneous bid for direct popular initiation of constitutional amendments failed, however. A majority in the legislature was persuaded that the "fundamental law of the State" should not be "subject...to the passing thought of the hour."¹³ Thus the progressives were not able to alter the ultimate power of the judiciary over constitutional matters.¹⁴ The authority to limit state intrusions upon private capital remained firmly entrenched in the judiciary, through its power to interpret the constitution.

During these years, however, progressive ideas were increasingly popular, and in 1908 conservationists succeeded in obtaining the nomination and election of one of their own, Bert



Governor Bert M. Fernald, elected on a rising tide of progressive politics in Maine, proposed a commission that would initiate water power development "under ultimate State ownership and control."

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M. Fernald, with a great deal of support from the Ricker family. When Fernald proposed a commission to devise plans for developing Maine's water powers "under ultimate State ownership and control," several years of effort by conservationists came to a head.¹⁵

Fernald's decision to broach this idea was based on a number of political considerations. Conservation had become popular nationally and locally. In Maine, as elsewhere, it was fueled by popular resentment of the corporations that dominated the local economy. Textile, paper, and hydroelectric developers had taken control of the state's rivers and lakes. Yet at the same time, Fernald had reason to believe he had the support of the state's most dynamic resource-based corporations. The state's two largest pulp and paper corporations had indicated they wanted more state involvement in developing reservoirs. In addition, Fernald did not believe the State Supreme Judicial Court would interfere on constitutional grounds. In a recent advisory opinion written by Chief Justice Lucilius Emery, the court had decided that the state could regulate timber cutting without "taking" (or appropriating) vested rights, and Fernald interpreted this to mean that the court would not object to state intervention in water development.¹⁶

In this reform context, the legislature approved Fernald's proposal for a State Water Storage Commission. Fernald appointed himself, Jordan, Ricker, and other prominent conservationists as commissioners. They hired engineer Cyrus Babb to begin planning for the state to assume development of its water resources. Babb wrote a conservation manifesto on the necessity of the state developing and owning hydroelectric generating and storage facilities, and the commissioners published it in 1910 as part of their first report. Although the commissioners asserted that they did not wish to appear "too radical," their recommendation that the state undertake "regulation" of all reservoirs constituted a major ideological shift.¹⁷

The political momentum building towards reform then swung quickly against Maine's nascent conservation movement. Opponents argued that radical proposals created political instability and thus deterred capital from investing in the state.¹⁸ Given Maine's biennial election process, conservationists were not assured executive continuity. Fernald, in fact, was defeated in 1910 and his successor, Democrat Frederick Plaisted, was no friend of the conservationists. He announced in 1911 that "our water powers can only be made valuable by being developed by private enterprise and capital. The State will never, as a State, develop a single water power, build a single storage dam, or erect a single power station."¹⁹ Instead of public power, Plaisted recommended establishment of a Public Utilities Commission which could coordinate the activities of the state's private utilities. The commission was formed in 1913, absorbing Fernald's State Water Storage Commission in the process. The P.U.C. facilitated the expansion of the state's private utility industry, and the idea of public power was buried in the process.²⁰

The changes in Maine's political system between 1907 and 1913 were limited. The people had obtained the power to initiate and veto legislation, but not the power to overcome judicial decisions on matters deemed "constitutional." This would prove to be a substantial limitation in future conservation struggles. The State Water Storage Commission did not evolve into an executive agency that controlled or operated water

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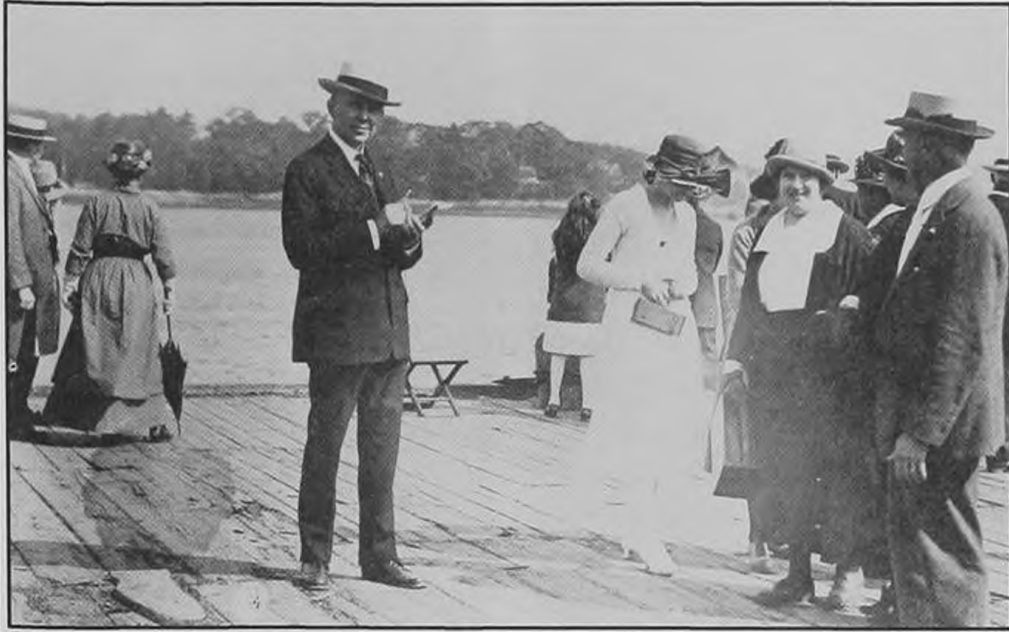
power facilities. Instead, the P.U.C. became an agency dedicated to facilitating development of the electric industry by private capital. Conflict over the use of water resources created enormous popular interest during these progressive years, but the primary solution proposed by conservationists had been rejected.

In the years immediately after establishment of the P.U.C., the only group actively interested in state ownership of water resources was the socialists. In every legislative session between 1913 and 1923 a document known as "the Tracy Bill" was introduced, referred to committee, and buried with a recommendation of "Ought Not to Pass." The bill called for establishment of a "People's Rights and Water Power Commission," which would assume control of all rivers, lakes, pond, and reservoirs, produce and distribute electricity, and divide any profits "annually per capita to every man, woman and child who are legal inhabitants of the state."²¹

While the Tracy Bill contained legal assertions contrary to much of the state's water law, it did reflect a popular understanding that Maine's water resources were "owned" by the public, and could therefore be controlled and developed by public authority. The belief had some support in recent judicial opinions, including a 1910 restatement of public rights in "great ponds" written by the state's most scholarly justice, Albert Savage of Auburn.²² This belief in ultimate public ownership would provide a popular base for the revival of the campaign for public power which began in 1917.

PERCIVAL BAXTER AND PUBLIC POWER, 1917-1923

The revival of the conservation movement was carried out largely through the efforts of a single individual: Portland's Percival P. Baxter. Like Gifford Pinchot at the national level, Baxter's personal ambition and political preferences had an overwhelming influence on the course of the conservation movement in Maine after 1917. Without Baxter, it is possible the second campaign for public power would never have occurred.



A second public water power campaign was launched by Governor Percival P. Baxter in 1917. Baxter, who served intermittently in the Maine House and Senate before becoming governor in 1921, announced his willingness to do battle with the state's most powerful industrial corporations.

Photo courtesy Earle Shettleworth, Maine Historic Preservation Commission.

His strategic decisions, his tendency to create confrontations to generate popular support, and his personality were intimately intertwined with the popularization – and the ultimate failure of the second effort to establish public control of the state's water resources.²³

Percival Baxter learned to appreciate the forests and waters of inland Maine as a child during extended fishing and canoeing trips with his father. He attended Bowdoin College and then Harvard Law School, graduating in 1901. He served in the Maine House in 1905 and in the Senate in 1909. He never practiced law, but confined his professional life to managing his father's businesses, investments, and philanthropies.²⁴ Reelected to the Maine House of Representatives in 1916, Baxter was determined to make conservation the centerpiece of his political career.²⁵

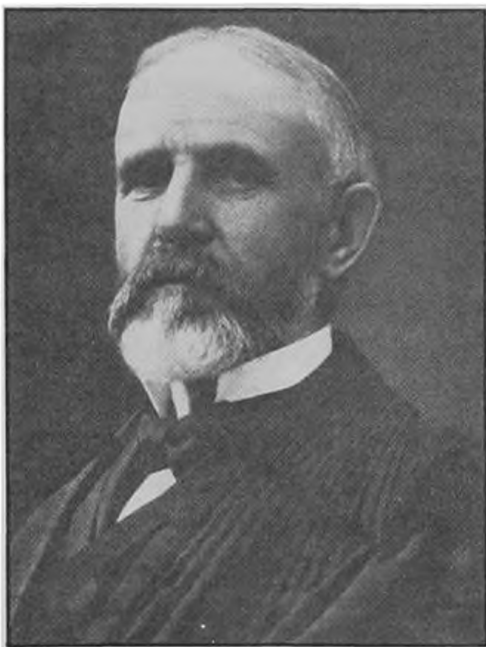
The state's largest landowner and manufacturing corporation, the Great Northern Paper Company, had long since abandoned any desire to have the state involved in developing reservoirs. It wanted to construct an enormous new dam on the

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Penobscot – “its river” – and came to the 1917 session of the legislature expecting easy confirmation of its right to flood upriver lands owned by others. When the bill reached the Senate floor for committee assignment, Baxter tried to get it referred to the Judiciary Committee, arguing that the request involved a major issue of public control. Asserting that Great Northern had, in effect, purchased the votes of the 1903 legislature in obtaining its original franchise rights on the river, Baxter gave notice that he was willing to do public battle with the state’s most powerful industrial corporation. The proposal was defeated by a wide margin.²⁶ His continued opposition to the bill, based on claims that the paper companies had effectively stolen their timberlands from the people of Maine, was equally ineffective. At this point, Baxter decided to salvage some publicity advantage by offering an amendment providing for reversion of the flowage rights to the state at no compensation, in the event that the state reacquired control of the river. When Great Northern indicated no opposition to the amendment, believing that such a state taking was extremely unlikely, Baxter described the company as “fair and reasonable.”²⁷ Baxter received valuable experience and a good deal of publicity from these events. Great Northern, meanwhile, consolidated its hold on the largest privately held water power system in the northeast and prepared to keep an eye on the mischievous new legislator.

When the legislative session ended, Baxter mounted a campaign to revive conservation ideas in Maine. Touring the state, he spoke to granges and other popular groups, focusing on the fact that legislators had thwarted “the People’s Rights” by delivering water resources into the hands of the corporations. He corresponded with other conservation activists, including Arthur Staples, a lawyer who had written a series of editorials in the *Lewiston Journal* on water conservation.²⁸ Baxter appeared at the Republican convention and introduced a “Water Power Resolution” calling for state assumption of all water power and storage sites.²⁹

Baxter’s publicity campaign quickly attracted the interest of the state’s largest manufacturers and utilities, sixteen of which



Lucilius Emery (left), former Chief Justice of the Maine Supreme Judicial Court, drafted a long letter attacking the legal premises of Baxter's proposals and sent it to Old-Guard Republican William T. Cobb (right). Governor of Maine prior to Fernald's administration, Cobb was an ardent foe of progressives like Ricker and Baxter, and he saw that Emery's letter reached the public.

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joined together to hire a publicity agent for a countercampaign. The agent denounced Baxter and his fellow conservationists for advocating "drastic and socialistic," "wild," and "ruthless" ideas and for "discourag[ing] the investment of capital" by "threatening the security of the title of owners of water powers."³⁰ Baxter's energetic campaigns and the corporations' response quickly revived popular interest in water power. The issue became the central conflict in Maine politics in the early 1920s.

Baxter's campaign also attracted the attention of another Mainer, with a much longer history in public life. Lucilius Emery was the former chief justice of the Maine Supreme Judicial Court, a speaker and author on a wide variety of legal subjects, an inveterate writer of letters-to-the-editor on many topics, and a professor at the state's law school in Bangor. Born in 1840, elected as a state senator and as a state attorney general in the 1870s, Emery was a long-time law partner with one of Maine's most prominent national senators. Appointed to the Maine

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Supreme Judicial Court in 1883, and serving as the state's chief justice from 1906 to 1911, Emery was approaching the end of a long career devoted to public affairs.³¹ Any pronouncement he chose to make on legal or constitutional matters carried considerable weight.

Emery carefully followed Baxter's revival of water power issues in the 1917 legislature. Baxter's ideas on public ownership were anathema to Emery, who was firmly committed to the ideology of limited state intervention in economic development. On March 10, 1917, he mailed a long letter attacking the legal foundation of Baxter's proposals to a prominent Republican, William T. Cobb. In the letter, Emery set out an ingeniously crafted legal argument. It would be unconstitutional for the state to develop any water powers, he argued, because the takings necessary for such development would not be a "public use."³² The party leadership decided that Emery's letter should be published. To give the opinion the greatest weight possible, the letter would appear in the form of a special report issued by the P.U.C. With some revision, the letter was presented to the public in 1918 as "The Legal Phase of the Water Power Investigation, By Lucilius A. Emery, Former Chief Justice of the Maine Supreme Judicial Court."³³

Baxter obtained a copy of Emery's letter before its publication and proceeded to make the biggest blunder of his public career. He did not seek to counter the legal conclusions stated in the letter; nor is there any evidence in his private papers that he sought the advice of more learned and politically savvy lawyers than himself. Instead of challenging Emery's interpretation, he dashed off an "open letter" to Governor Carl Milliken with copies to all the state's daily newspapers, declaring that there was "grave doubt under our Constitution as to whether the State can condemn water powers and develop and distribute electricity." Baxter demanded that the governor call a special session of the legislature to prepare a constitutional amendment that would give "the State the power to condemn and take over both the developed and undeveloped water powers and the great storage reservoirs of our Lakes and Rivers."³⁴

Baxter's confrontational strategy played into the hands of the opposition. Before a constitutional amendment could be submitted to a popular vote, it would have to be approved by a two-thirds majority in each house of the legislature. Under the state constitution, the House or the Senate, not the people, controlled constitutional amendments. Provoking a battle over the constitution introduced a new element into the public power debate, one that significantly increased the obstacles to its success.

During the 1919 session of the legislature, it became clear that Baxter could not garner the necessary votes to hold a constitutional referendum. Instead of backing away from the problem, he compounded his initial mistake by insisting on a constitutional confrontation. Instead of countering Emery's legal opinion, Baxter proposed that the issue be submitted for an advisory opinion from the members of the Maine Supreme Judicial Court.³⁵

Maine's advisory opinion procedure was an anomaly within American judicial practice. With origins in medieval English legal procedures established prior to principles of separation of judicial from executive and legislative powers, it had survived the American Revolution because the early republicans feared executive power more than judicial power.³⁶ From the perspective of the conservationists' strategy, the most important feature of the procedure was that it did not involve the adversarial presentations used in normal litigation. Neither Baxter, his fellow conservation activists, nor their corporate opponents had any opportunity to present arguments to the justices. Former Chief Justice Lucilius Emery himself had argued in a 1908 law review article that the procedure was "undesirable" for two reasons: the lack of adversarial argument meant a "greater liability to error" on the part of the justices, and the procedure opened the court to criticism for displaying "undue sympathy with a class or some powerful interest, or with some political or economic dogma."³⁷

Baxter had entered a legal game that was stacked against him. The only "brief" the justices had on the public power idea was the opinion by their former chief justice that had been

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published by the P.U.C. The justices adopted Emery's theory that privately owned power sites could not be taken by eminent domain because of the judicially created "public use" doctrine. Under their convoluted and technologically dated interpretation of the doctrine, the taking would constitute a "private use" because much of the electricity produced would be distributed to "private" manufacturers.³⁸ In an unusually sarcastic passage, they attacked the popular beliefs which underlay the political support for public ownership:

There seems to be some misapprehension as to these so-called public rights in great ponds. They are often spoken of as if they were sacred and inalienable. Not so....They can be granted and conveyed, as they often have been, by the Legislature, which represents the people. What is owned by the people may be transferred by the Legislature, unless prohibited by the Constitution, and no such constitutional inhibition barricades the way here. So much for public rights in great ponds.³⁹

Control of water resources in Maine, according to the justices, was a one-way matter. The state could give water rights to private capitalists; once given, the state could not take them back. The public's "ownership" of the great ponds was rendered valueless. The great ponds could be dammed up and used for the production of power by private capital; the state could not even impose taxes for their use as reservoirs, much less enter the business of producing or distributing electricity. The opinion was a resounding victory for the advocates of private control of Maine's water resources.

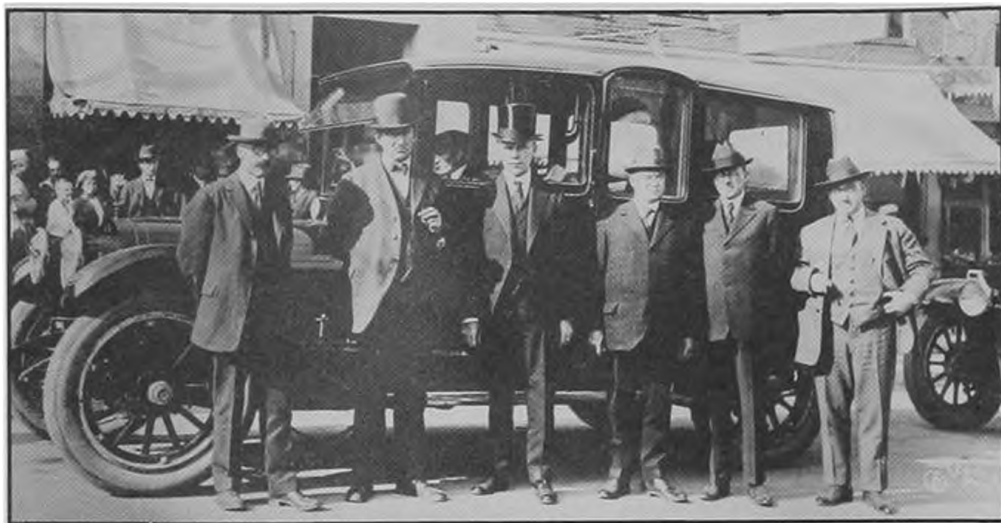
While events in the legal arena were shaping the terms of the struggle, the conservationists were having more success in the more ordinary political arena. Before the justices' opinion was issued, conservationists had succeeded in reviving the old State Water Storage Commission as an agency separate from the

P.U.C., this time calling it the Maine Water Power Commission. Edward Ricker, by this time the second most prominent conservation activist in the state, was appointed chairman. The new commission was authorized to report on whether water resources should be "acquired and developed by the state or by private enterprise." The commission was also directed to determine "what rights remain to the state in the storage reservoirs and basins and in the developed and undeveloped water powers." In short, it was to study the legal status of state control of water resources.⁴⁰

By the time the new commission was organized and issued its first report in 1920, however, it was too late. The justices had already published their opinion that it was unconstitutional for the state to store, produce, or distribute power. The commission tried to counter the justices with its own legal arguments, citing numerous precedents from other states, quoting a lengthy 1915 decision by United States Supreme Court Justice Oliver Wendell Holmes, and concluding that "the construction of storage reservoirs by the State...is essentially and in fact a public use." Yet, the commission stated, it was "useless" to present proposals to the legislature given "the attitude of the Maine courts."⁴¹ The commissioners were correct: While the justices' advisory opinion did not possess the technical status of final law, it was highly unlikely that the sitting justices would change their opinion in any litigation that might result from reform legislation.

The only practical course left for the activists at this point was to overturn the opinion by amending the state constitution. They were busy promoting possible amendments when events seemed to turn their way.⁴² When Governor Frederick H. Parkhurst died unexpectedly on January 31, 1921, Percival Baxter, then president of the Maine Senate, became governor.⁴³ The prospects for overcoming the legal imbroglio looked promising. Yet Baxter's confrontational leadership style precluded a reconciliation between the executive and judicial branches.

One of Baxter's first steps as governor was to fire the longtime chairman of the P.U.C., Benjamin Cleaves, allegedly for acting as a paid lobbyist for the utilities.⁴⁴ Baxter also led



Governor Baxter (in silk hat) tours through Belfast, October 18, 1921.

Photo courtesy Earle Shettleworth, Maine Historic Preservation Commission

efforts to eliminate state funding for the Law School in Bangor, an institution that had been a pet project and propaganda base for Lucilius Emery. Rather than work quietly behind the scenes to persuade the opposition that the state storage idea had real merit, Baxter continued to present his positions in the form of open letters, proclamations, pamphlets, and other public propaganda. The constitutional amendment he submitted to the legislature in March 1921 gave the state much broader authority than the development of storage reservoirs and taxation of water powers, increasing suspicions about his real intentions. After extensive and acrimonious debates, the proposed amendment was soundly defeated in both houses.¹⁵

Ironically, Baxter's failure in the legislature seemed to add to his stature as a popular politician. He was able to secure his party's gubernatorial nomination and obtained a resounding victory in the next election. While part of his popular political success can be attributed to his fiscal conservatism, it was also due to his stand against "the octopus," especially on the water power issue. His election as governor in 1922 was the closest thing to a popular mandate for public power the conservationists would ever achieve.

Baxter opened the 1923 session with a conciliatory offer on water resource development. He would no longer seek to tax

water powers; nor would he advocate a central power grid developed and operated by the state. All he wanted was an amendment to the constitution allowing state development of storage reservoirs.⁴⁶ This limited proposal was soon buried within a related controversy. Seven of the state's largest manufacturing and utility corporations submitted a bill that would give them the development rights to a major reservoir site: a portion of the Dead River near Bigelow Mountain. When the bill received approval, Baxter vetoed it because he wanted the site developed by the state instead. His veto was overridden by a wide margin. Baxter responded with an emotional public proclamation denouncing the bill, the corporations and their lobbyists, the P.U.C., the legislature, and the opposition newspapers. He then called for the citizens of Maine to initiate legislation repealing the bill.⁴⁷ In the context of this acrimonious controversy, Baxter's proposed constitutional amendment on storage was trounced in the legislature.⁴⁸ Baxter could get popular support on ordinary legislation like the reservoir bill under the initiative and referendum procedures of the state constitution, but he could not get past the legislature with an amendment which would allow the state to develop that same reservoir in its own right.

The corporations initiated a counter-referendum. Facing complete defeat, Baxter then proposed a compromise in which the state would lease the reservoir site to the corporations for a minimal rental fee. The offer was accepted, and both referendum campaigns were halted. The corporations then repudiated the deal by refusing to develop the site. By this time, any momentum in Baxter's favor had dissipated.⁴⁹ The vision of state control of water resources had collapsed.

CONCLUSIONS

Percival Baxter's opponents did not forget this public power campaign. When Baxter sought his party's nomination as United States senator in 1926, the same interests led the fight to stop him. As he saw the nomination slipping from his grasp, Baxter reflected on his past mistakes. The real turning point in

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his career, he felt, was the unsuccessful confrontation he had provoked with the state's judiciary back in 1919. Jotting a note to himself on the back of an envelope, Baxter wrote: "Had it not been for the out-of-date opinions of the Maine Supreme Court, a court that looked backward and not forward, a court too much influenced by the business interests of the State, not personally interested but impressed by them, I would have won. The people were with me."⁵⁰

Was Baxter Correct? Could the goal of public control of Maine's water powers have been achieved, had it not been preconditioned in a legal arena? Certainly he was correct in asserting that "the people" were with him; he had been one of the most popular governors ever elected in Maine, and his popularity was due in large part to his attempt to wrest control of the state's most important natural resource from "the octopus." While one could argue that the Maine Supreme Court would have declared such legislation unconstitutional anyway, this is somewhat speculative. As the State Water Power Commission pointed out in its belated legal brief, by 1917 there was ample precedent for government involvement in power projects at both the federal and state levels, and this precedent would certainly have been presented to the justices in a truly adversarial proceeding. The Maine court had previously written that the state "owned" the state's lakes, and conceivably it might have been amenable to contemporary reasoning of judges elsewhere on the public power issue. Further, the opposition was not fundamentally opposed to the kind of centralized power system envisioned by the conservationists. Early in 1921, before Baxter had engaged too many of his public confrontations, the president of the Central Maine Power Company had admitted privately that the only real difference between public and private control of hydroelectric development concerned the selection of its management.⁵¹ In these circumstances, it is possible that a majority in the legislature could have enacted the necessary legislation for some form of public power.

The traditional distribution of political power in Maine did not favor the establishment of executive stewardship of water

resources. Conservationists like Jordan, Ricker, Fernald, Babb, and Baxter faced difficult structural problems in their efforts to import water conservation ideas into Maine. In his study of grass-roots conservation politics in Maine, Richard Judd argues that the state's rural majority actively participated in creating the more limited kinds of conservation programs that were enacted, and in vetoing perceived corporate excesses through the referendum power.⁵² This study suggests that while popular majorities in Maine may have influenced ordinary resource policies, their influence did not change a deeper commitment to decentralized government and private power in the state. Popular influence could be contained within more powerful constitutional limits by the processes of legal politics.

Baxter's political failure demonstrates the difference between conservation politics in the East and in the West. The great achievements in American conservation – the national parks, federal forest preserves, and large-scale irrigation projects – took place at least initially in the West, where lands were still largely in the federal domain. In this new land, people with political resolve, like Frederick Newlands and Gifford Pinchot, could carve out vast changes in the concept of public responsibility for resource development. Eastern conservationists, with equally innovative ideas and the ability to excite the popular imagination, faced a much more daunting challenge. As Baxter's frustrating conservation story suggests, political tact and legal acumen were the keys to conservation politics where vested interests were strong and legal and political structures molded by centuries of private resource exploitation. Although America's conservation ideas were formulated by easterners to a large degree, the great stage for their implementation would be in the West.

A bust of Percival Baxter is now the centerpiece in the rotunda of Maine's statehouse. On contemporary highway maps, a patch of green surrounded by a white background marks the magnificent park he acquired and donated to the public. A monument to Baxter's public spiritedness, this patch of green also accentuates the overwhelming dominance of private land-

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holding surrounding it. The state's rivers and lakes continue to produce power under the control of its private paper and utility corporations. Percival Baxter was Maine's quintessential "public man," but after the failure of his water conservation campaign, he completed his life's work – Baxter State Park – in a very private way in a very private state: he personally bought up parcels of land from private timber companies and donated them, piece-meal, to the state.

NOTES

¹Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (Cambridge: Harvard University Press, 1959).

²See, for example, Theodore Steinberg, *Nature Incorporated: Industrialization and the Waters of New England* (New York: Cambridge University Press, 1991).

³For descriptions of this literature, see Richard White, "Environmental History: The Development of New Historical Field," *Pacific Historical Review* 54 (August 1985): 297-336.

⁴Richard W. Judd, "Reshaping Maine's Landscape: Rural Culture, Tourism, and Conservation, 1890-1929," *Journal of Forest History* 32 (October 1988): 180-190.

⁵For an introduction to the concept of legal politics, see Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (January 1984): 57-125.

⁶See David C. Smith, *A History of Lumbering in Maine, 1861-1960* (Orono: University of Maine Press, 1972), chapters 11-12.

⁷The pattern of accommodation was set by the famous "battle for the Rangeley Lakes" in 1907. For a recent recounting, see Judd, "Reshaping Maine's Landscape," pp. 187-88.

⁸See Lincoln Smith, *The Power Policy of Maine* (Berkeley: University of California Press, 1951), chapter 5.

⁹"Testimony of E.C. Jordan," *Maine House Documents*, no. 134, 1919. Also see Arthur G. Staples, "Evolution of Maine Water Powers: Conservation Problems of Central Maine," *Sprague's Journal of Maine History* 12 (April and July, 1924).

¹⁰Hays, *Conservation and the Gospel of Efficiency* pp. 271-73.

¹¹See Duane Lockard, *New England State Politics* (Princeton: Princeton University Press, 1959), chapter 4; James F. Horan, et als., *Downeast Politics: The Government of the State of Maine* (Dubuque, Iowa: Kendall/Hunt Publishing, 1975); and Elizabeth Ring, "The Progressive Movement of 1912 and the Third Party Movement of 1924 in Maine," *The Maine Bulletin* 35 (January 1935): 1-46.

¹²Important statements of the judicial policies which governed the distribution of power in Maine include Chief Justice John Appleton in *Allen v. Inhabitants of Jay*, 60 *Maine Reports* 124 (1872); and Chief Justice Albert R. Savage, "Some Sore Spots," *Maine Law Review* 7 (December 1913): 29-41.

¹³Maine, *Legislative Record*, 1907, pp. 639-47; quote at p. 642.

¹⁴The procedure for amending the constitution remained as before: approval by a two-thirds majority in both houses of the legislature before an amendment could be submitted to the voters. See Maine, *Legislative Record*, 1907, pp. 639-40.

¹⁵*Maine Public Laws*, 1909, pp. 1439-40.

¹⁶Hugh Chisholm (president of International Paper Company), "History of Papermaking in Maine," Maine, *Report of Industrial and Labor Statistics*, 1906, p. 168, and Great Northern Paper Company, "Facts and Figures," typescript of testimony before 1907 legislature, Box 843, Ripogenus Dam file, Great Northern Paper Company Papers, Fogler Library, University of Maine. Also, speech of Bert M. Fernald honoring Chief Justice Emery, January 26, 1911, Lucilius Emery file, Alumni Collection, Bowdoin College Library, Bowdoin College; and Opinion of the Justices, 103 *Maine Reports* 506 (1907).

¹⁷State Water Storage Commission, *First Annual Report* (1911), pp. 1-5.

¹⁸This argument became a major theme throughout the two phases of the public power campaign. Arthur Staples, "Evolution of Maine's Water Powers," p. 135.

¹⁹Inaugural Speech of Governor Frederick Plaisted, *Legislative Record*, 1911, pp.

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21-22.

²⁰See *Legislative Record*, 1913, pp. 879-911, 1033-51.

²¹The history of the bill can be traced in the *Legislative Record* and the House and Senate Documents. See, for example, *Senate Documents*, 1917, no. 56, or *House Documents*, 1919, no. 81.

²²See *Conant v. Jordan*, *Maine Reports* 107 (1910): 227. Another case reinforcing popular belief in public ownership of water resources was *City of Auburn v. Union Water Power Company*, *Maine Reports* 90 (1897): 576.

²³On the strategic influence of Gifford Pinchot, see Hays, *Conservation and the Gospel of Efficiency*, chapter 9.

²⁴John W. Hakola, *Legacy of a Lifetime: The Story of Baxter State Park* (Woolwich, Maine: TBW Books, 1981), chapter 16. An extensive set of Baxter's papers is located at the Maine State Library in Augusta.

²⁵A wonderful introduction to Baxter's motivations and personality is found in a letter wrote to novelist and conservation publicist Holman Day in 1919, in which Baxter pledges that "I am in this water power conservation fight to stay." Baxter to Day, November 19, 1919, Percival Baxter Papers, Maine State Library, Augusta (hereinafter "BP").

²⁶*Legislative Record*, 1917, pp. 116-17.

²⁷John McLeod, "The Great Northern Paper Company," typescript, Fogler Library, University of Maine, 1978, chapter 12, pp. 11-16. See also Maine, *Private and Special Laws*, 1917, chapter 94, section 3.

²⁸Baxter to Staples, August 1, 1917, folder 7, BP.

²⁹Baxter to Holman Day, November 19, 1919, folder 52, BP.

³⁰William M. Pennell, *Maine Water Powers* (1918), copy located in folder 53, BP.

³¹Emery's public career is summarized in "In Memoriam: Lucilius A. Emery," *Maine Reports* 120 (1921): 575-99. In addition to his published formal opinions, his writings can be found in editions of the *Maine Law Review* published between 1908 and 1918, in his *Concerning Justice* (New Haven, Connecticut: Yale University Press, 1914), and in a clipping file, Alumni Collection, Bowdoin College Library, Bowdoin College.

³²Lucilius A. Emery to Hon. William T. Cobb (copy), March 10, 1917, folder 51, BP.

³³Maine Public Utilities Commission, *Special Water Power Investigation* (Lewiston, Maine: Journal Printshop, 1918), p. 412. Emery's opinion letter appears at pp. 11-12.

³⁴See the carbon copy of Emery's letter to Cobb in Baxter's papers; Baxter to Gov. Milliken, January 19, 1918, folder 51, BP.

³⁵*Legislative Record*, 1919, pp. 280, 357-62.

³⁶Comment, "The Validity of the Restrictions on the Modern Advisory Opinion," *Maine Law Review* 29 (1978): 305-24.

³⁷Emery was so upset about criticism he had received for issuing an advisory opinion supporting regulation of forest cutting that he took the unusual step of publishing a law review article while still serving as chief justice. See his "Advisory Opinions from Justices," *Maine Law Review* 2 (November 1908): 1-5, and his "Opinion of the Justices," *Maine Reports* 103 (1908): 506.

³⁸Following Emery, the justices relied upon a close result in a 1905 decision written by one of the court's most respected jurists, former Chief Justice Albert R. Savage. Writing at a time when transmission technologies were just beginning to allow mixed power and lighting distribution systems, Savage had concluded that land could not be

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taken for a transmission line serving a single manufacturer because it would be for a "private use." See *Brown v. Gerald*, *Maine Reports* 118 (1919): 506.

³⁹Opinion of the Justices, *Maine Reports* 118 (1919): 505.

⁴⁰Maine, *Public Laws, 1919*, chapter 132.

⁴¹Maine Water Power Commission, *First Annual Report* (1920), pp. 16-17, 28-29.

⁴²See Walter S. Wyman to Charles Cook, January 15, 1921, and Cook's reply to Wyman, January 17, 1921, folder 52, BP.

⁴³Hakola, *Legacy of a Lifetime*, p. 288.

⁴⁴Baxter to Cleaves, March 30, 1921, folder 8, BP.

⁴⁵See letter from Baxter to the Legislature, "Office of the Governor – Water Powers," March 17, 1921; *Legislative Record, 1921*, pp. 539, 557-60, 1062, 1257-79, 1288-1304.

⁴⁶"Inaugural Address of Governor Baxter for 1923," in Baxter, *Water Powers* (Maine State Library, privately bound, n.d.). As he retreated from his earlier positions, Baxter was acting in greater cooperation with other political leaders. See his "Maine's Water Power Policy as Defined by Governor Percival Baxter," August 8, 1921, in the *Water Powers* collection.

⁴⁷See Baxter's "Veto Message," March 22, 1923, in the *Water Powers* Collection.

⁴⁸*Legislative Record, 1923*, pp. 706, 733-35.

⁴⁹See Baxter's "Speech to the Legislature," April 5, 1923; "Letter to the Legislature," April 6, 1923; "Inside History of the Kennebec-Dead River Storage Charters," 1923; and "The Water Power Resources of the State of Maine," 1923, all in the *Water Powers* collection. The sequence is described in Lincoln Smith, *Power Policy of Maine*, pp. 173-78.

⁵⁰Envelope located in folder 53, BP.

⁵¹Walter S. Wyman to Charles Cook, January 15, 1921, folder 52, BP.

⁵²Judd, "Reshaping Maine's Landscape," p. 190.

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