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RIVER OF BROKEN PROMISES

A REPORT ON STATE MANAGEMENT
OF THE ALLAGASH WILDERNESS WATERWAY
UNDER THE NATIONAL WILD AND SCENIC RIVERS ACT OF 1968

BY W. KENT OLSON

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February 13, 2001

AN ALLAGASH PARTNERS MONOGRAPH

“From Telos to the junction of the Allagash and the St. John it is a bit over a hundred miles. There are no hundred miles in America quite their equal. Certainly none has their distinctive quality. They will, I pray, be preserved for all time as a roadless primitive waterway.”

-- SUPREME COURT JUSTICE WILLIAM O. DOUGLAS,
My Wilderness: East to Katahdin (1961)

“As you know, both Secretary [of the Interior] Udall and I have felt from the very beginning that the key issue on the Allagash is the preservation of the riverway as a free-flowing stream and, insofar as possible, unspoiled forest area. To be meaningful such preservation must be made in perpetuity....As I see it, the burden is on the State to develop a meaningful program which will truly insure preservation of the area in perpetuity.”

-- LETTER FROM U. S. SENATOR EDMUND S. MUSKIE TO HONORABLE
AUSTIN H. WILKINS, FORESTRY COMMISSIONER, STATE OF MAINE,
(November 18, 1964)

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For David R. Brower
1912 - 2000

Long live the yak

Acknowledgments: Allagash Partners thanks the many attorneys, conservation professionals and other readers for their contributions to successive drafts. You know who you are. Any errors of fact or interpretation are those of Allagash Partners.

RIVER OF BROKEN PROMISES

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List of Nineteen Exhibits in Appendix

Nineteen exhibits, including numerous primary sources, appear in the Appendix in the order of their relevant introduction in chapters one through seventeen:

Exhibit 1: List of the 18 rivers designated under Section 2(a)(ii) of the National Wild and Scenic Rivers Act.

Exhibits 2, 3, 4 & 5: Prof. Dean Bennett- Gov. Kenneth Curtis correspondence, June 10-July 6, 2000 (Bennett-Curtis correspondence).

Exhibits 6 & 7: Application letters from Governor Kenneth M. Curtis to Interior Secretary Walter J. Hickel (Curtis, 4/10/70 & 5/4/70).

Exhibit 8: 1970 "Guidelines for Evaluating Wild, Scenic and Recreational River Areas Proposed for Inclusion in the National Wild and Scenic Rivers System Under Section 2, Public Law 90-542, Reprint - February 1977" (1970 Guidelines).

Exhibit 9: "The Allagash Wilderness Waterway, April 1970" (1970 Report).

Exhibit 10: *Federal Register* notice, July 17, 1970 pp. 11525, 11526 (1970 Fed. Regis.).

Exhibit 11: "Rules and Regulations for the Allagash Wilderness Waterway," 1/1/96 (1996 Rules).

Exhibit 12: Memo from DOC planner Tom Cieslinski to various recipients (De-designation Memo, 8/10/98).

Exhibit 13: Letter from Sen. Edmund S. Muskie to Hon. Edward P. Cyr (4/11/63).

Exhibit 14: Letter from Sec. of the Interior Stewart L. Udall to Gov. John H. Reed (draft 12/16/63).

Exhibits 15: Letter from Sen. Edmund S. Muskie to Hon. Austin H. Wilkins (11/18/64).

Exhibit 16: Letter from Sen. Edmund S. Muskie to Mr. Malcolm Stoddard (6/11/65).

Exhibit 17: Letter from Sen. Edmund S. Muskie to Sen. Henry M. Jackson (6/8/65).

Exhibit 18: Letter from Donald E. Nicoll, Admin. Asst. to Sen. Muskie, to Glenn Mahnken, Antioch College student (11/5/65).

Exhibit 19: "Maine's Allagash: A river wild, or is it?" by Beth Daley, *The Boston Globe*, November 28, 2000, pp. E 1-4. (Globe, 11/28/00).

Other cited materials are documented in the text or in numbered footnotes.

RIVER OF BROKEN PROMISES

A REPORT ON STATE MANAGEMENT
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Executive Summary

“...maximum wilderness character”

-- ALLAGASH WILDERNESS WATERWAY STATE STATUTE, 1966

On May 11, 1966, the Maine Legislature passed the Allagash Wilderness Waterway statute (AWW Statute) to protect the Allagash as a wilderness river, contingent upon passage of a state bond issue “to develop the maximum wilderness character of the Allagash Waterway.”

On November 8, 1966, Maine citizens passed a referendum question authorizing a bond of \$1.5 million “to Develop the Maximum Wilderness Character of the Allagash Waterway.” The vote was 184,937 in favor (68%), vs. 85,454 against (32%).

Four years later, in 1970, the state sought and was granted a federal designation for the Allagash under the National Wild and Scenic Rivers Act of 1968 (the Act), as amended. At the state’s request, the Allagash was permanently classified as a federal Wild river, for 92.5 miles, the most protective of river conservation categories. The Act granted the state the right to manage the Allagash.

The U.S. Congress defines Wild rivers as “generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These are vestiges of primitive America” (Act, section 2(b)). The Allagash Wild classification, and/or binding agreements associated with the federal designation, require among other things that the state 1) protect and enhance the Wild characteristics of the river and its adjoining landscape, 2) limit the number of roads and road accesses, and 3) administer the river permanently in its assigned classification – i.e., without allowing it to decline to the lesser

classifications of Scenic or Recreational, which allow more vehicular access and more development generally.

Between 1970 and 2000 the Maine Department of Conservation (DOC) and the Bureau of Parks and Lands (BPL)¹ repeatedly violated the Act and ignored their responsibilities to the people of Maine and the United States by improperly developing and over-developing the Allagash River Waterway, and failing to carry out several Act mandates, such as limiting public road accesses. This pattern of violations continues today.

In the *Federal Register* in 1970, the U.S. Secretary of the Interior, Walter J. Hickel, granted the Allagash designation and permitted two road accesses, at Telos Landing and Twin Brooks.

However, DOC has so far authorized and/or allowed at least fourteen automobile accesses, twelve more than the Secretary grandfathered:

1. Chamberlain Bridge Thoroughfare (which replaced the grandfathered Telos Landing access)
2. Twin Brooks (grandfathered)
3. Churchill Dam (not permitted)
4. Bissonnette Bridge (not permitted)
5. Umsaskis Lake Thoroughfare (Umsaskis I, along Realty Road, not permitted, in fact was excluded by Secretary Hickel)
6. Henderson Brook Bridge (not permitted)
7. Michaud Farm (not permitted)
8. Cunliffe (not permitted)
9. Ramsay (not permitted)
10. Indian Stream (not permitted)
11. Finley Bogan (not permitted)
12. Drake Road (Umsaskis II, not permitted)
13. Upper Allagash Stream (not permitted)
14. John's Bridge (authorized by LURC 11/1/00, not permitted, to replace a pre-existing illegal access in the vicinity)

Each access beyond the grandfathered two comprises a violation, and severally they make up a large cumulative violation.

¹ In this report, the terms "DOC," for the Maine Department of Conservation, and "BPL," for its Bureau of Parks and Lands, are used almost interchangeably. Except in quotations or other direct references, the terms are also used as substitutes for the names of their predecessor agencies. The Land Use Regulation Commission, though part of DOC, is principally referred to as "LURC."

DOC has allowed sixteen parking lots in the river corridor, of which at least eleven must also defy the Act because they are affiliated with illegal accesses:

1. Chamberlain Thoroughfare parking lot (which replaced the grandfathered Telos Landing parking lot)
2. Twin Brooks parking lot (grandfathered)
3. Churchill Dam parking lot (not permitted)
4. Umsaskis Lake Thoroughfare parking lot (Umsaskis I, not permitted)
5. Henderson Brook parking lot (not permitted)
6. Michaud Farm parking lot (not permitted)
7. Cunliffe parking lot (not permitted)
8. Ramsay parking lot (not permitted)
9. Indian Stream parking lot (not permitted)
10. Finley Bogan parking lot (not permitted)
11. Drake Road parking lot (Umsaskis II, not permitted)
12. Upper Allagash Stream parking lot (not permitted)
13. John's Bridge (not permitted)

The legal status of the three other DOC parking lots is unknown at this writing:

14. Zieglar parking lot
15. Nugent's parking lot
16. Jalbert's parking lot

In sum, twelve road accesses and eleven parking lots exist above what the Secretary permitted under the Act, and some others are questionable. DOC has plainly and severely breached the "generally inaccessible except by trail" standard.

From 1986 to 1999, DOC authorized at least twenty-nine miscellaneous developments within $\frac{1}{4}$ mile of the river, including some of the aforementioned accesses. Among the 29 developments, others doubtless breach the Act because they may not meet the Act's standard of appropriateness for constructions within the $\frac{1}{4}$ -mile corridor.

In so violating the Act and the management agreements affirmed by the U.S. Secretary of the Interior in the *Federal Register*, DOC also violated the federal river management guidelines of 1970 established by the Interior and Agriculture departments, which the state agreed to uphold when it applied for the designation and classification.

DOC's and BPL's actions downgraded the Allagash from a *de jure* Wild river as classified under federal law, to a *de facto* Scenic or Recreational river. Such downgradings are illegal under the federal Act. Because these actions occurred over just thirty years and continue today, they have shattered the Act's central mandate that the river shall be kept Wild in perpetuity.

DOC's actions repudiated those of the U.S. Congress, which duly enacted the Wild and Scenic Rivers law on behalf of the people of the United States. In particular, DOC repudiated the original intent of Maine's own Senator Edmund S. Muskie, who authored the section of the Act that allowed Maine and other states to obtain permanent federal designations for state-protected rivers.

DOC, which is an administrative agency not a legislative body, also broke faith with its own chief executive, Governor Kenneth M. Curtis, by ignoring binding agreements the Governor made when he petitioned for and received the National Wild and Scenic River designation and its permanent Wild classification in 1970. DOC is wholly without authority to do so.

Also, in 1997 DOC failed to obtain a permit from U.S. Army Corps of Engineers to build and operate a new concrete dam and to develop wetlands at Churchill Lake, as required under Section 404 of the federal Clean Water Act. The Corps failed to issue said permit to DOC, and also failed to obtain clearance from the National Park Service, contrary to Section 7 of the Wild and Scenic Rivers Act. Further, the modern dam, which was not grandfathered in the Allagash Wild classification, impairs the outstanding historic values for which, in part, the Allagash was federally designated in the first place. Completed in 1998, the dam is an illegal structure under both federal acts.

DOC's state permit for the dam, issued by LURC in 1997, is invalid because it is conditioned on the existence of the federal permit. DOC today continues to operate the dam in breach of both federal and state law. Federal fines for such violations can reach \$25,000 a day, or \$9.1 million a year. State fines can reach an additional \$10,000 a day, or \$3.6 million a year. Penalties are retroactive to when construction began. Both in fact and in respect to their possible consequences, the violations are serious.

River of Broken Promises enumerates the violations of the Act and other binding agreements. The report does not investigate why DOC has executed a continuing pattern of noncompliance, but five general possibilities exist: honest ignorance of the Act, institutional indifference to the Act, hostility toward the Act, political influence, or some combination of the above. The report does not suggest ways the Allagash can be restored, but they are legion.

General Chronology

“[T]he burden is on the State to develop a meaningful program which will truly insure preservation of the area in perpetuity.”

-- EDMUND S. MUSKIE TO HONORABLE AUSTIN H. WILKINS, FORESTRY COMMISSIONER, STATE OF MAINE (November 18, 1964)

This chronology summarizes some key events since 1964. Specific dates are supplied if known:

November 18, 1964. United States Senator Edmund S. Muskie of Maine, responding to “distorted” reports about his position on protecting the Allagash River, declares “[T]here can be no room for misunderstanding ... [T]he key issue is preservation of the riverway” in “primitive” condition in an “unspoiled forest area... [S]uch preservation must be in perpetuity.... [T]he burden is on the State [to] truly insure preservation of the area in perpetuity.”

May 27, 1965. Senator Muskie introduces an amendment to the proposed federal Wild Rivers Act, a compromise to reconcile state-federal conflicts about protecting the Allagash River and to grant federal protections to it and other qualified state-managed rivers in the U.S.

May 11, 1966. Allagash Wilderness Waterway Statute is passed by Maine Legislature, contingent upon passage of “a bond issue in the amount of \$1,500,000 to develop the maximum wilderness character of the Allagash Waterway.”

November 8, 1966. \$1.5-million state bond referendum is passed by Maine citizens, 62% to 38%, “to Develop the Maximum Wilderness Character of the Allagash Waterway,” purchase corridor lands, develop plans.

April 4, 1967. \$1.5-million matching grant from federal Land and Water Conservation Fund is approved by Bureau of Outdoor Recreation, U.S. Department of the Interior.

October 2, 1968. National Wild and Scenic Rivers Act, Public Law 90-542, is passed by U.S. Congress (the Act). Allagash specifically mentioned in Section 2 as eligible for inclusion “upon application of the Governor,” the terminology of the Muskie compromise amendment. Act grants permanent protections for qualified rivers, especially against road development and dam building.

February, 1970. “Guidelines for Evaluating Wild, Scenic and Recreational River Areas Proposed for Inclusion in the National Wild and Scenic Rivers System Under Section 2, Public Law 90-542” is published by Department of the Interior and Department of Agriculture (reprinted February 1977). Translates Act requirements into specifics a state must follow.

April, 1970. “Allagash Wilderness Waterway” report and plan is completed by DOC as part of state’s imminent application for federal designation of Allagash as permanent Wild river. Report conforms with Act and federal river management guidelines. Specifies, among other things, that state will develop two (possibly three) road accesses and will keep the river “forever in its wild condition” if the Allagash is federally designated. Seeks grandfathering of the “existing structure” of Churchill Dam, a timber crib construction of “historic significance.”

April 10, 1970. First application letter from Governor Kenneth M. Curtis to Secretary of the Interior Walter J. Hickel petitions for permanent federal designation of part of the Allagash Wilderness Waterway as a Wild river under the National Wild and Scenic Rivers Act of 1968.

May 4, 1970. Second application letter from Governor Curtis to Secretary Hickel requests that “entire waterway,” not just part, be classified as single Wild segment in perpetuity. Timber crib Churchill Dam (“existing structure”), deemed “of historic significance,” is incorporated into requested designation.

July 17, 1970. *Federal Register* notice is published, with Secretary Hickel accepting state’s petition for permanent Wild river area classification of entire Allagash, effective July 19. Allagash is to be “generally inaccessible except by trail . . . essentially primitive,” and state to “protect and enhance” Wild conditions, according to Act. Hickel agrees to most of state’s 1970 plan and self-imposed development limits. Hickel permits

public access over two roads (not three). All other private roads to be closed to public. Churchill and other wooden dams (“existing structures”) grandfathered in designation for historic reasons. Allagash becomes first state-administered Wild river in national system.

July 17, 1970 - Present. In a pattern and practice of breaches over three decades, DOC allows fourteen road accesses, seven times (i.e., 700% of) the number permitted by Secretary Hickel and agreed to by the state, contravening the Act. Sixteen parking lots approved by DOC, eleven more than permitted for public access. Some private roads are allowed to remain open to public, illegally. DOC allows Allagash *de-jure* Wild classification to decline to *de-facto* Recreational classification, breaching Act. DOC repeatedly breaches Act’s inaccessibility standard, its “protect and enhance” (i.e., non-degradation) requirements, and its mandate for permanence within the designated classification, amounting to dozens of individual counts and a massive cumulative violation.

October 6, 1972. Inter-Office Memorandum, “Subject: Allagash Waterway-Realty Road,” is sent from John M. Patterson, Assistant Attorney General of Maine, to Lawrence Stuart, Commissioner of the Department of Parks and Recreation, opining that “Public roads would obviously be inconsistent” with the wilderness purpose of the 1966 AWW statute.

November 1973. “Allagash Wilderness Waterway Concept Plan” is published by DOC. Promotes wilderness but reveals incipient deviations from Act requirements.

February 1977. U.S. Interior and Agriculture departments reprint the 1970 federal river management guidelines that set specific requirements states must follow on federally designated rivers, and to which DOC had agreed in 1970.

September 7, 1982. “National Wild and Scenic Rivers System; Revised Guidelines for Eligibility, Classification and Management of River Areas” is published in *Federal Register* by Department of the Interior and Department of Agriculture. Replaces February 1970 federal guidelines.

1986 - January 27, 1999. Twenty-nine miscellaneous development projects within ¼ mile (1320 feet) of river are approved by DOC, some impermissible in Wild river corridor.

April 14, 1997. DOC applies to LURC for state permit to construct new concrete-and-steel dam at Churchill Lake, at site of grandfathered timber

crib dam (the “existing structure” of “historic significance”). DOC application is silent on Act and federal Allagash designation.

June 17, 1997. LURC approves permit for concrete-and-steel dam conditioned on, among other things, compliance with all applicable federal and state laws, permits, etc. Permit is silent on Act and federal Allagash designation.

1998. For safety and other reasons, DOC demolishes wooden Churchill Dam, the “existing structure” that Secretary Hickel grandfathered for its historic values. DOC builds new, non-grandfathered concrete dam of no historic value, breaching the Act. DOC develops riverine wetlands for access ramp and dock. Although not revealed at the time, DOC fails to obtain, from U.S. Army Corps of Engineers, the 404 permit required under federal Clean Water Act, and Corps fails to consult with NPS as required by Section 7 of Wild and Scenic Rivers Act. DOC’s 404 permit application, identical to its LURC application, is devoid of references to Act.

August 10, 1998. Memorandum, “Subject: AWW de-designation,” is published within Maine Department of Conservation. Agency discusses idea of removing river from National System.

January 27, 1999. “Allagash Wilderness Waterway Plan” is published by DOC. Includes proposal to develop another access for vehicles, at John’s Bridge. Engineering drawings show new one-way loop road and new parking lot, both impermissible, to replace a pre-existing illegal access in the vicinity. Plan proposes to allow vehicular access at Finley Bogan too. Plan admits state is managing Wild river as “combination of Scenic and Recreational,” an illegal classification and downgrading. Plan is misleading and incomplete on Act requirements throughout.

August 17, 2000. Maine Land Use Regulation Commission (LURC) passes non-binding recommendation to itself that John’s Bridge access proposal be denied because alternative site may be better. LURC staff director instructs commission to ignore Wild and Scenic Rivers Act because it is irrelevant to a commission decision, and he makes no reference to permanent Wild classification. Staff to draft denial language. Issue to be revisited by Commission on September 21.

September 17, 2000. Finley Bogan vehicular access is quietly authorized by DOC rule.

September 21, 2000. LURC reverses itself, rejecting staff's draft denial of John's Bridge proposal. Denial contains no reference to Wild and Scenic Rivers Act. Staff is instructed to draft a John's Bridge approval for next meeting, scheduled for November 1.

Late September 2000. Prompted by questions, DOC admits it cannot find 404 permit that was required under federal Clean Water Act (CWA) for DOC to build new Churchill Dam and develop wetlands in 1998, but insists permit nevertheless exists. U.S. Army Corps of Engineers finds no record of permit in its data base, admits it doesn't exist. National Park Service finds no record of permit, and finds that Corps did not seek NPS review of project as required under Section 7 of the National Wild and Scenic Rivers Act. Under both laws, Churchill concrete dam is illegal as it stands, and DOC has been illegally operating dam for three years. CWA infractions can bring federal fines of \$25,000 per day for such violations, or \$9.1 million year. DOC does not notify Maine Attorney General's Office that 404 permit is missing.

Late September 2000. DOC and Corps initiate process for DOC to apply for retroactive 404 permit. Consistent with Section 7 of the Act, Corps informs NPS that DOC reapplication process is starting. DOC's 2000 404 application, a photocopy of the 1997 LURC and 404 application, is devoid of references to Act.

Late September 2000. U.S. Environmental Protection Agency (EPA), which has authority for enforcing the CWA, initiates phone inquiries to DOC and Corps regarding the missing 404 permit.

October 2, 2000. Memo from Corps to NPS, preferring Churchill Dam reapplication via "programmatic general permit," a process that does not involve public participation. "Another option could be that the activity [building the 1998 dam] was exempt . . .," meaning a 404 permit might not be required now.

October 4, 2000. Gate prohibiting private vehicles on part of Umsaskis Road (Drake Road) is discovered to have been removed by DOC sometime earlier. Total access road count reaches thirteen, eleven more than Secretary Hickel permitted.

October 4, 2000. 1997 LURC permit issued to DOC to construct and operate Churchill Dam is discovered to be null and void because its issuance was conditioned on compliance with all federal permits (e.g., 404 permit), laws, agreements, etc. State fines for such infractions can reach

\$10,000 per day, or \$3.6 million a year. Possible combined federal and state fine exposure for DOC: \$35,000 per day, or \$12.7 million a year.

October 12, 2000. Letter is sent from NPS to Corps, calling for “individual permit application process” for Churchill Dam re-application, a process that involves public comment. “[T]here is no question that the dam replacement project represents a significant undertaking with the potential for direct and adverse impacts to the Allagash National Wild and Scenic River.”

November 1, 2000. LURC votes 4-2 to approve John’s Bridge road-and-boat development, the fourteenth vehicular access, twelve above the permissible number.

November 8, 2000. Writing on behalf of Secretary of the Interior Bruce Babbitt, NPS Associate Director reaffirms “our strong opinion that the Corps must run the State’s application [for a Churchill Dam permit] through its individual permitting process rather than seeking an exemption or a review under a general permit.” Copies are sent to DOC’s BPL director and the EPA.

November 30, 2000. A coalition of conservationists, guides and river users sues to overturn LURC in state superior court for violations in the permitting of John’s Bridge road-and-boat access. Among the procedural errors alleged is that LURC did not consider Wild and Scenic Rivers Act.

January 3, 2001. EPA, in letter to Army Corps, writes that building Churchill Dam was not an “exempt activity” and needed a 404 permit. If Corps “is unable to issue” one, “EPA may reevaluate the need for an enforcement action for injunctive relief and/or penalties.”

January 9, 2001. Army Corps reverses position and announces that written public comment will be allowed until February 9 on DOC’s 404 permit reapplication for the modern Churchill Dam. Corps notifies NPS as required under Section 7 of Act.