

**STATE OF MAINE  
119TH LEGISLATURE  
SECOND REGULAR SESSION**

**Report  
of the  
COMMITTEE TO STUDY ACCESS TO  
PRIVATE AND PUBLIC LANDS IN MAINE**

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## EXECUTIVE SUMMARY

The Committee to Study Access to Private and Public Lands in Maine was created by a Joint Order during the Second Regular Session of the 119<sup>th</sup> Legislature, House Paper 1951 (See Appendix 1). The Joint Standing Committee on Agriculture, Conservation and Forestry proposed the study because of concerns raised by testimony on bills regarding the charging of fees for access to public and private lands.

The study committee was charged with the following duties:

- Estimate the number of acres of land owned or controlled by landowners or landowner associations to which access is controlled by checkpoints, gates or other means and estimate the number of people accessing those lands, categorize the various uses of those lands and assess environmental damage and costs to landowners associated with public access to those lands;
- Determine the number of acres of land managed by the Bureau of Parks and Lands within the Department of Conservation or the Department of Inland Fisheries and Wildlife that are commonly accessed via roads on which checkpoints are located and fees are charged.
- Review existing fee structures for accessing lands beyond checkpoints operated by landowners or landowner associations and compare these fees and systems of public access to access and fee systems in other states; and
- Assess the need for legislation to ensure reasonable access to the public resources of this state.

The committee convened on August 14<sup>th</sup> and held a total of 7 meetings and makes the following recommendations:

- **That the Bureau of Parks and Lands update the State Comprehensive Outdoor Recreation Plan (the SCORP) every 5 years. This is essential for assessing how demand is changing and how that demand is being met.**
- **When the State is acquiring land or interest in land for outdoor public recreation, require the landowner conveying the land to also convey the right for public vehicular access to the parcel whenever the landowner has that legal right to convey. Require the Land for Maine's Future Board to include in its biennial report a description of access to land acquired during the report period and justification for any land acquired without guaranteed vehicular access for the public.**
- **Amend statutory provisions for reclamation of excavations (gravel pits) to allow these areas to be developed as recreation management areas. Direct the off-road**

**vehicle division within the Department of Conservation to provide assistance in assessing an excavation site and, if the site is suitable, provide assistance in developing a plan for an ATV trail system and completing a variance application for submission to the Department of Environmental Protection.**

- **Reauthorize the Committee to Study Public Access to Private and Public Lands in Maine to deliberate on information gathered and develop policies that will best ensure public access to both public and private lands adequate to meet the growing demand for outdoor recreation in Maine.**

## **I. Introduction**

The Committee to Study Access to Private and Public Lands in Maine was created by a Joint Order during the Second Regular Session of the 119<sup>th</sup> Legislature, House Paper 1951 (See Appendix A). The Joint Standing Committee on Agriculture, Conservation and Forestry proposed the study because of concerns raised by testimony on some bills regarding the charging of fees for access to public and private lands.

The study committee was charged with the following duties:

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- Assess the need for legislation to ensure reasonable access to the public resources of this state.

The Committee to Study Access to Private and Public Lands consisted of 2 Senators and 3 members of the House of Representatives. The chairs were the first members appointed by the majority party from each house.

The committee was required by H.P. 1951 to hold a minimum of 6 meetings in geographic locations selected to accommodate maximum participation by landowners and people using the lands relative to the subject of the study. The committee convened on August 14<sup>th</sup> and met 7 times on August 28<sup>th</sup>, September 19<sup>th</sup>, October 7<sup>th</sup>, November 28<sup>th</sup>, December 21<sup>st</sup> and January 24<sup>th</sup>. Five of the meetings included public testimony and the others allowed the committee time to formulate and review its findings and recommendations. The meetings were held at several locations, including: Pittston Farms (Greenville/Rockwood region), Ashland, Rangeley, Augusta and Millinocket. These meetings included presentations from Office of Policy and Legal Analysis staff, Department of Conservation representatives, Department of Inland Fisheries and Wildlife representatives, the Attorney General's office, large timber company representatives, sporting groups, legal experts, the Maine Land Use Regulation

Commission, North Maine Woods Incorporated, land conservation groups and others. Public testimony was solicited through newspaper and e-mail notices and received at all but the two final meetings of the committee. The committee was originally required to submit its report to the Joint Standing committee on Agriculture, Conservation and Forestry on November 15, 2000. The committee requested two extensions to its report date, the first date being December 15, 2000 and the second being February 26, 2000.

One of the committee's recommendations is to extend the study during the next interim of the Legislature. Within the timeframe available, the committee was able to report some findings and make recommendations. However, several issues before the committee were unable to be fully considered. Those issues are: the number of lakes created by constructed impoundments and the access to them; policies regarding acquisition of development rights and conservation easements by the State and other entities; the acquisition of large parcels of land for private use; and the development of incentives to encourage that private landowners keep their land open for public use. These will be the issues that the committee will consider if the Legislature reauthorizes the study.

## **II. Background**

The Committee to Study Access to Private and Public Lands in Maine was authorized by a joint study order during the 2<sup>nd</sup> Session of the 119<sup>th</sup> Legislature. (See Appendix A - H.P. 1951) The Agriculture, Conservation and Forestry Committee proposed the study after receiving testimony from citizens and business owners concerned about fees being charged to access public and private lands.

The committee was directed to hold a minimum of 6 meetings at geographic locations determined by the chairs. Meeting locations were chosen to accommodate participation by landowners who control access to their lands and people who use the private and public lands located beyond the control points. At the first 5 meetings, presentations were held to provide background information on selected topics relevant to the study. Presentations were followed by sessions, including evening sessions, for public comment. The committee benefited greatly from people's willingness to travel to attend these meetings and share their knowledge, experiences and insight. This report contains a brief summary of presentations and public comments received to date.

## **III. Summary of Meetings**

After 5 meetings of concentrated information gathering, the committee returned to legal issues and began deliberating its findings and recommendations. Given the increasing demand on both private and public land for recreation and recent land transfers of large ownerships, the consensus of the committee was that questions

remain and further deliberations are needed to judiciously develop policy to address access issues. The committee's discussions at the January 24<sup>th</sup> meeting are summarized at the end of this report along with the consensus recommendations of the committee and draft implementing legislation.

### **A. Committee Meeting of August 14<sup>th</sup> – Pittston Farm, Northern Somerset County**

The first meeting of the committee was held at Pittston Farm near Rockwood, Maine. The committee received presentations from: Alan Hutchinson, Executive Director of the Forest Society of Maine; Ralph Knoll from the Bureau of Parks and Lands within the Department of Conservation; and Jim May, Chair of the Administrative Team for North Maine Woods Incorporated.

#### **Presentations:**

The committee's first meeting was held at Pittston Farm, beyond the "20-mile Gate" operated by North Maine Woods, Inc.. At this meeting Alan Hutchinson, Executive Director of the Forest Society of Maine (FSM), spoke about the FSM's involvement in negotiating a conservation easement to prohibit development and guarantee public access to over 20,000 acres surrounding Niatous Lake. He also spoke about ongoing negotiations to preserve traditional public access and allow continued forest management on over 650,000 acres encompassing the headwaters of the Penobscot and St John Rivers. This project, known as "the West Branch -public undertaking by the Forest Society of Maine, the State and Wagner Forest Management Co. Both the completed Niatous Project and the proposed West Branch Project include conservation easements on large landholdings and fee simple purchases of smaller parcels of land that would maintain traditional access and use of key recreational lands.

Ralph Knoll from the Bureau of Parks and Lands (BPL) within the Department of Conservation spoke of the State's involvement in negotiations for conservation easements and land purchases. For a project to go forward with State funding, the bureau, acting on behalf of the State, must determine that public access is satisfactorily addressed. Typically, an easement containing a right of access will specify the traditional uses allowed.

Jim May, speaking as Chair of the Administrative Team for North Maine Woods, Incorporated (NMW), provided information on recent fee changes at checkpoints NMW operates on lands managed by Wagner Timberlands. A fee is charged by NMW to access lands owned by member companies, however, no surplus or profit is returned to the landowners participating in NMW. All revenue generated from camping and day use fees is used to cover operating costs, and costs of maintaining and upgrading facilities at the checkpoints and camping areas.

Public Comment:

During the public comment period of the meeting at Pittston Farm, individuals directly affected by the checkpoint system expressed many concerns. Prior to McDonald Investments' purchase of just over 650,000 acres in this region, Bowater, a large paper company with mills in Millinocket and East Millinocket, owned these and other lands and managed access to the lands through checkpoints operated by Bowater. Although fees had been charged in the past for accessing these lands, at the time of the land sale to McDonald, Bowater allowed day use access to Maine residents without charge.

McDonald Investments has retained Wagner Forest Management to manage its lands in Maine and Wagner in turn has contracted with NMW to operate checkpoints to control access to the lands. Much of the testimony on LD 2486, An Act Concerning Access Fees on Tree Growth Lands, during the last legislative session and much of the public comment heard at the Pittston meeting relate to the access fees and policies on the McDonald lands. Common interests may be grouped and characterized as follows:

Leaseholders and internal landowners: People who own camps on leased land and people who own internal lots are concerned about the fees imposed to access their camps and land. An internal lot is a lot surrounded by privately owned land and with vehicular access over private roads owned by the owners of the surrounding land. Leaseholders and internal landowners can purchase 2 annual passes from North Maine Woods for \$25 each. In addition they can purchase up to 6 guests passes from NMW for \$40 each. Leaseholders are also concerned about how changes in ownership may impact the terms of their leases. Some leaseholders stated that they would like to purchase the lots that their camps are on.

Business owners: Owners of businesses in the West Branch (Penobscot River) region that are located beyond the NMW checkpoints have experienced a decline in business since Bowater's sale of land to McDonald Investments in 1999. NMW has recently adjusted its fee schedule, lowering rates for visitors to Seboomook Campground, Raymond's Store or Pittston Farm. In addition to the shared concerns about the terms of their leases, the business owners are also concerned about changes in policies regarding directional signs, gravel availability and the location of snowmobile trails. These changes can be critical to their continuing operation.

Recreational Users: For generations, residents of the Greenville-Rockwood-Millinocket area have enjoyed access to millions of acres of privately owned land for traditional recreation, including hunting, fishing and camping. These residents are acutely aware of the new landowner's changes in access policy and are disturbed by the loss of free day use access to lands that have been open.

Speakers at Pittston Farm brought many points before the committee for consideration; including the public right of access to great ponds guaranteed by the

Colonial Ordinance, and the creation of easements by prescription, easements of necessity and implied easements.

## **B. Committee Meeting of August 28<sup>th</sup> – Ashland, Aroostook County**

The committee's second meeting was held at the Four Season's Inn in Ashland, Maine. The committee received presentations from: Albro Cowperthwaite, Executive Director of North Maine Woods Incorporated; Del Ramey, Regional Land Manager with the Bureau of Parks and Lands; and Dave Peppard, Coordinator of Inland Fisheries and Wildlife's Landowner Relations Program.

### **Presentations:**

Al Cowperthwaite presented the committee with an overview of the North Maine Woods, Inc. (NMW) access checkpoint system which controls access to 3.5 million acres of privately-owned land. With this system, visitors pass through a checkpoint along the road system, pay a fee and then have access to approximately 6000 square miles of forest, logging roads, brooks, rivers, streams, ponds and lakes. Mr. Cowperthwaite then highlighted the advantages of monitored access provided by NMW system including: a decrease in the incidence of vandalism, reduction in incidence theft and illegal dumping of waste; consistent maintenance and monitoring of camp sites; forest fire prevention; improved relationships between landowners and land users; and better wildlife management. The presentation also included a comparison of the overall cost for access to the Allagash Wilderness Waterway, the lands managed by North Maine Woods and Baxter State Park. The comparison showed that North Maine Woods had the lowest user fees as a percentage of operating costs. Appendix B provides NMW's fee schedule that was in effect as of October 2000.

Del Ramey provided the committee with a summary of contractual relationships between NMW and the Bureau of Parks and Lands. The Bureau contracted NMW to collect fees, register visitors and distribute the bureau's rules and regulations for visitor land use for both the Allagash Wilderness Waterway and the Penobscot River Corridor. For some of the tracts of public reserved lands with relatively few campsites within the NMW system, the bureau contracts NMW to maintain and develop those campsites. For the public reserved lands at Nahmakanta (T1, R11 and T1, R12), the bureau contracts NMW to maintain campsites and a boat launch area and control access to the area. There is no fee for access to the 40,000 acres of Nahmakanta public reserved lands.

Dave Peppard presented the committee with a comprehensive summary of the issues surrounding public access to privately-owned land. He described Maine's longstanding tradition of permissive access to private land for sport and recreation and how that has come into conflict with the increasing number of private landowners who are unknown to the land-user. In essence, public access to private

land is a complex issue with two distinct sides. While land-users are relying on the longstanding tradition of unrestricted access to un-posted land, more landowners are concerned that they don't know who is using their land and for what purpose, particularly in Southern and Central Maine. This has resulted in an increase in acres posted for no access during the late 1960's and early 1970's. The Department of Inland Fisheries and Wildlife has sought to educate land-users about what private land means and the rights that go along with being a private landowner. The department's Landowner Relations Program also provides landowners with signs that indicate that access is allowed with permission or the access point that is intended for use. These efforts have resulted in fewer acres being posted as no access.

Mr. Peppard also described to the committee several examples of the cost to private landowners for permitting public access. Some examples cited illegal dumping of appliances and tires, vandalism, theft, unauthorized clearing of campsites, and cutting of unauthorized trails to great ponds, all on private land. In some instances, the landowner confronted the land-users to inform them of which activities were permitted on the land and which were not, only to be ignored. In light of these problems, Mr. Peppard outlined the benefits to both landowner and land-user of controlled access programs like North Maine Woods, Inc. He noted that the NMW system is not the best situation for all land-users but specific issues can be worked out. The presentation ended with the reminder that all land users of private property are the "guests" of the landowner. (See Appendix C for the text of Mr. Peppard's presentation)

Public Comment:

At the Ashland meeting, the committee heard testimony from several employees of NMW. They spoke of the benefits of the checkpoint system and related many examples of checkpoint employees being of help to visitors to the North Woods.

Other members of the public who described themselves as avid outdoorsmen, the Presque Isle Fish and Game Club, guides and other recreational users of the North Woods stated their support for the checkpoint system operated by NMW. They highlighted the ease of getting required approvals in one place as opposed to past procedures when recreationalists had to stop at one place to get a fire permit, then another to get a camping permit and then finally seek permission from several landowners to access their land.

Representatives of timberland owners, both large and small, commented to the committee that they have fewer access-related problems on their land behind the NMW checkpoints than on the land outside of the checkpoints.

Some who testified raised concerns about the possibility that the tree growth tax program would be linked with public access to private land. They stated that the

tree growth tax program is the state's best forest conservation program and that it is a separate issue from public access to private land.

The committee also heard comments that reiterated concerns expressed at the Pittston Farms meeting. These people stated their support for the tree growth tax program only being available to landowners who provide free public access to their land. They also voiced concern that the NMW checkpoint system and fees hurt businesses located behind the checkpoints. Finally, others in opposition to the NMW system cited examples of travels through the woods of the Northwest, stating that travel over thousands of miles of roads never required a fee for access.

### **C. Committee Meeting of September 19<sup>th</sup> – Augusta**

The committee's third meeting was held in Augusta at the State House. The committee reviewed presentations from: John Williams, Executive Director, Maine Land Use Regulation Commission; David Elliott, Esq., Principal Analyst, Office of Policy & Legal Analysis; Jeffrey Pidot, Esq., Assistant Attorney General; and Knud Hermansen, PhD, a surveyor, civil engineer, attorney and faculty member at the University of Maine.

#### **Presentations:**

John Williams, Executive Director, Maine Land Use Regulation Commission (LURC) explained that, the commission has classified certain ponds in the unorganized territories of Maine as remote ponds and adopted a zoning classification designed to protect their remote status and natural resource values. He further explained the purpose of the remote pond or Management Class 6 lakes designation within LURC jurisdiction. By definition a remote pond or Management Class 6 lake is a body of water: (a) having no existing road access by two-wheel drive motor vehicles during summer months within ½ mile of the normal high water mark of the water; (b) having existing buildings within ½ mile of the normal high water mark of the body of water limited to no more than one non-commercial remote camp and its accessory structures; and (c) supporting cold water game fisheries. The purpose of this designation is to provide protection from development and intensive recreational uses to those areas that currently support, or have opportunities for, unusually significant primitive recreation activities.

The Department of Inland Fisheries and Wildlife recommended special protection for remote ponds and worked with LURC to identify the ponds based on fish and wildlife resources, habitats and traditional uses. Of the 3,366 lakes and ponds in LURC jurisdiction, only 176 are classified as remote ponds.

David Elliott, Esq., Principal Analyst, Office of Policy & Legal Analysis gave a history of the Colonial Ordinance of 1641-1647 which was law in Massachusetts and became part of Maine's common law when Maine separated from

Massachusetts to become a State. The text as taken from the 1814 Edition of Ancient Charters and Laws of the Colony and Province of Massachusetts Bay was provided along with 2 sections of Maine law that appear to codify (to set in statute) the right of access guaranteed by the Colonial Ordinance.

A section in Maine's trespass law 17 MRSA 3860, prohibits a person from denying foot access over unimproved land to a great pond. The term "unimproved land" is not defined by law. The Colonial Ordinance allows passing on foot over land for purposes of "fishing and fowling" as long as the person did not trespass "upon any man's corn or meadow". Section 3860 does not limit the purposes to "fishing or fowling". Appendix D of this report is a copy of the Colonial Ordinance and provisions in Maine statute relating to great ponds.

Jeffrey Pidot, Esq., Assistant Attorney General, continued the discussion with the committee regarding public rights of access to land under the Colonial Ordinance. He stated that if the Maine Legislature were to enact a law granting access rights to Great Ponds that go beyond the rights granted under the Colonial Ordinance, the State could be required to compensate the property owner for those public access rights. To fail to compensate a landowner would likely be considered an unconstitutional taking.

Knud Hermansen, PhD, is a surveyor, civil engineer and attorney. He is a member of the faculty at the University of Maine. Mr. Hermansen gave a presentation on easements, such as rights to use private property in order to access other property using examples to illustrate various types of public easements and the elements a court would consider when deciding whether an easement existed.

In general, an owner of lakefront property owns the land between the high and low water mark of the water body, but that land is burdened by a public easement for fishing, fowling and boating. Also, if road access is not conveyed in a deed or lease agreement to shorefront property, the ability to access the property by water may preclude granting an easement by necessity.

#### Public comment:

Members of the public spoke regarding their various interpretations of access guaranteed to great ponds.

Additional comments were received supportive of NMW management. Additional comments were also received critical of Wagner Forest Management's communications and willingness to work with businesses located behind the checkpoints in the West Branch region.

#### **D. Committee Meeting of October 17<sup>th</sup> – Rangeley, Franklin County**

The committee's fourth meeting was held at the Rangeley Inn in Rangeley, Maine. The committee received presentations from: Duane Nadeau, International Paper Company (IP); Gary Donovan of IP; Bill Altenburg of Timberland Trails Inc.; Steve Reiling, Professor, Dept. of Resource Economics & Policy, University of Maine; and Tom Morrison, Director of the Bureau of Parks & Lands, Department of Conservation.

##### **Presentations:**

Duane Nadeau from International Paper Company (IP) provided a brief history of IP's lease to Megantic Fish & Game Club and the so-called "King and Bartlett" lease. Both of these leases pre-date IP ownership of the land. In 1980, IP acquired land and some camps on King & Bartlett Lake from ITT Industries. These camps were used as a private executive retreat by ITT Industries. Immediately following its purchase, IP sold the camps. A lease of land surrounding the camps was negotiated as part of the sale agreement. The camps continued to be operated as a private club. In 1991, the camps were purchased by the current owner who operates them as commercial sporting camps. The gatehouse used to control access to the camps is owned and operated by the camp owner.

In 1980, IP acquired 60,000 acres from Brown Company of Berlin, New Hampshire. The lease to Megantic Fish and Game came with IP's purchase of the land as an irrevocable agreement. Megantic Fish and Game club dates back to the mid-1800's. The club owns a set of camps and 81 acres surrounded by 25,000 acres that it leases. The gatehouse is owned and operated by the club.

Mr. Nadeau also provided information on the checkpoint operated on IP land in Lower Enchanted Township. This checkpoint is used seasonally to control access to a launch site for raft trips on the Dead River. This is a high use area with much of the traffic being commercial rafters using the site during mud season. IP has upgraded its road and provides outhouses and erosion control measures at the launch site. The fee is \$6 per commercial user and \$3 per private user.

Gary Donovan of IP gave a presentation on Public Access to Private Lands based on IP's experience and the experience of Champion Paper Company on land now owned by IP. Use of the company's land base has increased with the expanding network of roads constructed for forest management. The types of recreation are also increasing, e.g. all-terrain-vehicle (ATV) use and whitewater rafting. With increased recreational use, landowners have noted an increase in environmental damage and a declining experience generally for the recreational user. Mr. Donovan's presentation included photo-slides of abandoned automobiles, trash dumped on private land, erosion caused by recreational vehicles and vandalism at campsites and boat launches. IP estimates costs of \$200,000 annually that are attributable to public use of company land.

Bill Altenburg of Timberland Trails Inc. talked about his company’s partnership with IP to provide recreational opportunities on private land in the Phillips Brook Recreation Area in New Hampshire. Trails and inactive logging roads within the area are open and free for non-motorized public use. Users pay fees for overnight accommodations at the Timberland Trails Lodge, yurts and cabins.

Steve Reiling, Professor, Dept. of Resource Economics & Policy, University of Maine gave a presentation on the *Pros and Cons of User Fees for Outdoor Recreation*. The table below presents the pros and cons Dr. Reiling discussed.

Advantages of Fees	Disadvantages of Fees
Fees raise revenue	Recreation increases productivity of citizens, all society gains from this and should therefore pay cost of providing recreational opportunities.
Fees ration use to people who value it most	Fees may discriminate against low-income people who can not afford to pay the fee
Fees provide close correspondence between those who benefit from recreation and those who pay the costs of providing the opportunities	Attitudes of Users: <ul style="list-style-type: none"> <li>- Fee collection is intrusive</li> <li>- Unwilling to pay for services that were free in past</li> <li>- Those that reside nearest the site often object most to fees</li> </ul>

Also discussed were factors to consider when weighing the advantages and disadvantages of fees and ways to reduce resistance to fees. Research shows that users are more willing to pay fees for outdoor recreation if the fees are being used to maintain and improve the facilities and provide the services that they value.

Tom Morrison, Director of the Bureau of Parks & Lands, Department of Conservation, presented information on fees, revenue and costs associated with Maine’s state parks. The Bureau’s goal is to have user fees cover 40% of costs associated with managing and maintaining the parks. Currently between 35 and 38% of these costs are recovered. (Appendix E)

The committee was given a table prepared by OPLA staff that compares typical fees paid by a family of 4 on a weekend camping trip at each of several state owned camping areas and campsites within the North Maine Woods land management area. (Appendix F).

Public Comment:

Again in Rangeley, the committee heard comments in support of and in opposition to the checkpoints operated by North Maine Woods.

Kyle Stockwell speaking for The Nature Conservancy (TNC) advised that TNC had become a member of North Maine Woods and is allowing traditional uses to continue on its recently acquired land in the St. John River area because of NMW's ability to manage public use of private land. Camping, fires and vehicular access are not standard uses on Conservancy preserves.

A local forester for a land management company talked about the difficulty in keeping all-terrain-vehicles (ATV's) off private property. Signs notifying that ATV's were prohibited on the land were repeatedly removed.

A Registered Maine Guide spoke of the difficulty in accessing Kennebago Lake and River. There are 2 areas of public land behind the Kennebago gate operated by the Kennebago Landowner's Association. Three parking places are provided for users of that public land.

**E. Committee Meeting of November 28<sup>th</sup> – Millinocket, Penobscot County**

The committee's fifth meeting was held at the Charles Sanders Council Chambers in Millinocket, Maine. The committee received presentations from Office of Policy and Legal Analysis staff and received public testimony.

Staff Presentations:

OPLA staff presented the committee with survey results from a questionnaire designed by the committee and staff to gain a better understanding of access issues for managers of large tracts of public land and owners of large tracts of privately-owned land. Of the 9.5 million acres private land included in the survey responses, all but 40,000 acres were reported as being open for public access. Some of that access is permitted with a fee while other access is restricted to non-vehicular access. Just over 3 million acres of the total land included in the survey is part of the system. Survey respondents had difficulty quantifying costs to them for permitting public access on their land. However, most were able to report problems they have experienced as a result of access, such as vandalism, illegal dumping and violations of Land Use Regulation Commission rules regarding river and stream siltation. Appendix G provides a summary of the survey results.

Other staff presentations summarized various reports which have addressed the issue of public access to private land and a snapshot of public access to private lands in other states, including New Hampshire, Vermont, Wisconsin, New York, Missouri and Texas. The committee also heard an overview of New Hampshire's

current use taxation policy which provides for a 20% reduction of the tax placed on the current use value of privately-owned land if that land is open to the public for recreation. Approximately 40% of New Hampshire land enrolled in the current use program is benefiting from the optional recreational discount.

Before opening the meeting to public comment, committee members reviewed highlights from essays written by Lloyd Irland in which he identifies issues helpful for future policy debates regarding public access to private lands.<sup>1</sup> Points to consider include:

- Many recreationalists feel that the use of the outdoors ought to be free of charge;
- If wildland uses generated no costs at all, then fees for access to that land would not be necessary for cost recovery;
- If the level of use of wildlands was a minimal in most places as it was one hundred years ago, fees or regulations would not be needed and rationing access would not be necessary;
- There is no reason to subsidize most of the visitors to the North Woods – most have the means to pay;
- Instead of trying to find ways to maintain very low rates for everyone, there are many ways to provide concessionary prices for deserving groups;
- Users and managers of land must learn better ways to manage land use conflicts and develop effective communication to explain public access policies; and
- Retaining quality of remote experiences, accommodating new recreational land-use trends and enhancing the quality of heavily used areas will all cost money and will require careful management.

#### Public Comment:

As at past meetings, much of the testimony heard by the committee in Millinocket focused on the issue of the payment of fees to access private land, particularly land owned by timber companies. Members of the locally-based Fin and Feather Club argued that fees for access discriminate against those that can not afford to pay them and that public funds are spent on those private lands, for pesticide spraying of the forest, the tree growth tax subsidy, fish stocked in ponds and lakes and state biologists and forest rangers. Thus, the public should have access free of charge. Others stated that the fees are fair and the current system is better than past systems where someone needed to be aware of all the gates along their route on public land and needed to get permission to pass through those gates. Some acknowledged that there is a cost to providing for public access and that landowners should have some control over their own land.

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<sup>1</sup> **Source:** Outdoor Recreation in the Maine Woods: Issues for the Future Section 9 of Land, Timber, and Recreation in Maine's Northwoods: Essays by Lloyd C. Irland. Miscellaneous Publication 730, March 1996, Maine Agricultural and Forest Experiment Station, University of Maine

## **F. Committee Meeting of December 21<sup>st</sup> – Augusta**

The committee's sixth meeting was held in Augusta at the State House. The committee received presentations from: Deborah Friedman, Esq., Senior Analyst, Office of Policy & Legal Analysis; Dave Peppard, Landowner Relations Coordinator for the Department of Inland Fisheries and Wildlife; and Lloyd Irland, of The Irland Group.

### **Presentations:**

Following the September 19<sup>th</sup> meeting, OLPA staff posed a series of questions based on committee discussions concerning the public's right to access and use great ponds and the shore of great ponds. Deborah Friedman, Esq., Senior Analyst, Office of Policy & Legal Analysis, prepared a summary of the legal principles regarding access to great ponds and how these questions might be answered by a court of law. Her memo is found in Appendix H. She noted that while the applicability of principles to a specific situation can be discussed, ultimately a court of law would have to interpret the Colonial Ordinance to determine if access over certain lands by a particular mode for a particular purpose is guaranteed. Similarly, to determine if an easement exists to access certain lands, the court would have to study the history and use of that particular parcel. The Legislature's ability to address these questions with the intent of clarifying existing rights is limited.

Much of the committee's discussion following Ms. Friedman's presentation focused on public access to lakes that are not "great ponds", that is, lakes that are either less than 10 acres in size or artificial, such as "flowed lakes" that are 10 acres or greater in size. The committee asked for an opinion from the Attorney General to clarify public rights of access to these lakes. The response of the Attorney General is found in Appendix I.

Dave Peppard, Landowner Relations Coordinator for the Department of Inland Fisheries and Wildlife, discussed public access issues relating to the recent purchase of forestlands surrounding Spencer Lake in Hobbstown Township, Somerset County. An individual, John Malone, has completed acquisition of the entire shorefront of Spencer Lake. The committee had heard concerns that vehicular access to this popular lake might be closed to the public. Mr. Peppard advised the committee that he is working with representatives for Mr. Malone and he is optimistic that the land will remain open to the public.

Lloyd Irland, The Irland Group, talked briefly about costs associated with public recreation on both private and public lands. He has written extensively on ownership of forestland in Maine and has served under previous administrations as the State Economist and the Director of Public Lands. Mr. Irland provided comments from this perspective as the committee began discussing the issues before it and developing recommendations.

## **G. Committee Meeting of January 24<sup>th</sup> – Augusta**

### **Reauthorization discussed -**

The committee discussion focused on how best to complete its legislative charge and on the benefits of requesting that the Legislature reauthorize the committee to continue its work during the next interim with a final report date of December 5, 2001. This would allow the committee substantially more time to assess policy matters and make fully considered recommendations.

If reauthorized by the Legislature, the committee plans to gather data on lakes created by constructed impoundments. An effort will be made to determine which of these lakes the public is guaranteed access to under the Colonial Ordinance (those lakes of 10 acres or greater in size prior to the creation of an impoundment). The committee will also seek to determine the status of public access on lakes created or expanded by impoundments that are subject to FERC licenses.

If reauthorized by the Legislature, the committee plans to monitor land sales over the next several months, including the acquisition of development rights and conservation easements by the State, other public entities and private, non-profit conservation organizations. The committee will try to assess the demand for large acreages with high recreation values for investment and private use and anticipate the impact of private sales on public recreational opportunities in Maine. As land parcels of all sizes are transferred landowner objectives may change and these objectives may conflict with continuing free public use of the land.

If reauthorized, the committee will continue its discussion on incentives for keeping private land open to public use. Prior to making recommendations to the ACF committee, the access committee needs time to consider possible consequences and the fiscal impact of potential incentives. The committee has discussed both requiring public access for eligibility to participate in the Tree Growth Tax Program and establishing a 2-tiered current use system under which a landowner could qualify for lower taxes on lands open to the public. Either or any other proposal to link taxes and access is a major policy decision.

## **IV. Findings and Recommendations:**

The population in Maine and throughout the Northeast is growing. The demand for outdoor recreation including a gamut of recreational activities is growing. State parks and other state facilities are experiencing increased use and extending their season of operation. The use of private lands for recreation both by Maine citizens and vacationers from out of state is also increasing.

**Recommendation 1. That the Bureau of Parks and Lands update the State Comprehensive Outdoor Recreation Plan (the SCORP) every 5 years. This is**

**essential for assessing how demand is changing and how that demand is being met.**

Tools exist to ensure public access and optimize recreational opportunities in Maine. Among these is the acquisition of conservation easements for outdoor recreation and fee simple purchase by the State of land with high value for recreation. The committee supports public acquisition but cautions against acquisition without guaranteed public vehicular access to the acquired parcels. We strongly recommend ensuring vehicular access at the time the land is acquired or certain rights to a parcel of land are acquired.

**Recommendation 2. When the State is acquiring land or interest in land for outdoor public recreation, require the landowner conveying the land to also convey the right for public vehicular access to the parcel whenever the landowner has that legal right to convey. Require the Land for Maine's Future Board to include in its biennial report a description of access to land acquired during the report period and justification for any land acquired without guaranteed vehicular access for the public.**

Although the committee, if reauthorized, will continue to explore policies that promote the use of private land for outdoor recreation, we are making one specific recommendation towards that end now.

**Recommendation 3: Amend statutory provisions for reclamation of excavations (gravel pits) to allow these areas to be developed as recreation management areas. Direct the off-road vehicle division within the Department of Conservation to provide assistance in assessing an excavation site and, if the site is suitable, provide assistance in developing a plan for an ATV trail system and completing a variance application for submission to the Department of Environmental Protection.**

There are no simple, cost-free solutions to ensure continuing public access to private lands for future generations. The Colonial Ordinance provides specifically for free passage by foot over privately owned land that is neither corn nor meadow for the purpose of fishing or fowling on ponds of 10 acres or more. With very little modern case law to interpret the Colonial Ordinance, it is difficult to clarify in statute the extent of public access afforded today by the Ordinance. The Legislature may authorize the public to make any reasonable use of the Great Pond itself as it sees fit, since the State owns the body of water. However, if the common law does not grant public access rights over private property – for a particular use or in a particular manner – the Legislature may not require a private property owner to provide access without compensating the private property owner. Such legislation would result in an unconstitutional “taking” of private property.

If what the public really wants is free access by motor vehicle to ponds that are accessible by privately owned roads and what the common law grants is foot access

whether on these roads or through the woods, our continuing discussions on the Colonial Ordinance, although interesting, would not resolve the questions before this committee. Foot access is not going to meet the demand by recreational users wanting to trailer a boat to or camp by the pond. The committee's efforts would be more productively spent developing policies to promote the type of public access desired.

**Recommendation 4. Reauthorize the Committee to Study Public Access to Private and Public Lands in Maine to deliberate on information gathered and develop policies that will best ensure public access to both public and private lands adequate to meet the growing demand for outdoor recreation in Maine.**

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## **APPENDIX A**

### **Joint Study Order to Establish the Committee to Study Access to Private and Public Lands in Maine**

STATE OF MAINE

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IN THE YEAR OF OUR LORD  
TWO THOUSAND

---

H. P. 1951

**Joint Study Order to Establish the Committee to Study Access  
to Private and Public Lands in Maine**

**WHEREAS**, this joint study order establishes the Committee to Study Access to Private and Public Lands in Maine; and

**WHEREAS**, the charge of this committee is vital to the interests of Maine citizens and camp and business owners in this State; and

**WHEREAS**, the spring and summer months begin the seasons of peak use of the Maine woods for Maine citizens and tourists and, therefore, are the optimal time for the committee to study access issues; now, therefore, be it

**ORDERED**, the Senate concurring, that the Committee to Study Access to Private and Public Lands in Maine is established as follows.

**1. Committee established.** The Committee to Study Access to Private and Public Lands in Maine, referred to in this order as the “committee,” is established.

**2. Committee membership.** The committee consists of 2 Senators appointed by the President of the Senate and 3 members of the House appointed by the Speaker of the House. When making the appointments, the President of the Senate and the Speaker of the House shall appoint at least one member of a party that does not hold the majority of seats in that body and shall give preference to members who serve the Joint Standing Committee on Agriculture, Conservation and Forestry.

**3. Committee chair.** The first named Senator is the Senate chair of the committee and the first named member of the House is the House chair of the committee

**4. Appointments; convening of committee.** All appointments must be made no later than 30 days following the effective date of this order. The appointing authorities shall notify the Executive Director of the Legislative Council once all appointments have been made. When the appointment of all members has been completed, the chairs of the committee shall call and convene the first meeting of the committee, which must be no later than June 30, 2000.

**5. Duties.** The committee shall hold a minimum of 6 meetings at locations to be determined by the chairs. Geographic locations of meetings must be chosen to accommodate maximum participation by landowners and people using lands that are the subject of this study. The committee shall gather information and request necessary data from public and private entities in order to:

- A. Estimate the number of acres of land owned or controlled by landowners or landowner associations to which access is controlled by checkpoints, gates or other means and estimate the number of people accessing those lands, categorize the various uses of those lands and assess environmental damage and costs to landowners associated with public access to those lands;
- B. Determine the number of acres of land managed by the Bureau of Parks and Lands within the Department of Conservation or the Department of Inland Fisheries and Wildlife that are commonly accessed via roads on which checkpoints are located and fees are charged.
- C. Review existing fee structures for accessing lands beyond checkpoints operated by landowners or landowner associations and compare these fees and systems of public access to access and fee systems in other states; and
- D. Assess the need for legislation to ensure reasonable access to the public resources of this state.

**6. Staff assistance.** Upon approval of the Legislative Council, the Office of Policy and Legal Analysis shall provide necessary staffing services to the committee.

**7. Compensation.** The members of the committee are entitled to receive the legislative per diem as defined in the Maine Revised Statutes, Title 3, section 2 and reimbursement for travel and other necessary expenses related to their attendance at meetings to fulfill their duties as charged.

**8. Report.** The committee shall submit its report together with any recommended implementing legislation to the joint standing committee of the Legislature having jurisdiction over parks and lands matters no later than November 1, 2000. If the committee requires a limited extension of time to complete its study and make its report, it may apply to the Legislative Council, which may grant an extension. Upon submission of its required report, the committee terminates. The joint standing committee of the Legislature having jurisdiction over parks and lands matters may report out a bill during the First Regular Session of the 120<sup>th</sup> Legislature concerning the findings and recommendations of the committee.

**9. Budget.** The chairs of the committee, with assistance from the committee staff, shall administer the committee's budget. Within 10 days after its first meeting, the committee shall present a work plan and proposed budget to the Legislative Council for approval. The committee may not incur expenses that would result in the committee's exceeding its approved budget. Upon request from the committee, the Executive Director of the Legislative Council shall

promptly provide the committee chairs and staff with a status report on the committee's budget, expenditures incurred and paid and available funds.

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## **APPENDIX B**

**North Maine Woods, Incorporated – Fees as of 2000**

## **APPENDIX C**

**Testimony of Dave Peppard, Landowner Relations  
Coordinator, Department of Inland Fisheries and Wildlife**

## **APPENDIX D**

### **Colony Ordinance of 1641-47**

## **APPENDIX E**

**Bureau of Parks & Lands  
Maine Department of Conservation  
Fee Schedule – Effective January 20, 2000**

## **APPENDIX F**

**Chart – Family of Four on a Weekend Camping Trip – Friday  
& Saturday Night - Two Adults, Two Children – Ages 9 and 14  
(Maine Residents)**

**Family Of Four On A Weekend Camping Trip – Friday And Saturday Night**

**Two Adults, Two Children – Ages 9 And 14 (Maine Residents)**

**BPL = Bureau of Parks and Lands**

**NMW = North Maine Woods**

**N/A = not applicable**

<b>Location</b>	<b>Day Use Fee – Charged at Checkpoint by North Maine Woods</b>	<b>Camping Fee</b>	<b>Total Cost</b>	<b>Facilities/Amenities Available (See note on pg. 4)</b>
<b>Aroostook State Park</b>	N/A	\$10 per night per site + \$2 per night reservation fee per site  Camping total = \$24	\$24	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Flush toilets</li> <li>• Hot Showers</li> <li>• Group covered cooking area</li> </ul>
<b>Peaks Kenney State Park</b>	N/A	\$13 per night per site + \$2 per night reservation fee per site  Camping total = \$30	\$30	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Flush toilets</li> <li>• Hot Showers</li> </ul>
<b>Lily Bay State Park</b>	N/A	\$12 per night per site + \$2 per night reservation fee per site  Camping total = \$28	\$28	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>

<b>Location</b>	<b>Day Use Fee – Charged at Checkpoint by North Maine Woods</b>	<b>Camping Fee</b>	<b>Total Cost</b>	<b>Facilities/Amenities Available (See note on pg. 4)</b>
<b>Lobster Lake</b> Bureau of Parks and Lands campsites managed as part of the West Branch of the Penobscot River, accessed through NMW checkpoint	\$4 per person per day for Friday & Sunday Children under 15 free  \$4 x 2 people x 2 days  Day use fee = \$16	\$4 per person per night Friday & Saturday nights Children under 10 free \$4 x 3 people x 2 nights  Camping total = \$24	\$40	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>
<b>Authorized North Maine Woods campsite</b>	\$4 person per day for Friday and Saturday (not charged for day exiting checkpoint)  \$4 x 2 people x 2 days  Day use fee = \$ 16	\$5 person per night for Friday and Saturday Children under 15 free \$5 x 2 people x 2 nights  Camping total = \$20	\$36	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>
<b>Debsconeag Deadwater</b> Bureau of Parks and Lands campsites managed as part of the West Branch of the Penobscot River, accessed outside of NMW	N/A	\$4 per person per night Friday & Saturday nights Children under 10 free  \$4 x 3 people x 2 nights  Camping total = \$24	\$24	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>

<b>Location</b>	<b>Day Use Fee – Charged at Checkpoint by North Maine Woods</b>	<b>Camping Fee</b>	<b>Total Cost</b>	<b>Facilities/Amenities Available</b> (See note on pg. 4)
<b>Deboullie</b> Bureau of Parks and Lands campsites	\$4 person per day for Friday and Saturday (not charged for day exiting checkpoint)  \$4 x 2 people x 2 days  Day use fee = \$ 16	\$5 person per night for Friday and Saturday (not charged for day exiting checkpoint)  \$5 x 2 people x 2 nights  Camping total = \$ 20	\$36	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>
<b>Upper Richardson Lake</b> Bureau of Parks and Lands campsites  Fees are collected by South Arm Campground	N/A	\$14 per site per night  \$14 x 2 nights =\$28	\$28	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>
<b>Nahmakanta</b>	Users pass through NMW checkpoints if accessing from the south. No fee is charged. BPL pays NMW for additional checkpoint to monitor traffic.	No fee charged. BPL pays NMW for maintaining campsites	\$0	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>

Location	Day Use Fee – Charged at Checkpoint by North Maine Woods	Camping Fee	Total Cost	Facilities/Amenities Available (See note on pg. 4)
<b>Allagash Wilderness Waterway</b>	\$4 person per day for Friday and Saturday (not charged for day exiting checkpoint)  \$4 x 2 people x 2 days  Day use fee = \$ 16	\$4 per person per night Friday & Saturday nights Children under 10 free  \$4 x 3 people x 2 nights  Camping total = \$24	\$40	<ul style="list-style-type: none"> <li>• Fire ring</li> <li>• Picnic table</li> <li>• Outhouse</li> </ul>

**Note:** Camping fees at Maine’s State Parks vary depending on an assessment of the amenities and recreational opportunities provided. For example: Peaks Kenney State Park has a sand beach and hiking trails. The site fee at Peaks Kenney is higher than at Aroostook State Park, which has lake access but not a prime swimming beach. Lily Bay State Park does not have flush toilets or showers but has prime shorefront sites.

Only basic amenities associated with campsites are listed in this table. State parks commonly provide boat launches, playgrounds, dumping stations and other facilities.

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## **APPENDIX G**

### **Highlights from Questionnaire Sent to Private Landowners**

## **APPENDIX H**

**Memo from Deborah C. Friedman, Esq., Senior Analyst,  
Office of Policy and Legal Analysis**

To: Jill Ippoliti, Danielle Fox  
From: Deborah C. Friedman, Esq.  
Date: December 15, 2000

Re: Committee to Study Access to Public and Private Lands in Maine

The Committee has posed a number of legal questions concerning the public's right to access and to use Great Ponds and the shore of Great Ponds. The questions can be generally stated as follows.

- Does the public have a right, under the common law of Maine, based on the Colonial Ordinance, to cross private property to access a Great Pond: (a) by vehicle or any means other than on foot; (b) across any type of property as long as the crossing does not damage crops or other property; and (c) for purposes other than fishing, fowling or navigation?
- Does the public – or a segment of the public – have a common law easement across private property in the North Woods, based on the past history of usage, estoppel or necessity?
- If rights to access a Great Pond or to use it in a certain way are not provided by the Colonial Ordinance or by common law easement, may the Legislature provide those rights through legislation?

The third question is the easiest to answer. The Legislature may authorize the public to make any reasonable use of the Great Pond itself as it sees fit, since the State owns the body of the Great Pond. However, if the common law does not provide public access rights over private property – for a particular use or in a particular manner -- the Legislature may not do so without compensating the private property owner. Such legislation would result in an unconstitutional “taking” of private property.

The first two groups of questions ask the extent of public rights of access under the common law – through the Colonial Ordinance or common law easements. Definitive answers to these questions can only be obtained by taking the issue to court and having all sides of the issue present facts and arguments supporting their positions to the court. This memo attempts to set forth what courts have already said about the extent of public rights and to set forth some basic legal principles relevant to the issue.

## **I. Principles of Ownership and Public Rights**

To understand the source and extent of public rights, it is first helpful to set out the principles of ownership of water bodies and the land surrounding them. Maine law is clear about who owns title to the waters of the state, and the shore surrounding those waters. The principles were set forth by Knud Hermansen in his presentation to the Access Committee on September 19, 2000, as well as in a law review article.<sup>1</sup> The principles are as follows:

### **A. Tidal Water**

- The State owns the bed of tidal rivers and submerged land within 3 miles of the coast and holds them in trust for the public.
- The public has rights in this land and water by virtue of the State's ownership of it.
- The owner of upland property owns the land between high and low tide (the intertidal zone), but not more than 1650 feet from high tide line, subject to public rights.
- The public has rights to use the intertidal zone for certain purposes, by virtue of the common law, based on the Colonial Ordinance.
- The public has no general common law right of access to tidal water.

### **B. Great Ponds**

- The State owns the bed of Great Ponds (ponds covering at least 10 acres), and holds it in trust for the public.
- The public has the right to use Great Ponds, by virtue of the State's ownership.
- The owner of upland property owns to the natural mean low-water mark at the time of the conveyance, subject to the public's rights.
- The public has the right to use the shore of Great Ponds for fishing, fowling and navigation, by virtue of the common law, based on the Colonial Ordinance.
- The public has a right of access over private property to access a Great Pond, by virtue of the common law, based on the Colonial Ordinance

### **C. Non-tidal Rivers and Streams**

- The owner of property abutting a non-tidal river or stream owns to the thread of the river or stream. The thread is approximately the center of the stream,

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<sup>1</sup> Donald E. Richards and Knud E. Hermansen, Maine Principles of Ownership along Water Bodies, 47 Me. L. Rev. 35 (1995)

but more accurately the point equidistant from the sidelines of the bank at natural and ordinary stage of water.

- The public has an easement for navigation, fishing and commercial use on a navigable river or stream, but no rights on a non-navigable river or stream.

## II. The Colonial Ordinance as a Source of Public Rights

The Colonial Ordinance of 1641-1647 is the source of much of Maine's law relating to water bodies and the land surrounding them. The Ordinance was part of the Body of Liberties, adopted by the General Court of Massachusetts in 1641.<sup>2</sup> The Body of Liberties was the first codification of the laws and principles that governed the Massachusetts Bay Colony prior to that time, including principles of government as well as individual rights and rules of property.<sup>3</sup>

Among the principles set forth in the Colonial Ordinance were the following:

- The public has a right of free speech in public assembly;
- The public has a right of free fishing and fowling in Great Ponds of at least 10 acres, with the incidental right to pass and repass on foot through any man's property "so he trespass not upon any man's corn or meadow";
- Where the sea ebbs and flows, the proprietor of land adjacent to the water owns the property to the low-tide mark, but not more than 100 rods (1650 feet) from high-tide; and
- Colonists have a right to leave the colony.

### A. Acceptance of the Colonial Ordinance as the Common Law of Maine

The Colonial Ordinance is considered to be the law in Maine, not because it was adopted as a statute by the Legislature, but because it has been recognized by the judiciary as part of the common law of the State.

The common law is the body of law pronounced by the courts, and consists of long-standing principles and customs that the court finds to be accepted by the people as the law of the land. Much of our laws of property, contract and tort are derived from the common law, or are codifications of the common law. For example, long before the Maine Legislature adopted the Maine Tort Claims Act, protecting state agencies from tort liability, the courts had provided the same result by recognizing the common law doctrine of "sovereign immunity."

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<sup>2</sup> Later versions of the Ordinance were drafted in later years, which is the reason for the reference to 1641 and 1647; most reprintings are from the later version.

<sup>3</sup> John J. Whittlesey, Law of the Seashore, Tidewaters and Great Ponds in Massachusetts and Maine (under the Colony Ordinance of 16741-47). Murray Printing Co., Cambridge, Mass. 1932. Barrows v. McDermott, 73 Me. 441, 447 (1882)

In discussing the acceptance of the Colonial Ordinance into Maine common law, the Maine Supreme Judicial Court declared in 1882 that:

It is not adopted solely at the discretion of the court declaring its adoption, but because the court find that it has been so largely accepted and acted on by the community as law that it would be fraught with mischief to set it aside. Barrows v. McDermott, 73 Me. 441, 448 (1882)

## **B. Judicial Interpretation of Public Rights to Access and Use Great Ponds**

The extent of rights under the common law of Maine, based on the Colonial Ordinance, has been the subject of numerous Law Court cases. Only a few have dealt directly with public rights in Great Ponds and the right of access over private property to Great Ponds. Cases relating specifically to Great Ponds have provided the following:

- **Access to a Great Pond**

Barrows v. McDermott, 73 Me. 441 (1882). Plaintiff alleged that the defendant committed trespass by crossing his land to access a Great Pond. Defendant alleged that he had a right to cross the land based on the Colonial Ordinance. The court agreed that the Colonial Ordinance is part of the common law of Maine, but found that the defendant had committed trespass because he exceeded his rights under the Ordinance. The Ordinance authorizes the crossing of land, provided the person does not cross “corn or meadow.” The land crossed by the defendant had been cleared and cultivated in previous years, although no crops were raised and no grass had been cut in the year of the alleged trespass. Nevertheless, finding that the land was still capable of growing grass and that there was no proof that the land had reverted “to a state of nature” the court found it to be meadow.

The court also made a number of other statements that are not essential to the ruling of the case, but are helpful in understanding the court’s attitude toward the Colonial Ordinance. The court noted that modern (1882) notions of great ponds and their use may not be the same as those accepted in 1641; there may no longer be a need for sustenance fishing, and access to great ponds may result in damage to timber and woodlands. But any restriction on the public use is a matter for the Legislature to impose, not the court. Also important is the proposition that the Legislature can, indeed, limit public rights.

It cannot be doubted that they [the Legislature] may also abridge the common right in favor of the proprietor when they are satisfied that the interest of the public will be best served by ampler recognition of the right of private property. Barrows , 73 Me. at 451.

The court also states that a fisherman has the right to approach a Great Pond through “unenclosed woodlands,” a rule that is often used to describe the scope of the public’s access rights.

- **Title to Great Ponds**

Conant v. Jordan, 107 Me. 227, 77 A. 938 (1910). Plaintiffs sued to enjoin defendants from entering their land and using the Great Pond located within their boundaries for fishing and hunting, and for a declaration that they have the exclusive right to use the pond. Plaintiffs claim that their title to the pond pre-dates enactment of the Colonial Ordinance, so that the Ordinance’s proclamation of public rights does not apply to their pond. The court finds that the public right to fish and hunt on Great Ponds predates the Colonial Ordinance. The Colonies brought over the common law of England, which allowed private ownership of Great Ponds, but adopted only so much of the common law as suited the situation in the Colonies. Although ponds in England were not a primary source of sustenance, they were in the Colonies and thus the English right to private ownership of ponds did not take hold in the Colonies.

- **Use of Great Ponds**

*Cutting ice.* Great ponds and the subjacent soil are held by the state for the public. The right to take fish or ice from a great pond is common and free to all, unless abridged by the Legislature. Barrett v. Rockport Ice Co. 84 Me. 155, 24 A. 802 (1891).

*Taking water for a private use.* Several cases confirm the power of the Legislature to authorize a private company to take water from a Great Pond. American Woolen Co. v. Kennebec Water Dist., 102 Me. 153, 66 A. 316 (1906) and others.

### **C. Rights in the Intertidal Zone**

Most significant recent Maine cases on public rights in water bodies deal with public rights in the intertidal zone, i.e., the area between high-tide and low-tide. These cases are somewhat useful for understanding rights in Great Ponds, since they derive from the same Colonial Ordinance. They are also useful in seeing the court’s attitude toward construing the Ordinance in modern times, an attitude that would probably prevail in its construction of Great Pond rights.

The court has declared the following public rights in the intertidal zone:

- Fishing and fowling (by the terms of the Ordinance itself)
- Digging for sand-worms and for clams and other shellfish; and
- Navigation and uses incidental to navigation.

The Moody Beach case states the extent of public rights as follows:

Other may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water bearing ice, may fish in the water over them, but may not take shells or sea manure or deposit scrapings of snow upon the ice over them. Bell v. Town of Wells, 557 A.2d 168, 174 (1989)

#### **D. Judicial Attitudes toward Updating the Colonial Ordinance**

To what extent have public rights under the common law and the Colonial Ordinance expanded? The Justices of the Maine Law Court have been engaged in a debate in the last decade over that very question. Although the debate relates to rights in the intertidal zone, it provides an understanding of judicial attitudes that would apply equally to interpretation of common law rights relating to Great Ponds.

In Bell v. Town of Wells,<sup>4</sup> the so-called “Moody Beach case,” the owners of beachfront property asked the court, among other things, to declare that the public rights in the intertidal zone are limited to fishing, fowling and navigation. The Town of Wells, one of several defendants in the case, asserted a broader recreational easement, based on:

- (a) Historical evidence of use of the beaches for swimming, football and other games from colonial times on; and
- (b) An argument that modern uses of the beach have expanded beyond the fishing, fowling and navigation to include general recreation, and that such uses should be allowed provided they are “no more burdensome” than the traditional uses.

The majority of the court found the historical evidence “inconclusive,” since it did not show who used the beach, how often, and whether landowner permission had been granted for such use. The majority also flatly rejected, for several reasons, the contention that the court should allow any use “no more burdensome” than the traditional uses, in order to accommodate modern desires for recreation. First, any additional uses would have a cumulative effect that would be more burdensome. Second, the number of people wishing to use the beach for sunbathing and walking would clearly be greater than the number who use the beach for fishing or fowling and would in fact be more burdensome. Finally, the court said it would not find a general recreational right and it could find no principled basis for allowing uses specifically listed by the Town and excluding others.

The court also found, as a matter of governmental process, that it was not the role of the the court to create additional public rights:

The foregoing considerations demonstrate why a court cannot extend a public easement in the privately-owned intertidal land beyond that reserved in the

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<sup>4</sup> 557 A.2d 168 (1989)

Colonial Ordinance and defined by over 340 years of history. To declare a general recreational easement, the court would be engaged in legislating and it would do so without the benefit of having had the political processes define the nature and extent of the public need. It would also do so completely free of the practical constraints imposed on the legislative branch of government by the necessity of its raising the money to pay for any easement taken from private landowners. The objectives of the Town of Wells are better achieved by a public taking of a public easement tailored to its specific public need. Bell at 176

The court next addressed the Town's argument that a 1986 law, the Public Trust in Intertidal Land Act, granted an easement for use by the general public for recreation, without limitation. The court found that the Act grants the public much greater rights in the intertidal zone than are reserved by the common law, and therefore on its face, constitutes an unconstitutional taking of private property. The taking is not prevented simply because it involves only an easement rather than the title itself. Nor is it justified as a state police power regulation.

The minority opinion, written by the current Chief Justice of the Law Court, took a more expansive and flexible view of the public's common law rights. Justice Wathen wrote that the public rights in intertidal land derive from common law that predates the Colonial Ordinance and the custom of private ownership of intertidal lands. He then refers to several previous Law Court cases indicating a willingness to expand public rights beyond those existing in 1641. For example, he points to cases in which the right was recognized to include pleasure activities as well as those undertaken for sustenance. In 1925, the Court allowed the public to land boats on the flats, and the court "rejected a rigid application of the terms of the Ordinance and resorted to contemporary notions of usage and public acceptance in order to strike a rational and fair balance between private ownership and public rights." Bell, 106 A.2d\_ at 188.

Wathen chided the court for "arresting further development in the law" by refusing to recognize uses other than those recognized prior to 1925 (the last case in which the court addressed the public rights in the intertidal zone).

Although we must avoid placing any additional burden upon the shoreowner, there is no reason to confine, nor have we in the past confined, the rights of the public strictly to usage prevailing in the 17<sup>th</sup> century ... The citizens of Maine are still in need of sustenance, albeit in a different form. Bell at 188-189.

He declared that the "rights of the public are, at a minimum, broad enough to include such recreational activities as bathing, sunbathing and walking."

Two members of the current Law Court supported the minority opinion – Justices Wathen and Clifford. Another member of the current Court, Justice Saufley, recently wrote a concurring opinion in a case <sup>5</sup> stating that she would vote to overrule the Bell

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<sup>5</sup> Eaton v. Town of Wells, 2000 ME 176.

decision, indicating that the debate over the extent of public rights in the intertidal zone is not over.

### III. Common Law Easements

The common law recognizes several means of obtaining an easement, which is the right to use property that you do not own, for a specific purpose. This section describes the means of obtaining an easement that are most likely to be relevant to the Access Committee's work.

#### A. Easement by Prescription

An easement by prescription is an easement acquired by what is commonly called "adverse possession," i.e., acquiring a right by using the property over a certain period of time without the permission or action to prohibit such use by the landowner. The term "adverse possession" is generally used to refer to the ability to acquire title to land, while the acquisition of a mere right to use land may be called acquisition of an easement by adverse possession or a "prescriptive easement." In Maine, unlike some other jurisdictions, it is possible for the public to acquire a prescriptive easement. To acquire an easement in this manner, the use of the easement claimed must be:

- continuous
- for 20 years
- under a claim of right, adverse to the owner
- with the knowledge and acquiescence of the owner or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.

Eaton v. Town of Wells, 2000 ME 176 (October 2000).

The use of land is "adverse" if the person claiming the easement has not received permission from the owner, and he uses the easement in disregard of the owner's rights.

<sup>6</sup>If the owner gives permission for the use, the use is not "adverse" and an easement by prescription cannot be gained. In Maine, to gain a public recreational easement by prescription on wild and uncultivated land, one must rebut the presumption that open and continuous use of the land for hunting or other recreation is permissive, not adverse.<sup>7</sup>

Showing acquiescence means showing "passive assent or submission to the use, as distinguished from a license or permission ...."<sup>8</sup> Put another way, acquiescence is "consent by silence."<sup>9</sup>

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<sup>6</sup> S.D. Warren Co. v. Vernon, 1997 ME 161, 697 A.2d 1280 (1997)

<sup>7</sup> S.D. Warren at 1130.

<sup>8</sup> S.D. Warren at 1282.

<sup>9</sup> Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984)

Deciding whether an easement by prescription exists is primarily a matter of fact, involving a detailed review of the history of ownership and use of the property. An example of the type of facts used by the court in such an inquiry is shown in Eaton v. Town of Wells.<sup>10</sup> In Eaton, the Law Court confirmed the Superior Court's finding that the Town of Wells had acquired an easement by prescription over a portion of Wells Beach. In that case, the town had placed lifeguards and maintained the beach, witnesses testified to a long history of public use of the beach for general recreational purposes down to the low tide mark including some portions of dry sand, and it was shown that the owner had neither given permission nor prohibited such use.

Maine law codifies the 20-year limitation for acquiring a prescriptive easement, and refers specifically to acquisition of prescriptive easements by the public. Title 14 also contains several sections specifying ways for private landowners to prevent the public or any other person from acquiring a prescriptive easement, particularly in wildlands and land in the unorganized territory.

Title 14, section 812 allows a person to give public notice of his intent to prohibit acquisition of such an easement by posting such a notice for 6 consecutive days in a conspicuous place on the property, or in the case of land in the unorganized territory by filing such notice in the Registry of Deeds for the county where the land lies. In addition, the last paragraph of Title 14, section 814 specifically states that an interest may not be acquired in private roads in the unorganized territory through adverse possession, prescription or acquiescence, however exclusive or long continued. According to Professor Hermansen, section 814 may not be applied in practice to stop all such easements, as the language seems to suggest.

These laws appear to recognize that undeveloped land in the more remote areas of Maine is highly susceptible to claims of adverse possession or prescription, and to give those private landowners additional tools to prevent such acquisitions.

## **B. Estoppel**

An easement by estoppel arises when a person, by his acts, declarations or silence, induces another in reasonable reliance (on that act, declaration or silence) to act or not act in a reasonable manner, jeopardizing the reliant party's rights. This is a general rule of estoppel, which provides that a person cannot induce another to take an action or fail to act and then use their act or failure as an argument against their assertion of a right. There is some Maine case law in which estoppel plays a role in a property rights dispute, but there is not much case law relating to easements that would provide specific guidance to the Commission.

In Sprague Corp. v. Sprague, 855 F. Supp. 423 (D. Me. 1994), plaintiffs argued that they had an easement by estoppel over a road because they had plowed and maintained the road to the benefit of the defendant. The court found that the plaintiffs had not provided evidence to support that claim, and remarked that Maine courts have, so far, recognized only a limited theory of easement by estoppel. Such an easement arises when a grantor

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<sup>10</sup> 2000 ME 176

conveys land that is described as being bounded by a street or road, the purchaser reasonably believes that he or she has an easement over the road, and he or she purchased the property in reliance on that belief.

### **C. Easement by Necessity**

An easement by necessity is created when a landowner conveys a lot out of a larger parcel and the conveyed lot is “landlocked” by the landowner’s surrounding land.<sup>11</sup> To gain an easement by necessity, a person must show that:

- The lot that needs the easement and the lot that the easement would cross were at one time part of a single parcel; and
- There was a reasonable necessity for the easement at the time the 2 lots were severed.

If the lots were not owned by the same person at one time, or the easement wasn’t necessary at the time of the severance of the lots, there is no easement by necessity. For example, where a public road provided the only road access to a lot at the time of severance, but the public road was later discontinued, there is no easement by necessity.<sup>12</sup>

If the lot is bounded by navigable water, there may not be an easement by necessity because the landowner has a way of accessing the lot without crossing the other landowner’s property.<sup>13</sup> However, the court may still find an easement by necessity in this situation if the alternative method of access is too expensive.<sup>14</sup> In Amodeo v. Francis,<sup>15</sup> the court reiterated that the mere physical proximity of water does not prevent the finding that an easement over land is necessary. The person seeking the easement must show that access by water is “unavailable for all practical purposes”.

Likewise, in Morrell v. Rice,<sup>16</sup> the Maine Law Court found that land bordering the sea was considered landlocked because at low tide, access to the sea was across 100 yards of tidal flats and dredging to permit access at all times would have cost \$300,000.

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<sup>11</sup> Frederick v. Consolidated Waste Services, Inc., 573 A.2d 387 (Me. 1990).

<sup>12</sup> Frederick v. CWS.

<sup>13</sup> Flood v. Earle, 145 Me. 24, 71 A.2d 55 (1950).

<sup>14</sup> Flood, 71 A.2d at 57.

<sup>15</sup> 681 A.2d 462 (Me. 1996),

<sup>16</sup> 622 A.2d 1156 (Me. 1993)

## IV. Responses to Specific Questions

### QUESTION #1: Right of access to a great pond.

**The Colonial Ordinance** grants a person the right to pass on foot through any person's property to fish and fowl on a great pond as long as they do not trespass on "any man's corn or meadow" to access the pond. The Maine Supreme Court in Barrows v. McDermott, 73 Me. 441(1882) found that a person who accessed a great pond over tilled land did in fact trespass. The land had been cleared and cultivated but no crops were growing and no grass was being cut in the summer of the alleged trespass. The court wrote that the fisherman had the right to approach the pond through "unenclosed woodlands" but did not have the right to cross "another man's tillage or mowing land".

If the original intent of the Colonial Ordinance was to allow public access to great ponds where land could be crossed without causing damage or economic hardship, how would that right be interpreted today?

The Maine Legislature enacted 17 MRSA §3860 to provide a redress for a person denied access to a great pond under the colonial ordinance.

Is a reasonable interpretation of the term "unimproved land" land that would not be damaged by a person crossing on foot? Or if any activity that makes the land more valuable to its owners is an "improvement", may access be denied over any land that has a road, structure or other improvement on it?

### RESPONSE to QUESTION #1

What type of property may the public cross to access a Great Pond, under Maine Law or the Colonial Ordinance?

There are 2 parts to this question.

- What does the statute, 17 MRSA §3860 mean?
- What is the common law of Maine regarding public access to a great pond?

#### The common law & Colonial Ordinance

The Colonial Ordinance allowed a person to cross private property to access a great pond for the purpose of fishing and fowling, provided he "trespass not upon any man's corn or meadow." The ordinance was designed to allow the public to obtain sustenance by fishing and hunting on great ponds, while preventing damage to crops or grazing land.

The Maine Law Court has only once interpreted this common law right. In Barrows v. McDermott, the Court found a man guilty of trespass for crossing land to fish in a Great Pond. The land crossed had once been plowed and cultivated with grass, although it was not under cultivation when the defendant crossed it. The court found that the land had not returned to a state of nature, and could support a crop of grass, and thus continued to be classified as "meadow." The court also remarked that the fisherman had the right under the Colonial Ordinance to cross unenclosed woodlands, but not meadow.

### Maine statute

Maine statute, Title 17, section 3860 provides a penalty for any person who denies access to a Great Pond by a person on foot who crosses “unimproved” land. The term “unimproved land” is not defined in the law, in any court case, or in any immediate evidence of the Legislature’s intent when it enacted the law in 1973. The broadest meaning would be that provided by the Colonial Ordinance itself – that a person may not be denied access over land unless it is meadow or cornfields.

When it enacted the law in 1973, the Legislature could not have constitutionally expanded public rights beyond those provided by the common law, but it could have decreased public rights<sup>17</sup> or limited the protection of this law. The Legislature might have wanted to define the public’s right as the right to cross land only if the landowner has taken no action to change the land from its natural state, e.g., an unenclosed woodland. This would tilt the balance in favor of private property rights, as opposed to public rights, and could reflect a growing concern with privacy and private property, and a diminished view of the necessity of access to Great Ponds for sustenance. Although crossing someone’s yard may not cause tangible economic damage, the loss of privacy may be an equally serious intangible loss to the property owner.

There is no clear guidance on the meaning of the term, short of bringing the question to court. The Legislature could attempt to clarify the term, but it would need to take care not to expand public rights.

### **QUESTION #2: Public Use of Great Pond Shorelands**

For natural great ponds, the landowner of adjacent land owns to the low water mark. The land between the high and low water mark is burdened by an easement for public use.

The public has a right to engage in fishing and fowling activities between the high water and low water mark on great ponds. What other activities does the public have a right to engage in on this land?

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<sup>17</sup> In a 1919 Opinion of the Justices, 118 Me. 503, 106 A. 865, the justices recited the current understanding of public rights in Great Ponds, than stated that “since the people as beneficiaries possess these public rights, the Legislature, which represents the people, has the power to abridge these rights and to grant them, or any portion of them, to private individuals or corporations, if it sees fit so to do. . . . There seems to be some misapprehension as to these so-called public rights in a Great Pond. They are often spoken of as if they were sacred and inalienable. Not so. . . . What is owned by the people may be transferred by the Legislature, unless prohibited by the Constitution.” 106 A.2d at 868. In a more recent Opinion of the Justices, the justices rejected the argument that a law releasing the state’s title in certain submerged and intertidal lands exceeded the Legislature’s power under the Legislative Powers Clause of the Maine Constitution, Art. IV, pt. 3, §1, although they did require the la demanding standard of reasonableness,” since submerged and intertidal lands are not fungible (interchangeable) with land in the interior. 437 A.2d at 607. Legislation that constitutes a “gross or egregious disregard of the public interest” might violate the Legislative Powers Clause. 437 A.2d at 610.

## RESPONSE to QUESTION #2

Very few of the Maine Law Court cases interpreting the Colonial Ordinance deal specifically with the use of Great Ponds; most cases relate to the intertidal zone. It seems logical to assume that the permitted uses would be the same, although the court could come to a different conclusion, since public rights in Great Ponds have a different history than those in the intertidal zone<sup>18</sup>

In reviewing cases relating to public rights in Great Ponds, it is important to differentiate between cases relating to use of the Great Pond itself, and use of the shore of the Great Pond. Since the State owns the Great Pond, the court does not need to balance public rights against the rights of private property owners. Thus, permitted use of the Great Pond itself may be greater than the use of the shore. It is also important to remember that the right to cross private property to access a Great Pond applies only to crossing to use the Great Pond for particular purposes (e.g. fishing or fowling).

### Use of Great Ponds and the Shore of Great Ponds

With regard to the use of Great Ponds, the court has declared the public right to:

- Fish for pleasure as well as for sustenance, Barrows v. McDermott, 73 Me. 441 (1882); and
- Fish and fowl on Great Ponds and to make other uses of them, like cutting ice. Conant v. Jordan, 107 Me. 227, 77 A. 938 (1910)

### Use of the Intertidal Zone

With regard to use of the intertidal zone, the court has found the following public rights:

- The right to dig for sand-worms, State v. Lemar, 147 Me. 405, 87 A.2d 886 (1952); clams, State v. Leavitt, 105 Me. 76, 72 A. 875 (1909) and other shellfish, Moulton v. Libbey, 37 Me. 472 (1854);
- Bell v. Town of Wells summarizes the rights in the intertidal zone as follows:

“Others may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water bearing ice, may fish in the water over them, may dig shell fish in them, may take sea manure from them, but may not take shells or mussel manure or deposit scrapings of snow upon the ice over them.” quoting Marshall v. Walker, 93 Me. 532, 536, 45 A. 497, 498 (1900)

### Use of rivers and navigable streams

The court finds that, on navigable rivers and streams, the public has the right to:

- Use the water when frozen for navigation/transportation, French v. Camp, 18 Me. 433 (1841); and

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<sup>18</sup> See footnote #13 to the dissent in Bell v. Town of Wells

- Travel for recreational purposes as well as business, e.g., Smart v. Aroostook Lumber Co. 103 Me. 37, 68 A. 527 (1907)

### **QUESTION #3. Public rights on a dammed stream or river**

When a dam on a stream or river creates a pond or lake, the adjacent landowners retain ownership to the thread of the original stream. What rights of access does the public have to a “flowed lake”? If it was navigable before the dam, do they still have the right to boat on the “flowed lake”? If the customary spot to launch a boat is downstream from the dam, must a launch site be provided above the dam?

### **RESPONSE to QUESTION #3**

When a river or stream is dammed, the adjacent landowners retain the property rights they held before the damming – i.e., the landowner owns to the thread of the stream.<sup>19</sup> The public also retains the rights they held before the dam was built – i.e., assuming that the river or stream was navigable, the public retains the right to fish, fowl and navigate on the area that was covered by the stream or river, but probably not beyond that boundary. However, the Colonial Ordinance generally applies only to natural ponds, so the public has no right to cross private property to access the dammed lake. There does not appear to be any legal basis for requiring that access to the man-made lake be provided above the dam.

### **EASEMENTS – QUESTIONS 4, 5 and 6**

As stated above in Part III of this Memo, there are several ways that an individual – or the public – can acquire an easement, even without an explicit grant. The determination of whether an easement has been acquired is a factual issue to be decided by a court after detailed briefing by the parties involved. Each of the methods of acquiring an easement has specific elements that must be proved, but the proof for all comes from factual information, such as the following:

- Who owned the property 50 to 100 years ago?
- Who did the property owner sell each piece to?
- What were the expectations of the parties to a lease or sale regarding access? What was the actual practice?
- What did the property owner know about who was using the property and for what purpose?
- Did the owners give permission to use their roads? Did they prohibit such use or provide notice to prevent acquisition of an easement?

### **QUESTION #4: Public Easement through Prescription or Customary Use**

For more than 50 years, the public had access to a large tract of forestland without a fee being charged. No one prohibited them from driving on private roads and engaging in outdoor

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<sup>19</sup> Donald E. Richards and Knud E. Hermansen, Maine Principles of Ownership along Water Bodies, 47 Me. L. Rev. 35, 44 (1995)

recreation on the lands. At a point in time the land is sold, the new landowner erects a gate and gatehouse and begins charging to pass through the gate. The landowner denies access to people who do not pay. Does the public have an easement to the land behind the gate? By prescription? Customary use?

#### **RESPONSE to QUESTION #4**

The criteria for acquiring an easement by prescription are set forth above, and would have to be met to justify such a finding. The prescriptive easement could be claimed by specific individuals, or by the public in general. There is no question that, in Maine, the public may acquire a prescriptive easement, although some special rules apply. For example, the general public must use the land, not an identifiable segment of the public with special reason for using the land.

Among the questions that would be most important in proving an easement over roads in the forestlands would be whether the landowners had given permission to use the roads, since permission destroys one element of prescription, i.e., the requirement that the use be adverse to the owner.

In addition, with respect to “wildlands,” it is important to note that a property owner has statutory methods of preventing the acquisition of a prescriptive easement.

- Title 14, section 812 allows a person to prevent acquisition of such a right by posting notice for 6 continuous days or by recording such notice in the registry of deeds.
- Section 814 provides that “in roads privately owned in unorganized territory notwithstanding the other provisions of this subchapter, no title or interest shall be acquired against the owners thereof by adverse possession, prescription or acquiescence, however exclusive or long continued.” This section appears to prevent the public from acquiring easements by prescription in private roads in the unorganized territory, but according to Prof. Hermanesen, this rule may not be absolute. A court would most likely require that the landowner take some action to prevent the acquisition of an easement, such a filing, recording to delivering a notice to those who might seek to acquire the easement.

Once an easement is “earned,” it is not extinguished by sale of the property burdened by the easement.

As for acquisition of an easement by customary use, the court in Maine has not yet ruled on whether the public can acquire an easement by customary use. In Bell v. Town of Wells, the court stated that very few American jurisdictions recognize the English custom of public easement by local custom. Bell, 557 A.2d 168, 179. In that case, the court did not rule directly on that point because it found that, even if such an acquisition were possible in Maine, the facts in this case did not justify it. However, the court noted:

There is a serious question whether application of the local custom doctrine to conditions prevailing in Maine near the end of the 20<sup>th</sup> century is necessarily consistent with the desired stability and certainty of real estate title. Bell at 179.

#### **QUESTION #5: Subdivision Lot Owners**

**A subdivision occurred in an unorganized township far from any public roads.** The person who owned and subdivided the land did not own the primary road used to access the large block although the landowner had used the primary road for many years without paying a fee. At a later date the owner of the primary road decides to charge everyone who passes through a gate on the primary road. Do the owners of the subdivided parcel have an easement to use the primary road? Can they be forced into a road association to help pay for maintenance of the road? Is there an easement if the parcels are accessible by water? If no other access?

#### **RESPONSE to QUESTION #5**

If the developer had acquired an easement over the road prior to the sale of the lots (through necessity, prescription, estoppel or otherwise), the subdivision lot purchasers would also have an easement. An easement that benefits a particular property and is attached to that property is called an appurtenant easement and an appurtenant easement passes with the property to successive owners.

There may be some question about whether the easement is overburdened by subdivision lot owners. If the developer used the easement seasonally and infrequently and the development of the property results in year-round, constant use by a great number of vehicles, it is possible that the easement will be found to be overburdened and use would be restricted. The Maine Law Court has stated:

The permissible uses of an easement acquired by prescription are necessarily defined by the use of the servient land during the prescription period....[In determining whether a particular use overburdens an easement, the Court] must balance the prior use of the right-of-way established during the prescription period against any later changes in the method of use that unreasonably or unforeseeably interfere with the enjoyment of the servient estate by its current owner. S.D. Warren Co. v. Vernon, 697 A.2d 1280, 1283 (1997) (citations omitted)

Can the subdivision lot owners be forced into a road association? A person cannot be forced to join a road association unless the person has agreed by deed, lease or other contract to do so. However, a person can be forced to share in the cost of repairing a private way under the method set forth in Title 23, chapter 305, subch. 1 (§§3101 to 3104). Under that chapter, when 4 or more parcels of land are served by a private way, any 3 or more of the owners of that land can call a meeting to provide for repairs and the sharing of costs for those repairs.

However, two provisions of that law might prevent it from being used in the case of subdivision lot owners in an unorganized township within paper company lands. Most importantly, the law does not apply to “ways constructed or primarily used for

commercial or forest management purposes”.<sup>20</sup> While this was probably intended to prevent paper companies from being forced to maintain their roads in a manner satisfactory to small property owners, it also prevents small property owners from being drawn into sharing the cost of maintaining paper company roads by the paper companies.

The second provision of the law limiting its use in these situations is that there have to be at least 3 different property owners who join in the call for cost-sharing.

Is there an easement if the parcels are accessible by water or by other means? It depends on what type of easement the developer claims. The developer may not have an easement by necessity if access by water or other method was reasonably available to the developer at the time the developer’s land was severed from the larger parcel. If the developer is claiming an easement by estoppel, a quasi-easement, or prescriptive easement, the availability of alternative access would probably not affect the recognition of the easement.

#### **QUESTION #6: Camps on Leased Lands**

**A person owns a camp on a lake in Maine. The camp is on leased land.** For over 50 years the camp owner has used the same road to access the camp with no fee charged. The lease does not mention use of the road. At a point in time the land owner decides to charge a fee to use the road. Does the camp owner have a right to use the road without paying the fee? Can the camp owner be forced to join an association to pay for road maintenance?

#### **RESPONSE to QUESTION #6**

The owner of a camp built on leased land could try to argue that he has a quasi-easement, or that he has an easement by estoppel. Both of these would require that the land over which the camp owner seeks to walk or drive be owned by the same person who leased the property to the camp owner, at least at the time the camp owner entered into the lease.

A quasi-easement is an implied easement that is recognized by the courts if:

- the easement existed at the time the lease was entered into;
- the use of the easement has been continuous and apparent; and
- the easement is necessary for access.

The quasi-easement would be limited to the type and extent of easement that existed at the time the lease was entered into, and by the necessity.

A camp owner could also argue that the land owner is estopped from denying the easement if:

- the landowner engaged in acts, declarations or silence;

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<sup>20</sup> 23 MRSA §3101

- those acts, declarations or silence induced the camp owner to act or not act in a way that jeopardized the camp owner's rights; and
- the acts and the reliance of the camp owner were reasonable.

For example, the camp owner might argue that the landowner told him that he had the right to use the road to access his camp, and because of this statement the camp owner did not negotiate to put the right into the lease. Or the camp owner could argue that the landowner knew that the camp owner would need to use the road to access his camp, the camp owner continually used the road, assuming that he had a right to do so, and the camp owner would have secured that right in the lease if the landowner had not, by its silence, induced the camp owner to forego asking for the easement in the lease. Only the court can say whether the facts lead to a finding of quasi-easement or easement by estoppel.

For discussion of being forced into a road association, see the discussion above under subdivision lot owners.

#### **QUESTION #7: Legislation expanding public access**

**If the legislature chooses to enact laws that expand public access** beyond what is provided in the common law, i.e. the Colonial Ordinance, the State would be required to compensate landowners. Failure to do so would be a "takings".

#### **RESPONSE to QUESTION #7**

The Law Court in the Moody Beach case addressed this question directly. It struck down a law attempting to grant public rights in the intertidal zone for general recreational purposes. The Public Trust in Intertidal Land Act was found to give rights beyond those provided by common law, and thus constituted an unconstitutional taking of private property without compensation.

Although contemporary public needs for recreation are clearly much broader [than fishing, fowling and navigation], the court and the legislature cannot simply alter these long-established property rights to accommodate new recreational needs; constitutional prohibitions on the taking of private property without compensation must be considered. Bell at 169.

While the Legislature may infringe to some extent on private property rights for the good of the public, e.g., by prohibiting dumping of hazardous wastes on private property, it may not allow physical invasion of property without compensating the property owner. The Court in Bell cited with approval from a number of cases addressing this question. Most notable is their quotation from a Massachusetts case striking down a law creating a public footpath along the intertidal zone.

The elusive border between the police power of the State and the prohibition against taking property without compensation has been the subject of extensive litigation and commentary. ... But these difficulties need not concern us here.

The permanent physical intrusion into property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and of the United States.

It is true that the bill does not completely deprive private owners of all use of their seashore property in the sense that a formal taking does. But the case is readily distinguishable from such regulation as merely prohibits some particular use or uses which are harmful to the public. ... The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.... Bell v. Town of Wells, 557 A. 2d at 177.

The Court also cited a California case stating that it makes no difference that the intrusion is short-lived.<sup>21</sup>

Passage of legislation that takes private property may subject the State to litigation and the payment of compensation to owners deprived of the full value of their land.

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<sup>21</sup> Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

## Sources and Resources

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- Eaton v., Town of Wells, 2000 ME 176, Docket # Yor – 99 – 700 (decided October 20, 2000)
- Barrows v. McDermott, 73 Me. 441 (1882)
- Conant v. Jordan, 107 Me. 27, 77 A. 938 (1910) (finding no private ownership in a great pond; reaffirming public right to fish and fowl on a great pond)

- Brastow v. Rockport Ice Co., 77 Me. 100 (1885)
- Barrett v. Rockport Ice Co., 84 Me. 155, 24 A. 802 (1891) (right to take ice from a great pond)

#### *Public Trust Doctrine*

- Opinion of the Justices, 437 A.2d 597 (1981) (public trust doctrine; Legislature's right to release title in submerged lands)
- Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919) (riparian owners' rights; Legislature's power to limit public rights)

#### *Easements*

- Flood v. Earle, (easement by necessity)
- Frederick v. Consol. Waste Systems (easement by necessity and others)
- S.D. Warren Co. v. Vernon, 1997 ME 161, 697 A.2d 1280 (1997) (prescriptive easement)

#### *Judicial Process*

- State v. Haines, 620 A.2d 875 (Me. 1993) (court will not rule on legality of access fees in a criminal prosecution for trespass because parties charging the fee are not parties to the criminal case)
- In re Opinion of the Justices, 128 A. 691, 124 Me. 512 (1925) (court refused to respond to questions submitted by the Legislature, relating to the right of citizens to go upon unenclosed woodlands to hunt and take fish; such questions can only be determined in a proper proceeding in which both sides are heard)

#### **Maine Statutes**

12 MRSA §7551, sub-§2 (person on foot may engage in any action on great pond not prohibited by law)

14 MRSA sub-c. II (14 MRSA §§801-816) Real Actions (statutes governing adverse possession and acquisition of easement by adverse possession (prescriptive easement))

17 MRSA §3860 (prohibiting denial of access to great pond over unimproved land)

23 MRSA §2067 (path to great pond in unorganized territory)

23 MRSA c. 305, sub-c. II (§§3101 to 3104) (private ways; cost of repair))

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## **APPENDIX I**

**Letter from G. Steven Rowe, Attorney General, to the Chairs  
of the Committee to Study Access to Private and Public Lands  
Dated 2/12/2001**