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Title 12 M.R.S.A. § 2557-A, Public access to waters stocked by the State.

SYNOPSIS:

The Department of Inland Fisheries and Game may not plant fish or fish spawn raised by the State in any inland waters unless free public access to those waters is provided during the fishing season. The form of access which must be provided is different from and distinctly greater than access to which the public is entitled under the Colonial Ordinances.

FACTS:

Title 12 M.R.S.A. § 2557-A (the "Act") provides that no fish or fish spawn raised by the State shall be planted or deposited "in any inland waters of the State unless free public or private access to the public is provided to said waters at such time as said lakes are open to fishing under thegeneral law." There are inland lakes which are great ponds but to which no specific access, public or private, has been provided to the public at any time for the purpose of fishing. The public has common law rights under the Colonial Ordinances to fish and to fowl in all great ponds under certain circumstances. Questions have now arisen concerning whether or not rights under the Colonial Ordinances are sufficient to permit the stocking of such ponds and lakes.

QUESTION:

May the Department of Inland Fisheries and Game (the "Department") lawfully plant or deposit fish or fish spawn raised by the State in inland waters to which the only access provided to the public is that access conferred by the Colonial Ordinances?

ANSWER:

No.

REASONING:

The Colonial Ordinances, now a part of Maine's common law, grant to the public, among other things, fishing and fowling rights in all great ponds provided access to such ponds may, in terms of the ordinance, be had "by passing on foot without trespassing upon any man's corn or meadow." Since at leas 1649, therefore, the public has had available to it this limited form of access to all great ponds.

The Act was enacted by chapter 104 of the Public Laws of 1965. The issue is whether the Legislature intended that the public "access" required by the Act be something different from or greater than that to which the public was already entitled when the Act became effective. For several reasons, we conclude that the Legislature intended a different and significantly more functional type of public access in the Act. First, the Act restricts the conditions under which it will grant a public benefit (in the form of stocking fish). When a lake is stocked at public expense, the greatest beneficial impact falls upon the particular riparian owners and upon those persons in a position to gain ready access to the lake for the purpose of fishing. It seems logical that if the Legislature imposed a condition upon the bestowal of a public benefit, that condition should be construed to secure/broad and not a narrow public right.

Second, the Act requires "free" access, which implies that it was directed against situations where fees have been charged the public. No fees have been or can be charged by private landowners to members of the public to exercise such common law rights. Moreover, the Act requires that public access be provided only "at such times as said lakes are open to fishing under the general law." This presupposes that the public access intended by the Act could be suspended during the closed season, yet the public has many rights under the Colonial Ordinances not relate to the fishing season including the right to boat, bathe, take water, cut ice and hunt fowl. Finally, the public may not trespass upon any man's corn or meadow under the Colonial Ordinances, yet the Act does not contain this limitation. This gives rise to the presumption that access must be provided to the public under the Act even if it means, in some cases, crossing improved lands.

It seems clear from the purpose and wording of the Act, therefore, that the Legislature intended to require in the Act some form of public access during the fishing season which is different from and which is greater than that access to great ponds already enjoyed by the public for more than 300 years prior to the Act. The Act does not spell out precisely what form of public access is required. It is safe to assume, however, that the form of access required to be provided is free and is via a distinct and functional way of passage. It may also be concluded that the type of access which must be provided is consistent with the kind of fishing in common use on the body of water in question--for instance, access to a fisherman allowing him to launch only a canoe may not be adequate where, because of the size of the lake, the only practical means of fishing is from a larger watercraft.

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