STATE OF MAINE

ONE HUNDRED AND SIXTH LEGISLATURE

COMMITTEE ON JUDICIARY

December 2, 1974

Legislative Council
106th Legislature
State House
Augusta, Maine

Gentlemen:

In accordance with HP 1634, Order directing the Judiciary Committee to study "An Act Relating to Trespass on Certain Land Surrounding Lakes and Other Bodies of Water," H.P. 459, L.D. 614, I enclose herein final report of the Committee.

Respectfully submitted,

Wakine G. Tanous,
Chairman

WGT/pac
Enc.

COMMITTEE ON JUDICIARY

REPORT ON ITS STUDY OF

H.P. 459, L.D. 614, "AN ACT Relating to Trespass on Certain Land Surrounding Lakes and Other Bodies of Water"

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Report of the Committee on Judiciary

on Study of Trespass Law Relating to Great Ponds

The Committee on Judiciary was instructed to study the subject matter of "An Act Relating to Trespass on Certain Land Surrounding Lakes and Other Bodies of Water", H.P. 459, L.D. 614 introduced in the 105th Legislature, and to report on its findings at the next special or regular session of the Legislature. As the study order pointed out, L.D. 614 was primarily concerned with great ponds, ponds of 10 acres or more, the waters and beds of which are public property. The problem at which this bill was directed occurs when the waters of a great pond recede and leave exposed the bed of the pond, which is public land, in front of what is often privately owned shore land. The purpose of L.D. 614 was to make it a trespass to enter onto such exposed land.

The text of L.D. 614 reads as follows:

R.S.,T. 17, § 3853, amended. Section 3853 of Title 17 of the Revised Statutes is amended to read as follows:

§ 3853. Commercial or residential property

Whoever willfully enters in and upon any land commercially used, including parking lots, or whoever willfully enters in and upon residential property or the improved lands appertaining to any farm, summer camp or cottage or in and upon any riparian or littoral property or lands, or upon any land situated between the same and the then existing water's edge, or whoever parks any motor vehicle in any private drive or way in a manner to block the same or on a public highway in such a manner as to block the entrance to a private driveway, gate or barway, or whoever willfully permits his cattle, horses, sheep or swine to enter in and upon residential property, including summer residences and cottages after having been forbidden to do so by the owner or occupant thereof, either personally or by an appropriate notice posted conspicuously on the premises, shall be guilty of trespass and shall be punished by a fine of not more than $100 or by imprisonment for not more than 90 days, or by both.

An amendment had been proposed, which would delete the underlined language and add a new paragraph to section 3853 to read as follows:

> Whoever, not being the owner or lessee, willfully enters in and upon any property or land abutting a great pond between the high water mark and the water's edge without the consent of the owner, except for the purpose of passage, fishing or fowling, shall be guilty of a trespass and upon conviction shall be punished as provided in this section.

The Committee on Judiciary first met for this study on September 6, 1973. At that time, the committee met with Assistant Attorney General Leon V. Walker, who had done research on the problems involved in L.D. 614 and who had drafted the amendment to the bill.

Mr. Walker testified that the problem which inspired L.D. 614 had arisen during a period when the waters of Sebago Lake had receded below the usual low water mark. People began to go on to and to camp on the exposed land between the usual low water mark and the new water's edge, much to the annoyance and disturbance of owners and renters of adjoining camps and cottages on the former shore line. Local law enforcement officials felt there was nothing they could do in response to complaints about this activity, because no trespass law could be found which applied to this situation. L.D. 614 was introduced in response to this. Because the original language applied to streams and rivers as well as to ponds, the amendment applying only to great ponds was prepared. The exception in the amendment for entry onto land for passage, fishing, and fowling was added because such rights were guaranteed to citizens by the Colonial

Ordinance of 1641-7. Mr. Walker stated that the bill, even with the amendment, was still not clear on the issue of against whom the trespass would be committed, the land owner or the state. The committee then reviewed a letter which had been sent to the committee during the 105th Legislature, from Attorney Robert Cram of Falmouth, a former member of the Senate. The letter expressed Mr. Cram's opposition to L.D. 614 because he felt it would repeal public rights of access to great ponds established and guaranteed by the Colonial Ordinance and cited several Maine Supreme Court cases which had defined these rights.

The committee felt that further research on the background and effect of the Colonial Ordinance and its interpretation by the courts was necessary. The committee therefore directed Legislative Assistant Thomas P. Downing, who had just been assigned to work with the committee on this study, to research these matters and to prepare a report for the committee before the next meeting. The committee also decided to request information and testimony from state officials who might have knowledge of any problems regarding trespass and great ponds.

Mr. Downing's research memorandum to the committee, based in part on the references in Mr. Cram's letter, set forth the text of the ordinance and reviewed the cases. The basic law on the great ponds was well summarized in one of these cases, Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919):

> Under the peculiar, but settled law of Maine and Massachusetts, originating in the Colonial Ordinance of 1641-47, ponds of more than 10 acres in extent are designated as great ponds. Whatever doubt might otherwise arise from a critical study of the subject as a matter of legal history, it must now be accepted as the common law doctrine in Maine that the State holds these ponds in trust for the use of the people of the State, together with the right to control and regulate the waters thereof...The right of the individual to fish and fowl in these waters, provided he can do so without committing trespass upon the land of littoral proprietor... the right of boating, bathing, cutting ice..., and the supplying of water to a municipality for domestic uses, have all been recognized as among the public purposes which are within the regulation and control of the State. The State's title in great ponds is the same in its origins as in tidal waters. The State holds, and can control, the use of both for public purposes, and it is perhaps for the better protection of these rights in great ponds that the private ownership of littoral proprietors has been confined to low-water mark, and the title of the land below that line-- that is, to the bed of the great ponds-- has been declared to be in the State. It is in this qualified sense that the people are said to own the great ponds within our borders.

The memorandum also pointed out some recent statutes involving the great ponds. 38 MRSA § 422 requires permits for any construction or dredging or similar activity on great ponds, since they are public property. 23 MRSA § 2067 provides for establishment of foot paths to great ponds in unorganized territory, upon petition of 40 residents of the county. Most importantly, 17 MRSA 3860 , which was enacted in 1973, in effect enforces the rights under the Colonial Ordinance, by stating that no person on foot shall be denied access or egress over unimproved land to or from a great pond and by requiring the Attorney General, upon complaint, to enforce this right and by establishing a criminal penalty for those who violate this right.

After reviewing the memorandum, the committee met again on November 15 and at that time heard from two representatives of state agencies who had been asked about their experience with this problem, Lawrence Stuart, Director of the Bureau of Parks and Recreation, and Richard B. Parks, Chief of the Realty Division, Department of Inland Fisheries and Game.

Mr. Stuart testified that he had checked with the staff of his bureau and knew of no such problems other than incidents involving beach parties on land adjoining Sebago Lake State Park and therefore beyond the jurisdiction of his bureau. He stated that there was a real problem developing over the public's right of access to ocean beaches between high tide and low tide. There is a public right of access to such areas, also based on the Colonial Ordinance, but not fully defined by case law. Since more and more people wish to use such areas, Mr. Stuart felt that the Legislature might consider a clearer definition of public rights, by enacting an "Open Beaches Act" similar to a law enacted in Oregon and under consideration in Massachusetts.

Mr. Parks testified that his department was not aware of any problems involving exposed beds of great ponds. The question was asked how, if L.D. 614 or a similar bill were passed, the mean low water mark could be established and how an individual might determine this so that he could know whether or not he was committing a criminal trespass. Mr. Parks replied that it would require engineering surveys

over the entire water cycle of a lake, a period of 20 to 30 years, to establish the mean low water mark and that to do so for every great pond in the state would be a monumental task. No such records are currently kept.

The committee then discussed ways of handling the problem to which L.D. 614 was directed. A criminal trespass statute could not constitutionally be based on a mean low water mark which could not be readily determined, since a person would not be able to know whether or not he was in violation of the law. The committee felt that there were sufficient laws in effect now, such as statutes against disturbing the peace, to deal with the types of conduct at which L.D. 614 was directed. The problem is to encourage the authorities to enforce these laws. The committee felt that the best way to encourage the Department of Inland Fisheries and Game to enforce those laws would be to amend the statutes giving wardens general law enforcement powers to provide that fines derived from such enforcement be dedicated to the Department of Inland Fisheries and Game.

The committee concluded this meeting by voting on four recommendations which were to be sent to the Legislative Council. Before a report was sent to the Legislative Council, and after the special session of the 106th Legislature, the committee decided to hold an additional meeting

to hear from certain witnesses who wished to present testimony about their problems in this area.

The meeting was held on August 7, 1974. Representative Larry E. Simpson of Standish, who had sponsored the original L.D. 614 and the study order as well, appeared as the first witness. He stated that problems had continued in the Sebago Lake area with possible trespasses and other disputes at or near the water's edge and that the Sheriff's Department had been reluctant to take any action in regard to some complaints because of uncertainty about property boundaries. He also stated that the wording of some of the deeds in the Sebago Lake area may have contributed to the problem by using varying terms for boundary descriptions, such as "the water's edge", "the high-water mark" and "the low-water mark". He mentioned that the water level at Sebago Lake is more clearly defined than at most lakes, because the water level of the lake is regulated within specified limits by S.D. Warren Company of Westbrook under the authority of a private and special law dating from the nineteenth century.

Representative Simpson then introduced three persons from the Sebago Lake region who presented their views.

Mr. Michael Foye and Mr. Theodore Harriman, both from the town of Sebago Lake and both officers of the Long Beach Association, spoke about the problems of landowners whose property does not abut the lake in obtaining sufficient access to the lake shore. They both

reside in a development on Sebago Lake in which the owners or renters of back lots have access to the lake shore by rights of way which go to the beach. Their problem occurs when the water level is high, thereby shortening the beach and leading some persons using the rights of way on the beach to spill over the boundaries of the rights of way in front of the cottages and on the beaches of shorefront property owners or renters. The result is complaints from these persons. Neither witness had any comment on how L.D. 614 might help this particular problem. They did speculate that, because of the terminology of the deeds, some shorefront owners might not own to the low water mark and that there might be a "no-man's land" situation and that the shorefront owners or renters might therefore have no legal basis to their complaints.

The third witness was Mr. Lincoln Hawkes of Gorham, a real estate developer who had been the original proponent of L.D. 614. He felt that persons who pay the premium price for shorefront property should be entitled to full protection of their property rights. He suggested that the only solution for the problems of the two previous witnesses would be for the owners of back lots in such developments to join together and purchase, at a relatively small contribution from each, additional shorefront property to give sufficient guaranteed access to the beach.

The committee discussed the study further, in executive session. It was decided that, although it would be nearly impossible to determine the mean low water mark for most lakes in Maine, the level of Sebago Lake was regulated and the low water mark could therefore be determined. The committee felt that, in order to settle the disputes around Sebago Lake, the shorefront property line might be established, by a private and special law, as the lowest low water mark as regulated. This would be a boundary that would be readily ascertainable by most persons and might prevent further disputes. By such a bill, the state would in effect be ceding to the abutting shorefront owners its ownership of the bed of the lake between the lowest low water mark and the mean low water mark. The legislative assistant to the committee was directed to do further research on this possible solution, which might be an additional recommendation of the committee.

Research established that the Presumpscot Water Power Company, now a subsidiary of S.D. Warren, in its corporate charter as granted by the state by Chapter 64 of the Private and Special Laws of 1878 and as amended by Chapter 406 of the Private and Special Laws of 1885, had been given the authority to maintain a dam at the Presumpscot River outlet of Sebago Lake and then to raise the height of the dam, thus changing the level of the lake. The raising of the water level flooded some land around the lake. The question then arose of the ownership of the flooded land and of how it might be affected by a redefinition of shorefront boundary lines. This led to similar

questions about the legal status of flooded land, under other great ponds, beyond the natural mean low water mark, which is the limit of the state's ownership.

There are several possible answers depending on how the right to raise the level and flood land was originally obtained. Early in the nineteenth century, Maine passed the "Mill Act", which is still in the law at 38 M.R.S.A. §650 et seq. It gave any man the right to erect a dam in a non-navigable stream in order to store water for the generation of power. The law prescribes complicated procedures by which the owner of lands flooded by such a dam could obtain compensation from the mill owner in the form of damage payments. Under such procedures, the mill owner obtained a right in the nature of an easement. If the procedures were not followed, which may often have been the case because the burden was on the landowner to initiate them, the mill owner's rights were probably obtained by prescription (the uninterrupted invasion of another's property right for at least 20 years) or by some out-of-court agreement between the parties. In any event, unless the mill owner purchased the flooded land outright, his rights were in the nature of an easement and the original land owners continued to hold the land. Subsequent conveyances of shorefront property which refer to the low water mark may not have included the flooded land, the right to which would remain in the heirs of the original owners.

The history of the changing water levels of Maine lakes does therefore leave questions remaining about the status of property rights. The uncertainty makes it virtually impossible to establish a precise property boundary which might not adversely affect long-standing rights of private ownership. It also leaves the question, which has apparently never been presented to the Maine courts, of how the public's right of access to great ponds under the Colonial Ordinance applies to great ponds that have been enhanced in size because of dams or to lakes that might not have met the definition of great pond in their natural state. It also raises the question of the rights of persons living on the shores of such artificial great ponds to the continued enjoyment of a water level which is subject to change.

The committee is aware that the Congress of Lakes Associations, which represents many people who might be affected by these problems, is undertaking a much more extensive study of the situation, and may propose legislation to attempt to resolve these questions.

After further discussion, the committee then agreed to make the following recommendations to the Legislative Council:

1) Legislation such as L.D. 614 is not needed because the problem of misuse of the land under great ponds when receding water exposes this land occurs very rarely because the water levels do not fluctuate enough. All testimony to the committee indicated

that the problem had occurred only once in recent years, during one period at Sebago Lake.

2) Even if legislation were needed, it would not be possible to draft a constitutional criminal trespass statute based on mean low water marks, since testimony indicates that no record has been kept of this and it would not be feasible to attempt to determine such marks.

3) Problems such as those that did occur at Sebago Lake could be resolved if existing criminal statutes were fully enforced. The wardens of the Department of Inland Fisheries and Game would be encouraged to do so if the fines derived from such enforcement were dedicated to the Department. Proposed legislation is attached to this report.

4) The problems of property rights on the shores of artificially increased lakes and of public rights under the Colonial Ordinance to artificially increased great ponds merit further study. If legislation is not enacted to resolve these problems, the Legislature should undertake the further study needed.

5) The committee is concerned about defining and expanding other rights derived from the Colonial Ordinance, the public right of access to ocean beaches between high tide and low tide. The committee recommends further study of the possibility of adopting

in Maine legislation similar to that proposed in Massachusetts and enacted in Oregon. The committee recognizes that a recent Massachusetts case (Opinion of the Justices, 313 N.E. 2d 561, Mass., 1974) held the proposed legislation there an unconstitutional infringement upon the property rights of shoreland owners created by the Colonial Ordinance, but believes further study of alternative proposals is merited.

AN ACT Relating to Disposition of Fines and Penalties Resulting from Prosecution by Wardens of Criminal Offenses

Be it enacted by the People of the State of Maine, as follows:

12 MRSA § 3061, last sentence of 1st ¶, as last amended by PL 1971, c. 403, § 45, is further amended to read:

> All fees, fines and penalties recovered and money received or collected, and including any fees, fines and penalties recovered by the court from any prosecution by wardens pursuant to their acting, under section 2001, with the same powers and duties as sheriffs have, and including monies received from sale, lease or rental of department owned property, shall be paid to the Treasurer of State and credited to the department for the operation of fish hatcheries and feeding stations for fish, for the protection of fish, game and birds, information and education on conservation and for printing the report of said commissioner and other expenses incident to the administration of said department, and shall be expended by the said commissioner for the purposes for which said department is created.

STATEMENT OF FACT

Wardens are vested with the same powers and duties as sheriffs to prosecute criminal offenses. The purpose of this bill is to encourage their enforcement of such criminal offenses by providing that fines and penalties from prosecution will be added to the dedicated revenues of the Department of Inland Fisheries and Game. The bill is the recommendation of the Judiciary Committee resulting from its study, assigned by the 106th Legislature, of the problem of trespass and other criminal activities on the shores of great ponds.