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May 31, 2019

Christopher W. Nolan, Director
Office of Fiscal and Program Review
5 State House Station
Augusta, ME 04333-0005

Re: Fiscal Consequences of LD 1323

Dear Mr. Nolan,

I am writing regarding LD 1323, An Act to Revise the Laws Regarding the Public Trust in Intertidal Lands. LD 1323 was passed out of committee without any analysis of its fiscal impact, which would be substantial. Specifically, LD 1323 would result in multiple takings of private intertidal property rights that would require the State to pay just compensation to landowners along the entirety of Maine's Coast.

On its face, LD 1323 would grant to the public the right to conduct nearly any recreational or commercial use on private intertidal property. LD 1323 sets forth a number of uses of private intertidal land as examples of rights that it would grant to the public. However, the majority of the activities that LD 1323 would permit have been held by the Maine Supreme Judicial Court to be beyond the scope of the public's right to use private intertidal property.

Most blatantly, LD 1323 states that the public is permitted to engage in "seaweed harvesting" on all intertidal land in the State. Just two months ago, the Law Court unanimously held the opposite:

> rockweed attached to and growing in the intertidal zone is the private property of the adjacent upland landowner. Harvesting rockweed from the intertidal land is therefore not within the collection of rights held in trust by the State, and members of the public are not entitled to engage in that activity as a matter of right.

Ross v. Acadian Seaplants, Ltd., 2019 ME 45, ¶ 33.

The Office of the Attorney General submitted written comments on LD 1323 stating that "the majority of the 'commercial uses' set forth in LD 1323," which include the harvest of seaweed, "are not or may not be within the public's trust rights." Accordingly, the OAG recommended "deleting the entirety" of LD 1323's provision purporting to grant the public the right to conduct commercial uses (including rockweed harvesting) on private intertidal land. The OAG's comments are attached for your convenience.

Thus, under common law, the public unequivocally does not have the right to harvest rockweed on private intertidal property. While it is true that the Legislature has the authority to "codify, alter, or abrogate the common law," *Bell v. Town of Wells*, 557 A.2d 168, 191 (Me. 1989), legislation that results in a taking of private property rights requires the State to pay just compensation. U.S. Const. Amend. V ("nor shall private property be taken for public use, without just compensation"); Me. Const. art. I, § 21 ("Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.").

LD 1323 would cause a taking of, among other property rights, privately owned intertidal rockweed up and down the Maine Coast. In order to accomplish that taking, the State would need to compensate every intertidal landowner whose land contains rockweed. Although rockweed is not a high-value resource (it sells for about four cents a pound at the dock), a 2001 University of Maine study estimated that there are approximately one million metric tons (2,204,622,622 pounds) of wet intertidal rockweed in Maine. That works out to a very rough estimated dock value $88,184,000. That estimate does not appear to account for the rockweed growing on the significant coastline of Maine's islands.

In addition to the compensation specific to the State taking of rockweed, LD 1323 would result in multiple other takings. If enacted, the statute would allow commercial uses "including, but not limited to" infrastructure related to "aquaculture of fish, shellfish and other marine organisms," installation "utility cables and pipelines," and "the storage, rental and sale of paddle boards and surf boards, kayaks, small boats and related marine equipment" on private intertidal property.

Finally, the recreational use provision in LD 1323 is functionally the same as the 1986 intertidal recreational use statute that was invalidated as an unconstitutional taking in *Bell v. Town of Wells*. That 1986 statute, which is still on the books, states, "The public trust rights in intertidal land include . . . [t]he right to use intertidal land for recreation." 12 M.R.S.A. § 573. The *Bell* Court held that this recreational use provision "takes for public use much greater rights in the intertidal zone than are reserved by the common law and therefore the Act on its face constitutes an unconstitutional taking of private property." 557 A.2d at 176-77.

LD 1323 would simply replace the invalidated recreational use provision of 12 M.R.S.A. § 573 with new recreational use language in 12 M.R.S.A. § 574 that suffers from the same constitutional defect, namely the taking of property rights without just compensation.

As discussed above, the majority of LD 1323 will either require substantial State payment of just compensation to landowners or will result in unconstitutional non-compensated takings. Accordingly, I respectfully request that your office conduct an analysis of the fiscal impacts of LD 1323.

Sincerely,

Gordon R. Smith

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April 25, 2019

Senator James Dill, Chair
Representative Craig Hickman, Chair
Committee on Agriculture, Conservation and Forestry
c/o Legislative Information Office
100 State House Station
Augusta, ME 04333-0100

Re: Testimony in Support of LD 1323

Dear Senator Dill and Representative Hickman,

Please accept this testimony in support of LD 1323. The Office of the Attorney General (the OAG) respectfully requests that the Committee on Agriculture, Conservation and Forestry vote LD 1323 out of committee as ought to pass. The basis for the OAG's support of LD 1323 is set forth below, along with proposed amendments to the bill.

Background on the Public Trust Doctrine

First, some context. According to Law Court decisions applying the Colonial Ordinance of 1641-47, Maine is one of only a few coastal states that does not own its intertidal zone. Rather, those decisions provide that the intertidal zone in Maine is susceptible of private ownership, and, at many locations, is privately owned. Ownership of the intertidal zone, however, is subject to the public's common law rights to use the intertidal zone. The public's common law rights to use the intertidal zone, which are traced back to Maine's colonial origins, are referred to as the public trust doctrine. In recent decades, the public trust doctrine has been under siege by persons interested in shrinking the public's right to use the intertidal zone. Because so much of the intertidal zone in Maine is in private hands, preserving the public's trust rights to use the intertidal zone is critically important.

To protect the public's trust rights to the intertidal zone, the Legislature, in 1986, enacted the Public Trust in Intertidal Land Act (the Public Trust Act), which act codifies Maine's common law. 12 M.R.S.A. §§ 571-573 (2005), enacted by P.L. 1985, ch. 782. The Public Trust Act states that the public's trust rights to intertidal land include the right to use that land, without permission of the landowner, for "fishing, fowling, and navigation"; "*recreation*"[1]; and "[a]ny other trust rights

[1] The Public Trust Act does not define "recreation."

. . . recognized by the Maine common law and not specifically abrogated by statute."[2] 12 M.R.S.A. § 573(1)(A)-(C) (emphasis added). In a 1989 opinion, however, the Law Court declared for the first time in Maine's history, over a strong dissent and contrary to the arguments of the OAG, that the public's trust rights to the intertidal zone are limited to fishing, fowling and navigation only, and do not include general recreation. *Bell v. Town of Wells* (*Bell II*), 557 A.2d 168, 176-77, 187 (Me. 1989). Since *Bell II*, "a member of the public has been allowed to stroll along the wet sands of Maine's intertidal zone holding a gun or a fishing rod, but not holding the hand of a child." *Ross v. Acadian Seaplants*, 2019 ME 45, ¶ 34, __A.3d__ (Saufley, C.J., concurring). *Bell II's* holding essentially gutted the public's right to use the intertidal zone for traditional recreational purposes.

In the decades following the *Bell II* decision, the OAG has advocated resolutely to the courts of this State that the public's trust rights to use the intertidal zone are not confined to fishing, fowling, and navigation, and that the Law Court wrongly decided *Bell II.* Although the Law Court has not yet explicitly overruled *Bell II*, neither has it steadfastly adhered to *Bell II's* fishing, fowling, and navigation only holding.[3] Thus, the scope of the public's trust rights to use the intertidal zone remains an unsettled area of law.

<u>LD 1323</u>

LD 1323 would amend the Public Trust Act to, among other things, identify those recreational activities that the Legislature understands to be within the public's common law trust rights to the intertidal zone. The OAG supports LD 1323 because (1) LD 1323 reiterates what the OAG has always understood to be true: The public's trust rights to the intertidal zone include the right to reasonable recreational use of the intertidal zone, and (2) LD 1323 clarifies what constitutes a "recreational use" pursuant to the Public Trust Act. As such, the OAG requests that the Committee vote LD 1323 out of committee ought to pass, with the modifications proposed below.

The OAG cannot overstate the importance of the Legislature, through LD 1323, reiterating its understanding that the public's trust rights to use the intertidal zone is, and has always been, more expansive than fishing, fowling, and navigation only. At a minimum, it must also include the public's "right to walk unfettered upon the wet sand of Maine beaches to peacefully enjoy one of the greatest gifts the State of Maine offers the world." *Ross*, 2019 ME 45, ¶ 41, __A.3d__ (Saufley, C.J., concurring).

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[2] The Public Trust Act also provides that certain activities, such as removing sand, soil, rocks, or minerals, are not within the public's trust rights to use intertidal land. 12 M.R.S.A. § 573(2) (2005). In other words, the Public Trust Act, like Maine's common law, distinguishes between uses that involve unobtrusive, temporary occupations of the intertidal zone and extractive uses.

[3] In the most recent Law Court case discussing the public's trust rights to the intertidal zone, three of the seven Justices stated that they would explicitly overrule *Bell II. Ross v. Acadian Seaplants*, 2019 ME 45, ¶¶ 35, 42, __A.3d__ (Saufley, C.J., Mead & Gorman, J.J. concurring). The four Justices in the majority did not rule out explicitly overruling *Bell II*, but observed that *Ross* "does not present us with the occasion to consider the vitality of the holding in *Bell II.*" *Ross*, 2019 ME 45, ¶ 33, __A.3d___.

Proposed Changes to LD 1323

The OAG requests that the Committee consider amending LD 1323 as follows:

- The OAG recommends that the Committee reject the proposed deletions to 12 M.R.S.A. § 571. That language provides helpful context by concisely describing the historical origins of the public trust in intertidal lands.

- LD 1323 includes as within the scope of the public's trust rights to use the intertidal zone certain activities that are not or may not be within the public's trust rights, such as "gathering shells and sea glass," and the majority of those "commercial uses" set forth in LD 1323 as proposed 12 M.R.S.A. § 574(3). Accordingly, the OAG recommends deleting from proposed 12 M.R.S.A. § 574(2) "gathering sea shells and sea glass," and deleting the entirety of proposed 12 M.R.S.A. § 574(3).

- The clarity of LD 1323 could be improved by limiting its applicability to intertidal lands and, accordingly, deleting proposed 12 M.R.S.A. §§ 572(2) and 574(4) and removing all references to submerged lands from proposed 12 M.R.S.A. § 575. The statute governing the State's submerged lands leasing program is set forth at 12 M.R.S.A. § 1862 (Supp. 2018) and it is unclear how LD 1323 would impact 12 M.R.S.A. § 1862.

- Because the State, through its Legislature and various executive branch agencies, already possesses the legal authority contemplated by proposed 12 M.R.S.A. § 576(1), the OAG recommends deleting proposed 12 M.R.S.A. § 576(1).

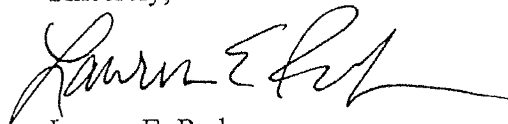
- Because municipalities possess some of the legal authority contemplated by proposed 12 M.R.S.A. § 576(2), the OAG recommends deleting the first two sentences of proposed 12 M.R.S.A. § 576(2).

- In light of the suggested revisions listed above, the OAG also recommends deleting section 5 of LD 1323.

- Finally, to ensure that the OAG is able to assert or defend the public's trust rights to the intertidal zone in any lawsuit where those rights may be at issue, the OAG requests that LD 1323 be amended to explicitly provide that the Attorney General has a right to intervene in any lawsuit that may affect the public's trust rights to the intertidal zone.

The OAG is happy to answer any questions the Committee may have regarding this testimony and welcomes the opportunity to work with the Committee and its staff on LD 1323.

Sincerely,



Lauren E. Parker
Assistant Attorney General