White Paper
on the
Public's Right of Seaweed Harvesting
in the
State of Maine

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Pre-1640 Colonial Times

When the settlers first landed in what is now the States of Massachusetts and Maine, they brought with them a fairly unabridged form of the English Common Law, as their claim to the new land was based solely upon Royal Charter. As they landed and settled upon the new continent, there were obviously no roads or any infrastructure for commerce. Perhaps there were Native American paths and by-ways, but nothing that would answer the settlers' call for developing the resources of their new land and waters, most notably the timber and fisheries the area was so blessed with.

According to the English Common Law in the early 1600s, a waterfront property owner owned the upland down to the "medium high tide line between the springs and the neaps."[1] In common vernacular, this line is today known as the "ordinary high water mark." Above the high water mark, the colonial upland owner owned the land in fee simple. Below the high water mark, and out to the open seas, the Crown claimed the submerged lands, the waters thereupon, and all living creatures within.

In other words, seaward of the high water mark, the English Crown held title to all the navigable waters, and the lands beneath those waters, and all living resources within. The Crown, however, did not own these resources outright, but rather held them for the benefit of all English subjects. The English common law viewed shorelands as useless for cultivation or other improvements and considered their natural and primary uses – navigation, commerce and fishing – to be *public* in nature,[2] and thus the Crown held these lands and waters subject to the dominant public uses of navigation, commerce and fishing. This today is commonly known as the Public Trust Doctrine.

As the colonialists settled into their roadless new world, it became obvious that the only method of transportation, commerce and moving goods was by the same means that brought them there from England – by boat. And in order to develop a water-borne commerce, docks and wharves were necessary. As stated in an 1810 Massachusetts[3] case,

> "When our ancestors emigrated to this country, their first settlements were on harbours or arms of the sea; and commerce was among the earliest objects of their attention. For the purposes of commerce, wharves erected below high water mark were necessary."[4]

But because an upland owner owned only to the high water mark, permission was needed to build a structure out over and in the Crown's lands and waters; the early colonists needed colonial governmental permission to do so. As noted in an 1857 Massachusetts case:

> "In the earliest times of the Colony, before the passage of any ordinance on the subject, wharves were built by the proprietors of land bounding on the sea, by the permission or authority of the towns, and with the approval of the general court. The earliest order of this kind, appearing in the Boston town records, is one of January 21st 1638-9, by which 'there is granted to the owners of the wharfe and crayne an hundred acres of land at Mount Woolystone, next to the allotments already granted, towards the repayring and mainteyening of the said wharfe and crayne.' 1 Boston Town Records, 27." [5]

But the colonialists were faced with the same problems commonly faced today – budget. As individuals, they had no money to build costly wharves, and even if they did, they would be building a structure at their own expense which wouldn't even belong to them; the wharf, being within the Crown's realm, would belong to the King! This being the case, few individuals sought permission to do so. Rather, they sought what could be seen today as the first "public works project" of the new world – they solicited the Charter government to pay for the construction of the wharves. But as noted by the same 1810 Massachusetts court:

> "But the colony was not able to build them at the public expense. To induce persons to erect them, the common law of England was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not more where the tide ebbs to a greater distance."[6]

The Colonial Ordinance of 1641/1647[7]

The "ordinance" referred to by the Court above is the ordinance of 1641, later amended in 1647, and which remains the law of Maine today.[8] Rather than the upland boundary being the common law's *high water mark,* the ordinance modified the common law so that the boundary was the low water mark, but no further than one hundred rods (or 1,650 feet in today's measurement) where the low water mark is even further offshore.[9] This made it possible for boats and ships to reach a wharf at any stage of the tide, high or low. Early courts have noted the purpose of the 1641/1647, in light of these events:

> "The object of the ordinance of 1641, from which the right to flats originated, was to give the proprietors of land adjoining on the sea convenient wharf-privileges, to enjoy which, to the best advantage, it is often necessary to extend their wharves to low-water mark at such times when the tides ebb the lowest."[10]

The ordinance, however, was not just a simple grant of *private rights* (or in latin: *jus privatum)* to the upland owner out to the low water mark to do with as he or she wished. Rather, the ordinance extended the upland owners private rights out to the low water mark for the specific and limited purpose of facilitating the construction of wharves necessary for the advancement of navigation and commerce. But of great importance to the colonialist at the time, as well as succeeding generations, the ordinance reserved certain specific *public rights* (the *jus publicum)* – the free passage of vessels (navigation) as well as the public's right of fishing and fowling – within the tidal area now "owned" by the upland owner. As described by the Maine Supreme Court in 1900:

> "The seashore primarily belonged to the Crown as a *jus publicum* in trust for the people. It may be held by the subject, but his *jus privatum* is charged, nevertheless, with the *jus publicum*. This is so, whether title thereto be set up under the grant from Charles I to Sir Ferdinando Gorges, or by virtue of the Colonial Ordinance of 1641 as modified in 1647. That ordinance has become a part of our common law, and by it, the proprietor of the main holds the shore to low water not exceeding one hundred rods. He holds it in fee, like other lands, subject, however to the *jus publicum,* the right of the public to use it for the purposes of navigation and of fishery, not, however, to interfere with his right of exclusive appropriation that shall not unreasonably impeded navigation by filling and turning it into upland, or by building wharves or other structures upon it, so that necessarily the public would be excluded thereby. Their right remains so long as it be left in a natural state, covered by the flow of the tide and left bare by its ebb. * * * Controversies over flats are frequently between the exercise of *jus publicum* and *jus privatum*. The one is an easement, the other a fee. [11]

As recently described by the Supreme Court of Maine:

> "The Colonial Ordinance as received into the common law of Maine and Massachusetts reserved out of the fee title granted to the upland owner a public easement only for fishing, fowling and navigation. We have held that the public may fish, fowl, or navigate on the privately owned land for pleasure as well as for business or sustenance."[12]

Thus, the Ordinance amended the English common law by extending the upland owner's private ownership from the traditional high water mark to the low water mark (but no further out than 100 rods) for the specific purpose of building wharves to encourage commerce.[13] At the same time, the Ordinance preserved the common law's recognition of the public's dominant rights of fishing, fowling and navigation over those waters and bottomlands now "owned" by the upland proprietor.

> "The private right thus created in the flat is not a mere easement, but a title in fee ... and which [the proprietor] may build upon or enclose, provided he does not impede the public right of way over it for boats or vessels. But his title is subject to the public rights of navigation and fishery; and therefore, so long as the flats have not been built upon or enclosed, those public rights are not restricted or abridged."[14]

In short, the public's rights of fishing, fowling and navigating are superior to the proprietor's "private" ownership of the flat, except for the proprietor's right to wharf out to the low water mark, or otherwise lawfully enclose his flats.

The Ordinance Terms are to be Liberally Construed.

As noted above, the Maine Supreme Court recently considered the public's rights in the privately owned strip of land and water between the high and low tide lines, and limited them to the specific uses included within the Ordinance: fishing, fowling and navigating. The Court went on, however, to note that over the years it had "given a sympathetically generous interpretation to what is encompassed within the terms 'fishing,' 'fowling,' and 'navigation,' or reasonably incidental or related thereto."[15]

> "For example, the operator of a power boat for hire may pick up and land his passengers on the intertidal land; and 'navigation' also includes the right to travel over frozen waters, to moor vessels and discharge and take on cargo on intertidal land; and, after landing, 'to pass freely to the lands and houses of others besides the owners of the flats. Similarly, we have broadly construed 'fishing' to include digging for worms, and shellfish. We have never, however, decided a question of the scope of the intertidal public easement except by referring to the three specific public uses reserved in the Ordinances. The terms 'fishing', 'fowling,' and 'navigation,' liberally interpreted, delimit the public's right to use this privately owned land."[16]

Thus, the Maine Supreme Court has upheld a liberal interpretation of what is encompassed within the terms 'fishing,' 'fowling,' and 'navigation' as to include those activities which are "reasonably incidental or related thereto."

Seaweed: Alluvial and Non-Alluvial

In the early 1630s, the colonialists were forced to provide for themselves from the "native bounty" at hand, whether by fishing, clamming, fowling, hunting, from wild roots and plants, as well as crops they could produce from their first attempts at agriculture and gardening. It is well known history that to some extent they were assisted with food and shelter by the native Americans. It is also well documented that seaweed, in its various forms, was harvested by the colonialists since their first landing on the new continent, as a fertilizer for their agricultural fields and gardens (and then

called "sea manure"), and also as food, especially as an additive in soups, stews and stuffings. But is it "reasonably related" to fishing, as the Maine Supreme Court in the *Town of Wells* put it, to fall within the scope of the public's trust rights?

The answer to this question depends upon where the seaweed to be harvested is found. Seaweed "cast up from the sea on to the beach" is treated differently under Maine's common law than is seaweed still afloat, or still growing at sea attached by its holdfast.

The *Town of Wells* Court, after determining that the Ordinance terms were to be "liberally construed" went on to specifically cite a 1900 case, *Marshall v. Walker,* wherein the earlier court set forth a "declaration" of the "nature of the *jus publicum"* in the intertidal zone, and

"set forth only activities related to those specified uses in the following oft-quoted summary:

> "the right of the public to use it for the purposes of navigation and of fishery .... 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." [17]

Thus, the harvesting of seaweed (then commonly known as "sea manure" due to its use by the colonialists as a fertilizer on their agricultural fields and gardens) has been declared by the Maine Supreme Court as falling within the reserved public rights of the Ordinance of 1641/1647. This portion of the *Marshall* decision, although not directly connected to the ruling in the case, was nonetheless not mere *dicta*. Rather, it is described by the Maine Supreme Court in *Town of Wells* as an "oft-quoted" ***declaration*** of "the nature of the *jus publicum* in the intertidal land" under the Ordinance of 1641/1647.[18]

Nonetheless, the courts in Maine and Massachusetts have created a geographic limitation in the public's right to harvest seaweed on the privately owned flats, based on whether it is still growing at sea, or detached but flowing with the tides and currents, or cast so far up upon the beach as to no longer be subject to the tides and currents. These distinctions were discussed by the Massachusetts Supreme Court in the 1861 case *Anthony v. Gifford*, where the Court stated:

> "By a liberal construction of the *jus alluvionis,* it is held that sea-weed, kelp and other marine plants, when detached from the bottom of the sea and thrown on the shore or beach, become vested in the owner of the soil. *But these marine products do not become the property of the riparian proprietor until they are cast on the land or shore, so that they rest there and may be justly said to be attached to the soil. So long as they are afloat and driven or moved from place to place by the rising tide, it is wholly uncertain where they may find a resting-place; and no one can claim ownership in them as appertaining to the particular part of the shore or beach which belongs to him. And this is true, whether they are wholly afloat so that they do not*

> *come in contact with the bottom, or only partially so, or to such an extent that they occasionally, by the motion of the waves, or the rise of the tide, touch or rest on the beach."*[19]

The Court also noted that the Massachusetts legislature had earlier passed a statute (Mass. Gen. Stat. C. 83, §20) that clearly gave "to any person the right to take and carry away kelp or other sea-weed, which had not actually been cast so far up the beach as to be deposited there and "be justly said to be attached to the soil" and thereby become vested in the riparian owner."[20] Thus, in Massachusetts, before the Civil War, it was well settled by the courts and the legislature that the public had a right to harvest seaweed located within privately owned flats, up until when the seaweed is cast up on shore and no longer floating with the winds and tides – *justly said to be attached to the soil* – whereupon the seaweed is considered *alluvion*, which, under the common law, belongs to the upland proprietor.

In the same year as the *Anthony* case in Massachusetts, the Maine Supreme Court decided *Hill v. Lord,* a case involving the harvesting of seaweed that was, as described by the court, "accumulate[d] upon the flats of the island in question." The harvesters were not using boats, but rather walked and brought horse-pulled carts across a privately owned island and down to the beach. There they gathered the seaweed that was reachable from land, and was no longer subject to the tides and currents. The proprietor physically blocked the harvesters from the beach, and one of the harvesters brought civil suit against the proprietor. His complaint was based on the common laws of Custom and Prescription, and not on any *jus publicum rights* reserved by the Ordinance, arguing that he had a right to cross the private land and gather the seaweed from the top of the beach, as he and many others had done for several decades. After reviewing several cases, and without even discussing the Ordinance of 1641, the Court held:

> "So far as any general rule can be deduced from these cases, they *tend to the conclusion* that the right to take seaweed is a right to take a profit in the soil. *It does not come within the principles applied to aquatic rights.* The subject of it is, in part, a product of the soil where it is found. And, ***in regard to that portion which is washed ashore by the tides***, though not permanently remaining, the right which the owner of the flats has to it is much more analogous to the *jus alluvionis* of riparian proprietors, than to the right of appropriating waifs or derelict goods ....".[21]

The court went on to state that seaweed cast high upon the beach and no longer affected by the normal tides becomes *alluvion*, and more of the nature of corn or timber than it is of the nature of a marine product. As such, the taking of *alluvial* seaweed is, as a matter of law, subject to the

common law doctrine of *profit a prendre* (profit by taking), and no longer subject to the legal principles applied to aquatic rights under the Ordinance.

To summarize, once seaweed has been cast so far up the beach that it is no longer affected by the tides and currents, but rather accumulates in drifts upon the beach, its legal nature changes from being *jus marus* – a thing of the sea – and becomes *jus alluvionis* – a thing of the land. While of the sea, it remains available to be harvested by the public; once it becomes a thing of the land, it becomes the private property of the upland owner.

Thus, the Supreme Court of Maine has ruled in *Hill v. Lord* (1861) that seaweed cast high upon the shore so that it is free and unaffected by the tides and currents, is *alluvial* seaweed, and as such is the property of the owner of the flats. To harvest or gather it, one needs the permission of the landowner, much the same as one would need the landowner's permission to harvest corn, cut grass or harvest timber upon privately owned land.

Likewise, the Supreme Court of Massachusetts has held in *Anthony v. Gifford* (1861) that seaweed still growing at sea, either attached by its holdfast or freely floating and drifting with the tides and currents, is not *alluvial*, and thus is not owned by anyone, but rather is a "marine product." As such, under the Massachusetts statute in force at the time, the public had a right to harvest it, and once harvested the seaweed became the property of the harvester.

Note that the decisions of the Supreme Court of Massachusetts pertaining to the Colonial Ordinance are viewed by the Supreme Court of Maine as "persuasive precedent." In *Bell v . Town of Wells*, the Court relied upon three Massachusetts decisions[22] to reach their decision, and in doing so noted:

> "The Maine common law rules defining the property interests in intertidal land come from the same Colonial Ordinance source as the Massachusetts common law rules on that subject, and the Maine case development on the subject has in no significant respect departed from that in Massachusetts. ... In these circumstances, the three unanimous Massachusetts opinions, addressing the precise issue here raised in Maine for the first time, are persuasive precedent in the case at bar."

But though Maine has never had such legislation as did Massachusetts clearly stating the public's right to harvest non-alluvial seaweed within the private flats, the Supreme Court of Maine has twice reiterated, in 1900 (*Marshall v. Walker*) and 1989 (*Bell v. Town of Wells*) the **declaration** that the harvesting of "sea manure" is within the scope of the public's rights in the intertidal zone. And though neither of these cases directly addressed the right of a harvester to take "non-alluvial" seaweed within privately owned flats, this reiteration of the **declaration** of "the nature of the *jus publicum* in the intertidal land" under the Ordinance of 1641/1647, certainly is a powerful suggestion

of how the Court would view the matter today if ever a case brought the question directly before the Court.

Taking the Maine cases: *Marshall v. Walker* and *Hill v. Lord* along with the Massachusetts case of *Anthony v. Gifford*, and harmonizing the rulings of these three cases establishes a solid legal conclusion that once seaweed has been cast so far up the beach that it is no longer affected by the tides and currents, but rather accumulates in drifts upon the beach, its legal nature changes from being *jus marus* – a thing of the sea – and becomes *jus alluvionis* – a thing of the land. While of the sea, it remains available to be harvested by the public; once it becomes a thing of the land, it becomes the private property of the upland owner.

Harvesting Seaweed is "reasonably related" to Fishing

Taking the analysis further, however, leads to the same conclusion. As noted above, the Maine Supreme Court has held as a matter of statutory interpretation, the State's courts should give "a sympathetically generous interpretation to what is encompassed within the terms 'fishing,' 'fowling,' and 'navigation,' or reasonably incidental or related thereto" and that these terms should be "liberally interpreted."[23] Following this rule of statutory construction, the question specific to this inquiry can be raised: Does a "sympathetically generous" and "liberal interpretation" of the term "fishery" and activities "reasonably related" to "fishing" include harvesting seaweed?

It is beyond scientific argument today that seaweeds are, ecologically speaking, primary producers, providing food for a variety of fish, birds and crustaceans. Their biomass also provides habitat and shelter for innumerable sea creatures, many of commercial interest. Without seaweeds, the marine environment would be drastically different. Certainly both recreational and commercial fishing would be affected. Given the Maine Supreme Court's affirmation that "the nature of the *jus publicum* in the intertidal land" includes the harvest of non-alluvial seaweed, and the fact beyond argument that seaweeds are directly related to both recreational and commercial fishing in Maine, it seems that even with a conservative interpretation – let alone a "sympathetically generous" and "liberal" interpretation – of the Colonial Ordinance that harvesting of seaweed is "reasonably related" to fishing.

Interpretation of Grants of Private Rights in Public Trust Lands and Waters

Another approach of analysis is to investigate the courts' long-standing decisions of how grants of property rights are to be interpreted. This leads to the same conclusion that the right to harvest non-alluvial seaweed within the intertidal zone is not held by the proprietor, but rather remains in the public's *jus publicum* rights.

In general, when an individual seller sells a parcel to another individual buyer, everything in, on and attached to that parcel is sold, unless there is specific written reservation in the Deed that the seller is not selling some aspect of the parcel. In other words, the grant is interpreted against the seller, known as the grantor, and in favor of the buyer, or grantee.[24]

It is well extablished, however, that the exact opposite is true whenever there is a grant of land from a sovereign to a private landowner. In that case, the grant is interpreted against the grantee. Any ambiguity of the grant is to be construed against the grantee on the ground that the grant is presumed to be made at the solicitation of the grantee. In 1865 the U.S. Supreme Court restated this principle of interpretation of State conveyances to private individuals in the case of *Chenango Bridge Co. v. The Binghamton Bridge Co.*:

> "The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption ... . If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be resolved in favor of the State.").[25]

This is well established in both Massachusetts and Maine law. For example, in the 1851 case of *Commonwealth v. Alger*, the Massachusetts Supreme Court held:

> "When therefore the government did, by such general act, grant a right of separate property in the soil of the sea-shore, to enable the riparian proprietor to erect quays and wharves for a better access to the sea, and by the same act reserved some right to individuals and the public of passing and repassing with vessels, but without defining it, it seems just and reasonable to construe such reservation much more liberally in favor of the right reserved, than it otherwise would be under other circumstances."[26]

Just six years after the *Alger* case, the Massachusetts Supreme Court, in *Commonwealth v. City of Roxbury*, again visited the rules of interpretation of a conveyance of public trust land from the State to the City of Roxbury, and held:

> "As a general rule, in all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor--reversing the common rule as between individuals--on the ground that the grant is supposed to be made at the solicitation of the grantee. * * * [N]o portion of the *jus publicum* will be presumed to have been granted without express words."[27]

This principle of interpretation of grants involving public trust lands has been affirmed by the Courts repeatedly over the decades, such that the principle is now described as "familiar" and "long established." [28]

As the *Roxbury* court explained, grants of public trust land from the government to a private grantee are interpreted against the grantee on the "ground that the grant is supposed to be made at the solicitation of the grantee." This is precisely what happened, as depicted above. The early settlers of the 1640s solicited their colonial government to pay for the construction of the wharves. The colonial government, not having the funds, instead determined to alter the common law in order to induce the colonialist to build wharves.

Following the *Roxbury* case further, a reading of the Colonial Ordinance (see footnote 7) shows that there are no *express words* conveying any public right (*jus publicum*) to the waterfront proprietors. In contrast, there is only language limiting the proprietor's ability to interfere with the public's *jus publicum* rights in the intertidal zone. Given the "long-established" rule of interpreting grants of public trust lands into private ownership against the grantee, per *Roxbury* and the progeny of cases thereafter, a reading of the Colonial Ordinance shows no specific language conveying any *jus publicum* at all to the waterfront proprietors, except to use the submerged lands in order to build wharves. There certainly are no express words specifically conveying to the grantees – the upland proprietors -- exclusive ownership rights to seaweed. At best the Colonial Ordinance is very ambiguous on this point, and any ambiguity must be resolved in favor of preserving the *jus publicum.* Unless the Colonial Ordinance is specific and clear, it must be presumed that exclusive ownership rights to seaweed were not conveyed by the Ordinance.

In other words, the legal burden is upon any waterfront proprietor in Maine claiming exclusive ownership rights to seaweed on his or her flats to establish the claim by producing some instrument of conveyance containing specific and express words transferring the seaweed out of the *jus publicum* and into the *jus privatum*. If the only instrument of conveyance relied upon by the proprietor is the Colonial Ordinance, it is the proprietor's burden to clarify any "reasonable doubt" that seaweed was conveyed. If not, following *Roxbury* and its progeny, that reasonable doubt must be resolved in favor of the public's *jus publicum.*

Could the Legislature Enact Regulatory Legislation That Would Be Upheld as Constitutional?

In 1986 the Maine legislature enacted the "Public Trust in Intertidal Land Act" which provided, among other things, that "the intertidal lands of the State are impressed with a public trust" and that those rights include a "right to use intertidal land for recreation." [29] According to the Act, the public had an unlimited right to use the intertidal land for strolling, swimming and sunbathing. The Act defined "intertidal land" in accordance with the Ordinance of 1641/1647, that is, land between the high and low water marks, out to no further than 100 rods.

Upon challenge, the Maine Supreme Court struck the Act down as unconstitutional. Although

it recognized, as noted above, that it had always given "generously sympathetic" and "liberal construction" to the terms of the Ordinance, the Court stated, nonetheless, that it had never

> "decided a question of the scope of the intertidal public easement except by referring to the three specific public uses reserved by the Ordinance. The terms 'fishing,' 'fowling,' and 'navigation,' liberally interpreted, delimit the public's right to use this privately owned land."

Because none of these three terms could be liberally or generously construed as being in any way related to strolling, swimming or sunbathing, the Court held they were outside of the scope of the three terms. As a result, the Court held that:

> "The common law has reserved to the public only a limited easement; the Public Trust in Intertidal Land Act takes a comprehensive easement for 'recreation' without limitation. The absence of any compensation to the fee owners renders the Act unconstitutional."[30]

The Maine Supreme Court, however, has reached the opposite result if it is found that the Legislature has acted within the scope of any of the Ordinance's three terms: fishing, fowling and navigation. If so, then the Legislature is merely acting in the interest of the public's superior Ordinance rights (now often called Public Trust rights), and "just compensation" as required under either Art. 1, sec. 21 of the Maine Constitution, Declaration of Rights, or the 5th Amendment of the U.S. Constitution, is <u>not</u> required.

For example, in the 1909 Massachusetts case of *Home for Aged Women v. Commonwealth*,[31] the Charles Basin River Commission, acting under a state statute authorizing the improvement of Boston Harbor, filed a "taking in fee" of a strip of flats and lands covered by tide water, such that the affected riparian owners no longer had any access to the water, and no compensation was paid. One of these land owners, the Home for Aged Women, sued the Commonwealth of Massachusetts for "taking" their land without just compensation. The Massachusetts Supreme Court disagreed, holding in part:

> "If there is "sufficient reason, in the conditions and in the objects to be accomplished, for the exercise of the paramount power of the Legislature over the Commonwealth's lands under tide water" no compensation is due the riparian owner even if this results in the total loss of riparian situation. The State need not act under eminent domain, by which just compensation would be due, but rather *can exercise its paramount trust power to further the public's welfare and interest in navigation, fishing and fowling, which does not require just compensation.*"[32]

In another similar case involving the improvement of Boston Harbor in 1909, a proprietor operated a sand and gravel mine where it was possible to remove the substance while the water was

at low tide when the bottomland was uncovered. When the Charles River Basin Commission built a dam as authorized under the statute mentioned above, the water level in Boston Harbor remained at a constant 8 feet deep. This made it impossible for the mine operator to continue operations, and he sued the Commonwealth. In an opinion mirroring that of the *Home for Aged Women*, the Massachusetts Supreme Court held in *Crocker v. Champlin*:

> "Our decision rests upon the ground that this improvement in navigation was one which, apart from the ordinance of 1647, the Government would have had a right to make as owner of the soil and as the representative of the public, and that the ordinance creating private property in flats reserved this right for the benefit of all the people, ... and for that reason justified an appropriation of the property for the public benefit without compensation. "[33]

Thus, following *Home for Aged Women, Crocker,* and other decisions[34], if there is sufficient reason and need to protect the commercial fishery in Maine by assuring an adequate resource of seaweed as food and habitat for the fishery, the Legislature may protect the fishery by exercising its paramount power and regulate seaweed harvesting. Because it is exercising a paramount public power over private property rights, no compensation is due the riparian owner even if this results in the total loss of riparian situation, which in the case of seaweed, it would not.

Pertinent U.S. Supreme Court Decisions

One of the sentinel cases rendered by the U.S. Supreme Court concerning the conveyance of submerged lands into private ownership is the 1892 case of *Illinois Central Railroad v. Illinois*. The facts in *Illinois Central* and those existing in Maine under the Colonial Ordinance are greatly similar, although offset in time by a couple centuries. *Illinois Central* involved the conveyance by the Illinois state legislature of the entire Chicago Harbor and adjacent areas of Lake Michigan to the Illinois Central Railroad. Several years later, the legislature repealed the act conveying the submerged lands, and the Railroad took the case all the way to the Supreme Court. Vast areas of submerged lands were involved, exactly as the situation in Maine where vast areas of submerged lands throughout the entire State have been conveyed by the Colonial Ordinance. A key and oft-cited portion of the *Illinois Central* decision has provided guidance to courts, both State and Federal, ever since, on the question of the conveyance of what we today call public trust lands. Although lengthy, the pertinent portion of the decision states:

> That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the

waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. ***It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.*** The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. ***It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining,*** that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. ***The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.*** The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. ***A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.*** The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more

> conformable to its wishes. ***So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.***[35]

Applying these *Illinois Central* principles to the question of ownership of non-alluvial seaweed along the shores of Maine within a proprietor's flat, it can only be concluded that seaweed, a vital component of the marine ecosystem, "cannot be placed entirely beyond the direction and control of the State." Grants of "parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce" were upheld by the *Illinois Central* Court. Clearly, the Colonial Ordinance squares with this. To repeat the quote from the 1840 Massachusetts case:

> "The object of the ordinance of 1641, from which the right to flats originated, was to give the proprietors of land adjoining on the sea convenient wharf-privileges, to enjoy which, to the best advantage, it is often necessary to extend their wharves to low-water mark at such times when the tides ebb the lowest."[36]

Further, the "management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property." Indeed, the Colonial Ordinance is silent as to any transfer of management and control of seaweed to the upland proprietors. The Ordinance has no express words or language that would effectuate the transfer of ownership of seaweed "entirely beyond the direction and control of the State."

The Colonial Ordinance squares well with the principles set down by the U.S. Supreme Court in *Illinois Central v. Illinois.* To argue that seaweed growing within privately held flats is privately owned and entirely beyond the direction and control of the State is to argue that the Colonial Ordinance violates the *Illinois Central* principles.

Maine 1991 Laws, C. 591 and 1999 Law, C. 501.

In 1991 the Maine Legislature enacted a statute that exercised the State's continuing "direction and control" over seaweeds, or more specifically, the harvest of seaweed. Amended in 1999, the state statute requires anyone harvesting seaweed – anywhere within Maine's waters – to obtain a permit, and directs the Commissioner of Marine Resources to adopt rules regulating the harvest of seaweed. The intent here is not to analyze this statute closely, but to note that it is a clear exercise of legislative authority over a marine resource within the privately held flats of upland proprietors. The 1991 and 1999 laws are not only consistent with the principles of *Illinois Central*, but can be seen as actually being necessary for the Colonial Ordinance to be reconciled with *Illinois Central.*

Clearly the Maine legislature has taken a significant step to maintain its "direction and control" over this vital marine resource which grows to a great extent within privately owned flats.

Conclusion

To summarize the points discussed above:

- Seaweed has been harvested in Maine since the first days that the English colonialists set foot in their new land in the early 1600s. It was part of their subsistence living, whether as food or as a fertilizer for growing food.
- The Colonial government enacted the Ordinance of 1641/1647for the purpose of inducing the erection of wharves and quays in order to better develop maritime commerce and navigation.
- Reserved to the public, however, were paramount rights of fishing, fowling and navigation.
- The Ordinance terms "fishing", "fowling" and "navigation" are to be "broadly construed" and "given a sympathetically generous interpretation" so as to include uses that are "reasonably incidental or related" to fishing, fowling and navigation.
- Seaweed only becomes privately owned by the riparian proprietor if and when it is cast so far up upon the beach as to no longer be subject to the tides and currents. At that point it is alluvial, and no longer comes "within the principles applied to aquatic rights." Prior to becoming alluvial, seaweed is a publicly owned marine resource the same as fish and fowl, and subject to the principles of aquatic rights.
- The harvesting of seaweed (sea manure) has been declared by the Courts to be within the scope of the paramount rights reserved to the public by the Ordinance.
- Given today's understanding of marine ecology, it is beyond dispute that seaweed is a primary producer within the tidewaters, providing food as well as habitat and shelter for innumerable species, many of them of commercial interest, such that the stewardship of seaweed is reasonably related and incidental to the stewardship of fisheries.
- It has been long established that grants of tidelands by the State to private parties are to be interpreted against the private parties, with any ambiguity resolved "much more liberally in favor of the right reserved," and that "No portion of the *jus publicum* will be presumed to have been granted without express words."
- The legal burden is upon any waterfront proprietor in Maine claiming exclusive ownership rights to non-alluvial seaweed on his or her flats to establish the claim by producing some instrument of conveyance containing specific and express words transferring the seaweed out of the *jus publicum* and into the *jus privatum*.
- The State is not only empowered, but obligated, to exercise its paramount power to properly steward the State's fisheries and marine resources, just as it is empowered and obligated to exercise its paramount power to assure and provide for maritime navigation. "The State can exercise these paramount trust powers to further the public's welfare and interest in navigation, fishing and fowling, which does not require just compensation."

- The Colonial Ordinance squares well with the principles set down by the U.S. Supreme Court in *Illinois Central v. Illinois* (1892). Claims that non-alluvial seaweed within privately held flats is privately owned and subject to proprietary control conflict with the *Illinois Central* principles.

In the final analysis, there are numerous court cases in both Massachusetts and Maine, as well as the U.S. Supreme Court, pertaining to the property rights in alluvial and non-alluvial seaweed that, together, form a large constellation of cases. No individual case can be singled out as being the "law" on the subject. Rather, the constellation must be taken as a whole, and to the greatest extent possible, reconciled. The ancient doctrine of the *jus publicum* – the Public Trust Doctrine – must be implemented with the best of modern scientific understanding. Rules of interpretation of State grants of tidelands must be adhered to. Proprietary property rights must be respected and accorded, but for centuries under the English and American law of tidewaters and tidelands, such proprietary rights have yielded to the paramount powers of the State to control and manage fisheries, and navigation.

Reviewing this constellation as a whole, it can be concluded with a high degree of assurance that non-alluvial seaweed was never intended to be conveyed into exclusive private ownership under the Ordinance of 1641/1647. As such, harvesters of non-alluvial seaweed in Maine must comply with all regulatory and statutory requirements promulgated by the legislature as the ultimate Trustee of the State's marine resources, but need not seek permission of any riparian proprietor. At the same time, the harvesting of alluvial seaweed – that which is cast far upon the beach and out of reach of the tides and currents – may only be done with the permission and consent of the riparian proprietor.

FOOTNOTES

1. *Attorney General v. Chambers,* 4 De. G.M. & G. 206 (1789). This was the leading English High Court case, decided a mere two years after the U.S. Constitution was ratified. This case is more fully discussed in *Borax Consolidated, Ltd. v. Los Angeles,* 296 U.S. 10, (1935).

2. *See* Slade, David C., *Putting the Public Trust Doctrine to Work,* 2nd Edition, at 5.

3. Citations are made to both Massachusetts and Maine Supreme Court cases herein, due to the reciprocity that the two Courts grant each other in cases involving the Ordinance of 1641/1647. As noted by the Maine Supreme Court in the *Bell v. Town of Wells* case: "The Maine common law rules defining the property interests in intertidal land come from the same Colonial Ordinance source as the Massachusetts common law rules on that subject, and the Maine case development on the subject has in no significant respect departed from that in Massachusetts." As a result, Massachusetts decisions are viewed by the Maine Supreme Court as being "persuasive precedent" in similar Ordinance cases.

4. *Storer v. Freeman*, 6 Mass. 435 (1810). *See also, BWDC v. Commonwealth*, 378 Mass. 629, 635 (1979).

5. *Quoted* in *Commonwealth v. Roxbury,* 75 Mass. 451, 514 (note to decision) (1857).

6. *Storer v. Freeman*, 6 Mass. 435 (1810).

7. "Everie Inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers so far as the Sea ebs and flows, within the precincts of the town where they dwell, unles the Free-men of the same town, or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great Pond conteining more then ten acres of land: and that no man shall come upon anothers proprietie without their leave otherwise then as heerafter expressed; the which clearly to determin, it is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the land adjoyning shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebs farther. Provided that such Proprietor shall not by this libertie have power to stopo or hinder the passage of boats or other vessels in, or through any sea creeks, or coves to other mens houses or lands. And for great Ponds lying in common though within the bounds of some town, it shall be free for any mand to fish and fowl there, and may passe and repasse on foot through any mans proprietie for that end, so they trespasse not upon any mans corn or meadow."

8. *See, Shively v. Bowlby*, 152 U.S. 1, 14 (1894)("In [Maine and] Massachusetts, by virtue of an ancient colonial enactment, commonly called the Ordinance of 1641, but really passed in 1647, and remaining in force to this day, the title of the owner of land bounded by tide water extends from high water mark over the shore or flats to low water mark, if

not beyond one hundred rods."). Note: this decision was written by the Chief Justice of the U.S. Supreme Court, Justice Gray, who was formerly the Chief Justice of the Massachusetts Supreme Court.

It should be noted that the original Colonial Ordinance did not become the law of Maine until 1692. The original 1640 ordinance, as amended in 1647, was in force in areas of Massachusetts, but not what is today the State of Maine. The Ordinance remained in force in Massachusetts until the original 1620 Charter was terminated in May, 1686. The Ordinance was again revived, however, by the Provincial Charter of William and Mary in 1692, whereupon it also became the law in Maine, Plymouth, Nantucket and Martha's Vineyard, all of which joined the Massachusetts Colony at that time. *See Commonwealth v. Alger*, 7 Cush. 53, 76, and other authorities collected in 9 Gray, 523. The Ordinance remained in effect until 1774, when the final attachment to Great Britain was dissolved, leading to the War of Independence. After Statehood, its final and modernized form was set down in 1814 by Joseph Storey in the "Ancient Charters and Laws of the Colony and Province of Massachusetts Bay." It remained the law of Maine upon statehood in March 15, 1820, and is the law of Maine to this day. *See also*, *Bell v. Town of Wells*, 557 A.2d 168, 171-2 (Me. 1989).

9. Passage of this ordinance must have been of great importance to the colonialists, given that the first request for permission to build a wharf was in 1639 and the passage of the ordinance just two years later, in 1641.

10. *Sparhawk v. Bullard*, 42 Mass. 95 (1840), as cited in *Storer v. Freeman*, 6 Mass. 438 (1810). *See also, Commonwealth v. Roxbury*, 9 Gray 451 (1857)("The main object of the Massachusetts Colony ordinance has always been understood to be to induce the erection of wharves for the benefit of commerce."); *Fafard v. Conservation Commission of Barnstable*, 432 Mass. 194, 198 (2000)("One portion of these shorelines passed into private ownership when the colonial ordinance of 1647 granted owner of the flats, or the lands between the high and low water marks, to private upland owners in order to provide incentives for private parties to build wharves and docks." *Citing Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 634-35).

11. *Marshall v. Walker*, 93 Me. 532, 536, 540 (1900).

12. *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989).

13. This area between the ordinary high and ordinary low water marks is commonly known as "flats".

14. *Shively v. Bowlby*, 152 U.S. 1, 18-19 (1894).

15. *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989).

16. *Id.*

17. *Marshall v. Walker,* 93 Me. at 536, 45 A. at 498 (1900), and as cited in *Bell v. Town of Wells*, 557 A.2d 168, 174 (Me. 1989).

18. *Bell v. Town of Wells*, 557 A.2d 168, 174 (Me. 1989).

19. *Anthony v. Gifford*, 84 (2A) Mass. 549, 550 (1861), citing *Chapman v. Kimball*, 9 Conn. 38. *Emans v. Turnbull*, 2 Johns. 313, 321. *Phillips v. Rhodes*, (48 Mass.) 7 Met. 322 (1843). Angel on Tide Waters, 260.

20. *Id. See also* Note to *Commonwealth v. City of Roxbury*, 75 Mass. at 527 ("But, by a recent statute, seaweed adrift, moved by each wave, though touching the beach, may be taken by any one. St. 1859, c. 247. *Anthony v. Gifford*, 2 Allen (84 Mass.) 549.

21. *Hill v. Lord*, 48 Me. 83, 100 (1861)

22. *Butler v. Attorney General*, 195 Mass. 79 (1907); *Michaelson v. Silver Beacfh Improvement Association*; 342 Mass. 251 (1961); and *Opinion of the Justices*, 365 Mass. 681 (1974).

23. *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989).

24. See generally *Putting the Public Trust Doctrine To Work*, 2nd Edition, David C. Slade (1997) at 236, and cases cited therein.

25. *Chenango Bridge Co. v. The Binghamton Bridge Co.*, 70 U.S. 51, 75 (1865).

26. *Commonwealth v. Alger*, 61 Mass. 53, 94 (1851).

27. *Commonwealth v. City of Roxbury*, 75 Mass. 451, 494 (1857).

28. *Butcher's Slaughtering House v. Boston*, 214 Mass.254 (1913)("A legislative grant of property ... is not to be extended by implication in favor of the grantee or the party on whom such right may be bestowed."); *BWDC v. Commonwealth*, 378 Mass. 629, 639 (1979)("Following the long-established principle of statutory construction that 'in all grants, made by the government to individuals, of rights, privileges, and franchises, the words are to be taken most strongly against the grantee ...'"). See also, *Prudential Insurance Co. v. Boston*, 369 Mass. 542, 547 (1976); *Proprietors of Mills on Monatiquot River v. Commonwealth*, 164 Mass. 227, 234 (1895). *Commonwealth v. Roxbury*, 9 Gray (75 Mass.) 451, 492 ("It is a familiar rule that grants by the sovereign are always to be construed strictly against the grantee.").

29. 12. M.R.S.A. §§571-573.

30. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

31. *Home for Aged Women et al v. Commonwealth*, 202 Mass. 422 (1909).

32. *Home for Aged Women et al v. Commonwealth*, 202 Mass. 422, 436 (1909).

33. *Crocker v. Champlin*, 202 Mass. 437, 442 (1909).

34. *See Pazolt v. Director of DMF*, 417 Mass. 565, 571 (1994) ("The private property rights of coastal owners in the tidal area may be subordinate to the public's right if the public purposes are reasonably related to the protection or promotion of fishing or navigation. In those circumstances, public rights may prevail and the owner is not entitled to compensation."); *Opinion of the Justices*, 365 Mass. 681, 686 (1974)("It has been held proper to interfere with the private property rights of coastal owners in the tidal area for purposes reasonably related to the protection or promotion of fishing or navigation
without paying compensation.")

35. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892). Emphasis added to original.

36. *Sparhawk v. Bullard*, 42 Mass. 95 (1840), as cited in *Storer v. Freeman*, 6 Mass. 438 (1810). *See also, Commonwealth v. Roxbury*, 9 Gray 451 (1857). See cases cited in Note 10 above.

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About the Author

David C. Slade received his Masters in Marine Ecology from the University of Puget Sound, Tacoma, Washington, in 1978. His masters thesis investigated the 48 constituents of crude oil and their affects upon the interstitial bio-communities of the intertidal zone of Puget Sound. Mr. Slade received his Law Degree in 1981 from Lewis & Clark School of Law, Portland, Oregon, majoring in Environmental Law. In 1983 Mr. Slade became chief counsel of the National Advisory Board on Oceans and Atmosphere in Washington, D.C. In 1986, he became General Counsel, and in 1991, Director, of the Coastal States Organization, representing the governors of the 30 coastal states. In 1987, he participated in the U.S. Supreme Court case of *Phillips Petroleum v. Mississippi,* involving the Public Trust Doctrine, by drafting an amicus brief on behalf of the Attorneys General of the 13 Original States, a brief quoted by the Court in the case. This lead to his leading the team of lawyers that research and compiled the first edition of *Putting the Public Trust Doctrine to Work,* published in 1990; Mr. Slade was also the chief editor and author of the 2nd edition, published in 1997. He was awarded the Distinguished Environmental Lawyer award in 1999. Mr. Slade resides in Bowie, Maryland.