

Standard for Summary Judgment

At the outset, Plaintiffs suggest that the present motion is improper because there is no statement of material fact. *Opposition*, 2-3. In the context of this case, as is obvious, an independent statement of facts is unnecessary because the Law Court made an incorrect decision based upon the record before it – which consisted of uncontroverted history and case law from which it clearly diverged. We are relying upon what was before the Law Court and matters of public record – and something clearly lacking in the *Bell II* majority decision: common sense. In such a situation, no statement of material facts is necessary.

ARGUMENT

I. *Stare Decisis* Does Not Protect *Bell*.

Plaintiffs' first argument is that because *Bell II* has not been overturned yet, it must remain the law of the land forever. *Opposition*, 3-15. At the outset, Plaintiffs grossly mischaracterize the state of the law in Maine at the time the *Bell* decisions were handed down, as explained in the State's primary memorandum – no case in Maine had previously limited the public trust rights to fishing, fowling and navigation prior to *Bell*; no case in Maine had even cited to the Massachusetts case of *Butler v. Attorney General*, , 80 N.E. 688 (1907), as binding on Maine prior to *Bell*; Maine precedent clearly stated that Maine's condition regarding the intertidal zone was different than that of Massachusetts; and the Justices of the Law Court had stated that the public trust rights were expansive in particular regarding recreation.¹ Moreover, it is not as if the Law Court has in any way confirmed *Bell II* when the issue has been posed to it over the last two decades – rather, at the urging of those like Plaintiffs' counsel, the Law Court

¹ At footnote 4, Plaintiffs suggest that the six Justices in *Bell I* were 100% in line with *Bell II*. Of course, that is absolutely incorrect. Of the three Justices remaining from *Bell I*, two were in the *Bell II* dissent (Justices Roberts and Wathen, with the latter writing the strong dissenting opinion), and only one in the majority (Justice Glassman).

has avoided the issue for technical reasons suggested by those seeking to preserve *Bell II*. *E.g.*, *Flaherty v. Muther*, 2011 ME 32, ¶¶ 86-88 (issue is not justiciable because title owner of intertidal zone not made a party); *Eaton*, 2000 ME 176, ¶ 49, 760 A.2d at 248 (decided on other grounds). In sum, those seeking to preserve the slim *Bell II* majority base their position upon successfully having the Law Court *not* address the issue for several years on non-substantive grounds. This delaying tactic is a slender reed upon which to permanently ban Mainers from strolling on the 3,500 mile Maine coastline.

Plaintiffs go on to discuss *stare decisis* utilizing the factors identified by the Law Court. The five principles regarding *stare decisis* reiterated in the *Eaton* concurrence, 2000 ME 176, ¶ 54, n. 9, 760 A.2d at 250 n.9, strongly argue for *Bell II* to be overturned.

1. “[T]he rule of the prior decision operates harshly, unjustly and erratically to produce, in its case-by-case application, results that are not consonant with prevailing, well-established conceptions of fundamental fairness and rationally-based justice....”

On this factor, Plaintiffs work hard to attempt to convince this Court that *Bell II*'s creation of an “exclusively private” Maine coast, thereby dispossessing Mainers of the simple joys of strolling along the water, is a fair and wonderful result. *Opposition*, 5-7. Plaintiffs could not be more wrong, *Bell II* obviously operates “harshly, unjustly [and] erratically” in contravention of common sense as well as “prevailing, well-established conceptions of fundamental fairness and rationally-based justice.” *Eaton*, 2000 ME 176, ¶ 54, n. 9, 760 A.2d at 250 n.9.

First, Plaintiffs wholly ignore the absurdity of *Bell II* and in the real world it can hardly be considered workable. As discussed in our first memorandum, at 28-29, no court, including the *Bell II* majority, have suggested that that decision is *workable*. *See Bell II*, 537 A.2d at 189 (dissent) (“the narrow view adopted by the Court today results in absurd and easily thwarted

distinctions between permissible and impermissible activities”); *Eaton* 2000 ME 176, ¶ 53, 760 A.2d at 249 (“unworkable restrictions”); *Flaherty*, Vol. I: 93-96 (Crowley, J.) Under *Bell II*, the public may walk, sit, stand, and eat when it is related to fishing, fowling and navigation but not just walk, sit, stand or eat for the joy of it. Enforceability is a nightmare, and the impact on the upland owner is in fact less from the latter because it does not involve guns, fishing poles and hooks, bait, or boats. Moreover, the Colonial Ordinance, as discussed in the State’s first memorandum, did allow for travel, walking and driving of cattle, nowhere conveyed away the *jus publicum* to walk or sit for the enjoyment of it, and was intended to encourage wharf-building not the creation of private recreational preserves. The problem is not the Colonial Ordinance – it is *Bell II*’s interpretation of it.

Second, before *Bell II*, the public at the very least walked along the intertidal zone unrelated to fishing, fowling or navigation for as long as anyone could remember, without seeking or receiving the permission of the upland owner. See discussion in *MSJ Memo* at 18-20. That historical fact was confirmed in court. *Id.* at 19-20. *Bell II* operates *harshly* by for the first time by preventing the public from strolling in the intertidal zone anywhere on Maine’s coastline unless by permission of the upland owner. Only the most callous and egocentric of individuals would suggest that the impact of privatizing the Maine coastline is not harsh.

Third, regarding financial impact, *Opposition*, 6, the *Bell* decisions completely ignore the reliance of the public on *Opinion of the Justices* (“1981 *Opinion*”), 437 A.2d 597, 605 (Me. 1981), which broadly defined the public trust rights in the intertidal zone, and the State clearly relied upon that *Opinion* when approving of the grant of millions of dollars of state resources. The 1981 *Opinion* was confirmed that same year in *James v. Inhabitants of Town of West Bath*, 437 A.2d 863, 865 n. 5 (Me. 1981), a legal fact wholly ignored by the *Bell* decisions. Moreover,

while Plaintiffs suggest that beachfront property values will be “substantially reduced” if *Bell II* is overturned, *Opposition*, 6, there is no support in the record for such a proposition. Most of Maine’s intertidal zone does not adjoin sandy beaches.

Mapping has estimated that about 2% of the coast (120 km or 75 miles) has beaches. About half of this distance is made up of sandy beaches and the other half is made up of coarser gravel and boulder beaches. The latter category is commonly pocket beaches, of which there are over 200 pocket barrier beaches that front coastal wetlands.

Eaton, 2000 ME 176, ¶ 52 n.7, 760 A.2d at 249 n.7 (Saufley, J., concurring), *citing to* Maine Department of Conservation, Maine Geological Survey, *at* <http://www.state.me.us/doc/nrimc/mgs/marine/marine.htm>. The impact of overturning *Bell II* on upland owners along most of Maine’s coastline is minimal at best. And, if it is more than minimal, that only makes the case stronger for the public as they now are required to buy back the rights that the majority in *Bell II* took from the public.

Obviously, beachfront property owners do not have exclusive recreational use of the intertidal zone – the public may engage in recreation on the intertidal area by beaching boats, fishing, fowling, using fishing poles and nets, and using guns – and walk, sit, stand, stroll, eat, and drink while doing so. And, there is no limit on the number of people who may do so. Additionally, in view of the controversy surrounding the *Bell* decisions, its lack of support in subsequent decisions and general condemnation in law review articles and commentary (with the notable exception of Mr. Thaxter’s article), reliance upon the decisions is, at best, tenuous. Indeed, the *Bell* deeds reflect this by not specifically limiting the public rights to particular uses but by simply referring to the Colonial Ordinance; if *Bell II* is appropriately corrected, such

deeds do not even have to be reformed.²

Fourth, like the *Bell II* majority, Plaintiffs make no effort to deal with the obvious incongruities of the decision in the real world. Every subsequent judge who has addressed this issue agrees that these incongruities are patent. *See Bell II*, 537 A.2d at 189 (dissent); *Eaton* 2000 ME 176, ¶ 53, 760 A.2d at 249 (concurrence); *Flaherty, supra* at 25-29 (Crowley, J.)

Fifth, Plaintiffs suggest that since *Bell II* “the public and private use of Moody Beach and Goose Rocks Beach has been peaceful and without significant controversy until this case.” *Opposition*, at 6. One should not confuse Mainer’s being law-abiding citizens with lack of controversy. We are in court today because there is controversy at Goose Rocks beach. There is controversy in Eastport in the pending case of *McGarvey v. Whittredge*, WAS-10-83 (pending). There was controversy on Wells Beach in *Eaton*. There was controversy on Secret Beach in Cumberland. *Flaherty v. Muther*, Cumb. Docket. No. RE-08-098 (July 30, 2008) ,*rev’d on other grounds* 2011 ME 32. One need only review the newspapers to find additional controversies.³ In the face of what has occurred in the courts since *Bell II*, Plaintiffs assertion that overturning that decision would foster more litigation is absurd (*Opposition*, 6) – there was no litigation over the public walking on the intertidal zone before *Bell II* and, as the *Eaton* concurrence accurately predicted, there has been continuing litigation to deal with *Bell II*’s illogic. There would be more cases but for the cost. Obviously, the continuing controversy created by *Bell II* causes “huge”

² The final judgments signed by Justice Brodrick in the *Bell II* case provided that the properties of the Plaintiffs were “subject only to the public easement under the Colonial Ordinance of 1648 in the intertidal portion of their property.” *See e.g., Bell v. Inhabitants of the Town of Wells*, Docket no. CV-84-125, Final Judgment and Declaration of Title (June 30, 1987) (attached hereto as Exhibit A). There is no further description of the scope of that “easement” although counsel for the upland owners sought to have the final judgment further describe the public rights by limiting them to “fishing, fowling and navigation” (Exhibit B, hereto).

³ *See e.g.*, “Public response grows as Harpswell beach owner blocks access, *The Forecaster* (July 7, 2010), *available at* <http://www.theforecaster.net/content/m-harp-cedarbeach-3>.

emotional, financial and psychological burdens on the public *and* the upland owners. *Flaherty, supra* at 27 (Crowley, J.) In the end, it is *Bell II* that revisited and dramatically altered property rights along Maine's coastline, and the courts should correct the errors of that decision.

Sixth, it is *Bell II* that disrupts the Maine coast and causes litigation. The *Bell II* construct requires a trial on prescription, dedication and custom at every spot along Maine's 3,500 mile coastline where members of the public may want to walk or sit unrelated to fishing, fowling or navigation in the intertidal zone unless it is purchased by the public. A stroller would have to obtain the permission of each upland owner, and if as in the present case one upland owner gives permission and another does not, there is no strolling. This patchwork approach by its very nature is "erratic."

The weakness of the majority's opinion is manifest, with no support in prior law, history or logic as discussed in our first memorandum. The common law, and the courts of this State, do *not* embrace unfair and illogical results. The record is clear that the Puritans and colonists used the intertidal zone for travel, such as walking, and for driving and resting of cattle, but today under *Bell* human beings do not possess the same rights of cattle in the 17th century. *Stare decisis* does not require this Court to continue to adhere to such a decision.

Seventh, Plaintiffs argue that that no harsh results were inflicted on the public by *Bell II*, but that harsh results would be felt by upland owners if the decision were overturned because property values would be reduced and "exclusively private" beaches would be made public. *Opposition*, at 6. It lacks credulity to suggest that preventing Mainers from strolling on portions of Maine's 3,500 coastline is not harsh. *Bell II* effectively prevented the public from enjoying Maine's coastline for certain but not all types of recreation. It is clear that all Plaintiffs care about is their newly created "exclusive" beaches. But, in fact, they are not exclusive – the public

may stroll, sit, stand and picnic on the intertidal area so long as it is somehow related to fishing, fowling and navigating. The absurdity is manifest, and explained nowhere by the *Bell II* majority or Plaintiffs. Regarding economic impact, as a result of the *1981 Opinion* upon which the State relied, coastal property worth many millions of dollars was granted away. The impact on the overwhelming majority of oceanfront property owners of reversal of *Bell II* will be minimal at best.

2. The case should be overturned “by more than the commitment of the individual justices to their mere personal policy preferences, that is, by the substantial erosion of the concepts and authorities upon which the former rule is founded and that erosion is exemplified by disapproval of those conceptions and authorities in the better-considered recent cases and in authoritative scholarly writings”.⁴

Again, it is the *Bell* decisions’ divergence from accepted rules and precedent that is before the Court. As this brief has already explained, the two *Bell* decisions are out of line with applicable rules of construction, statements of the Maine courts, every law review article written on the subject other than one penned by Plaintiffs’ counsel, the premier treatise on Maine coastal law (2 Henry & Halperin, *Maine Law Affecting Marine Resources*, 239 (1970)), and the views of the Justices who wrote the *1981 Opinion*, the Justices who dissented in *Bell II*, the Justice concurring in *Eaton* and the Superior Court Justice in *Flaherty*. See *MSJ Memo*, at notes 1 & 2. These are not *personal* preferences, but rather the clear direction of the law both *before* and *after* the *Bell* decisions.

The *Bell II* majority suggests that the limitation of rights was “[l]ong and firmly established.” 557 A.2d at 169. A fair reading of Maine law clearly shows otherwise. In no case in Maine prior to *Bell II* did anyone question the public’s right to walk or sit in the intertidal zone unrelated to fishing, fowling and navigation, and no such case existed on either side of the Atlantic at the time Maine became a state.

⁴ *Eaton*, 2000 ME 176, ¶ 54, n. 9, 760 A.2d at 250 n. 9.

The framework of law regarding the intertidal zone is based upon the public trust doctrine and the common law rules protecting against the loss of *jus publicum* except in extraordinary circumstances. This framework was part of Maine law prior to and after *Bell*. The concept underlying the Colonial Ordinance, of course, was to give the upland owner rights to build wharves – not prevent citizens from walking and sitting in the intertidal zone for enjoyment.

The *Bell* decision was rendered just 20 years ago by a closely divided 4-3 court, and it remains disputed and controversial for good reason – because it conflicts with case law, common sense and the essence and experience of Maine. The majority decision represents a clear departure from Maine law up through 1981. *Bell II*, 557 A.2d at 187 (dissent) (noting no Maine case had ever held that the public may not walk, sit, stand, or engage in general recreation in the intertidal zone); *1981 Opinion*, 437 A.2d at 607 (“The intertidal and submerged lands are public resources, the demand upon which steadily increases. In dealing with public trust properties, the standard of reasonableness must change as the needs for society change.” *See also* 2 Henry & Halperin, *supra*, at 239.

The courts are not bound by the doctrine of *stare decisis* when the underpinnings of the previous decisions are disproved and the conditions of society have changed. *Maddocks v. Giles*, 1999 ME 63, ¶ 11, 728 A.2d 150, 153-54; *Myrick v. James*, 444 A.2d 987, 998 (Me. 1982); Mark Cheung, *Rethinking the History of the Seventeenth Century Colonial Ordinance: A Reinterpretation of an Ancient Statute*, 42 Me. L. Rev. 115, 155-56 (1990) (explaining why *stare decisis* does not prevent reexamination of *Bell II*). The *Bell II* majority did not even try to comport its decision with the reality that Mainers walk and sit in the intertidal zone unrelated to fishing, fowling and navigation, other than suggesting that Maine take the intertidal zone by eminent domain along Maine’s coast. The majority’s 1989 opinion is not one long adhered to,

since prior thereto the Law Court had never held or even hinted that the public was excluded from the intertidal zones for common recreational activities. 557 A.2d at 187 (dissent). The majority's rule leads to unworkable distinctions – for example, is walking in the intertidal area to ascertain the location of a future landing or fishing site permissible? The doctrine of *stare decisis* does not enshrine or embrace results which are illogical and problematic.

It is not surprising that the Plaintiffs fail to discuss in any detail the Maine law on this point (*Opposition*, 7-8) because it supports the Maine people, and not Plaintiffs. *MSJ Memo*, 11-

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3. “[T]he former rule is the creation of the court itself in the legitimate performance of its function in filling the interstices of statutory language by interpretation and construction of vague, indefinite and generic statutory terms.”⁵

This is not a matter of statutory construction of the Colonial Ordinance or simply adopting in Maine the law of Massachusetts. The *Bell II* majority's decision ignores the process of how the limited changes to the normally applicable rules of property regarding the intertidal zone in Maine occurred as a result of the attitudes and actions of Maine people reflected in Maine's common law. As explained a century ago, Mainers “adopted only so much of” the common law on the Colonial Ordinance “as was suitable to their new conditions and needs, consistent with the new state of society, and conformable to the general course of policy which they intended to pursue” as “so acted upon and acquiesced in as to have become a settled, universal right.” *Conant v. Jordan*, 107 Me. 227, 234 (1910). As of yet, no Maine decision or party has identified how and where the public “acted upon and acquiesced in” the creation of private recreational parks in the intertidal zone along Maine's coast.

Bell II majority's use of the Articles of Separation, and Plaintiffs' arguments (*Opposition*, 9-11), ignore the process by which the Colonial Ordinance became part of Maine common law –

⁵ *Eaton*, 2000 ME 176, ¶ 54, n. 9, 760 A.2d at 250 n. 9.

by the actions of the public as recognized by the courts.⁶ Moreover, as of 1820 at the time of the Articles, no case in Massachusetts or Maine suggested or found that public walking or sitting were granted away. Since the common law of Massachusetts did not establish until 1907 that the public could not bathe in the intertidal zone, it is hard to see how the Articles trump the public trust doctrine in Maine. Moreover, for the reasons set out in our prior memorandum, at 14, 17 & 33, the rationale of the Massachusetts Supreme Judicial Court in *Butler* is badly flawed, and it makes no sense for Maine's Law Court to pay any deference to a ruling that was issued almost 100 years after Maine separated from Massachusetts.

The nature of the public trust doctrine was not changed under Maine's common law, other than recognizing certain rights connected with the Colonial Ordinance's purpose of promoting wharf-building. *MSJ Memo*, 3-17. Under the normal rules that apply to protect the *jus publicum*, public rights that do not interfere with wharf-building are not lost. *Id.* at 5-6. And, as we have previously explained, the *Maine* courts continuously gave the public trust rights an expansive reading through 1981. *Id.* at 11-17. It is the *Bell II* decisions that are both a departure from Maine precedent and founded upon faulty conceptions of history and the public trust doctrine. *Id.* at 20-36.

Plaintiffs' argument, therefore, misses the mark when they suggest that the Colonial Ordinance is part of Maine law because it was enacted. *Opposition*, 9-11. The Maine courts have made it abundantly clear that the Colonial Ordinance is part of Maine's *common* law only insofar as Mainers themselves have made it so by their own actions. Mainers "adopted only so much of" the common law on the Colonial Ordinance "as was suitable to their new conditions

⁶ Article X, Section 3 provides: "All laws now in force in this State, and not repugnant to the constitution, shall remain, and be in force, until altered or repealed by the legislature or shall expire by their own limitations." This provision, of course, supports the Legislature's Intertidal Lands Act. *See Bell II*, 557 A.2d at 190-92 (dissent).

and needs, consistent with the new state of society, and conformable to the general course of policy which they intended to pursue” as “so acted upon and acquiesced in as to have become a settled, universal right.” *Conant*, 107 Me. at 230, 234; *MSJ Memo*, 11-15.

Finally, the Legislature has spoken directly to this issue and the common law, and has clearly come down on the side of Mainers and not the new “lords of the manor” by enacting the Intertidal Lands Act, P.L. 1985, ch. 782, codified at 12 M.R.S. §§ 571, *et seq.* This Act at the very least clarified the nature of the public trust along Maine’s shoreline and should be honored. *MSJ Memo*, 18; *Bell II*, 557 A.2d at 191-82.

4. “[T]he Legislature has not, subsequent to the court’s articulation of the former rule, established by its own definitive and legitimate pronouncement either specific acceptance, rejection or revision of the former rule as articulated by the court.”⁷

Under cases such as *Illinois Central*, the *jus publicum* is not lost if not conveyed for a public purpose – and there is no public purpose in preventing the public from strolling on the intertidal zone. *MSJ Memo*, 5-6. Moreover, the Legislature has spoken – that the public trust rights do include recreational rights, before *Bell II*. 12 M.R.S. § 571.

The Plaintiffs raise the specter that the Court’s reversal of *Bell II* would constitute a taking, relying upon *Stop the Beach Nourishment, Inc. v. Florida Dep’t of Environmental Protection*, S. Ct. No. 08-1151 (June 17, 2010). That decision does not preclude the Law Court from correcting the errors made in *Bell* for several reasons.

First, the conclusion that the actions of a state court might constitute a “judicial taking” was not the decision of the Court but only the opinion of four justices.⁸ Therefore, it is not the law of the land.

⁷ *Eaton*, 2000 ME 176, ¶ 54, n. 9, 760 A.2d at 250 n. 9.

⁸ Justice Scalia’s opinion on “judicial takings” was concurred in by Chief Justice Roberts and Justices Thomas and Alito. Justices Kennedy, Ginsburg, Breyer, and Sotomayor disagreed on this point, although they agreed a taking had not occurred. Justice Stevens did not participate in the decision.

Second, *Stop the Beach* did not address public trust rights or the public trust doctrine. The public trust doctrine is not even mentioned, and the fountainhead public trust case of *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892), is not questioned. Thus, *Illinois Central's* holdings regarding the public trust doctrine are the law of the land, in particular that the *jus publicum* cannot be lost if not supported by a public purpose. 146 U.S. at 453. The Supreme Court has upheld a legislature's revocation of a broad conveyance of the *jus publicum*. *Id.* Therefore, even assuming "judicial takings" are to be recognized, the public trust doctrine as explicated under cases such as *Illinois Central* would mandate a conclusion that a state court's reversal of a "judicial conveyance" of the *jus publicum* not supported by a public interest is not a "judicial taking."

Third, there is serious doubt that the *Bell II* majority opinion if corrected would form the basis for a "judicial taking" under any of the *Stop the Beach* opinions. The plurality proposes an "established right of private property" standard. Slip Opinion, at 10. That standard, however, is founded upon the premise that the common law does *not* determine the nature of property rights – that property rights are set in stone for all time and the common law can never change them. Slip Opinion, at 17-18, 22. Of course, the common law's incorporation of the Colonial Ordinance, as experienced and accepted by the public, is the *only* reason that the normal property rules that *all* rights in the intertidal zone rest with the sovereign state and the public do not apply in Maine. It is hard to see, therefore, how the *Stop the Beach* plurality's standard applies at all.

The common law, according to both the majority and dissent in *Bell II* determines the balance of rights in Maine in the intertidal zone. 537 A.2d at 171-73, 181-85 (dissent); *see also Bell I*, 510 A.2d at 511-512; *1981 Opinion*, 437 A.2d at 605-07. The common law, "the perfection of human reason," as discussed in the State's prior brief, requires the Court to evaluate

the evolution of society and” develop new ideas of right and justice.” *Matter of Robinson*, 88 Me. 17, 23 (1895). These principles apply to the intertidal zone just as they do elsewhere. Thus, in addition to the public trust doctrine, the common law in Maine strongly argues against applying *Stop the Beach* to the present controversy.

The concurring opinion of Justice Kennedy, in which Justice Sotomayor joined, suggests that the Takings Clause is an inappropriate foundation for the sort of claim raised in *Stop the Beach*. Instead, Justice Kennedy proposes using the due process clause with a “legitimate expectation” standard. Slip Opinion, at 4 (Kennedy, J., concurring). Significantly, Justice Kennedy’s concurrence disagrees with the plurality regarding the role of the common law:

This might be the type of incremental modification under state common law that does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law. The usual due process constraint is that courts cannot abandon settled principles.

Id. at 5-6. It is hard to believe that the strongly divided *Bell II* decision represents “settled principles” in view of the judicial statements predating it and the criticisms levied afterward. The *Bell II* majority decision is an aberration, which fails to support any “legitimate expectation” to maintain private recreational preserves in the intertidal zone of Maine.

Indeed, if we accept the concept that state court action can result in a judicial taking, so too by the same logic can state court action violate the public trust doctrine. Under the public trust doctrine, private recreational preserves in the intertidal zone are not *established* or a *legitimate expectation* because under *Illinois Central* a broad “conveyance” of public rights in the intertidal zone can be repossessed if the “conveyance” has no public interest foundation. Assuming a court decision can effect a *judicial* taking by wrongly infringing upon *private* interests, it must follow that a court decision can violate the public trust doctrine by wrongly infringing upon *public* interests as *Bell II* did. If a *legislative* conveyance of the *jus publicum* can

be voided for failure to be founded upon a legitimate public interest without constituting a taking as was the case in *Illinois Central*, a *judicial* conveyance of the *jus publicum* can be reversed for the same reason without being a taking.

Finally, by any fair account, the *Bell* decisions mark a dramatic departure from Maine case law. The Colonial Ordinance was not intended to be the foundation for private recreational parks in the intertidal zone. There is no public purpose in dispossessing the public of the right to walk and sit in the intertidal zone, and neither the *Bell* decisions nor Plaintiffs suggest otherwise. The previous Maine cases did not hold that fishing, fowling and navigation were the *only* public rights – they dealt with the disputes before them, none of which involved general public recreational rights. *Bell* represents a dramatic departure from the views previously expressed. Compare e.g., *1981 Opinion of the Justices*, 437 A.2d at 607; *Blaney v. Rittall*, 312 A.2d 522, 528 n.7 (Me. 1973) (“Although the extent of the public rights under the ordinance to tidal flats is not entirely clear there are certain rights which apparently were includable in addition to navigation.” (Emphasis added)); 2 Henry & Halperin, *Maine Law Affecting Marine Resources*, 239 (1970) (“the broad powers given to the public to be on the flats would be sufficient to encompass the public rights of swimming on the seashore.”) The public at the very least was walking in the intertidal zone as long as anyone can remember, with no suggestion they could not do so until the 1980s. The *Bell* decisions create illogical and largely unenforceable distinctions, and the *Bell* decisions make no effort to even discuss them. Immediately prior to *Bell*, the Maine Justices embraced a broad reading of the *jus publicum* in Maine as a vital and vibrant principle. *James*, 437 A.2d at 865 n.5, *confirming 1981 Opinion*.

In these extraordinary circumstances, should the Maine courts properly conclude that the *Bell II* majority was mistaken, it is hard to believe that the majority of the Supreme Court would

find that the 1989 decision is the basis for an “established right to private” recreational preserves or supported a “legitimate expectation” of private recreational parks. Where a state court *corrects* a recent mistake, that is not a “judicial taking;” rather, it is engaging in proper, necessary and lawful justice.

5. “[T]he court can avoid the most severe impact of an overruling decision upon reliance interests that may have come into being during the existence of the former rule by creatively shaping the temporal effect of the new rule articulated by the holding of the overruling case.”⁹

The *jus publicum* in the open intertidal zone should be the same everywhere in Maine. The primary argument of the proponents of the *Bell II* majority is that even if that decision was wrong 20 years ago, that error must remain as part of Maine law *forever*. *Opposition*, 13-15. Plaintiffs wish to profit from the efforts of Mr. Thaxter and others to delay the courts from re-addressing the public trust issues to the point where they can claim that they were prejudiced by the short span of time between *Bell II* and now. As we have demonstrated, there had been no precedent in Maine for over 300 years that Mainers could not walk or sit in the intertidal area unrelated to fishing, fowling or navigating. *MSJ Memo*, 11-18. That came about in 1989 with the *Bell II* majority. In light of all that preceded *Bell II*, the dissent in *Bell II*, the *Eaton* concurrence, and the overwhelming condemnation of the decision by commentators, there were strong indications that *Bell II* did not finally resolve the issue. Indeed, any reliance on it pales in comparison to the reliance of the public upon their unquestioned actions for generations of engaging in general recreation on Maine’s intertidal zone and upon the Justices of the Law Court in the *1981 Opinion* when the Governor gave away millions of dollars of public land and rights based upon the expansive views expressed therein. Indeed, even in the *Bell II* Superior Court

⁹ *Eaton*, 2000 ME 176, ¶ 54, n. 9, 760 A.2d at 250 n. 9.

judgment, the description remains vague, lending further support for the correction sought by this motion.¹⁰

In sum, the *Bell* courts made a clear mistake to the detriment of Maine and Mainers. The decision is unfounded on its face, and wrested from Mainers the simple joys of strolling along the coast, without having to engage in the easily-contrived deception of pretending to go fishing or fowling or navigating. The primary argument Plaintiffs proffer to prevent this obvious and much needed correction is that their lawyer and his associates have succeeded in delaying having the Maine courts directly readdress the issue. Successful delay, however, does not mandate that *stare decisis* bar the common law be corrected.

II. Plaintiffs' Description of the Colonial Ordinance Fails to Properly Place it in the Common Law, Fails to Properly Consider the Public Trust Doctrine, and Fails to Properly Set Forth Maine Case Law Prior to *Bell*.

Plaintiffs suggest that the State's position that Plaintiffs "must demonstrate by 'some condition, custom[,] act or expression by the public that it could not engage in recreation in the intertidal zone'" is "nonsensical" and "without support in the law. *Opposition*, 17 n.13. The statement, made at page 12 of the State's memorandum, directly follows from the cases discussed immediately preceding it.

[The Ordinance] has been judicially adopted, not in the sense that the court extended it to this state, but that the court found it *extended by the public itself, as the expression of a public right, so acted upon and acquiesced in as to have become a settled, universal right.*

Conant v. Jordan, 107 Me. 227, 230 (1910) (emphasis added). Mainers "adopted only so much of" the common law on this subject from elsewhere "as was suitable to their new conditions and needs, consistent with the new state of society, and *conformable to the general course of policy*

¹⁰ See n. 2, *supra*.

which they intended to pursue.” *Id.* at 234 (emphasis added). Additionally, as we explained public trust rights in the intertidal zone cannot be lost by the public unless clearly done so for a public reason, a concept fully explained in our memorandum at 4-6. *See e.g., Shively v. Bowlby*, 152 U.S. 1, 10 (1894); *1981 Opinion*, 437 A.2d at 607; *Moulton v. Libbey*, 37 Me. 472, 488 (1854) (public trust rights not conveyed “unless it be so clearly and fully expressed as to be incapable of any other reasonable construction.”) The proposition, therefore, is fully supported by the case law— the *Bell II* majority’s failure to follow it represents a radical departure from all that preceded it.¹¹

Otherwise, Plaintiffs completely disregards all of the history of the Colonial Ordinance and its incorporation by the people of Maine into Maine by relying entirely upon the *Bell* decisions which, as we have demonstrated, are patently incorrect. *MSJ Memo*, 18-36. Plaintiffs go on to discuss the importance of the intertidal zone to the upland owner for sustenance, commercial fishing, drying fish, wharfing. *Opposition*, 17-19. First, this new “sustenance” argument is a radical departure from Maine and Massachusetts case law that has consistently stated that the *only* historical basis for the Colonial Ordinance’s grant of “*proprietie*” was to encourage wharf-building by the upland owner. *MSJ Memo*, 11; *Commonwealth v. City of Roxbury*, 75 Mass. 451, 515 n.13 (1857); *Storer v. Freeman*, 6 Mass. 435 (1810) (Cape Elizabeth). That precedent establishes, of course, that there is a conflict only when the public activity actually conflicts with the wharf-building, *id.*, and there is no suggestion here, or in any

¹¹ Plaintiffs continue to misunderstand the Colonial Ordinance and the Body of Liberties of which is a part, by suggesting that they somehow encompassed all of the public’s rights and ended rights preserved by custom and usage. *Opposition*, 16-17. Both the Body of Liberties on its face and as understood by the courts require an opposite conclusion. *See MSJ Memo*, 10-17 & n.9 (lower court in *Bell II* concluding, *inter alia*, “The framers also expected that public rights by custom could develop and be part of the law subsequent to passage of the 1648 Laws and Liberties, so long as they were not immoral.”)

prior case, that public recreation is in conflict with any wharf-building of the upland owners. When the wharf is built, the public's uses are necessarily impacted.

Second, the original purpose of the Colonial Ordinance in 1641 was to guarantee the most important rights of the public to uses related to fishing, fowling and navigation for sustenance, business and pleasure. *Andrews v. King*, 124 Me. 361, 364 (1925). Later in 1647, the rights of *proprietie* for wharf-building were confirmed in the upland owner. Plaintiffs' newly-created argument, therefore, has no historical or legal basis. Maine courts have recognized that the public rights can be exercised for business as well as *pleasure*.

Third, the public trust doctrine tells us that all uses not in conflict thereof remain in the public and are lost only as necessary to fulfill a public necessity. *MSJ Memo*, 4-6. Assuming *arguendo* that "sustenance" is now newly added to wharf-building as a basis for the Colonial Ordinance, under the applicable precedent even if such uses of the upland owner are protected Plaintiffs do not and cannot explain how or why the upland owner's "sustenance" needs have somehow expanded to gobble up "recreation." This is particularly so here where there is no suggestion that any Plaintiff is seeking to engage in wharf-building or "sustenance" activities, or is even alleging that walking, sitting, or frisbee throwing is in conflict with such activities. No decision in Maine, including the *Bell* cases, has identified the necessity of preventing the public from strolling in the intertidal zone for the fun of it, particularly when the public can do so when fishing for fun. And, as we explained, the Maine courts never limited the public rights in the intertidal zone in a manner to bar public recreation unrelated to fishing, fowling and navigation – until *Bell II*. *Id.*, at 11-17, 29-32.

While the Colonial Ordinance was part of the common law before Maine became an independent entity (*Opposition*, 16-17, 25-26), the public trust doctrine clearly was part of the

common law *before* the Colonial Ordinance ((*MSJ Memo*, 3-6). We do not dispute, and have never disputed, that the Colonial Ordinance is part of Maine’s common law. The failure of the *Bell* decisions and Plaintiffs’ position is that they wholly fail to recognize that the public trust doctrine precedes and supersedes the Colonial Ordinance. The failure of the *Bell II* majority to apply the normal rules to the impact of the Colonial Ordinance on the public trust doctrine remains a critical error, one notably addressed by neither Plaintiffs nor the Law Court. In sum, they fail to properly place the Ordinance in the proper legal and historical context of the common law.

Plaintiffs then boldly assert that because no one contested the rights of the public to stroll in the intertidal zone for the fun of it, such rights did not exist. *Opposition*, 19-20. Common sense and the language of the Maine court opinions, however, demand the opposite conclusion – that the public understood they could engage in such activities. The *1981 Opinion* made this clear, and regarding the views of lawyers, the premier treatise on the subject in Maine clearly stated: “the broad powers given to the public to be on the flats would be sufficient to encompass the public rights of swimming on the seashore.” 2 Henry & Halperin, *Maine Law Affecting Marine Resources*, 239 (1970).

Plaintiffs attempt to trash the *1981 Opinion*, as they must to succeed. However, there is no doubt that *Opinion* accurately assesses the law of Maine. Most importantly, Plaintiffs do not dispute that the public, through their elected representatives, relied upon that *Opinion* in giving away millions of dollars of public lands and rights. It was quite clear that if the Justices had suggested that the State would later have to come back and purchase pure recreational rights along Maine’s coastline, the “giveaway” likely would not have occurred. Indeed, no Maine case

prior to the *Bell* decisions so much as hinted that the more restrictive views of *Butler* would apply in Maine, but rather took a broad and expansive view of Maine public trust rights.

Plaintiffs suggest that the State is seeking to abrogate the common law on policy grounds. *Opposition*, 22-26. As our first memorandum makes clear, that is far from true. For example, Rule Number 1 is that public trust rights are not lost unless they are clearly taken from the public for a public purpose or necessity. *MSJ Memo*, 3-6. No one – not the *Bell II* majority nor Plaintiffs – have explained how or for what purpose the public right to stroll in the intertidal zone was taken away, particularly where livestock could travel and rest in the intertidal area. *Id.* at 9. In addition, the lower court in *Bell* that heard the legal and historical experts concluded that “The drafters of the Colonial Ordinance did not intend to encourage the development of private recreational parks when they granted ownership of the intertidal zone to adjacent property owners.” *Id.* at 10. We simply ask the courts to apply some level of common sense to the matters presented. We have asked only that the courts of Maine to apply the normal, well-established rules of common law and the public trust doctrine to this matter – it is the *Bell* courts that inexplicably, *inter alia*, altered history by basing their decisions on the notion that the public never owned the intertidal zone in Maine, ignored the finding below that the public had always strolled on Moody Beach, ignored the well-established rule of construction that public trust rights are not lost unless clearly done so for a public purpose, and ignored that there is no public purpose in preventing the public from walking as they always have on the intertidal area. Yes, public policy is part and parcel of the public trust doctrine because, as the courts have clearly explained, for the public rights to be lost, that loss must be supported by some public need. *MSJ*

Memo, 3-6. No public purpose for such a loss has been identified by the *Bell II* majority or Plaintiffs' counsel.¹²

Plaintiffs end their discussion of the *Bell II* majority with a bit of a tirade, attempting to characterize the Attorney General's effort to overturn *Bell II* majority as "illogical." *Opposition*, 25-26. We suggest that the opposite is true. The positions taken by the State fully comport with case law, history and most certainly logic. Prior to the *Bell* decisions, the case law of *Maine* had never suggested that the public's right to stroll had been lost or taken away – indeed, the *1981 Opinion* stated exactly the opposite. *See e.g.*, 2 Henry & Halperin, *supra*, 239 ("the broad powers given to the public to be on the flats would be sufficient to encompass the public rights of swimming on the seashore.") The established history before the *Bell* decisions was that prior to the Colonial Ordinance the intertidal zone was owned by the public – a position with which even Plaintiffs' counsel agreed (*MSJ Memo*, 23) – therefore, the applicable rules mandate that public rights are not lost unless clearly granted away for a public purpose. Again, Plaintiffs do not identify such a grant or any public purpose in granting away the public's right to stroll in the intertidal zone. Finally, regarding logic, neither of the *Bell* courts nor Plaintiffs' counsel have ever explained, or even attempted to explain, the "logic" of allowing Mainers to walk, sit, stand, and eat in the intertidal zone when engaging in pleasurable fishing, fowling and navigating, but not simply to walk, sit, stand and eat. Such a legal construct is and remains illogical and

¹² At footnote 14, Plaintiffs continue to perpetuate a falsehood. They suggest that "[p]ermissive walking in the intertidal zone has never been an issue in any of the beach cases." For this proposition, they mis-cite to a portion of the *Bell* Superior Court's findings that the upland owners were willing to allow walking to continue. The issue of whether the public had the right to walk regardless of an upland owner's permission was hotly contested in the *Bell* litigation. The public clearly sought an order that they could stroll on the intertidal zone unrelated to fishing, fowling or navigation *regardless* of the permission of the upland owner. (Exhibit C, hereto) When the State and Town sought to have this purported "permission" placed in the judgment by the Superior Court and the Law Court in *Bell II* and thereby hold the plaintiffs to their representations, Mr. Thaxter adamantly and successfully objected. 557 A.2d 168, 192 (dissent).

unworkable. *Eaton*, 2000 ME 176, ¶ 51, 760 A.2d at 248-49 (concurrency); *Bell II*, 557 A.2d at 188-89 (dissent). Additionally, they still do not answer how cattle can have the right to travel and rest in the intertidal zone but people do not. In the end, it is the *Bell* decisions that lack logic, which is why they should be overturned.

III. The *Bell II* Dissent is Based upon Sound History, the Law and Common Sense.

Plaintiffs take aim at the *Bell II* dissent by grossly mischaracterize it and the principles upon which it relies. *Opposition*, 26-32. Again, Plaintiffs make their points by ignoring the same firm principles ignored by the *Bell II* majority.

Plaintiffs begin by relying upon the lower court in *Bell II* which created the *wrong* notion that because no case had identified walking as a public right before the Colonial Ordinance, no right existed. *Opposition*, 27-28. The basic principles of the public trust doctrine are that all public rights and uses are retained unless granted away for a public purpose. *MSJ Memo*, 3-6. In other words, unless the Ordinance specifically named walking for the fun of it as a public use to be conveyed, it remained; and, even if specifically given away, such a gift is void unless for a public purpose. *Id.* The fact that Justice Brodrick does not believe that the public was “slathering” itself with suntan oil in 1647, therefore, is without meaning. It was not a matter of the Ordinance “preserving” such rights – rather, the question is whether all of the conceivable public use was conveyed away for a public purpose. The Body of Liberties on its face goes on to recognize “custom and usage,” and the right of the public to drive and rest cattle in the intertidal zone. *MSJ Memo*, 9-11.

Everyone seems to agree that the public has a right to walk, sit, and eat in the intertidal zone when fishing, fowling and navigating for recreation. The fact that the public now, when doing so, protects itself with suntan oil does not logically prevent the public from doing so. The

focus of *Bell II* and the Plaintiffs on suntan oil and frisbees, however, does not change the legal history that the Puritans did *not* intend that the upland owner acquire rights to create private parks. *Id.* The exclusive rights to use suntan oil and frisbees do not easily fall within wharf-building purposes. Indeed, Justice Brodrick's view of the Puritans' repugnance to these uses, upon which Plaintiffs so heavily rely (*Opposition*, 28), applies equally to the upland owners. The point, therefore, is that if no one was being allowed to slather themselves with sunscreen or toss frisbees, then such a right was not granted away.

Plaintiffs go on to misperceive the *Bell II* dissent, by continuing to harp on "custom and usage." *Opposition*, 28-32. Custom, of course, is at the core of the common law, which is the only source of private rights in the intertidal zone. Repeatedly, the Maine courts have found that the balance of rights between the public and the upland owners is the result of a process where the rights have been established "by the public itself, as the expression of a public right, so acted upon and acquiesced in as to have become a settled, universal right." *Conant v. Jordan*, 107 Me. 227, 230 (1910) (emphasis added). Mainers "adopted only so much of" the common law on this subject from elsewhere "as was suitable to their new conditions and needs, consistent with the new state of society, and conformable to the general course of policy which they intended to pursue." *Id.* at 234 (emphasis added); see *MSJ Memo*, 11-16. Indeed, if there if "custom" was not part of Maine's common law, there would be no private rights in the intertidal zone. *Id.* Indeed, the Body of Libertyes of which the Ordinance is a part retained "custom" as a means to confirm rights in property (*MSJ Memo*, 10). In the end, Plaintiffs get it wrong because they fail to understand that "custom and usage" are the very process under the common law which allows them to have any rights at all in the intertidal zone.

IV. *Eaton*

Plaintiffs attempt to distinguish *Eaton*. *Opposition*, 32-33. This is a reiteration of the tactic of Plaintiffs' counsel for the last 20 years. At every turn, said counsel has sought to persuade courts *not* to address the problems of *Bell II*. By doing so, said counsel now argues that *Bell II* cannot be overturned because upland owners – *i.e.*, his clients – have relied upon it. This sleight of hand should not be honored. The *Bell* decisions have been universally condemned and criticized, except of course by Plaintiffs' counsel. Any attorney who did not advise his clients that the *Bell* decisions have been under attack from the moment written and may be overturned or severely limited, simply, are not doing their jobs. Indeed, as noted above, even Justice Brodrick did not in the final judgment provide a list of what the public could and could not do in the intertidal zone.

CONCLUSION

Plaintiffs end with a long conclusion setting forth vague, unsubstantiated reasons why the limitations created by the *Bell* decisions are a “good thing.” *Opposition*, 33-35. It represents an attitude – an attitude with which we strongly disagree. It smacks of *noblesse oblige*, whereby these new “lords of the manor” out of the “goodness of their hearts” allow the lowly Maine commoners, who are too uncivilized to control themselves, limited use of their “private parks” in a manner that best suits them. We strongly object.

The fact that Mainers honor the *Bell II* decision on Moody Beach (even though the decision dealt with less than one-fourth of the upland owners) is because Mainers are law-abiding citizens. Since *Bell II*, the controversy, however, has not abated along Maine's coast – there are more cases dealing with this issue after that decision than before. The State has merely *intervened* in the litigation that has arisen between Mainers and those upland owners who seek to

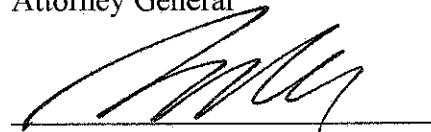
create private parks in the intertidal zone. The State has not driven this ongoing dispute, but only followed it.

In the end, this issue will not go away. It is necessary for the courts to readdress *Bell II*, despite the continuing efforts of Plaintiffs' counsel to create an unassailable precedent by arguing the courts should not deal with the issue. We ask this Court to add its voice to the jurists and commentators speaking out against the *Bell* decisions, and thereby increase the opportunity to overturn it.

DATED: May 23, 2011

Respectfully submitted,

WILLIAM J. SCHNEIDER
Attorney General

A handwritten signature in black ink, appearing to read 'Paul Stern', is written over a horizontal line.

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EXHIBIT A

STATE OF MAINE
YORK, SS. SEP 30 1987

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-125

EDWARD B. BELL, et al.,)
)
 Plaintiffs)
)
 v)
)
 INHABITANTS OF THE TOWN)
 OF WELLS, et al.,)
)
 Defendants)

FINAL JUDGMENT
AND DECLARATION
OF TITLE

These quiet title and declaratory judgment actions pursuant to 14 M.R.S.A. § 6651-6658 and 14 M.R.S.A. § 5951-5963 came for trial before the Court, Honorable William S. Brodrick presiding, and the Court on September 14, 1987, having ordered that judgment be entered for the plaintiff, Edward B. Bell, on all pending counts of his complaint:

It is hereby ORDERED, ADJUDGED and DECLARED that the plaintiff, Edward B. Bell, is vested with title to his property as described by deed in the York County Registry of Deeds, Book 1484, Page 422, free and clear of all encumbrances except those of record, if any, and further subject only to the public easement under the Colonial Ordinance of 1648 in the intertidal portion of his property.

JUDGMENT on these actions having been so entered on the docket; a copy of this FINAL JUDGMENT and DECLARATION OF TITLE is

to be duly recorded in the York County Registry of Deeds pursuant
to 14 M.R.S.A. § 6654.

Dated: 9/30/87

W. S. Brodrick
William S. Brodrick
Justice, Superior Court

LAH8J

EXHIBIT B

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-125

EDWARD B. BELL, et al.,)
)
 Plaintiffs)
)
 v)
)
 INHABITANTS OF THE TOWN)
 OF WELLS, et al.,)
)
 Defendants)

FINAL JUDGMENT
AND DECLARATION
OF TITLE

These quiet title and declaratory judgment actions pursuant to 14 M.R.S.A. § 6651-6658 and 14 M.R.S.A. § 5951-5963 came for trial before the Court, Honorable William S. Brodrick presiding, and the Court on September 14, 1987, having ordered that judgment be entered for the plaintiff, Edward B. Bell, on all pending counts of his complaint:

It is hereby ORDERED, ADJUDGED and DECLARED that the plaintiff, Edward B. Bell, is vested with title to his property as described by deed in the York County Registry of Deeds, Book 1484, Page 422, free and clear of all encumbrances except those of record, if any, and further subject only to the public right under the Colonial Ordinance of 1648 for fishing, fowling and navigation in the intertidal portion of his property.

JUDGMENT on these actions having been so entered on the docket, a copy of this FINAL JUDGMENT and DECLARATION OF TITLE is

to be duly recorded in the York County Registry of Deeds pursuant
to 14 M.R.S.A. § 6654.

Dated:

William S. Brodrick
Justice, Superior Court

LAH8J

EXHIBIT C

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-125

EDWARD B. BELL, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 INHABITANTS OF THE TOWN OF)
 WELLS, et al.,)
)
 Defendants.)

OBJECTION TO PLAINTIFFS'
PROPOSED JUDGMENT

Defendants Town of Wells and State of Maine object to Plaintiffs' Proposed Judgment on the following grounds:

1. In order to have a document that is both enforceable and understandable, the decrees should set forth exactly which activities the public may engage in on plaintiffs' property under the September 14, 1987 decision.

2. Walking on the beach should be expressly specified as an activity which the public has the right to engage in, based on the Court's findings in the September 14, 1987 decision.

3. The judgment should specify that it is determining plaintiffs' rights as of this date and is not foreclosing public rights that may be determined under decisions of the Law Court in future cases.

Consistent with these objections, the Town and State submit the attached form of a Final Judgment and Declaration of Rights in keeping with the Court's September 14, 1987 decision. In doing so, the Town and State do not waive (1) their objections to the Court's findings as set forth in any motion that may be filed pursuant to Me.R.Civ.P. 52(b); (2) their right to file motions pursuant to Me.R.Civ.P. 50(b) and 59; and (3) any other objections they may have to the correctness of the September 14, 1987 decision and any judgment based thereon.

Dated: Augusta, Maine
September , 1987

Respectfully submitted,

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STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-125

EDWARD B. BELL, et al.,)
)
 Plaintiffs,)
)
 v.)
)
INHABITANTS OF THE TOWN OF)
WELLS, et al.,)
)
 Defendants.)

FINAL JUDGMENT AND
DECLARATION OF TITLE

These quiet title and declaratory judgment actions pursuant to 14 M.R.S.A. §§ 5951-5953 came for trial before the Court, Honorable William S. Brodrick presiding, and the Court on September 14, 1987 having ordered that judgment be entered for the plaintiff(s) (insert name or names) on plaintiffs' first, second, eighth, ninth, twelfth, thirteenth, and fourteenth claims for relief:

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED that as of this date the plaintiff(s) (insert name or names) is/are vested with title to his/her/their property as described by deed in the York County Registry of Deeds, (insert appropriate book and page numbers), free and clear of all encumbrances except those of record, if any, and further subject to the following public rights:

- fishing, fowling, and navigation in the intertidal zone

- recreational fishing and boating in the intertidal zone
- recreational fowling in the intertidal zone, except to the extent prohibited by Town Ordinance
- walking along the beach, both in the intertidal zone and on the dry sand at high tide
- mooring boats in the intertidal zone for business or pleasure
- landing boats in the intertidal zone for business or pleasure and walking upon the tidal flats
- riding or skating on tidal flats when they are covered with ice
- unloading cargo in the intertidal zone
- digging shellfish in the intertidal zone
- procuring sea manure in the intertidal zone
- such other public rights as the Law Court may interpret the Colonial Ordinance of 1648 to include in future cases.
- such other public rights as may be permitted under the common law as interpreted by the Law Court in future cases.

Once this judgment is entered on the docket, a copy of this final judgment and declaration of title is to be duly recorded in the York County Registry of Deeds pursuant to 14 M.R.S.A. § 6654.

Dated:

WILLIAM S. BRODRICK
Justice, Superior Court