STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT and ALL PERSONS WHO ARE UNASCERTAINED,

Defendants

STATE OF MAINE'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Since the briefing on summary judgment in the present case, the Law Court issued its decision in *McGarvey v. Whittredge*, 2011 ME 97, in two separate opinions. Both opinions elucidate the majority decision in *Bell v. Town of Wells* ("*Bell II*"), 557 A.2d 168 (Me. 1989), and both embrace an evolving view of Maine's common law governing the intertidal zone. This recent guidance comes in time to help the court in this case.

In prior memoranda, the State, too, suggested that such a course is mandated by history, common law and the public trust doctrine. Plaintiffs, on the other hand, have relied on *Bell II*'s strict construction, arguing that recreational public uses are categorically excluded under Maine's public trust doctrine. *McGarvey* instructs otherwise. Under both opinions in *McGarvey,* we are required to look at a particular public use in dispute in the intertidal zone, and on a use-by-use basis assess whether it falls within the public trust. Although the two *McGarvey* opinions take separate paths, it is now clear that recreational uses are not outside the public trust. The State

reiterates all it argued in prior filings, and provides the following additional discussion in light of *McGarvey*.

MCGARVEY V. WHITTREDGE

The dispute in *McGarvey* was whether the public could walk across the intertidal zone in order to reach the ocean to engage in recreational scuba diving. 2011 ME 97, ¶ 1. The scuba diving did not involve the use of a boat, and no one engaged in fishing or fowling. *Id.* at ¶ 6. The Superior Court (Cuddy, J.) found in the affirmative, likening scuba diving to navigation. *Id.* at ¶ 7. At the same time, restricted by *Bell II,* that court found other "social activities" were not permissible public trust uses. *Id.* The plaintiffs appealed the scuba diving aspect of the decision but the defendants did not file a cross-appeal with respect to the "social activities" holding. *Id.* Therefore, the Law Court directly addressed only the "act of walking across the intertidal land to reach the ocean to scuba dive." *Id.*

The Law Court unanimously answered in the affirmative, in a three-three split. Two opinions issued: one written by Chief Justice Saufley in which Associate Justices Mead and Jabar joined, and the second by Associate Justice Levy joined in by Associate Justices Alexander and Gorman. (For ease of reference, this memorandum will refer to the former as the "*Saufley Opinion*" and the latter as the "*Levy Opinion.*") Associate Justice Silver did not sit on the case.

Saufley Opinion. The *Saufley Opinion* sets forth a thorough discussion of the history and caselaw underpinning Maine's public trust doctrine, and finds *Bell II* aberrational in its departure from Maine's decisional law. 2011 Me 97, ¶¶ 8-53. The *Saufley Opinion* set out a two-part test: first, whether the disputed public use falls readily within the "fishing, fowling or navigation" descriptors, and if so the analysis ends. *Id.* at ¶ 49. If not, however, the court looks at whether "our common law has regularly accommodated the public's right to" engage in the disputed

activity, even where that activity does not fall within the three descriptors. *Id.* at ¶ 51. The *Opinion* stated:

> *To the extent that Bell II can be read to forever set the public's rights in stone as related to only "fishing," "fowling," and "navigation," we would expressly disavow that interpretation.* We believe the better approach is to extract the principles upon which the *Bell II* opinion was decided and evaluate those principles in light of the centuries-old jurisprudence governing ownership and use of the intertidal lands.

Id. at ¶ 53 (citation omitted) (emphasis added). In doing so, the *Saufley Opinion* stated that these Justices "respectfully disagree[d] with the concurring opinion's conclusion that courts must strictly adhere to principles of *stare decisis* when addressing the development of the common law". *Id.* at ¶¶ 54 – 56. The *Opinion* explained that the common law expresses the "changing customs and sentiments of the people," the history of the cases prior to *Bell II* did not so severely limit public trust uses, and the artifice created by attempting to fit accepted uses into the three categories of "fishing, fowling or navigation." *Id.* at ¶¶ 54 – 56.

These Justices found that scuba diving did not fit nicely into "navigation." *Id.* at ¶¶ 50, 53. "Instead, [these three Justices] will determine whether [appellants'] purpose for crossing the intertidal zone is among the purposes consistent with the common law of the *jus publicum,* even when such access is for activities that do not strictly fall within the triumvirate of descriptors." *Id.* at ¶ 54. The *Saufley Opinion* concluded that the "private ownership of intertidal lands...has always been subject to the public's right to cross the wet sand to reach the ocean.... In our view, pursuant to the common law of Maine, the public trust rights are at least broad enough to allow the public to walk across the intertidal lands to enter the water and scuba dive." *Id.* at ¶ 58.

Levy Opinion. Although agreeing with the *Saufley Opinion's* conclusion that walking across the intertidal zone to scuba dive fell within the public trust uses, the *Levy Opinion* in an effort to honor the "fishing, fowling or navigation" nomenclature, likened scuba diving to the last

category. The *Levy Opinion* believed that in light of the 1989 *Bell II* 4-3 majority opinion, *stare decisis* limited the Court, and therefore rejected the *Saufley Opinion's* approach. *Id.* at ¶¶ 59-67. Instead, the *Levy Opinion* advanced a "functional" test, *id.* at ¶¶ 74-75.

Rather than a rigid application of the "fishing, fowling, and navigation" descriptors, however, the *Levy Opinion* applied a "'sympathetically generous' and broad interpretation" to those terms. *Id.* at ¶¶ 68-71. Although the *Levy Opinion* believed that the analysis should "center[] on the three enumerated public uses," "[t]hat approach has not prevented us from accounting for the ever-changing circumstances of society when applying the principles of the Colonial Ordinance." *Id.* at ¶ 70. This *Opinion*, thus, specifically and directly acknowledged the continuing evolution of the three terms.

> In short, we should apply, as have the generations of Maine jurists that have preceded us, a sympathetically generous and broad interpretive approach when construing the uses arising from the public trust rights in Maine's intertidal lands, but we should do so without deviating from the core requirement that the uses are delimited by the terms fishing, fowling, and navigation as these terms have and will continue to evolve.

Id. at ¶ 71.[1]

The *Levy Opinion* went on to opine that "bathing" was not permissible under *Butler v. Attorney General,* 80 N.E.2d 688 (Mass. 1907), a case explicitly relied upon by the *Bell II* majority, 557 A.2d at 175, but distinguished "bathing" from "swimming." 2011 ME 97, ¶¶ 73-74. The *Levy Opinion's* "functional" approach appears to rest upon an assessment of the

[1] In passing, we note that the *Levy Opinion* appears to be making an effort to conform the *Bell II* majority's heavy emphasis on the three descriptors (fishing, fowling and navigation) with the approach previously taken by the Law Court. For example, in *Moulton v. Libbey*, 37 Me. 472 (1854), the Law Court ruled, *inter alia*, that any interpretation of a grant that would diminish public trust rights should be rejected, "*unless it be so clearly and fully expressed as to be incapable of any other reasonable construction.*" 37 Me. at 488 (emphasis added). The majority, thus, rejected the reasoning of the dissent that the Colonial Ordinance vested the proprietor with ownership of the intertidal zone "subject *only* to the express reservations specified in the Act." *Id.* at 498 (Hathaway, J., dissenting) (emphasis in original).

characteristics of the disputed public use, and a comparison of them *functionally* to activities previously approved by the courts. *Id.* at ¶¶ 74-75.

It is important to note, that the activity that is the subject of the "functionality" test in *McGarvey* is activity *beyond* the intertidal zone – that is, in the publicly-owned ocean. The *Levy Opinion* focused on the proposition that "bathing" contemplated use of the land beneath the water while swimming did not. *Id.* at ¶¶ 73-75. (Of course, scuba diving also contemplates often getting to and being on the bottom of the ocean.) In addition, the *Levy Opinion* discussed the facts that "scuba diving has qualities of navigation" because external devices are used. *Id.* at ¶ 75. The *Levy Opinion* cast aside a strict constructionist approach and embraced the proposition that the public can cross the intertidal zone for a particular use of the ocean, even when that use could not have been imagined in the 17th century, or for that matter in 1925. *Id.* at ¶ 76.

Taking into account the "expansive and adaptive force" of the common law, the *Levy Opinion* opined

> [S]cuba diving as an activity that is within the public's right to use intertidal land for purposes of navigation. Furthermore, we have previously recognized that the public has the right to walk upon intertidal land when it is incidental to the right of navigation; therefore, walking across intertidal lands to access the ocean in order to scuba dive is also within the public's right.

Id. at ¶ 77.

SUMMARY OF ARGUMENT

McGarvey presents this Court with two templates to analyze this case. It is quite clear now that the *Bell II* majority decision must be viewed as an aberration, and that the Plaintiffs' arguments that public recreational uses are categorically prohibited in the intertidal zone are wrong. Both templates require that courts examine public uses not as broad categories but rather as individual assessments. *McGarvey,* 2011 ME 97, ¶ 11 n.5. In other words, the activities in

dispute must be identified and separately evaluated under the *Saufley* and *Levy Opinions.* Additionally, both *Opinions* did not rely upon any particular testimony but rather on common sense and common knowledge. That is the approach that will be taken in the following discussion.

At this juncture, Plaintiffs are seeking to prevent members of the public from being in the intertidal zone in front of their properties unless engaged in "fishing, fowling and navigation" which Plaintiffs define in extraordinarily narrow terms. We now know, under *McGarvey,* this approach is wrong. This brief will address public uses that apparently are disputed by Plaintiffs, at least as revealed by the few depositions taken. Under both the *Saufley* and *Levy Opinions,* the particular activities in dispute – sitting, standing, strolling, swimming, and surfing-type activities[2] – are permissible public trust uses.

ARGUMENT

The argument below presumes that the member of the public has gained access lawfully to the intertidal zone, for example by means of a public accessway such as those at Goose Rocks Beach, of the ocean itself, or of a private, upland parcel with permission.

I. Sitting and Standing Are Permissible Under the Public Trust Doctrine When Associated with Public Trust Uses.

Both the *Saufley* and *Levy Opinions* found, at the very least, that the public has the right to *walk* across the intertidal zone in order to reach the ocean for public trust activities. The *Opinions* did not specifically address public *sitting* or *standing* when associated with or

[2] If Plaintiffs disagree with the list, either because it is too broad or narrow, we expect them to state so. In particular, however, these are public uses that we ask the Court find are protected by the public trust doctrine. We want to avoid the "cake and eat it, too" approach, still argued by Plaintiffs here, that because the plaintiffs in *Bell* stated that they did not dispute the public walking in the intertidal zone, the plaintiffs could thereafter prevent the public from doing so. *State of Maine Reply Memorandum in Support of Motion for Summary Judgment,* at19-23 & n.12.

incidental to public trust activities. Because sitting[3] and standing have been confirmed when associated with public trust activities in the past, it is logical to assume that they fall within the public trust when associated with otherwise permissible public trust activities.

Under the public trust doctrine, the public has the right to pass, repass and rest within the intertidal zone related to a variety of activities – including driving livestock,[4] getting to and from boats moored offshore or beached in the intertidal zone,[5] fishing and fowling.[6] "[T]hey have all the privileges of lying upon the flats, when they go or return from the lands of others...." *Deering v. Proprietors of Long Wharf*, 25 Me. 51, 65 (1845). And, it is irrelevant whether these associated activities are for business or pleasure. *Andrews v. King*, 124 Me. 361, 363, 364 (1925) (using the flats as a landing place could be "in pursuit of . . . private affairs, of business as well as pleasure.") Fishing (by line, net or rake, for fish or shellfish) and fowling (the shooting of waterfowl) obviously contemplate sitting and standing – it could not be otherwise. A

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[3] In reality, the "sitting" on blankets, etc., at the beaches about which Plaintiffs and other upland owners in the past have strongly complained has had little to do with the intertidal zone. That dispute is largely over the dry sand, above the high water mark. After all, the sand is wet in the intertidal zone, and the tide is eventually going to come in.

[4] Both the 1641 Body of Libertyes and the 1648 Lawes and Libertyes had a specific provision on "Drovers," permitting cattle to walk and rest in "open" areas, including the intertidal zone. The "Drovers" provision, referred to as a "Liberty" in the margin, (Addendum A2 to State's Memorandum in Support of Summary Judgment) stated:

> It is ordered by this Court and Authoritie thereof; That if any man shall have occasion to lead or drive cattle from place to place that is far off, so that they be weary or hungrie, or fall sick or lame, it shall be lawfull to rest and refresh them for a competent time in any open place that is not corn, meadow, or inclosed for some particular use.

See also, Wood's New-England's Prospect (a 1630's account, describing swine feeding on clams in the intertidal area) (Addendum A4-A5 to State's Memorandum in Support of Summary Judgment).

[5] "[The public] may sail over [the flats], 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 shellfish in them, may take sea manure from them, . . ." *Marshall v. Walker*, 93 Me. 532, 536-37 (1900).

[6] *Id.*

requirement that one must be in constant motion when fishing or fowling defies common sense. For example, when clamming, by necessity the clammer must move from one spot to another and at each spot stand while leaning over to rake the spot for shellfish. And, being engaged in strenuous work, clammers are known to rest out on the flats. Likewise, when engaged in classic navigation, which includes beaching a boat in the intertidal zone, the view that one cannot stand or sit next to the boat until the tide rolls in is wrong as *Andrews, Marshall* and common sense make clear.

In view of this, under the logic of both the *Saufley* and *Levy Opinions,* 2011 Me 97, ¶¶ 53, 75, when engaging in or about to engage in public trust activities in the intertidal zone or in the ocean, the public may engage in the incidental activities of walking, standing and sitting.

II. Strolling is a Public Trust Use.

The activity of *strolling* is a public trust activity. By strolling, we mean simply walking in the intertidal zone unrelated to fishing, fowling or navigation – *i.e.,* the simple joy of strolling from one spot to another. To be more specific to Goose Rocks Beach, there is no dispute that there are several publicly-owned accessways down to low water mark. The question is whether members of the public can, under the public trust, stroll in the intertidal zone at low tide from one accessway to another, or even back to the accessway the public used to get onto the intertidal zone.[7]

There is no historical evidence that the colonial experience prevented the public from

[7] This intertidal strolling would also include that of other upland owners.

strolling in the intertidal zone.[8] In *Deering v. Proprietors of Long Wharf,* 25 Me. 51, 65 (1845), the Court explained that "there is reserved for all, the right to pass freely to the lands and houses of others besides the owners of the flats.... They may pass over the ground ... whenever their necessities or their inclinations induce them to go to others' lands or houses, and they have all the privileges of lying upon the flats, when they go or return from the lands of others...." In *Marshall v. Walker,* 93 Me. 532, 536-37 (1900), the Court stated that the public "may ride or skate over the[] [intertidal zone] when covered with water bearing ice...." It is hard to understand how the public has the public trust right to travel over the intertidal area when covered with ice but not when bare. The Court obviously presumed, without stating, that the public could ride and walk over the intertidal zone when not covered with ice. One commentator, in 1932 explained that "In Maine ... the courts have extended the public privileges on the flats ... to include ... walking upon the flats...." John J. Whittlesey, *Law of the Seashore, Tidewaters and Great Ponds in Massachusetts and Maine*, 14 (1932).

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[8] In fact, the opposite is true. *Bell II,* 557 A.2d at 170, 174, 189, 192. The Superior Court in *Bell II* agreed that walking was permissible in colonial times:

> The Puritans did not view the crossing of someone else's land as a trespass unless some actual damage to the land resulted. When the Colonial Ordinance speaks of "coming upon" the land, it means inflicting damage or removing assets. It does not mean a simple crossing of the land.

Bell, 1987 Me. Super. LEXIS 256, at *11 - *12. The Superior Court also concluded that defendants proved that the public consistently strolled on Moody Beach "as far back as eyewitness testimony can take us;" when Plaintiffs purchased their lots they expected "public strolling" up and down the beach; and the public strolling had never been and was not disputed by the plaintiffs, who, according to the court "were willing to let the public walk on the beach and remain willing to do so." *Id.* at *39, *42. However, plaintiffs objected to putting in the judgment that the public had a right to stroll, and the Superior Court declined to directly address the issue in its final judgment. Thus, apparently, public strolling was to be allowed solely at the discretion of the upland owner. Therefore, although travel with and without cattle had been "accepted in the community" in 1648, and although public strolling had gone on as long as anyone could remember, this public right somehow was lost inexplicably from the *jus publicum. Id.* at *8.

Similarly, the public could walk along and rest with their livestock. *See* note 4, *supra.* Again, it is hard to understand, and no one has explained how, cattle and their drovers had the right to walk and rest in the intertidal zone in the past but the public alone does not have that right today. Certainly, the burden on the upland owner is less *without* the livestock.

Saufley Opinion. The *Saufley Opinion* lends strong support to strolling being within the public trust. "We even concluded, without a direct connection to fishing, fowling, and navigation, that the public may lawfully cross intertidal lands by riding or skating when that land is covered with ice." *McGarvey,* 2011 ME 97, ¶ 40. It is indistinguishable, moreover, from walking to or from a moored or beached boat, or to fishing, fowling, navigating, scuba diving or other allowable activities. Certainly, the "changing customs and sentiments of the people" strongly support this conclusion. *See id.* at ¶¶ 54 – 56. Today, members of the public walk less in order to fish or fowl, and more in order to simply stroll. In addition, no decision prior to the *Bell II* even hinted otherwise. *Id.* Indeed, the English decision upon which the peculiar twists in the public trust doctrine are based, presumed recreational walkers. *Blundell v. Catterall,* 106 Eng. Rep. 1190 (K.B. 1821) (Bayley, J.) ("generally used for the recreation of walking...."), reprinted in Joseph K. Angell, *Treatise on the Right of Property in Tide Waters and the Soil and Shores Thereof,* at xxxii; *see also discussion in State's Memorandum in Support of Motion for Summary Judgment,* at 33-35.

Levy Opinion. The "functional" approach of the *Levy Opinion* should lead to the same conclusion. Again, the *Levy Opinion* focuses on the public use to which strolling would be attendant. Some strollers could be said to be walking in the intertidal zone to physically access the ocean perhaps to wade in (which will be discussed below), but most are not. These strollers are not fishing, fowling or navigating as the *Bell II* majority might find. However, as noted, the

Court has already stated that "the public may pass over the ground ... whenever their necessities or their inclinations induce them to go to others' lands or houses...." *Deering,* 25 Me. at 65; *see also Marshall,* 93 Me. at 536-37; Whittlesey, *supra,* at 14 ("walking on the flats" is a public privilege in Maine). The "sympathetically generous and broad interpretive approach" proposed in the *Levy Opinion,* in light of this precedent and under these circumstances should call for a conclusion that strolling falls within the public trust uses.

III. Swimming is a Public Trust Use.

The *Saufley* and *Levy Opinions* make clear that the public may cross the intertidal land to swim in the ocean. *McGarvey,* 2011 ME 97, ¶¶ 40 n.12, 41, 74-75.[9] Under both Opinions, at the very least, it is abundantly clear that the public is allowed to cross the intertidal area in order to swim in the ocean which is an acceptable and established public trust use. *Id.* Thus, for example, at Goose Rocks Beach, members of the public can walk down the publicly-owned accessways to the intertidal zone, and walk in the intertidal zone along the entire beach in order to reach the ocean in order to swim. The real questions relate to what that means.

Saufley Opinion. The *Saufley Opinion* explained "pursuant to the original public trust doctrine, the public has a right to use the ocean itself...." *Id.* at ¶ 12.

> [A]lthough not expressly stated in any one opinion, our common law has regularly accommodated the public's right to cross the intertidal land to reach the ocean for ocean-based activities. The list of uses that have been accepted within the common law, but which do not fall strictly within the definitions of "fishing," "fowling," and "navigation," is significant.

Id. at ¶ 51. These Justices noted that the Massachusetts decision in *Butler v. Attorney General,* 80 N.E.2d 688 (Mass. 1907), upon which the *Bell II* majority so heavily relied, "excluded the use of the intertidal land for *hygienic*, bathing-related purposes," and under that decision "the public

[9] *See also,* 2 Henry & Halperin, *Maine Law Affecting Marine Resources,* 239 (1970) ("[T]he broad powers given to the public to be on the flats would be sufficient to encompass the public rights of swimming on the seashore.")

also may use the intertidal lands to swim, but not to bathe." *McGarvey*, 2011 ME 97, ¶¶ 40 n.12, 41 (emphasis added). It is clear, therefore, under the *Saufley Opinion*, that the public trust rights include use of the intertidal zone to swim in the ocean, and commensurately to use the intertidal zone to reach the ocean in order to swim.

The question may remain whether the public may stand or sit in the intertidal zone when preparing to engage in swimming or whether their feet may touch the intertidal zone land when swimming above it in the ocean water at higher tides. The *Saufley Opinion* would require the answer to be in the affirmative. As discussed above, when engaged in a variety of undisputed activities (be they fishing, fowling or navigation), human experience makes clear that the public stands and sits in the intertidal zone. There is no reason not to recognize such obvious incidental uses when engaged in swimming as well. Just as a person must sit or stand in order to rest, drink and eat – or simply wait – in the intertidal zone when fishing, fowling or navigating, so too must a person do when swimming or for that matter scuba diving.

Likewise, when analyzing the activity of swimming in the ocean along the shore, the reality of the experience is a necessary factor. As the waves crash in along the water line, even the strongest swimmer will be tossed about so that the intertidal zone land will be stepped upon in a retreat from the waves. The reality is that most if not all swimmers of all ages, especially those of tender years, require a simple rest or pause as well. This is no different than a kayaker or rower pulling in to beach in order to rest on the intertidal area. The act of swimming in the ocean necessarily includes standing on the intertidal zone; defining it otherwise does not comport with common experience. Swimming in the ocean from both practical and historic perspectives includes standing in the intertidal zone, whether covered with water or otherwise.

Levy Opinion. The *Levy Opinion* distinguishes "bathing" from "swimming," defining

the latter in terms used in *Butler*, 80 N.E. at 689, as "passing freely over and through the water without any use of the land underneath." *McGarvey*, 2011 ME 97, ¶¶ 73-75. Under the *Levy Opinion*, crossing (*i.e.*, walking over) the intertidal zone to reach the ocean to swim is an incidental public trust use, just as it is with scuba diving.

The question is: does this allow sitting and standing in the intertidal zone, with or without covering water, when resting between swims? If the *Levy Opinion* contemplates swimming as it has been exercised along Maine's coast, the answer is in the affirmative. Under the "'sympathetically generous' and broad interpretation" espoused by this *Opinion, id.* at ¶ 68, it is hard to find otherwise. The *Levy Opinion* recognized that the Court "over time, greatly expanded the scope of the 'public' that benefits from the right to fish, fowl, and navigate, and we have construed those terms far beyond their traditional meanings." *Id.* at ¶ 62. Again, although swimming may not fit neatly within those three descriptors, there is no doubt now that the public can engage in swimming in the ocean over the intertidal zone and can walk on the intertidal zone to the ocean. Just as one sits and stands when fishing, fowling or navigating, so too sitting and standing in the intertidal zone are incidental to swimming in the ocean. A *sympathetically generous and broad interpretation* mandates no less.

IV. Surfing and Similar Activities, Such as Tubing, Are Public Trust Activities.

If scuba diving is a public trust use, it is hard to understand how surfing and similar activities, such as boogie-boarding and tubing, are not. Therefore, the sitting, standing and walking associated with the more traditional public trust uses (fishing, fowling or navigation) should be recognized as well.

Saufley Opinion. The *Saufley Opinion* approach resolves the issue under its first step: does the primary activity here – surfing, tubing or similar activities – fall readily within

navigation. *McGarvey*, 2011 ME 97, ¶ 49. Those activities, and similar ones, contemplate using a device to float on top of the water – that is navigation.

Levy Opinion. The *Levy Opinion* methodology mandates the same result. These activities are navigation as defined by that *Opinion*: each uses a vessel of some type to pass freely over the water. *Id.* at ¶ 75. The fact that tubing or surfing did not exist 100 years ago is irrelevant as they are "newly developed methods of travel associated with" passing freely over the water. *Id.* at ¶¶ 76-78. Just as walking across and sitting and standing in the intertidal zone when using a more traditional boat are attendant public trust uses, therefore so are walking, standing and sitting associated with surfing or tubing.

CONCLUSION

We respectfully ask this Court to grant summary judgment in favor of the State of Maine that the public trust includes the rights to stroll, swim and surf in the intertidal zone, and when doing so to engage in incidental activities such as sitting and standing.

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Respectfully submitted,

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