

**Abstract for Maine Bicentennial Conference Panel #7:
Public Ownership vs. Private Rights: The Case of Maine's Disputed Public Lots
Saturday, June 1, 2019, 1:30 – 3:30 pm**

Panel Members:

Lee Schepps (former Assistant Attorney General of Maine and past director Bureau of Public Lands)

Richard Barringer (Maine Bureau of Public Lands and Muskie School of Public Service, ret.)

Martin Wilk (Maine Attorney General's Office, ret.)

Thomas Urquhart (Maine Audubon Society, ret.), chair

When Maine separated from Massachusetts, the Articles of Separation (part of the new state's Constitution) required that as it sold off its public domain (about 8 million acres) Maine continue to reserve four lots of 320 acres per township – one each for the minister, the church and the school, and one for general purposes. The formula was soon modified to a single 1,000-acre lot from each township "for public use." These Public Reserved Lands (also called Public Lots) were held in trust by the state for the benefit of the future town.

Pending settlement of the land, its only realizable value was the timber standing on it. Even before Maine's statehood, authorities realized there were no practical means of protecting these lands, including the Public Lots, from "timber trespass," or theft. Over the first 30 years of statehood, the problem only increased, even as the expansion of the United States westward made it apparent that settlement of remote portions of Maine was unlikely to proceed at the pace anticipated in 1820.

The Articles of Separation prohibited selling the Public Lots; so to solve the problem of timber theft, in 1850 the Legislature authorized the Land Agent to sell the "right to cut and carry away the timber and grass" from the Public Reserved Lands, the right to continue until the township from which the reservation was made became incorporated as a town or organized as a plantation.

By 1875, the Land Agent had sold off all the public domain, selling the timber rights to the Public Lots pursuant to the act of 1850. That year, the Land Agent's office was abolished; responsibility for the Public Lots eventually ended up with the Maine Forest Service, established in 1891. Early in the 20th century, Maine began to tax timber lands in private hands including the timber rights on Public Lots. The Public Reserved Lands remained virtually unmanaged for most of a century, treated as if they were the property of the surrounding, private landowners.

By the early 1970s, the administration of Gov. Kenneth Curtis, with support from some "Rockefeller Republicans" in the Legislature, had transformed the institutions and structure of Maine government; it brought a time of what federal Judge Frank Coffin once termed "positive government," one that might make a difference in the lives of all Maine people.

Bob Cummings, a reporter for the *Maine Sunday Telegram*, published an article in 1972 about the Public Lots, suggesting that the state had been derelict in protecting and using them. As public interest caught fire, Forestry Commissioner Austin Wilkins requested that the Attorney General James Erwin look into the

matter. Erwin asked Lee Schepps, Assistant Attorney General in the Environmental Protection Division, to undertake the analysis.

Over the following months, Schepps did factual and legal research and authored a report. When he submitted it to the Attorney General, Cummings called to request a copy and was told by the Attorney General that it would not be made public. The following day, the *Maine Sunday Telegram* carried a headline story about "suppression" of the report. In subsequent weeks, the issue became highly publicized and politically controversial. In January 1973, the new Legislature elected Jon Lund as Attorney General, who promptly released the Schepps report.

Schepps's legal analysis argued that: 1.) the right to cut the timber on the Public Reserved Lands referred to the standing timber *in existence* at the time of the sale of those rights, and that the rights had therefore long since been exhausted; 2.) in 1850, long before the method had been invented to make paper from wood, the word "timber" had a specific and widely understood meaning; 3.) the rights did not extend to the use of the land for a form of agriculture, namely, the production of wood fiber; 4.) the rights had been treated by the private owners as if they were the surface rights, which is not what the documents themselves had said.

In addition, over 100,000 acres of Public Lots had never been laid off on the ground, or "located." Consequently, the state was a four percent (+/-) owner of a *common and undivided* interest in the whole township; and, therefore, a partner in the ownership of well over 2.5 million acres. Without a partnership agreement, the state had wide legal rights of use and access to the whole. Further, the Public Lots that had been located on the ground were scattered across the entire Unorganized Territory, some with logging roads across them, many directly in the path of future logging roads for access to adjoining private property.

Finally, the report pointed out that regardless of the extent of the timber rights conveyed, the deeds specified that the rights expired upon the incorporation of the township or its organization as a plantation, acts fully within the power of the State Legislature to take.

The same Legislature in 1973 created a high-profile, Joint Select Committee to look into the Public Lots. The Committee wrote legislation to organize plantations in Maine's entire Unorganized Territory, thereby terminating the timber rights on the Public Lots. Maine's non-industrial landowners and paper companies then brought suit against the State seeking an adjudication of their rights and status as the successors-in-interest to grantees of deeds from the State of Maine between 1850 and 1875. The lawsuit was used politically to hold in abeyance the enactment of the "Grand Plantations" legislation that would terminate the rights. The State counterclaimed, raising the defense of sovereign immunity, and asserting that the timber cutting rights had expired, because the timber in existence at the time of the conveyance had all been cut.

The Legislature also created within the new Department of Conservation a Bureau of Public Lands (BPL) to assert and manage the state's interests in the Public Lots. In late 1973 Richard Barringer arrived at the invitation of Governor Curtis and with the approval of the now-defunct Executive Council, to head the BPL. As was its custom at the time, the Maine Legislature created the BPL with a mission but little else: a modest salary for the director, no staff, and no direction as to how, to what

purposes, and with what means to manage the Public Lots over which it had jurisdiction and to retrieve those over which it did not.

In early 1974, Bureau of Forestry Director Fred Holt assigned a desk, a vehicle, a forester (John Walker), and a Forest Fire Ranger (John Hinckley) to the BPL. Barringer, Walker, and Hinckley went promptly off to the woods to survey their charge; and, with members of the Joint Select Committee, around the state to assess public sentiment about the Grand Plantation idea (they found luke-warm support, especially among the few residents of the Unorganized Territory). Then, in late springtime, an event occurred that would change everything.

Robert Hellendale, president of the Great Northern Paper Company (GNP), approached Curtis in confidence to suggest the possibility of a negotiated settlement to the disputed Public Lots, of which GNP claimed 90,000 acres, some 60,000 of which were located on the ground. Curtis assigned Barringer to explore this opportunity. Over the summer months and into the fall season, Barringer and Hellendale negotiated an agreement to consolidate these 60,000 scattered, located lots in a small number of high-value places that GNP owned outright.

In order to persuade his Board of Directors that he was acting in GNP's best interest, Hellendale suggested that the land trades be made on a strict value-for-value basis, taking into account the differing values of the timber stands, access to water, and other notable features. Average prices were established for any timberland, lake frontage, and other features that might be exchanged between GNP and the state.

In December 1974, a month before Curtis left office, he and Hellendale signed the agreement that the Legislature subsequently approved. Hellendale's action in the exchange had violated a well-established norm of behavior among the large, private Maine landowners – "We get along by going along" – and his unilateral action was viewed by the others as a profound betrayal.

The same value-for-value exchange was adopted and applied in settlement with all the remaining private landowners. Over the next five years, the BPL, under Lee Schepps (Barringer had become Conservation Commissioner), selected lands for consolidation, negotiated trade deals with the private landowners, and obtained approval from the Legislature to create the first 13 areas of consolidation. In each trade, the landowners claimed to be donating the timber rights on the Public Lots and took tax deductions, subject to the outcome of the litigation.

Meanwhile, the lawsuit was progressing through the courts, the state represented by Assistant Attorney General Martin Wilk. Because the case involved an extensive time period of some 125 years and the consideration of voluminous documentary evidence, the case was assigned to a Special Master, retired Supreme Court Justice Donald Webber. By agreement of the parties, the issues were narrowed to two questions: (1) whether or not the timber cutting rights related only to the timber in existence at the time the rights were conveyed and (2) whether or not the cutting rights were limited to certain sizes and species of trees that were considered "timber" at the time. All other issues were reserved.

The two narrow issues were presented to Justice Webber based on a Stipulated Record of over 1,000 pages and more than 250 exhibits. Two days of evidentiary hearings were held, including testimony by the late University of Maine Professor

David Smith on the meaning in the deeds of the term “timber.” The Special Master issued his report in May 1979, deciding both issues in favor of the private landowners. Superior Court Judge Daniel Wathen accepted Justice Webber’s Report and entered Judgment in favor of the landowners.

The State appealed the judgment to the Maine Supreme Judicial Court. In August 1981, in a 3-to-1 decision, the Court ruled in favor of the State: the timber cutting rights related only to the timber in existence at the time the rights were conveyed, and that those rights had been exhausted. The Court expressly stated that it was not deciding the present rights of the parties “in light of their conduct and that of their predecessors over the past 130 years.”

The timber covered by the timber and grass deeds had either all been cut or had otherwise ceased to exist by about 1920. However, the private landowners had continued to harvest timber on the Public Lots until the present. If, as the State maintained, the private landowners had no rights to that timber, their cutting was unauthorized, and the State would be entitled to damages for the value of all such timber. Given the large volume and the length of time of such unauthorized harvesting, the potential damages were significant.

The Court’s decision left it to the state to figure out just how to proceed. Shortly thereafter, Barringer, now State Planning Director, Conservation Commissioner Richard Anderson, and Martin Wilk asked Brennan to convene all the private landowners in a meeting, where they would propose the State’s plan to resolve the entire issue, once and for all. Brennan invited the landowners to the Blaine House on May 4, 1982. Every party to the matter attended this historic occasion.

Brennan welcomed his guests with some humor, then carefully delivered the comprehensive proposal in a bound volume for each landowner. The proposal would consolidate the Public Lots to the maximum extent possible in a manageable number of units, generally on a 2-for-1 acre basis to compensate the state for the timber value lost in the previous six decades of cutting. The immediate response was one of shock and disbelief. One appeared literally to fall from his chair, and all left the Blaine House quiet and angry.

Over time, however, through the negotiating skills of Martin Wilk for the state and Gerald Amero for the landowners, and led by Brad Wellman of the Seven Islands Land Company, the landowners yielded, negotiated, and brought the lingering dispute to a conclusion by 1985. According to Lloyd C. Irland, the Maine State Economist at the time, the ultimate value benefit to the State after all the trades were completed was approximately \$50 Million.

In the meantime, Barringer, Schepps, et al. had provided for the Public Lots’ long-term management in the public interest by drafting and shepherding to enactment two far-reaching Maine laws: the first, to improve their management according to the principles of multiple-use management (30MRS Sec. 4162(1)); and the second, to create a non-lapsing account for their improvement and public use (30MRS Sec. 4163).

Finally, one may ask, how did this remarkable change in the history of Maine and to the very map of Maine come about? It was a combination of great good people, great good fortune, and events best described as an unusual “alignment of the planets.” Two ornery men from upcountry made and kept it a public issue over

several decades. The press made it newsworthy and noteworthy. An Assistant Attorney General authored an incisive analysis of a thorny, complex issue. The right people – devoted and talented – joined together to meet this challenge of the times, believing in the public interest, in government as an instrument of public good, and in unceasing teamwork as the vehicle of high accomplishment.