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Testimony of Rep. Lori K. Gramlich presenting

LD 1696, Resolve, to Study Maine's Absolute Dominion and Beneficial Use Laws Relating to Water Rights

Before the Joint Standing Committee on Environment and Natural Resources

Senator Tepler, Representative Doudera and distinguished colleagues of the Environment and Natural Resources Committee, I am Lori Gramlich. I have the honor and privilege of representing House District 131, the lovely seaside community of Old Orchard Beach, and of serving as Assistant House Majority Leader. Thank you for the opportunity to return to my former committee today to present ***LD 1696, Resolve, to Study Maine's Absolute Dominion and Beneficial Use Laws Relating to Water Rights***.

By way of background, I wanted to frame how I am coming before you to introduce this proposed legislation. As some of you may recall, in previous legislative sessions, I have worked on a myriad of policy initiatives relative to water, including but not limited to ensuring that we all have safe, clean accessible drinking water, that water refilling stations are readily available for folks to access, thereby decreasing our dependence on plastics. One of these bills was a Resolve, Establishing the Commission to Study the Role of Water as a Resource in the State of Maine. I was appointed as House Chair of this study commission. The Executive Summary from the Study Commission is attached to my testimony, and the full report is available online.¹

The commission had a series of recommendations, as well as some proposed legislation that this committee might consider working on. Two of the recommendations included the establishment of a new study commission, which I believe Senator Bennett's bill addresses. The second recommendation, relevant to LD 1696, was to further study groundwater rights and ownership, which I will elaborate on later in my testimony.

As many of us know, Maine is an incredibly water-rich state — our lakes, rivers, aquifers and groundwater systems are not only vital ecological resources but are also foundational to our health,

¹ <https://legislature.maine.gov/doc/9405>

agriculture, economy and way of life. Yet, as increasing demands are placed on these resources — from bottled water extraction to drought pressures exacerbated by climate change — our legal frameworks for governing groundwater use must be current, equitable and sustainable.

This resolve is both timely and necessary. It creates a diverse, balanced and expert-driven commission tasked with a thorough review of Maine's current legal standards — including the absolute dominion doctrine, which effectively treats groundwater as the unrestricted property of landowners — and asks critical questions about whether those standards still serve the best interests of Maine people and communities.

As identified in the December 2022 Water Resource Commission Report, many states take varying approaches to how they regulate groundwater rights and ownership. In fact, the Maine Supreme Judicial Court in 1999 identified that the absolute dominion rule is now the minority rule in the United States, with a few states in addition to Maine continuing to recognize the rule. The Law Court further identified that the Legislature should be weighing the heavy policy considerations involved in this issue, not the least of which is the reliance of land owners on the present property laws. However, the Legislature has not weighed in on this rule with any deliberative and definitive conclusion or resolution. It is for this reason that I submitted LD 1696.

The intent of LD 1696 is to, as stated, establish a commission which would be directed to study not only Maine's laws but also how other states manage groundwater — from the reasonable use and correlative rights doctrines to the prior appropriation model. This comparative approach is essential for identifying legal models that may better align with modern understandings of shared resource stewardship and long-term water security.

Importantly, the commission will include members from across sectors; the configuration is distinct from both the previous Water Commission Study in 2022 and from the configuration noted in LD 757, Senator Bennett's bill, with proposed membership including tribal nations, agricultural businesses, water utilities, conservation organizations, hydrologists and the legal community. Including membership in the legal community with specificity to legal expertise in water rights and water ownership as well as property rights and constitutional law is integral in achieving the intent of this commission and ensures that multiple worldviews and priorities are reflected in any recommendations.

The task ahead is complex, but the commission's charge is clear: to develop findings and recommendations for policy, possible legislation and relevant statutory changes to the legal status of groundwater rights and ownership once and for all. By supporting this resolve, the Legislature affirms its commitment to long-term water resource planning, environmental justice and the public interest.

I urge the committee to vote to pass LD 1696 to ensure Maine has the legal tools to manage its water resources wisely and justly for future generations.

Thank you for your time and consideration. I would be happy to try to answer any questions for you.

Executive Summary

Through the passage of Resolve 2021, Chapter 85, the 130th Maine Legislature established the Commission To Examine the Role of Water as a Resource in the State of Maine, referred to in this report as the “commission.”¹ The resolve directed the commission to study the role of water resources in the State and the nature and extent of infrastructure involved in the use and delivery of water resources including:

- The extent of water resources available in the State;
- Legal principles regarding the ownership of water resources in the State;
- The extent to which water resources will be needed in the State and nation in the future for household, government, business, commercial and other purposes;
- The quality of available water resources and the need for measures to protect water quality;
- The extent of transportation of water within the State and exportation of water from the State;
- The sustainability of aquifers within the State;
- The nature and use of natural resource extraction taxes in other states and the advantages and disadvantages of enacted natural resource extraction taxes in the State; and
- The relationship between water resources and climate change in the State, including an analysis of what actions other states are taking on this issue.

The commission was charged with developing recommendations to ensure that there is adequate clean, safe and accessible drinking water for the State's residents and to meet the needs of commercial and business interests now and in the future; to identify the need for additional state resources to implement its recommendations; and to make a recommendation regarding the positive and negative aspects of a tax on water extraction.

The sixteen commission members appointed to examine these issues brought a broad range of experience to the table.² Over the course of five meetings, the commission solicited, received and discussed a substantial amount of information relevant to its charge as set forth in its authorizing legislation.³

Based on the information collected by the commission and following discussion and deliberation by commission members, the commission developed the following recommendations for consideration by the 131st Legislature:

¹ See Appendix A for a copy of the resolve.

² See Appendix B for a list of appointed commission members.

³ See Part III of this report for a summary of the commission process.

1. The Legislature should establish a new Commission To Study the Role of Water as a Resource in the State of Maine, with a more focused scope of study, to address the unresolved work of this commission;
2. The Legislature should amend the Water Resources Planning Committee statute in Title 5, section 6401 to:
 - A. Include among its duties: (1) identification of measures to promote public access to information about Maine's water resources, including, but not limited to, measures to centralize within a single state agency all relevant data on water use and water resources that is currently collected by state, federal and other entities; and (2) identification of measures to enhance or supplement state monitoring and data collection regarding water use and water resources, the analysis of that data and, where necessary, funding opportunities to support those measures; and
 - B. Require annual reporting, including any proposals for necessary legislation, to the Legislature, with authority to certain legislative committees to propose legislation related to the report;
3. The Legislature should amend the Maine Agricultural Water Management Board statute in Title 7, section 352 to:
 - A. Include among its duties identification of measures to enhance drought preparedness and drought resilience by agricultural producers, including, but not limited to, improved water capture and storage measures, enhanced irrigation opportunities and identification of low-flow areas and low-flow occurrences and development of a notification system to producers located in those areas; and
 - B. Require annual reporting, including any proposals for necessary legislation, to the Legislature, with authority to certain legislative committees to propose legislation related to the report;
4. The Legislature should further study the legal status of groundwater rights and ownership in Maine, including, but not limited to, further review of the Maine Supreme Judicial Court's 1999 opinion in *Maddocks v. Giles* and the approaches to this issue taken by other states; and
5. The Legislature should consider the enactment of measures that would require testing and reporting on the levels of perfluoroalkyl and polyfluoroalkyl substance or PFAS contaminants in water extracted and used for commercial bottling purposes.

Further information on these recommendations, including a summary of commission member votes on each recommendation, is found in Part IV of this report. Draft legislation incorporating a number of the above recommendations is found in Appendices C and D.

IV. Recommendations (Excerpts)

A. Establishment of New Study Commission

- ***Recommendation 1:*** *the Legislature should establish a new Commission To Study the Role of Water as a Resource in the State of Maine, with a more focused scope of study, to address the unresolved work of this commission.*

As indicated by the numerous recommendations from individual commission members suggested for the third meeting but not voted on,⁵⁶ the regulation of water resources in Maine is complex and, depending on the activity, can implicate multiple regulatory schemes. The commission gathered and received a substantial amount of information relevant to its charge and engaged in lengthy and deliberative discussions on those matters over its five meetings. By the close of those meetings, however, many questions remained unresolved regarding the regulation of Maine's water resources and the potential impacts of proposed changes to existing laws or rules.

Accordingly, a majority of commission members present and voting at the fourth meeting⁵⁷ proposed that this unresolved work of the commission be taken up by a new commission during the next legislative interim through the enactment of a resolve establishing a new Commission To Study the Role of Water as a Resource in the State of Maine. During the fourth meeting, at the suggestion of commission member Scott Boak, those supporting this recommendation agreed that, for the purposes of the new commission, the member representing the Office of the Attorney General would be replaced with a member with general legal expertise in water rights and water ownership. During the fifth meeting, as a result of member discussion, this recommendation was further refined to remove from the new commission a representative of the Governor's Office of Policy Innovation and the Future and to add as members representatives of the Department of Environmental Protection and the Public Utilities Commission. At the same time, the commission decided to replace the member representing the interests of businesses that use water in manufacturing or the provision of items or services for sale with a member representing the interests of businesses that use water to irrigate agricultural products.

As discussed during the fourth meeting, this new commission would have a more focused scope of study than was provided in the authorizing legislation for the current commission. That scope of study would focus on the general categories of recommendations identified by commission members⁵⁸ – oversight, data collection, data reporting; drought planning, agricultural issues; water rights and ownership; water quality/PFAS; and water extraction, contracts and permitting.

Commission members requested that staff prepare draft legislation incorporating this recommendation. That legislation is provided in Appendix C.

⁵⁶ See Appendix E.

⁵⁷ Members supporting this recommendation were Chipman, Gramlich, Wood, Boak, Jordan, Sekera and Longfellow (7). Members opposing this recommendation were Berger, Soucy and Dubois (3). Members abstaining from voting on this recommendation were Gordon and Lachance (2).

Members absent for this vote were Stewart, Hanley, Hubbell and Paul (4). During the fifth meeting, commission member Hanley requested to be recorded as opposing this recommendation and instead supporting his general position set forth on page 4 of the spreadsheet included as Appendix E.

D. Further Study of Groundwater Rights and Ownership

- ***Recommendation 4:*** *the Legislature should further study the legal status of groundwater rights and ownership in Maine, including, but not limited to, further review of the Maine Supreme Judicial Court's 1999 opinion in Maddocks v. Giles and the approaches to this issue taken by other states.*

As noted in Part II of this report, Maine is an absolute dominion rule jurisdiction in terms of the manner in which its law regulates the use and ownership of groundwater. Enacted laws and rules have modified the nature of those common law rights but, as noted by the Maine Supreme Judicial Court in 1999 in *Maddocks v. Giles*, Maine still remains an absolute dominion rule jurisdiction. As previously described, many states take a different approach in regulating groundwater rights and ownership, whether through application of the prior appropriation doctrine, the correlative rights doctrine or the reasonable use or so-called American rule.

Although the commission reviewed the current status of Maine law pertaining to groundwater rights and ownership and received information regarding the approaches to that issue taken by other states, given that changing the way in which Maine regulates these matters could potentially have significant impacts on multiple industries and activities, commission members were not prepared to recommend any such changes at present. Instead, a majority of commission members present and voting at the fourth meeting⁶⁵ proposed that the Legislature further study the legal status of groundwater rights and ownership in Maine, including, but not limited to, further review of the *Maddocks v. Giles* opinion and the approaches to this issue taken by other states.

⁶⁵ Members supporting this recommendation were Chipman, Gramlich, Wood, Boak, Jordan, Sekera and Longfellow (7). Members opposing this recommendation were Berger, Soucy and Dubois (3). Members abstaining from voting on this recommendation were Gordon and Lachance (2). Members absent for this vote were Stewart, Hanley, Hubbell and Paul (4). During the fifth meeting, commission member Hanley requested to be recorded as opposing this recommendation and instead supporting his general position set forth on page 4 of the spreadsheet included as Appendix E.