

2017 Maine Beaches Conference

Session 6. New Topics in Coastal Law and Policy: Access, Ownership, and Marine Algae - NOTES

Introductions. Most in attendance were from Maine. Others trickled in after the session began. John Duff, University of Massachusetts, Boston got the session started.

Amy Tchao of Drummond Woodsam Law Firm and Ben Leoni of Curtis Thaxter Law Firm were present to discuss various legal issues affecting Maine Law. The coast of Maine is dynamic and ever changing which makes this area of law interesting.

Code of Justinian was discussed (Latin Codex Justinianus or Corpus Juris Civilis, Body of Civil Law) and its use in conflicts in coastal law. It asks the question, where are you? Today the focus is on Maine and New Hampshire with Maine having near 5,000 miles of coast and New Hampshire having much less (18-20 miles).

The question of where am I along the coast has three options: Below tide, Intertidal and Upland. Conflicts arise over where you are or what you own in these areas. Typically private owners get along but conflicts arise between private and public use and ownership.

Maine is a “low water state” similar and derived from Massachusetts Common law. Private rights granted to private owners from Massachusetts law to engage in fishing, fowl and navigation.

New Hampshire is a “high water state.” State has jurisdiction/ownership of intertidal and low tide land.

Various law court cases were discussed:

Bell vs Wells 1989

- What can take place in the intertidal zone
- Private property owners prevailed
- Fish, fowl and navigation rights remained

Eaton vs. Wells 2000

- How to gain public access on the coast through a prescriptive easement
- Can the public demonstrate adverse possession to obtain a prescriptive easement (use of 20 years)

McGarvey vs. Whittredge 2011

- Private owners didn't like scuba divers crossing their land
- Law decided scuba divers can travers the intertidal land but reasoning why was split (its navigation, no its time to change the law)

Almedon vs Kennebunkport

- Recreational use, sailing, tubing, sun bathing, etc

- Went to Superior Court then Law Court
- Decided Prescriptive Easements are to be litigated on a parcel by parcel basis
- Current Court Outcomes – Intertidal area allows fishing, fowl and navigation (including scuba diving). Other uses are still struggling to evolve the law.

New Hampshire law cases also include the ownership of Great Ponds.

Question: What is the difference from standing in the intertidal zone vs scuba diving in the water?

Answer: With scuba diving you are in the water and not touching the land and the use of equipment is like being a vessel. The water is owned by the public.

Amy Tchao discussed how communities are starting to define beach use by establishing cause agreements.

Harspswell – has 220 miles of coastline, the most out of all Maine municipalities. Disputes can arise. Harspswell came up with a Beach Use Agreement.

Almeder vs Kennebunkport Case – long lived case, started in 2009 and continues today. 2 miles of beach. Went to Superior Court in 2012 (bifurcated). Lower Court decided that the law should be expanded to include snorkeling, scuba diving, etc along with fish, fowl and navigation. Law Court claimed there was no public prescriptive easement and that prescriptive easements must be established on a parcel by parcel basis. In Dec 2016, 25 Plaintiffs still remained. Town went to trial to decide who owns the beach. Decision is still pending.

Access Types – Perpendicular access (road/path) and Lateral access (walk along the beach).

In Kennebunkport – it is lateral access case. The beach has 8 public pathways that the Town owns. Cedar Beach case- does the public have prescriptive rights to Cedar Beach Road (perpendicular access case).

Public Prescriptive Easements are disfavored by the Court as so much evidence is needed, so many elements to present; it's a very difficult thing to prove.

Beach Use Agreements are extremely beneficial to outline expectations and rights of all parties involved.

They are positive community building efforts. Things to know when making an agreement include:

- Who are the stakeholders
- Who will enforce the rules and regulations
- Work best if an agreement is established before litigation is filed. Be proactive.

Gooserocks Beach Agreement (270+ stakeholders involved, 110 lots with ¼ mile wide sand at low tide). Some beach front and back lot owners have signed, but not all yet. The agreement reserves the owners areas but permits the public to walk through the reserved areas. The agreement also defines maintenance. It is a work in progress but is a positive endeavor by the community.

Question: Do beach owners put themselves at risk for prescriptive easement claims down the road by allowing public access?

Answer: No, the agreement just establishes rights. Liability was reviewed and addressed in the agreement.

Cedar Beach Agreement defined the public easement area but had no access to get to the beach. The Owner closed the road. A license agreement with the owner was established to allow Town residents to use the road. Another lot was ok with public using her beach. Agreement requires signage and beach monitoring efforts.

Question: At low tide, how far does the Town own?

Answer: The Town or private ownership is to the low water or 1,650 feet (100 rods). State ownership goes out 200 miles is the rule.

Ben Leoni discussed Liability. Statute says if the owner allows passive recreation on the property, the owner is not liable. However, if you make the public pay you lose the liability exemption and can be held responsible.

To prevent prescriptive easement claims, following Title 14, section A12, post 1 time for 7 days in 20 years and this can prevent prescriptive easement claims. Recommend having the sheriff do the posting and record an affidavit at registry, self-posting can be disputed.

Ben Leoni discussed the Rockweed Harvesting Case, a coastal rights lawsuit involving Acadian Sea Plants Co who harvests rockweed around the world using boats in the water at middle to high tide. Washington County has sued the company because the seaweed is on upland owner/Town owned land to low water. Seaweed has historically been harvested for fertilizer since colonial times. Could the Colonial Ordinance included seaweed harvesting as part of the fish, fowl and navigation rights.

Rockweed Facts:

- Male and female plants
- Float with the currents
- Attach to rocks when big enough using a “hold fast”
- Can live for decades off the nutrients of the ocean
- It is an intertidal species
- Seaweed loses 60% of its biomass each year from wave action, snow, etc
- 95% of seaweed harvested each year is from Maine

The Rockweed Harvesting Case is at the Maine Superior Court.

Dept. of Marine Resources regulates clam and seaworm Harvesting. They have legislation that declares it owns and shall control harvesting, etc. The questions that arise is whether harvesting seaweed is “fishing” and whether seaweed is a living resource of the sea.

Common Law: Intertidal property rights cannot be taken without compensation.

Rockweed Case Plaintiffs position:

- Rockweed is owned by the upland land owner
- Rockweed harvesting is not a form of fishing
- They seek a permanent injunction to prevent others from harvesting
- A 1950’s case in Kennebunkport where the owner sued seaweed harvesters. The harvesters said they historically always have harvested and should be allowed to continue to do so. The case decided the seaweed is owned by the owner of the soil and seaweed cannot be collected off of the beach.
- SMCC Study – shows seaweed removal causes the beach to erode away. Seaweed removal is a problem from a policy standpoint.
- Upland land owners do not like the noise, the principal of it, and concerns over the commercialization of a natural resource
- Conservation Concerns
- Landowners should be able to decide what happens to rockweed
- Rockweed harvesting creates more clams and causes larger carbon sink in the ocean, etc

Ben’s Arguments:

- Hill vs Lorde case – seaweed is a crop – result from land owner property (this refers to casted seaweed from the ocean onto the land).
- Rockweed is a marine organism and is a product of the sea, not the land. Similar to an oyster or mussels which are owned by the public. The Public Trust allows harvesting from the sea.
- Wormers and clamers are supporting the Rockweed harvesters
- A court decision will settle many ongoing questions
- Harvesting should not affect land values
- Harvesting regulations only permit 17% to be harvested at a time

Question: What happened with the Rye and Bonney case?

Answer: This is a prescriptive easement spot by spot case near Wentworth by the Sea in NH. New Hampshire hasn’t looked at silence is presumption of permission. Golf owner near the beach where people parking to fish. Court determined the public did have rights.

Question: How will this discussion affect the public if harvesters win case?

Answer: Mussels and clammers fall under fishing and are protected – no change. Historically, rockweed has been referred to as “sea manure.” Clammers haven’t filed their brief yet.

Question: Any existing or proposed Beach use agreements that include Rockweed Harvest?

Answer: Not known

Question: Can Maine become a high-water state?

Answer: Law Court could make a determination to change this; however there is no movement to do so partly due to such a change being a taking of land.

Question: Any case law on property owners losing land rights as the water rises or the beach erodes?

Answer: No, if the water rises or beach erodes, you lose that land. A solution could be to install a retaining wall or seawall but the States and Towns don’t allow them.

Question: What is Acquiescence?

Answer: Reluctant acceptance of something without protest. Post your property so there is no acquiescence. Post using the Sheriff and record proof at the Registry of Deeds.

Question: Has state joined with Harvesters?

Answer: Amicus Brief will be filed for Harvesters by State and Dept. of Marine Resources and Maine Seaweed Council.

Question: What is the economic support and basis for this Rockweed suit?

Answer: The company harvests around the world, not just in Maine. It is a multi-national company and harvests other types of seaweed as well which are more profitable than rockweed.

Question: What is the right case that needs to happen for Public Trust Doctrine to change?

Answer: A case has to include and address all the issues and go all the way up to the Supreme Court. A Non-Governmental Organization could take on the case.

Question: Are Gooserocks Beach owners taxed on the intertidal land?

Answer: No, not taxed on intertidal areas. Beach front properties are assessed differently based on value.