

## Accessing the Maine Coast: Updates from the Courts AMY TCHAO / JOHN DUFF, JULY 17TH SMCC

### **Speaker: John Duff**

Discussion begins with various lawsuits regarding beach front ownership rights. First case most are familiar with.

Bell v Town of Wells / Eaton v Town of Wells - beach access v public beach

Intertidal area - McGarvey v Whittredge

Almeder v Town of KPT - still in litigation (Dec modified Apr order)  
remanded to York County Superior Court (YCSC) - re-examine rules.

Public Trust Doctrine - Fishing, Fowling & Navigation

Maine/Mass share high low water ownership. Maine - 1641 Colonial Ordinance, see Bell vs Wells which allowed ownership to low water mark

Eaton v Wells, prescriptive easement - continuously used land for 20 years and can document, then public can prove prescriptive easement. Prescriptive Easement applied to Eaton property.

McGarvey v Whittredge 2011, scuba business, cross intertidal zone to obtain access to water. Yes, 6-0 Maine Law Court

Goose Rocks Beach has proven Prescriptive Easement, yet still lost?

Navigation - walking in a single direction would be navigating east or west?

Justice Brennan says public shows prescriptive easement? Remands back to Law Court - Dec 9, 2014, opinion issued. They reconsidered and again remanded to YCSC because nothing specific against each owner individually so was vacated. Decision pending in YCSC.

### **Speaker: Amy Tchao**

Public policy issues.

Public Trust Doctrine: balance between public & private owners needed. Coast is so special it needs a special set of rules, vs interior state. State owns land to high water in

most cases across country, but Maine is a low water state. Maine, Mass both low water states. 3,500 miles of coastline. 3rd longest in country. Longest on eastern seaboard. Wet sand, fish fowl navigation, but not other uses. Per Bell v Wells NJ Court "fish, navigate & commerce allowed and more modern base activities added" 1972 Neptune v Avon. Should not be fixed and static but should be molded and extended to meet changing needs. Are beaches being used the same today as they were before?

Bell, beach ownership - 1987.

McGarvey, scuba diving case- 2011.

Maine most restrictive. How can we achieve public access? 60% of GRB is public. By agreement. Managed by town & owners, but not all owners agreed. In Almeder, Law Court appeared to slam door on recognizing public use rights in 2012, ignoring town maintaining beach, no evidence to allow prescriptive easement. However, decision of 2014 appears to say if public is using beach recreationally, we have DNA (Doctrine of Neighborly Accommodation) so we'll assume public recreation on private land is permissive and presumptive becomes, as practical matter, irrefutable. Must show continuous use, 20 years, without permission and using property as if own, and as if the owner knows it's going on, sits by and does nothing about you using it. Can never establish public easement. also said Town was maintaining and controlling this beach with lifeguards, on all 2 miles of beach, buoy rings for about 40 years town pd for services, spray for mosquitos, trash collecting, etc.

Open Lands - definition by court is northern wood lots where you would be accessing others property to snowmobile, 4wheel without owners knowledge. Vs southern areas of beaches. Does not apply to Moody Beach. It is posted. What is specific uses allowed on intertidal areas. Negotiated beach agreements very difficult. Harpswell headed to Law Court regarding footpath to beach and whether or not there is a public prescriptive easement. Right now Cedar Beach can be used, but only by access of boat. Cedar Beach Rd connects, but is in litigation so no one can use right now.

## **Questions:**

~ What about litigation being so uncertain?

Amy Tchao: In her view, standards are changing and evolving in public prescriptive easement law. First was focused on nature of land, then private use, now public recreation use and need for parcel by parcel basis. Lawyers can only go on history in court; Bell v Wells is example. Almeder, back to court. Court now says change rules, but haven't done so yet. Law Court still has yet to tackle headon intertidal area issues.

John Duff - not abundantly clear what rules are and whether they are using correctly.

20 years adverse, owner knew and did nothing. If its 20 years and someone takes over by posting, chasing people out etc. Certain areas you can do something - post, file affidavit in registry that they are not acquiescing to that.

Does DNA say doesn't count? Law Court said in 1st decision you can't prove public access but second time, said not as a matter of law, no set of facts, you can prove there are. What are set of facts used now. What conduct would be considered adverse. Still uncertainty.

~ How could beach front owner post to show private property - front, back, high level, etc?

Amy Tchao & John Duff - what does sign say? No loitering. What does that mean? Could be different to each visitor. Could be sitting, standing time. etc.

~ Higgins family front lot owner: They hadn't decided how to share lots. At time they were subdividing, lots were deeded with recreational use of beach to heirs and assigns forever. Public access was allowed for family front lot owners only other than guests or owners to back lots. Now Town Manager has interest, and deeded interest was pointed out. Now Town owns property and parking lot, so do they have deeded rights for their guests to access beach so does that mean anyone who goes to parking lot now has deeded access as guest? How do you distinguish who has rights?

AT/JD parallel to GRB. Parking is management issue that can make or break negotiated agreement. How to not abuse access? DNA works if everyone agrees not to abuse. Has to be managed with everyone.

Amy: challenge is when you do have a beach, such as Higgins or GRB, that town should help manage; however, not many towns have resource if interest public cannot use beach or is limited access. If access can be taken away at private owners will. 400 yrs of history that public had rights. John Duff has seen changes to Higgins, but has not reached level of high court. He knows at Higgins he can be at public property, private DNA or several houses where we aren't neighborly, and have staked sand. Shouldn't have to have map to show where access is allowed. Question of whether public or private AND ownership is ongoing.