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Legal Seaweed

Shoreline access suit caught up in details of colonial MA ordinance

By Jordan Bailey | Jun 30, 2017

Children play and sunbathe on the shore in front of a private home in Belfast at low tide, where rockweed can be seen clinging to rocks. According to Maine courts, this is trespassing, but local landowners generally allow public use of their beaches. *Photo by: Jordan Bailey*

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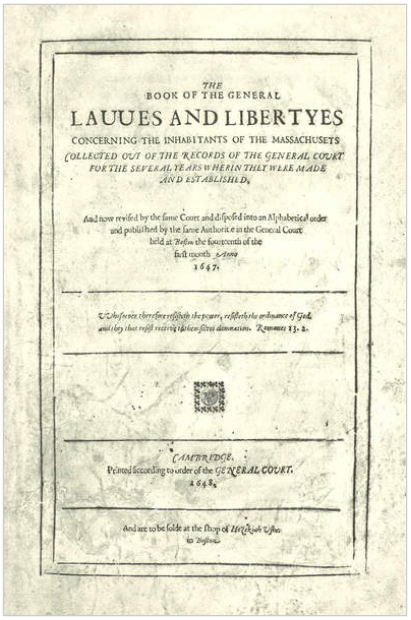
A lawsuit under appeal in Maine Supreme Judicial Court over whether landowners' permission must be obtained to harvest seaweed revives the longstanding dispute over what the public can do on the strip of land between the high and low tide lines along the coast.

In Maine and Massachusetts, the intertidal zone, as it is known, is private property, with certain use rights reserved for the public. In Maine,


THE
BOOK OF THE GENERAL
LAUUES AND LIBERTYES
CONCERNING THE INHABITANTS OF THE MASSACHUSETS
COLLECTED OUT OF THE RECORDS OF THE GENERAL COURT
FOR THE SEVERALL YEARES WHEREIN THEY WERE MADE
AND ESTABLISHED.
And now revised by the same Court and disposed into an Alphabeticall order
and published by the same Authority in the General Court
held at Boston the fourteenth of the
fifth moneth 1647.
Whosoever therefore resisteth the power, resisteth the ordinance of God,
and they that resist receive to themselves damnation. Romans 13. 2.
CAMBRIDGE.
Printed according to order of the GENERAL COURT.
1648.
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fishing and scuba diving are OK but strolling on the beach and sunbathing are not.

In all other coastal states, the shore is public, plain and simple. With the exception of a few major cities' harbors set aside for commerce, private ownership ends at the high tide mark. The principle is based on the “public trust doctrine” passed down from an ancient Roman law that describes the air, running water, sea and shoreline as “common to all mankind.”

The doctrine was adopted by the English with the tidal lands owned by the King for the public use of all his subjects, and when the original American colonies were granted charters, public shores came with them.

Maine's departure from the norm can be traced to a 1640s Massachusetts Bay Colony ordinance commonly interpreted as ceding those tidal lands to private landowners, with a few restrictions: access to the shore for “fishing, fowling and navigation” would be reserved as a public right. Maine’s judicial system has held that Massachusetts’ shoreland law carried over when Maine became a separate state in 1820.

There has been much confusion, however, about what activities are included in the ordinance's enumerated rights. In two famous cases brought by coastal landowners against the town of Wells in the 1980s, Maine's supreme court, also called the law court, ruled that the public did not have the right to sunbathe or stroll on Moody Beach, where the plaintiffs owned homes.

The Legislature responded by spelling out that recreational uses are allowed, expanding the list of permitted activities to include “fishing, fowling, navigation, use as a footway between points along the shore and use for recreational purposes." In a second consideration of the Moody Beach case, the court ruled that legislation unconstitutional, for taking private property without compensation, so it is not enforced.

The ruling has had little effect on the Midcoast. Only if a landowner complains about the public using their beach would the local police get involved. Belfast Police Chief Mike McFadden, who said he believed private property ends at the high tide line, could recall just one instance when landowners complained: when a naked man was walking along the Belfast shore.

In Searsport in 2015, at the prompting of the owner, police threatened to arrest members of an environmental group who were on a company's shore warning the public about high acidity in the area. Later, when one member returned armed with a fishing pole, the police backed off. Police Chief Richard Lahaye said he knew that fishing is permitted in the intertidal zone.

In the case before the law court now, Ross v. Acadia Seaplants Ltd., the dispute is over whether harvesting rockweed, a type of commercially harvested seaweed that grows attached to rock and makes up more than 95 percent of seaweed landings in the state, is included in the reserved public rights. In March, Washington County Superior Court ruled that it is not.

Harvesters of other marine organisms that, like rockweed, attach to the rocks on the sea floor (mussels and oysters) or stay put in the mud (worms or clams) are worried that a restriction on seaweed harvesting could threaten to encompass the species they harvest as well.

The courts' reliance on the colonial ordinance to guide Maine's intertidal law is the reason that intertidal harvesters can sometimes be heard opining on the original intent of the ordinance or on the Old English definition of the word "proprietie."

Dave Preston, staff biologist for Waldoboro seaweed company Atlantic Laboratories, said, "I believe that the intent of the colonial ordinance was to include all commercial uses of the intertidal zone to allow people to make a living. And that's why they kept the 'fishing fowling and navigation' relatively subjective. They left a lot of room for interpretation. So I believe the lawsuit should have gone the other way."

Robert Morse, owner of Atlantic Laboratories, said he believed the ordinance was meant to encourage wharf building, and that the language giving tidelands to upland landowners applied only to lands on which a wharf is built.

"Now that's morphed into them owning the whole intertidal," he said. "It's written in Old English. If you get a period dictionary for 1648, you'll see the words had different meanings than they do now."

The issues Morse brings up continue to be debated by legal scholars, some of whom argue that the ordinance shouldn't apply to Maine at all. But the appeal's focus is more narrow.

Is seaweed a fish?

"The case is about the whole issue of 'fishing, fowling and navigation,' ... and whether seaweed can be considered a fish," said Benjamin Leoni, the lawyer representing Acadia Seaplants. "I am advocating for an expansion of the term *fish*."

Maine statute defines fishing as taking or attempting to take a marine organism from the sea, and the Department of Marine Resources regulates seaweed as a fishery.

Gordon Smith, the lawyer for the landowners, said June 19 that he will be arguing in his brief due in August that "seaweed is more like a plant than an animal."

His main argument, Smith said, will be that common law (the law passed down by court decisions) has clearly established that seaweed is the property of landowners: In a precedent-setting case in 1861, the Maine Supreme Judicial Court determined that seaweed belongs to landowners because the judges equated it with land crops that derive nutrients from soil. (Landowners own the land in the intertidal zone, not the water above it at high tide.)

“There is testimony to show that seaweed, instead of drifting to Vaughan’s island from distant places, grows on its soil and in its immediate vicinity,” the 1861 decision reads. “It is thus as much a crop of the plaintiff as the herbage on his uplands. A right to take a profit in another’s soil cannot be acquired by prescription in this State.”

While the landowners in the current case have behind them the force of common law and common language — it is called sea*weed*, after all — science is on the side of the defendants. Taxonomy classifies rockweed in an entirely different kingdom than plants: Chromista. Ironically, the harvesters trying to prove that rockweed is not a plant have the term "Seaplants" in their name.

Dr. Susan Brawley is a University of Maine biology professor who served on the development team for the state’s new Rockweed Management Plan, which has been on hold since the lawsuit was raised. She said, “Rockweed isn’t a terrestrial plant. It isn’t a plant at all. The decision is internally inconsistent.”

She is referring to a section in the Washington County Superior Court judgment summarizing rockweed biology. At the base of rockweed is a holdfast, a disclike structure that attaches to rock. Justice Harold Stewart writes: “The holdfast’s sole purpose is to keep the rockweed in place and is not a means to extract nutrients from the ground. Instead, rockweed receives nutrients from the sea and absorbs CO2 from the air and seawater.”

However, Stewart concludes that “Rockweed is a terrestrial plant,” and “Harvesting a terrestrial plant is no more a fishing activity such as worming, digging for mussels, trapping lobsters, or dropping a line for fish clearly are, than is harvesting a tree the same as hunting or trapping wildlife.”

In the appellant brief filed Friday June 16, Leoni says rockweed is more like other habitat-forming commercial species whose harvest is a public right. Like oysters and mussels, rockweed starts life as plankton floating on the currents and then settles to the seafloor where it affixes to rock and obtains nutrients from the water. Terrestrial plants derive nutrients from their roots, he writes.

Smith agreed that calling seaweed a terrestrial plant in the superior court decision was “probably not the best choice of words,” and said neither party disputes that it is a marine organism, but he said the issue is immaterial to the case because the judges will be considering the issues “de novo,” or anew, without reviewing the lower court’s decision. However, he does refer to seaweed as a plant in his arguments.

The arguments move further into minute distinctions, close readings and technicalities.

Beyond pointing out that the Maine Supreme Court's 1861 decision that seaweed is the property of landowners was flawed because it was based on the false premise that it derives nutrients from the soil, Leoni also argues that the landowner does not gain title to seaweed through other means: It is not the product of the landowner's labor, nor has it become a part of his soil through accretion. He cites an 1861 Massachusetts Supreme Court case that ruled that only when marine products are detached and wash up onto the shore, can they be considered a part of the soil and the property of landowners. Because seaweed harvesters work from boats, trimming living seaweed, he writes, they do not set foot on or remove private property.

On the landowners' side, Smith said he plans to argue that the 1861 precedent establishing seaweed as private property is a "settled question," and should not be reexamined.

Though ownership was established in that case, he said, the question Acadia Seaplants is raising now, if harvesting seaweed is included in the public trust rights, is a distinct question that did not come up then. Smith will argue that it is not.

The public trust doctrine is an access doctrine, he said, meaning it gives people the right to walk on or travel over intertidal private property in order to conduct otherwise public activities.

"The items being taken (when harvesting) are clearly public property," he said. "Fish are never private property. Ducks and birds are never private property."

Seaweed is a different story, he said, and characterized it as a habitat-forming primary producer that takes in carbon dioxide.

"The baseline issue is, this is private property: It is a plant growing in the ground," he said. "It makes sense that clams, worms, oysters, could be considered fishing, but the case law in Maine has never even hinted that any kind of plant would be considered a fish."

Are we Massachusetts or are we Maine?

While the lawyers in this case argue over whether seaweed harvesting is fishing, retired University of Maine Law professor and founding member of the Maine Civil Liberties Union Orlando Delogu says they are missing the bigger picture: Maine is a separate political entity from Massachusetts, and intertidal law spelled out in the colonial ordinance has not applied since Maine became its own state in 1820.

Delogu outlined this argument in a paper he wrote for a symposium on coastal law that the University of Maine Law School organized after the controversial Moody Beach decision. Several of the lawyers and legal scholars at the symposium, including Delogu, argued that the court misinterpreted the wording

and intent of the colonial ordinance in that decision. One said the use of word "proprietie" could have meant that the landowner had first right to the resources on his shore and that other, clear transfers of property at that time used the words belongs to, or grants.

Delogu also pointed out that the court failed to consider the “equal footing doctrine,” according to which any new state that joins the union does so on an equal footing with the original 13 colonies. Because each of those colonies owned its shoreline, he said, a new state automatically gains title to that land when it joins the union. This is a position the U.S. Supreme Court has taken in several cases related to intertidal ownership in coastal states.

The landowners’ lawyer, Smith, said the equal footing doctrine is merely “academic,” and something he believes the law court is not interested in exploring. The court wrote in its Moody Beach decision that the colonial ordinance's common interpretation and applicability to Maine was "considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question." Its current interpretation was established in common law in Massachusetts at the time of separation, they said, and Massachusetts common law was incorporated into Maine common law when Maine became a state.

They also followed the reasoning of an 1832 Massachusetts case in which the judges said a reinterpretation of the colonial ordinance at that point would be “extremely injurious to the stability of titles, and to the peace and interests of the community.”

However the U.S. Supreme Court considers the doctrine neither merely academic, nor too disruptive. Most recently, in the 1988 case Phillips Petroleum Co. v. Mississippi, Delogu said, it invoked the equal footing doctrine to correct a 171-year-old judicial error through which Mississippi was deprived of its title to the intertidal zone. The law court dismissed that decision as “revisionist history,” but Delogu said it confirmed that the doctrine is “alive and well.”

"The majority's failure to grasp the significance of the equal footing doctrine and the case law interpreting it is inexplicable,” he wrote in a 1990 Maine Law Review article. “Indeed no Maine court has considered these issues — the full meaning and implications of the Act of Statehood and the equal footing doctrine as it related to the Colonial Ordinance and Maine's new status as a separate political entity.”

When asked about his current thoughts on the matter, Delogu said June 19 that he is in the midst of writing a book on this very topic, which he anticipates will be finished before the seaweed case is resolved.

“The federal courts have consistently held that Maine was never obligated to adhere to Massachusetts law," he said.

It was the Moody Beach decision that tied Maine coastal law to the colonial ordinance, Delogu said, but it is the Legislature, not the courts, that is charged with making intertidal law. Through review of the Public Trust to Intertidal Lands Acts, The Submerged Lands Act, and their amendments, he has found that the only areas of the coast the state has actually ceded are those that have been "wharfed out" or filled.

"That leaves 98 percent of the state's intertidal lands, which remain unfilled, in the hands of the state, held in trust for the public," he said.

The erroneous Moody Beach decision, he said, has emboldened upland owners to claim that seaweed is their property, whether they use it or not. Other intertidal harvesters believe a ruling in favor of landowners would further embolden them to restrict access to the shore.

After a coalition of these harvesters wrote to Maine Attorney General Janet Mills urging her to enter the case on behalf of the state to protect public trust rights, the office authorized the Department of Marine Resources to retain a lawyer to file a friend-of-the-court brief. Catherine Connors of Pierce Atwood will be representing the state. She did not respond to calls by press time.

If the court takes a narrow focus on the case and does not reexamine its adherence to the colonial ordinance or revisit its Moody Beach decisions, Delogu said, the case may go to the U.S. Supreme Court where those issues are likely to come up, and Maine may find out that its whole shoreline is public.

"This isn't going away," he said. "Other suits are going to be spawned by the continuing adherence to Moody Beach because there are other people who would like to make uses of the intertidal zone for recreational purposes and tourism."

"The upland owners believe that they have the right to exclude most of these activities, so what we're talking about today is going to be brought to a head," Delogu said. "Either we will put a stick in our own eye and continue to adhere to Massachusetts law, which is out of step with a wide range of other states, or we will change the law, which is a much healthier position for economic interests and the public of Maine."

Related Information:

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Part 2: Conservation concerns complicate rockweed dispute

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