



*The*  
**University of Mississippi**

Oxford • Jackson • Tupelo • Southaven

National Sea Grant Law Center  
Kinard Hall, Wing E - Room 262  
Post Office Box 1848  
University, MS 38677-1848  
Office Phone: (662) 915-7775  
Fax: (662) 915-5267  
E-mail: sealaw@olemiss.edu

March 21, 2014

Kristen Grant  
Maine Sea Grant and University of Maine Cooperative Extension  
Wells Reserve  
342 Laudholm Farm Road  
Wells, ME 04090

Re: Maine Supreme Court Ruling in *Almeder v. Kennebunkport* (NSGLC-14-04-03)

*This product was prepared by the National Sea Grant Law Center under award number NA09OAR4170200 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.*

Dear Kristen,

Thanks for sharing the recent development in the Goose Rocks beach access case. In response to your request for an analysis of the opinion, I've summarized the court's key holdings and provided some context of how this case fits with previous rulings by the Maine Supreme Court. Please note, the information below is legal research provided for education and outreach purposes, and does not constitute legal advice or representation of Maine Sea Grant or its constituents.

Some of the beach access cases in Maine are a form of impact litigation, where advocates for social change turn to the courts to advance their cause. Others are filed by property owners in response to real and perceived infringement on private property interests. Cases with very similar facts may result in very different legal outcomes depending on who initiated the lawsuit, what type of claims were raised, and how the court chose to apply previous case law.

An interesting dynamic seems to be in play between the lower courts and the Maine Supreme Court. In a number of recent cases, the lower courts have issued rulings and opinions recognizing broader public rights to access Maine beaches. On appeal, the Maine Supreme Court has often overturned these decisions, favoring legal interpretations that are more protective of private property rights. Over time, this type of "claim and response" should eventually lead to firm answers about the scope of the public's right in intertidal lands in Maine as lawyers and lower courts learn how to identify cases and frame arguments that can survive on appeal. While the law is developing, however, it can be very unclear which way the scales are leaning.

One thing to keep in mind is that advocates for broader public access to Maine's beaches have been proceeding on at least two separate lines of attack. They are often asserting that (1) the court should recognize that the public has obtained a right of access based on an easement by prescription or custom, as well as (2) a right of access under the public trust doctrine. The foundations of these two claims are very different. Cases that seem to conflict at first glance may in fact be addressing completely different legal arguments.

### **Public Trust Doctrine**

In its recent decision in *Almeder v. Kennebunkport*, issued on February 4, 2014, the Maine Supreme Court limited its ruling to the easement question. The Court declined to rule on the scope of the public's right to use the intertidal zone pursuant to the public trust doctrine, finding the lower court's ruling to be premature as that portion of the case had not yet been litigated. The *Almeder* opinion, therefore, has no impact on nor does it conflict with the Court's previous ruling in *McGarvey v. Whittredge* in 2011.

In 1989, in *Bell v. Town of Wells*, the Maine Supreme Court held that beachfront owners hold title to the low-water mark subject to a public easement pursuant to the public trust doctrine to fish, fowl, navigate, and undertake uses reasonably incidental to the three traditional uses. Although the Court has consistently held that the public trust rights in intertidal lands do not include general recreational activities, in *McGarvey* the court held that "pursuant to the common law of Maine, the public trust rights are at least broad enough to allow the public to walk across the intertidal lands to enter the water and scuba dive." In other words, the activities in *McGarvey* were "reasonably incidental" to the traditional uses of fishing, fowling, and navigation. One of the questions that remain in *Almeder* is whether the activities engaged in at Goose Rocks Beach are "reasonably incidental." If the Court deems them to be general recreational activities, the Court is likely to rule that they are not protected by the public trust doctrine.

### **Easement by Prescription or Custom**

Turning now to the issues the Court did address in *Almeder* – easement by prescription or custom. In Maine, the public may acquire certain rights to use the land of another through long and regular use. This legal right is referred to as a prescriptive easement. The party asserting the claim has the burden of proving continuous use for at least 20 years under a claim of right adverse to the owner. The Maine Supreme Court stated in *S.D. Warren Co. v. Vernon* (1997) that a use is adverse to the owner "when a party ... has received no permission from the owner of the soil, and uses it the way the owner would use it, disregarding his claims entirely, using it as though he owned the property himself..."

It is generally quite difficult to obtain rights to use the land of another on the basis of prescription, as any break in the public use resets the clock and a property owner can prevent rights from arising simply by granting permission. Asserting prescriptive easements over beaches is even more difficult. The Maine Supreme Court has stated, "When the land is wild and uncultivated, Maine applies the rule that open and continuous use for the requisite length of time raises a rebuttable presumption that the use was permissive." The courts, therefore, will presume that the public's use of the beach was permissive and the party asserting the claim has the burden of proving the use was without permission and therefore "adverse." Adversity can be established by demonstrating hostility, which in *Lyons v. Baptist School of Christian Training* (2002), the Maine Supreme Court stated required "a showing that the use was: (1) without the express or implied permission of the owner; (2) with the intent to displace or limit the owner's rights to the land; and (3) undertaken in a manner that provided the owners with adequate notice ... that the owner's property rights are in jeopardy."

In *Eaton v. Town of Wells* (2000), the Maine Supreme Court held that the public had acquired a prescriptive easement with respect to Wells Beach. In *Eaton*, the court found there was a long history of the Town maintaining, patrolling, and enforcing laws on the contested beach and some indication of landowner dissatisfaction with some of the public uses. The court concluded that “[t]his evidence was sufficient in *Eaton* to give the owners notice that a public easement was being acquired and that their rights were in jeopardy.”

In *Almeder*, the Maine Supreme Court ruled that the lower court erred by evaluating adversity without affording the Beachfront Owners the benefit of the presumption of permission. Although the court could have remanded this issue back to the lower court for further fact-finding and analysis, the court concluded that as a matter of law there was insufficient evidence to support a finding that the Town had rebutted the presumption. The lower court had found that the Town spent money on Goose Rocks Beach to provide public conveniences and increase tourism. The Supreme Court found this fact insufficient to overcome the presumption that the public’s recreational use was permissive.

Furthermore, the court suggested that the presumption would have to be rebutted parcel-by-parcel, and not addressed by looking at the beach as a whole. The Maine Supreme Court’s ruling highlights the importance of establishing the factual record. In the court’s opinion, the record was not developed enough to support a finding that the Town actively managed Goose Rocks Beach in a manner similar to Wells Beach without the permission of the Beachfront Owners.

The Maine Supreme Court also refused to recognize an easement by custom. Under British common law, groups of people could obtain easements through customary usage that “lasted from time immemorial, without interruption and as a right.” Most attempts to import the British doctrine into state property law have failed. The Maine Supreme Court refusal to recognize customary easements is in line with the majority of courts in the United States. Oregon is the only state that has applied the doctrine of custom to grant access to their dry sand beaches.

## **Conclusion**

In looking at the *Almeder* decision, the key findings for the legal community include:

- The question as to the extent of public access rights to Goose Rocks Beach pursuant to the public trust doctrine remains unanswered. At a minimum, the public has fishing, fowling and navigation rights. The public also has the right, modestly expanded from these traditional public trust rights, to cross and use Goose Rocks Beach for scuba diving as determined in *McGarvey v Whittredge*.
- Those seeking to assert prescriptive rights must present sufficient evidence to rebut the presumption of permission as the party asserting the claim carries the burden of proving adversity.
- Lower Maine courts should apply the presumption of permission when prescriptive easements are asserted over beaches, and thereby foreclose the opportunity for attorneys to raise this particular issue on appeal in future cases.

Key findings for private landowners, waterfront users, and local decision makers include:

- At this time, it is not clear how the Court’s ruling will affect public access to privately held Maine lands in the future.
- Private landowners, as well as municipal governments, need to carefully consider how the “presumption of permission” might apply to specific Maine beaches.

- Because the ruling makes it harder for prescriptive easements to arise, it is possible that, as a result of this ruling, some private landowners may be more willing to allow access and refrain from fencing or posting their property.
- Other private landowners, however, might interpret the ruling to mean that their private property rights could be challenged in the future and react by posting or fencing their properties. In such a scenario, it is possible that these landowners could be unintentionally creating a situation in which the public would be able to assert prescriptive rights. By posting their property, the landowners are signaling that any public use of the beach is adverse, thereby enabling the public to start the 20-year clock towards establishment of a prescriptive easement. Under *Almeder*, allowing public use is actually in the landowner's best interest as the existence of permissive use will likely defeat prescriptive claims.

I hope you find this information helpful. Please let me know if you have additional questions.

Sincerely,



Stephanie Otts, Director, National Sea Grant Law Center