STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. # YOR-18-251

_____

ROBERT F. ALMEDER, et al.,
Plaintiffs-Appellants

V.

TOWN OF KENNEBUNK, et al.,

Defendants--Appellees

_____

ON APPEAL FROM MAINE SUPERIOR COURT
For York County

_____

BRIEF OF APPELLEE

_____

By: Adam Steinman, Bar No. 7695
49 Shipwreck Cove Rd.
Cape Elizabeth, ME 04107

Counsel for Intervenor--
Appellee
Surfrider Foundation

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. # YOR-18-251

_____

ROBERT F. ALMEDER, et al.,
Plaintiffs--Appellants

V.

TOWN OF KENNEBUNK, et al.

Defendant--Appellees

_____

ON APPEAL FROM MAINE SUPERIOR COURT
York County

_____

BRIEF OF APPELLEE

_____

By: Adam Steinman, Bar No. 7695
49 Shipwreck Cove
Cape Elizabeth, ME 04107

Counsel for Appellee-Intervenor
Surfrider Foundation

TABLE OF CONTENTS

SECTION **PAGE NO.**

1. TABLE OF AUTHORITIES iii

2. STATEMENT OF FACTS 1

3. STANDARD OF REVIEW 2

4. STATEMENT OF ISSUES PRESENTED 3

5. SUMMARY OF ARGUMENT 3

6. ARGUMENT ON ISSUES PRESENTED 7

ISSUE 1: Should the Law Court affirm the Superior Court's holding that the Town of Kennebunkport has title to intertidal land adjacent to 22 of the 23 parcels at issue in these proceedings. 7

ISSUE 2: Should the Law Court rely on public trust principles to support the Superior Court's holding and extend the holding to all of Goose Rock Beach and all Beaches in Maine. 11

ISSUE 3: Should the Law Court rely on Maine's Statehood Act and the "equal footing" doctrine to support the Superior Court's holding to extend statewide. 15

ISSUE 4: Is plaintiffs'/appellants' argument that they hold title to adjacent intertidal land pursuant to the Law Court's holding in the *Bell* cases precluded by the U.S. Supreme Court's holding in *Illinois Central Railroad Co. v. Illinois* 20

ISSUE 5: Is plaintiffs'/appellants' collateral argument that they hold title to adjacent intertidal land pursuant to prescriptive rights, chain of title statutes, and related equitable doctrines supported by U.S. Supreme Court and Maine case law. 25

ISSUE 6: If the Law Court reverses the Superior Court's holding and finds the Town does not hold Title to the intertidal lands

adjacent to 22 of 23 parcels at issue, are issues related to the 1647 Colonial Ordinance with respect to the Scope of the term Navigation ripe and, if so, does the term include surfing and other water activities. 29

7. CONCLUSION 31

TABLE OF AUTHORITIES

Page No(s).

Cases

Almeder v. Town of Kennebunkport,
YORSC-RE-09-111
(Me. Super. Ct., Yor. Cty.,Oct. 16, 2012)……...30

Barrows v. McDermott,
73 Me. 441 (Me. 1882)……11

Bell v. Town of Wells,
510 A.2d 509 (Me. 1986)……4-7, 11, 15-17, 25-26

Bell v. Town of Wells,
557 A.2d 168 (Me. 1989)……...4-7, 11, 14-19, 25, 26

Boston Waterfront Dev. Corp. v. Commonwealth,
393 NE2d 356 (Ma. 1979)……15

Britton v. Dept. of Conservation,
974 A2d 303 (Me. 2009)……6, 28

Cary v. Whitney,
48 Me. 516 (Me. 1860)……..28

Cushing v. Cohen,
420 A2d 919 (Me. 1980)……13

Cushing v. State of Maine,
434 A2d 486 (Me. 1981)……...13-15

Illinois Central Railroad Co. v. Illinois,
146 U.S. 387 (1892)……...6, 21-25

Knight v. United States Land Association,
142 U.S. 161 (1891)……17-19

Lapish v. Bangor Bank,
8 Me. 85 (Me. 1831)……11, 14-15

Martin v. Lessee of Waddell,
41 U.S. 367 (1842)……..17

McGarvey v. Whittredge,
2011 ME 97, 28 A.3d 620……1, 6, 31

North Yarmouth v. Skillings,
45 Me. 133 (1858)……10

Opinion of the Justices,
437 A2d 597 (Me. 1981)…….24-25

Phillips Petroleum Co. v. Mississippi,
484 U.S. 469 (1988)…….5, 17-20

Pollard v. Hagan,
44 U.S. 212 (1845)……17

Portland Water Dist. v. Town of Standish,
905 A2d 829 (Me. 2006)……...28

PPL Montana, LLC v. Montana,
565 U.S. 576 (2012)…….17, 20

Sandmaier v. Tahoe Development Group,
887 A2d 517 (Me. 2005)……29

Shively v. Bowlby,
152 U.S. 1 (1894)……..17-19

Storer v. Freeman,
6 Mass. 435 (1810) …….4, 5, 11

United States v. California,
332 U.S. 19 (1947)……17, 27-29

Statutes

1641-1647 Colonial Ordinance of the Massachusetts
Bay Colony derived from Liberties Commons § 2,
The Book of the General Lawes and Libertyes
Concerning the Inhabitants of Massachusetts
(Boston Mass. 1647)……4, 5, 7, 11, 14, 16, 19

Maine Statehood Act
Sixteenth [U.S] Congress, Sess. I, chapter 19……...16, 17

Submerged Lands Act
Public Law 1975, chapter 287,
recodified by Public Law 1979, chapter 545…….6, 24, 25

Other Authority

J.T. Abdy, The Institutes of the Justinian, Cambridge Univ. Press (1876)……...12

O. Delogu, Maine's Beaches Are Public Property:
The Bell Cases Must be Reexamined……..10, 12

U.S. Constitution
Article IV, §§ 1-3……...16, 17

STATEMENT OF FACTS

This case began in 2009 when plaintiff Almeder and 28 other Goose Rocks beachfront owners sued the Town of Kennebunkport, and all other parties claiming the right to use Goose Rocks Beach. Plaintiffs sought a declaratory judgment finding that they own title to intertidal lands abutting their respective properties to the low water mark in fee, and the exclusive right to use intertidal property, subject only to those rights explicitly reserved to the public (fishing, fowling, and navigation) in the 1647 Massachusetts Colonial Ordinance. Surfrider Foundation (Surfrider) on behalf of its Maine Chapter, the State of Maine, and many backlot owners intervened.

The Town counterclaimed and asserted ownership of the intertidal lands and, alternatively, asserted prescriptive and customary rights to use Goose Rocks beach for recreational purposes. The case was bifurcated and the lower court heard claims based on prescription and custom, the public trust doctrine and the scope of the Colonial Ordinance first, and set title claims for the second part of the trial.

The lower court found that the Town, back lot owners and general public had established both a prescriptive right and a right predicated on custom to engage in general recreational activities on all Goose Rock Beach intertidal lands. The lower court also found, consistent with the Law Court's holding in *McGarvey v. Whittredge,* that the term Navigation included surfing and a number of other water based activities.

The Law Court reversed the lower court holdings on prescriptive and customary rights and remanded the case to the trial court to address Title claims. The Law Court, however, did not address the lower court's findings with respect to the Public Trust Doctrine or the scope of the term Navigation in the 1647 Colonial Ordinance even though these issues were tried and the lower court issued findings.

The second trial resumed in 2016, and in 2018 the trial court held the Town of Kennebunkport holds title to the intertidal land adjacent to 22 of the 23 upland parcels that were examined. Plaintiffs appealed the lower court ruling to the Law Court and briefs are now due.

STANDARD OF REVIEW

The issues on appeal involve interpreting the meaning and scope of the 1647 Massachusetts Bay Colonial Ordinance, Maine Statutes, ancient grants of property rights, Maine's Statehood Act, prior State Court and U.S. Supreme Court decisions, and Federal and State Constitutional provisions. All of these are matters of Law subject to the Law Court's independent review. The Law Court's holdings are subject to further review only by federal courts and only with respect to federal questions that a party to these proceedings regard as wrongly decided by the Law Court's final disposition of this case.

STATEMENT OF ISSUES PRESENTED

1. Should the Law Court affirm the Superior Court's holding that the Town of Kennebunkport has title to intertidal land adjacent to 22 of the 23 parcels at issue in these proceedings.

2. Should the Law Court rely on public trust principles to support the Superior Court's holding and extend the holding to all of Goose Rocks Beach and all Beaches in Maine.

3. Should the Law Court rely on Maine's Statehood Act and the "equal footing" doctrine to support the Superior Court's holding to extend statewide.

4. Is plaintiffs'/appellants' argument that they hold title to adjacent intertidal land pursuant to the Law Court's holding in the *Bell* cases precluded by the U.S. Supreme Court's holding in *Illinois Central Railroad Co. v. Illinois*.

5. Is plaintiffs'/appellants' collateral argument that they hold title to adjacent intertidal land pursuant to prescriptive rights, chain of title statutes, and related equitable doctrines supported by U.S. Supreme Court and Maine case law.

6. If the Law Court reverses the Superior Court's holding and finds the Town does not hold Title to intertidal lands adjacent to 22 of 23 parcels at issue, are issues related to the 1647 Colonial Ordinance with respect to the scope of the term Navigation ripe and, if so, does the term Navigation include surfing and other water activities.

SUMMARY OF ARGUMENT

The Surfrider Foundation ("Surfrider") on behalf of its Maine Chapter argues on a variety of alternate grounds that the Town of Kennebunkport and the State of Maine (not upland owners) hold title to intertidal lands in trust for the public, except for discrete parcels alienated to meet "wharfing out" needs.

First, this court should affirm the *Robert F. Almeder v. Town of Kennebunkport* trial court holding. The holding is based on historical records

incident to the settlement of Cape Porpus/Arundel. This settlement was authorized pursuant to the Massachusetts Bay Colony legislation—legislation that did not believe that the 1647 Colonial Ordinance alienated all intertidal land in Massachusetts as *Storer v. Freeman*, 6 Mass. 435 (1810), *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986)("Bell I") and *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989)("Bell II") assert. The records show, with one exception in the 23 parcels examined, the public, of necessity, retained title to intertidal lands fronting Goose Rocks Beach, and that grants of land to initial settlers consistently ran from the mean high tide line, landward. Carefully documented and readily available studies show a similar pattern of development in the settlement of Wells and North Yarmouth, Maine (also initiated by Massachusetts colonial legislative bodies, and also undercutting the *Storer*, and *Bell* holdings). Specifically, the studies show public retention of title to intertidal land with private property grants running from the mean high tide line, landward, providing support for this Court to affirm the lower Court's decision with respect to Goose Rocks Beach—which it should do. However, Surfrider argues the better approach is for the Court to take this opportunity to extend the lower court's holding to all of Goose Rock Beach as well as every other beach in Maine.

Second, public retention of title to intertidal lands grows out of societal views that go back more than 1,500 years—Justinian codes, Roman law, and English common law saw some types of property as incapable of being privately owned—

the air, seas, and seashore. Title to these unique lands was, of necessity, held by governmental instrumentalities in trust for the public. Both Massachusetts and Maine case law support and have carefully guarded these trust properties.

Third, the American Revolution, the founding of the Union, the Federal Constitution's "equal footing" doctrine, and U.S. Supreme Court case law analyzing the doctrine recognize this. Older sovereign entities were supplanted—French, Spanish, British colonial grants were no longer in force. As the Supreme Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), stated:

> "Consequently, we reaffirm our long-standing precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide… the lands at issue here are 'under tide waters' and therefore passed to the State of Mississippi upon its entrance into the Union."

Maine is in the same position as Mississippi and, therefore, all lands under waters subject to the ebb and flow of the tide similarly passed to Maine. Under the Supreme Court's ruling in *Phillips Petroleum,* the *Bell* cases are legally unsupportable. Bell I and II are predicated on the 1647 British/Massachusetts Colonial Ordinance (said to grant title to all intertidal lands to upland owners) and the *Storer* case, a Massachusetts case that is contrary to the legislative history of that colony/state.

Fourth, the Supreme Court in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892), saw a grant of all the lands under the navigable waters of a state to be, "… if not absolutely void on it face, as subject to revocation." This holding further brings into question the bases for the *Bell* case holdings. More importantly,

Illinois Central balances the trust duties attached to intertidal lands of a state with the legitimate "wharfing out," needs of the state by characterizing more limited grants of title to discrete parcels of such lands actually filled to meet these needs as a "mere license". This is the approach taken by Maine's 1975 Submerged Lands Act (as amended in 1981)—which the Law Court inexplicably ignored in the *Bell* cases.

Fifth, the plaintiff/appellants' argument that they hold title to the intertidal lands in dispute in these proceedings pursuant to prescriptive rights, adverse possession, chain of title statutes, and related equitable doctrines is legally unsupportable. Both U.S. Supreme Court and Maine case law take a contrary view. *Britton v. Dept. of Conservation*, 974 A2d 303 (Me. 2009), holds that "A party cannot obtain rights against the State by adverse possession, prescription, or abandonment absent express statutory authorization."

Finally, if this Court reverses the trial Court and finds plaintiffs' own title to the intertidal lands in front of their homes, then a ruling on the scope of the term Navigation in the Colonial Ordinance is no longer moot, and this Court should expand the scope of activities espoused in *McGarvey v. Whittredge,* under the definition of navigation to specifically include surfing, stand-up paddle boarding, boogie boarding and any other water based activity that requires equipment or a floatation device. This component of the first trial was not addressed (reversed or remanded) by the Law Court, despite the initial court's holding to expand the term.

ARGUMENT ON ISSUES PRESENTED

ISSUE 1: Should the Law Court affirm the Superior Court's holding that the Town of Kennebunkport has title to intertidal land adjacent to 22 of the 23 parcels at issue in these proceedings.

Defendant Surfrider argues, yes.

In the remanded proceedings the Superior Court was directed to examine the competing claims of ownership (title to) Goose Rocks Beach intertidal lands. The plaintiffs/appellants, 23 upland owners, rely primarily on the *Bell* cases[1] which held that pursuant to the 1647 Colonial Ordinance, littoral upland owners hold title to adjacent intertidal lands. Plaintiffs also assert ownership of the disputed lands based on prescription, adverse possession, chain of title statutory provisions,

and related equitable arguments. These latter claims are addressed in Issue #5.

Defendants/appellees, the Town of Kennebunkport, State of Maine, and Surfrider, assert ownership not only of 22 of the 23 parcels at issue in these proceedings, but of all Goose Rocks Beach intertidal lands based on the founding instruments of settlement of Cape Porpus/Arundel (including Goose Rocks Beach) fashioned by successive Massachusetts Bay Colony legislative bodies.

The Superior Court opinion makes clear that the settlement of this area was not an event that took place on a given date, but was instead a process. The process, which began in approximately 1620 and entailed abandonment, resettlement,

[1] *Bell v. Town of Wells*, 510 A2d 509 (Me. 1986) and *Bell v. Town of Wells*, 557 A2d 168 (Me. 1989).

abandonment (often due to sickness and difficulty overcoming indigenous populations), the resolution of conflicting Royal patents, and finally the pulling together by the Colony of resettlement efforts by the appointment in 1681 of Thomas Danforth as the President of the Province of Maine.[2] Danforth was charged with issuing "indentures to confirm title to lands." The court further notes:

> "In 1684, Danforth, acting on behalf and with the authority of the Massachusetts General Court [the Legislature] issued indentures pertaining to land located in five towns in the Province of Maine—including Cape Porpus…"[3]

The land, then held by the Colonial government of Massachusetts, included both vast upland areas and intertidal land down to the low water mark. With respect to the intertidal lands, the Superior Court noted:

> "From the earliest times and into the 18th century, beaches were used as a way for public travel and passage. Before inland roads or 'highways' were cleared and secured, beaches were 'the main, often the only, road for travel along the Maine coast….' Beaches were also used for driving cattle, a practice that continued well into the 18th century…" [4]

Given these realities, the original proprietors in Cape Porpus (forerunners of Town Selectmen), acting pursuant to the Danforth indenture, retained beach and flat areas in public ownership. Proprietor grants to new settlers and/or confirmation of earlier grants consistently ran from the mean high tideline, or a natural barrier referred to as the "seawall", landward. The court, speaking in terms reflecting the natural configuration of Goose Rock Beach (e.g., the western section, the middle section, and the eastern section), noted:

> "In the western section of the beach, the land was predominantly Town Commons;

[2] See Superior Ct. opinion pgs. 16-22.
[3] Id. at pg. 21.
[4] Id. at pg. 34.

> and the 1777 Emmons layout of the 1730 grant of land to Humphrey Dearing fixed the boundary at the seawall. By its terms, the Emmons layout did not include the beach. There is no evidence of confirmation by the Proprietors of any other grant or deed to land in the western section of Goose Rocks Beach inclusive of the tidal flats…"[5]
>
> "The middle section of the beach also contained town commons land, a portion of which was the subject of the 1681 grant of upland and marsh to John Miller…Upland and marsh do not include tidal flats…Other relevant deeds did not convey out the tidal flats or beach. There is no evidence of confirmation by the Proprietors of any other grant or deed to land in the middle section of Goose Rocks Beach inclusive of the tidal flats…"[6]
>
> "There is no evidence of confirmation by the proprietors [or] of any other grant or deed in the eastern section of Goose Rock Beach "[Except for the previously noted Temerlin plaintiffs] inclusive of the tidal flats…"[7]

While the Superior court's focus was on the 23 named plaintiffs, the historical record demonstrated that "…there is no evidence the Proprietors granted out any portion of the beach."[8] Consequently, the court's findings should be extended to all upland owners fronting Goose Rocks Beach, the Temerlin property excepted. The court noted:

> "If the original proprietors did not allot the land in question we think it was their intention and the intention of the [Massachusetts Bay] Colony that the town [Kennebunkport] should succeed to all their rights therein."[9]

The chain of title to Goose Rocks Beach intertidal land runs from the Massachusetts Bay Colony, to Danforth, to the original Proprietors, to the Town of Kennebunkport, to the State of Maine.

Given the number of times this issue has been litigated and will likely be again in the future until a definitive ruling is provided by this Court, and the amount of

---

[5] Id. at pg. 264. The "seawall" is invariably landward of mean high.
[6] Id.
[7] Id. at pg. 265.
[8] Id.
[9] Id. at pg. 268

personal and state resources expended in these litigations, it follows that the court's reasoning should be extended statewide. Documented studies of colonial settlements in Wells and North Yarmouth evidence the same pattern of development that unfolded along Goose Rocks Beach.[10] Specifically, they were authorized by Massachusetts Bay Colony legislative bodies, unfolded over many years, and were totally reliant on lateral passage within the intertidal zone. Most importantly, they too (with a handful of exceptions) granted original settlers title to tracts of land that ran from mean high, landward. This left title to the intertidal zone in these settlements in the hands of public instrumentalities, where it remains today.[11] It is difficult to imagine any settlement along the coast of Maine where these same conditions would not exist. Accordingly, the Superior court's holding should apply to Goose Rocks Beach, as well as all Maine beaches.

For well over 100 years (the early 1600s to the mid-1700s), Massachusetts Bay Colony legislative bodies did not believe that they had alienated all of the intertidal land in Massachusetts to meet "wharfing out" needs. On the contrary, they believed they held title to these lands in trust for the public and they retained that title, with a handful of exceptions, in the process of authorizing settlements along the coast of Maine. It follows that *Storer v. Freeman's* [12] strained interpretation of

[10] See O. Delogu, Maine's Beaches Are Public Property: The *Bell* Cases Must Be Reexamined, chapter 9, pgs. 144-156.
[11] See *North Yarmouth v. Skillings*, 45 Me. 133 (1858).
[12] 6 Mass. 435 (1810).

the Ordinance, fashioned more than 160 years after the Ordinance was enacted, was erroneously decided. While this decision may be the law in Massachusetts, it cannot be squared with the facts.

The *Bell* cases, ceding title to all of Maine's intertidal land to upland owners, rest squarely on *Storer v. Freeman.* The fact that these errors have been repeated by prior Maine Law Courts[13] does not change the underlying facts that the *Bell* cases were wrongly decided and that this Court can now take the opportunity to overturn *Bell*, rather than waiting for the next case.

Moreover, as subsequent arguments in Surfrider's brief will show, the *Bell* cases have compounded the received errors noted above by failing to recognize the significance of Maine's statehood, Maine legislation with respect to intertidal lands, and relevant Supreme Court cases.

ISSUE 2: Should the Law Court rely on public trust principles to support the Superior Court's holding and extend the holding to all of Goose Rock Beach and all Beaches in Maine.

Defendant Surfrider argues, yes.

Public trust principles go back over 1,500 years to Justinian and Roman codes holding that some things are incapable of private ownership:

> By the law of nature then, the following things are common to all men, air, running water, the sea, and consequently the shores of the sea…. The seashore is determined by the line reached by the highest winter tide…. The public use of the seashore is also a part of the law

[13] The earliest post-statehood Law Court to consider bed ownership issues, *Lapish v. Bangor Bank*, 8 Me. 85 (Me. 1831), was followed by *Barrows v. McDermott*, 73 Me. 441 (Me. 1882); both of these cases cited *Storer* without ever examining the underlying facts or premises upon which *Storer* rested.

> of nations, just as is the use of the sea itself. [14]

Organized government is the institutional embodiment of these principles; it holds title to those things (types of property) incapable of private ownership, in trust for the public. In *Boston Water-front Dev. Corp. v. Commonwealth*,[15] a Massachusetts case noted:

> Throughout history, the shores of the sea have been recognized as a special form of property of unusual value, and therefore subject to different rules from those which apply to inland property. At Roman law, all citizens held and had access to the seashore in common; in the words of Justinian, they [the shores] cannot be said to belong to anyone as private property.[16]

The *Boston Waterfront* court went on to note that these views were assimilated into English common law and concluded its point by noting they are a part of Massachusetts law:

> "The Supreme Judicial court [of Massachusetts] frequently referred in its opinions to the notion that the Crown's ownership of shoreland, from which all Massachusetts titles historically derived, was in trust for public uses." [17]

Maine should follow suit.

Two additional Maine cases warrant consideration as well, *Cushing v. Cohen*, 420 A2d 919 (Me. 1980) and *Cushing v. State of Maine,* 434 A2d 486 (Me. 1981). These do not involve intertidal land, but they are very much on point in that they involved public lots in northern Maine that the state held title to in trust for the public. Paper companies acquired cutting rights on lands in the mid 1850s, with the revenues going to stipulated state accounts. These rights were renewed from time

---

[14] J. T. Abdy, *The Institutes of Justinian,* Cambridge Univ. Press, (1876*).* See *supra* note 10, O. Delogu book, chapter 3, pgs. 43-45.
[15] 393 NE2d 356 (Ma. 1979).
[16] Id. at pg. 358.
[17] Id. at pgs. 358-359.

to time, but gradually the formalities of renewal and the collection of revenues receded. The paper companies came to exercise control and management of these public lots, acted as a private owner, and perceived their cutting rights as extending indefinitely into the future (a status tantamount to private ownership of the lots). In 1973, the Attorney General's office issued a report asserting that the original grants of cutting rights encompassed only trees existing at the time of the grant, essentially reasserting the state's ownership of the public lots. The paper companies brought suit to clarify the scope of the cutting rights originally granted. The state argued that sovereign immunity barred the suit.[18] The legislature, seeing the significance of the suit and the need to resolve underlying questions of ownership and control over the public lots (which in the aggregate encompassed a vast land area) waived sovereign immunity, thus ending the *Cushing v. Cohen* case and commencing *Cushing v. State of Maine*.

At the outset of the *State of Maine* case the court makes clear that: "Legal title to public reserved lots in unincorporated townships was held by the State, as a trustee."[19] The court also makes clear that it had before it both a Referee's report favorable to the plaintiff paper companies, and a Superior court affirmance of that

[18] See *Cushing v. Cohen*, 420 A2d 919 (Me. 1980).
[19] Id. at pg. 490.

report. It goes on to note, however, that: "It is a proper part of our appellate function to question the legal accuracy of the Referee's interpretation of those [cutting rights] documents"[20] It further notes that:

> The ordinary rule that a deed is construed most strictly against the grantor and in favor of the grantee, does not apply when the grant is from the sovereign …. The general rule [in the latter case] is that public land grants are to be construed favorably to the government…. The sovereign will be presumed to have conveyed away no more than is necessary to achieve its purpose.[21]

In overturning the Referee's report, and lower court holding, that held for the paper companies, the Law Court noted that the Referee did not consider "…the State's responsibility as trustee of the public reserved lots." The court reasoned that the state's trust duty precluded the Referee's broad interpretation of state statutes and cutting rights documents.[22]

Maine Courts have not of late applied the reasoning espoused above to intertidal lands, which also in the aggregate encompass a vast area. Rather, Maine Law Courts from *Lapish*[23] to the *Bell* cases have not: seen the state as a trustee of its intertidal lands; independently interpreted and construed the Colonial Ordinance "favorably to the government;" or conveyed away "no more than is necessary to achieve its ["wharfing out"] purpose. *Lapish* and the *Bell* cases incorrectly conveyed away all of Maine's intertidal land and as such have given rise to numerous law suits, cost the state and private parties tens of millions of dollars in litigation, restricted the

[20] Id. at pg. 494.
[21] Id. at pg. 500.
[22] Id.
[23] See *supra* note 14.

public from land they are entitled to occupy, been a huge emotional drain on hundreds of litigants and until the Law Court overturns Bell I and II, this will continue.

The standards applied in *Cushing v. State of Maine* to protect the state's title to reserved lots held in trust for the public, to guard against the ceding of more rights than warranted to private ownership and control, were markedly more stringent and more protective of state/public property rights than those applied by Law Courts examining the state's title to intertidal lands.[24] The discrepancy is inexplicable, unjust and unwarranted. The *Bell* cases should be reexamined applying the *Cushing v. State of Maine* standards which lead one to conclude that Maine holds title to its intertidal lands, except for discrete parcels alienated to meet "wharfing out" needs.

ISSUE 3: Should the Law Court rely on Maine's Statehood Act and the "equal footing" doctrine to support the Superior Court's holding to extend statewide.

Defendant Surfrider argues, yes.

Perhaps the single most egregious error of the *Bell* cases (and preceding Law Court cases) was the Court's failure to see that the issues before them were larger than the resolution of a property dispute between upland owners and their neighbors and the state, and larger than the interpretation of an ambiguous 1647 Massachusetts

[24] It is also worth noting the Court had no difficulty reaching back 130 years to correct error, to confirm the state's title to its public lots.

Bay Colony Ordinance. There was a Revolution, where colonies along the eastern seaboard banded together and defeated the British; these colonies struggled to fashion a governmental structure, but ultimately, all 13 colonies framed and ratified a Constitution, and the Union, a new nation, was formed. A hallmark of the new nation was full equality among the original states, and between the original states and new states that they knew from the outset would eventually be formed.

These principles are embodied in Article IV, §§ 1-3 of the Federal Constitution, and gave rise to what is now referred to as the "equal footing" doctrine. In the late 1700s and early 1800s, as settlements in Maine grew in number and population, the movement for statehood grew, culminating with Maine becoming the 23rd state on March 15, 1820. The last line of the Statehood Act, passed by the United States Congress and signed by President Monroe states:

> "… the state of Maine is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever."[25]

The Congress of the United States, via this federal Act, admitted Maine into the Union, and ultimately, it is the Supreme Court of the United States that would interpret Article IV of the Constitution and the meaning of the "equal footing" doctrine. Though nothing prevents the courts of Maine from examining "equal footing" case law as it has been applied to ownership of intertidal land over the years, the Maine Law Court has never done so. This is an error this court now has the

[25] Sixteenth [U.S] Congress, Sess. I, chapter 19.

power to correct. Surfrider argues that the Law Court has a duty to conform Maine's intertidal land law to the broad principles outlined in U.S. Supreme Court case law with respect to title/ownership of, and trust duties with respect to intertidal land.

There are many Supreme Court cases laying out the parameters of the "equal footing" doctrine (e.g., *Martin*,[26] *Pollard*,[27] *Knight*,[28] *Shively*,[29] *U.S. v. California*,[30] *Phillips*,[31] *PPL Montana*[32]). Of all these, the *Phillips* case is the most significant because it reconfirmed the "equal footing" doctrine in a setting analogous to Maine's setting and circumstances, and because it was handed down between the 1986 *Bell* case (Bell I), and more than a year before the 1989 *Bell* holding (Bell II).[33] The briefs of the parties and an amicus brief in *Bell II* either saw *Phillips* as controlling, or sought to distinguish it. The 1989 *Bell* holding, however, with little comment, brushed *Phillips* aside as "revisionist history." Surfrider argues this was a mistake, and *Phillips* is controlling law.

The *Phillips* court begins by approvingly citing Mississippi's highest court which recognized that: "Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title

---

[26] *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842).
[27] *Pollard v. Hagan*, 44 U.S. 212 (1845).
[28] *Knight v. United States Land Association*, 142 U.S. 161 (1891).
[29] *Shively v. Bowlby*, 152 U.S. 1 (1894).
[30] *United States v. California*, 332 U.S. 19 (1947).
[31] *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).
[32] *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012).
[33] See *supra* note 11, O. Delogu book, chapter 6.

suit."[34] Justice White, speaking for the court and citing the *Shively* and *Knight* cases, noted that English common law and various cases from the state courts concluded that:

> "At common law the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders…."[35]

Justice White then noted that "*Shively* rested on prior decisions of this court, which included similar, sweeping statements of States' dominion over lands beneath tidal waters."[36] Turning to the *Knight* case, White noted:

> "It is the settled rule of law in this court [the U.S. Supreme Court] that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several States, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders." [37]

White then concluded: "On many occasions, before and since, this court has restated and reconfirmed these words from *Knight* and *Shively*."[38] Considering the array of cases, he then stated: "…it is not surprising that Mississippi claims ownership of all of the tidelands in the State. Other States have done as much."[39] The Supreme Court ruling in *Phillips* ruling was clear and in Surfrider's view, it is

---

[34] See 484 U.S. at pg. 472. Procedurally it should be noted that Mississippi's highest court declared that the state held title to all tidally influenced land, notwithstanding the fact that plaintiffs tract (derived from pre-statehood Spanish grants) consisted of only 42 acres. The Supreme Court granted certiorari to review the Mississippi Supreme Court's decision. It affirmed the state court's decision.
[35] *Shively*, 152 U.S. at pg. 57.
[36] *Phillips*, 484 U.S. at pg. 474.
[37] *Knight*, 142 U.S. at pg. 183.
[38] *Phillips*, 484 U.S. at pg. 474.
[39] Id.

impossible to justify the *Bell II* court's dismissal of *Phillips* confirmation of the "equal footing" doctrine.

Plaintiffs in the *Phillips* case claimed it would be inequitable to upset their claims of title which predate Mississippi's statehood. The *Almeder* plaintiffs make a similar argument reaching back to the 1647 Colonial Ordinance. The *Phillips* court noted:

> "How such facts would transfer ownership of these lands [acquired pursuant to the equal footing doctrine] from the state to petitioners is a question of state law."[40]

The argument did prevail in Mississippi and it should not in Maine.

Plaintiffs in *Phillips* also sought to sustain their claim of title on the basis of adverse possession and related equitable doctrines. The *Almeder* plaintiffs make a similar argument. The short answer of the *Phillips* court was that Mississippi law makes clear that "…the state's ownership of these lands [trust property] could not be lost via adverse possession, laches, or any other equitable doctrine", thereby dismissing plaintiffs' argument.[41] Maine law on this point is identical to Mississippi law and these equitable arguments will be more fully examined in Surfrider's issue #5, below.

Finally, the Supreme Court's adherence to "equal footing" principles did not end with the *Phillips* case. In 2012, *PPL Montana, LLC v. Montana*,[42] was decided. While the state lost on the question of navigability, after referencing the same cases

---

[40] Id. at pg. 484.
[41] See *Phillips*, 484 U.S. at pg. 484.
[42] 565 U. S. 576 (2012).

cited above (and more), Justice Kennedy speaking for a unanimous Supreme Court noted:

> "The title consequences of the equal footing doctrine can be stated in summary form: Upon Statehood, the state gains title within its borders to the beds of waters then navigable, or tidally influenced."[43]

it is Surfrider's view that the Statehood Act, the constitutionally predicated "equal footing" doctrine, and the Supreme Court's *Phillips* case can no longer be ignored by Maine's highest court. Under each of these bases, ownership of the lands under waters subject to the ebb and flow of the tide is held by the state in trust for the Public.

ISSUE 4: Is plaintiffs'/appellants' argument that they hold title to adjacent intertidal land pursuant to the Law Court's holding in the *Bell* cases precluded by the U.S. Supreme Court's holding in *Illinois Central Railroad Co. v. Illinois*.

Defendant Surfrider argues, yes.

In 1869 the Illinois legislature, in an effort to spur marine commerce moving through Chicago Harbor to east coast and global markets enacted legislation granting title to essentially all of the bed of the harbor to the Illinois Central Railroad Company as an inducement for them to extend rail lines, and build wharves, warehouses, and loading facilities. In 1873 the Legislature, facing pushback, and persuaded that it had gone too far, repealed the 1869 enactment. The Railroad Company brought suit claiming the repeal legislation constituted a "taking" of their property. Ultimately, the suit proved unsuccessful, but the court's reasoning with

[43] Id. at pg. 591.

respect to "takings" law, the relationship between the "equal footing" doctrine and trust principles, and most importantly, the fashioning of a more flexible and more pragmatic concept of trust principles and duties are legacies of the case that remain important and timely.

Issue #2, above, shows that public trust principles are of ancient origin. These principles were assimilated into English common law and are part of both Massachusetts and Maine law.[44] Many of the early "equal footing cases noted that the title to intertidal land acquired by the new states was "charged with a like trust," a trust similar to the English common law trust.[45] But trust principles/duties are related but different from the "equal footing. The latter is about title, ownership—but once a governmental entity has title to a unique property, something said to be incapable of private ownership (whether it's intertidal land or public lots) the question becomes: what can the governmental entity, the trustee on behalf of the public, allow to be done in/on/with the property? The *Illinois Central* case helps with the definition.

Transient public uses of trust property (e.g., fishing, fowling, navigation, lateral passage, gathering clams, blood worms, SCUBA diving, a wide range of recreational activities in/on intertidal lands, hunting in woodland areas) can be addressed by regulation. Regulatory measures enacted by government can protect

[44] See *supra* notes 18 and 21- 24 and accompanying text.
[45] See *supra* note 37.

both the public use and the trust property. *Illinois Central* makes clear that any and all of these activities, and more, are "…appropriately within the exercise of the police power [the regulatory power] of the state."[46] More broadly the court notes:

> "The laws of most nations have sedulously guarded the public use of navigable waters [all trust property] within their limits against infringement, subjecting it only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right." [47]

At the other extreme *Illinois Central* makes clear that:

> "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties… than it can abdicate it police powers in the administration of government and the preservation of peace." [48]

At another point the court notes: "There can be no irrepealable [sp] contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to manage it."[49] The court ruled that the legislature cannot give all of Chicago Harbor, trust property, away to a private party, and if it does, that action can be repealed, as was done by the Illinois legislature. Further, the court says the state has a duty, presumably through legislative and executive arms of government, to "manage" trust property. This reasoning, noted at the outset of this argument, opened the door to a more flexible approach to trust principles and duties.

The *Illinois Central* court recognized that:

---

[46] See *Illinois Central*, 146 U. S. at pg. 459.

[47] Id. at pg. 458. It is worth noting that when the Court speaks of "laws," the exercise of "police powers"—these are the product of the legislative and executive arms of government. They are rarely, if ever, (and then only temporarily) the product of the judiciary in the context of deciding cases.

[48] Id. at pg. 453. A complete reading of pgs. 452-462 of the Court's opinion is useful.

[49] Id. at pg. 460.

> "The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; [50]

The court went on:

> "But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor, or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public."[51]

The court makes clear that trust duties do not require an absolutist approach. Trust property is intended to benefit the public and wharfing out to encourage commerce benefits the public—they are not mutually exclusive and we can have a large measure of both. The granting of discrete parcels of lake bed, or intertidal land, to private upland owners to facilitate "wharfing out" need not unduly impinge on trust property or trust duties. It is more correctly seen as prudent "management." The court characterized such grants—grants the Illinois legislature was open to, as a "mere license."[52] This approach has been followed in the large majority of coastal states and is the most enduring legacy of the *Illinois Central* holding.

It was the approach taken by the Maine legislature in enacting the 1975 Submerged Lands Act, and the critical 1981 amendment to that enactment. These two enactments, while recognizing the state's ownership of intertidal lands, confirmed upland owners' title only to discrete parcels of Maine intertidal land actually filled to meet "wharfing out" needs. This left title to the large majority of

[50] Id. at pg. 452.
[51] Id. at pgs. 452-453.
[52] Id. at pgs. 460-462.

Maine's intertidal lands precisely where the "equal footing" doctrine put it—in the hands of the state, in trust for the public.

Moreover, this approach was sustained by the Law Court in an *Opinion of the Justices*[53] which sought to confirm the efficacy of the 1981 amendment to the Submerged Lands Act. The amendment was deemed appropriate, and the *Opinion* approvingly cited the *Illinois Central* case.[54] It noted the Maine legislature in relinquishing title only to discrete parcels of intertidal land and treating the enactment as a "mere license", avoided the mistakes made originally by the Illinois legislature—had it not, had it alienated all of Maine's intertidal land, the *Opinion* says the Legislature would have violated the reasonableness clause of Maine's Constitution.[55]

The *Bell* cases have ignored the Supreme Court's *Illinois Central* holding. This alone should justify reversal. The fact that the *Bell* cases have also ignored Maine's Submerged Lands Act, as amended, the 1981 *Opinion* sustaining these enactments, and public trust doctrines going back centuries, the *Bell* holdings appear legally unsupportable.

Surfrider asserts that the *Bell* errors noted above transcend clinging to an ambiguous Colonial Ordinance or the errors or *Storers*. The *Bell* errors have enabled the Court to do what *Illinois Central* and the Maine Constitution say that not even a

[53] See 437 A2d 597 (Me. 1981).
[54] Id. at pg. 609.
[55] Id. at pg. 610, Me. Const. art. 4, part 3, §1.

legislature may --alienate all intertidal land in an entire state. In so doing, the Judicial Branch, not Maine's legislature, has done what *Illinois Central* said could not be done:

> "… abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties." [56]

This result is untenable and mandates a re-examination and overruling of the *Bell* cases.

ISSUE 5: Is plaintiffs'/appellants' collateral argument that they hold title to adjacent intertidal land pursuant to prescriptive rights, chain of title statutes, and related equitable doctrines supported by U.S. Supreme Court and Maine case law.

Defendant Surfrider argues, no.

The *Almeder* plaintiffs rest their claim of title to Goose Rocks Beach intertidal lands on the *Bell* holdings. Their suit, a quiet title action, sought to quell what they regarded as unwarranted intrusions on the beach by the public and back lot owners, random claims of title to use the beach, and uses of the beach beyond those enumerated in the Colonial Ordinance.

The Town of Kennebunkport, State of Maine, and Surfrider also claimed title, and asserted that a widened range of use rights, predicated on custom and prescriptive rights could be enjoyed by those in proximity to the beach, including the general public. When competing claims of title could not be quickly resolved,

---

[56] See *supra* note 54.

the trial was bifurcated. The non-title issues were taken up first. The defendants largely prevailed at the trial court level. On appeal to the Law Court, the plaintiffs prevailed—a widened class of people did not have a widened range of customary or prescriptive right to use the beach. The case was remanded to deal with the unresolved title/ownership issues.

At this point the defendant Town claimed title/ownership of the disputed intertidal land predicated on historical records fashioned in the context of settlement. Plaintiffs met this argument (not by rearguing the correctness of the *Bell* holdings) but by a two-pronged argument that, first, challenged the authenticity and correctness of the historical data offered by the Town and its experts, and secondarily, raised a theory based on adverse possession, laches, statutory chain of title ownership claims, and related equitable arguments. In Surfrider's view, Supreme Court and Maine case law clearly hold that these collateral or secondary arguments cannot prevail.

United States v. California, [57] is an "equal footing" case where California argued unsuccessfully that its title to intertidal land extended from the mean high tide line seaward for three miles; its collateral or fallback argument was that the federal government, by its conduct was "…barred from enforcing its rights due to

[57] 332 U. S. 19 (1947).

principles similar to laches, estoppel, or adverse possession." [58] This argument was rejected by the Supreme Court:

> "… even assuming that [Federal] Government agencies have been negligent in failing to recognize or assert the claims of the government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result… The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." **[59]**

The Court makes it clear that governments stand on a different footing from private parties. The equitable arguments sought to be used by California may suffice to resolve disputes between two abutting private property owners, but they are ill-suited to resolve disputes that involve large areas held in trust by government, significant public interests, and/or large numbers of the public. In the *Almeder* case we do not have a dispute between two abutting private property owners. It is a quiet title action against the Town and State, and the ownership of vast intertidal areas affecting large numbers of people is at stake. In this context, the *California* court has held that the equitable arguments raised by the plaintiffs may not be used.

Maine Law Court case law takes the same position. *Cary v. Whitney* [60] noted:

> "The possession, whilst the title remained in the State, even if adverse and exclusive in its nature, could not operate to disseize or limit the State. A title cannot be acquired by adverse possession of the land of the State, whilst the title and property is in the State." [61]

---

[58] Id. at pg. 39.
[59] Id. at pgs. 39-40.
[60] 48 Me. 516 (Me. 1860).
[61] Id. at pg. 532

In a more recent case, *Britton v. Dept. of Conservation*,[62] the court, in a complex setting ultimately remanded to the lower court, nonetheless noted that: "A party cannot obtain rights against the State by adverse possession, prescription, or abandonment absent express statutory authorization."[63] Lower level governmental entities are similarly protected. In *Portland Water Dist. v. Town of Standish*, [64] the first paragraph of the court's opinion states:

> "In this appeal, we are called upon to answer two questions: (1) does the common law doctrine, *nullum tempus occurrit regi,* "time does not run against the king," apply in Maine to prohibit the taking of government owned land by adverse possession or prescriptive easement; and if so, (2) is the quasi-municipal special purpose Portland Water District a governmental entity for the purpose of applying the *nullum tempus* doctrine. We agree with the trial court … and answer both questions in the affirmative." [65]

Finally, in *Sandmaier v. Tahoe Development Group*,[66] these principles are applied to protect a municipality; the court noted: "Since the early 19th century, we have reiterated the common law rule that one cannot assert a claim of title by adverse possession against a municipality."[67]

In sum, Supreme Court cases and Maine Law Court cases hold that governmental entities, including federal, state, and municipal entities, and special districts, cannot be divested of property interests they hold in trust for the public on the basis of equitable arguments brought forward by private parties in an effort to vindicate private property rights. Time does not run against a governmental entity, and the

---

[62] 974 A2d 303 (Me. 2009).
[63] Id. at pg. 307, fn. 6.
[64] 905 A2d 829 (Me. 2006).
[65] Id. at pg. 830.
[66] 887 A2d 517 (Me. 2005).
[67] Id. at pgs. 518-519.

California case makes clear that lower level officials "… who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."[68] Only the appropriate legislative body may divest a governmental body of trust property, and then only within constitutional parameters. That has not happened here. Accordingly, the collateral, or secondary, arguments of the *Almeder* plaintiffs must be rejected.

ISSUE 6: If the Law Court reverses the Superior Court's holding and finds the Town does not hold Title to the intertidal lands adjacent to 22 of 23 parcels at issue, are issues related to the 1647 Colonial Ordinance with respect to the Scope of the term Navigation ripe and, if so, does the term include surfing and other water activities.

Defendant Surfrider argues the issues are ripe and the term Navigation should be extended to include surfing and all water-based activities that require any type of specialized equipment

The Superior Court concluded that the State's public trust counterclaim is moot as to all Plaintiffs other than Temerlin. *Almeder*, YORSC-RE-09-111, Order Amending Final Judgment 2 n.1, 3 (June 4, 2018). As to Plaintiff Temerlin, the Superior Court concluded that the State's public trust counterclaim is unripe. Id. at 3.

If the Law Court vacates or otherwise alters the Superior Court's judgment, the State's and Surfrider's public trust arguments may no longer be moot and

[68] See *supra* note 67.

unripe, respectively. Similarly, arguments related to the Public Trust and the scope of Navigation as that term relates to surfing and water-based activities were tried in the original 2012 case and the lower court issued a well-reasoned opinion expanding the activities that constitute Navigation to include surfing and water-based activities. *Almeder v. Town of Kennebunkport,* YORSC-RE-09-111 (Me. Super. Ct., Yor. Cty., Oct. 16, 2012), at 20–21. While the Law Court reversed and remanded this decision, it never addressed these aspects of the ruling.

Should the Law Court vacate or otherwise alter the Superior Court's judgment in a manner that renders the State's counterclaim justiciable, Surfrider argues that the Law Court should explicitly expand the activities constituting Navigation to include surfing and all water-based activities that are done with any type of artificial apparatus. This would be entirely consistent with its unanimous decision in *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620.

At a minimum, this Court should continue its willingness to take a "sympathetically generous" view of Navigation and clarify by listing the broad scope of activities currently allowed under the Colonial Ordinance so continued piece-meal litigation over specific activities can be minimized.

CONCLUSION

The lower court correctly found the Town of Kennebunkport owns the intertidal lands fronting 22 of the 23 parcels on Goose Rocks which it examined. The Law Court should affirm this ruling.

The Law Court, however, has a unique opportunity to step back, examine the overarching issues, and decide who owns the intertidal zone up to the high-water mark in Maine. This unique and hugely important area of land was never intended for private ownership to the exclusion of the public. This is why most nations and states within the United States have retained ownership of this property in trust for the public, subject to narrow exceptions which also apply for the benefit of the public.

Two wrongly decided Maine Law Court decisions relying on a Massachusetts Ordinance enacted in **1647** have resulted in litigation pitting neighbor v. neighbor, town v. its citizens, and public v. beachfront property owners for the last four decades. The costs of litigation alone are in the tens of millions, with no end in sight; and the legal bases for the *Bell* decisions are not supported by Maine or Supreme Court Case Law interpreting the Equal Footing Doctrine, the Maine Statehood Act, or Maine and Federal Constitutional provisions. This is the best opportunity the Law Court has had since 2011 to reverse these wrongs when the Court split 3 to 3 on whether to reverse. It is time.

If the Court decides the lower court erred and the upland property owners have Title to the intertidal lands to the low water mark, at a minimum it should find that the scope of the term Navigation under the Colonial Ordinance is justiciable and ripe, and find that the term encompasses surfing and a variety of other water based activities presented at the original trial.

February 15, 2019

Respectfully Submitted,

_____

Adam H. Steinman, Esq. 7695
49 Shipwreck Cove Rd.
Cape Elizabeth, ME 10107

Counsel for Intervener-Appellee
Surfrider Foundation Maine Chapter

CERTIFICATE OF SERVICE

I, Adam Steinman, attorney for the Appellee Surfrider Foundation, certify that I have this day caused two copies of the foregoing Brief of Appellee to be served on the following counsel, by depositing the same in the United States mail, first class postage prepaid, addressed as follows; and have also provided a copy by electronic mail:

Dave Kallin, Esq.
Drummond Woodsum
84 Marginal Way
Portland, ME 04101
DKallin@dwmlaw.com

Lauren E. Parker, Esq.
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Lauren.parker@maine.gov

Gordon R. Smith, Esq.
Verrill Dana LLP
1 Portland Square
Portland, ME 04112-0586
gsmith@verrilldana.com

Gerald F. Petruccelli, Esq.
Petruccelli, Martin & Haddow, LLP
2 Monument Square, Suite 900
Portland, ME 04112-8555
gpetruccelli@pmhlegal.com

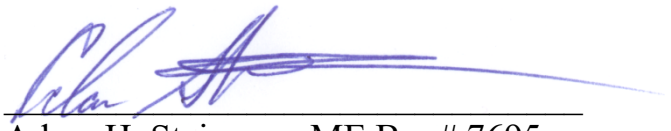
William Leete, Esq.
Leete & Lemieux, P.A.
95 Exchange Street
P.O. Box 7740
Portland, ME 04112
wleete@leelem.com

Sandra L. Guay, Esq.
Woodman Edmands Danylik
Austin Smith & Jacques, P.A.
234 Main Street/ P.O. Box 468
Biddeford, ME 04005-0486
SLG@woodedlaw.com

David Silk, Esq.
Curtis Thaxter, LLC
1 Canal Plaza, Suite 1000
Portland, ME 04112-7320
DSilk@curtisthaxter.com

Orlando E. Delogu
22 Carroll Street, Unit #8
Portland, ME 04102
orlandodelogu@maine.rr.com

Dated: February 15, 2019



Adam H. Steinman, ME Bar # 7695
49 Shipwreck Cove Road
Cape Elizabeth, ME 04107