Natural Resources Highlights

ACCESS TO COASTAL AND INLAND WATERS

The Public Use of Private Land

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Maine *is* different from other states in the United States, and one of the key differences has to do with the access Maine people and out-of-state visitors have to the state's water resources. Maine has:

- a great abundance of marine, lake, and river resources;
- a small resident population;
- the great bulk of its land in private ownership; and
- a tradition of free and easy access across private lands.

Will this unique combination of abundant resources and open access continue? As our shorelands gradually become developed, as recreation activities and tourism increase, and as traffic builds up on our roads, are we moving toward a time when private lands are closed off and the only public access we have will be that available on publicly owned lands?

The answer to this last question is, most likely, No. Urban growth and tourism will undoubtedly continue. But as long as we can foresee, Maine people and out-of-state visitors will continue to rely, for their water access, on a mixture of public and private lands. And this mixture will depend on:

- the legal rights and obligations of landowners, towns, and the public;
- changes in laws to meet new needs of landowners and the public;
- how the State and towns deal with frictions caused by development and growth in tourism;
- whether private landowners in the future will be as generous as landowners have been in the past; and
- the extent to which cities, towns, and the state utilize the wide range of options that are available for guaranteeing future public access to the State's water resources.

BACKGROUND

There are, roughly, three public access situations in Maine:

In northern and eastern Maine, paper companies and other large corporations own much of the land. In a substantial part of this area, recreational use of private lands is managed by the North Maine Woods, a cooperative organization formed by the large landowners. Recreational pressures in this part of Maine are relatively light, and access problems are not critical. However:

- Recreational pressures on the "wildlands" have increased greatly with expansion of the logging road network and use of four wheel drive vehicles and ATVs.
- Managing widely scattered recreational activities over a large area poses special problems of safety, impacts on natural resources, conflicts with forestry uses, and coordination between multiple private owners and state agencies.
- There are problems in paying for recreational management. The charging of fees upsets some citizens who think that recreational use of the wildlands should be free. Industrial landowners don't want to subsidize public recreational use of their lands. And taxpayers find it difficult to shoulder the costs of managing recreational activities over a vast area of private and public lands.

In central and southern inland Maine, swimming, boating, and fishing access have been provided, to a great extent, by a combination of private and public lands and facilities (such as private marinas and public boat launching areas). However, accessibility to lakes and rivers in this area is gradually becoming restricted as

- development continues around lake shorelands;
- shorelands of rivers, cleaned up partly at public expense, are being developed and put off limits to the public by some of their owners; and
- extensive forested areas, which include many rivers, streams, and lakes, are being subdivided and posted against public access.

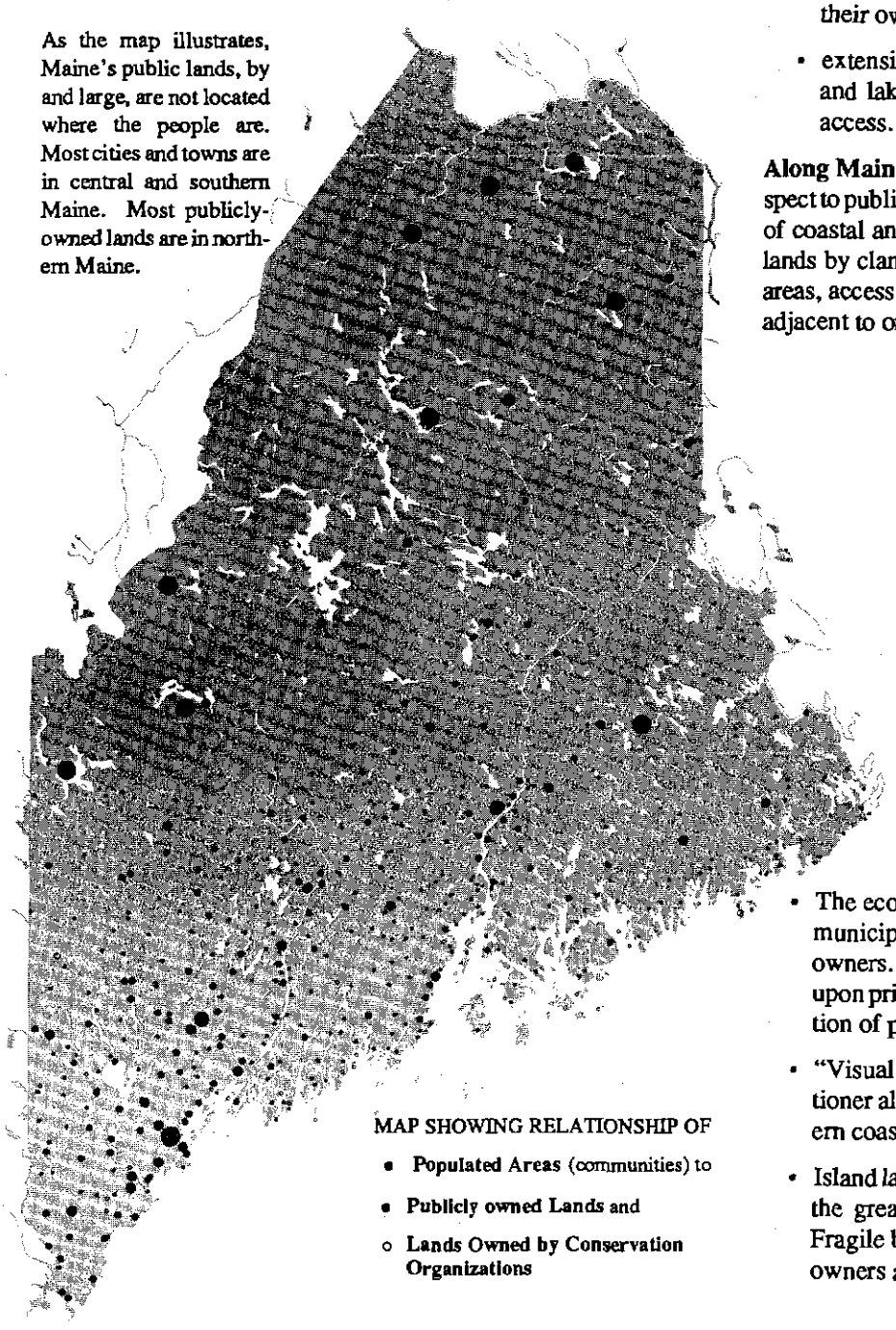
Along Maine's seacoast, severe problems are emerging with respect to public access to water. Historically, owners of large parcels of coastal and island shoreland permitted occasional use of their lands by clamdiggers, "summer people," and others. In built-up areas, access to the water was also available (often by town ways adjacent to or across private lands).

Increasingly, these historic means of coastal access are proving inadequate. Shorelands (and some islands) that have been open to public use in the past are now being subdivided, developed, or sold to new owners who have outlooks toward public use different from those of previous owners. Public use has become much more intensive with the growth in tourism. And the old town ways, suitable for local people on foot, are now often not suitable for numerous tourists arriving by car.

There are many ramifications to the coastal access problem:

- Maine's shellfish and fishing industries are being squeezed by loss of traditional access and by the pleasure boats and condominiums that are moving into the State's harbors.
- The economic benefits of tourism are being partly offset by municipal government problems and encroachments on landowners. These encroachments are in the form of intrusions upon privacy, deposits of refuse, and, in some cases, destruction of properties.
- "Visual access" to the coast, for Maine resident and vacationer alike, is being diminished, especially along the southern coast.
- Island landowners are experiencing unwanted intrusions with the great increase that is taking place in coastal boating. Fragile bird habitats face encroachment by both island landowners and boaters.

As the map illustrates, Maine's public lands, by and large, are not located where the people are. Most cities and towns are in central and southern Maine. Most publicly-owned lands are in northern Maine.



MAP SHOWING RELATIONSHIP OF

- **Populated Areas** (communities) to
- **Publicly owned Lands** and
- o **Lands Owned by Conservation Organizations**

Tradition

We have had a long tradition, in Maine, of free and easy access to unimproved and unposted private land. Some have called this custom "permissive trespass." We shall use the term "permissive access" because it does not suggest illegal action. We are not talking about a legal right*, but rather a custom in which people use private property with the informal permission of the owner. Such people include hunters, fishermen, trappers, hikers, cross-country skiers, snowmobilers, clam- and worm-diggers, boaters, canoers, bird watchers—indeed most of us who use the out-of-doors for recreation and, in some cases, for our livelihoods.

The tradition is so ingrained that many of us would be surprised to learn that it does not exist in many other parts of the nation. It is so ingrained, in fact, that we sometimes forget that the land is owned by someone. While we are sometimes careless about how we leave the land, most of us are careful. We stay off land that is posted. And if the owners are living near the area we are using, some of us, at least, have the courtesy to ask permission for our use of their land.

Permissive access has a long tradition in Maine.

* Customary practices do have legal significance and, under certain circumstances, can develop into legal rights.

Law

The use we (the public) can make of someone else's land depends not only upon that person's generosity. It depends also upon legal rights and obligations that have evolved over centuries.

Someone may own a piece of land and have certain rights to use the land, but those rights are not absolute. As the following questions suggest, ownership of land is not a clearcut matter.

1) Does the owner "own" the water that passes over the land? the water alongside it? the water under it?

2) Does the owner "own" the fish and other wildlife that temporarily occupy land and waters? the trees and vegetation on the land? the seaweed in the water?

3) Does ownership mean that no one else has any rights to use a given piece of property?

The answers to such questions, especially the last one, are complex and controversial. Several centuries ago they bitterly divided the Indians and European settlers. Today they are the subject of court disputes and of frictions between landowners and the public.

With respect to the first set of questions—on ownership of water—legal traditions in the eastern United States are quite different from those in the west. In the east, where water resources have been abundant, the "riparian" owner (the owner of land next to a body of water or flowing stream) has had fairly unlimited, but not exlusive, rights to use the water. In the western United States, where water is not so abundant, rights of riparian owners are much more limited.

No one "owns" **fish and wildlife.** Sovereign rulers used to, but this "ownership" evolved into management of fish and wildlife by federal and state governments as a public trust. On the other hand, ownership of land has come to mean exclusive rights to use the trees **and vegetation** on the land.

The third question—concerning **public rights on private land**—will be addressed in the following pages. Here we will only summarize the key laws and legal traditions that have determined those rights:

- There are two legal foundations for public rights in Maine waters. One is the **public trust doctrine**, whose history goes back to the Magna Carta and even antiquity. Because the sea was so important as a source of food and means of transportation, public access to the sea and seashore was vital, and public rights of access were guaranteed. The tradition became part of the common law of England and, in time, our own law. In the late 19th Century, the nation's courts determined that the public trust doctrine applied to inland as well as coastal waters. State courts generally rule on how the doctrine aplies to a particular state.

- The other foundation for public rights of access in Maine waters is the **Colonial Ordinance** enacted by the Massachusetts Bay Colony in the 1640s. This law, which recognized customary practices in use of the seacoast and inland lakes, became part of the **common law** that has come down to us.

- Although public rights in shoreland areas have changed over the decades, major expansion of such rights has been limited by the **U.S. Constitution**, which prohibits taking land without "due process" (i.e. without compensating the owner).

- The rights and obligations of landowners and the public have been further determined by a host of court decisions; judicial interpretations; acts of Congress and the State Legislature; international law (affecting boundary waters); and local ordinances and easements. For example, a 1964 state law allows state agencies to lease private land or accept easements for scenic or recreational purposes. Another law, passed in 1978, protects landowners from risks of liability suits where the public is using private land for outdoor recreational activities.

- While the question has not been answered by Maine courts, provisions in the U.S. Constitution suggest that public water rights extend to out-of-state visitors as well as to Maine citizens.

PUBLIC AND PRIVATE RIGHTS ON MAINE'S SEACOAST

To a great extent, Maine's seacoast is private. The proportion of Maine's coastline in public ownership is well under 10% (probably around 7%). Moreover, public rights on Maine's privately owned beaches are far more restricted than they are in most other states. This is because the legal tradition of Maine and Massachesetts was strongly influenced by the Colonial Ordinance of the Massachusetts Bay Colony.

In Maine, the extent of **public rights** on the seacoast depends upon where the tide rises and falls . . .

Below low tide, the State owns all submerged lands. In this zone, the public has free use of water and the sea bottom, subject to state restrictions.

In the upland zone, above high tide, all rights are with the landowner, subject to any easements that may exist. This is the case even where landowners had (by filling prior to 1975) created upland areas from areas that were once intertidal.

In the intertidal zone, private ownership extends down to low tide.* There are, however, public rights in the intertidal zone (subject, of course, to state and local regulations):

- The public has the historic rights (going back to the Colonial Ordinance) of "fishing, fowling, and navigation."
- In the course of time, these rights have come to include skating, cutting ice, pleasure boating, mooring boats, hunting, and collecting shellfish, seaweed, and sea worms. There are some limitations to these rights, however. The public can collect free-floating seaweed, but not seaweed cast up upon the beach. Collecting mussels from a mussel bed is permitted if the bed is surrounded by water at low tide. It is not permitted if the bed is connected by dry land to the shore at low tide. *Those* mussels belong to the shoreland owner.
- The public can swim in tidal waters (e.g. from a boat), but the right to use the shore for swimming and sun bathing is in dispute.
- Public rights may include walking across an intertidal area at low tide, but this right has not been definitely established by the State's courts.
- A few years ago the Legislature adopted legislation intended to strengthen public rights in the intertidal zone. Under the Intertidal Lands Act of 1986, use of motorized recreational vehicles would be prohibited, but most other modern-day recreational activities would be a matter of public right: swimming, sunbathing, jogging, playing volleyball, building fires, and picnicing. These recreational rights, however, and the 1986 law are currently in dispute. (See discussion of Moody Beach case on opposite page.)
- Maine's Legislature could expand public recreational and access rights in the intertidal zone, but the State's courts might require that this be done by eminent domain and that landowners be compensated.

* Where there is an extensive tidal area, such as a tidal flat, the ownership extends only for a distance of 100 rods (1,650 feet).

While public **legal** rights on the seacoast have always been quite restricted, actual access has, until recently, been ample as a result of landowner generosity and the custom of permissive access. This situation is changing, however, with the rapid growth of tourism and the fact that new landowners are sometimes not as permissive as the old. These changes are affecting water-dependent commercial fishermen as well as recreationists.

A recent study of coastal access by the State Planning Office found that the people most threatened by losses of traditional access are those who have traditionally crossed private lands at dispersed locations. Clammers and wormers are particularly affected. Almost 90% of the State's clam diggers and wormers cross private shorelands to get to tidal flats. One-third of these marine workers have had new landowners try to stop them. Similar patterns of shoreland use and declining access have been experienced by waterfowl hunters and surfcasters.

The State Planning Office study documented other access problems on Maine's seacoast. These include inadequate docking and mooring space for commercial fishermen; shortage of public ways for launching pleasure boats; and lack of parking and access ways for the increasing numbers of people visiting the coast.

What About Landowners?

The public policy issue is not simply one of strengthening public rights of access along Maine's seacoast. Certainly Maine citizens, and the rising tide of tourists, need to be assured access to the coast. Such access is essential to the quality of life in Maine. Moreover, job-holders, local businesses, and the State's taxpayers benefit from expanded recreation and tourism. On the other hand, the needs and rights of shoreland owners need to be respected and accommodated:

- The small proportion of recreationists who are not considerate have an impact far beyond their numbers. Many of us who visit the coast have come across trash left from a beach picnic.
- While precise data is not available, it appears that tourism activitities may have doubled in the last ten years. During this period there were no significant additions to coastal public lands. As a result, private shorelands, as well as public areas, have come under increasing recreational pressures.
- Perhaps the principal appeal of Maine has been its unmarred, peaceful landscape. Many coastal landowners purchased their land because of its combination of natural beauty and minimal human activity. Now, whether the tourists are considerate or not, their sheer numbers are transforming the character of some private shorelines.
- The increase in pleasure boating activity along the coast does not measure the full impact of boating on islands. Ocean kayaking, while not yet a major recreational activity, has placed new pressures on islands. Boat owners, able to sleep and prepare food on board, make only brief visits to the land. Kayak owners, on the other hand, are more apt to ferry across camping equipment and use the islands more intensively than other boaters.

The Moody Beach Case

This case (Bell versus the Town of Wells) is one of the most important court cases to have come before Maine law courts. It will greatly affect - for years to come - the extent of public rights in the intertidal zone of Maine's seacoast.

Moody Beach, located in the town of Wells on Maine's southern coast, is a sand beach approximately one mile in length. 126 cottages front on the beach. The strip of private ownerships is broken by three town ways. These were used for many years as beach access by owners of cottages lying behind the shorefront cottages.

Until the 1960s most non-residents used the public beaches located on either side of Moody Beach (the Ogunquit and Wells Beaches). General public use of Moody Beach was minimal and mostly limited to the areas in front of the town ways. Public use spilled over, some, into the intertidal areas adjacent to the town ways but not to a significant degree.

In the 1970s, public use of Moody Beach increased substantially. New cottages were built behind the shorefront cottages, and non-resident visitors to the town began to use the beach in increasing numbers. Some campground owners even advertised availability of the beach. By the early 1980s, substantial numbers of people were using the town ways, the intertidal areas beyond the town ways, and even the above-tide areas in front of the cottages.

In 1984, a group of shorefront owners brought a court action against the town of Wells. The aim of the action was to force the town to restrict public use of what the shorefront owners considered to be a private beach. The State Attorney General's Office entered the case in order to assist the town and protect public rights to the beach.

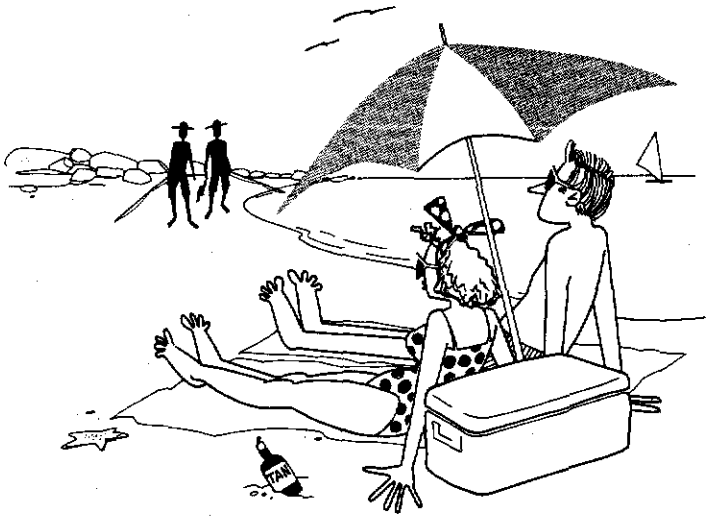
The State's attorneys attempted to show that the Colonial ordinance did not preclude expansion (under the public trust doctrine) of public rights beyond "fishing, fowling, and navigation." The Town of Wells argued that public use of the beach over many years had established a right by custom.

In September 1987, Judge William Broderick of the Superior Court decided the case in favor of the cottage owners. He found that:

- "general recreation" in intertidal areas was not a right recognized by the Puritans of the 17th Century. (The judge noted that intensive recreational use, with "beach towels, umbrellas, coolers, and slathering of bodies with various oils in search of the perfect sun tan," would have been repugnant to the Puritans.)
- a general public recreation right on private beaches had not developed in the years since the Colonial Ordinance became embodied in Maine law.

The Town of Wells' attempt to establish a public right on the basis of custom was similarly dismissed. The dismissal was based on the judge's finding that public use "by custom" had not met two criteria: 1) the custom must have been in effect "so long as the memory of man runneth not to the contrary" and 2) the use must be peaceable and free from dispute.

The case is being appealed to Maine's Supreme Court.



The Puritans would not have approved sunbathing on any beach.

INLAND WATERS

The public can use most inland waters for fishing, swimming, boating, and other recreational uses. The difficulties lie in getting to the water and using the shore.

"Great Ponds"

There is a difference in public rights on water bodies based on their size. A natural lake 10 acres in size or greater is legally considered a "great pond," and public rights of use on great ponds are extensive. Most lakes that anyone would wish to use are at least 10 acres in size, so the distinction is of no great matter to most people.

Public rights on great ponds in Maine and Massachusetts were first set forth in the same Colonial Ordinance that defined rights in tidal areas. The rights have been broadened some since that time, particularly by state legislation enacted in 1973.

- The public can canoe or boat on the water, walk on the bottom, swim, water ski, cut ice, skate, hunt ducks, or fish from a boat or canoe - and even drive a vehicle over the ice. The public has no legal right, however, to engage in activities on the shore without permission of the shoreland owner. In practice, many people do fish, swim, and boat from private shores, but this is being done under the "permissive access" custom described on page 3.
- The state owns the waters and the bottom. As noted before, fish in the lake belong to the people and are managed by the state as a public trust.
- The shoreland owner owns to the natural mean low water mark of the lake or pond.

Interestingly, public access *to* the shore is more available in the case of great ponds than along the seacoast. People have the right to cross private lands to get to great ponds. They can do this, according to the Colonial Ordinance, "so they trespass not upon any man's corn or meadow." This right has passed down to us to mean that people can walk through private property to get to a lake as long as the area is wooded and unenclosed.

This right of access is not of much value. Someone can walk through the woods to get to a lake, look at the lake, and walk back. But a person cannot, except for the permissive access custom, swim or fish from the shore. Nor can that person make use of recreational rights on the lake without being able to get to the lake with a car, canoe, or boat.

In practice, lake access has depended primarily upon a combination of 1) public lands and facilities and 2) the custom of permissive access over private land. In southern and central Maine, people have had considerable access by means of public roads, state and town parks, and boat access facilties (both public and private). In the unorganized territories of northern and eastern Maine, recreationists have been heavily dependent upon the permissive access custom. They have driven, often on private logging roads, to a location near or next to a lake. And they have frequently camped or launched canoes and boats from privately owned shorelines.

What about future access to Maine's lakes? Following are some of the problems and issues that local and state officials will need to address if Maine's lakes are to remain accessible to the public:

- As lake shorelands become ever more developed, the public right to cross unimproved land to get to a shore becomes even more awkward and meaningless. On some lakes, cottages now ring the lake to such an extent that there is no significant public access.
- The subdivision and posting of land is affecting lakes in the southern half of the State.
- Increasing land values threaten the long-term viability of campgrounds, sporting camps, and childrens camps. These have been types of development that have given many vacationers and children access to lakes.
- Some landowners have leased shorelands to individuals, recreational enterprises, and fish and game clubs. These leasing arrangements provide recreational opportunities for some people; they allow landowners to capitalize on the recreational values of their properties; and they generate funds that cover costs of recreational management of the land. However, by controlling the surrounding land and closing off private woods roads, the landowners and leaseholders have restricted access to some lakes for the general public. Only a small number of Maine's lakes have been closed off by such leasing arrangements, but there is a concern that the practice will become widespread.
- Continued public access to Maine's wilderness lakes will not only require protection of fish resources and the natural character of the lakes; it will also require solving problems that private landowners face with increased public use.

This is not a great pond.

Small Ponds

These are the small bodies of water - under 10 acres in size - that are not "great ponds." The extent of public rights in using small ponds for recreation is not clear. It appears that the public may have the right to swim, fish, or boat on them. However, private landowners own the bottom of the ponds, and the public has no right to cross unimproved private land to get to the ponds. Thus even if the public had recreational rights on the water, those rights would be worthless without means of access.

Inland Rivers and Streams

The legal basis for public rights on water courses is quite different from that for rights on the seacoast and great ponds. Where the Colonial Ordinance specifically allowed certain public activities in intertidal areas and on great ponds, it did not provide for similar rights on non-tidal rivers and streams. This may have been because most settlement in the 1600s was on tidal waters.

Nevertheless, there are extensive public rights on water courses, rights that evolved through custom and common law. These rights, however, rest on a number of distinctions:

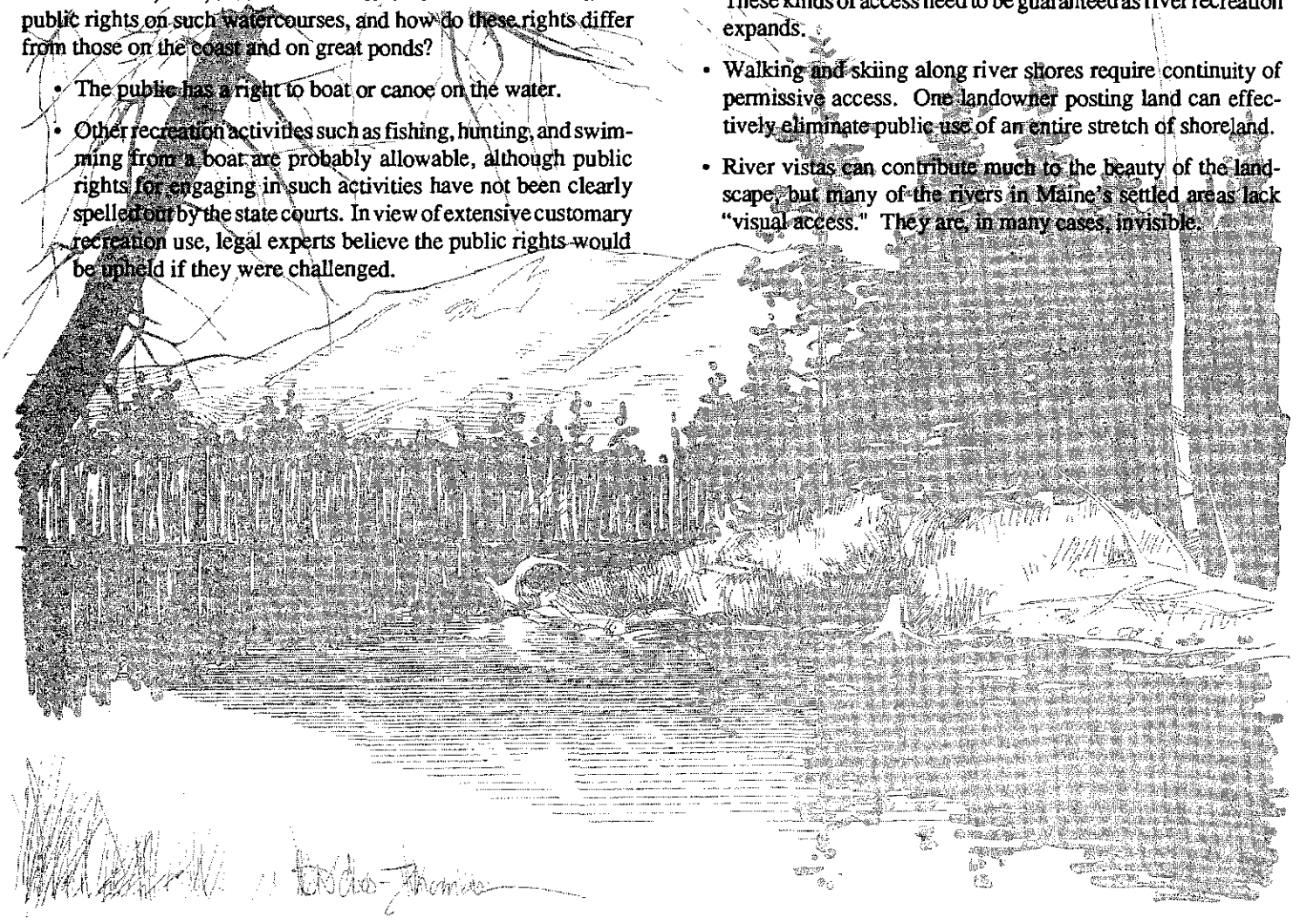
- Unlike bottoms of great ponds, river and stream bottoms in Maine are owned by the owners of adjacent land (the "riparian" owners).
- Public rights are extensive on "floatable" streams and rivers but non-existent on "non-floatable" rivers. This distinction is a little like that between great ponds of 10 acres or more and smaller ponds, since most rivers and streams that anyone would want to use are "floatable". To be floatable a stream only needs to be large enough to float logs at least once a year.
- There are other legal distinctions that have little to do with public access for recreation. For example, watercourses may be "navigable" or not or may be on the boundary between the United States and Canada. (Under Maine law, a "navigable" river or stream is one in which the tide ebbs and flows.)

Let us assume, then, that a stream or river is "floatable." What are public rights on such watercourses, and how do these rights differ from those on the coast and on great ponds?

- The public has a right to boat or canoe on the water.
- Other recreation activities such as fishing, hunting, and swimming from a boat are probably allowable, although public rights for engaging in such activities have not been clearly spelled out by the state courts. In view of extensive customary recreation use, legal experts believe the public rights would be upheld if they were challenged.
- The public does not have the right to fish along the shore or to walk on the bottom of a stream while fishing. Indeed, there is no legal right for the public to use private shorelands for walking, cross-country skiing, snowmobiling, or any other recreational use.
- The public has no legal right to ***cross*** land to get to a river or stream, even if the shoreland is undeveloped. In practice, of course, many people approach and use unposted shorelands under the permissive access custom.

Generally, access problems on rivers and streams are not as severe as those on the State's lakes and seacoast. In the expanses of northern and eastern Maine, river recreation largely means canoeing on a river, with some fishing and camping. River rafting has become popular on a few stretches. Generally people who fish, canoe, or raft Maine's inland rivers are able to find access to those rivers and avoid frictions with private landowners. However,

- where canoeing activities become relatively intense (along the Saco River, for example) some frictions have developed. Some canoers who have made eating and "rest stops" along the way have cut down trees for firewood and left trash and human waste.
- Canoers need access to key private lands where they have to portgage around a rapids or waterfall. Similarly, rafting companies need to post someone on shore at certain critical points. These kinds of access need to be guaranteed as river recreation expands.
- Walking and skiing along river shores require continuity of permissive access. One landowner posting land can effectively eliminate public use of an entire stretch of shoreland.
- River vistas can contribute much to the beauty of the landscape, but many of the rivers in Maine's settled areas lack "visual access." They are, in many cases, invisible.



QUESTIONS A LANDOWNER MIGHT ASK

On Long-term Public Use

Q. If I allow people to walk across my land, will a public right of access be created?

Generally no. State courts in Maine have consistently held that incidental public use of unimproved land does not create a public right of access.

Where a private road or path has been actively used by the public for many years, a town (or the State) ***can*** establish a public way or bring a suit against a landowner who attempted to terminate a public use that had existed for many years. The legal basis for such an action is "**prescriptive use**". However, to be successful, a town would have to prove ***all*** of the following:

- the use has been continuous and uninterrupted over a period of at least 20 years;
- the use has been "under a claim of right, adverse to the owner, with his knowledge and acceptance"; and
- the use has been so "open, notorious, visible and uninterrupted that knowledge and acquiescence have been presumed."

These conditions are so difficult to prove that "prescriptive use" is rarely employed by towns in Maine.

On Posting

Q. How does posting affect a public's right to use my land?

It is commonly assumed that state law gives people the right to use private property for recreational activities without the express permission of the owner unless the land has been posted. This is not true. However, as a practical matter, posting signs at regular intervals along boundaries is the best way to let people know that public use is not permitted or is permitted under certain conditions. The owner can:

- prohibit all use without express permission;
- indicate that certain uses are prohibited; or
- allow only certain uses (such as hiking or cross-country skiing);

There are no legal standards for sign frequency. However, a 50-foot interval is a rule-of-thumb guideline. Another practice, helpful for recreationists who seek permission for access, is to include the landowner's telephone number on posted signs.

Comment: Many landowners are willing to accommodate *some* public use of their land. They are increasingly frustrated, however, by their inability to control such use. They might want fewer people using their land or simply wish to be assured that visitors will be relatively quiet and leave their land as they found it.

On Trespass Laws

Q. What protection do trespass laws give a landowner?

Anyone entering another person's land without authorization is a trespasser, whether or not the land is posted. Specifically:

- Trespassers are liable for any damage to structures or land. Such damage includes: cutting down trees; removal of rocks, soil, or any materials; and damages to private roads, especially those caused by vehicles during the spring thaw.
- Someone using a private road can be sued whether or not there are damages.
- Trespassers may not park a vehicle on a private road if passage of other vehicles is blocked nor may they operate an ATV on a private road if forbidden to do so by the owner.

In practice, trespass laws are somewhat unenforceable, especially on islands and in other remote places. Indeed, it is difficult to convict a trespasser in the absence of a verbal warning. Even with conviction, if there is no damage to property, no threats or injury to other persons, and no unauthorized entry into buildings, penalties tend to be light. More severe penalties may result if a person is convicted of "criminal trespass," which may involve unauthorized entry into a building or even entering land that is posted.

On Landowner Liability

Q. If I permit some public use, will I be vulnerable to a lawsuit if someone has an accident on my land?

There has been a major change in laws affecting landowner liability. Until recent years, public use and enjoyment of the nation's water resources were becoming increasingly threatened by liability laws and escalating jury awards. In response to this situation, many states in the nation, including Maine, passed legislation that would protect landowners from unreasonable liability.

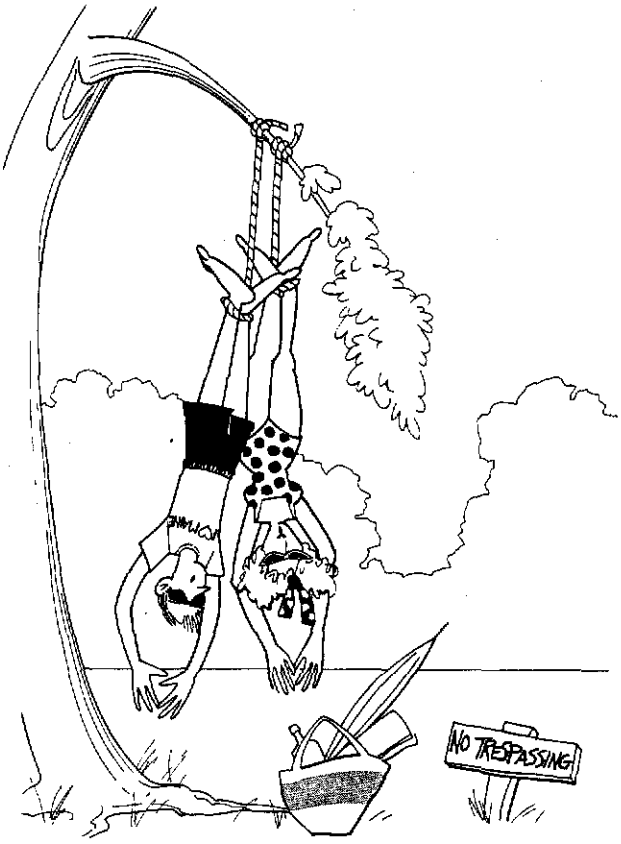
Under the Maine law (enacted in 1978), the landowner has no duty to keep property safe for recreational or timber-harvesting activities nor to give warning of hazardous conditions on the property. If someone uses private land without permission, the owner's only "duty of care" is to refrain from wantonly injuring or setting traps for the person.

For the most part, then, people using someone else's land do so at their own risk, even if they are doing it with the owner's permission. Exceptions occur where:

- the failure to guard against or warn of a dangerous condition on the property is willful or malicious;
- the landowner charges a fee for the public use;* or
- a person to whom permission is granted injures someone, and the landowner had a special responsibility to the injured person to keep the property safe.

The 1978 law has been used successfully by a number of landowners who have been sued by people injured while driving recreational vehicles over their land.

* These landowners may be granted similar protection from liability under proposed legislation.



Landowners cannot play practical jokes on trespassers.

MUNICIPALITIES

Liability

The State and towns are, by law, not liable for accidents that people have while engaged in outdoor recreation. (Purchase of liability insurance would not reinforce a town's immunity and might even reduce it.) If an injury is due to the negligence of a public official or employee, the injured person can sue that individual. However, the amount of compensation such a person can recover is limited to $10,000, unless:

- the state or municipality has provided liability insurance coverage to the individual in an amount greater than $10,000; or
- it can be shown that the individual was acting in a private, not official, capacity.

Town Roads and Ways

There are three types of town roads:

- **A public road, also called a "town way,"** is a road designated and held by the municipality. The town may actually own the road right-of-way, but more commonly the town merely has an easement. In such cases, if the town discontinues the road, ownership reverts back to the adjacent landowners. Whether the road has been established by actual ownership or by easement, the town is responsible for its maintenance. If a town fails to maintain a road properly and there is injury to a person or damage to property, the town *is* liable for damages.
- **A public easement, also called a "private way,"** has a status similar to a public road in some respects. The town has an easement, and the general public has a right of unobstructed access by foot or motor vehicle. However, the town has not accepted the private way as a public road. The town therefore has no responsibility to keep it in repair and generally is not liable for any injury or property damage that may occur on it. This is true even if the town does some maintenance on the way.
- **A private road or "privately-owned road"** is one where neither the town nor the public has any rights. People often use private roads for recreational use, especially in the forested sections of the state. Anyone using a private road without permission is liable and can be sued if their trespassing results in damages to the owner's land.

A town can establish a road or easement in any of four ways:

- purchase, with terms agreed to by landowner;
- eminent domain (taking possession with compensation but without the owner's acquiescence);
- dedication by the owner with town acceptance; or
- "prescriptive use," as described on the opposite page.

A town can get rid of a road or easement by "abandonment" or "discontinuance." Abandonment does not require any specific vote on the part of the town, merely evidence that the road or easement was not kept passable or used as a town road. Discontinuance of a road or easement requires public notice and a vote of the town's legislative body. (See Maine Municipal Association's Municipal Roads Manual for a fuller description of steps needed to establish or get rid of roads and easements.)

Posting for Town Residents Only

Some towns restrict non-resident access to shoreland areas they have purchased and developed. They do this to assure uncrowded use by local people. The practice is at some variance with Maine tradition. It also may be unlawful, in view of court cases in other states. (There appears to have been no case challenging the practice in Maine.)

PUBLIC POLICY ISSUES AND OPTIONS

Public Land Acquisition

Even with the boom in development and tourism, there are relatively few areas on the Maine coast where recreational pressures have become heavy. These are the areas, however, where serious conflicts tend to occur between landowners and the public. One solution to these conflicts is an increase in public ownership. Public acquisition may also be necessary in less developed parts of the state where other options are not feasible.

While some land will need to be purchased outright, costs may be reduced by purchase of easements in many areas where continued mixture of public and private use is possible. For example,

- **scenic easements** could provide visual access to motorists or pedestrians;
- **access easements** could allow the public to cross private land to reach an area where public recreational rights exist; and
- **recreational easements** could allow limited public recreational use of a portion of a private owner's land.

There is considerable precedent for such easements. Successful examples include: Cape Elizabeth's use of easements as part of a town green belt, the "Marginal Way" in Ogunquit, a shoreline walk around a coastal point; the Thirteen-mile Woods on the Androscoggin River just over the Maine-New Hampshire border; and the extensive recreational easements given to the State by the Great Northern Paper Company on the West Branch of the Penobscot. These examples show that the easements have great potential in many areas: on the seacoast, on inland lakes and rivers in central and western Maine, and along water bodies in the North Woods.

Rights of public access can be provided, too, with conservation easements. While landowners normally give conservation easements to a public agency or conservation organization, there is generally no requirement that the easements allow public access. Whether there is any public access depends upon the landowner. The Maine Coast Heritage Trust, which helps landowners in arranging conservation easements, is attempting to strengthen public access provisons in the easements they help negotiate. Such provisions would necessarily allow only the kind of limited public access now being allowed on other conservation lands.

Water Access Issues in the Wildlands

There are special problems and opportunities in the wildlands of northern and eastern Maine. The access problems in this area are, to some extent, economic:

- As noted on page 2, supervision of scattered recreational activities over a huge area is costly relative to the numbers of people involved.
- There is a lag between mounting recreational management costs and the willingness of sportsmen, hikers, and other recreational users to pay more than nominal fees for their use of both public and private land.
- As recreational values of their water resources increase, the large landowners are attempting to capitalize on those values. The leasing of exclusive recreational rights to hunting and fishing clubs represents such an attempt.

What are the options for solving these problems?

- In recent years cooperative arrangements have been made for managing recreational uses in the wildlands. In places, the state has leased private land for campsites. A large landowner - or the private North Maine Woods organization - may, as a matter of convenience, collect user fees on behalf of a state agency. One state agency may help in enforcing the regulations of another state agency. These public-private cooperative arrangements will undoubtedly need to be expanded.
- The State has, in some cases, traded State-owned forested land for private lands adjacent to water bodies. Such trades in the future may involve shoreland easements as well as changes in ownership. However, recreational needs in the wildlands need to be balanced with the State's need for revenue from timber resources as well as forest conservation needs.

- Special tax advantages have, in the past, been designed to encourage sound long-term forestry practices. Sporting groups would like the guarantee of public recreational rights to be another condition for current or new tax advantages. (Many lawmakers, it must be said, do not like changing the tax system for non-revenue purposes.)

Clarification of Public Rights in the Intertidal Zone

Some public rights in the intertidal area are clear, such as the right to fish or dig for clams . It is also clear that the public has no legal right to cross private land to get to the seashore (other than by easement or "prescriptive use"). But what about walking along a tidal beach or mud flat? It appears that there may be a public right for strolling along the beach, but this is not absolutely clear. And whether public recreational rights in the intertidal zone include sun bathing and swimming is the issue that will shortly be determined by the Maine Supreme Court in the Moody Beach case.

Expansion of Conservation Areas

A considerable amount of land (over 22,000 acres) is owned by the Nature Conservancy and other private conservation organizations. These include the Maine Audubon Society, National Audubon Society, and local land trusts. Expansion of conservation areas through private donations will strengthen public access to the State's water resources, especially on Maine's seacoast. Virtually all conservation areas are open to the public, with the exception of special bird nesting areas. There are some restrictions on recreational use, however. In most of these areas, camping, hunting, and use of recreational vehicles are not allowed.

Development of Access Ways and Areas

Before a town initiates a concerted attack on the access problem, it needs to prepare some kind of a plan for public access. This involves: 1) pulling together information on existing public access locations; 2) identifying problem and opportunity areas; and 3) choosing from a wide range of options to meet current and future access needs. In addition to acquisition of land and easements, the options include:

- reasserting public rights of access on old town ways that have been lost through encroachment by private landowners or for other reasons;
- inventorying tax-delinquent properties for possible public access use;
- creating additional town ways (either roads or pedestrian paths);
- developing parking areas and restroom facilities at key locations;
- requiring water access for the public in new subdivisions; and
- using "incentive" zoning and other inducements to gain public recreational and visual access in new private developments.

The State offers assistance to towns in planning; waterfront development; boat launching sites; and purchase of open spaces. Information on these programs is available from Maine's Department of Economic and Community Development and from regional planning agencies.

There are other access opportunities in addition to those requiring town action. County commissioners have the authority to lay out public ways to lakes. And the rights-of-way of abandoned railroads could be incorporated into a state public access network.

Conditions on Dam Relicensing

Most hydroelectric dams operate under federal licenses, which must be renewed periodically. In Maine, a substantial number of dams, including all but one of the largest dams, will be coming up for relicensing in the next half-dozen years. Since the federal and state governments can require that recreational facilities and access be provided as a condition of relicensing, the relicensing process will offer a major opportunity for assuring future public access to the impoundments behind the dams. The access facilities may include boat launches, parking areas, swim sites, trails, and picnic areas.

ATVs

Towns can restrict operation of ATVs, snowmobiles, and other recreational vehicles in certain areas. Similarly, landowners can post land with restrictions on such vehicles. Town regulations and restrictions may be effective - to a point. However, enforcement can be difficult, especially where there are not alternative trails for recreational vehicles. The State Bureau of Parks and Recreation currently has a program that helps local clubs develop trail systems. Some of these trails are on public land; many are on private land. Private landowners, protected from having to cover legal costs of liability suits, give written permission to local clubs for use of the trails.

BASIC LAWS AND DEFINITIONS

Colonial Ordinance — This law, enacted by the Massachusetts Bay Colony in 1641 and amended in 1647, established public rights on coastal and inland waters. These rights became part of the common law of Massachusetts and Maine.

Common Law — In contrast to *statute* law, common law derives from long-term customs and court decisions.

Establishment of Town Roads and Easements
23 M.R.S.A. § 3021 — There are three types of roads and travel easements: 1) public roads, also known as "town ways;" 2) public easements, also known as "private ways;"and 3) privately-owned roads.

Intertidal Zone — The area between mean high tide and extreme low tide.

Landowner Liability
14 M.R.S.A. § 159-A — This law, enacted in 1978, protects landowners from unreasonable exposure to liability suits.

Access to Great Ponds
17 M.R.S.A. § 3860 — Passed in 1973, this act clarified public recreational rights on and access to "great ponds" (natural water bodies over 10 acres in size).

"Permissive Access" — The assumed approval of the landowner to public use of unimproved and unposted land is a matter of custom, not law (except for trappers, who **must** get landowner permission).

Prescriptive Use
14 M.R.S.A. 14 § 801/812 — Under certain conditions, long-term use can create a public right. The conditions are summarized on page 8.

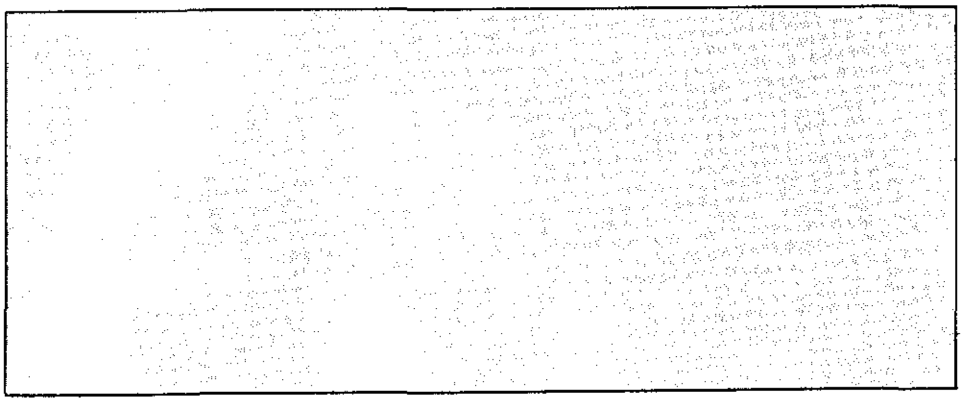
Public Rights in Intertidal Zone
12 M.R.S.A. § 571-573 — This law, passed in 1986, broadened public rights in the intertidal zone to include general recreation activities. Its validity is under review in the Moody Beach case being appealed to Maine's Supreme Court.

State Courts — The State's lower court, the **Superior Court**, decides civil cases such as those involving access rights and most trespass violations. Appeals from their decisions go to the State's highest court, the **Supreme Judicial Court** (also called "Supreme Court" or "Law Court").

Town Liability (Tort Claims Act)
14 M.R.S.A. § 8103 — Citizens, not the town or State, are responsible for their safety when they use public lands for recreation.

Trespass — ***Any*** unauthorized entry onto private property.

Criminal Trespass
7-A M.R.S.A. § 402 — Entry into a dwelling, locked structure, or land when the trespasser knows that entry is not approved by the landowner.



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