STATE OF MAINE

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Inter-Departmental Memorandum Date March 7, 1967

To Lawrence Stuart, Director Dept. Parks and Recreation

From Jerome S. Matus, Assistant Dept. Attorney General

Subject Title to Accrued Land Areas at Drake's Island in Wells, Maine.

FACTS:

Certain beach areas on Drake's Island at Wells, Maine have accreted as a result of the construction of jetties by the United States Army Corps of Engineers.

QUESTION #1:

Does the title to the accreted beach areas vest in the property owners whose deeds run to the ocean or does the title vest in the State of Maine?

QUESTION #2:

Should a declaratory judgment be sought to ascertain title to the accrued beach areas?

ANSWERS:

See opinion.

OPINION:

"Rights in respect of additions to or conditions of land by accretion or reliction are governed, ordinarily, by the law of the State in which accretion or reliction occurs." 56 Am. Jur. p. 897, Waters, § 482, and cases and annotations cited. Footnote 16.

We look to the law of the State of Maine and find three cases dealing with accretion. None of the three cases deal with accumulation of land brought about by artificial conditions, i.e., jetties, dams. State v. Yates, 104 Me. 360 (1908) dealt with the terminous of a public street at Old Orchard Beach laid out in 1871 to the high water mark. Since 1871, the high water mark had moved by accretion about 88 feet seaward. The Court held, inter alia, that when the high water mark gradually extended seaward by accretion the public easement which was attached to it originally at high water mark went with it and the street ended at all times at high water mark. This case defines accretion as,

". . . the gradual and imperceptible accumulation of deposit of land by natural causes." Ibid at 362. Babson v. Taintor, 79 Me. 368 (1887) concerned a title dispute to flats between the mainland and an island. A channel between the mainland and the island had gradually filled up by accretion. Held title in owner of the mainland property. King v. Young, 76 Me. 76 (1884) concerned title to certain mussel beds. The Court held that a mussel bed over which the water flows at every tide is not an island. Such formations were considered flats and if within 100 rods at high water belonged to the owner of the adjoining land if not covered by water when the tide was out. The Court ruled that accretion must be gradual and from the shore outward.

Our Court's definition of "accretion", State v. Yates, supra., on its face could be argued as not being applicable to a five-year accumulation of land as a result of the building of a jetty which are the facts in the instant case. It could be argued that the build-up was not accretion as it was not a deposit of land by natural causes, that is, it was the jetty, an artificial object, which was really the proximate cause of the deposit of the land and that the sea and wind were merely incidental causes which followed in an unbroken sequence from a proximate cause which was not a natural cause. I do not believe our Courts would accept this argument. An annotation at 134 A.L.R. 467 contains a series of cases which makes it clear there is a distinction in many jurisdictions between an artificial condition (a jetty) and an artificial cause. The annotation is titled, "Waters: Rights in respect to accretion or reliction due to artificial conditions." The annotation states as a rule that "generally a riparian owner is precluded from acquiring land by accretion or reliction, notwithstanding the fact that the accumulation is brought about by artificial obstructions erected by a third person where the riparian owner had no part in erecting the artificial barrier." 134 A.L.R. 468. The cases cited include a United States Supreme Court Decision, St. Clair Court v. Livingstone, (1874) 23 Wall 46, 23 L. Ed. 59; decisions from eleven state jurisdictions including Massachusetts, New York and Rhode Island and an English Decision. Of particular interest is Burke v. Commonwealth (1933), 283 Mass. 63, 186 N. E. 277, in which the Massachusetts Court expressed the view that the circumstances of building of breakwaters by public authority may have aided the operation of natural cause in the deposit of the accretion but did not modify the general rule that the littoral proprietor is entitled to his proportionate share of such accretions. The English decision Brighton and H. General

Gas Co. v. Hove Bungalows, (1924) 1 Ch (Eng) 372, 13 BRC 183, is also of interest. The annotation states that this decision held "that the general law of accretion applies to a gradual and imperceptible accretion to land abutting upon the foreshore, brought about by the operation of nature, even though it had been unintentionally assisted by, or would not have taken place without, the erection by the public of groins for the purpose of protecting the shore from erosion. . . ." 134 A.L.R. 469.

The 134 A.L.R. annotation distinguishes the situation where a condition is created by the claimant. The annotation states, "in general a riparian owner cannot claim title to land aided by accretion or formed by reliction as a result of creating by himself an artificial condition causing the accretion or reliction. We do not have this type of a factual situation.

In "Shore and Sea Boundaries" by Aaron L. Shalowitz, Vol. 2 at page 538, the author states, "A variant of the accretion doctrine is where changes in shoreline are brought about by natural causes but induced by artificial structures, as, for example, where jetties or breakwaters have been built, and thereafter, by gradual and imperceptible processes, accretions to the shoreline occur as a result of the artificial structures. The rule applied in the Federal Courts is to treat such changes as natural accretions for the benefit of the adjacent riparian owner.[122]" Footnote 122 distinguishes the rule applied in Federal Courts from the rule in California where accretions so added are regarded as artificial in character and as against the state or its grantee the riparian owner is not entitled to claim such accretions. Carpenter v. City of Santa Monica, 147 P. 2d 964 (1944). The California rule is a minority rule. Also see Dana v. Jackson Street Wharf Co., 31 Cal. 118, 89 Am. Decisions 164, in which case it was held that the owner of a lot on the waterfront of San Francisco did not become the owner of land adjoining the lot and lying in the harbor beyond it where such land had been gained from the sea by the gradual accretion of sand and earth caused by a purpresture, or encroachment in the form of a wharf in the public harbor.

I am of the opinion that our Court will follow the majority rule and not the rule of California.

It may be further argued that the accumulation of sand on Drake's Island would not be considered an accretion because the accumulation was not gradual or imperceptible, which is necessary in order to have accretion. I am of the opinion that our Courts would consider this deposit of sand as gradual and imperceptible.

". . . the word 'imperceptible' as used in this rule means that the accretion is imperceptible in its progress although it may be perceptible after a long lapse of time. As stated in some cases, the test as to what is gradual and imperceptible in the sense of the rule is that although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. According to some authorities, it is not necessary that the formation be one not discernible by comparison at two distinct points of time, but it has been said that the length of time during formation is not material if the increment added is utterly beyond the power of identification." 56 Am. Jr. 898, § 484.

For a general study of the doctrine of accretion I refer to "Shore and Sea Boundaries" by Shalowitz, Vol. 2, pages 536 through 541.

CONCLUSION:

In my opinion title to the accreted beach areas is vested in those property owners of lots whose deeds run to the ocean. It does not belong to the State of Maine beyond being subject to the Colonial Ordinance of 1641-47.

In view of the foregoing, I do not believe it would be useful to seek a declaratory judgment concerning the problem as the cost would be too great and the chance of success remote.

Jerome S. Matus
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JSM/slf

Approved:

James S. Erwin
Attorney General