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Access to the Sea

Maine

Public Access to Maine Shoreline

A Workshop Discussion

Maine Department of Marine Resources

in cooperation with

Time and Tide Resource
Conservation and Development Project



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PUBLIC ACCESS TO MAINE SHORELINE

A Workshop Discussion

Joel D. Cowger, Editor

**Maine Department of Marine Resources
in cooperation with
Time and Tide Resource Conservation and Development Project**

Augusta, Maine 1978

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Photo by John Ewing

PREFACE

This publication contains the transcript of a workshop on public access to the shoreline, held in Damariscotta, Maine, on October 18, 1977. The workshop was conceived and organized by the Ocean Resources Committee of the Time and Tide Resource Conservation and Development Project, in response to a recognized need for information on methods of locating lost or abandoned public rights-of-way to the shore. As usually happens in a workshop of this type, discussion encompassed a wide range of topics relating to public access rights, but emphasis was placed on the role of the individual or town in the preservation and improvement of public access sites. It is hoped that this publication will stimulate local action to reaffirm the public interest in access to the Maine coast.

Five speakers were invited to the workshop. They included: Lee Rogers, staff counsel for the Natural Resources Council of Maine; Thomas Reeves, attorney in the Bureau of Legal Affairs of the Maine Department of Transportation; Sterling Dow III, Executive Director of the Maine Association of Conservation Commissions; Garland Davis, a Brunswick realtor; and John Moncure, an attorney and chairman of the Harpswell Conservation Commission. Discussion was moderated by the editor of this publication.

Several appendices have been added to the transcript. These include sections of the Colonial Ordinance of 1641-47, sources of financial and technical assistance available to towns interested in improving local public access, selected references to literature on public access rights, and a concise methodology for use by citizens interested in recovering lost or abandoned public ways.

Cover graphics by Phoebe McGuire

PUBLIC ACCESS TO MAINE SHORELINE

A Workshop Discussion

JOEL COWGER: Public access to water, or lack of it, is an issue of concern to both coastal and inland Maine residents. Acquisition of more public land on the coast is a controversial subject. A recent survey conducted for the State Bureau of Parks and Recreation indicated that 52% of Maine residents felt that the amount of public land on the coast was adequate. However, 75% felt the State should spend more money on development of swimming areas and 57% felt that the State should spend more money on boat ramps, so the majority of Maine residents do feel that public access is a problem. A survey by the State Planning Office has shown that the municipal officials of at least fourteen coastal towns list public access research and planning as one of their top five priorities for consideration under Coastal Zone Management funding. From my own experience, I know that fishermen, clam diggers and worm diggers are feeling the crunch as they lose the use of traditional rights of way to new housing or other developments.

One of the basic problems in acquiring new access sites is expense - ocean frontage gets more expensive, often prohibitive, every day. However, one method of increasing the number of access sites, a method which costs little and which can be used by concerned local citizens, is to identify public ways which for various reasons have been lost or abandoned or where the legal status is not clear. No matter how one feels about the subject of public access, I think it is important to reaffirm the public's rights. Even if the use or development of public access on particular public ways is not desirable now and should not be encouraged in some instances, that future use should not be precluded.

Although I have been talking about ocean access, I would like to emphasize that I do not mean to exclude discussion of access to great ponds or rivers, which to many towns, particularly non-coastal towns, is just as

About 96% of Maine coastal shoreline is privately owned.

Maine Recreation Use and Preference Survey, A Look at the Coast, was conducted in 1977.

important.

Finally, I would like to point out that this workshop is just that. It's not a seminar or a lecture. The only reason I organized this with speakers is to start the discussion. I am sure that most of you here probably know at least as much about the problem as the six of us do, so I hope we can all participate in this and come up with some good suggestions.

I originally had four speakers lined up, but we've picked up another one tonight. What I would like to do is to have each of them talk for about ten minutes on the subject they're particularly interested in, and then we will open it up to discussion. During the discussion period Garland Davis has a few examples of the methodology of going about identifying these sites, and we do have some slides which might be used.

Why don't we start off right away. Our first speaker is Lee Rogers. Lee is the full time counsel for the Natural Resources Council in Augusta. He previously was an assistant attorney general in the Environmental Division of the Attorney General's Office in Augusta, and prior to that he was general counsel for the Environmental Defense Fund in New York.

LEE ROGERS: Good evening. I would like to just give you a brief thumbnail sketch of the law of public access as we know it in statutory and case law. Let me start by reading the Colonial Ordinance of 1641 - 47 from the Massachusetts law 1814 edition. "Every inhabitant who is a householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court, have otherwise appropriated them." Then it goes on, "Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed." What this means is if someone owns land, you have to come under one of the exceptions. It goes on, "It is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further, provided that such proprietor shall not by this liberty have power to stop

Relevant sections of the Colonial Ordinance of 1641-47 are reproduced in Appendix I.

or hinder the passage of boats or other vessels in or through any sea, creeks or coves to other men's houses or lands." And then it goes on with the great ponds exception: "And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and re-pass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow."

So you get the concept of improved property with regard to the great ponds where the purpose of the ordinance is clearly to prevent any trespass that would do damage. The permission that now exists for a man to trespass across another man's land to get to a great pond was based, I think, upon a policy consideration that they should not permit a trespasser to do damage. That was the underlying rationale.

The interesting thing is while they talk about access to the great ponds, they seem to be more concerned about the right to fish and fowl on the bays, coves, and rivers, where the sea ebbs and flows, and suddenly there is no access across land provided to the bays, coves, and rivers. There is no access across by land, but you do notice that there is access by boat, and that is the first part of the exception, so that they apparently were not concerned about access by land to the ocean shore. Access by water to the bays, rivers, etc., along the seashore - that was their concern, not directly towards the question of land access to the shore. Once you got to the flats, presumably you could do anything there, and the case law makes it very clear. Once you get to the tidal flats you can clam, fish, presumably swim, and so forth. There is no provision in the law, including Maine statutory law, providing access to the salt water shore in the same way there is in the statute for the great ponds.

Another way of looking at this is to look at the law of trespass. The generally-held opinion is that under the old common law if you're generally entering someone's land to take something or cause damage, there is some element of harm. In the classical notion of common law trespass, you didn't have a general action of trespass. You had different specific allegations of harm. There was no general trespass charge. Likewise, if you look at Maine law, until recently all the trespass actions talked about trespass on "commercially used land, on pasture, orchards, residential property," and then they had more specific improved property. An

argument could be made that if you were going across unimproved land, even though there is no statutory exception like there is for great ponds, likewise, there is no statutory offense and you have to go back to the common law of trespass. The common law has specific harms connected with it before it is actionable. I am talking about English common law - I am not talking about our law.

COWGER: But that hasn't been tested here.

ROGERS: No, that hasn't been tested here. But the general exception here is that you can post your land. If you have unimproved land, you can put up a sign saying "no trespassing," "hunting by permission only," and it will be effective. Most people assume that can be on completely unimproved land. There is a case which involved Diamond International and a fellow named Estabrook, and he drove his truck across their land and across a public lot to get to a great pond. He was charged with criminal trespass. The court found him not guilty, and the first ground was that the land was timberland and not land commercially used within the meaning of that particular statute. Secondly, there was a failure to post it. For those two reasons he was found not guilty.

Until recently the law was that specific in regard to trespass. Under the revisions to the criminal code, there are some simplifications of the law. There are all sorts of exceptions. But it was not intended to be a substantive change in the law, and therefore a case of trespass across unimproved unposted land might not be actionable. If I were arguing, I would argue that unimproved land meant where the trespass would not do any harm. In other words, where you would not be imposing upon somebody's privacy, where you would not be doing any physical harm to their land. I would say if you tramped across a fellow's corn or across his garden, or any improved area where you could cause damage, something of that sort....

COWGER: Doesn't the Great Ponds Act basically consider unimproved land as meaning woodland?

ROGERS: I wouldn't think it would have to be woodland. Some cleared land could be less improved than woodland. Woodland can be intensely managed, and in that sense be more improved than land that had once been farmland or pastureland and allowed to grow back. There has been some case law on it, but I don't think there is anything that specifically defines it for all time.

There is to my knowledge no case in Maine involving a trespass action against someone trying to get access to the shore. At least there's no reported case in the Supreme Court. There may be a Superior Court or District Court case of which I am not aware.

The fascinating thing is that this old Colonial Ordinance recognized the importance of the public right to the shore. They recognized the importance of the access, and the access in terms of the use once you get there - the access in that sense is protected. But there is no explicit provision for getting across to seashore by land as there is for great ponds. You have to assume that they somehow didn't think that was a problem, because they certainly thought the use was important. The public use of the tidal flats, of the coves, of the bays, of the tidal rivers was very important. They just didn't spell out any specific way of getting there, except by boat, and then they did protect it. You have a sort of strange dichotomy of recognizing the public right but not providing the way of getting there explicitly, with the exception of the great ponds.

FROM AUDIENCE: If access to great ponds is only allowed on foot, how would you get a boat there to go fishing?

COWGER: You could carry a canoe or a small boat.

FROM AUDIENCE: Using a driveway in a truck when the road is good and hard, you don't do any damage at all.

ROGERS: That was the case with Estabrook. He took his truck to the Great Pond, crossing the Diamond International land and a public lot. That was actually prosecuted as a test case. The lawyer in that case was actually hoping to take that case to the Supreme Court, but he couldn't because his client won.

JOHN MONCURE: Yes, but I don't think that case really turned on the issues we're talking about. I think the court skirted the real issues.

ROGERS: If you look at the obvious purpose of the Colonial Ordinance, it seems to me that you could make an argument that what was really intended was to prevent any real harm from occurring to somebody as a consequence of your going across his land to get to a Great Pond. Enclosed land that had a fence around it, or land that was improved in any way, would presumably be out of the question. But let's take a man walking down a road - would a court be inclined to say that a

road was improved within the meaning of the statute? I don't know of any cases on it.

MONCURE: What you're really saying is that the courts are looking to the nature of the trespass, as opposed to the nature of the ownership of the land - which is eminently reasonable.

ROGERS: It's certainly true that you can walk down a road (the statute says "on foot" so there's no question that it's limited to walking). The old Colonial Ordinance says that for Great Ponds, "... it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow." Now, if you didn't park the vehicle on the property, it's hard to see any additional damage from taking a vehicle down a road rather than going on foot, assuming that the road is not "improved land." In fact, it might be less offensive. In a vehicle you're going to be through and out of sight and gone much quicker, assuming that you're reasonably quiet. The only problem is that you can't get rid of the vehicle. That's sort of the history of the trespass law in Maine - they keep adding tighter and tighter restrictions to the law. Every time somebody had a particular type of land - pastureland or commercially used land or something - that wasn't apparently covered by the existing ordinances, he would try to get a special statute passed to try and make that a trespass action. So you have a constant tightening up of that law of trespass by statute, and it really raises very serious public policy questions as to what sort of access should be preserved, and what sort of statute we should have. It certainly hasn't been answered in Maine - it's been a case by case sort of development, both in the legislative law and in the case law.

COWGER: Our next speaker is Tom Reeves, who is also an attorney. I hope we don't get too heavily involved in legal quagmires here. Tom is an attorney in the Legal Division of the Maine Department of Transportation. He is now pursuing a Master's Degree in Natural Resources at the University of Michigan. Tom has a special interest in the historical aspects of public access rights.

TOM REEVES: I am trying to play the role more of the historian than the lawyer this evening. Unlike most of the western world, in the United States, and in particular New England, the public's right of access to

the seashore is rather limited. In most European nations and countries bordering the Mediterranean Sea, there is a right of access from the upland interior to the seashore. In Maine we may possibly possess a limited right of access based on customs that were observed in the early history of New England. I should caution, however, that the courts, and particularly the Massachusetts Court, in interpreting the public's right of access based on historical practices or customs have been quite restrictive in advancing the public's cause over the interests of private landowners.

I would like to present my talk from two time periods with 1620 being the dividing date. Prior to 1620 there were few permanent inhabitants from Europe living on the North American coast. But after 1620, one begins to have permanent settlements. In each time period the coast was used and hence viewed differently.

Approximately one hundred years prior to the first permanent settlement in New England, fishermen from England, Holland, France, and Spain had been voyaging from Western Europe to fish for cod off the banks of Newfoundland and perhaps occasionally in the Gulf of Maine. Fish at that time was an important source of protein for the populace of these countries. The consumption of fish acted to conserve beef stocks as well as to serve religious purposes. The practice of consuming fish was thus institutionalized for both secular and religious reasons by governments officially setting aside numerous days as "fish days."

To obtain their catch, each spring the fishermen from the western ports would race over to the Newfoundland fishing banks. Since there was no refrigeration, the fish had to be immediately processed and this activity usually took place upon the shore. The fishermen would set up wooden stages, dry and salt their catch on these stages or flakes, and then immediately return back to Europe. The competition was stiff because the first vessels back usually received the best prices for their catch.

The fishermen's perspective in gaining access to and using the shore was amphibious. They would come in from the sea, not from the interior, touch the seashore, use it very briefly, then destroy whatever they erected, and return to their respective ports. Their overall perspective was a marine one rather than being a perspective from the interior looking seaward. This legacy may have influenced the drafting of the Colonial Ordinance of

1641-47 which today governs the public's right to use the seashore and great ponds. Though the fishermen left behind few records, remnants of their presence can be gleaned from the names of such Maine islands as Stage Island and Flake Island.

The second perspective that I would like to mention is what I call a "settlement perspective," and that occurred around 1620 with the establishment of the Plymouth Bay Colony. At this time there were also permanent fishing stations in Maine. All of these settlements were fringe type settlements -that is, settlements that hugged the coast. Since there were few horses or animals with which to gain access to the interior, most houses were located so as to have immediate access to the sea. To ensure that no one gained a monopoly on this critical form of transport, the various towns passed ordinances imposing maximum shore front limits. These ordinances are examples of the first type of land use planning conducted in the United States. It is ironic that today we have turned a complete circle by worrying about minimum shore frontages, but in colonial New England the authorities worried about how much land any one individual would own on the seashore.

For example, a 1651 ordinance of Kittery, Maine reads: "It is ordered at this town meeting that the town shall not exceed in any grant of land of any persons whatsoever above 24 rods by the water side, and so into the woods until it amounts to 200 acres and no more." In this ordinance, two restrictions are imposed: one is the maximum amount of shoreland frontage a person could possess and the second is the maximum amount of land that any one person could own. A similar ordinance imposing a 1:10 shore front ratio was passed in Pemaquid in 1683. That ordinance reads: "No one who takes four-score of land shall have of the said acres above 8 acres fronting to the sea, river or creek, and so proportionately for any who takes more or less ground." Though the records of early municipal ordinances are scant, it is not unlikely that many settlements had similar controls.

Finally, note should be made of the Plymouth Colony ordinances which contain the only example I know of a colonial ordinance explicitly dealing with public access to the seashore. In dividing the lands of the Plymouth Colony, the proprietors passed the following law in 1627: "That the old path ways be still allowed and that every man be allowed a convenient way to the water where-

Source: Kittery Town Records, Vol. I, October 21, 1651.

Source: Papers Relating to Pemaquid and Parts Adjacent in the Present State of Maine, Known as Cornwall County. Franklin Benjamin Hough, Editor. Weed, Parsons, and Company, Albany, N.Y. 1856. Page 79.



Photo by Tom Jones

Source: The Compact, with the Charter and Log of the Colony of New Plymouth. William Brigham, Editor. Boston. 1836. Page 29.

so ever the lot fall."

In conclusion, today's public rights to the sea-shore are derived from the Colonial Ordinance of 1641-47 which was passed in response to the conditions that existed in the 16th and 17th centuries. Because of the pre-settlement maritime perspective based only on using the shore for fishing purposes, and because of the fact that most of the early houses bounded on the shore, there is no direct mention in the Colonial Ordinance of the public's right of access to the seashore. As has been demonstrated, this does not mean that such a right did not exist nor does not exist. More likely such rights were merely eclipsed by the social conditions that occurred in the 16th and 17th centuries.

COWGER: Our next speaker is Sterling Dow, who has been the Executive Director of the Maine Association of Conservation Commissions for 7 years. He's a resident of Kennebunkport and obviously has been involved with issues like this at the local level for several years. He'll talk about the initiatives of the local towns towards improving shore access.

STERLING DOW: I am not sure if I'm going to be talking about that or not. I'm going to switch gears here because I am not a lawyer compared to just about everyone else. I would like to talk about what I think is happening at the local level in a practical sense.

Of 497 minor civil divisions or townships in the State of Maine, 493 have significant amounts of water in them (rivers, ponds, streams, ocean frontage), and I daresay it's probably a fact that almost all of those have insufficient amounts of access. I think that in a practical sense in most of those townships and certainly on the coast, there is access already in existence now; access points that do exist that the town has picked up over the years. The town may not know it owns them, but it does, and it may have been sort of quietly absorbed into some private property owner's backyard. In fact it's still there. In most Maine towns the access is known. Most selectmen (both existing selectmen and people who were selectmen 20 or 30 years ago and are still around) know where those access points are. But the selectmen, or other people in town who know about the access points, don't advertise them. I just want to talk a little bit about why and what's the problem. Then I just want to throw out what I think is sort of a priority approach to the whole thing.

There are a lot of problems with public access,

and I am not wholly convinced that having a lot of public access to the coast is such a red-hot idea. Let me just throw out some of the obvious ones.

First of all, there are not enough sites. If you create twice as many sites as are now in existence, you will still not have enough sites. In fact, the more sites you have, the more people are going to flock to all of those sites, and the more pressure there is going to be on each of those sites. Which is to say, in a given town that has no access now, or at least doesn't provide access to the public - it may have some but it doesn't tell anybody about it - as far as that town is concerned, the problem moves on. The people come by, they look for a place to launch their boat, they look for a place to walk down onto the beach or onto the rocky headlands, but they don't find any, so they have to keep going. As far as that town is concerned, that's its way to solve the problem. Obviously, if they opened up a place, the people would stop and utilize it. That's true, I'm sure, of all the towns. So, it's sort of a no-win situation in the sense that you can't supply enough access to the general public. There are 50,000,000 people within 8 hours of the State of Maine, and a lot want to see that water, for a good reason - it's a beautiful coastline. So lack of enough sites is a very basic problem, obviously.

Parking space is very difficult in a lot of these towns. How do you handle cars, and cars with trailers? A lot of the towns on the coast can barely handle the existing tourist trade in terms of the numbers of people trooping in and out, let alone providing space for people to park so they can go running around in their outboards.

Then there is the problem of what type of access you are going to have or develop. Are you going to have boat launching facilities, are you going to have a ramp and all of that fairly sophisticated set-up, or are you going to allow just car-top boats, which has been done on some of the inland lakes? The way you do that is to only allow walking access to the water, so people have to carry their canoes or car-top boats or whatever they can carry. That minimizes horsepower problems on the lake. Anyway, you can control, but you have got to make a decision what kind of access you are going to allow, and here you are talking recreational. I'll get into the economics in a minute.

Another problem that arises is if you have access and you publicize it, thereby making it open to the public, you are going to have to control it some way or another. You are going to have vandalism problems, you're going to have litter problems, you're going to have all the problems that come with just the general public focusing in on one area or another of your town.

These problems are controllable, but I would point out that recently there have been a couple of situations I know about (and I'm sure you know more) where there are some pretty serious problems arising: not just vandalism and litter, but in terms of real conflicts between the local people and out-of-town people. Incidents of pickup windows being smashed, people hauling off and hitting other people, because the local clambers couldn't get down to the water or because the local property owner doesn't want the clammer to get down to the water. I am just saying the scene is not getting better. It's getting worse because of the pressure on the points that do exist.

Another problem that arises - the town fathers know that if they use federal land and water conservation money, the so-called BOR money, they have to let in the general public, which is those fifty million or so people that may come trooping into town one day next summer, and the thought of that just terrifies them. So they may be inclined to allow public access, but they want to somehow restrict it to their own people, so they can say "No" to people from out-of-town. If they do that it means that they are going to have to spend more money to acquire the site (if they do not already have one). That gets down to one of the real basic problems that is hitting the Maine coast: the land valuations are rising so rapidly that the towns are being priced right out of access to water. Therefore, if any action is to be taken, the sooner the better. It's going to be twice as expensive in five years as it is now.

Those are some of the problems that I perceive. I just want to say a couple of things about what I think the priorities should be. The lawyers mention the business about access to fish and to fowl. I think that what was intended in the Colonial Ordinance was a survival mechanism to allow people to get to the water to catch fish to eat and hunt birds so they could be eaten. I think we are really talking about survival here. That's probably the original intent there, and we should

The Land and Water Conservation Fund is a Federal grant-in-aid program which provides reimbursement for the acquisition and/or development of public outdoor recreation facilities. Facilities constructed under the program must be operated to allow use by the general public without discrimination. The program is administered cooperatively by the U.S. Heritage Conservation and Recrea-

keep focusing more on survival. I think the people of Maine are pretty good at that. I think, therefore, that the priority is economics for the State of Maine. It should be an economic priority, which is to say that at both the local level and the state level, we should as a matter of policy favor the fishing industry as the

tion Service (formerly the Bureau of Outdoor Recreation, commonly referred to as BOR) and the Maine Bureau of Parks and Recreation.



Photo by John Ewing

highest priority. The economic interests of the fishermen, the lobster catchers, the clambers, the wormers, are the highest priority and recreational interests (which I suppose some could argue are part of survival) would have to come, certainly, second on the list.

So what I think should happen is, the towns, in their comprehensive plans, should say in fact that the economic interests of the fishing industry in their town (and this is true of most Maine towns, they do have some sort of fishing industry) is the highest priority. The town should in fact support that industry to any measure that it deems appropriate. This means the identification of the access points that already do exist. If you don't have any that exist now or you have ones that are really poor, identify one or two that are desirable. Do it quietly, don't make a lot of noise about it. Have someone (conservation commission, planning board, some local citizens) get together in the town office, go through the records, and find out what the town owns. Just do it quietly. Don't make a lot of noise. Then proceed to exercise this economic priority through some system. In other words, if you deem that the fishermen ought to have better access, then the town ought to get together with various funding sources which are becoming available through programs such as Coastal Zone Management, and start to develop good access for the fishermen to the water. That would mean acquiring the land in some cases; in other cases just developing the land. It seems to me that that's where the priorities lie, at least from my point of view, and I'll stop right there.

COWGER: Any questions?

FROM AUDIENCE: If you were going to comply with economic priorities, could you still do it with BOR funds if it would be for fishermen from all over?

DOW: I think the BOR money is slated for acquisition of land for recreational use. You don't have to exclude the fishermen, but you could not restrict it to fishermen.

NORRIS BRALEY: It could possibly with BOR have to exclude fishermen, since it's recreation funds. If the recreation people complain, they'll exclude the fishermen.

DOW: Yes, that's probably right. You don't necessarily, however, if everyone was satisfied, have to exclude them as a matter of law, I don't think.

BRALEY: You would as far as BOR is concerned. Take Wiscasset, for example, where they developed their water-

The State of Maine is now working to meet regulations of the Federal Coastal Zone Management Act for public access planning. There are no CZM funds available now for acquisition and development of public access sites, though money may be appropriated in the future for these purposes.

Norris Braley is Coordinator for the Time and Tide Resource Conservation and Development Project.

front. The reason BOR funds weren't given was because it had to be for recreation use, not for commercial.

ROGERS: What kind of development are you talking about? Are you talking about a port improvement?

BRALEY: A pier. Any BOR funds are primarily for recreational use. They just haven't been around to police them, but if people complain, and they will --

DOW: Which is not to say that there may not be other funds available, through the Coastal Zone Management Program, for example.

FROM AUDIENCE: The tax situation being the way it is, not many coastal towns are going to be interested in converting their private property to public property and take it off the tax rolls.

DOW: I'm not convinced of that.

FROM AUDIENCE: Then you're not paying any taxes.

DOW: Yes, I certainly am. I pay a good deal in taxes. I know of one town, the town I live in, where the town fathers are going full blast ahead to provide facilities for the fishermen because they believe they have a higher priority. You're talking about taking one piece of land off the tax rolls, which is paying right now on the order of \$1,500 a year in taxes, and providing a fishing pier which may bring in to the town enough fish to enable a processing plant to get started and who knows how many people employed, and on and on and on, which the town views as a much higher interest.

FROM AUDIENCE: It's the same thing for the recreation industry - hotels, restaurants...

COWGER: Of course, one of the reasons for holding this workshop is to possibly identify existing sites that don't have to be purchased. That eases the burden on everybody.

NAT BARROWS: Tad, your planning of priorities is really music to my ears for the fishing industry. I want to take it a little bit further in one specific case, or cases. In my area of the Maine coast land is held by several people who as they acquired property have stopped informal access by diggers across their lands, often in isolated areas where there aren't roads close to the shoreline. The diggers have to cross fairly long pieces of property, some of which may be lawn and some of which may be wild shoreland, and this is a real problem separate from the town purchasing a piece of land where they're going to put a pier, let's say. What sort of mechanisms do you or anyone else here

Wiscasset developed a waterfront facility in 1976. Because use of Heritage Conservation and Recreation Service (HCRS) funds would have limited the facility to recreational interests, the town decided to take a Resource Conservation and Development Loan through the Farmer's Home Administration. The facility is now used by both recreational and commercial interests.

According to the Bureau of Parks and Recreation, the guidelines for use of HCRS money are somewhat flexible. In general, commercial uses are excluded; however, proposals are considered on a case-by-case basis, and a portion of development costs for a combined recreational and commercial facility may be provided. The Bureau of Parks and Recreation is available to review public access development proposals to see if they are eligible for at least some financial assistance.

Nat Barrows is President and Chairman of Fisheries Communications, Inc., publishers of the monthly newspaper Maine Commercial Fisheries.

see that town officials or planning boards can provide for an informal foot access for diggers, separate from acquiring a corridor down to key coves. Some of these coves are worth 50, 80, or 100 thousand dollars a year, believe it or not, in terms of income from gross sales of the clams and worms. What sort of mechanism do you see as possible here? Has anyone been involved in that at all?

DOW: I think that if the landowners are not disposed to allowing the clambers to cross their land that the town would have to exercise its power. I don't know if eminent domain is possible under those circumstances, -I'm sure the lawyers would. I would think that the town would have to press very hard to make sure they get that access. They may have to condemn some land. I don't know.

BARROWS: Could it be done as a matter of the town plan or zoning ordinance that informal access was permitted across these lands for diggers for commercial or economic use, or is that illegal?

ROGERS: There are two aspects. One aspect is litigating a whole common law right, the sort you're talking about. That would be the best to take to court with you where you had a so-called survival right - in other words, a fish or fowl right - that was being abridged by a landowner, and you had alleged abridgement of those basically common law rights even though it was never articulated in the Colonial Ordinance.

Assuming that fails (I have no idea whether it would or not), then I think you're faced with the question of what kind of right could the municipality or the state assert on behalf of the clam diggers through formal action. It would not be by zoning. If there's not a right in that class of persons to trespass, then the zoning cannot help them. Zoning has to do with restrictions of rights, restrictions of the landowners use, for the general public benefit. It does not generally involve a servitude for public access. This is what the Supreme Court said in the State vs. Johnson. It's one thing to zone a wetland for preservation by stating that the common good requires that this land not be developed. That is a restriction for the common good imposed on the land owner's option to do with as he wants with his property, provided you don't deprive the property owner of the value of that land. That's constitutional, that's legitimate zoning. But if you say that you're going to provide an access across that land, assuming there's no

fundamental right to that, then that's not zoning, that constitutes a taking, and I think you're going to have to pay something. You're going to have to pay either for an easement for a public right or you're going to have to buy it and pay the full fee value, and that can be expensive. Either one of those can be expensive.

DOW: Could the towns use eminent domain?

ROGERS: I would think they could. It would have to be designated as a public way. I don't think you could restrict it to clam diggers if you did that.

FROM AUDIENCE: Isn't there an exception in Camden's town ordinance (I suggest that somebody read it, it's been a long time since I studied it) providing that if somebody is breaking his land into a number of portions, then some portion of that land has to be made available for public use?

ROGERS: That's a little different. Glad you brought that up - I should have. That's an exception. That is where you actually are talking about someone doing something with his land to further develop it. You can restrict that future development by all sorts of conditions that are reasonable protection of the public health and welfare. If there has been, for example, traditional use of lands or there has been no explicit prohibition of them for certain public uses, you can provide that if that land is going to be subdivided or otherwise developed, there's going to have to be some access or improved access to a lake or to a shore or something like that. Yes, indeed. That can be a condition to exercise a privilege under a zoning law. But, I'm talking about (and I think that is the context in which the question was asked) the situation where X has three acres and a house on it, can someone say, "We're going to zone it for a public way through there." I don't think so.

DOW: I'd just like to follow up on that, I think that's really good. Anybody that's on a planning board, if you get a subdivision thrown at you that borders on waterfront, lake, river, or ocean, make sure you get the developer to agree on at least a foot access from the road, as it comes into that subdivision, through to the water, so that the public can at least get to the water.

MONCURE: Practically speaking, he's going to increase the value of his lots by providing access. In other words, any developer that I've ever worked with has said, "alright, here's my right to way to the frontage which increases that value of the back lots." he does

it for selfish motives, but he accomplishes what we're looking for. On his plan that he lays out there's a right-of-way. Most of the ones that we see go through Harpswell don't provide for whose benefit that right-of-way is for. In his deed the developer will say that together with all rights-of-way as existing on a certain plan. I have seen it interpreted that by doing that he creates a public right-or-way, not only for other land-owners, but for everyone.

Some developers, the high-powered ones, will restrict a right-of-way to only those owners of the lots in the development. It is then incumbent upon the planning board to push the developer into dropping that restriction, and you'll be surprised how quickly he'll fold.

COWGER: Any questions?

BARROWS: Yes, Joel, one last thing. I'd like to address any member of the panel on this question. What's your assessment on the present judicial climate for some sort of test case establishing what Tad is talking about in terms of economic priorities - fish and fowl access to the shore?

REEVES: That question is very hard to answer without knowing the specific facts of the case which you are trying to demonstrate. I would say that traditionally the judicial posture, particularly in Massachusetts, has been extremely negative. Fishermen that claim a right to go across land to reach flats usually must base their right on unwritten practices or customs, and I would say that generally in this country (not so much in England, at times), custom has received very short change by the judiciary. As a general rule, American courts bend over backwards to disprove that a custom exists. So if you present your case in the context of custom, you should have a very strong case to present. In such a case the basic conflict is between public rights versus the interests of private property owners, and since the mid-nineteenth century the courts have favored the rights of private property owners.

ROGERS: But isn't there a right for public use between high and low water mark?

REEVES: In Maine, yes, there is. An extensive one - you can bathe, swim. Unlike Massachusetts.

ROGERS: So the public use is protected. It's just a question of getting there. Say you had a case where you could establish that six generations of Mainers had been crossing certain unimproved land to get to their clamming flats. I couldn't imagine a stronger case based

on custom than that. And suddenly you're faced with a "No Trespassing" sign. That would be the strongest possible case to take to court.

I couldn't predict how you'd come out on that, but there's a chance you might succeed. There's no explicit statutory law that's going to help you - in fact there are inferences from statutory law which are against you. I think that the fact that they did carve out an exception for right of access on foot to Great Ponds suggests that they did not intend one for bays, coves, rivers, and so forth. But that's not conclusive.

BARROWS: Another judgment question. Do you think that it would be worthwhile for perhaps an association of diggers to get together and try and do a test case, much as in the past test cases have gone through which changed the residency requirements for lobster licenses a few years ago, which created quite a lot of turmoil in the industry (perhaps negatively, perhaps not) but in this case we're talking more positively.

ROGERS: I wouldn't want to give an opinion on that.

DAVIS: I'm not an attorney, and I'm lost here - perhaps I shouldn't even be here, but I would think that you would lose that case, because generally the public never stands up for its rights. There's nobody really looking out for the public's rights. I've found that in my research. When I find that there are public lands and what not, that they actually do belong to the public, there's no one really to contest it on the public's behalf. At times you really almost have to force the public's rights, because there's nobody assigned - directly assigned - to the public, at least that I can find.

ROGERS: I think that's a fair statement.

COWGER: Well, that should lead right into your presentation, Garland. Garland Davis is a real estate broker in Brunswick. He's a member of the Maine Historical Society, and a former representative to Cumberland County. He was a former Soil and Water Conservation District representative to the Time and Tide RC&D Project, and has served on various town boards and commissions in Brunswick, including the Rights-of-Way to Water Committee, which located 14 public access sites. Garland has also been a member of the Brunswick Conservation Commission. Garland will be talking on methods of recovering lost or abandoned public ways.

DAVIS: As I said before, I'm sitting in the wrong spot, I'm sure. All the legals are on both sides of me, and I'm usually the opposite. I'm usually for the rights

Garland Davis is now a Brunswick Town Councilman.

of the public.

I was not a real estate broker at the time I got into this - I got into it by accident. I originally started by looking for Brunswick's Town Commons. There was a common land in the town somewhere, but nobody knew where the boundaries were. I took the historical routes, and found my way through, and found that I could find the boundaries of the Brunswick Town Commons, and it was officially declared that the boundaries were intact and still existed.

As a result of that, the town formed a rights-of-way to water committee, to keep me out of mischief I think, so they would know exactly what I was doing. In my research I found that Brunswick was settled early in the 1600's, and as these gentlemen have stated, all the modes of transportation up to about 1750 were by water, and almost all the houses were on the shore. Almost all the communities that were developed along the shore that had a river, an inlet, or a cove, put roadways connecting those shores to the river or the inlet, and they usually went across peninsulas also. We found that anyplace where you had a shipyard (and there were certainly a lot of shipyards along the coast of Maine in our area) the businessmen got the town to take over the roadway to that shipyard, and it's a general rule that they made the community maintain it as far as they could. Usually it went right to the pier - right to the shorefront.

My purpose was not to decide what the use of this public property would be. My job was to identify public access points as thoroughly and as quickly as possible, and let the planners and future generations decide what to do with them.

We talked with some of the old people who used to pack snow in the winters for the town. They knew which roadways they used to pack for the horses and wagons. That was a place to start looking, to see if it was an official town way at one time. We'd go and see if we could physically find evidence of a roadway. When you're traveling along the shore or when you're traveling along the roads, you can see, if you're looking, what originally were the clearings right through the woods. You can tell by the trees, because you get different tree growths. Then you go to the Registry of Deeds and check the abutting property owners, to see if in fact the land borders on a road. From that step, you go to the town records and see if it had

been accepted (it's pretty difficult to locate at times) from a house or from a shore to a certain place. Usually in the records there's a lane from one farmhouse to another. The reason they made the roads that way was because everyone wanted to get to town with the produce, and there were many roads prior to automobiles. The roads were fairly inexpensive to maintain then, and people usually went in almost a straight line, or as near as possible, from one point to another. When we couldn't find that they had ever been eliminated from the town records, we presented them to the town attorney for his opinion as to whether it was a public way or not.

The main thing is to identify and mark the public ways. It doesn't make any difference whether you use them today, tomorrow, or a hundred years from now. A good example is Brunswick's Twelve Rod Road, given to the town in 1719. It appeared on plans of the town in 1742. There were two roads that appeared on the plan, but they supposedly lost the boundaries to it. Now they have been located. The town saved an immense amount of money a few years ago because of the wide road. Instead of putting the sewer mains right down the middle of a freshly paved street, they went over on the side and put the mains under the grassed areas and saved about \$75,000 on just the one construction project. The main thing is to identify the right-of-way. Even if you're not sure whether it's a public right-of-way or not, identify all of them and let the town attorney, if you have one, determine whether it is a legal town way or not.

COWGER: Our final speaker tonight is John Moncure. John is an attorney in Bath, and a resident of Harpswell. He is now the president of the Harpswell Conservation Commission. He was formerly an attorney in the Admiralty Shipping Section of the U.S. Department of Justice, and previous to that was legal officer of the Brunswick Naval Air Station. I'm not sure what you're going to discuss, John - it's probably not going to be what we had down on the agenda.

MONCURE: Strictly, I could say that according to what my topic is, "What to do with identified access routes," I could facetiously say "nothing," because that is really what Harpswell has done once we had established our claim.

Garland's primer that he has prepared for you is almost a verbatim account of what we did in Harps-

Garland Davis' access recovery methodology is reproduced in its entirety in Appendix IV.

well, at least through Step Four. This was all done, by the way, before I became President of the Harpswell Conservation Commission.

Garland has done it before, Harpswell has done it before, and what they originally did was this: some very active, aggressive members of the Conservation Commission who had the time got together and said, "Here's a good project - let's identify access to the water." They started with the town records, and they talked with the old-timers around the town. They went through the town records, they went back so far as to go into Boston, where some of the town records were stored (I don't know the historical context, but there were some town records in Boston). They went all the way back, brought everything forward, they reviewed every town record they could find. In the early days, the records of donations were kept at the town meetings. They wrote down all these possible locations, they talked to the old-timers, the fishermen, the people who had lived there all their lives - and asked them where the locations were. They were, according to the people I talked to before coming to this workshop, the most accurate sources of where these town ways were located.

A surveyor was then hired - a local boy named Billy Coombs from Bailey Island who knew the island well, and knew the Town of Harpswell very well. He talked to people, he took the list that was prepared by the members of the Conservation Commission, and he went down and inspected each site himself just to see if he could find points - to see if they were marked. I don't know how many he was originally given (we eventually located thirteen), but of those thirteen he was able to find ten, and there were accurate deeds to seven of those. He then talked to the abutting owners, very low-key, just asking them if they believed there was a town way there. The old-timers would say, "Yes, it's over there somewhere," and had a pretty good recollection of where the town way was. The new people, (and I'm a "new people"), generally said, "No, no town way near my place. I own all the way as far as you can see," and they didn't know anything. They did it out of ignorance, but politically it was a real hot potato. So when Billy ran across those problems, he went to the Registry of Deeds, and he searched the titles. He didn't do a full title search, but he looked at the descriptions.

Now I have to part ways with Garland in paragraph five of his methodology, where he says that anyone can go to the Registry of Deeds and do this. I think it really takes someone who can read deed descriptions. It doesn't take a long time to become trained at how to read deed descriptions, but you at least have to familiarize yourself with how to read deed descriptions and how to locate places on the face of the earth. Active members of a conservation commission can do this if they have the time to go out, get a deed, here's this point, here's that point, learn how compass calls are made if they are done by compass calls, and get a feel for what it is. Fortunately, we had Billy Coombs, who was paid for it. I think we ended up paying him about \$2000, but it was two years' work. He did it on weekends.

What we did then was the following: Billy located these either through pins in the ground or by deed research. He talked to abutters at that point, and then then he located the points and placed pins on the face of the earth. Then, most importantly, he did plans for every one of them and we recorded them in the Registry of Deeds. If nothing else, I would say that this is a great legacy of the Conservation Commission. What it does, really, is to state a claim saying that the Town of Harpswell owns this piece of land. It's one of the few ways that you can put everyone on notice (other than perhaps by posting on the land, which you really don't want to do, for political reasons).

O.K. What have we done since then? The Conservation Commission was very proud of the work that it did, so we wanted to beat our chests and put our thumbs in our lapels, and brag to everybody about how we located these access points. We then went to the selectmen and we said, "Boy, we have this beautiful plan. Not only do we have thirteen small maps showing where the access points are, but we have placed the locations on a big town map. The town meeting is coming up, and we would love to post this thing at the meeting." The selectmen said, "You're out of your minds." There was no way we were going to post those maps.

That's all we've done, and that was two or three years ago. The reason for it is that the locals know where they are and use them, while the out-of-staters don't know where they are, except for Land's End. It's a political hot potato.

One of the reasons is parking, and it's a problem.

The more people you get down there, the more problems you have with cars, the less access they're going to have. I live in Cundy's Harbor, and in the summer there is a beach which was donated to Cundy's Harbor residents. The word has gotten around. My wife goes down to this lovely little beach. Unfortunately the parking is so bad now that my wife can't go there anymore because she can't park within half a mile of the beach. These are Cundy's Harbor residents, most of them, but the problem is that we have an infant and my wife can't carry the baby. But it's tough - the more people who know about it, the more their rights are going to be exercised, so there has to be a balance. We haven't found the answer yet. The real problem comes not in the footpath, but in the parking to obtain access.

DAVIS: I'd like to make a remark. I said that I was not in real estate business at the time I started my research, and I'll say again that I had no training. I had a pretty good imagination, I could understand English, and I could look at a map and pretty well understand it. Other than that, the deeds which were researched, the Commons which were researched, were all done by an amateur. I agree that we should not have hundreds of people flocking to the Registry of Deeds, if they don't know what they're doing. However, I did go to it, and I was quite capable of reading the deeds, in particular...where it might say "bordered on a 4-rod road" or "bordered on a road." It doesn't take an expert to read that part, to understand whether it was on a road or not. I guess I could be an attorney - I've disagreed with two here!

The other thing is, John has affirmed what I said before - there is nobody looking out for the public's rights. That's what I hope you are all here for. You must locate those public ways and try to identify them and put them in such a manner that they do become part of the town record. Again, I don't care if you use them now, it doesn't make any difference, but the main thing is to mark it in such a way that it is a public way.

The lawyers here have not touched on what constitutes a public way, a private way, and a town way. It might be helpful to our audience if they were identified. I'll go ahead, and you can correct me if I'm wrong. A town way is one that has been accepted by the town as a public way. A private way is not for public use - it's just for the use of the people who

have the property. A public way may never have been accepted by the town officials or by any other officials as a road. However, the public has the right to use it - any member of the public, whether from Maine or anywhere else. Every community has public ways that they have never accepted as town ways, but they are maintained by the town. They are in Brunswick - there are a tremendous number of roads and streets that are public ways and the town still maintains them, but they have never been officially accepted by the town. The rights to each one of these ways - town, private, and public - are different, and I'm not sure what they are, because that is not my field, and I wasn't really interested. I just tried to identify which it was.

FROM AUDIENCE: What about the case of a subdivision where the planning board says a road has to run down to the water, and the developer starts selling off lots. Now I assume that road won't be taxed, or will it be taxed? What if the town doesn't accept the road for ten years - the developer says that he wants to keep it a private road, and the people he's selling to want to keep it a private road, so the developer, I suppose, pays the taxes until the point when the town accepts the road. Is that true or not?

ROGERS: Well, I think it would depend upon the particular terms of the deeds in question. In other words, it could be provided that each owner would pay for his share up to the time of acceptance by the town. Or it could be provided that the original developer would assume the liability.

FROM AUDIENCE: I'm going to guess that most of the deeds are just a description.

ROGERS: Yes, but the deeds would say whether or not the owner is subject to a servitude.

DAVIS: If it is a subdivision, where the lots are sold off by numbers, and the street is shown on that plan, and is filed, then that street becomes a public way, and is not taxed. The individual lots that are sold off are taxed. Mere Point in Brunswick is the same way. The street is not private if the lots are sold off by numbers on a street.

FROM AUDIENCE: Can a planning board require of a subdivider that the road going through the subdivision ends up at the shoreline, and be accessible to the public? I guess that's what I'm really asking.

DAVIS: Well, that all depends on what the town's subdivision ordinance calls for. In Brunswick now

Tom Reeves has supplied the following definitions of town ways, public ways, and private ways:

Town ways are highways which are maintained by the towns and which have not been classified as state highways or state-aid highways by the Maine Department of Transportation.

A public way is a way open to all people without distinction for passage at their pleasure. Highway and public ways are used interchangeably and both have the same meaning.

A private way has two meanings which have obscured the use of this term.

By statute, public way is defined to be a public easement. Public easement, in 23 M.R.S.A., § 3021 (1978 Supp.) is defined as follows:

"Public easement means an easement held by a municipality for purposes of public access to land or water not otherwise connected to a public way, and includes all rights enjoyed by the public with respect to private ways created by statute prior to the effective date of this Act. Private

ways created pursuant to sections 3001 and 3004 prior to the effective date of this Act are public easements."

Private way also has a

the subdivision ordinance calls for construction of streets to town standards before it's ever approved.

FROM AUDIENCE: Is that language enough to allow the community to get to the water?

DAVIS: Yes, if it's a dedicated public way on that plan. If you follow the newspapers, you will see somewhere along the line the outcome of the suit in Bruns-

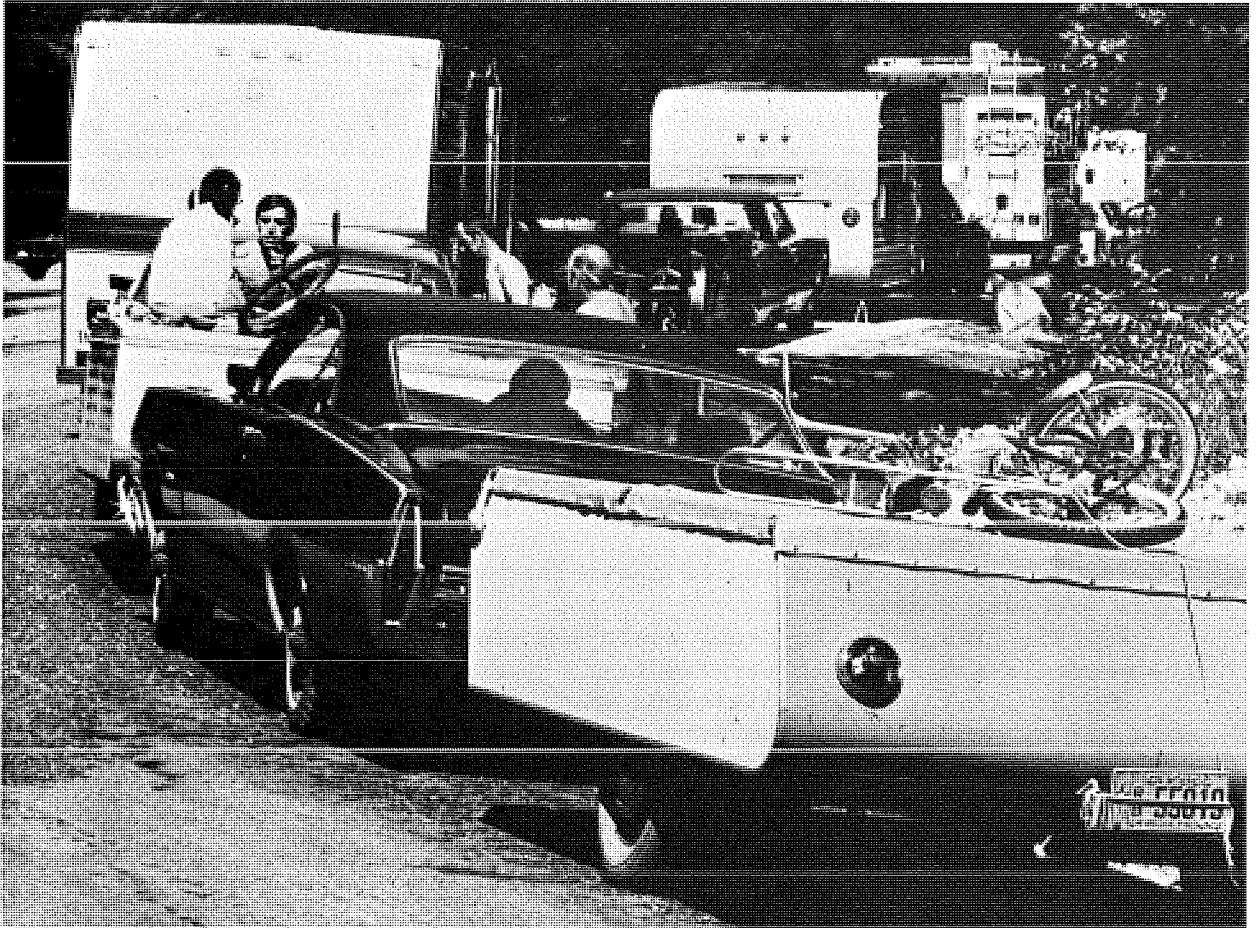


Photo by Tom Jones

wick in relation to Mere Point. Now that was a subdivision which was laid out in 1876, with a plan showing four streets on it, lots by numbers, parks, and park and recreation area. The town has not maintained it - they offered to maintain it in years past, prior to 1920. At that time there was not that much travel anyway, most of it being by water until then. The case has been run by some housewives who had no legal training, they did all the paperwork all the way through, and presented it to the town attorney. The town attorney is pretty sure he has a case. But there was a barrier on the road, and it was taken down. Watch and you'll see the outcome of that, because I think this is the first one that has ever been tried and tested in Maine. If the public has the right to use a roadway, someone has to clearly distinguish that right. So it will take a court action now to see if they can take the public's right away from them.

COWGER: (to member of audience) Sir, are you on a planning board? A selectman. Are you looking for specific language to use in a comprehensive plan to ensure public access in subdivisions?

FROM AUDIENCE: No, I was just wondering what your opinion is as to how a planning board can assure themselves that when they designate a road on a subdivision plan as being open to the public to get to the water, that the access will not in fact be private.

COWGER: You would have information on that, wouldn't you, Tad? The type of language to include in a comprehensive plan or ordinances?

DOW: Well, the cases that I've seen, the planning board asks the developer to come back with the preliminary plan. The planning boards may say, "Well, we want a footpath," which by the way is sometimes a good compromise in that situation because the developer may not want to impose on those prospective homeowners the problem of cars parking all over the neighborhood. Anyway, the planning board may say, "Give us a five-foot swath down at this end of the subdivision to the water," or "Give us a road" if the board really wants road access. When the developer brings the plan back, the agreement is on the plan, written in, and the planning board then approves the plan. The plan is recorded and all that. Then say there's a five-foot path - that path is for the use of the public. The only problem is the public can't get to the path because it's still a private road. The road at some

second meaning as merely a passage or road over private property in which the public possesses no special rights.

The Sea Point Land Company, a summer colony at the end of Mere Point in Brunswick, contends that the loop road through the colony is private, since the road has been maintained by the Company for many years. In 1977, to prevent traffic flow around the loop, two barriers were placed in the road near the end of the point. The Town of Brunswick removed the barriers shortly thereafter, claiming that effective police and fire protection was not possible with the barriers in place. The Sea Point Land Company has now taken the controversy to court.

There are possibly public rights-of-way to the water at the end of Mere Point. If the court rules in favor of Sea Point Land Company, there may be no land access for the public to the rights-of-way. The outcome of this case could have landmark implications on public access rights in Maine.

point in time (presumably it has been built according to some standard the town may have) then goes before the town for acceptance. Once the road is accepted, of course, the public has access all the way to the water. If the town turns down that road, then the public still can't get to the beginning of the path.

DAVIS: It's a very poor policy for a planning board not to define at the initial presentation who is going to have the maintenance responsibilities for the road, because sooner or later the developer says, "Well, the lots are drawn off and there's nothing left but the road." If there's nothing in writing as to who would maintain the road, the town would automatically have to take over and maintain it, because it would be abandoned property.

MONCURE: Another good tool that I would suggest for planning boards is that they put the restrictions and the rights right on the plan itself - print them out right on the plan - so they are recorded. What a lot of developers like to do is to promise the moon at the planning board meeting, giving all kinds of restrictions and conditions that they won't impose on their deeds. Unless you get those restrictions and conditions recorded on the plan, that's the only sure way to ensure that those restrictions and conditions will be met.

FROM AUDIENCE: Isn't there a state law that creates access to property if the land has been travelled for twenty years?

MONCURE: No, it's not a statute. I think it's an adverse possession, the twenty years. But the prescriptive easement is just by use.

FROM AUDIENCE: Well, would that create access to water?

REEVES: Yes, it could. It has been done in a few instances.

FROM AUDIENCE: So if the public - clam diggers, for example - have been using a way for twenty years, does that create a right?

REEVES: The key thing is that it has to be adverse, and proving that is very difficult.

DAVIS: I think you're talking about two different things. Adverse possession is not really what the lady in the audience is talking about. She's talking about usage.

REEVES: But in order to obtain a prescriptive easement, it would have to be done openly, notoriously and

Tom Reeves has supplied the following definitions of adverse possession, prescription, and prescriptive easement:

Adverse possession, as distinguished from adverse use, is a method of acquiring title by hostile possession for a statutory period under specified conditions. In order to gain title to land by adverse possession, one must prove that the possession is actual, adverse to the original

adversely. In other words, if the clam digger has an understanding with the property owner that involves his permission, there is no longer an adverse use.

FROM AUDIENCE: Is that necessary?

REEVES: Yes. You see, if the clam digger has the landowner's permission, that wipes out the idea of adverse use. Then he merely has a license, and whenever the landowner chooses to terminate that agreement, the clam digger's right of access will cease.

ROGERS: Then it becomes, factually, a very dicey situation. For example, in some jurisdictions, if the landowners have made some acquiescence to people to use their land for some purpose like that - to cross it to get to some other part or to get to a swimming-hole or whatever - they'll put a chain across that path once a year or so just to let the public know that they only have a license to use that land, and that the owner can terminate that license whenever he wishes.

FROM AUDIENCE: But in many cases, traditionally, land to the sea has been used for access to clam diggers and then when the land is once sold, that access is closed off. But isn't that access guaranteed to the public?

REEVES: Not necessarily. In the few instances that there has been litigation over this issue, the courts have bent over backwards to find against any such right of passage. One of the concerns of the judiciary, though generally not articulated, is that if they find public rights of access based either on custom or prescription, landowners will react by terminating friendly arrangements for access out of fear that these arrangements will ripen into irrevocable rights.

COWGER: So you are saying that you may be losing more than you are gaining by granting such rights. At least that is what their theory is.

REEVES: That is what the theory is, yes.

DAVIS: But that has not been tested in the State of Maine.

REEVES: There may be some 19th century case law involving attempts to get access to the seashore, and I would say that it depends on the particular facts of the case.

BRALEY: I'd like to ask Tad something. Are you advocating that we should have minimum amounts of access to the shore?

DOW: No.

BRALEY: I get the feeling that you're saying that

owner, under claim or right and continuous, open, notorious and exclusive for a period of 20 years.

Prescription concerns itself with the acquisition of what are called rights in the land of another such as easements, public ways, and water rights but it does not involve gaining a full and complete title to the property. Like adverse possession, prescription involves the gaining of rights by acts which are adverse to the original claimant.

A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed. Acquiescence does not mean license or permission in the active sense but passive assent or submission. The public as well as an individual may acquire a right of way by adverse use.

Acquisition of rights of way by adverse use is also governed by statute. See 14 M.R.S.A., § 812.

we should stay away from it, even though the problem is getting bigger all the time.

DOW: O.K., I separate it into the recreation on the one side, and the economic on the other. As far as the economic side is concerned, which I consider a much higher priority, the towns ought to get in back of it as a matter of town policy, as well as the state getting in back of it as a matter of state policy, to provide for all fishing, clamming, worming, lobster-catching, whatever, within each town where in fact this is an industry. From the town's point of view that means that if they are going to provide facilities it may cost some money to maintain it, to keep it going, they may have to hire some people. O.K., the town ought to get into that business, and maybe agree to appropriate money. In other words, if the town accepts the comprehensive plan which states that this is a matter of town policy, then the townspeople should take the next step and appropriate the necessary money to implement that policy, to provide that economic access.

As far as the recreation side is concerned, a survey that was done recently (by Northeast Markets, I believe it was) asked a lot of questions about public access on the coast.

ROGERS: Of whom?

DOW: Of natives and non-natives.

ROGERS: On the coast?

DOW: Living on the coast.

COWGER: It was statewide, having to do with both inland and coastal residents.

DOW: Yes, I guess there were some inland questions. One of the conclusions that came out was that respondents who were lifelong Maine residents favored increasing public beach rights, while non-natives did not, with the exception of non-coastal respondents who had lived in Maine less than five years. The second thing is that everyone felt that the amount of land along the coast was inadequate, and of the amount that should be purchased, a majority favored the state two to one over the federal government and three to one over local government as the agency to acquire the additional land.

It seems to me that if we're talking about recreation, then we should be talking about the state playing a major role, at least as far as these responses are concerned, and I would tend to concur with them. I think the Bureau of Parks and Recreation should really focus on that issue, and they are focusing on it. They

This, again, is the 1977 Maine Recreation Use and Preference Survey, A Look at the Coast.

The survey found that 51% of lifelong Maine residents favored increasing coastal beach rights. The survey also found that 37% of the respondents who had lived in Maine for less than five years, 40% who had lived here for between five and ten years, 43% who had lived here for more than ten years, and 45% of the lifelong residents felt that existing public coastal shoreland was less than adequate.

have just come out with a draft document which starts to talk about the whole issue on the coast. Nothing is really concrete yet, but they are moving in that direction, and I think that they would argue that from the recreational standpoint, that is one of their major obligations. I would tend to shift that work away from the local level to the state because I don't think that work can be done on a spotty local level basis.

ROGERS: As I recall, at a prior meeting the Director of the Bureau of Parks and Recreation, Herb Hartman, said that perhaps the state could help in the acquisition of recreational access and so forth, but that he would favor local administration rather than state administration.

DOW: He does, because his agency right now cannot handle what it's got.

ROGERS: That's right, and he also said that in terms of priorities overall for recreation in the state, that inland lakes have a higher priority right now than does the coast in terms of what his surveys indicate to him in terms of demand. But if you look at the question of coastal use, it seems that while there is comparatively a lot of public access in the southern part of the state, when you get further north it is few and far between.

I'm not talking in terms of beaches, I'm talking about points of access - it's hard for people to know where they are, or to come by them. If you look at beaches in the mid-coast range, you can go to Reid State Park or Popham on a summer weekend, but it's crowded to the point where people who don't live on the coast stay home, rather than try to go down to a crowded beach. Or they go to an inland lake, because they don't want to fight the mobs. So there must be some pent-up demand there.

DOW: No question about it.

ROGERS: And I just wonder from a standpoint of public policy whether or not that ought to be really wrestled with in terms of public access. It seems to me that an argument could be made that from a recreational standpoint there is hardly anything better for people than to get out on the water, and those sorts of activities ought to be encouraged rather than discouraged. I mean, you talk about vandalism in regard to clam diggers who are frustrated because they can't get to their clam flats, I can understand that frustration. But I can also understand the frustration of people who simply can't get to the shore, and are

A report, The Maine Coast: Recreation and Open Space, was released by the Bureau of Parks and Recreation in May 1978.

resentful about it.

DOW: True. I agree with you. I'm just trying to get to survival vs. recreational needs. In my own mind there is no question about where the priority lies. I think there is a tremendous recreational need. There is no question that the existing facilities are way overstressed now. But I think the recreational problem can better be handled at the state level, and that the economic access of handling how the fishermen in that town actually get to the water so that they can improve their catch, which is hopefully going to increase with the 200-mile limit, I think that's better handled at the local level.

ROGERS: So you agree with me on the question of need, only you think the state should handle the recreational aspect. But what if we're faced with the situation where the state's not going to do that?

DOW: Well, I don't think we're going to be faced with a situation where the state is not going to do that. I think it's a question of whether the people in the state think that the state ought to do that, and if they do, they will put enough pressure on the state. The state will respond in kind.

FROM AUDIENCE: Nobody has mentioned private enterprise and private tax-paying operations here. I know that the fishermen have gotten together in some places and have built their own facilities, and not relied on the back of the taxpayer to carry the load. I'd like to hear some remarks about encouraging private tax-paying, free enterprise operations rather than sopping up tax money.

ROGERS: Well, I think that one answer to that point is that the tradition of Maine fishermen has not been largely to...

FROM AUDIENCE: Down in Boothbay Harbor the fishermen have gotten together and bought a whole freezer plant, and they're operating it. They're bringing in fish and lobsters, so if they can do it...

ROGERS: If they could do it, they could do it. That's what that proves. It doesn't prove that someone else could do it.

FROM AUDIENCE: I would just like to hear you people suggest, along with your other suggestions, that you don't rely upon the state or the town or the federal government to do it.

ROGERS: There's a good theory, though, for providing public access for clam diggers or fishermen,

The Boothbay Region Fish and Cold Storage Plant, known locally as "The Freezer," was destroyed by fire on March 21, 1978. Stockholders have considered various options for financing the rebuilding; some options involve government financial assistance.

particularly for those who have traditionally been able to enjoy it, and that access has been part of their way of life. Secondly, there's good economic justification for it. That is, if you provide access and it's known to the fishermen so they can get to their clam flats or to their boats quickly and at minimum cost, presumably the revenues that result will more than pay for the right of way involved, so the whole community benefits.

I mean, I think you can push the notion of private enterprise to the point of absurdity. Where it works, fine. Where it doesn't work, that's where the government action is necessary, and that's where people in the community should step in and work together.

FROM AUDIENCE: I guess it depends on whether you're working for taxes or sopping them up.

COWGER: I think certainly in terms of finfishermen and lobstermen, private enterprise can work very well.

FROM AUDIENCE: I know it's worked well in one place.

COWGER: Sure. But in terms of clam diggers and wormers, that's a different problem.

FROM AUDIENCE: You mean the worm fishermen here in Wiscasset should be subsidized by the government?

COWGER: No, no. I'm saying that they are the people who need the access to shore, and they can't afford to buy shore access. Clam dealers certainly don't provide diggers with access to flats. I mean, I agree with you in terms of finfishermen and lobstermen, but I think if you're talking about clam diggers and wormers, it's a totally different problem.

FROM AUDIENCE: Well, a lot of clam diggers use boats.

COWGER: A lot of them *have* to use boats, that's part of the problem.

BARROWS: There are two separate things we're talking about: fisheries products that need a dock to get to shore - lobsters or finfish, and the diggers - the clambers and the wormers - who don't necessarily need a dock. The financial incentive of private enterprise to put up a shore facility for clams or worms is not there. Most clam and worm buying stations in Maine are on roads, because they rely on the trucking industry and can't afford to be on the shore. There is a lot of private incentive to put in a lobster or finfish pier because you have to have the pier to get the product. So there are two different things you're trying to deal with here.

FROM AUDIENCE: If I have heard correctly, there are

some differences of opinion about access to the shore over private property. There is no question, from what I've heard tonight, that access by water is generally accepted. Is that right?

COWGER: Correct.

FROM AUDIENCE: That creates a very interesting situation for someone who owns an island, where all access is by water. How far can they go?

REEVES: High water mark.

ROGERS: For use.

FROM AUDIENCE: Except by burglars and vandals.

I'd like to know if anyone can block off a road that was used for many years. Part of it is still in use, and is designated as the Old County Road. It's definitely established as the Old County Road. I'd just like to know if any of the abutting landowners can block the road off, lay a telegraph pole across it, and in that way keep people away from their yards.

DAVIS: The road running from Yarmouth to Whiskeag Creek, laid out in 1764, in Brunswick, is just such a road. It was a county road, connecting Yarmouth with Bath. There were five accesses to water found on that roadway. Five years ago the town said it was not a public way, and would not maintain it. I did the research on it, and part of it now is called Peterson Lane and there are some rather large houses on it, with some mobile homes on the other end of it. But it's still a county road, and they just stopped using it because it wasn't necessary. They stopped using it about 35 years ago, I guess, but it was still a public way, still a county road, 66 feet wide, and the town was obligated to maintain it. They did build the road so that people could build houses on it.

There's another case coming up in Brunswick, involving the Old Litchfield Road leading from Freeport. Properties are bounded by the Old Litchfield Road, that's what it's called. Freeport has acknowledged the presence of the road without question. The road continues right on through Brunswick, but as far as Brunswick is concerned there was never a road there. Of course there was, but someone has to do the research, and someone will have to prove that it was there, and that anyone has a right to it. But anyone can stop you from doing anything, if you let them.

ROGERS: Where was this road, this Old County Road?

FROM AUDIENCE: Part of this road was discontinued because they built a bridge across the river. The

stagecoach used to cross the Medomak River by ferry boat, and when they built the bridge a mile upriver from the ferry, they discontinued that part of the road that led down to the ferry.

DAVIS: Are you sure they discontinued it?

FROM AUDIENCE: Well, they didn't use it anymore.

DAVIS: That's not the same.

DOW: Did they vote to discontinue it?

FROM AUDIENCE: I don't know.

DAVIS: Well, that's what you have to find out. If they did not vote to discontinue it, just because it is not being used doesn't mean that it is not still a county road, and you can continue to use it.

ROGERS: Well, abandonment is a question of fact. You'd have to get all the facts together that tend to indicate that it was not an abandonment. One of them would be whether or not they voted to discontinue it. If they didn't vote, that would be something in your favor. The mere fact that it hasn't been used may not constitute abandonment. If it continues for a long period of time, it could. Running back a century, perhaps. There's a case here that I was just looking at, where the road was also an old county road, near the Kennebec River. The plaintiff's house was on Washington Street, a city street in Bath. In that case they held that the public way was abandoned, where there had been a century of non-use. Therefore, the plaintiff, the abutting landowner, could then put a chain across the road. So it would, apparently, depend on the particular facts as to whether or not a public way has been abandoned.

FROM AUDIENCE: A lot of clam diggers use this road to get down to the shore. They've used it for years and years, and then somebody blocked it off, about five or six years ago, with a telephone pole.

COWGER: Who blocked it off?

FROM AUDIENCE: A johnny-come-lately, who bought it and built a house.

DAVIS: That happened in Brunswick, and the clam diggers came up with a chain saw and cut the barrier down. So the people who owned the property came along and dynamited the ledge and what not so the diggers couldn't get over to the shore. But that didn't make any difference, because the clammers came back and parked on the people's property then, and tore up the yard. There's a nice boat ramp there now.

COWGER: Well, that's one way of doing it.

DAVIS: That's another example of the public exercising its rights. If you don't exercise them, you will lose them. But with every right-of-way to the water, you're going to end up with some sort of problem, because you do not have parking space. If the public knows that there is a right-of-way to water, they are going to use it. Harpswell may be a little wiser than Brunswick in not publicizing their rights-of-way, but as a result of our efforts in Brunswick there are now five boat launching ramps and one park, and there will be additional land purchased from abutting landowners to create parking areas.

COWGER: And I know that those areas are used heavily in the summer.

DAVIS: Yes, very heavily.

MONCURE: Don't get Harpswell wrong - we do have many boat launching facilities in addition to these thirteen sites that we're not publicizing. It's just that these are the ones they decided they didn't want to do anything about.

ROGERS: Garland, what kind of financing did you get for your boat landings and your park? State or federal or both?

DAVIS: It was originally for state and federal funds, but the timetable was not met, and it ended up being town money.

COWGER: How much money did it cost to develop them?

DAVIS: At the time the park project first became available, on the market, the land was \$4000. When the property was finally bought, it was \$19,000, and about \$30,000 has been put in since then. So that's about \$59,000, and the town will continue to improve it.

FROM AUDIENCE: Well, who does the maintenance of this park year after year? Isn't that the biggest problem?

DAVIS: I think our Recreation Department, which has a budget of I think about \$130,000 a year. We have quite a Recreation Department. Don't quote me, but I think it's about \$130,000.

FROM AUDIENCE: That's the problem with most small towns - they can't take advantage of the federal monies.

DAVIS: The small town can, I'm pretty sure.

FROM AUDIENCE: They can't, because they can't afford to maintain sites.

ROGERS: You mean there are no maintenance funds - just acquisition funds.

COWGER: That's the same problem the state faces.

Actual development costs for the Sawyer Park project were as follows: Purchase of 18+ acres on the New Meadows River in 1968 cost \$17,250 (\$8,625 Federal share, \$4,312.50 State share, and \$4,312.50 Town share); development costs for the period 1969-1971 totaled \$31,356 (\$15,678 State share, and \$15,678 Town share). Development costs were for road construction, boat ramp construction, picnic facilities, and toilet facilities.

The Bureau of Parks and Recreation just hasn't got the money to maintain a lot of access sites.

DAVIS: I guess parking areas would be quite an expense, but as far as boat launching ramps are concerned, they are not too much to maintain.

FROM AUDIENCE: Well, there is in terms of vandalism, and trash.

DAVIS: Yes, and there is a problem with every one you identify. Again, I said originally I didn't care what the public did with their rights, as long as the rights were identified and held onto for future posterity. We know the price of land now, we know the price of shore frontage, and if the public owns a 66-foot strip of the shore now, they should preserve it whether they can maintain it at present or not. The communities are going to grow, and somewhere along the line you'll be able to afford to maintain what you have.

COWGER: That sounds like a good closing note to me. If there is no further discussion, it's quarter to ten now, and we should probably adjourn. If anybody wants to stay longer, I'm sure discussion can continue informally. I'd like to thank our speakers, and thank all of you for participating.

According to Richard Smith, Recreation Director for the Town of Brunswick, vandalism and litter problems have been minimal. However, residents of neighboring towns which do not have garbage collection sometimes will leave their weekly garbage, neatly stored in plastic bags, at the park for collection by Brunswick workers.



Photo by John Ewing

COLONIAL ORDINANCE OF 1641-47^a

CHAPTER LXIII

Sec. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court, have otherwise appropriated them:

Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

The which clearly to determine;

Sec. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further:

Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

Sec. 4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. (1641-47).

^a. Taken from the 1814 edition of Ancient Charters and Laws of the Colony and Province of Massachusetts Bay, p. 148.

SOURCES OF FINANCIAL OR TECHNICAL ASSISTANCE AVAILABLE FOR RESEARCH
AND DEVELOPMENT OF PUBLIC ACCESS TO MAINE SHORELINE.

Maine's Coastal Program: town grants

All coastal towns are eligible to receive direct grants for solving coastal management problems, including public access.

Contact: Town Grants Program Director
Coastal Program
Natural Resources Planning Division
State Planning Office
189 State Street
Augusta, Maine 04333 Tel: (207) 289-3154

Small Grants Program to Assist Municipal Conservation Commissions

Eligible projects, including public access research, may be funded by the State on a 50-50 matching basis with a conservation commission.

Contact: Bureau of Parks and Recreation
Department of Conservation
State House
Augusta, Maine 04333 Tel: (207) 289-3821

State Boat Facilities Fund

Funds are available to aid in the acquisition and development of public boat facilities.

Contact: Bureau of Parks and Recreation
Department of Conservation
State House
Augusta, Maine 04333 Tel: (207) 289-3821

Heritage Conservation and Recreation Service (formerly Bureau of Outdoor Recreation).

Funds are available to aid in the acquisition and development of public outdoor recreation facilities.

Contact: Bureau of Parks and Recreation
Department of Conservation
State House
Augusta, Maine 04333 Tel: (207) 289-3821

Resource Conservation and Development

Technical and financial assistance is available in certain areas of the state through Resource Conservation and Development (RC&D) projects for the purpose of public water-based fish and wildlife and recreation development.

Contact: Local RC&D Office or Local USDA Soil Conservation Service Office.

FHA Community Facility Loans and Grants

Loans or grants are available to construct necessary community facilities for economic development.

Contact: Local USDA Farmers Home Administration Office

Public Works Grant Program

Contact: Economic Development Administration
Federal Building
Augusta, Maine 04330 Tel: (207) 622-6171

Other offices to contact regarding assistance for access development assistance:

Local Regional Planning Commissions
Eastern Maine Development District
10 Franklin Street
Bangor, Maine 04401

SELECTED LITERATURE CONCERNING PUBLIC ACCESS RIGHTS TO SHORELINE

Ducsik, Dennis W. 1974. *Shoreline for the Public - A Handbook of Social, Economic, and Legal Considerations Regarding Public Recreational Use of the Nation's Coastal Shoreline*. 230 p.

An analysis of the supply and demand of resources, underlying legal principles, techniques of acquisition and regulation, and other factors relating to recreational use of America's shoreline.

Henry, H.P. and D.J. Halperin. 1970. *Maine Law Affecting Marine Resources, Vol. II: State, Public, and Private Rights, Privileges, and Powers*. 417 p.

An encyclopedic work containing considerable information on access rights. Chapter 3, Public and Private Rights on the Seashore and in Maine's Tidal Waters, is particularly relevant.

Parks, Richard B. 1967a. Public rights to Maine's inland waters. *Maine Fish and Game, Spring 1967*.

_____. 1967b. Public and private rights to Maine's tidal waters. *Maine Fish and Game, Summer 1967*.

Both of the above are well-written, readable explanations of access rights, intended for the interested layperson.

Waite, G. Graham. 1965. Public rights in Maine waters. *Maine Law Review*, 17:161-204.

A lengthy examination of rights to use waterways, rights of access to waterways and to the ocean, law problems in controlling and promoting water recreation, and restrictions of state power to create and regulate public rights in Maine waters.

SHORELINE ACCESS RECOVERY METHODOLOGY

An outline of methods by which citizens may recover use of lost or abandoned shore and water access roads.

by Garland Davis

1. Ask fishermen and elderly citizens where access points have been in the past. When launching the project, it is best to keep it confidential among those immediately involved, rather than alarm the property owners.
2. Look at the town map and tax maps for unused access points.
3. If access points used in the past are not on the town maps, look up the deeds of the property owners bordering the site to find reference to the roads, as a boundary, for example.
4. Look at old maps for roadways leading to the water's edge such as bridge sites, fords, and ferry landings. Roads may be town or county or simply acknowledged public ways. Use as many maps as can be found, particularly old maps; e.g., U.S. Geological Survey topographic maps (older 15' maps are preferred to newer 7½' series), current and older Coast and Geodetic Survey charts. Other clues to old roads are pins set 33 or 49½ feet apart (two or three rod road-widths) or stone walls similarly spaced. Try to find all the old access points in your town.
5. Determine if the road has been disposed of. If it has not been disposed of, the town or county, or more to the point, the public, still has it. Roads on subdivision plats designated for public use are public ways, even if the town has not accepted them as town roads. Town roads discontinued or abandoned are still town roads and public ways if the town has not deeded (acted) to transfer ownership to someone. Deeds of the bordering property owners (names may be obtained from the tax maps) can be traced in the Registry of Deeds. Follow the transactions back at least one-hundred years. Clerks in the Registry of Deeds will show the beginner how to trace deeds. Housewives, college students, and high school students may be enlisted to do the work. These may spend an hour or so tracing deeds when shopping in the county

seat. The mechanics are simple, but much time is required. The work has to be done by interested, motivated citizens. The cost of such a project, if done by professionals, would be prohibitive.

6. Collect all the information on one access point, "get the facts cold." If the presentation of facts is incomplete or faulty, there is little likelihood that future attempts to secure public access of abandoned ways will be granted attention or respect.
7. Present the information to the selectmen or town council when there is not much pending business or others present vying for their attention. If the town administration does not look favorably on the project, if they do not cooperate in securing public rights of access to previously acknowledged public ways, or if they are inclined to give public lands away to private interests or adjacent landowners, it may be advisable to postpone further action until a more sympathetic administration is in power.

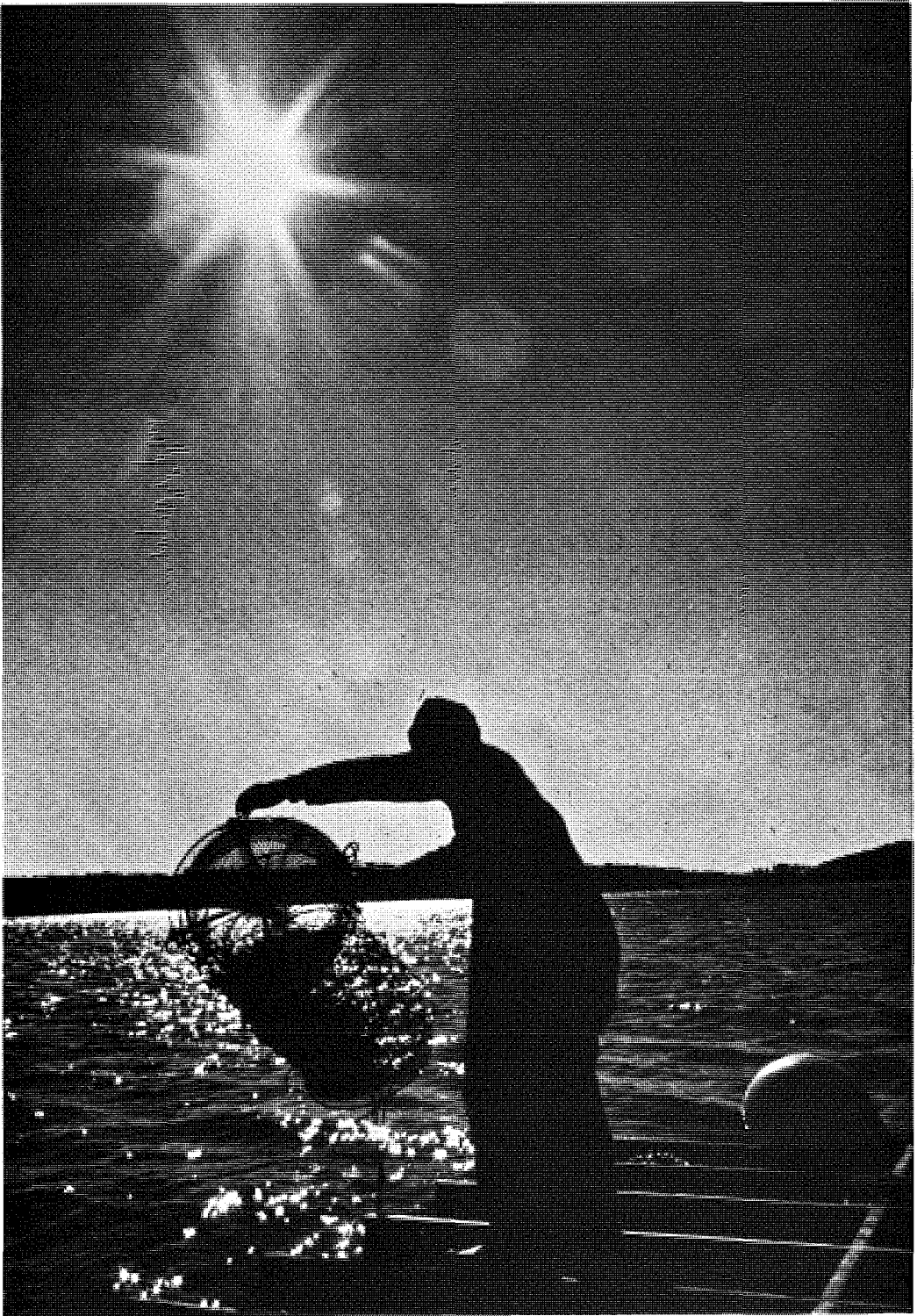


Photo by John Ewing