STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
Docket No. WALSC-RE-2019-018

JEFFREY R. MABEE, JUDITH B. GRACE, and FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA,

Plaintiffs,

v.

NORDIC AQUAFARMS, INC. and JANET ECKROTE and RICHARD ECKROTE,

Defendants,

And

UPSTREAM WATCH,

Cross-claim Defendant,

And

LYNDON W. MORGAN,

Party-in-Interest.

TRIAL BRIEF OF UPSTREAM WATCH

INTRODUCTION

At trial, Upstream Watch ("Upstream"), Plaintiffs Jeffrey Mabee and Judith Grace ("Mabee/Grace"), and Friends Of the Harriet L. Hartley Conservation Area ("Friends") will prove that: (i) the easterly boundary of Janet and Richard Eckrotes' (collectively, "Eckrotes") property, most of the easterly boundary of Lyndon Morgan's ("Morgan") property, and the easterly boundary of Donald and Wendy Schweikerts' (collectively, "Schweikerts") property is the high water mark of Penobscot Bay; and (ii) the intertidal land abutting the Morgan's,

Eckrotes', and Schweikerts' upland was initially retained by Harriet L. Hartley at the time of the conveyance of upland to Fred Poor and then subsequently conveyed to William and Pauline Butler (collectively, "Butlers") in 1950. Mabee/Grace now own the intertidal land that adjoins their upland[1], and the upland properties now owned by Morgan, the Eckrotes, and the Schweikerts.[2]

Nordic Aquafarms, Inc. ("Nordic") will argue at trial that the intertidal land could be owned by the Eckrotes ***or*** the intertidal land could be owned by individuals who Nordic claims are heirs of Harriet L. Hartley ***or*** that Nordic could own the intertidal land based on release deeds from Grantors that Nordic has described as "heirs of Harriet L. Hartley."

Nordic and the Eckrotes will argue that: (i) the phrase "along high-water mark of Penobscot Bay" in the 1946 Hartley-to-Poor deed[3] and the 1964 Bells-to-Grady deed is a "call to the water" that actually means the low water mark of Penobscot Bay which did not cause a severing of the upland from the intertidal flats; and (ii) the Eckrotes always understood that they owned the intertidal land on which their lot fronts. However, neither the Eckrotes nor Party-in-Interest Morgan—whose waterfront boundary is primarily derived from the same Hartley-to-Poor deed—have proof of title to this intertidal land beyond the speculations and erroneous legal interpretations offered by Nordic, previously rejected by this Court in its June 4, 2020 Order denying Plaintiffs' Motion for Partial Summary Judgment.

Nordic, which has been substituted for the Schweikerts, similarly bases its claim that the Schweikerts own the intertidal land on which their lot fronts on the legal premise that the phrase

1 Designated as Belfast Tax Map 29, Lot 38.

2 Designated as Belfast Tax Map 29, Lots 35, 36 and 37, respectively.

3 WCRD, Book 452, Page 205 ("Hartley-to-Poor deed").

"along high-water mark of Penobscot Bay" is a "call to the water" that means to the low water mark of Penobscot Bay.

Since 2018, Nordic has proceeded with its salmon farm project despite input from its own surveyors (Good Deeds and James Dorsky) that the Eckrotes do not own the intertidal land abutting the Eckrotes' land. When it became clear that the Eckrotes had no valid claim to the intertidal land, Nordic hatched a new, entirely speculative, and false argument that Harriet L. Hartley had mistakenly retained the disputed intertidal land when she sold all her remaining Belfast land to the Butlers in 1950 and that Nordic had acquired partial title to the intertidal land from alleged "heirs" of Harriet L. Hartley.

As shown below, the evidence is clear that Harriet L. Hartley did not retain a stranded piece of flats in 1950. At that time, Harriet L. Hartley sold all her upland and intertidal land to the Butlers and that intertidal land is now owned by the Butlers' successors, Mabee/Grace.

(a) <u>The Court's prior Rulings Have Greatly Narrowed the Issues for Trial</u>

The Summary Judgment Orders issued by this Court greatly narrowed the issues for trial. The Court rejected Nordic's argument that the Hartley-to-Poor deed contains a call to the sea that triggers the Colonial Ordinance presumption that the intertidal land goes with the upland of the Morgans, Eckrotes, and Schweikerts. While summary judgment did not issue in favor of Mabee/Grace's claim to title to the intertidal land based on a missing iron pin called for in both the Eckrotes' and Schweikerts' deeds, that missing pin does not make the deeds ambiguous. As the Court will see during the site visit, the Hartley-to-Poor deed calls for three natural monuments which establish the easterly high-water line boundary of the Fred Poor property. Those natural monuments are the "mouth of a brook," "along high-water mark," and the "outlet of a gully." All three of these natural monuments are located at the high-water mark. Given that

the natural monuments are controlling in terms of interpreting the deeds, Morgan's, the Eckrotes' and the Schwiekerts' respective easterly boundary lines clearly follow the high-water mark of Penobscot Bay.

Throughout this case, Nordic and its surveyor, James Dorsky, have contended that based on *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 37, 217 A.3d 1111, the colonial presumption was triggered in this case because the Hartley-to-Poor deed includes a "call to the water." However, in its Order on Plaintiffs' Motions for Partial Summary Judgment (the "Summary Judgment Order")(June 4, 2020), this Court rejected Nordic's argument and noted that *Lapish v. President of Bangor Bank*, 8 Me. 85, 89-90 (1831)(citing *Storer v. Freeman*, 6 Mass. 435, 438-39 (1810)) provides: *"... it is perfectly clear that a deed bounding a piece of land by high-water mark, which is one side of the shore, cannot be construed as conveying the flats*." Summary Judgment Order at 12 (citing *Lapish*, 8 Me. at 90)(emphasis in original).

The Court further noted:

> Whether the Court is dealing with inconsistent termini of boundary lines, and, if so, how they might factor into gleaning the parties' intent, is not readily apparent because it is not clear from the face of the deed whether the iron bolt and stake are above, at, or below the high-water mark. Nor do the statements of material facts indicate where on the face of the earth the bolt and stake are located, if they even still exist. The exact locations on the face of the earth are important because "[e]ven if one of the termini is at high water mark and the other at low water mark, the shore may be included in the conveyance…." *Whitmore*, 100 Me. at 414, 61 A. at 987 (emphasis added). Moreover, whether the rule would apply in a hypothetical situation where at least one of the bolt or stake were located between high and low water mark is also not clear. On the other hand, if the iron bolt and stake are both at or above the high-water mark, combined with the call along the high-water of Penobscot Bay, it would seem likely that the Court would have to apply "the rule that where the two ends of a line by the shore are at high water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed as excluding the shore." *Whitmore*, 100 Me. at 416, 61 A. at 988.

See Summary Judgment Order at 21 (citing *Whitmore v. Brown,* 100 Me. 410, 61 A. 985 (1905)).

With the aid of the site walk and the testimony of the surveyors, the evidence before the Court will be clear that the termini of the side lines of Morgan's, the Eckrotes', and the Schweikerts' properties are at the high-water line of Penobscot Bay. Accordingly, there is no issue of inconsistent termini.

(b) Nordic's House of Cards

Given the compelling evidence that Harriet L. Hartley ("Hartley") sold all the disputed intertidal land to the Butlers in 1950, Nordic has resorted to creating a fiction that Hartley mistakenly and unknowingly severed a portion of her intertidal land and retained that portion of the intertidal land that abutted the Fred R. Poor upland. Nordic cannot prove that Hartley intentionally retained the intertidal land because her Pennsylvania probate records establish definitively that she died owning no real estate of any kind in Maine, having sold her real property in Maine during her lifetime, more than 12 months prior to her death.

Since the start of its permitting process in 2018, Nordic knew the Good Deeds surveys, including the August 31, 2012 survey by Gusta Ronson and the April 2, 2018 survey by Clark Staples, and the November 14, 2018 survey by James Dorsky, show that the Eckrotes did not own the intertidal land on which their lot fronts. Nordic's surveyor, James Dorsky, informed Nordic's president, Eric Heim, in a sealed surveyor's opinion letter dated May 16, 2019, that the intertidal land had been retained by Harriet L. Hartley at the time of the Harriet L. Hartley to Fred Poor conveyance. Dorsky prepared seven surveys/sketches of the Eckrotes' land and the intertidal land for Nordic. Each of Surveyor Dorsky's surveys and sketch plans show the Eckrotes as **not** owning the intertidal land on which their lot fronts.

After Nordic submitted permit applications premised on the Eckrotes owning the intertidal land, Surveyor Donald Richards prepared his analysis, sketch plans, and survey

showing that the disputed intertidal land was owned by Mabee/Grace. When the surveying work by Surveyor Donald Richards, combined with the surveying work of Surveyor James Dorsky, confirmed that the Eckrotes did not own the intertidal land, Nordic adopted another false position. Rather than claiming that the Eckrotes owned the intertidal land, Nordic speculated that Harriet L. Hartley unintentionally retained ownership of the intertidal land in 1950 when she conveyed the last of her Belfast land to William Butler (the predecessor in title to Mabee/Grace).

In creating this "orphaned land" fiction, Nordic ignored the fact that Harriet L. Hartley conveyed all her remaining land to William and Pauline Butler in 1950. Nordic also ignored the fact that Harriet L. Hartley's Pennsylvania probate records establish that Harriet L. Hartley died owning no land in the State of Maine—a fact to which her executrices attested under oath—and which rendered Harriet L. Hartley's 1945 Will "ineffective" and resulted in an intestacy. Nordic also ignores that there was absolutely no reason Harriet L. Hartley would sell off her upland to the Butlers but elect to retain some mudflats (with no access to or from the upland).

Nordic then drafted and acquired release deeds from the so called "Heirs of Harriet Hartley." After Nordic obtained release deeds, Nordic's surveyor, James Dorsky, still would not opine that Nordic owned the intertidal land on which the Eckrotes' lot and most of Morgan's lot front. Instead, Surveyor Dorsky changed his survey to show that the ownership of the intertidal land was "**Unclear**."

(c) <u>The Surveys by James Dorsky and Donald Richards Show the Same Easterly Boundary Line for the Eckrotes' Upland Parcel</u>

At trial, the Court will review multiple surveys from four surveyors. All the surveys confirm that the easterly line of the Eckrotes' property, most of the Morgan property, and the Schweikerts' property, is along the high-water line of Penobscot Bay.

Surveyor Richards' survey shows the "mouth of the brook" as called for in Schweikerts' and the Eckotes' deeds and the Hartley-to-Poor deed. Based on his field work and his review of existing surveys, Surveyor Richards confirmed that the terminus of the southerly boundary line running from the "head of the gully" at U.S. Route One to the mouth of the brook, referenced in the Hartley-to-Poor deed, was at the high-water line of Penobscot Bay. Surveyor Richards' survey confirms that the Eckrotes' southerly boundary line is confirmed by natural monuments, on the westerly end consisting of U.S. Route One, the concrete culvert at U.S. Route One, and the "head of the gully," and, on the easterly end, consisting of the end point of the gully, the "mouth of the brook," and the "high water line" of Penobscot Bay.[4]

From the point where the gully meets the brook and the high-water line of Penobscot Bay, Surveyor Richards' survey follows along the high-water line of Penobscot Bay easterly and northeasterly 410 feet more or a less, where Richards found two iron stakes lying on the ground at the approximate high-water line and at a gully. The stakes were located at the point called for in the Hartley-to-Poor deed as "a stake at the outlet of the gully." This boundary is now on property owned by Morgan, as most of Morgan's waterside boundary is formed from land that was originally part of the Hartley-to-Poor conveyance.

Surveyor Richards found that the calls in the Hartley-to-Poor deed (275 feet, more or less, from the concrete culvert and the head of the gully at U.S. Route One to the mouth of the brook at the high water line of Penobscot Bay, and then 410 feet along the high water line, more or less, to the stake at the outlet of the gully) confirmed the location of the Eckrotes' easterly boundary line as following the high water line of Penobscot Bay, with the termini of the deed

4 This is the same terminus referenced as the northeasterly (waterside) boundary of the Schweikerts' property.

description of the boundary line being in harmony with the length of the calls, the physical/natural monuments, and the pins and stakes.

The waterside boundary described in the Hartley-to-Poor deed as beginning at a point in a gully 275 feet from the Atlantic Highway and proceeding easterly and northeasterly along the high-water mark of Penobscot Bay 410 feet more or less to a point marked by a stake at the outlet of a gully, was definitively located in the field by Surveyor Richards and documented by the recorded Richards' Plan (WCRD, Plan Book 24, Page 34).

Surveyor Dorsky agrees that the easterly line of the Eckrotes' upland runs entirely along the high-water line of Penobscot Bay. Surveyor Dorsky initially concluded that the intertidal lands were retained by Harriet L. Hartley at the time of the Hartley-to-Poor deed and this finding is reflected in his survey and multiple revisions.

The August 31, 2012 Good Deeds Survey, upon which the legal description in the Eckrotes' Deed is based, was prepared by the Estate of Phyllis J. Poor for the Eckrotes in 2012 and shows that the Eckrotes' easterly boundary line as running 425 feet more or less "along high water." This finding is consistent with the survey of Surveyor Richards, as well as the 10-15-2018 Good Deeds survey prepared for Nordic by Clark Staples and the survey and all revisions prepared by James Dorsky from 11-14-2018 through the revision dated 7-24-2020.

The law is clear that a grantor, such as Harriet L. Hartley, may sever the upland from the flats, and convey the one and retain the other. *Storer v. Freeman,* 6 Mass. 435. As the Law Court states in *Whitmore v. Brown*, 61 A. 985, 988 (1905): "A deed of the upland prima facie conveys flats—not appurtenances nor privileges merely, but the land itself, subject to public uses —to low-water mark. On the other hand, we think it must be held that, if by the descriptive terms in the deed the flats are excluded, they do not pass even as appurtenances or privileges.

They are outside the boundaries fixed by the deed. No interest in land in the flats passes which is beyond the dividing line." The *Whitmore* case also holds that when the two ends of a line by the shore are at the high-water mark, in the absence of other calls or circumstances showing a contrary intention, the boundary will be construed to exclude the shore. *Id.* at 988. In the case at hand, Harriet L. Hartley's deed to Fred Poor sets each end of the easterly boundary at the high-water line, and then expressly follows the high-water line of Penobscot Bay, which indisputably results in the flats being excluded.

Nordic tries to avoid the legal principles of *Lapish v President of Bangor Bank*, 8 Me. 85 (1831), which establishes in simple and unequivocal terms that a call in a deed to the high-water line is what it says, and not a call to the low water line. The high-water line of Penobscot Bay is not simply a "point of convenient measurement," as alleged by Nordic. *Lapish* holds in clear terms that a deed bounded by the high-water line does not convey the adjoining flats. Thus, the high-water line of Penobscot Bay is the undisputed easterly boundary of the Eckrotes' property and most of Morgan's property, and the Schweikerts' property.

(d) <u>As the Butler's successors, Mabee/Grace own all of the Intertidal Land Retained by Harriet L. Hartley</u>

Mabee/Grace acquired their land from Heather O. Smith by virtue of a deed recorded at Book 1221, Page 347 in the Waldo County Registry of Deeds (the "Smith-to-Mabee/Grace deed"). That deed conveyed to Mabee/Grace: "a certain lot or parcel of land …Northerly by land of Fred R. Poor; Easterly by Penobscot Bay; Southerly by Little River and Westerly by the Atlantic Highway….". The land of Fred R. Poor is the land that is now owned by the Eckrotes and Morgan. The call for "Northerly by land of Fred R. Poor" has that boundary line running along the high-water mark along the Eckrotes' and Morgan's properties, and the call "Easterly by Penobscot Bay, Southerly by Little River" encompasses the intertidal land that is in dispute

on which the lots of the Eckrotes and Morgan front. The Smith-to-Mabee/Grace deed also includes the language: "Together with all our right, title and interest in and to that portion of the premises which lies between high and low water mark, commonly designated as the flats."

The cardinal rule of deed construction is to give "effect to the intention of the parties if practicable, when no principle of law is violated. This intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it." *Pike v. Munroe*, 36 Me. 309, 315 (1853). Further, "all doubtful words and provisions are to be construed most strongly against the grantor." *Id*. at 316-317.

Applying these rules of interpreting deeds, it is apparent that the Hartley-to-Poor deed did not include the disputed intertidal land and, conversely, the Hartley-to-Butler deed did include the disputed intertidal land. Here, the intertidal land was retained by Harriet L. Hartley when she executed the Hartley-to-Poor deed and she subsequently sold the intertidal land to the Butlers in 1950 when Harriet L. Hartley, then 75 years old, sold all her Belfast land (both upland and intertidal land). The intertidal land was included in the chain of title running to Mabee/Grace and included the "portion of the premises which lies between the high and low water mark, commonly designated as the flats." Nothing in the 1964 Bells-to-Gradys deed diminished the intertidal land owned by Mabee/Grace's predecessors in interest, as that 1964 deed also evidenced an express intent to sever the upland conveyed from the flats – retaining the flats for the benefit of the dominant estate retained by the Bells (and their successors).

The inclusion of the intertidal land in the Mabee/Grace title is conclusively established by Order of the Waldo County Superior Court in *Winston C. Ferris v. Genevieve E. Hargrave,* Civil Action, Docket No. 11275 (the "*Ferris v. Hargrave* quiet title action"). On June 26, 1970, the Waldo County Superior Court issued a Final Decree that established that the land now owned by

Mabee/Grace (including the intertidal land) was owned solely by Winston C. Ferris. This is critical because Winston C. Ferris is a predecessor in the Mabee/Grace chain of title. As a result, the Superior Court has already determined that the intertidal land is owned exclusively by Mabee/Grace, whose chain of title comes through Genevieve Hargrave, the named Defendant in the *Ferris v. Hargrave* quiet title action.

Significantly, in this Court's 1970 Final Judgment, the Court appointed guardian ad litem (Roger Blake, Esq.) to represent the defendants, pursuant to Title 14, M.R.S.A., Section 6656 and, after Mr. Blake accepted that appointment and filed an answer denying the allegations of the Complaint, the Court entered its Final Decree. In that Order, this Court held that Ferris owned all lands described in his deed (the identical description in the Mabee/Grace deed as well as all intervening deeds) in fee simple. The Court also held that: "The defendants and every person claiming by, through, or under them, be barred from all claims to any right, title, interest or estate. . ." in the land described in the Ferris Deed and the Final Decree.

(e) <u>Nordic and the Eckrotes Improperly Cite Extrinsic Evidence to Support their Various Theories of Who Owns the Intertidal Land</u>

Nordic and the Eckrotes argue that, despite the clear wording in the Hartley-to-Poor deed that establishes the high-water line of Penobscot Bay as the easterly boundary, extrinsic evidence should be used to modify the plain meaning of the Hartley-to-Poor and the Hartley-to Butlers deeds. Maine law, however, does not permit such a deviation from the deed. *See Mitchell v. Smith*, 67 Me. 338, 342 (1876) ("If the deeds are free from ambiguity, so that the intention of the grantors, whether clearly expressed or not, can be made certain by an examination of the papers themselves, then extrinsic evidence of such intention, whether consisting of the acts and declarations of the parties at the time of the delivery of the deeds, or the mode of subsequent occupancy under them, cannot be received for the purpose of modifying their legal [rights].");

see also Wellington v Murdough, 41 Me. 281, 287 (1856) ("The subsequent acts and declarations of the parties,…are not sufficient to destroy or vary their legal rights as exhibited by the deed").

The deed is the primary source for determining the intent of the parties. *See Badger v. Hill*, 404 A.2d 222 (Me. 1979) (The scope of an interest in land conveyed by a deed is properly to be determined solely from the language of the conveyance, provided that the language has plain meaning.); *North Sebago Shores, LLC v. Mazzaglia*, 2007 ME 81, ¶ 13, 926 A.2d 728 (A court construing the language of a deed must first attempt to construe the language by looking only within the four corners of the instrument); *Kennebec Ferry Co. v. Bradstreet,* 28 Me. 374, 377-8 (1848) (All words used in the description of the premises in a deed, are presumed to be inserted from a belief in the parties, that they are material, and all must be so treated if possible; and nothing is to be considered redundant, if it can be avoided; and when the whole is taken together according to its common and ordinary signification, if it be free from ambiguity, and convey clear and distinct ideas to the mind, and if it can apply to the subject matter of the conveyance, it is not to be controlled by anything not found in the deed.); *Conary v. Perkins*, 464 A.2d 972, 975 (Me. 1983) (In determining what the boundaries are, a surveyor may not rest his judgment on what he thinks intention of the parties may have been contrary to certain accepted positive rules of law which control and which parties to real estate transactions must heed, if they would effectuate their intent and avoid consequences they did not intend).

Given that the Hartley-to-Butlers deed conveyed all of Hartley's remaining upland, the law presumes that Hartley intended to convey all her land, including the flats. *Lincoln v. Wilder*, 29 Me. 169, 181-2 (1848) (If the whole lot had not been intended to be conveyed, one would suppose, that a part of it would have been expressed, or some exception made…But if the

expressions of a deed are contradictory, creating so much doubt, that it cannot be known, which of two descriptions is the true one, the deed is to be construed most favorably to the grantee.)

However, if extrinsic evidence is admitted at trial to clarify Harriet L. Hartley's intention in the Hartley-to-Butlers deed (i.e., to convey all of her remaining land to the Butlers including all intertidal lands or to sever and retain an inaccessible portion of the intertidal land she owned), the best extrinsic evidence of Harriet L. Hartley's intent are the sworn statements submitted by Harriet L. Hartley's executrices (her sister and heir-at-law Genevieve Hargrave and her sister-in-law and an intended beneficiary of Harriet L. Hartley's 1945 Will, Ruth Hartley Weaver), to the Philadelphia Register of Wills, barely a year after the Hartley-to-Belfast Water Management conveyance. In the 1951 Hartley Probate File, there are multiple sworn statements, attestations, schedules, inventories of assets, and even a hand-written notation on a copy of her 1945 Will, all submitted under oath by the executrices, and all confirming that Harriet L. Hartley had sold and conveyed all her land in Maine during her life.

(f) <u>The Hartley-to-Poor Deed Also Requires Only Residential Use</u>

In the event the Court determines that the Eckrotes own the intertidal land, the Eckrotes' land can be used only for residential purposes pursuant to the Hartley-to-Poor deed. That deed provides: "The lot or parcel of land herein described is conveyed to Fred R. Poor with the understanding it is to be used for residential purposes only, that no business for profit is to be conducted unless agreed to by Harriet L. Hartley, *her heirs or assigns* (emphasis added)."

This covenant was intended to run with the land for the benefit of Harriet L. Hartley's retained dominant estate. Mabee/Grace, as successors in interest to the dominant estate, are assigns of Harriet L. Hartley and are entitled to enforce this restrictive covenant for the benefit of the dominant estate. This restrictive covenant prohibits the August 6, 2018 Easement Agreement to bury Nordic's industrial pipes in the Eckrotes' land, as this use would violate the "residential

purposes only" restriction and would diminish the value and use of the dominant estate now owned by Mabee/Grace.

CONCLUSION

For all the above reasons, Upstream Watch respectfully requests that the Court determine that Plaintiffs Jeffrey Mabee and Judith Grace own the intertidal land abutting Morgan's, the Eckrotes,' and the Schweikerts' upland as shown on the survey of Surveyor Donald Richards.

Dated in Portland, Maine this 15th day of June, 2021.

Respectfully submitted,

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