Bertocci, Cynthia S

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Sent: Tuesday, November 05, 2019 12:43 PM
To: Bertocci, Cynthia S; Kim Ervin Tucker; Barry A. Costa-Pierce; Bensinger, Peggy; Boak, Scott; Burke, Ruth A; Charles Tilburg; David Losee; DEP, Nordic Aqua Farms; Diane Hunt Braybrook; Donald W. Perkins, Jr.; Donna Broderick; Ed Cotter; Eleanor Daniels; Elizabeth M. Ransom; Erik Heim; Jensen, Laura; Lawrence Reichard; Marianne Naess; Martin, Kevin; Michael Lannan; Northport Village Corporation; Peter Tischbein
Cc: David M. Kallin
Subject: Mabee/Grace/MLU Appeal
Attachments: 2019-11-01 NAF Opposition to Pltfs Amended 2nd MSJ and Declaratory Judgment Against Eckrotes (Intertidal Ownership).PDF; 19-08-14 NAF Special Motion to Dismiss.PDF

Nordic Aquafarms, Inc. ("Nordic" or "NAF") respectfully requests that the Board of Environmental Protection deny the appeal of Intervenors Mabee/Grace and the MLU regarding the Presiding Officer's decision to exclude right, title and interest from the list of hearing topics. The Waldo County Superior Court (Justice Murray) is currently presiding over a quiet title action brought by Intervenors Mabee/Grace. That court action properly addresses the claims that Intervenors seek to have this Board review and decide. On Friday of last week, one day before Intervenors filed their appeal to the Board, the Applicant, who is also a party to the court action, filed the attached brief seeking summary judgment on this issue.

The Commissioner properly decided that there is sufficient right, title and interest for Department review of the applications to proceed while the Court quiets title. The Presiding Officer properly determined that right, title and interest should not be a hearing topic (but allowed submission of new written evidence regarding right, title and interest). Intervenors have preserved the right, title and interest issue for appeal (likely to the same judge hearing the quiet title action). The Board cannot take the action that Intervenors want- i.e. deciding who has a better claim to the Eckrotes' intertidal.

As discussed previously, in excruciating detail, (and as further discussed in the attached court brief regarding intertidal ownership) the Eckrotes have presumptive deed title to the intertidal. The record includes Nordic's option to acquire an easement to utilize the Eckrotes' intertidal for the project. No more and, in fact, far less would suffice to establish the jurisdictional threshold of right, title and interest as defined by Chapter 2 of the Department's Rules. Thus, the Board should avoid muddying the record in this matter or, potentially, before the Court by entering into substantive review of Intervenors' claims regarding their alleged ownership of the Eckrotes intertidal. As discussed in detail in Nordic's anti-SLAPP Motion to Dismiss (also before the Waldo County Court), the only purpose of these claims is delay.

Thank you for your consideration.

Respectfully submitted,

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STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-2019-18

JEFFREY R. MABEE and JUDITH B. GRACE, individually and as joint tenants of certain real property that is the subject of this action,

Plaintiffs

v.

NORDIC AQUAFARMS, INC., a Foreign Corporation registered in the State of Delaware; JANET ECKROTE; RICHARD ECKROTE; and UNKNOWN "HEIRS" OF GENEVIEVE HARGROVE AND/OR HARRIET "A." HARTLEY AND/OR HARRIET "L." HARTLEY.

Defendants

and

UPSTREAM WATCH, a Maine Non-Profit Corporation registered in the State of Maine,

Party-In-Interest

SPECIAL MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO 14 M.R.S. § 556

Pursuant to Maine's anti-SLAPP statute (14 M.R.S. § 556) and M. R. Civ. P. 12(b)(1), 12(b)(6) and 19, Defendant Nordic Aquafarms, Inc. ("NAF") moves to dismiss Plaintiffs' Amended Complaint (hereinafter, the "Complaint"). In support of this motion, NAF states as follows.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs' Complaint identifies the "Gravamen of the Dispute" as arising from statements that NAF made in on-going local, state and federal permitting proceedings asserting that NAF has sufficient administrative standing, or "title, right or interest" ("TRI") to seek regulatory approvals related to its proposal to build a land-based salmon aquaculture facility in Belfast, Maine. Complaint ¶¶ 8–9. Plaintiffs have not, and cannot, identify any injury resulting from such statements because no executive agency or municipality has yet issued a final decision on any permit.

When, as here, a permitting authority's decision regarding an applicant's standing to seek a permit will later be adequately reviewable pursuant to Rule 80B or 80C (once a final decision has been made on that permit) that process provides the "exclusive process for judicial review." *Antler's Inn & Rest., LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶ 14, 60 A.3d 1248, 1254. Further, "[t]he constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate, ongoing executive function." *Bar Harbor Banking & Tr. Co. v. Alexander*, 411 A.2d 74, 77 (Me. 1980). Without final agency action, this Court lacks jurisdiction to review any preliminary decision of the agency, including that an applicant has sufficient TRI to establish administrative standing. *Tomer v. Maine Human Rights Comm'n*, 2008 ME 190, ¶ 14, 962 A.2d 335, 340. Further, where a party seeks an injunction that would impact ongoing executive agency proceedings, the agency is a necessary party to that proceeding. M. R. Civ. P. 19; *cf. Alexander*, 411 A.2d at 75.

Here, Plaintiffs attempt to improperly insert the judiciary into ongoing executive agency proceedings through a preemptive lawsuit seeking a "temporary, preliminary and permanent

injunction" prohibiting NAF "from making any further claims" of standing in those proceedings, enjoining NAF from "seeking permits and leases," and forcing NAF to "withdraw all applications for permits or leases." Complaint ¶ 86(b)–(d). This portion of the lawsuit is interposed solely for delay and to abuse the discovery process against NAF when Plaintiffs' real cause of action is establishing the location on the face of the earth of their boundary with their abutters, Janet and Richard Eckrote (the "Eckrotes"). As such, it is a Strategic Lawsuit Against Public Participation ("SLAPP") that is instituted to "dissuade or punish" a participant in a permitting proceeding "through the delay, distraction, and financial burden of defending the suit." *Gaudette v. Davis*, 2017 ME 86, ¶ 4 & n. 5, 160 A.3d 1190, 1194 & n. 5.

By statute, NAF's statements on TRI made to the government as part of adjudicatory proceedings for development permits and submerged land leases are "petitioning activity" at the core of protection by Maine's anti-SLAPP law. 14 M.R.S. § 556; *Gaudette*, 2017 ME 86, ¶ 8 & n. 5, 160 A.3d at 1196 & n. 5; *Morse Bros. v. Webster*, 2001 ME 70, ¶ 19, 772 A.2d 842, 849. This holds true whether the party to that proceeding is speaking for or against the permits. 14 M.R.S. § 556. To prevent such lawsuits, Maine enacted its anti-SLAPP statute, 14 M.R.S. § 556, which provides "a means for the swift dismissal of such lawsuits early in the litigation as a safeguard on the defendant's First Amendment right to petition." *Id.*

Furthermore, the Plaintiffs' attempt to create a new property description as part of a purported "conservation easement" solely on the intertidal zone in front of their neighbor's property, and then enforce that conservation easement against NAF, who is not a party thereto nor affected thereby, is likewise solely a delay tactic in response to NAF's petitioning activity.

Accordingly, as set out more fully below, this Court must dismiss the Complaint in its entirety. In the alternative, Count II must be dismissed pursuant to Rule 12(b)(1) because

Plaintiffs have not "been in uninterrupted possession" of the intertidal zone in front of the Eckrotes' property for the jurisdictionally necessary period of "4 years or more" prior to bringing a statutory quiet title action. 14 M.R.S. § 6651; *Chickering v. Yates*, 420 A.2d 1219, 1222 (Me. 1980). Count V must be dismissed pursuant to Rule 12(b)(6) because none of the Defendants are in privity to any party bound by the conservation easement, and therefore it cannot be "enforced" against any of them. Finally, the Complaint must be dismissed due to Plaintiffs' failure to join necessary parties and because there is no justiciable controversy for this Court to resolve.

II. FACTUAL BACKGOUND

NAF seeks to build and operate a $500 million land-based salmon aquaculture facility on certain land located in the City of Belfast Maine, and presently owned by the Belfast Water District and others under contract with NAF to acquire ownership and/or easement rights to their properties. *See* Affidavit of Erik Heim ("Heim Aff.") ¶ 7. The aquaculture facility requires access to Penobscot Bay for three seawater pipes (two 30" intake pipes and one 36" outfall/discharge pipe). Heim Aff. ¶ 8.

In September 2017, NAF approached the Belfast Water District and the City of Belfast about purchasing land, and thereafter NAF, the City of Belfast, and the Belfast Water District engaged in discussions and negotiations that resulted in agreements being signed on January 30, 2018 regarding the location of the proposed location of the aquaculture facility. Heim Aff. ¶ 10. On October 16, 2018, the City adopted the current rezoning of the property and surrounding areas to allow for the proposed facility. Heim Aff. ¶ 21. Abutters to the project sued the City, claiming that the Council did not act in the public interest. This Court ultimately rejected this

challenge and upheld the City's decision to rezone. *See Daniels and Broderick v. City of Belfast*, Docket Num. CV-2018-45 (Me. Super Ct., Waldo Cty, July 10, 2019).[1]

During this period, NAF was also engaged in discussions with the Plaintiffs regarding the purchase of their property at an asking price of over $1 million. Heim Aff. ¶ 15; *see also* Affidavit of Elizabeth Ransom ("Ransom Aff.") ¶ 7 and Exhibit A attached thereto. In August 2018, NAF obtained an option to purchase an easement from the Plaintiffs' neighbors, the Eckrotes, for the placement of its intake and outfall pipes to access Penobscot Bay. Heim Aff. ¶ 16. As described in their current deed, the Eckrotes' property extends from Route One on the west, to Penobscot Bay on the east. Complaint (Exhibit 1 attached thereto). The intake and outfall pipes will all be completely buried underground within the intertidal area. Heim Aff. ¶ 9. As recently as September 2018, the Plaintiffs contacted NAF's agent to see if NAF was still interested in purchasing their property after a prospective buyer from California had definitely backed out. Ransom Aff. ¶¶ 7–11; Heim Aff. ¶ 17. The Plaintiffs were aware of NAF's discussions with the Eckrotes and other neighbors. Ransom Aff. ¶ 12; Heim Aff. ¶ 18. At no time during these discussions did Plaintiffs assert any claim to own the intertidal zone in front of the Eckrotes or dispute that the Eckrotes' property was bounded by Penobscot Bay. Ransom Aff. ¶ 14; Heim Aff. ¶ 19.

On September 26, 2018, NAF filed an application with the Bureau of Parks and Lands ("BPL") to obtain a submerged lands lease to subtidal land adjacent to and extending from the upland and intertidal zone owned by the Eckrotes. Heim Aff. ¶ 20. As the alternatives analysis required for other permit applications progressed, the application was amended on November 20, 2018, December 5, 2018, and March 22, 2019 (together with the September 26, 2018 filing, the

[1] A copy of this decision is attached for the Court's convenience under Tab 1.

"Application"). Heim Aff. ¶ 22. Upstream Watch opposed this Application before BPL and was represented by Attorney Kim Ervin Tucker, one of the attorneys now representing the Plaintiffs in this case. *See* Affidavit of Joanna Tourangeau ("Tourangeau Aff.") ¶¶ 10, 12. Plaintiffs are named members of Upstream Watch. *Id.* ¶ 11. In opposing the lease application, Upstream Watch asserted that NAF did not have TRI because the Plaintiffs, not the Eckrotes, owned the intertidal zone in front of the Eckrotes' land. *Id.* ¶ 10. Although NAF believes that the Eckrotes hold title to the intertidal zone in front of their property, NAF has since sought and obtained release deeds from the heirs of Harriet Hartley for any portion of her former property that may have been severed (accidently or otherwise) from the upland conveyed to the Eckrotes' predecessor in interest. Heim Aff. ¶ 25. On April 29, 2019, Plaintiffs purported to grant a conservation easement to Upstream Watch over intertidal land adjacent to their property and three of their neighbors, including the Eckrotes' intertidal property over which NAF had obtained an option to purchase an easement. *See* Tourangeau Aff. ¶ 16 and Exhibit 9 attached thereto; Complaint ¶ 14. This conservation easement creates a new property description that is different than the one used in the Plaintiffs' source deed, and expressly describes the intertidal zone in front of the Eckrotes (which the source deed does not do). *See* Tourangeau Aff. ¶¶ 9, 16 and Exhibits 5 and 9 attached thereto; Complaint (Exhibit 13 attached thereto).

Plaintiffs authored an article that was posted on *The Free Press* website on May 16, 2019, in which they explained that this conservation easement was created as a litigation ploy in response to NAF's petitioning activity before the BPL:

> For the past 25 years, we have owned the shorefront property directly across Route 1 from the Belfast Water District where Nordic Aquafarms is now hoping to build their salmon farm. We were recently informed by the legal team of Upstream Watch that we also owned the intertidal zone in front of the three neighboring properties, *which we did not know.*

See Tourangeau Aff. ¶ 13 and Exhibit 6 attached thereto (emphasis added). Mr. Mabee told the *Bangor Daily News*: "This is all I talk about. I feel really angry that this company that knows I own the property is pushing the way they are…I think the only other thing I've been this indignant about is the Vietnam War." *Id.* ¶ 14 and Exhibit 7 attached thereto. Attorney Tucker also told the *Bangor Daily News*: "I swear to you, with my dying breath, I'm going to keep them from doing this." *Id.* ¶ 15 and Exhibit 8 attached thereto.

Upstream Watch continues to participate in the ongoing permitting proceedings, but is no longer represented by Attorney Tucker. *Id.* ¶¶ 12, 20–22. The Plaintiffs are also participating in these ongoing permitting proceedings, now represented by Attorney Tucker, and are making the same TRI arguments before the agencies that they are making to this Court. *Id.* Every agency to consider the issue has determined that NAF has sufficient TRI to proceed with the permitting process. *Id.* ¶ 23 and Exhibits 13 and 14 attached thereto. These determinations will be judicially reviewable only after each agency issues a final decision on the respective permit.

III. ARGUMENT

A. The anti-SLAPP statute protects NAF's conduct in seeking permits and leases.

In relevant part, Maine's Anti-SLAPP statute provides that:

> [w]hen a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss…The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

14 M.R.S. § 556. The statute expressly defines "a party's exercise of its right of petition" to include written statements made to an executive agency in connection with a permitting issue

under consideration by that agency, as well as statements reasonably likely to encourage consideration or review of a permit application. *Id.* Upon filing of a special motion to dismiss, all discovery is automatically stayed until notice of entry of the Court's order on the motion. *Id.*

The Law Court established a three-step burden shifting analysis for deciding a special motion to dismiss. First, in a motion with accompanying affidavits, the moving party (usually the defendant) must demonstrate, as a matter of law that the anti–SLAPP statute applies to the conduct that is the subject of the plaintiff's complaint. *Desjardins v. Reynolds*, 2017 ME 99, ¶ 8, 162 A.3d 228, 233–34. If the defendant satisfies this initial burden, the burden then shifts to the plaintiff to offer prima facie evidence that the defendant's exercise of his right to petition "(1) was 'devoid of any reasonable factual support or any arguable basis in law' and (2) caused 'actual injury' to the plaintiff." *Id.* ¶ 9, 162 A.3d at 234. If the plaintiff fails to meet "any portion of this prima facie burden," the special motion "must be granted, either partially or wholly, with no additional procedure." *Gaudette*, 2017 ME 86, ¶ 17, 160 A.3d at 1198. Only if the plaintiff meets his prima facie burden of establishing that any one or more of the petitioning activities at issue "lacks factual or legal support and caused the plaintiff actual injury," may the parties avail themselves of an additional procedural mechanism that provides for limited discovery and an evidentiary hearing at which "the plaintiff must prove that those petitioning activities for which the prima facie burden was met are devoid of factual or legal support and caused actual injury, this time by a preponderance of the evidence." *Desjardins*, 2017 ME 99, ¶ 10, 162 A.3d at 234; *Gaudette*, 2017 ME 86, ¶ 18, 160 A.3d at 1198–99.

Applying the three step burden shifting analysis makes clear that the majority of Plaintiffs' Complaint must be dismissed on Step 2, leaving the only issue to be adjudicated as the location on the face of the earth of the boundary line between the Eckrote property and the

Plaintiffs' property. That boundary line dispute is independent of NAF's petitioning activities in seeking permits. The portions of Plaintiffs' Complaint that attempt to interfere with such petitioning activity must be dismissed.

1. **Step 1: NAF plainly meets its burden of establishing that its claims of TRI is protected petitioning activity.**

The basis of Plaintiffs' Complaint is the allegation that NAF "is falsely asserting that it has title, right or interest (TRI) in Plaintiffs' intertidal land adjacent to Lots 35 and 36 in order to obtain the local, State and federal permits required to place NAF's three industrial pipelines . . . into Penobscot Bay as a part of its development of a salmon fish factory." Complaint ¶ 9. Statements made to the government as part of adjudicatory proceedings for development permits and submerged land leases are statutorily defined as "a party's exercise of its right of petition" at the core of protection by Maine's anti-SLAPP law. 14 M.R.S. § 556; *Gaudette*, 2017 ME 86, ¶ 8 & n. 5, 160 A.3d at 1196 & n. 5; *Morse Bros.*, 2001 ME 70, ¶ 19, 772 A.2d at 849. As a matter of law, these statements fall with the anti-SLAPP statute, thereby shifting the burden to Plaintiffs to show that NAF's assertion of TRI "lacks factual or legal support and caused the plaintiff actual injury." 14 M.R.S. § 556.

2. **Step 2: NAF's permit application contains factual support and an appropriate legal basis for review.**

Plaintiffs must carry a two-part burden in order to prevent dismissal pursuant to 14 M.R.S. § 556: (1) that NAF's claims of TRI were "devoid of any reasonable factual support or arguable basis in law" and (2) that NAF's claims of TRI "caused the plaintiff actual injury." 14 M.R.S. § 556. Because Plaintiffs cannot make either showing, their claims must be dismissed.

(a) NAF's claims of TRI have both factual and legal support.

NAF's claims of TRI to the various permitting authorities were all supported both factually and legally. The respective filings are attached here as Exhibits 1, 2, and 3 to the Affidavit of Joanna Tourangeau. *See* Tourangeau Aff. ¶¶ 4–5, 7, 17–19 and Exhibits 1–3 and 10–12 attached thereto. Every executive agency to have addressed the issue has concluded that NAF does indeed have sufficient TRI to establish administrative standing. *Id.* ¶ 23 and Exhibits 13 and 14 attached thereto. As described above and in the agency filings, TRI is an element of administrative standing that must be decided in the first instance by the administrative agency as a jurisdictional threshold for substantive review of a permit application. This Court cannot preemptively determine whether a party has administrative standing—only the agency can do that. The exclusive avenue for judicial review of an agency's decision is appeal of that agency's final decision on the permitting application. *See* M. R. Civ. P. 80(c); *Flaherty v. Muther*, 2011 ME 32, ¶ 87, 17 A.3d 640, 662; *Tomer*, 2008 ME 190, ¶ 14, 962 A.2d at 340. This alone is sufficient to preclude Plaintiffs from making the showing necessary to avoid dismissal.

(b) NAF's claims of TRI have not and cannot cause the Plaintiffs' actual injury.

In order to survive a special motion to dismiss, a plaintiff must show that it has *already* suffered an actual injury, which requires "a reasonably certain monetary valuation of the injury suffered by the plaintiff." *Desjardins*, 2017 ME 99, ¶ 14, 162 A.3d at 235. The Law Court adopted a narrow definition of the term "actual injury" in the anti-SLAPP context, which only covers "out-of-pocket damages." *Id.* ¶ 28, 162 A.3d at 239. The amount "cannot be left to mere guess or conjecture." *Camden Nat. Bank v. Weintraub*, 2016 ME 101, ¶ 12, 143 A.3d 788, 794.

Here, Plaintiffs allege that they "have suffered and will continue to suffer significant and irreparable damages to the value, marketability and use of their property as a result of Defendants' false claims relating to title, right or interest over Plaintiffs' lands and fabrication of

release deeds, and other unrecorded instruments and documents to bolster their assertion of 'color of title' to intertidal lands owned by the Plaintiffs." Complaint ¶ 80. This is the only statement in the Complaint that refers to damages that Plaintiffs have allegedly incurred, and the claim is highly speculative. Because Plaintiffs have not suffered any actual injury, their claims and requests for relief regarding NAF's protected petitioning activity cannot survive a motion to dismiss.

As a matter of law, Plaintiffs can show no injury until a permit is granted and upheld on appeal (even then, the permit itself causes no injury). As a matter of fact, it is absurd for Plaintiffs to allege now that NAF's representations of TRI have caused injury to Plaintiffs when they admit that for the last 25 years, they made no claim of ownership or possession of any of that property. *See* Tourangeau Aff. ¶ 13 and Exhibit 6 attached thereto. Plaintiffs' newfound assertion of ownership of the Eckrotes' intertidal zone did not come from them or any professional advising them. Instead, it was invented by the then-attorney for Upstream Watch, who no longer represents that organization, as a litigation ploy for opposing NAF's project. The Eckrotes' current deed from 2012 describes their property as bounded by Penobscot Bay, which Plaintiffs concede extends to low water. *See* Complaint ¶ 30. Plaintiffs' claim that the Eckrotes do not own their intertidal zone is constructed on a house of cards, the basis of which is an assumption that the southerly line of the lot conveyed to Fred Poor in 1946 terminates at the high tide line. *See, e.g.,* Complaint ¶ 31.

A cursory review of the documents demonstrates that this is not so. Instead, the view held by the Plaintiffs for the last 25 years—that the Eckrotes, not the Plaintiffs, own that intertidal zone—is the correct one. The lots in question were owned by Harriet Hartley in the 1930s and 40s. Complaint (Exhibit 1 attached thereto). Although the lots were conveyed by

deeds between 1946 and 1950 (prior to Harriet Hartley's death in 1951), the lots themselves were actually created and monumented prior to their conveyance by deed. Exhibit 20 to Plaintiffs' Complaint contains the Last Will and Testament of Harriet L. Hartley, and it describes several lots as follows:

> Third…To Ruth Hartley Waver I give, devise and bequeath the furnished house and garage at Belfast, Waldo County, Maine for her use during her life time and at her death I wish it to pass outright to my nephew Samuel Nelson Woods Jr. This house and garage shall include the plot of ground extending from the Little River, Belfast Maine on the South to a line at the top of the hill on which there is a row of blackberry bushes, on the East of the plot is Penobscot Bay and on the West is the State Highway.[2]
>
> Fourth…To my nephew, Samuel Nelson Woods Jr. I give devise and bequeath the balance of the ground owned by me in Belfast, Maine. This includes the lot beyond the blackberry bushes known as the Knoll lot[3], also the lot upon which Frederick Poor has a cottage (for which lot the said Frederick Poor pays twenty five dollars annually for ground rent)[4] and also includes all the ground north of the lot up to what is described in the deed as Moody's line and is now the Southern line of the property known as Rainbow Cabins.[5] **All of these lots are bounded by Penobscot Bay on the East and the State Highway on the West, the Northern line is marked by monuments.**

Complaint (Exhibit 20 attached thereto) (emphasis added).

Thus, prior to 1946, Harriet Hartley plainly understood the Poor lot to extend to the Bay, and the northern line of the Knoll lot (coincident with the southern line of the Poor lot) was already marked by monuments (the line itself plainly extended to the Bay regardless of the location of the monuments). Fred Poor's southerly boundary is likewise plainly described in his

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[2] As set forth in Exhibit 16 to Plaintiffs' Complaint (captioned "Mabee-Grace Chain of Title"), this lot, together with the Knoll lot, was conveyed by deed to the Butlers in 1950.

[3] The northerly boundary of this Knoll lot, which coincides with the southerly boundary of the land leased by Frederick Poor, is the line that is now in dispute. Complaint (Exhibit 16 attached thereto).

[4] This lot was conveyed to Frederick Poor in 1946. Complaint (Exhibit 1 attached thereto; captioned "Eckrote Chain of Title").

[5] This lot was conveyed to the Cassidas in 1946. *See* Complaint (Exhibit 16 attached thereto).

1946 deed and visible on the face of the earth along this monumented line. Complaint (Exhibit 1 attached thereto). It is the center line of a brook that begins "in the head of a gully in the center of a concrete culvert which is on or near the southerly bound of the Atlantic highway" and runs along "the bottom of the gully" to a stake in "the mouth of" the brook. *Id.* The plain meaning of the word "mouth" is "that part of a stream where its waters are discharged." *See* Webster's Comprehensive Dictionary of the English Language (1998 Edition). Thus, by definition, the mouth of a stream joins the ocean where the stream's waters are discharged, which occurs at all levels of the tide. Fred Poor's deed unambiguously extends his southerly lot line to the low tide line. And if there were any ambiguity, that is cleared up by the very same Grantor (Harriet Hartley) in her contemporaneous will when she describes the property as "bounded by Penobscot Bay to the East." Complaint (Exhibit 20 attached thereto).

Regardless, the Court need not resolve the actual location of this line (or whether the Eckrotes' 2012 deed should be reformed) in order to conclude that the Plaintiffs are not injured by NAF's representations of TRI which were entirely consistent with their understanding for the last 25 years.[6]

B. Requests for relief that demand interference with the permitting process must also be dismissed pursuant to M. R. Civ. P. 12(b)(1) and 12(b)(6).

This Court lacks subject matter jurisdiction to review any preliminary decision of the agency prior to a final agency decision on the permit, including agency determinations that an applicant has sufficient TRI to establish administrative standing. *Tomer*, 2008 ME 190, ¶ 14,

[6] Even if Plaintiffs were the record title owner by deed of the intertidal zone north of that brook (which they are not), their acquiescence in the Eckrotes' ownership and possession north of this brook for over 25 years likely means either that the parties had established a boundary by acquiescence along the stream that flows from the gully to its "outlet" in the Bay at low tide, or that the Eckrotes had obtained title to the intertidal zone by adverse possession. This alone prevents Plaintiffs from being injured by NAF's claims of TRI. *See Southridge Corp. v. Bd. of Envtl. Prot.*, 655 A.2d 345, 348 (Me. 1995).

962 A.2d at 340. The First Circuit has held that a cause of action is not ripe if it relies on a hypothetical outcome of a concurrent action. *See Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990). A justiciable controversy is "a claim of present and fixed rights, as opposed to hypothetical or future rights, asserted by one party against another who has an interest in contesting the claim." *Flaherty*, 2011 ME 32, ¶ 87, 17 A.3d at 662. A decision rendered on a non-justiciable controversy is an advisory opinion, which the Court generally does not have authority to provide. *Id.*

The Court also lacks jurisdiction to hear a statutory quiet title action for any property for which the Plaintiff has not "been in uninterrupted possession of such property for 4 years or more." 14 M.R.S. § 6651; *Chickering*, 420 A.2d at 1223. "When a court's jurisdiction is challenged, the plaintiff bears the initial burden of establishing that jurisdiction is proper." *Commerce Bank & Trust Co. v. Dworman*, 2004 ME 142, ¶ 8, 861 A.2d 662, 665. Unlike a motion to dismiss for failure to state a claim for which relief can be granted, in determining whether facts exist sufficient to support subject matter jurisdiction, the court makes no favorable inferences in favor of the plaintiff, and should consider any material outside the pleadings submitted by the pleader and the movant. *Davric Maine Corp. v. Bangor Historic Track, Inc.*, 2000 ME 102, ¶ 6, 751 A.2d 1024, 1028.

Plaintiffs' request for relief contained in Counts I, II, III and V[7] contravenes NAF's protected petitioning activity and must be dismissed.[8] Furthermore, the Plaintiffs' attempt to create a new property description as part of a purported "conservation easement" solely on the

[7] Plaintiffs' Amended Complaint does not contain a Count IV.

[8] While Count III plainly seeks injunctions against NAF's protected petitioning activity, Plaintiffs reference this relief in other parts of the Complaint as well, including in Counts I and V. *See* Complaint ¶¶ 9-10, 29(d), 72(f), 90(b).

intertidal zone in front of their neighbor's property, and then enforce that conservation easement against NAF which is not a party thereto, nor affected thereby, is likewise interposed solely for delay in response to NAF's petitioning activity. Pursuant to Maine's conservation easement statute, 33 M.R.S. § 476 *et seq.*, the holder of a conservation easement is "primarily responsible for enforcing the terms of the easement" and a landowner whose property is burdened by such easement lacks standing to bring "[a]ny injunctive, declaratory, or enforcement relief." *Estate of Robbins v. Chebeague & Cumberland Land Tr.*, 2017 ME 17, ¶¶ 13, 31, 154 A.3d 1185. Only the holder of an easement (or the Attorney General) can bring an enforcement action against someone in privity with the grantor of such an easement. *Id.* Count V should be dismissed pursuant to 14 M.R.S. § 556 because it is a meritless count brought in response to NAF's petitioning activity solely for the purpose of delay. In the alternative, it should be dismissed pursuant to Rule 12(b)(6) as required by *Estate of Robbins.*

Finally, it appears to be the property description in this conservation easement, rather than that in the Plaintiffs' deed, to which they seek to statutorily quiet title. The Complaint does not allege that Plaintiffs have been in uninterrupted possession of the intertidal zone in front of the Eckrotes for the jurisdictionally necessary 4 years (nor could it, as Plaintiffs concede this had not been the case for the last 25 years). Accordingly, Count II must be dismissed pursuant to 14 M.R.S. § 556 because it is a meritless count brought in response to NAF's petitioning activity solely for the purpose of delay. In the alternative, it should be dismissed pursuant to Rule 12(b)(1) as is required by the quiet title statute. 14 M.R.S. § 6651 (Plaintiff must "have been in uninterrupted possession of such property for 4 years or more"); *see also Chickering*, 420 A.2d at 1223. The Law Court, recognizing that a plaintiff's failure to comply with these statutory requirements can deprive the court of subject matter jurisdiction has said that "the arcane

intricacies found in the procedural requirements of these provisions represent a trap for the unwary." *Hodgdon v. Campbell*, Me., 411 A.2d 667, 669 (1980). Plaintiffs cannot escape this trap.

C. The Agencies, "Morgan", and "Theye" are necessary parties, without which the Complaint must be dismissed.

Rule 19 requires that courts shall order the joinder of parties necessary for just adjudication if "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." M.R. Civ. P. 19(a). The Rule further allows for dismissal of an action if an "indispensable" person cannot be joined in the action. M.R. Civ. P. 19(b). When determining whether an action must be dismissed for failure to join a necessary party, the court considers "first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." *Id.*

NAF failed to join both the respective agencies and the owners of Lots 35 and 37.[9] In their Complaint, Plaintiffs seek injunctions to reverse preliminary agency determinations in ongoing executive agency proceedings. Complaint ¶ 86(b)-(d). Where a party seeks an injunction that would impact ongoing executive agency proceedings, the agency is a necessary party to that proceeding. M. R. Civ. P. 19; *cf. Alexander*, 411 A.2d at 75. Plaintiffs failed to join the Maine Department of Environmental Protection / Board of Environmental Protection and the BPL. Not only is adjudicating the preliminary agency determinations not contemplated in the Maine Rules of Civil Procedure, but it would be immensely prejudicial to the agencies and the permitting process. *See Antler's Inn*, 2012 ME 143, ¶ 14, 60 A.3d at 1254 (once a final agency decision has been made, Rules 80B and 80C provide the exclusive process for judicial review).

Plaintiffs seek a declaration that they "are the owners in fee simple of all of the intertidal lands on which Belfast Tax Map 29, Lots 35, 36, 37 and 38 front," yet fail to join the alleged owners of Lots 35 and 37. Complaint ¶¶ 2-3, 72(a). Plaintiffs' Complaint alleges that Lot 35 is owned by "Morgan" under a deed recorded in Book 1804, Page 307, and that Lot 37 is owned "Theye" by deed recorded in Book 1303 page 184. *See* Complaint ¶¶ 2-3 (and incorporated sketch of lots). Under Maine law, their ownership of the upland parcel grants them presumptive ownership of the intertidal zone absence evidence to the contrary. *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 12, 206 A.3d 283, 288. They are therefore necessary parties in any suit to adjudicate ownership of the intertidal zone. Adjudicating the case without the alleged owners of Lots 35 and 37 is extremely prejudicial. Maine law presumes that the owners of Lots 35 and 37

[9] Not only do Plaintiffs fail to join necessary parties, they completely disregard Rule 19(c) which requires a pleading shall state the names of necessary parties not joined, "and the reasons why they are not joined." M. R. Civ. P. 19(c).

own the intertidal zone and Plaintiffs are attempting to claim ownership of this land, absent any notice to the owners of Lots 35 and 37 or opportunity to rebut Plaintiffs' allegations.

The prejudice to the agencies and the lot owners cannot be lessened or avoided without joining these parties. Accordingly, both the agencies and the lot owners are indispensable parties, without which the action cannot proceed and must be dismissed. In the alternative, Plaintiffs must amend their Complaint yet again to join these necessary parties.

IV. CONCLUSION

For all of the reasons set forth above, this Court must dismiss Counts II, III and V, and those portions of Count I directed at NAF's protected petitioning activity. Moreover, the remainder of Count I must be dismissed due to Plaintiffs' failure to join necessary parties.

Dated: August 14, 2019

for David M. Kallin

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NOTICE

Any opposition to this motion must be filed not later than twenty-one (21) days after the filing of this motion unless another time is provided by Rule 7(b)(1) of the Maine Rules of Civil Procedure or set by the court. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.

STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-19-18

JEFFREY R. MABEE and JUDITH B. GRACE,

Plaintiffs

v.

NORDIC AQUAFARMS, INC., JANET ECKROTE; RICHARD ECKROTE, et. al.,

Defendants

and

UPSTREAM WATCH,

Party-In-Interest.

DEFENDANT NORDIC AQUAFARMS, INC.'S OPPOSITION TO PLAINTIFFS' AMENDED SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT AND DECLARATORY JUDGMENT AGAINST DEFENDANT ECKROTES

(Intertidal Ownership)

Defendant Nordic Aquafarms, Inc. ("NAF") hereby opposes Plaintiffs' Amended Second Motion for Partial Summary Judgment and Declaratory Judgment Against the Defendant Eckrotes (the "Amended Second MSJ"), incorporates the Eckrotes' Opposition by reference, and asks that this Court enter summary judgment against Plaintiffs Jeffrey R. Mabee and Judith B. Grace (hereinafter "Plaintiffs" or "Mabee"), and in favor of the Eckrotes. M.R. Civ. P. 56(c).

I. INTRODUCTION

Plaintiffs' Amended Second MSJ asks this Court to resolve a single question of law: If a deed describes an area of upland with a call to tidal water "along high water mark of Penobscot Bay," is the upland severed from the flats? The Law Court has answered that question. As a matter of law, there is no severance. Title to the flats is presumed to convey with the upland as a matter of law. *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶¶ 28, 37-38. The upland, by definition, meets the water at the "high water mark." *Id.* at ¶ 8. This Court must, consequently,

enter judgment in favor of the Eckrotes becuase Mabee has not overcome the *Almeder* presumption of law that the Eckrotes own the entirety of their upland and associated intertidal zone.

Even if Mabee could overcome the *Almeder* presumption, they cannot obtain judgment regarding allegations of defects in the Eckrotes' chain of title. A Plaintiff can only quiet their own title – in other words, this Court can only determine for Mabee what Mabee owns. Mabee cannot obtain judgment that the Eckrotes do not own the intertidal zone. In contrast, as explained below, any Defendant may demonstrate that a plaintiff does not have title. Such a showing, here that Mabee does not have title, is an independent basis for entering judgment against the Plaintiffs.

Plaintiffs sought judgment only as to the Eckrotes. Because the Court can enter judgment against Mabee, it can resolve this motion. However, the alternative makes no sense, and this Court should decline Plaintiffs' invitation to enter judgment against the Eckrotes only to proceed to litigate the exact same claims as to NAF and Mabee.

II. SUMMARY JUDGMENT STANDARD

Summary judgment, "may be rendered against the moving party." M.R. Civ. P. 56(c); *S. Portland Civil Serv. Comm'n v. City of S. Portland*, 667 A.2d 599, 601 (Me. 1995). "Rule 56 was intended to permit the prompt disposition of cases in which the dispute is solely dependent on the resolution of an issue of law." *Tisei v. Town of Ogunquit*, 491 A.2d 564, 568 (Me. 1985). Accordingly, the "trial court *must* enter a summary judgment" where the facts in the summary judgment record demonstrate "that *any party* is entitled to a judgment as a matter of law." *Frost Vacationland Props., Inc. v. Palmer*, 1999 ME 15, ¶ 7, 723 A.2d 418, 420 (emphasis added); *accord* Me. R. Civ. P. 56(c) (summary judgment "*shall* be rendered forthwith" if the summary judgment record shows "that there is no genuine issue as to any material fact" in that record "and that *any party* is entitled to judgment as a matter of law.") (emphasis added).

In reviewing whether the facts in the summary judgment record entitle any party to judgment as a matter of law, the "court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment." M.R. Civ. P. 56(h)(4); *see Granville Lumber Corp. v. Advanced Construction*, No. RE-01-03/CV-01-63, at 3-4 (Me. Super. Ct., Han. Cty., Mar. 7, 2003) (disregarding plaintiff's statement of material facts where they contained a legal conclusion and were unsupported by record citations). "The existence of supporting evidence [elsewhere] in the trial court record does not satisfy the moving party's burden; that evidence must be (1) included in the summary judgment record, (2) the subject of one or more statements of material facts, and (3) cited to in the statements of material facts." *Ocean Communities Fed. Credit Union v. Roberge*, 2016 ME 118, ¶ 13, 144 A.3d 1178. Indeed, the trial court "is neither required *nor permitted* to independently search a record to find support for facts offered by a party." *Id.* (emphasis in original). In other words, documents in the record before this Court on the anti-SLAPP motions to dismiss, submitted to demonstrate petitioning activity regarding administrative standing in ongoing permitting proceedings, cannot be considered by this Court to be part of the summary judgment record. The relevant deeds at issue, however, are self-authenticating and may be considered by this Court to the extent they have been properly made part of the summary judgment record.

III. THE ECKROTES ARE THE DEEDED RECORD TITLE OWNERS OF THE INTERTIDAL ZONE ADJACENT TO THEIR UPLAND

The Law Court recently issued a lodestar decision on waterfront property ownership. *Almeder v. Town of Kennebunkport*, 2019 ME 151, -- A.3.d --. The *Almeder* decision—issued mere weeks after this case was filed—leaves no doubt that where, as here, a deed describes an area of upland with a boundary call referencing tidal water, that the adjacent flats are included with the upland by operation of law under the common law principles of the Colonial Ordinance. *Id.* at ¶¶

28, 37-38. The upland, by definition, can only touch tidal water at the "mean high water mark." *Id.* at ¶ 8. This presumption of inclusion of the flats with the upland can only be overcome by a showing that the flats were expressly reserved to the Grantor by other language in the deed. *Id.* at ¶¶ 28, 37-38.

Here, the deed language is plain. The easterly boundary call runs: "along high water mark of Penobscot Bay," Penobscot Bay is a tidal water and a call to high tide of the Bay is a call to a tidal water body. Plaintiff's SMF ("PSMF") ¶ 1 and Exhibit A attached thereto; Defendants' Joint Opposing SMF ("DSMF") ¶¶ 1, 10. Thus, the *Almeder* "Colonial Ordinance" presumption of law operates to vest in the Eckrotes record title to the intertidal zone associated with their upland.

Indeed, Plaintiffs are not even neighbors to the Eckrotes, and the summary judgment record further establishes that they are not even record-title owners to the intertidal zone in front of the Theyes (who own property between the Eckrotes and the Plaintiffs).

Thus, as a matter of law, judgment must be entered against the Plaintiffs and for the Eckrotes. Accordingly, this brief will first address the general principles of deed construction summarized in *Almeder* and other binding precedent, and then apply those principles to the key deeds at issue here in order to distill the questions of law that this Court may answer on summary judgment against the Mabees on the plain language of the deeds.

A. General Principles of Deed Construction Applicable to Waterfront Boundaries

The *Almeder* case analyzed twenty-four separate title chains from the 17th century to the present in order to resolve disputed ownership of a two-mile stretch of beach in Kennebunkport. In a comprehensive, 274-page decision, the Superior Court meticulously analyzed the waterfront boundaries described in hundreds of deeds. *Almeder v. Town of Kennebunkport*, Dkt. No. RE-2009-11, (Me. Super. Ct. York Cty., April 6, 2018) (Douglas, J.). That decision concluded that, by operation of the Colonial Ordinance of 1641, the waterside boundary of one landowner was the

low water mark of the Atlantic Ocean, but that the waterside boundary of twenty-two other landowners did not touch the water at any level of the tide. *Id.* In affirming that decision, the Law Court reaffirmed "that the interpretation of a deed is a question of law and that [the trial court's] role [is] to apply the relevant principles of deed construction and construe the language of the deed to give effect to the expressed intention of the parties." *Almeder*, 2019 ME 151, ¶ 28.

The *Almeder* Court issued an encyclopedic summary of the rules that govern deed construction for intertidal zone ownership in Maine, concisely articulating the following rules of decision that control in this case:

> [T]he owner of upland oceanfront property presumptively owns to the low water mark by operation of the Colonial Ordinance of 1641. Because the beach may be conveyed separately from the upland, an owner only benefits from this presumption where a grant of property specifically includes a call to the water. This rule applies only in cases where the grantor, seised of the upland and flats, in conveying his land, bounds the land sold on the sea or salt water, or describes other boundaries of equivalent meaning, without any reservation of the flats. Terms such as "Atlantic Ocean," "ocean," "cove," "sea," or "river" are calls to the water that trigger the presumption. However, language limiting a grant "to" or "by" the shore, beach, bank, or sea shore may defeat the presumption. As a monument, the shore limits the grant to the high-water mark.

Id. at ¶ 37 (internal citations and quotations marks omitted). "Upland" is land "above the mean highwater mark" of the tidal water. *Id.* at ¶ 8. The shore, beach, bank, or sea shore are monuments of *land* (not water) that abut the upland at the highwater mark and abut the submerged land at the low-water mark. *Id.* at ¶¶ 8, 31.

As the *Almeder* Court explains, where an area of "upland" is described by a deed that "specifically includes a call to the water," such as "along" the "high water mark" of tidal water, the grantee "benefits from this presumption" that the intertidal zone is included with the upland unless there is a specific "reservation of the flats." *Id.* at ¶¶ 8, 28, 37-38. This presumption may be "defeat[ed]" if the deed contains an abuttal call that excludes *the land under or near the water*

by terms such as shore, beach bank, sea shore, or sea wall. *Id.* This is because that land, like any other land, can serve as an abuttal that is specifically reserved to the Grantor. *Id.* at ¶¶ 31, 38. The presumption can also be defeated by an express reservation of the flats. *Id.* at 37. Although some deeds describe the intertidal zone by metes and bounds with a specific call to low water, in such cases the intertidal zone passes by the express terms of the grant. In other deeds, the Colonial Ordinance presumption holds that they are constructively included in a description of the upland, which necessarily meets the ocean at the "high water mark." *Id.* at ¶¶ 8, 28. Thus, a call to tidal water—including those along the high water mark (as here)— includes the intertidal zone as a matter of law unless there is an express reservation or other language that defeats that presumption.

B. There is no law supporting Mabee's claim to the Eckrotes' intertidal.

Plaintiffs Amended Second MSJ does not cite a *single* case involving waterfront boundaries on tidal water. Instead, Mabee relies solely on a law review article (which itself contradicts Mabee's claim), to baldly, and wrongly, assert the following propositions:

> The use of the phrases: "along high water," "along high water mark," and "along high-water mark of Penobscot Bay" in conjunction with the reference "to" a specific monument (i.e. the iron bolt, a stake, a point) have a plain meaning in Maine Law. Such phrases of description are considered words of ***exclusion***, indicating that the Grantor intends to sever the intertidal land from the upland and only convey the upland property to the Grantee down to the high water mark. Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies*, 47 Me. L. Rev. 35 (2018), pp 52-54, f.n. 60-61 (pp. 19-21 of 35).

Amended Second MSJ at 7. Plaintiffs' argument confuses several different concepts, and misstates both Maine law and the very law review article they cite for support.

1. The Presumption of Conveyance of the Flats Applies to Upland Bounded "Along high water mark" of Penobscot Bay

First, as recently explained by the Law Court in *Almeder*, the presumption that the upland includes the intertidal pursuant to the Colonial Ordinance of 1641 applies when the metes and bound description is limited to "upland," which—by definition—has a waterside boundary where

it touches "the mean highwater mark." *Almeder*, at ¶¶ 8, 28, 37. The *Almeder* Court thereby reaffirmed principles that have long been the common law of this State. *See Pike v. Munroe*, 36 Me. 309, 313–14 (1853) (although all monuments in the deed were located at the high water mark, by operation of the Colonial Ordinance the deed "conveyed not only the upland, but also the flats, in front of and adjoining the same" likewise the same was true for a subsequent conveyance of half of that lot bounded with a call to the water "**on high water mark, twenty-five rods.**") (emphasis added); *Partridge v. Luce*, 36 Me. 16, 17 (1853) (although the lot was described in a partition petition as a single acre of upland with side lots lines described "by a line from the highway **to an iron bolt in the ledge at highwa[ter] mark,**" and with the parties admitting "**the highwater mark being a line curving into the upland**" the Court rejected the argument that the flats "are not embraced in the description of the premises" and held to the contrary that because the referenced "highwater mark" was that of "Owl's head Bay" in Rockland, and a "bay is an arm of the sea," the principles of the Colonial Ordinance of 1641" constructively included the intertidal zone between the highwater mark and the low water mark."); accord *Mayhew v. Norton*, 34 Mass. 357, 359 (1835) (The Massachusetts Supreme Court rejected the argument "that the grantor excluded the flats, by means of the very accurate description of the premises, as well in regard to quantity, as in regard to the length of lines" that terminated at highwater mark and held to the contrary that because that accurate description extended to the highwater mark of "the harbour of Edgarton," the Colonial Ordinance presumption included the intertidal zone in the description of the upland). Indeed, this presumption regarding the applicability of the Colonial Ordinance of 1641 (the "Colonial Ordinance presumption") operates as a common law rule that constructively includes the intertidal zone in a deed description that would otherwise terminate at the highwater mark where the upland meets tide water. *See City of Bos. v. Richardson*, 105 Mass. 351, 354 (1870)

("The effect of the ordinance of 1647, as established by a long course of decisions, is, that the title which the proprietor of land bounded by tide water had above high water mark was thereby extended over the shore or flats, subject only to the public rights of navigation and fishing.")

In other words, the Colonial Ordinance presumption operates to include the flats when an upland property description lists a tidal water body as one of the boundaries of the upland even when that description is to the high water mark unless the grantor expressly reserves the flats by listing a land monument, such as the shore, beach, sea wall etc. as the abutter. *Almeder*, 2019 ME 151, ¶ 37. In effect, this land monument operates as an express reservation of the flats, to defeat the presumptions. *Id.* at ¶¶28, 37-38. A description of upland alone, that is silent as to the flats, includes the flats with the upland by operation of law. *Id.* This rule of deed construction which includes the flats in the description of the upland is consistent with another presumption of deed construction that interprets any grant in favor of the grantee and against the grantor. *Winslow v. Patten*, 34 Me. 25, 27 (1852) (To determine "whether the flats were granted or excepted, the construction most favorable to the grantee should be adopted. And if the grantor has really left it in doubt whether he has excepted a part of the premises granted, such part must pass by the general terms and description of the grant").

2. "Words of Exclusion" Apply to Monuments of Land, Not to Iron Bolts or Points that Indicate Where a Side lot Line Touches the High Water Mark

Contrary to Plaintiffs' assertion, "words of exclusion" apply to monuments of land, not to iron bolts or points where a side lot line touches the high water mark. As the Law Court has explained, "To, from, or by, are terms of exclusion" as parts of deed descriptions in situations "where land is conveyed bounded by the land of A and running from the land of B to that of C." *Bradley v. Rice*, 13 Me. 198, 201 (1836). Thus, "'To' is a word of exclusion **when used in describing premises**" and "[t]he 'shore' is **the ground** between the ordinary high and low water

mark--the flats--**and is a well defined monument**" so phrases like "to" or "by" the "shore" excludes that entire "premises." *Montgomery v. Reed*, 69 Me. 510, 514 (1879) (emphasis added). In other words, the "shore" is excluded in the same manner that the "land of A" is excluded. "Words of exclusion" only apply to a monument with width, not to an iron bolt, a point or a line.

A line "along high water mark of Penobscot Bay" does not exclude any premises- it just describes the line where the upland meets tidal water and provides a convenient point of measurement. *Almeder* at ¶ 8. "Penobscot Bay" is owned by the State of Maine, in trust for the public, so it is never included or excluded from any private grant. Likewise, words of exclusion don't make sense when applied to an iron bolt or a stake or a point. *See Partridge*, 36 Me. at 17 ("to" and "by" are not words of exclusion in a lot described in a partition petition "as bounded westerly by a highway; southerly by a line, [described;] easterly **by Owl's Head bay**; northerly by a line from the highway **to an iron bolt in the ledge at highway[ter] mark**, and to *the eastern boundary,* being about one acre" even though the lot would have greatly exceeded an acre if measured to low water); *accord Lowell v. Robinson*, 16 Me. 357, 360 (1839) ("When the monument is stated to stand by the river or by the edge of the river, the same idea is communicated as if it had stated, that the line of boundary commenced by the river or by the edge of the river, instead of at the monument thus standing").

Even words of exclusion in reference "to or by the shore" are not necessarily sufficient to sever the intertidal from the upland, and in those cases the Court will look to calls to the high water to determine whether the entire "monument of land" that is the "shore" was included or excluded. *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14, 24 A. 429, 430 (1891); *Storer v. Freeman*, 6 Mass. 435, 441 (1810). That principle is why the *Almeder* Court noted that the Colonial Ordinance Presumption may be "defeat[ed]" when the deed contains an abuttal call that excludes

the land under or near the water by terms such as shore, beach bank, sea shore, or sea wall. *Almeder*, 2019 ME 151, ¶¶ 8, 28, 31, 37-38. References to the highwater mark, coupled with a reference to a monument that describes the land that comprises a well-known monument, can exclude that monument in the same way it can exclude "the land of A."

Contrary to Mabees' claim, phrases like "to an iron bolt in the ledge at highwater mark" or "by the high water mark" without reference to one of these *monuments of land,* do not operate as "words of exclusion" and cannot defeat the presumption. Indeed, the presumption *only applies* when upland is described in a manner that ends at the high water mark (there is no need for a presumption when the low water mark is used expressly). It would make no sense to say that the conditions necessary to trigger the presumption are the same ones that defeat it. Doing so would be contrary to *Almeder* and centuries of Maine common law, including *Partridge v. Luce*, and *Pike v. Munroe*, as well as the other cases described above. In short, a call to tidal water along the high water mark *includes* the intertidal zone as a matter of law. *Almeder*, 2019 ME 151, ¶¶ 8, 37-38.

3. The Law Review Article Mabee Cites Doesn't Say what Mabee Claims it Says.

Even if this Court could overturn centuries of Maine law based on the analysis of a single law review article, even the law review article cited by Mabee doesn't claim that the Colonial Ordinance Presumption does not apply here. Plaintiffs cite to: "*Maine Principles of Ownership Along Water Bodies*, 47 Me. L. Rev. 35 (2018) [sic] , pp 52-54, f.n. 60-61 (pp. 19-21 of 35)." Although the referenced article was actually published in 1995, not in 2018, the Law Review article does contain the sentence "Terms often used as evidence of intent to separate the uplands from the shore or flats include 'by the bank,' 'along high water mark,' 'high tide,' 'by the shore,' 'by the head of the cove,' and 'along the near (or upland) shore.' Donald R. Richards & Knud E. Hermansen, *Maine Principles of Ownership Along Water Bodies*, 47 ME. L. REV. 35, 52 (1995). However, it is wrong to posit that Mr. Richards and Mr. Hermansen meant to misstate Maine Law

and suggest that there mere existence of any *one* of those terms effected a severance regardless of context. Indeed, the article first recognizes that "common law presumption is that a conveyance of land bounded by tidal water will convey title to the low tide mark" *Id.* at 39, and it nowhere implies that the phrase "along high water mark" is sufficient to establish a separation of the upland from the shore or flats without the deed also including "by the bank" or "by the shore." Instead, as all of the cases cited in footnotes 60 and 61 demonstrate, the phrase "along high water mark" of tidal water has only ever been held to create a severance when it is used to described one side of a monument of land such as such as shore, beach bank, sea shore, or sea wall.[1] Furthermore, if there were any doubt as to whether the presumption applied to upland that was described with a boundary along "mean high water," the *Almeder* case eliminated all doubt.

C. Application of the Principles of Deed Construction to Key Deeds in this Summary Judgment Record Establish no Mabee Ownership Anywhere Near the Eckrotes' Intertidal Zone.

As a plaintiff, Mabee can only prevail on the strength of their own title, not on the alleged weakness of anyone else's. *Blance v. Alley*, 330 A.2d 796, 798 (Me. 1975). "If the Plaintiff shows no title she cannot prevail even though she proves the Defendant has no title." *Id.* "The defendant

[1] The following cases are included in the article's referenced footnotes: *Proctor v. Hinkley*, 462 A.2d 465, 467 (Me. 1983) (inapplicable non-tidal case); *McLellan v. McFadden*, 114 Me. 242, 247, 95 A. 1025, 1028 (1915) (deed bounded "by the shore"); *Whitmore v. Brown*, 100 Me. 410, 414 -15, 61 A. 985, 987- 88 (1905) (deed "to the shore"); *Wilson & Son v. Harrisburg*, 107 Me. 207, 212-13, 77 A. 787, 789 - 90 (1910) (inapplicable non-tidal case); *Brown v. Heard*, 85 Me. 294, 27 A. 182, 182 (1893) (deed "to the seashore; thence by the seashore"); *Bradford v. Cressey*, 45 Me. 9, 12 (1858) (inapplicable non-tidal case); *Dunton v. Parker*, 97 Me. 461, 467, 54 A. 1115, 1118 (1903) (deeds "by the shore"); *Hodgdon v. Campbell*, 411 A.2d 667 (Me. 1980) (deed "by the shore"); *Proctor v. Railroad Co.*, 96 Me. 458, 52 A. 933 (1902) (deed "by the bank" of tidal river); *Stone v. City of Augusta*, 46 Me. 127 (1858) (inapplicable non-tidal case). Other case law is similarly consistent with this rule. *See Lapish v. President, etc., of Bangor Bank*, 8 Me. 85, 89 (1831)(The "bank of the Penobscot River" at "high water" excludes the flats because bank references land, and the highwater references the side of that land, just as with the term "shore"); *accord Dunlap v. Stetson*, 8 F. Cas. 75, 81 (C.C.D. Me. 1827) (A previous case interpreting the same deed later at issue in *Lapish*, held "The limitation throughout is by the bank of the river, and with reference to known objects on that bank; and the words, 'to high-water mark,' can have no other rational meaning, in the connexion in which they stand, than as indicating the front line of the bank itself.")

may, however, always show that the plaintiff obtained nothing by his deed." *Id.* (emphasis added); Likewise, in a case specifically involving competing claims to tidal flats, the Law Court noted that the purpose of statutory provisions for quieting title "is to quiet possession, and not to cast the burden of proof upon one of two claimants to land, neither of whom has possession, or perhaps title. He who begins the litigation must and ought to carry the burden of proving title." *Marshall v. Walker*, 93 Me. 532, 45 A. 497, 498 (1900) (emphasis added); *accord Smith v. Varney*, 309 A.2d 229, 233 (Me. 1973); *Hodgdon*, 411 A.2d at 669–71. Accordingly, this Court must start with the Mabees' deed.

1. The Plaintiffs Have Not Demonstrated Record Title to the Intertidal Zone In Front of the Theyes

Plaintiffs' deed contains a description of the larger parcel of land that had been owned by their predecessor in title, then excepts therefrom the northern half of the lot that had previously been conveyed by "Ernest J. Bell and Marjorie N. Bell," with a description that runs "to the highwater mark of Penobscot Bay; thence turning and running northeasterly along said highwater mark." DSMF ¶ 9 (Book 1221, Page 347); *See also* DSMF ¶ 12 (Bk 621, Pg 288). This lot is now owned by the Theyes. DSMF ¶ 13. The referenced deed from the Bells to the predecessor in title to the Theyes uses the identical description, to and along "high watermark of Penobscot Bay," and is otherwise completely silent as to whether the flats are conveyed to the grantee or reserved to the grantor. DSMF ¶ 12. This is an *identical fact pattern* to the case of *Pike*, which is controlling precedent holding that Plaintiffs are barred from claiming any intertidal zone in front of the Theye property. *Pike*, 36 Me. at 313-14. Just as the Plaintiffs trace their title (and that of the Theyes) to the Bells, so too there "[b]oth parties trace their title to the same source" *Id.* at 311. Just as here, the Bells lot was bounded on tidal water "Penobscot Bay," so too there was it bounded on a "navigable river in which the tide ebbs and flows." *Id.* at 313. Just as here, the Bells conveyed the

northerly half of the lot to the predecessor in interest to the Theyes with a metes and bounds description "on high watermark," so too there did Robins convey the northerly half of his lot with a meets and bounds description to Bohannan "on high water mark" with no other provision indicating whether the flats were conveyed or reserved *Id.* Just as here, the Plaintiff there "contend[ed] that by this conveyance Bohannan was bounded by, and restricted to high water mark" and that plaintiff thus retained the flats. *Id.* But the Court there held the opposite: that the Plaintiff had no claim to the flats, because the flats had passed to Bohannan by operation of the Colonial Ordinance Presumption. *Id.* The same outcome is mandated by application of the principles recently reiterated in *Almeder*. It is also identical to the "very accurate" metes and bounds description that the Massachusetts court in *Mayhew* held *included* the intertidal zone by operation of the Colonial Ordinance Presumption. *Mayhew*, 34 Mass. at 359. Thus, this Court must enter judgment against the Plaintiffs on any claim of ownership to any intertidal zone other than that associated with their upland pursuant to the Colonial Ordinance of 1641.

Nor could either the Plaintiffs or the Theyes make any claim of ownership to any intertidal zone northerly of the Fred Poor's southerly line (now the Eckrotes' southerly line). The Plaintiffs and the Theyes together could claim only such flats as passed by operation of law in the original grant to their predecessor in title. As will be demonstrated below, the language in the deed to Poor already included the flats prior to Dr. Hartley conveying land to Plaintiffs' predecessor in title. But even if that were not the case, the Law Court tells us it is always appropriate to look to previous descriptions of lots in the Plaintiff's chain of title when determining "the flats appertaining thereto, and of right belonging to said parcel." *Treat v. Strickland*, 23 Me. 234, 243 (1843). Accordingly, in determining which flats attached "of right belonging to [each] parcel" conveyed by Dr. Harriet L. Hartley between 1946 and 1950 (including the one conveyed to Mabee's predecessor in title,

the Butlers), this Court can look to the will Dr. Hartley prepared, and that she signed on September 25, 1945, four months before her deed to Fred Poor and four years before her conveyance to the predecessors to the combined lot of Mabee and the Theyes. DSMF ¶ 14. In her will, Dr. Hartley described her shorefront property as four distinct lots. *Id.* The first contained a house and garage and was basically the lot now owned by Mabee. *Id.* The second lot she referred to as the "Knoll lot" which is basically the Theye property. *Id.* The third lot she described as "the lot upon which Frederick Poor has a cottage," which was what she subsequently conveyed to Fred Poor, and which became the waterfront portions of the Eckrotes and Dr. Morgan. *Id.* The fourth lot was described as all the land north of the Poor lot. *Id.* She then stated "*All of these lots are bounded by Penobscot Bay on the East.....*". *Id.* Accordingly, when she conveyed to the Butlers in 1950, what was the combination of the Knoll Lot, and the "house and garage" lot, the only flats appertaining thereto were those that were southerly of the line of Fred Poor extended to the ocean. *Id.*

2. The Plaintiffs Have Not Demonstrated Record Title to the Intertidal Zone In Front of the Eckrotes

Just as the Plaintiffs can't claim record title to the flats conveyed by their predecessor to the Theyes, neither can they claim record title to the flats zone previously conveyed to Fred Poor.

a. Plaintiffs are Barred By Res Judicata From Asserting A Claim to the Intertidal Zone In Front of the Eckrotes.

The combined land of the Plaintiffs and the Theyes was the subject of a quiet title action in the 1970s that quieted title to a four-sided description with a northeasterly corner where the land of Fred Poor meets Penobscot Bay. DSMF ¶ 15. The *Ferris* quiet title action is silent regarding the shore or flats, and makes no reference to any portion of any intertidal zone. At that time, Fred Poor was still the record owner of his lot, but he was not named as a defendant. Fred R. Poor was a known and ascertainable party (he lived in Belfast, Maine his entire life, was on the Board of the Belfast Water District, and is buried in the Grove Cemetery (he died in 1974 but was survived by

one son William O. Poor who likewise lived in Belfast and was buried in the Grove Cemetery in 1999). DSMF ¶¶ 16-17 . Mr. Poor (whether Fred himself or his son) would have been required to be joined in the suit if Mr. Ferris was making a claim that his deed overcame the presumption that Mr. Poor owned the intertidal zone adjacent to the Poor upland. Because Mr. Poor was not joined at that time, Plaintiffs are 50 years too late in bringing a claim to Poor's intertidal, which is now barred by *res judicata* and *collateral estoppel.*

b. Plaintiffs Do Not Show Any Title By Deed To the Flats in Front of the Eckrotes.

There is no dispute that the Eckrotes are the deeded owners of whatever land was conveyed to Fred R. Poor from Harriet L. Hartley by deed dated January 25, 1946 and recorded in the Waldo County Registry of Deeds in Book 452 and Page 206. The Plaintiffs can't claim any land that was conveyed to Fred Poor by deed. DSMF ¶ 18. There no dispute that Fred R. Poor was conveyed the upland that abuts a certain "450 feet along the highwater mark of Penobscot Bay" by virtue of his deed from Dr. Hartley. Thus, if Fred R. Poor also "own[ed] to the low water mark by operation of the Colonial Ordinance of 1641," the Court must issue judgment against the Plaintiffs. Application of the *Almeder* rules of decision to the Hartley to Poor deed results in Fred R. Poor receiving title to the low water mark "by operation of the Colonial Ordinance of 1641."

This can be illustrated by inserting the relevant undisputed facts in this case to the following paragraph in Almeder:

> [T]he owner of upland oceanfront property [Fred R. Poor] presumptively owns to the low water mark by operation of the Colonial Ordinance of 1641. ... [Fred R. Poor] benefits from this presumption where a grant of property specifically includes a call to the water [*i.e.* the "highwater mark of Penobscot Bay"]. This rule applies only in cases where the grantor [Harriet L. Hartley], seised of the upland and flats [she was], in conveying h[er] land, bounds the land sold [*i.e.* the upland described by metes and bounds] on the sea or salt water [*i.e.* "along the highwater mark of Penobscot Bay"] ... without any reservation of the flats [there was no such reservation]. Terms such as "Atlantic Ocean," "ocean," "cove," "sea," or "river" are calls to the water that trigger the presumption. [The "highwater mark of

> Penobscot Bay" is a call to the water that triggers the presumption]. However, language limiting a grant "to" or "by" the shore, beach, bank, or sea shore may defeat the presumption. [There is no reference to the shore, beach, bank, sea shore, sea bank, or sea wall, nor any monument of land that may defeat the presumption].

Almeder, at ¶ 37 (alterations added). There is no dispute that Dr. Harriet L. Hartley was "seised of the upland and flats." DSMF ¶ 19. In conveying her land, she "bound[ed] the land sold [*i.e.* the upland] on the sea or salt water [*i.e.* "along the high water mark of Penobscot Bay."]." DSMF ¶ 1 & PSMF Exhibit A. The deed contained neither an express grant nor an express "reservation of the flats." Thus, for the same reasons articulated above, the deed to Fred Poor constructively *includes* the intertidal zone with the call to tidal water "along highwater mark of Penobscot Bay."

Indeed, while the call to tidal water coupled with the lack of any express reservation of the flats is sufficient to conclude that the flats were constructively included as a matter of law, the other calls in the deed from Hartley to Poor add additional support to this conclusion. The seaward boundary of that deed is not described by reference to a single monument. Instead, the two side lot lines terminate in points where a river or gully meet the ocean itself. The seaward boundary of the deed requires analysis of three operative calls as follows:

> Thence Southeasterly following the bottom of the gully 275 ft. more or less to an iron bolt in the mouth of a brook; thence Easterly and Northeasterly along high water mark of Penobscot Bay 410 ft. more or less to a stake at the outlet of a gully; thence Northerly up the bottom of said gully 100 ft.

Unlike a deed that excludes the shore, beach, bank, seashore, or seawall, which could defeat the presumption, *Almeder*, 2019 ME 151, ¶¶ 8, 37-38, this deed has no such monument of land. Instead, the side lot lines terminate at "an iron bolt **in the mouth of a brook**" and "a stake **at the outlet of a gully**." Because the "mouth of a brook" and the "outlet of a gully" are both points where those streams intersect with the ocean itself, this is further evidence that tidal water (Penobscot Bay) was their terminus. *See Partridge*, 36 Me. at 17 (a single acre of upland with side

lots lines described "by a line from the highway **to an iron bolt in the ledge at highwater mark**," understood to include the flats). This principle was likewise recognized by the Law Court with regard to streets. *Stetson v. City of Bangor*, 60 Me. 313, 317 (1872) (Although "strictly measured they do not extend beyond high-water mark on the plan" the Court held that "it was the intention to make a direct and unbroken connection between the street and the river at all times of the tide."). The mouth of a stream always makes a direct and unbroken connection between the stream and the ocean at all times. Moreover, although the artificial monuments of an "iron bolt" or a "stake" at highwater are sufficient to extend the line to low water, the further the reference to the natural monuments of the "mouth of the brook" and the "outlet of the gully" are considered in addition to (and more reliable than) those artificial monuments. *See Baptist Youth Camp v. Robinson*, 1998 ME 175, ¶¶ 5-10, 714 A.2d 809, 811. *Baptist Youth Camp* presented a case regarding a deed reference to a stake in the "mouth of Ohio Stream." There, the natural location of where the stream empties into Lake Pennamaquon was held to control over the artificial monument of a stake that could be easily moved or lost. Accordingly, it was proper for the trial court to recognize the unreliability of the monuments named in the original deed description, and place "more reliance on the geographic boundaries of the stream and the lake." *Id.* at ¶10. The plain meaning of the word "mouth" is "that part of a stream where its waters are discharged." *See* Webster's Comprehensive Dictionary of the English Language (1998 Edition). Thus, by definition, the mouth of a stream joins the ocean where the stream's waters are discharged.[2] It is also consistent

[2] Several Court cases support the interpretation that the mouth of a brook is a natural monument where that brook meets the bay. *See e.g. Eaton v. Town of Wells*, 2000 ME 176, ¶ 8, 760 A.2d 232, 237 (Discussing "Wells Harbor" and "the mouth of the Webhannet River" as adjacent waterbodies marking the northerly bounds of an easement); *Baptist Youth Camp*, 1998 ME 175, ¶¶ 5-10; *State v. Ruvido*, 137 Me. 102, 15 A.2d 293, 296 (1940) (discussing state jurisdiction and quoting a treatise that "mouths of rivers of any State where the tide ebbs" are "portions of the sea"); *Hamor v. Bar Harbor Water Co.*, 92 Me. 364, 42 A. 790 (1899) (the reporter of decisions describes a "mill situated at the mouth of Duck Brook" as located "below the high-tide mark of Frenchman's Bay"); *Haight v. Hamor*, 83 Me. 453, 22 A. 369, 370 (1891) (a deed call

with Maine freshwater cases that extend similar side lots lines to the lowest point of ownership under the water body. *See Mansur v. Blake*, 62 Me. 38, 41 (1873); *Lowell*, 16 Me. at 361. It is also consistent to read the "mouth of the brook" in favor of the grantee and against the grantor, as evidence of intent not to expressly reserve the flats to the Grantor. *Winslow*, 34 Me. at 27.

As a matter of law, Mabee has no claim to the intertidal zone in front of the property that was conveyed to Fred R. Poor, an outcome mandated by *Pike v. Munroe* and by application of the principles recently reiterated in *Almeder*. The Fred R. Poor situation is also identical to the "very accurate" metes and bounds description that the Massachusetts court in *Mayhew* determined constructively included the intertidal zone. *Mayhew*, 34 Mass. at 359. For all of the above reasons, judgment must be entered against Mabee and, as a matter of law, in the Eckrotes favor.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD HOLD THAT THE RIGHT TO LAY WATER PIPES UNDER THE INTERTIDAL ZONE IS A PUBLIC RIGHT THAT CANNOT BE ENJOINED BY THESE PLAINTIFFS

As discussed, this Court should decline Plaintiffs' invitation to ignore the Law Court's decision in *Almeder*, overturn precedent dating back to 1853, and instead rely solely on a misstatement of the conclusions of a law review article. Instead, this Court should enter judgment against the Plaintiffs. As explained in a long line of case, the only reason any private rights in the intertidal zone were granted to the owners of the upland was "[f]or the purposes of commerce," structures "erected below high water mark were necessary" "[b]ut the colony was not able to build them at the public expense" so in order to "induce persons to erect them, the common law of

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that draws a line with "four rods of land" between the line and a brook, and then crosses a brook "at right angles to the brook, and following the same to its mouth" is shown on a plan to describe a locus parcel where the mouth of the river joins Frechman's Bay); *Spring v. Russell*, 7 Me. 273, 293 (1831) (quoting legislative authorization to "open and cut a navigable canal" to "communicate with the sea, at the mouth of said river."); *Winthrop v. Curtis*, 3 Me. 110, 111 (1824) (discussing a boundary line between the *Kennebec* and *Pejepscot* proprietors as beginning at "the mouth of Cathance river, which empties itself into Merry-meeting-bay.").

England was altered" to give private rights. *Storer*, 6 Mass. at 438. Here the Plaintiffs are trying to thwart marine commerce by asserting the right to block seawater pipes serving a property that they do not own from being buried below an intertidal zone that they similarly do not own. This Court must accordingly determine whether the "the public's right to fish, fowl, and navigate include[s] the right to cross the intertidal zone [with underground water pipes] to engage in ocean-based activities" such as aquaculture, or whether a private Plaintiff can sue to block that right. *See Almeder*, 2019 ME 151, ¶ 4; *Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 36, 106 A.3d 1099, 1114, *as corrected* (Apr. 16, 2015). Maine's "common law has regularly accommodated the public's right to cross the intertidal land to reach the ocean for ocean-based activities," *McGarvey v. Whittredge*, 2011 ME 97, ¶ 51, 28 A.3d 620, 634, so burying water pipes for ocean-based activities such as aquaculture should be recognized as a public trust right.

In the alternative, this Court could evaluate whether the intertidal zone is actually owned by the State or the City because Maine's recognition of private ownership in the intertidal zone is unconstitutional under the equal footing doctrine and public trust doctrine, or otherwise violates the State or Federal Constitution. *See* O. Delogu, Maine's Beaches Are Public Property: The *Bell* Cases Must Be Reexamined (Tower, 2017); *see also* E. Churchill and R. Yarumian II, The Great Land Grab - Maine Beaches Ripped from the True Owners: The Towns' Inhabitants (Tower, 2019). Under any of these public rights theories, these Plaintiffs would be precluded as a matter of law from receiving a declaratory or injunctive judgment that they had the private right to prevent seawater pipes from being buried under the intertidal zone.

V. FACTUAL ISSUES PRECLUDE ENTERING JUDGMENT *FOR* THE PLAINTIFF.

There are no factual issues that prevent this Court from entering judgment *against* the Plaintiffs, but the fact that the Plaintiffs have acquiesced in the Eckrotes' possession of the

intertidal zone north of the stream that extends from the gully between the Theyes and the Eckrotes to the low tide line prevents this Court from entering judgment *for* the Plaintiffs. This is sufficient to establish title in the Eckrotes by acquiescence because that stream is "a visible line" that is itself a "monument," that the Plaintiffs have already conceded "actual notice" of the Eckrotes' possession, that all adjoin landowners have recognized that possession for a long period of years. DSMF ¶¶ 20-24 . This is sufficient to establish title by acquiescence, *Grondin v. Hanscom*, 2014 ME 148, ¶ 11, 106 A.3d 1150, 1155–56, even if Plaintiffs could show title by deed—which they cannot and have not.

VI. CONCLUSION

This motion comes to the Court in a simple procedural posture: the only thing that Plaintiffs seek is a judgment regarding the weakness in the Eckrotes' title. As a matter of law, Plaintiffs are not entitle to such a judgment. *Blance*, 330 A.2d at 798; *Marshall*, 45 A. at 498; *Smith*, 309 A.2d at 233; *Hodgdon*, 411 A.2d at 669–71. Accordingly, this Court cannot enter judgment in Plaintiffs' favor. Me. R. Civ. P. 56(c). Separately, controlling precedent dictates that judgment must be entered against the Plaintiffs on their claim to the intertidal associated with the Theyes, the Eckrotes, or the Morgans, because a description "along the highwater mark of Penobscot Bay" is a call to tidal water that includes the intertidal zone in the grant by operation of the Colonial Ordinance. *Almeder*, 2019 ME 151; *Pike*, 36 Me. at 313–14; *Partridge*, 36 Me. at 17; *Mayhew*, 34 Mass. at 359. Accordingly, this Court must enter judgment against Mabee and in favor of the Eckrotes on record-title ownership to the flats associated with their upland. M.R. Civ. P. 56(c).

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