

**Burke, Ruth A**

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**From:** Kim Ervin Tucker <k.ervintucker@gmail.com>  
**Sent:** Monday, November 04, 2019 8:02 AM  
**To:** Bertocci, Cynthia S  
**Cc:** 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; Joanna B. Tourangeau (JTourangeau@dwmlaw.com); Lawrence Reichard; Marianne Naess; Martin, Kevin; Michael Lannan; Northport Village Corporation; Peter Tischbein  
**Subject:** Re: Nordic Aquafarms' - Appeal of Denial of Hearing on TRI in the Third Procedural Order  
**Attachments:** BEP Appeal of 3rd Procedural Order TRI Hearing Denial.pdf; Images(17).pdf; Images(16).pdf

**EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.**

On behalf of Intervenors Mabee and Grace and the Lobstering Representatives the attached appeal of the denial of a hearing on the jurisdictional question of the applicant's lack of title, right or interest is filed. Two additional exhibits are submitted with this appeal and incorporated in the appeal and the pending motion to dismiss the NAF applications for lack of TRI.

Respectfully submitted,  
 Kim Ervin Tucker  
 Maine Bar No. 6969

On Nov 1, 2019, at 1:10 PM, Bertocci, Cynthia S <[Cynthia.S.Bertocci@maine.gov](mailto:Cynthia.S.Bertocci@maine.gov)> wrote:

Good afternoon.

I have attached to this email Presiding Officer Duchesne's order regarding the issues that will be the subject of direct testimony and cross-examination at the hearing on Nordic's applications. Please note that the deadline for any appeal of this order is Tuesday, November 5, 2019 at 1:00 pm. Any such appeal will be heard by the Board at its November 7, 2019 meeting.

Thank you for your attention to this matter.

*Cynthia S. Bertocci*

*Executive Analyst, Board of Environmental Protection  
17 State House Station, Augusta, Maine 04333-0017  
Phone: (207) 287-2452  
[Cynthia.s.bertocci@maine.gov](mailto:Cynthia.s.bertocci@maine.gov)*

<2019-11-01 Nordic Aquafarms - Third Procedural Order .pdf>

## IN THE MATTER OF

NORDIC AQUAFARMS, INC.	) APPLICATIONS FOR AIR EMISSION,
Belfast and Northport	) SITE LOCATION OF DEVELOPMENT,
Waldo County, Maine	) NATURAL RESOURCES PROTECTION ACT, and
	) MAINE POLLUTANT DISCHARGE ELIMINATION
A-1146-71-A-N	) SYSTEM (MEPDES)/WASTE DISCHARGE LICENSES
L-28319-26-A-N	)
L-28319-TG-B-N	) APPEAL FROM DETERMINATIONS IN THE
L-28319-4E-C-N	) THIRD PROCEDURAL ORDER REGARDING
L-28319-L6-D-N	) FAILURE TO CONDUCT A HEARING ON THIS
L-28319-TW-E-N	) APPLICANT'S ADMINISTRATIVE STANDING
W-009200-6F-A-N	) AND LACK OF TITLE, RIGHT OR INTEREST
	) FILED ON BEHALF OF INTERVENORS JEFFREY
	) MABEE AND JUDITH GRACE AND THE
	) LOBSTERING REPRESENTATIVES

As noted in multiple previously filed submissions by the above-referenced Intervenor, the Board and Department of Environmental Protection lack jurisdiction to issue the permits sought by Nordic Aquafarms, Inc. ("NAF") because this applicant lacks title, right and interest in all of the property that is proposed for development or use, contrary to the requirements in 06-096 C.M.R. ch. 2, §11.D.

A hearing on this issue is appropriate and necessary pursuant to the criteria in 06-096 C.M.R. ch. 2, §7.B. Specifically, the Department previously determined that there is credible conflicting information regarding title, right or interest ("TRI"), which is a jurisdictional requirement for administrative standing and Board or Department jurisdiction to take action on the above-referenced applications. TRI is a mandatory licensing criterion. The above Intervenor filed a formal challenge to the Department's determination that NAF had demonstrated "sufficient" TRI to proceed with the permitting process. Intervenor first filed a challenge to the Department's TRI determination in January 2019 and have supplemented that challenge with substantial evidence thereafter.

Intervenor has a pending challenge to the Department's June 13, 2019 TRI determination which failed to acknowledge that Intervenor Mabee and Grace's fee simple title to the intertidal land on, over and under which NAF proposes to place its three industrial pipelines *was adjudicated by the Waldo County Superior Court on June 26m 1970*, which entered a quiet title judgment in favor of Intervenor Mabee and Grace's predecessor in interest, Winston C. Ferris. The Waldo County Superior Court's Final Judgment in *Ferris v. Hargrave*, Docket No. 11,275, was based on the identical property description that is in all subsequent deeds, including the May 31, 1991 deed vesting title in the relevant property in Intervenor Mabee and Grace. The June 13, 2019 Department Order failed to even consider this prior judgment.

On June 15, 2019 a new quiet title action was filed in the Waldo County Superior Court to, in part, enforce the 1970 Order, but there is no justification for the Department or this Board to ignore the existing judgment. Further, it is contrary to the public's interest to expend the limited resources of

the State in processing an application for an Applicant that has failed to present a single recorded instrument to support its claim of TRI. Indeed, every recorded instrument submitted to the Board demonstrates that this applicant lacks the standing required to obtain any permit to use this land.

A hearing at which the applicant can be questioned regarding the basis of its claim of TRI and at which expert testimony by Donald R. Richards, P.L.S., L.F. can be presented regarding the location of the relevant boundaries will assist the Board in understanding the evidence already submitted to it in support of the pending motion to dismiss.

Attached hereto and incorporated herein the appealing Intervenors submit the recently recorded survey plan and survey plan Report, completed by Mr. Richards as additional evidence in support of Intervenors' pending challenge to the Applicant's TRI and Intervenors' appeal of the denial of their right to a hearing on this issue in the Third Procedural Order. Mr. Richards' Survey Plan is recorded in the Waldo County Registry of Deeds ("WCRD") at Book 24, Page 34; and his Report in support of that survey is recorded at WCRD Book 4425, Page 165.

Respectfully submitted,



Kimberly J. Ervin Tucker  
Maine Bar No. 6969  
Counsel for Intervenors Mabee and Grace  
And the Lobstering Representatives  
48 Harbour Pointe Drive  
Lincolnton, Maine 04849  
P: 202-841-5439  
[k.ervintucker@gmail.com](mailto:k.ervintucker@gmail.com)

NOTES / REPORT

This plan pertains to a perimeter boundary survey of the tract shown and is for the clients use only. Unauthorized use by other parties (without the review and update by the surveyors) shall be at their own risk. This plan is intended to depict property boundaries only and may not reflect important site factors or conditions, zoning restrictions or conditions, unwritten or unrecorded title rights, or compliance with covenants or governmental regulations, unless otherwise noted. All references to recording information are citations to the Waldo County Registry Of Deeds unless otherwise noted. This plan should be considered in conjunction with a comprehensive title abstract and review by legal counsel.

Reference is made to a separate survey report for a full explanation of this survey and plan.

Tie line Point B to Point C: N 61° 11' E - 732.8'  
Distance along high water from Point C to Point D: 1185' +/-  
Distance along high water from the southeasterly end of the line through Points A and B to Point C: 760' +/-

Belfast Water District  
1092 - 145  
474 - 322

L. D. Theye  
B. Becker-Theye  
1303 - 184

J. R. Mabee  
J. B. Grace  
1221 - 347

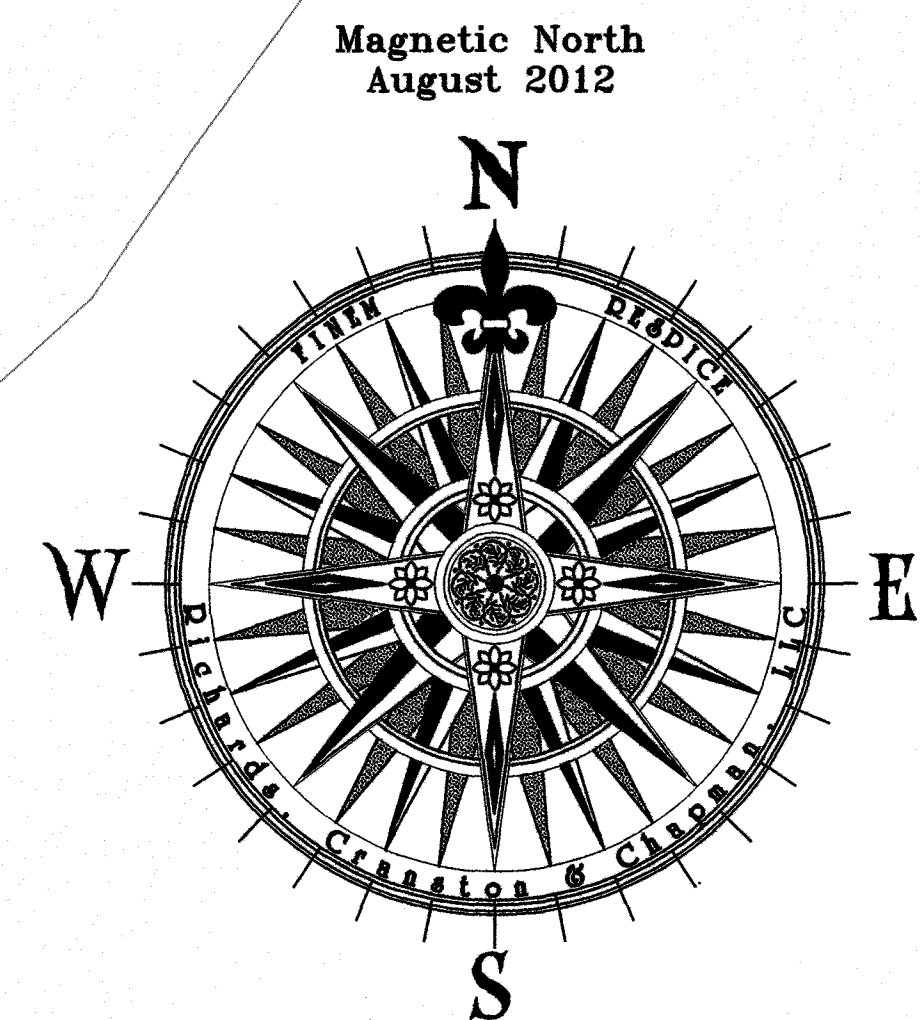
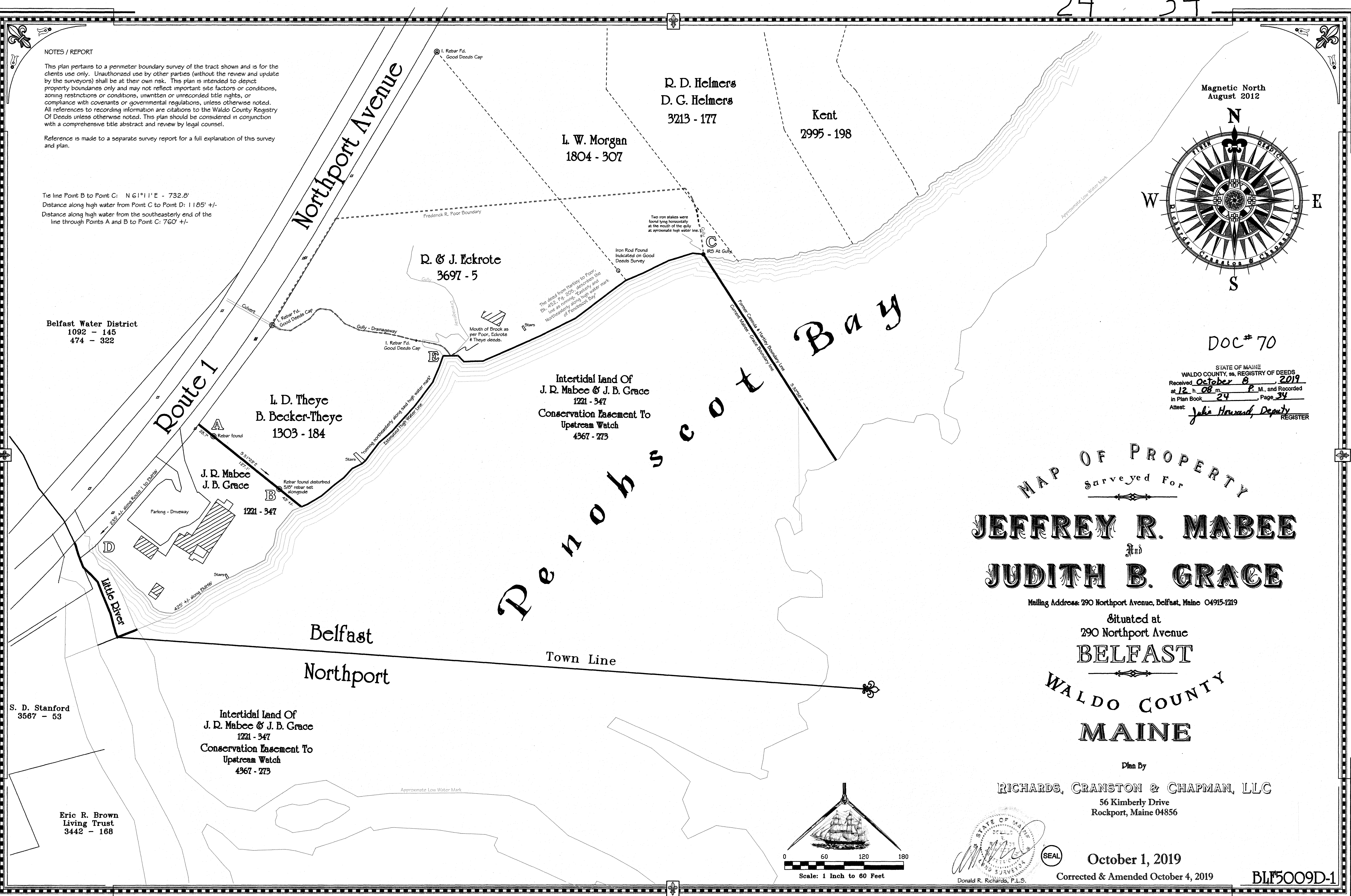
R. & J. Eckrote  
3697 - 5

Intertidal land Of  
J. R. Mabee & J. B. Grace  
1221 - 347  
Conservation Easement To  
Upstream Watch  
4367 - 273

R. D. Helmers  
D. G. Helmers  
3213 - 177

L. W. Morgan  
1804 - 307

Kent  
2995 - 198



DOC # 70

STATE OF MAINE  
WALDO COUNTY, ss, REGISTRY OF DEEDS  
Received October 8, 2019  
at 12 h. 08 m. P. M., and Recorded  
in Plan Book 24, Page 34  
Attest: Julie Howard, Deputy REGISTER

MAP OF PROPERTY  
Surveyed For  
**JEFFREY R. MABEE**  
And  
**JUDITH B. GRACE**

Mailing Address: 290 Northport Avenue, Belfast, Maine 04915-1219

Situated at  
290 Northport Avenue  
**BELFAST**

**WALDO COUNTY**  
**MAINE**

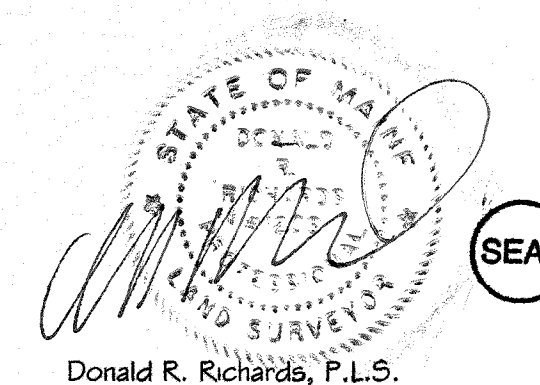
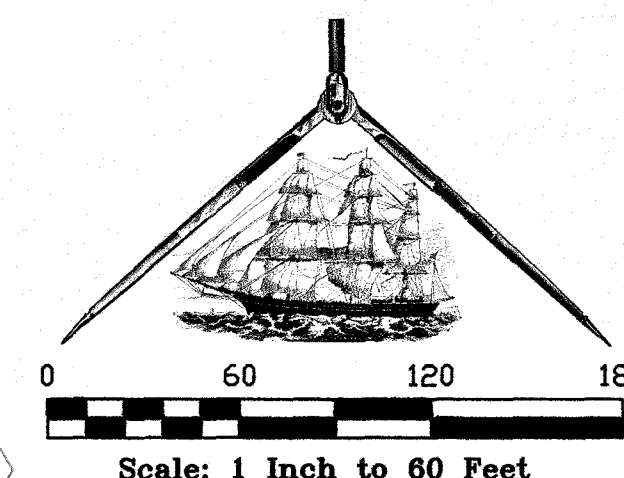
Plan By

**RICHARDS, CRANSTON & CHAPMAN, LLC**  
56 Kimberly Drive  
Rockport, Maine 04856

October 1, 2019

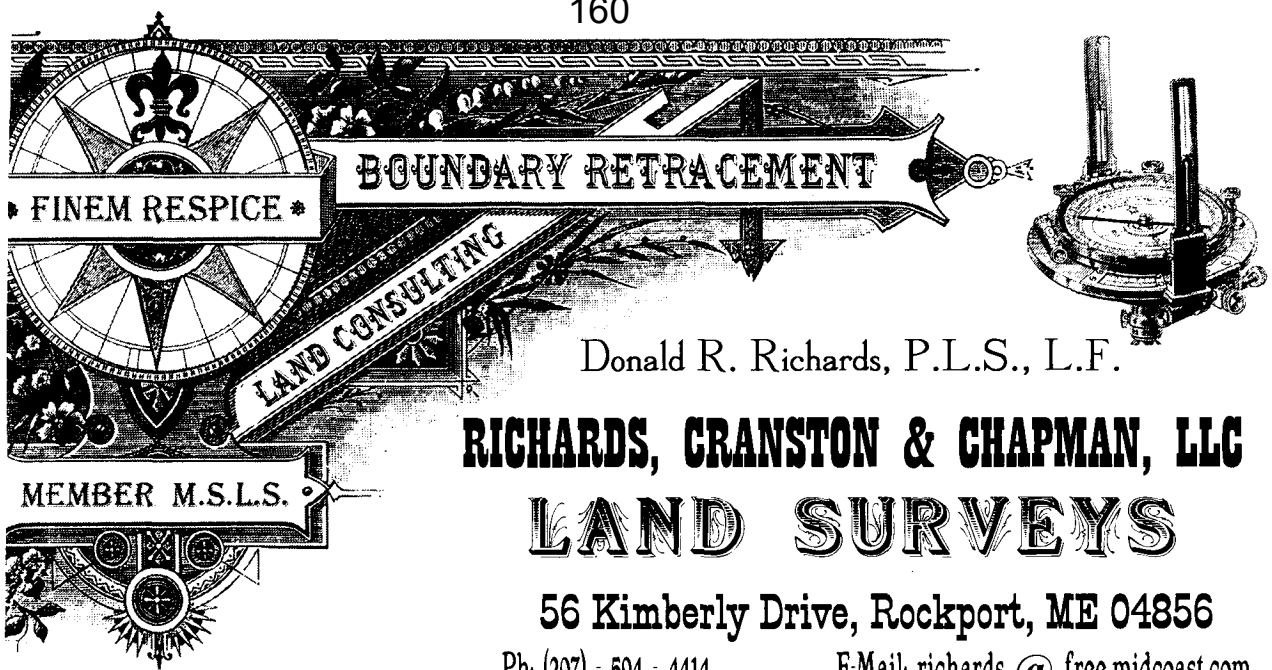
Corrected & Amended October 4, 2019

BLF5009D-1



Receipt # 144376 WALDO SS: RECEIVED  
VOL 4425 PG 165  
Instr # 2019-9782  
10/08/2019 12:08:33 PM  
22 Pages

ATTEST: Stacy L Grant, Waldo Co Registry of Deeds



Donald R. Richards, P.L.S., L.F.

**RICHARDS, CRANSTON & CHAPMAN, LLC**  
**LAND SURVEYS**

56 Kimberly Drive, Rockport, ME 04856

Ph: (207) - 594 - 4414

E-Mail: richards @ free.midcoast.com

Surveyors Report  
For The Land Of  
Jeffrey R. Mabee and Judith B. Grace  
Situating At  
Northport Avenue Also Known As Route 1  
Belfast, Knox County, Maine  
Corrected<sup>1</sup> and Amended October 4, 2019

This report is prepared to accompany and explain a survey and plan prepared for the Jeffrey R. Mabee and Judith B. Grace property at 290 Northport Avenue (Route 1), Belfast, Waldo County, Maine, also adjacent to Little River and Penobscot Bay. This report constitutes my professional opinion based on my research, measurements, knowledge, experience and expertise under the statutory requirement that a surveyor in the course of their work shall apply the special knowledge of the rules of evidence and boundary laws<sup>2</sup>. It is important that in matters of controversy pertaining to this survey that

<sup>1</sup> The first edition of this survey and report contained an error in the address of the property stating that it was at 690 Northport Avenue when it should have stated it was at 290 Northport Avenue. That survey was recorded in Plan Book 24, Page 32 of the Waldo County Registry of Deeds and the report was recorded in Book 4424, Page 73 of that registry. This survey and report should supercede those earlier documents.

<sup>2</sup> **Title 32: PROFESSIONS AND OCCUPATIONS - Chapter 121: PROFESSIONAL LAND SURVEYORS**

**§13901. Definitions 6. Practice of land surveying.** "Practice of land surveying" means any service or work involving the application of special knowledge of the rules of evidence and boundary laws, principles of mathematics and the related physical and applied sciences for measuring and locating lines, angles, elevations, natural and man-made features in the air, on the surface of the earth, within underground workings and on the beds of bodies of water. This service or work shall be for the purposes of determining areas and volumes, for the **monumenting of**

legal counsel be consulted for another professional opinion. Any court case citations contained in this report are not intended as legal advice but are provided to demonstrate the basis of my opinions derived from instructions or rules of property provided to surveyors and real estate professionals dealing with boundary retracement and land use issues.

The subject property of this survey is described in a warranty deed from Heather O. Smith to Jeffrey R. Mabee and Judith B. Grace, dated May 1991 as recorded in Book 1221, Page 347 of the Waldo County Registry of Deeds. It is depicted on the Belfast Tax Map 29 as Lot 38. This survey and report are prepared to depict the property boundaries and address various questions or issues that have been raised regarding the successive conveyances in the chain of title and the limits of ownership and deeded rights. All deed and document references are to recording designations in the Waldo County Registry of Deeds unless otherwise stated.

The Mabee - Grace deed describes their property as bounded:

Northerly by land of Fred R. Poor; Easterly by Penobscot Bay, Southerly by Little River and Westerly by the Atlantic Highway, so called."

The description of the real estate then goes on to except the upland tract conveyed to John Joseph and Catherine Grady by Ernest J. Bell and Marjorie N. Bell by deed dated May 18, 1964 and recorded in the Waldo County Registry of Deeds in Book 621, Page 288. That Grady tract is now owned by Larry D. Theye and Betty Becker Theye (WCRD Bk. 1303, Pg. 184).

The chain of title to the Mabee - Grace Parcel is attached as Appendix A. This survey is based on title research back to the warranty deed of Eva T. Burd and Edwin D. Burd to Arthur Hartley dated March 3, 1924 as recorded in Book 343, Page 497. The chain of title shows that the Mabee - Grace tract originated with Harriet L. Hartley after she conveyed off tracts to Fred R. Poor (WCRD 452, Pg. 205 - depicted in red outline on the survey plan) and to Sam M. Cassida (WCRD Bk. 438, Pg. 497 - later land of Kent and portions of Helmers, Morgan and Eckrote as depicted on the survey plan).

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**property boundaries** and for the platting and layout of lands and subdivisions of land, including topography, alignment and grades of streets and **for the preparation and perpetuation of maps, record plats, field note records and property descriptions that represent these surveys.** (Emphasis added)

**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. Perkins v. Conary, supra, 295 A.2d at 646.*) **Sylvan Prop. Co. v. State Planning Office 1998 ME 106** (But we must consider and construe the grant according to settled rules of construction. ... They are rules of property. And the security of real estate titles depends upon a strict adherence to these rules of construction. *Sargent v. Coolidge, 399 A.2d 1333, 1344 (Me. 1979) (citing McLellan v. McFadden, 114 Me. 242, 246-247, 95 A. 1025, 1028 (1915)).*) See also, **Stuart v. Fox, 129 Me. 407, 412-3 (1930)** and **Sargent v. Coolidge, 399 A.2d 1333, 1344-5 (Me. 1979).**

From the entire tract of land of Harriet L. Hartley easterly of Northport Avenue (Route 1) the first tract sold out was by deed to Fred R. Poor from Harriet L. Hartley, dated January 25, 1946 as recorded in Book 452, Page 205 of the Waldo County Registry of Deeds which described the southeasterly (waterside) boundary of the property conveyed as running, "Easterly and Northeasterly along high water mark of Penobscot Bay...". That language clearly bounds the land conveyed at the high-water mark which is a natural monument of clear and specific location and excludes the lands between the high water mark and the low water mark of Penobscot Bay. By that language Harriet L. Hartley retained the shore and the flats adjoining the Fred R. Poor tract.

In contrast, in October 1946 Harriet L. Hartley created a second lot that she sold to Sam M. Cassida (WCRD Book 438, Page 497). That lot included all her land North of Fred R. Poor and conveyed the land between high and low water marks of Penobscot Bay in front of the lot, by inclusion of specific language in that deed. Specifically, the deed from Hartley to Cassida, states in relevant part:

"Also conveying whatever right, title or interest I may have to and in the land between high and low water marks of Penobscot Bay in front of the above described lot."

By the use of the very specific, clear and contrasting language used in the two 1946 conveyances it must be concluded that it was Harriet L. Hartley's intention to retain the intertidal land between land of Fred R. Poor and the bay but to convey the shore and flats adjoining the Sam M. Cassida tract.

After the 1946 conveyances, Harriet L. Hartley owned the upland parcel between the Little River and Fred R. Poor and the intertidal land in front of her upland parcel and in front of the Fred R. Poor parcel. She conveyed all of her remaining land on September 22, 1950. The description of the remaining land conveyed by Harriet L. Hartley to William P. & Pauline H. Butler (Book 474, Page 387) states that it is bounded by four monuments and specifies the general location of those monuments in relation to the subject tract. The Fred R. Poor tract is a record or adjoining monument<sup>3</sup> situated northerly of the described parcel; Penobscot Bay is a natural monument situated easterly of the parcel; Little River is a natural monument situated southerly of the parcel; the Atlantic Highway is a natural

<sup>3</sup> **Edmonds v. Becker**, 434 A.2d 1012 (Me. 1981); **Kinney v. Central Maine Power Co.**, 403 A.2d 346, 350 (Me. 1979) (*this Court has always accorded an adjoiner the dignity of a monument if, as in this instance, its location at the time the operative deed took effect is ascertainable. Sargent v. Coolidge, supra at 1344; Liebler v. Abbott, Me., 388 A.2d 520, 521 (1978); McCausland v. York, 133 Me. at 123, 174 A. at 387.*); **Abbott v. Abbott**, 51 Me. 575, 581 (1863) (*An existing line of an adjoining tract may as well be a monument as any other object.*); **Sargent v. Coolidge**, 399 A.2d 1333, 1344 (Me. 1979); **McCausland v. York**, 133 Me. 115, 123 (1934) (*When one accepts a deed bounding his conveyance by the land of another, the land referred to becomes a controlling monument. Perkins v. Jacobs, 124 Me. 347, 129 A., 4.*); See also *Abbott v. Abbott*, 51 Maine, 575, 581. *Murray v. Munsey*, 120 Maine, 148, 150.); **White v. Jones**, 67 Me. 20, 24 (1877) (*For it must be remembered that the Cilley line - an undisputed line - is to be regarded as a continuous monument for its whole distance; and it must control.*)



monument situated westerly of the parcel. <sup>163</sup> Specifically, like the Mabee – Grace deed, the Hartley-Butler deed describes the boundaries of the property conveyed as:

Northerly by land of Fred R. Poor; easterly by Penobscot Bay, southerly by Little River and westerly by the Atlantic Highway, so-called."

The Butlers conveyed their property to Ernest J. & Marjorie N. Bell by deed dated May 13, 1961 and recorded in Book 587, Page 100. The Bells then conveyed off a portion of their tract to John Joseph & Catherine Grady by deed dated May 18, 1964 and recorded in Book 621, Page 288. The tract conveyed to John Joseph Grady has been transferred by intervening conveyances to Larry D. Theye and Betty Becker Theye by deed dated June 29, 1992 and recorded in Book 1303, Page 184 as shown on the plan.

The remaining land of Harriet L. Hartley was subsequently transferred by intervening conveyances to Jeffrey R. Mabee and Judith B. Grace. (Book 652, Page 116; Book 663, Page 98; Book 680, Page 688; Book 684, Page 688; Book 817, Page 291; Book 833, Page 152; and Book 1221, Page 347). In addition, a quiet title judgment was entered by the Waldo County Superior Court, in favor of Mabee-Grace's predecessor in interest, Winston C. Ferris, on June 26, 1970, recorded in the Waldo County Registry of Deeds at Book 683, Page 283, in *Winston C. Ferris v. Genevieve E. Hargrave, et al.*, Docket No. 11275 (discussed in more detail below).

Reference is made to the following surveys and plans:

Maine State Highway Commission Right Of Way Map, State Highway "D", Federal Aid Project No. 68 (3), Northport - Belfast, Waldo County, dated May 1944 as recorded in Plan Book 2, Page 1.

Boundary Survey of the property of PHYLLIS J. POOR ESTATE by Good Deeds, Inc. In Belfast, Maine as dated August 31, 2012.

Topographic Survey, Lands of Richard & Janet Eckrote, by Clark G. Staples at Good Deeds, Inc. dated October 15, 2018 as submitted in a letter to Melanie Loyzim, Deputy Commissioner, Maine Department of Environmental Protection on June 10, 2019 as page four.

Littoral Zone & Intertidal Zone Survey for Nordic Aquafarms by Gartley and Dorsky Engineering and Surveying dated November 14, 2018 with four revisions as submitted in a letter to Melanie Loyzim, Deputy Commissioner, Maine Department of Environmental Protection on June 10, 2019 as Exhibit A on page three.

## General Boundaries -

The Mabee - Grace parcel was the remaining land of Harriet L. Hartley with the exception of the land of Grady, now land of Larry D. Theye and Betty Becker Theye (WCRD Book 1303, Page 184). I have met with Mr. Theye at his property and he showed me two iron rods which mark his contiguous boundary along the Mabee - Grace tract. Those iron rods are indicated on the plan at points A and B and are held to define the Mabee - Grace boundary with the Theyes. The deed description from the Bells to the Grady tract (Book 621, Page 288) runs, "to the high water mark of Penobscot Bay; thence turning and running northeasterly along said high water mark 333 feet more or less...", which description excludes the shore and the flats adjacent to the parcel. That description has been used in subsequent conveyances into the Theyes and leaves the remaining shore and flats adjacent to the Theyes within the Mabee - Grace deed.

The monuments in the Mabee - Grace deed are clear and definable. The Fred R. Poor tract, the monument situated to the north, is readily locatable from the calls in the deed from Harriet L. Hartley to Fred R. Poor (Bk. 452, Pg. 205). The description in that deed calls for the tract to run, "Easterly and Northeasterly along high water mark of Penobscot Bay 410 feet more or less to a stake at the outlet of a gully". That description, by the use of the call for along the "high water mark" clearly limited the Fred R. Poor tract to the upland and excluded the intertidal land or shore and flats in front of it and retained the shore and the flats in Harriet L. Hartley now owned by Mabee & Grace<sup>4</sup>.

To clarify, the shore is the land between the ordinary low stage and ordinary high stage of the water or all the ground between the ordinary high water mark and low water mark.<sup>5</sup>

<sup>4</sup> If the deed had called for the line to run "to the shore and along the shore" the presumption would have been that the word "to" was used as a term of exclusion and the shore and flats would be excluded. **Nickerson & al. v. Crawford 16 Me. 245 (1839)** (By the case of *Storer v. Freeman*, 6 Mass. R. 435, it was decided, that a deed extending the line of boundary to the shore and thence by the shore would not convey the flats, not being described as extending to the water.); **Montgomery v. Reed, 69 Me. 510, 514 (1879)** ("To" is a word of exclusion when used in describing premises - "to" an object named excluding the terminus mentioned. *Bradley v. Rice*, 13 Maine, 198. *Bonney v. Morrill*, 52 Maine, 256. "To the shore," then, includes no part of the "flats."); **Dunton v. Parker, 97 Me. 461, 467 (1903)**; Nevertheless there are times when the wording calling for the shore leaves in doubt whether the deed intended the boundary to run along the high water mark or the low water line. In the case of the Mabee - Grace Tract however, by the use of the term, "high water mark" in the deed to Fred R. Poor no question may be raised as to whether the grantor intended the line to run other than by the high water line. The deed is clear on its face and speaks for itself.

<sup>5</sup> *Proctor v. Hinkley*, 462 A.2d 465 (Me. 1983); *Hodgdon v. Campbell*, 411 A.2d 667 (Me. 1980); *Sinford v. Watts*, 123 Me. 230. 122 A. 573 (1923); *McLellan v. McFadden*, 114 Me. 242 (1915); *Dunton v. Parker*, 97 Me. 461 (1903); *Proctor v. Railroad Co.*, 96 Me. 458 (1902); *Abbott v. Treat*, 78 Me. 121 (1886); *Montgomery v. Reed*, 69 Me. 510 (1879); *Littlefield v. Littlefield*, 28 Me. 180 (1848); *Hodge v. Boothby*, 48 Me. 68 (1861 Me.). In *Lapish v. Bangor Bank*, 8 Me. 85 (1831), the court adopted the following definition:

The sea shore must be understood to be the margin of the sea, in its usual and ordinary state. Thus when the tide is out, low water mark is the margin of the sea, and when the sea is full, the margin is high water mark. The seashore is, therefore, all the ground between ordinary high-water mark and low water

This area is also known as flats, intertidal zone, foreshore, beach, or the beachfront area.<sup>6</sup> It may be sold separately from the upland and may be excluded from a sale of the upland by appropriate wording.

The Court has made a statement that clearly applies in this very matter:

*Now, as high water mark is one side of the sea shore or flats, and low water mark is the other, and as a deed bounding land on one side by the shore, does not convey the flats, 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.*<sup>7</sup>

The call in the deed to Fred R. Poor for, "along high water mark" therefore is clear and unambiguous language calling for the high water mark, a natural monument, and thereby excluding the shore and flats from the conveyance<sup>8</sup>.

I have found most of the monuments called for in the Fred R. Poor deed description and have no question as to its location. Based on my measurements the area of the Fred R. Poor tract contains 2.3 acres which compares closely with the deed call for 2.23 acres. The Fred R. Poor tract has subsequently been divided into portions of land of Helmers, Morgan and Eckrote. Additionally, I have obtained a signed and sealed survey plan from surveyor Gusta Ronson, P.L.S. at Good Deeds, Inc. in Belfast, Maine who performed the survey for Richard and Janet Eckrote dated August 31, 2012 which plan agrees with my findings. I have spoken with Gusta Ronson to discuss her findings and she indicated that she found no deeded information or language that indicated fee title of the Eckrote parcel included the intertidal zone and by language at its creation specifically stops at high water and also that there was no note on her plan saying title would extend to low water. Therefore, her reading of the deed description and the depiction on her survey plan excluded the shore and the flats adjoining the former Poor parcel subsequently owned by Eckrotes (Bk. 3697, Pg. 5). Her plan expressly states that the Eckrotes' waterside boundary is "along high water".

It is also worth mentioning that James Dorsky in a May 16, 2019 letter attached as Appendix B, explaining his interpretation of the deeds pertaining to this area states that the

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mark. *Id.* at 89-90. See also, *Storer v. Freeman*, 6 Mass. 435, 4 Am.Dec. 155 (1810).

<sup>6</sup> *Bell v. Town Of Wells*, 557 A.2d 168, 57 U.S.L.W. 2590 (Me. 1989). For the definition of beach see *Littlefield v. Littlefield*, 28 Me. 180 (1848) See also, Me. Rev. St. Ann. tit. 12, § 572.

<sup>7</sup> **Lapish v. Bangor Bank, 8 Me. 85 (1831)**

<sup>8</sup> **Freeman v. Leighton, 90 Me. 541, 545 (1897)** (*The grantor declared in terms that the south line should extend east "to the shore." He then declared that the next line, the east line, should extend northerly "by the shore and by the upland," to the first bound. He thus fastened this last line to the eastern edge of the upland and the western edge of the shore. He drew it between the upland and the shore. The court cannot draw it in any other place or direction. This line, drawn by the grantor and accepted by the grantee, separates the shore from the upland and excludes it from the conveyance.*)

conveyance to Sam M. Cassida, "created a boundary line across the flats between the flats northerly of this line that were conveyed to Cassida and the flats southerly of this line that Hartley would have still owned in front of Poor (now Eckrote and Morgan) and southerly to the Little River"<sup>9</sup>. This statement confirms that three different surveyors have concluded that Harriet L. Hartley retained the shore and the flats in front of the Fred R. Poor property at the time of that conveyance to Cassida in 1946. Additionally a fourth surveyor, Clark Staples, also of Good Deeds in Belfast, Maine, prepared a Topographic Survey of the lands of Richard & Janet Eckrote dated October 15, 2018 for use by Nordic Aquafarms in which he notes the discrepancy between the description in the deed to Richard and Janet Eckrote (WRKL Bk. 3697, Pg. 5) and the previous deeds in the chain of title and suggests that a legal opinion should be provided to evaluate whether the Phyllis J. Poor estate had the right to grant an easement below the high water line<sup>10</sup>.

The issue is that while the deed to Phyllis J. Poor (Book. 1228, Page 346) calls for the boundary at the shore to run "Easterly and Northeasterly along high-water mark of Penobscot Bay...", the description in the subsequent release deed from the Estate of Phyllis J. Poor to Richard and Janet Eckrote, dated October 15, 2012 and recorded in Book 3697, Page 5 of the Waldo County Registry of Deeds, has been altered to read, "to the high water mark of Penobscot Bay; Thence generally southwesterly along said Bay a distance of four hundred twenty five (425) feet more or less to a 5/8" capped rebar set..." which would suggest that the estate was conveying the shore and flats adjoining the Eckrote property. That portion of the written description is clearly erroneous. The description includes the statement that, "The description above is based on a survey entitled "Boundary Survey of the Property of Phyllis J. Poor Estate" dated August 31, 2012, oriented to magnetic north, August 2012, by Good Deeds, Inc.". This survey was not signed or recorded but a survey bearing that name and date was produced in a filing submitted by Nordic Aquafarms to the Maine Bureau of Parks and Lands on May 16, 2019 and I have acquired a signed & sealed copy of the plan from Gusta Ronson, the surveyor at Good Deeds as noted above. The survey clearly labels the boundary of the Phyllis J. Poor lot (now lot of Janet and Richard Eckrote) as running 425 feet more or less along the high water line. There is therefore a discrepancy between the plan ("along high water") and the written description ("along said Bay"). The subsequent re-description in the deed to Eckrote altered the boundary description such that it was inconsistent with the previous deeds back to 1946 and the subsequent August 31, 2012 survey by Good Deeds, incorporated by reference into the October 15, 2012 deed. The correct monument, the high water mark, was erroneously replaced by a call for the bay, which if implemented would extend and unfairly expand the

<sup>9</sup> Refer to the letter of James A. Dorsky, PLS, to Erik Heim, President of Nordic Aquafarms dated May 16, 2019, which letter has been included in permitting applications documents to submitted to Deputy Commissioner Loyzim on June 10, 2019, and is attached to this report as Appendix C.

<sup>10</sup> Reference is made to page 4 of a letter from Joanna B. Tourangeau to Melanie Loyzim, Deputy Commissioner of the Maine Department of Environmental Protection.

grant to the low water mark<sup>11</sup>. It is a fundamental<sup>167</sup> principle of conveyancing that you cannot sell what you do not own<sup>12</sup>.

It is a longstanding and well established rule of deed construction that when a deed refers to a survey plan in the descriptive language that plan is incorporated into the deed, becomes a material and essential part of the deed and is subject to no other explanations by extraneous evidence than if all the particulars of the plan had been actually inserted in the body of the grant or deed and furthermore the parties are chargeable with full notice of the contents of the plan whether the plan is recorded or not<sup>13</sup>. When a survey and plan is made and a deed description is prepared based on the survey and plan, the lines and corners made and fixed by that survey are to be respected as determining the extent and bounds of the tract and if the written description disagrees with the survey and plan the erroneous description will not stand over and against the survey and plan<sup>14</sup>.

After calling for the Fred R. Poor tract as the monument to the north, the Mabee - Grace deed description deed calls for the tract to be bounded easterly by Penobscot Bay. That

<sup>11</sup> *Isley v. Kelley*, 113 Me. 497, 505 (1915) (If the owner of a parcel of land, through inadvertence or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate a disseizin. ... To allow the defendant's claim to include a part of lot 15 as in a deed of a part of lot 14, would, as held in *Robinson v. Miller*, 37 Maine 312, "be to contradict or vary the plain and unambiguous stipulations of his deed, and to enlarge his grant in a manner unauthorized by law." (See *Brown v. Gay*, 3 Maine, 128).

<sup>12</sup> *Alemeder v. Kennebunkport* 2019 ME 151; *Eaton v. Town of Wells*, 2000 ME 176; *Diveto v. Kjellgren* 2004 ME 133 *Calthorpe v. Abrahamson*, 441 A.2d 284, 287 (Me. 1982) (*A grantor can convey effectively by deed only that real property which he owns. See May v. Labbe*, 114 Me. 374, 96 A. 502 (1916); 6 U. Thompson, *Commentaries on the Modern Law of Real Property* § 2935 (1962).) *Rusha v Little*, 309 A2d 867 (Me 1973); *Dorman v. Bates Mfg* 82 Me. 438 (1890) (*One can not convey what he does not own. One can not convey land, nor create an easement in it, unless he owns it. An attempt to do so may render him liable on the covenants in his deed; but neither the land nor the easement will pass.*)

<sup>13</sup> *Kinney v. Central Maine Power Co.*, 403 A.2d 346, 351 (Me. 1979); *Perkins v. Jacobs*, 124 Me. 347, 349 (1925); *Bradstreet v. Winter*, 119 Me. 30, 38 (1920); *McElwee v. Mahlman*, 117 Me. 402, 406 (1918); *Danforth v. Bangor*, 85 Me. 423, 428 (1893); *Chesley v. Holmes*, 40 Me. 536, 546 (1855); *Palmer v. Dougherty*, 33 Me. 502, 506 (1851) (*Where land is conveyed according to a plan taken, the courses, distances and lines there delineated, are regarded, in legal construction, as the description, by which the limits of the grant are to be ascertained. Proprietors of Kennebec Purchase v. Tiffany*, 1 Maine, 219; *Thomas v. Patten*, 13 Maine, 329; *Davis v. Rainsford*, 17 Mass. 207. ); *Lincoln v. Wilder*, 29 Me. 169, 179 (1848); *Eaton v. Knapp*, 29 Me. 120, 122 (1848); *Proprietors of Kennebec Purchase v. Tiffany*, 1 Me. 219, 223 (1821).

<sup>14</sup> This principle is more fully explained in, "**Principles and Procedures for the Location of Boundaries in Maine**", Maine State Bar Association Practice Series 102 - Number 1, August 2006 by Donald R. Richards and Knud E. Hermansen, Pages 145 - 149. See also, *Chandler v. Green*, 69 Me. 350, 352 (1879) ( If a deed contains an admixture of correct and erroneous calls, and evidence can show which is false and true, then: ...by well established principles of law, the false is to be discarded, and the true adopted. *Jones v. Buck*, 54 Maine, 301; approved and explained in *Jones v. McNarrin*, 68 Maine, 334. ); *Palmer v. Dougherty*, 33 Me. 502, 506 (1851) (*Where land is conveyed according to a plan taken, the courses, distances and lines there delineated, are regarded, in legal construction, as the description, by which the limits of the grant are to be ascertained. Proprietors of Kennebec Purchase v. Tiffany*, 1 Maine, 219; *Thomas v. Patten*, 13 Maine, 329; *Davis v. Rainsford*, 17 Mass. 207.); *Lincoln v. Wilder*, 29 Me. 169, 182 (1848) (... we are inclined to the determination, that the plan is the more certain and prominent part of the description.); *Bussey v. Grant* 20 Me. 281, 286 (1841) (...like other grants, exceptions or reservations, which depend on a plan, the actual survey and location on the face of the earth are to determine their boundary and extent. This has become an established principle in regard to grants and conveyances depending on a plan, which cannot be departed from without unsettling the bounds of lands in a great part of the State.); *Heaton v. Hodges*, 14 Me. 66, 69-70 (1836) (*We have understood the rule applied in such cases has been, that the survey actually made, if it can be ascertained, is to govern the location.*) *Pike v. Dyke* 2 Me. 197, 199 (1823)

language indicates that the Mabee - Grace parcel<sup>168</sup> extends to the low water line of the bay and includes the residual intertidal real estate which belonged to the remaining Harriet L. Hartley tract. There is nothing in the deed descriptions to indicate that Harriet L. Hartley intended to convey anything less than her entire remaining land to William and Pauline Butler (Bk. 474, Pg. 387) when she made the September 22, 1950 conveyance to them, or that Ernest and Marjorie Bell intended to convey anything less than the remaining land of Harriet L. Hartley less the parcel that they had sold to John Joseph & Catherine Grady (WCRD Book 621, Page 288).

The next monument called for in the deed description into Mabee and Grace is the Little River. The call for that natural monument would carry title to the river. The last monument called for is the Atlantic Highway which is currently designated as Northport Avenue and U. S. Route 1. All four of the monuments in the description are clear and identifiable and completely surround the Mabee - Grace tract and the Theye parcel (formerly Grady) which is excepted.

A search of the records on file in the Waldo County Registry of Deeds turned up a quiet title action by Winston C. Ferris a prior owner of the Mabee - Grace tract (WCRD Book 680, Pg. 688) which named Genevieve E. Hargrave and others as defendants in Book 680, Page 1112 and Book 683, Page 283. The description of the land covered by the action was identical to the present description in the Mabee - Grace deed and Winston Ferris. The Court granted judgment in favor of Winston C. Ferris stating that the various defendants and every person claiming by through or under them were barred from any and all claims to any right title or interest or estate in the land of Winston C. Ferris (WCRD Book 683 Page 283)

It is significant to note that the probate documents for the estate of Harriet L. Hartley, on file in the County of Philadelphia, Pennsylvania, acknowledge that she sold off her real estate in Belfast in its entirety<sup>15</sup>. That coupled with the clear meaning of the deed to the Butlers and the quiet title action by Winston C. Ferris should leave no doubt as to her intentions to convey all her remaining land to the Butlers in the September 22, 1950 conveyance or the location of the boundaries described in the deed to Mabee and Grace. My search of the deeds of record and other documents indicate that Harriet L. Hartley sold all her land in Belfast, Maine, easterly of Route 1 or Northport Avenue during her lifetime. This is the same determination made on Schedule D of the 1951 Inventory and Appraisalment of the assets of the Estate of Harriet L. Hartley, recorded in the Philadelphia County Register of Wills, in the Commonwealth of Pennsylvania, attached hereto as Appendix C.

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<sup>15</sup> See County of Philadelphia, Register of Wills, Will Book 613, Page 594 and Schedule D in inventory Book 143, Page 395 for will number 3085 as filed on December 10, 1951 which states, "The will purports to devise and bequeath certain property, real and personal, which actually was sold by dependant during life." The only real estate mentioned in her will was her land in Belfast, Maine situated at Penobscot Bay and Little River.

The deed to the Mabee - Grace tract describes the tract as, " a certain lot or parcel of land together with the buildings thereon situated in Belfast, in the County of Waldo, and State of Maine. The upland and the buildings are situated in that municipality however a portion of the shore and the flats extend to the low water mark in the town of Northport. The deed states the tract is conveyed, "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".

A conservation agreement deed was granted by deed from Jeffrey R. Maybe and Judith B. Grace to Upstream Watch dated April 29, 2019 as recorded in Book 4367, Page 273 which described the protected property by a written description (Appendix A) and a sketch (Appendix B). The written description is as follows:

The shore and flats rights appurtenant to the land described in deed from Heather O. Smith to Jeffrey R. Mabee and Judith B. Grace dated May 15, 1991 as recorded in Book 1221, Page 347 of the Waldo County Registry of Deeds which shore and flats area is bounded and described as follows: Northerly by land formerly of Adonirom Moody, and W. L. West, Easterly by Penobscot Bay, southerly by Little River and northwesterly by land formerly of Fred R. Poor, and westerly by land formerly of John Joseph Grady and Catherine E. Grady and the upland of land of Jeffrey R. Mabee and Judith B. Grace said shore and flats to include that intertidal area extending westerly along Little River to Northport Avenue also known as U.S. Route One.

The description contains some errors which are not insurmountable. The general description indicates that the protected property would be the shore and the flats appurtenant to the Mabee - Grace property under their deed as cited which portion of the description standing alone would have been sufficient and complete. The description then provides an additional and more particular description which is clear and accurate in part and flawed in part. The first call in the more particular description stating that the protected area is bounded, " Northerly by land formerly of Adonirom Moody, and W. L. West " is incorrect. That call for adjoiners Moody and West, previous landowners to the north of the Cassida tract (WCRD Bk. 438, Pg. 497), would have carried the protected area beyond the limits of the Mabee - Grace tract. Because the general description is clear and the particular description is erroneous at this one point the general description would prevail<sup>16</sup>. The sketch attached depicts a line running from the high water mark across the

<sup>16</sup> **Perry v. Buswell, 113 Me. 399, 401-2 (1915)** (*In a few cases, a description in general terms followed by a more particular description, or by reference, for description, to a prior deed, the language of the whole deed has led the court to give effect to the general description. Such cases are Keith v. Reynolds, 3 Maine, 393; Willard v. Moulton, 4 Maine, 14; Childs v. Fickett, 4 Maine, 471; Field v. Huston, 21 Maine, 69. See also, Lovejoy v. Lovett, 124 Mass., 270. ... But a reference to other deeds, when it appears that it was so intended, makes them a part of the description, as much as if their language had been copied as a part of it.*); **Hathorn v. Hinds 69 Me. 326, 329-30 (1879)** (*If the particular description by metes and bounds be uncertain and impossible, the general description governs. Savage v. Kendall, 10 Cush. 241.*); **Andrews v. Pearson, 68 Me. 19, 20-1 (1875)**

shore and flats to the low water mark of the bay and labels that line, "Schematic Location Mabee & Grace Line". Due to the resolution and clarity of the attached sketch it is not entirely clear precisely where that line intersects the shore but it is fair to conclude that the sketch and the schematic line were not intended to portray anything more than the generalities of the protected area. By the use of the term "schematic" it is clear that the line is not located with precision. Considering the Conservation Easement document as a whole it is my opinion that the shore and the flats appurtenant to the Mabee - Grace property in its entirety is contained within the description provided.

The Right of Way for Northport Avenue or U. S. Route 1 is stated to be 5 rods wide by the Maine D.O.T. on their public map viewer and right of way web site. They state the source of their information comes from Williamson's History of Belfast In The State Of Maine Volume 1. I have confirmed their findings in my digital copy entitled, "History of Belfast In The State Of Maine From It's First Settlement in 1770 to 1875", by Joseph Williamson, on pages 635 and 636. Additional communication with the Maine D.O.T. indicated the state claims only an easement at this location so that ownership would extend to the center of the road subject to the rights of the public in the right of way. Any alteration or construction near or within the right of way should be cleared with Maine D.O.T to verify their rights, regulations, limitations and permitting requirements.

The conveyance from Harriet L. Hartley to Fred R. Poor dated January 25, 1946 as recorded in Book 452, Page 205 stipulates the property was sold with the understanding that it was to be, "used for residential purposes only, that no business for profit is to be conducted there unless agreed to by Harriet L. Hartley, her heirs or assigns". That clause was undoubtedly inserted in the deed to protect the remaining land of Hartley, now owned by the Theyes and Mabee and Grace. It would be appropriate to confirm with legal counsel if the benefit of that restriction runs with and attaches to the Mabee - Grace and the Theye tracts of land as successors of Harriet L. Hartley under common law principles<sup>17</sup> or Maine Revised Statutes Annotated, Title 33 § 773 which states: "In a conveyance of real estate all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary shall be stated in the deed".

Based on my field measurements the upland area of the subject tract is 1.0 Acres. Due to the change and variation in the alluvium of the Little River estuary the area of the shore and flats may be subject to gradual variation and change. During the course of my surveying I observed no encroachments by structures or signs of trespass that would need to be addressed.

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*(a mere false description in one particular, where enough remains to make it reasonably certain what premises were intended to be conveyed, will not defeat the conveyance.); Child v. Fickett, 4 Me. 471, (1827)*

<sup>17</sup> **Herrick v. Marshall, 66 Me. 435, 438 (1877)** *(When...language in a deed which must be held to convey distinctly to the grantee's mind the character of the act which he is to abstain from doing on the land granted, and to identify the lot to which his own is made servient, we do not understand that it is necessary either to name the person who is to be immediately benefited by the clause, or to insert words of limitation or inheritance in order to have his rights pass to his heirs or assigns.)*



## Controversies -

This survey was requested during a period of controversy over property boundaries and ownership rights and particular issues under discussion pertaining to various permitting applications of Nordic Aquafarms, Inc. (NAF) and claims made by them regarding the extent of ownership and rights in the intertidal land on which the Fred R. Poor lot fronted (now Eckrote and a portion of the Morgan lots) and of Jeffrey R. Mabee and Judith B. Grace under their deed from Heather O. Smith (WCRD Bk. 1221, Pg. 347) noted above. Specifically, NAF is proposing to construct an industrial facility with a pipeline installation running from the northwest side of Route 1 across land of Eckrote and land of Mabee and Grace to the waters of Penobscot Bay. They have raised several objections to the ownership rights of Mabee and Grace which deserve to be addressed in conjunction with this survey.

In a letter to Erik Heim, president of Nordic Aquafarms dated May 16, 2019 James Dorsky, land surveyor, acknowledges that after Harriet L. Hartley sold land to Sam M. Cassida she had retained ownership in the shore and flats in front of the Fred R. Poor tract. He then suggests that the shore and flats in front of the Fred R. Poor tract were severed by the subsequent conveyance to William P. and Pauline H. Butler (WCRD Book 474, Page 387) because the description into the Butlers was an abutters description. He states, "If Harriet Hartley had intended to convey to the Butlers the flats in front of the land she had conveyed to Fred R. Poor, the abutters description would have also stated *Northerly by land of Sam M. Cassida* since Cassida was a northerly abutter to Hartley's remaining flats." Although the deed does not call for land of Cassida as an adjoining monument, deeds descriptions are seldom as complete and accurate as desired<sup>18</sup>, neither does it call for remaining land of Harriet L. Hartley or other land of Harriet L. Hartley as the limit of the boundary which, by Mr. Dorsky's reasoning, would have been necessary.<sup>19</sup> The land of Butler had the Fred R. Poor tract as a northerly bounding monument for its full extent and was bounded easterly by Penobscot Bay which extended to the high water mark.

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<sup>18</sup> **Wing v. Burgis 13, Me. 111, 114-5 (1836)** (*Errors in description will sometimes creep in, in spite of care, vigilance and caution; and deeds are often drawn by unskillful and inexperienced hands.*); **Hill v. Lord, 48 Me. 83, 94 (1861)** (*In Madden v. Tucker, 46 Me. 367, 376 (1859) the court discusses its responsibility in dealing with problems arising from "unskillful, ignorant or misinformed scriveners" who may not have obeyed, in every particular, their instructions. Hill v. Lord, 48 Me. 83 (1861), states that, "It was not always possible to employ officers or scriveners who understood all the requirements of the law; and sundry persons, having just and equitable titles to estates were in danger of being evicted out of their just rights and possessions, because the deeds, or instruments, or other writings conveying such estates, were defective, or imperfectly made and executed." An Act was therefore passed for "quieting possessions," which made such possessions, if continued until 1720, conclusive evidence of title. Province Laws, c. 49 and 115.*)

<sup>19</sup> **Cilley v. Childs, 73 Me. 130, 134 (1882)** ("A deed is not to be held void for uncertainty, because the boundaries are not fully expressed, when by reasonable intendment it can be ascertained what was considered and understood by both parties to be embraced and intended to be embraced in the description." *Com. v. Roxbury* 9 Gray, 490.)

Mr. Dorsky's suggestion fails to deal with the fact that his interpretation of the description in the conveyance to Butler calling for the abutting property to be "bounded northerly by the land of Fred R. Poor" does not allow the call to run the full extent of the Fred R. Poor tract<sup>20</sup>. Mr. Dorsky, contrary to fundamental principles of land conveyancing and principles of boundary retracement, is somehow suggesting that the shore and the flats adjoining the Butler property need to be treated as something other than land or real estate. The shore and the flats are not an inferior or less significant convenient add-on to the to the upland. They are real property and must be treated as such. For example see **Call v. Carroll, 40 Me. 31, 33-4 (1855)**:

*The flats appertaining to each lot consequent upon such division, were as much parts of the original lots as the uplands, - and when granted were as much included in the terms of the grant, if that followed the original location, as the upland.*

According to *Sawyer v. Beal*, 97 Me. 356, 358, 54 A. 848,848 (1903). "The ownership of the **intertidal** zone is as **land** and not a mere easement." To suggest that all the land lying southerly of the entire Fred R. Poor tract is not included in the conveyance finds no basis in the rules of retracement. The fact remains that the tract to Butler is bounded, "Northerly by land of Fred R. Poor" and "easterly by Penobscot Bay". That portion of Sam M. Cassida's land in the shore and the flats is part of Penobscot Bay. Fred R. Poor's land is a clear fixed and certain monument for the whole length of its extent from Route 1 to land of Cassida at the bay.<sup>21</sup> The court has said in **Edmonds v. Becker, 434 A.2d 1012, 1013 (Me. 1981)** :

*The intent of the parties is the principal guide to deed construction, Kinney v. Central Maine Power Co. ... and the law reasonably assumes that where a call in a deed runs to the land of an abutter, the grantor intended to convey the entire parcel to that point, and not to retain title in a narrow slice of land.*

Additionally, contrary to Mr. Dorsky's explanation, the court has generally held the presumption that the flats remain with the upland unless clear words of separation are used in the description. Regarding the shore and the flats the court has said in **Snow v. Mt. Desert Island Real Estate Co., 84 Me. 14, 16 (1891)**:

<sup>20</sup> *White v. Jones, 67 Me. 20, 24 (1877)* (For it must be remembered that the Cilley line - an undisputed line - is to be regarded as a continuous monument for its whole distance; and it must control.)

<sup>21</sup> *Howe v. Natale, 451 A.2d 1198, 1202 (Me. 1982)* (A boundary line is a controlling monument, *Liebber v. Abbott, Me., 388 A.2d 520, 521 (1978)*, having priority over courses and distances or quantity descriptions in a deed. *Mayer v. Fuller, Me., 248 A.2d 140 (1968)*. "One who accepts a deed describing his land in terms of an adjoining tract is bound by the prior tract as a boundary and a monument to which any distances in the deed must yield." *Rusha v. Little, Me., 309 A.2d 867, 870 (1973)*. ); **White v. Jones, 67 Me. 20, 24 (1877)** (For it must be remembered that the Cilley line - an undisputed line - is to be regarded as a continuous monument for its whole distance; and it must control.)

While they may be held in private ownership under our law, they are yet subject to the public right of navigation and fishing. Annexed to the upland, they may be of great value to the common owner. Apart from the upland, they are rarely of any value to a private owner, who would have no access to them except by water. .... It is also common knowledge that since the ordinance, the occupation of the flats has usually followed that of the upland, and that the flats are usually of no value without the upland. Conveyances of the upland are commonly supposed to convey the flats.

See also **Dunton v. Parker 97 Me. 461 (1903)**. There is nothing in the deed from Harriet L. Hartley to William P. Butler and Pauline H. Butler (WCRD Bk. 474, Pg. 387) suggesting that Harriet Hartley intended to retain a portion of her land that would have had no access except by water.

Further, probate authorities in the Philadelphia Register of Deeds determined that Harriet L. Hartley’s Will was “ineffective” because she had conveyed all of her land in Maine during her lifetime. As a result her remaining assets (all cash) were distributed to her heirs-at-law, her two sisters Genevieve Hargrave Bailey and Esther Hargrave Woods – not the heirs named in her 1945 Will (Ruth Hartley Weaver and Samuel Nelson Woods, Jr.) in whom she had expressed an intent to bequeath her Maine land. (See Scheduled D attached). Since Harriet L. Hartley had no real property in Maine at the time of her death in October of 1951, her Will was determined to be “ineffective” and neither her intended heirs nor her heirs-at-law under the Pennsylvania Intestacy Law received any real property from Harriet L. Hartley’s estate. This 67 year old probate determination confirms that the Hartley-Butler deed conveyed all of Harriet L. Hartley’s remaining land in September 1950.

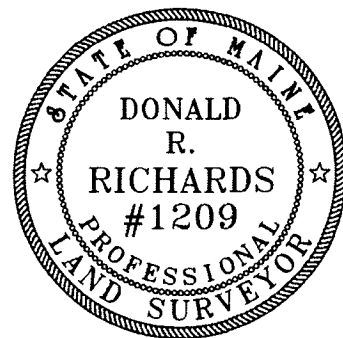
Mr. Dorsky does not appear to have considered the actual probate records of the Harriet L. Hartley estate when he drafted his May 16, 2019 letter to Erik Heim and proposed that Harriet Hartley had retained the intertidal land in front of the Fred R. Poor parcel when making the conveyance to the Butlers. When all the records and rules of retracement are considered together the only logical conclusion that can be reached, consistent with *Edmonds v. Becker* and *Snow v. Mt. Desert Island Real Estate Co.*, both noted above, is that Harriet L. Hartley conveyed all of her remaining land, including all intertidal lands, to the Butlers in 1950. Further, using the same abutters description thereafter all of the Butlers’ successors in interest have continued to convey all of this land, using the same description, down to Mabee and Grace – who now own this intertidal land pursuant to the *Ferris v. Hargrave* judgment.

October 4, 2019



Signed: \_\_\_\_\_

Donald R. Richards, P.L.S. 1209



**Mabee - Grace Chain of Title**

Jeffrey R. Mabee & Judith B. Grace

↑

↑    ⇒    ⇒    ⇒    Conservation Easement Sold Out    ⇒    Upstream Watch  
↑    Bk. 4367, Pg. 273  
↑    April 29, 2019

Jeffrey R. Mabee & Judith B. Grace

↑

↑    Bk. 1221, Pg. 347  
↑    May 15, 1991

↑

Heather O. Smith

↑ ↑

↑ ↑    Bk. 833, Pg. 153  
↑ ↑    December 11, 1984

↑ ↑

↑    Christopher S. Smith

↑ ↑

↑ ↑    Bk. 817, Pg 291  
↑ ↑    November 1, 1983

↑ ↑

Andrew J. Gay & Judith Gay

↑

↑    Bk. 684, Pg. 688  
↑    August, 26, 1970

↑

↑ ⇒ **QUIET TITLE ACTION** ⇒ Winston C. Ferris vs. Genevieve E. Hargrave, et. als.

↑    Abstract of Complaint Bk. 680, Pg 112

↑    April 10, 1970

↑    Final Decree, Bk. 683, Pg. 283

↑    June 26, 1970

↑

Winston C. Ferris

↑

↑    Bk. 680, Pg. 688  
↑    March 19, 1970

↑

Evelyn Flanders &

Continental Ill. Bank & Trust Co. Chicago Exec. u/w/o Snelling S. Robinson

Evelyn Flanders &

Continental Ill. Bank & Trust Co. Chicago Exec. u/w/o Snelling S. Robinson

↑

↑ Will

↑

Snelling S. Robinson

↑

↑ Bk. 663, Pg. 98

↑ September 1, 1967

↑

Willis C. Trainor & Virginia K Trainor

↑

↑ Bk. 652, Pg. 116

↑ October 17, 1966

↑

Ernest J. & Majorie N. Bell

↑

↑ ⇒ ⇒ ⇒ ⇒ ⇒ Parcel Sold Out ⇒ Jn. Joseph & Catherine Grady

↑

Bk. 621, Pg. 288

↑

May 18, 1964

↑

Subsequently land of Theye

Ernest J. & Majorie N. Bell

↑

↑ Bk. 587, Pg. 100

↑ May 13, 1961

↑

William P. & Pauline H. Butler

↑

↑ Bk. 474, Pg. 387

↑ September 22, 1950

↑

↑ ⇒ ⇒ ⇒ ⇒ ⇒ Parcel Sold Out ⇒

↑

Sam Cassida

↑

Bk. 438, Pg. 497

↑

October 25, 1946

↑

↑ ⇒ ⇒ ⇒ ⇒ ⇒ Parcel Sold Out ⇒

↑

With Restrictions

↑

Fred R. Poor

Bk. 452, Pg. 205

January 25, 1946

Harriet L. Hartley

↑

↑

Arthur & Harriet L. Hartley

Arthur & Harriet L. Hartley

↑

↑ Bk. 386, Pg. 453

↑ August 27, 1934

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Genevieve Hargrave

↑

↑ Bk. 386, Pg. 452

↑ August 27, 1934

↑

Arthur Hartley

↑

↑ Bk. 343, Pg. 497

↑ March 3, 1924

↑

Eva T. Burd & Edwin D. Burd - Widow & Son

↑

↑ Heirs at law

↑

Edwin D. Burd

Gartley & Dorsky  
ENGINEERING & SURVEYING

May 16, 2019

Erik Heim  
President, Nordic Aquafarms  
Via email @: [erik.heim@nordicaquafarms.com](mailto:erik.heim@nordicaquafarms.com)

RE: Ownership of Intertidal Zone in front of Eckrote Property  
Northport Avenue, Belfast, Maine

Dear Mr. Heim:

I am writing this letter to you at the request of David Kallin, Esq. of Drummond Woodsum. The purpose of this letter is to address a conclusion made by another surveyor, Donald R. Richards, PLS of Richards, Cranston & Chapman, LLC, in a letter to David Losee, Esq. dated April 30, 2019 that the intertidal zone in front of the Eckrote property is owned by Jeffrey R. Mabee and Judith B. Grace. I disagree with Mr. Richards' conclusion.

The property in Belfast along the shore of Penobscot Bay from the Little River northerly for more than 1,600 feet (this would end more than four current-day parcels northerly of the Eckrote property) was owned in 1946 by Harriet L. Hartley.

The first parcel that Hartley conveyed along this shoreline included the shore frontage now owned by the Eckrotes (Tax Map 29, Lot 36) and Lyndon G. Morgan (Tax Map 29, Lot 35) and was described in a deed to Fred R. Poor dated January 25, 1946 and recorded in Book 452, Page 205 of the Waldo County Registry of Deeds. Mr. Richards interprets this deed as severing the intertidal zone or flats from the upland. Mr. Richards concludes that Hartley retained the flats in front of the upland she conveyed to Poor.

The series of conveyances thereafter, do not support the conclusion that the intertidal zone would convey to the predecessors in interest of Mabee/Grace. The second parcel that Hartley conveyed along this shoreline included the shore frontage now owned by Helmers (Tax Map 29, Lot 34), Kent (Tax Map 29, Lot 33), Giles (Tax Map 29, Lot 32) and a small amount beyond Giles northerly line. This second parcel was described in a deed to Sam M. Cassida dated October 25, 1946 and recorded in Book 438, Page 497 of the Waldo County Registry of Deeds. This deed from Hartley to Cassida clearly conveyed the flats with the upland by stating "*Also conveying whatever right, title or interest I may have in and to the land between high and low water marks of Penobscot Bay in front of the above described lot*". This conveyance created a boundary line across the flats between the flats northerly of this line that were conveyed to Cassida and the flats southerly of this line that Hartley would have still owned in front of Poor (now Eckrote and Morgan) and southerly to the Little River.

The third parcel that Hartley conveyed along this shoreline included the shore frontage now owned by Theye (Tax Map 29, Lot 37) and Mabee/Grace (Tax Map 29, Lot 38). This third parcel was described in a deed to William P. Butler and Pauline H. Butler dated September 22, 1950 and recorded in Book 474, Page 387 of the Waldo County Registry of Deeds. This deed from Hartley to the Butlers described the land being conveyed as “*Northerly by land of Fred R. Poor; easterly by Penobscot Bay; southerly by Little River and westerly by the Atlantic Highway, so-called*”. Mr. Richards concluded that this description “*necessarily includes the shore and the flats in front of the Eckrote property and northerly to the extent of the Fred R. Poor tract*”. I disagree. The call to be bounded by Penobscot Bay does cause the conveyance to include the flats with the upland. However, I believe that the northerly limit of the flats that were conveyed to the Butlers should be determined by applying what is known as the Colonial Method, which would create another boundary line across the flats, as happened in the Cassida deed. The westerly or landward end of this boundary line is at the common corner between the land conveyed to Poor and the land conveyed to the Butlers at the high water mark. This would be a boundary line between flats owned by the Butlers to the south and land retained by Hartley to the north.

The description in the deed to the Butlers is what is sometimes referred to as an “abutters description”. It is not a “metes and bounds” description that would include measurements around the property. In an abutters description the boundaries are described by calling for the adjoining property owners or monuments around the perimeter of the property being described. If Harriet Hartley had intended to convey to the Butlers the flats in front of the land she had conveyed to Fred R. Poor, the abutters description would have also stated *Northerly by land of Sam M. Cassida* since Cassida was a northerly abutter to Hartley’s remaining flats.

It is common for deeds conveying land along the shore, even when the language in the description clearly includes the flats, to not specify what portion of the flats is being conveyed. When the description fails to clearly describe the boundaries of the flats being conveyed, Maine courts have long held that the method for determining those limits, or the direction of the property line from high to low water, is the Colonial Method.<sup>1</sup> Since the abutters description from Hartley to the Butlers does not call for Cassida as a northerly abutter, it reads like a deed describing the upland portion being conveyed along with a call to the Bay, which would include the flats in front of that upland, but that does not clearly describe the limits of the flats being conveyed. Again, this is a common method of describing shorefront properties without defining the direction of the property line being created across the flats.

Ernest J. and Marjorie N. Bell, successors in title to the Butlers, conveyed what is now the Theye property to John and Catherine Grady in 1964 (Book 621, Page 288) without the flats. The Bells then conveyed their remaining property to Willis C. and Virginia K. Trainor in 1966 (Book 652, Page 116) by using the same abutters description that had been used in the Hartley to Butler deed and then excepted what they had conveyed to the Gradys in 1964. This same language has been carried forward to the deed to Jeffrey R. Mabee and Judith B. Grace (Book 1221, Page 347) resulting in Mabee and Grace owning the flats in front of their upland property and the flats in front of the Theye’s upland property.

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<sup>1</sup> Emerson v. Taylor, 9 Me. 42 (1832); Portsmouth Harbor, Land & Hotel Co. v. Swift, 82 A. 542, 109 Me. 17



I should also point out that, separate from a record title issue, the Eckrotes may have an adverse possession claim to the intertidal zone in front of their property. I have been told, but have not independently verified, that one the Eckrotes is a grandchild of Frederick Poor. It appears that the Eckrote property has been in the same family since the conveyance from Harriet Hartley. There is a plaque on the house near the shore that says "The Eckrote House, Est. 1949" suggesting the age of the house. There are two sets of steps leading to the shore from the upland near the house. One set is a combination of stone and wood. The other is a set of stone steps. Both sets of steps appear to have been there a long time. Your legal counsel will be able to help you review this information along with their own research to help determine the status of the actual ownership of the intertidal zone in front of the Eckrote property.

Sincerely,

**Gartley & Dorsky Engineering & Surveying, Inc.**



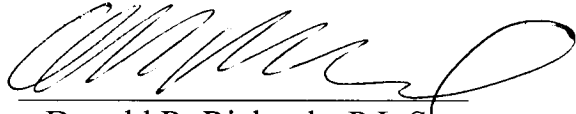
James A. Dorsky, PLS  
Senior Vice President

Cc: David M. Kallin, Esq.  
Drummond Woodsum



This survey report contains 14 pages in the body and three appendices labeled Appendix A, Appendix B and Appendix C.

Dated: OCTOBER 8, 2019



Donald R. Richards, P.L.S.


STATE OF MAINE

COUNTY OF KNOX

On the 8<sup>th</sup> day of October 2019, then personally appeared the above-named, Donald R. Richards, who swore that the foregoing statements by him are based upon personal knowledge, research and information that he believes to be true and form the basis of his professional opinion.

  
Notary Public/~~Attorney at Law~~

My commission expires:

	JENNIFER UPHAM Notary Public - Maine My Commission Expires November 9, 2022
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