# ME MAINE

By Brian M. Rayback & William E. Taylor, Pierce Atwood LLP

## I. Introduction, Historical Perspective, Developing Trends.

Maine's water law is rooted in the English common-law doctrines of natural use and natural flow. These doctrines developed in Maine at a time when industrial development for activities such as logging, paper mills, and textile factories depended heavily on the flow of a river. Maine averages approximately 40–46 inches per year of precipitation, and is blessed with numerous water bodies in the form of lakes, ponds, streams, rivers, and brooks, and a lengthy coastline. For example, the Maine Department of Environmental Protection estimates that Maine has approximately 1.5 million acres of ponds and lakes, and 31,000 miles of rivers and streams. Thus, given this abundant resource Maine, along with much of the rest of the eastern United States, adopted the natural flow doctrine to promote industrial uses. Over time, however, largely to ensure a more workable system of allocating water rights, these doctrines have been replaced by riparianism and reasonable use, which largely continue to dominate today.

For many years, water law in Maine was uncontroversial, probably because of the abundance of water, the state's small population, and the limited industrial base. In recent years, however, some have begun to question the traditional assumption that water is always abundant, citing, for example, increasing development pressure, particularly in the southern part of the state, snow making at ski resorts, bottled water operations, and conflicts on small "Downeast" streams that both supply water for agricultural irrigation and provide habitat for endangered Atlantic salmon. This has led to additional regulations on water use, including the adoption of a water withdrawal reporting program in 2001 and water extraction regulations in 2007. In addition, it has also led to increasing attention on Maine's adherence to the absolute dominion rule for groundwater, including several failed attempts to abandon absolute dominion in favor of other ownership systems. Nevertheless, despite the increasing attention being paid to issues of water quantity, conflicts are still relatively isolated and rare.

## II. Surface Water.

Under the Reasonable Use Doctrine, or the "American Rule," which has evolved into the common law in Maine, all riparians share the right of "reasonable use" of surface waters. [*See generally supra* Treatise § 7.02.] That is, a riparian may use the water freely as long as it does not unreasonably interfere with the use of other riparian owners. In *Lockwood Co. v. Lawrence*, 77 Me. 297, 316 (1885), the Maine Supreme Judicial Court ("SJC") set out Maine's interpretation of this rule in a case that actually dealt with water quality, not quantity:

> Every proprietor upon a natural stream is entitled to the reasonable use and enjoyment of such stream as it flows through or along his own land, taking into consideration a like reasonable use of such stream by all other proprietors above or below him. The rights of the owners are not absolute but qualified, and each party must exercise his own reasonable use with a just regard to the like reasonable use by all others who may be affected by his acts. Any diversion or obstruction which substantially and materially diminishes the quantity of water, so that it does not flow as it has been accustomed to, or which defiles and corrupts it so as to essentially impair its purity, thereby preventing the use

> of it for any of the reasonable and proper purposes to which it is usually applied, is an infringement of the rights of other owners of land through which the stream flows, and creates a nuisance for which those thereby injured are entitled to a remedy.

Case law in Maine shares several characteristics of the reasonable use doctrine as applied by other states. For example, a riparian owner has only a right to the reasonable use of the water, and does not own the water itself. *See Opinions of the Justices*, 118 Me. 503, 507 (1919). Also, riparian rights are shared among the riparian owners. [*See supra* Treatise § 6.01(b).] The priority of appropriation of the water does not create any priority of right. *See Bailey v. Rust*, 15 Me. 440, 442 (1839); *Heath v. Williams*, 25 Me. 209, 216 (1845). Finally, riparian rights attach to nearly all free-flowing surface waters, including tidal waters, lakes, ponds, rivers, streams, and brooks (although, as discussed *infra*, Section IV, navigable waters are also subject to occasionally conflicting public use rights held in trust by the legislature for the benefit of the people of the state). *See, e.g., Opinions of the Justices*, 118 Me. at 503–08. [*See supra* Treatise § 6.02.]

In determining whether a use is reasonable, courts balance the utility of the riparian owner's use against the gravity of the harm. *See Stanton v. Trustees of St. Joseph's College*, 233 A.2d 718 (Me. 1967) [*Stanton I*]. Nearly all uses of water are potentially reasonable, including for manufacturing and industrial purposes. *See Central Maine Power Co. v. Public Utils. Comm'n*, 163 A.2d 762, 769 (Me. 1960). Whether a use is reasonable in a particular instance is typically a factual question that depends on the totality of the circumstances:

> In determining what is a reasonable use, regard must be had to the subject matter of the use; the object, extent, necessity and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases; and all the other and ever varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration.

*Kennebunk, Kennebunkport, & Wells Water Dist. v. Maine Turnpike Auth.*, 71 A.2d 520, 526 (Me. 1950) [*Kennebunk I*] (quoting *Lockwood Co.*, 77 Me. at 317). [*See supra* Treatise § 7.03.]

As a result of this open-ended inquiry, the Maine courts have developed a rule that rarely works prospectively, but imposes liability for use only after-the-fact. The SJC has described this *ad hoc* process by stating "[t]he final arbiter in each case is not so much the law as the exercise of good sound judgment." *Portland Sebago Ice Co. v. Phinney*, 117 Me. 153, 160 (1918).

Although courts often historically considered non-riparian uses of water to be *per se* unreasonable, the trend in many states is to consider such bright line rules inconsistent with reasonable use theory. In Maine, however, case law still draws an important distinction between riparian and non-riparian uses.

In *Kennebunk I*, 71 A.2d at 523, a public water district sought to recover damages for harm to its water supply by the Maine Turnpike Authority. The District drew water from Branch

Brook downstream from where the Authority was building the Maine Turnpike. The District argued that the Authority's actions were unreasonable because they were polluting the water in the brook. After expressing doubt that the District owned land on the brook, the SJC stated that even if the District were riparian, extraction of the water for sale to the public was an unreasonable use because the District had not purchased those rights from other riparians. It concluded that where the use by a lower proprietor is non-riparian, that use cannot be considered when judging the reasonableness of the upper riparian's use. The Court held that the only relevant use it could analyze was that of the Authority, and because that use was not forbidden by law, it rejected the District's claims. *See id.* at 527. [*See generally supra* Treatise § 7.02(a).]

After remand, the District amended its pleading to allege that it did own land along the brook and could exercise its full riparian rights to protect the purity of its water supply. *See Kennebunk, Kennebunkport, & Wells Water Dist. v. Maine Turnpike Auth.*, 84 A.2d 433, 435 (Me. 1951) [*Kennebunk II*]. The SJC clarified its previous opinion by stating that the District's "proprietary right to use the waters of Branch Brook stemming from its ownership of riparian lands was restricted to riparian purposes." *Id.* at 436. "While a riparian proprietor may make reasonable diversion or abstraction of the water for a riparian use, he can make neither for a non-riparian use." *Id.* at 437. As a result, the District's use of the water "cannot be a factor in determining as between the plaintiff and the defendant whether or not the use by the defendant of its upper riparian land is a reasonable use." *Id.* at 439. With nothing against which to compare the Authority's use, the Court again concluded that it was reasonable. *See id.* at 440.

In *Stanton II*, the SJC again faced an issue involving a non-riparian use. Several landowners who were riparian to Wescott Brook sought to prevent St. Joseph's College from discharging treated sewage effluent into the brook. *See Stanton v. Trustees of St. Joseph's College*, 254 A.2d 597, 598 (Me. 1969) [*Stanton II*]. The College itself, including the treatment plant, was located several miles away from the brook, but it purchased easements and a parcel of land riparian to the water for the purpose of discharging the waste. The SJC concluded that the College's proposed use of the brook was non-riparian, and therefore held it could not assert the reasonable use doctrine against the lower riparians. The key to the decision is that the brook was not subservient to the land that the College intended to benefit.

> The proposed use is not for the benefit or in the service of either the land or easements acquired by the defendant along the stream. They are mere conduits and are themselves as such employed in the service of defendant's non-riparian property. However reluctantly, the Court is compelled by stare decisis to conclude that defendant would not be "using the (brook) for a proper purpose and in the kind of business to which the stream was subservient." Since defendant has no legal right to make the brook serve the needs of its non-riparian land, its intended use is unreasonable as a matter of law.

*Id.* at 598 (quoting *Kennebunk I*, 71 A.2d at 527). The Court further explained: "The land used for discharging the effluent is intended to be used for no other purpose connected with the waters of the brook. For example, the College is not located on riparian land or the land is not used for grazing cattle, or for industrial purposes from which waste might be anticipated." *Id.* at 599.

In reaching its decision, the *Stanton II* court specifically rejected an argument that Maine should adopt the more flexible rule followed by Massachusetts in *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83 (1913):

> Under the *Stratton* rule it is argued that the discharge ... [if otherwise reasonable] is permissible in the absence of actual perceptible damage. In our view, however ... , the ... discharge of the effluent under the circumstances would be a nonriparian use. The test then is not whether there is reasonable use between riparian owners, or whether actual perceptible damage results from such use. The proper test is whether the right of the plaintiffs to the waters of the brook undiminished in quantity and quality is breached ... .
>
> The defendants seek to use Wescott Brook for nonriparian purposes under circumstances violating the rights of the plaintiffs. The use which may be today's injury without damage may ripen into prescriptive rights in the defendants limiting the legal and valuable rights of the plaintiffs, and so may be challenged and enjoined before the commencement of the unlawful use.

*Stanton II*, 254 A.2d at 600. The court then concluded: "We are not prepared to adopt the rule of the *Stratton* case." *Id.*

Maine has also taken a different approach with respect to diversions from great ponds (bodies of water whose surface area exceeds 10 acres in their natural state) and tidal water bodies. In *City of Auburn v. Union Water Power Co.*, 90 Me. 576 (1897), the SJC held that the legislature properly authorized the City of Auburn to divert a reasonable supply of water from a great pond to provide water for domestic use by its citizens. Drawing upon the common law inherited from the era when Maine was still part of Massachusetts, the *Union Water* court reasoned:

> The state's ownership of great ponds, and the authority of the legislature to permit water to be taken from such ponds for domestic purposes without the payment of damages, were affirmed in *Fay v. Salem and Danvers Aqueduct*, 111 Mass. 27. No reason is perceived why the same doctrine should not prevail in this state. The Colonial Ordinance of 1641-7 is in force in this state; and it is settled law that by virtue of it, the title to all great ponds is vested in the state. The right of the people to a sufficient quantity of water for domestic purposes is incontrovertible.

*Id.* at 589; *see also Frost v. Washington County R.R. Co.*, 96 Me. 76, 85–86 (1901) (holding that state owns tidal waters, and therefore could deprive without just compensation riparian mill owner of access to wharf by constructing railroad trestle across bay).

## III. Surface Water Runoff.

Until recently, Maine followed the "Common Enemy" rule with regard to surface water runoff, which held that:

> [A]ny proprietor of land may control the flow of mere surface water over his own premises ... without obligation to any proprietor either above or below ... . He may prevent surface water from coming upon his land according to its accustomed flow, whether flowing thereon from a highway or any adjoining

> land. He may prevent its passing from his land in its natural flow.

*Morrison v. Bucksport & Bangor R.R.*, 67 Me. 353, 355–56 (1877).

The legislature abandoned the Common Enemy rule, however, in favor of reasonable use principles. Now, any "[u]nreasonable use of land that results in altered flow of surface water that unreasonably injures another's land or that unreasonably interferes with the reasonable use of another's land is a nuisance." Me. Rev. Stat. Ann. (MRSA) tit. 17, § 2808.

The legislature explained the intent of the change as follows:

> The purpose of this Act is to amend the applicable rule governing the alteration of surface water flow under Maine law. Maine case law historically has applied the "common enemy rule" to define a landowner's responsibility for altering the flow of surface water that affects another's land. The common enemy rule allows landowners to dispose of surface water as the landowner sees fit. This Act instead codifies the "reasonable use rule," which serves to establish as a nuisance any unreasonable use of a person's land that results in altering the flow of surface water in a way that would unreasonably injure another's land or unreasonably interfere with the reasonable use of another's land.

P.L. 2005, ch. 564 (eff. Jan 1, 2007).

## IV. Groundwater.

Although other states have adopted variants of the reasonable use rule for groundwater, Maine ostensibly continues to follow the so-called absolute dominion rule, which provides that one who owns the overlying land has the right to extract the groundwater, even if this causes a neighbor's well or spring to run dry. *See Chase v. Silverstone*, 62 Me. 175, 177 (1873). The *Chase* court referred to the injury suffered by such a neighbor as *damnum absque injuria*, or an injury that does not give rise to an action for damages against the person causing it. *See id.* at 176. [*See generally supra* Treatise ch. 20.]

The SJC rejected an argument in *Maddocks v. Giles*, 728 A.2d 150, 153 (Me. 1999), that Maine should abandon the absolute dominion rule in favor of a reasonable use test. The plaintiffs alleged that their spring had run dry because of the operations of the defendant's gravel pit on abutting property. In urging the SJC to depart from more than a century of precedent, the plaintiffs argued that the absolute dominion rule was developed at a time when courts did not understand how water flows underground, and thus did not account for the interconnected nature of the hydrological cycle. After recognizing that several courts have abandoned the rule on these grounds, the *Maddocks* court declined to follow the trend, in part because there had been no showing at trial that the rule—whatever its historical basis—failed to provide a workable system for allocating groundwater rights in Maine. *See id.* at 154. Thus, although there has been some public debate over the past several years about groundwater quantity, the SJC was unwilling in *Maddocks* to make assumptions in the context of deciding an appeal about whether there exists a concrete problem with the current system.

Despite the SJC's refusal to abandon the absolute dominion rule, it is clear that Maine has never followed the most stringent version of this doctrine—that absolute ownership gives rise to an absolute right to waste or pollute groundwater, regardless of the impact on others. *See Woodward v. Aborn*, 35 Me. 271, 274 (1853) (proscribing negligent and malicious conduct that may injure "the useful waters of another," namely a neighbor's well).

Furthermore, the legislature has clearly modified the absolute dominion rule in multiple instances, and thus provided extensive protections for other users and natural resources. For example, the legislature created a cause of action against a person who withdraws groundwater in excess of household purposes for a single-family home if the withdrawal interferes with a pre-existing household use of the groundwater. MRSA tit. 38, § 404(2). That rule was inapplicable in the *Maddocks* case because the plaintiffs intended to use their spring for commercial purposes. *See Maddocks*, 728 A.2d at 154 n.6.

There are also multiple environmental statutes that are designed to protect groundwater from contamination, and thus *de facto* restrict the scope of the absolute dominion rule in Maine, *see* MRSA tit. 12, § 550-B (requiring reporting of well drilling to assist with aquifer mapping efforts); MRSA tit. 38, §§ 465-A, 470 (creating a classification system for groundwater that gives preference to public water supplies); MRSA tit. 38, § 470-B (requiring reporting for certain water withdrawals, including those from groundwater); MRSA tit. 38, § 480-D (requiring an applicant seeking to withdraw groundwater from a significant groundwater well to demonstrate that the withdrawal will not have an undue unreasonable effect on waters of the State, water-related natural resources, and existing uses); MRSA tit. 38, § 484 (requiring developers of certain large projects to demonstrate that the project will not pose an unreasonable risk of a discharge to a significant groundwater aquifer); MRSA tit. 38, § 543 (barring the placement of petroleum or petroleum waste products on or in the ground in any manner that would permit drainage into groundwater); MRSA tit. 38, §§ 561 to 570-L (setting standards for the location of underground oil storage tanks, requiring removal of abandoned tanks, and requiring monitoring of the condition of existing tanks, as well as creating a groundwater clean-up fund through various user fees). These statutes are administered by the Maine Department of Environmental Protection. Many municipalities also regulate the use of groundwater. *See, e.g.*, Denmark, Maine, Ordinance Governing the Large-Scale Pumping or Extraction of Groundwater, Spring Water, and/or Water from Aquifers Within the Municipality of Denmark, Maine (Oct. 9, 2006).

Finally, in 2009 the legislature rejected a proposal to abandon absolute dominion in favor of a public trust in groundwater. 124th Legis., L.D. 837 (2009).

## V. Ownership & Common Law Public Trust Rights.

With respect to land along shorelines, the rights of landowners and the general public generally depend on which of three zones is at issue: (1) submerged lands, which are below the mean low water mark; (2) intertidal lands, which includes the shore and flats between the mean high and low water marks, but not exceeding 100 rods; and (3) uplands, which are above the mean high water mark. Much of the law in this area can be traced back to the Colonial Ordinance of 1641–47, which had its origin in the Massachusetts Bay Colony and was adopted by the SJC as common law after statehood "because it has been so largely accepted and acted on by the community as law that it would be fraught with mischief to set it aside." *Barrows v. McDermott*, 73 Me. 441, 447, 448 (1882).

Pursuant to the Colonial Ordinance, the State holds title to submerged lands, meaning great ponds and lands below intertidal waters. *See Opinion of the Justices*, 437 A.2d 597, 605

(Me. 1981). The Colonial Ordinance does not extend the state's ownership to non-tidal rivers, but it does guarantee the public the right to navigation, power generation, and fish passage on all navigable waterbodies in Maine. *Central Maine Power Co. v. Public Utils. Comm'n*, 163 A.2d 762, 779 (1960). Reasonable use, however, still requires that such uses do not unreasonably interfere with the rights of other riparians or the public.

In addition to ownership of submerged lands, the Colonial Ordinance also provides that the land in the intertidal zone belongs to the owner of the adjacent upland property, subject to certain public trust rights. This ownership is "as land and not a mere easement," *Donnell v. Joy*, 85 Me. 118, 119, 26 A. 1017, 1018 (1892), and may be separated from ownership of the adjacent upland, *Dunton v. Parker*, 97 Me. 461, 467, 54 A. 1115, 1118 (1903). Nonetheless, the Colonial Ordinance guarantees to all citizens the right of free fishing, fowling, and navigation on great ponds and intertidal waters, and access over private land for those purposes. *Barrows*, 73 Me. at 448. As a result, the upland owner cannot build so as to interfere with these rights. *Opinion of the Justices*, 437 A.2d at 605. In addition, the SJC recently held that there is a strong presumption of permission that is applied to the public's recreational use of beaches (including both the intertidal zone and the associated uplands), and thus rejected a claim for prescriptive easement on a beach used openly for many years by the public. *Almeder v. Town of Kennebunkport*, 2014 Me. 12 (2014).

The SJC has traditionally given a broad interpretation to what is meant by "fishing," "fowling," and "navigation," *see State v. Lemar*, 147 Me. 405 (1952) (digging for worms); *Andrews v. King*, 124 Me. 361 (1925) (operation of boat for hire to drop off and pick up passengers in intertidal zone); *Haynes v. DeWitt Ice Co*, 86 Me. 319, 325 (1894) (cutting ice), but has refused to expand the scope of the public trust to include some common recreational activities, *see Bell v. Town of Wells*, 557 A.2d 168, 173–75 (Me. 1989) (swimming, sunbathing, or walking not protected by Colonial Ordinance). As one justice on the SJC has pointed out, this has led to the anomalous situation that "a citizen of the state may walk along a beach carrying a fishing rod or a gun, but may not walk along that same beach empty-handed or carrying a surfboard." *Eaton v. Town of Wells*, 760 A.2d 232, 248–49 (Me. 2000) (Saufley, J. concurring).

In the most recent decision to interpret the scope of this right, the SJC concluded that the public may cross intertidal lands to reach the ocean for the purpose of scuba diving. *McGarvey v. Whittredge*, 2011 ME 97, 28 A.2d 620. The Court split 3-3, however, on how they reached this result, issuing two separate opinions, both referred to as "concurrences." The first opinion, written by Chief Justice Saufley, concludes that—with the exception of the decision in *Bell*, 557 A.2d at 173–175—public uses have never been strictly limited to fishing, fowling, and navigating, and emphasizing that common law must evolve over time. In her view, the public trust should be read broadly enough to allow scuba diving. *McGarvey*, 2011 ME 97, ¶ 56, 28 A.3d at 635 (Saufley, C.J., concurring). The second opinion, written by Justice Levy, concludes that "navigation" can be read broadly enough to include scuba diving, as with past cases recognizing rights of skating or travelling by horseback over frozen intertidal lands. *Id.* ¶ 76, 28 A.3d at 641. Justice Levy particularly emphasizes the need to respect *stare decisis* in the context of property rights, noting that Maine has roughly 3,500 miles of ocean coastline. *Id.* ¶¶ 65–66, 28 A.3d at 638.

Finally, owners of upland areas abutting waterbodies possess certain rights or privileges different from those generally belonging to the public, including: (1) the right to have the water remain in place and retain, as nearly as possible, its natural character, (2) the right of access to the water, (3) the right to wharf out to the navigable portion of the body of water, subject to reasonable regulation, and (4) the right of free use of the water immediately adjoining the

property to conduct business associated with wharves. *Britton v. Donnell*, 2011 ME 16, ¶ 8, 12 A.3d 39, 42.

The riparian rights of upland owners are subject to regulation by the state in the exercise of its public trust duties over waters of the state, although such regulation must be "reasonable." *Great Cove Boat Club v. Bureau of Pub. Lands*, 672 A.2d 91, 95 (Me. 1996) (holding riparian right to wharf out subject to reasonable restriction of obtaining lease before building over state-owned submerged lands); *see also Conservation Law Ass'n v. DEP*, 823 A.2d 551, 562–63 (Me. 2003) (affirming authority of state to issue permits by rule authorizing construction of docks, rather than through individual permitting process).

Pursuant to the Submerged and Intertidal Lands Act ("SILA"), landowners who wish to dredge, fill, or erect permanent structures, such as marinas, wharves, or piers, on submerged or intertidal lands, must obtain a submerged lands lease or easement from the State. MRSA tit. 12, § 1862. The State's power to regulate structures such as docks, wharves, and piers does not, however, give it the authority to infringe on the rights of neighboring riparian landowners, who also have rights of access to the waters. Before granting a submerged land lease, the State must find, among other things, that the lease will not unreasonably interfere with the ingress and egress of riparian owners. *Id.* § 1862(2)(a)(6)(d). Also, pursuant to the Wharves and Weirs Act, landowners who wish to erect a fish weir, trap, or wharf below the low-water mark in front of the shore of another must obtain consent from the owner of that shorefront property. MRSA tit. 38, § 1026. In 2009, the Law Court clarified that SILA does not trump the Wharves and Weirs Act, and therefore ruled that a landowner wishing to operate a wharf must comply with both statutes. *Britton v. Dep't of Conservation*, 2009 ME 60, 974 A.2d 303, 309 ("SILA grants the State authority to protect the public's rights to open waters; it does not give the State authority to infringe upon one riparian owner's rights in order to allow an abutting riparian owner to operate a commercial enterprise.").

## VI. Flowage Rights.

Under Maine's Mill Act, the owner of land is authorized to erect and maintain a dam for the purposes set forth in the Act, including the powering of mills and machinery. MRSA tit. 38, § 651. "In Maine, [t]he private right to operate a dam and flood the property of upstream waterfront landowners ... arises from the Mill Act ... which has its genesis in the early statutory law of the Province of Massachusetts Bay." *Dorey v. Estate of Spicer*, 715 A.2d 182, 184 (Me. 1998). The Mill Act permits individuals to erect dams to raise water for working mills, thus flowing land upstream, and limits liability to the assessment and payment of yearly damages. *See id.* at 185. Instead of paying these annual damages, many dam owners contracted, in the form of flowage deeds or easements, with those whose lands would be flowed as a result of the dam. *See Trask v. Public Utils. Comm'n*, 731 A.2d 430, 433 (Me. 1999) (defining a flowage right as the "private right to operate a dam and flood [flow] the property of upstream waterfront landowners"). [*See generally supra* Treatise § 9.02(a).]

A dam owner can argue that it has obtained a prescriptive right or easement to flow lands for which easement deeds were not purchased, thereby acquiring the right to flow that land without the payment of damages which might otherwise be required under the Mill Act. Although the Mill Act does not expressly provide for the creation of prescriptive easements, it does provide that the dam owner from whom damages are sought may seek to demonstrate that he has a right to flow the land in question without the payment of damages. MRSA tit. 38, § 703. The cases interpreting this provision have analyzed the issue as one of prescriptive rights and have sought to

define how and when such rights may be established, and what their effect may be.

To establish a prescriptive easement under the Mill Act, it must be shown that:

1. The land has been flowed for at least twenty consecutive years under a claim of right adverse to the landowner without consent;

2. That the flowing of the land has caused some appreciable damage each year;

3. That the damages were such as would have allowed a suit for damages under the Mill Act, but that no such suit was brought;

4. That the flowing was such that the owner knew or had a means of knowing of it; and

5. That if there was a short period of time during which there was no flowage, such as for repairs or maintenance, the omission of time was not voluntary but was unavoidable and was accompanied by an exhibited intention to resume the use as soon as practicable.

*Foster v. Sebago Improvement Co.*, 100 Me. 196, 199–201 (1905); *Wood v. Kelley*, 30 Me. 47, 50, 56–57 (1849).

The primary difference between the requirements for establishing a prescriptive right to flow without the payment of damages under the Mill Act and other prescriptive easements at common law is the requirement to show some appreciable damage to the flowed land in each of the 20 years of the prescriptive period. It is this provision that has been the focus of the cases interpreting the Mill Act and which requires further elaboration here.

Under the Mill Act, the owner of the mill dam is entitled to flow the land of another provided that he may be required to answer in damages pursuant to the provisions of the Act. *See Foster*, 100 Me. at 199. Unlike the situation at common law where the owner of the flowed land would be permitted to maintain an action for *any* invasion of his land regardless of whether that invasion results in damages, an owner of land flowed by a mill dam is entitled to seek compensation under the Mill Act only if his land has actually been damaged. *Id.* Absent such damages, the owner of the flowed land has no recourse against the owner of the dam and cannot prevent the flowing.

Thus, in order to obtain a prescriptive right to flow land of another without the obligation to pay damages, the owner of the mill dam must show, among other things, that the flowing has caused such damages as would have allowed the owner of the land to bring a suit for damages under the Mill Act during each of 20 consecutive years. *Id.*; *see also Nelson v. Butterfield*, 21 Me. (8 Shepl.) 220 (1842). Such damages will not be presumed simply because of the fact that the land was flowed during this time. *See Gleason v. Tuttle*, 46 Me. 288, 289 (1858). If at any point during the prescriptive period the owner of the land sustains no damage, that owner would be unable to bring an action for damages under the Mill Act for that time period and would therefore have no recourse against the flowing of his land. The law therefore refuses to presume that he has relinquished any of his rights. *See Foster*, 100 Me. at 200.

In the *Foster* case, for example, it was held that no easement by prescription to flow the

plaintiff's land was obtained because there was no evidence that the plaintiff had sustained any actual damage to his land during the first three years of the 20-year period:

> It only appears that the plaintiff's land was continuously flowed by the dam for twenty years prior to the date of the writ. It does not appear that there was any actual damage to the land during the first three years of that time. It does not appear that the flowage during those three years was adverse, under a claim of right, without the payment of damages or without the consent of the land owner. For aught that appears in this case the flowage during those three years may have been by permission of the landowner. The case fails to disclose any foundation for a prescriptive right to flow the plaintiff's land during that period.

*Id.* at 201.

The kinds of damages that could give rise to a right of action under the Mill Act include such things as evidence that trees, grass, or soil on flowed land have been injured by the water. *See Gleason,* 46 Me. at 290-91. If, for example, grass grown for hay was killed by the flowage, a claim for damages could be brought. *See Burleigh v. Lumbert*, 34 Me. 322, 323 (1851). Whether or not the land has been improved or cultivated may be relevant considerations. *See, e.g., Hathorne v. Stinson*, 12 Me. (3 Fairf.) 183 (1835).

Assuming that a prescriptive right could be established, the question arises as to the extent of the flowage right that was gained. In Maine, at least two cases have held that, where a prescriptive easement to flow land has been obtained, the right to flow extends to the "effective" or "efficient" height of the dam. *See Carr v. Piscataquis Woolen Co.*, 110 Me. 184, 190 (1912); *Voter v. Hobbs*, 69 Me. 19, 20 (1878); *see also Ray v. Fletcher*, 12 Cush. 200, 207–08 (Mass. 1853) (cited with approval in *Carr* and *Voter*). As explained by the Massachusetts Court in *Ray v. Fletcher*:

> It is not the actual height of the dam, which will regulate the prescriptive right of the party holding it, but its efficient height, according to its structure and operation, to maintain the height of the water, when in repair, and in good order; and although the water actually raised by it, may to some extent vary from one season, or one year, to another, owing to the tightness of the dam, the mode of using the water, the different seasons, as being dry or wet, and the like, *yet these considerations are too variable and uncertain, to be adopted or relied on, as the basis of a right acquired by grant or prescription*. We think, therefore, the efficient height of the dam, in its ordinary action and operation, measures and limits the claim of the mill-owner, to raise and appropriate the mill power of the stream; and the adverse, continued, peaceable, and uninterrupted use and enjoyment of the privilege, according to such claim, is evidence of the acquiescence of all other riparian proprietors, who would have a right to question and contest such claim, and, therefore, constitute that right in the stream by prescription, which would be the result of a grant from all such other proprietors in the stream.

*Ray*, 12 Cush. at 208 (emphasis added). Similarly, in the *Voter* decision, the SJC expressly held that it is "not what the dam may absolutely flow at a particular time, but what the dam in good condition ordinarily will flow" that controls. *Voter*, 69 Me. at 21.

In *Voter*, the Court specifically held that this rule applies even though the water may be "kept more uniformly and flowed to a greater height than by the dam before it was repaired; and even though the complainant's land was flowed for a longer period of the year ... ." *Id.* at 20. Similarly, in *Carr*, the Court noted that the dam owner may at times use the water with more or less economy "depending on the exigencies of business," but that it is nonetheless the effective height of the dam that controls the extent of the prescriptive easement. *Carr*, 110 Me. at 189.

## VII. Miscellaneous Water Law Provisions.

Perhaps the most significant changes to Maine water law over the past several decades are the various statutory provisions that affect water rights. For example, the legislature has prohibited by statute the "transport of water for commercial purposes by pipeline or other conduit, or by tank truck or other container, greater in size than ten gallons, beyond the boundaries of the municipality ... in which [the] water is naturally located ... ." MRSA tit. 22, § 2660-A(1). The prohibition has several exceptions, such as for water transported by water utilities and for water withdrawn pursuant to a permit issued by the Maine Department of Environmental Protection or the Maine Land Use Commission, which thus far have rendered it largely inapplicable to most of this kind of activity in the state (and, not coincidentally, have protected it from challenge on commerce clause or takings grounds). *See* MRSA tit. 22, § 2660-A(2).

Of broader application and greater importance, Maine also has multiple environmental laws that affect a riparian's use of water. Maine has been delegated authority to administer most aspects of the Clean Water Act, and has enacted statutes that are at least as stringent as federal law regarding the discharge of pollutants. *See* MRSA tit. 38, §§ 411–24, 451–52, 491–501, 541–560; *see also* MRSA, tit. 22, § 1471-E (pesticides). The state has also classified all of its waters (fresh surface, lakes and ponds, estuarine and marine, and groundwater), *see* MRSA tit. 38, §§ 465 to 465-C, and established ambient and in-stream discharge standards, *see* MRSA tit. 464. [*See generally supra* Treatise chs. 53, 54.] In addition, the legislature has protected Maine's freshwater and coastal wetlands, as well as rivers, streams, brooks, and great ponds, from development activities such as filling, draining, and large groundwater extraction operations, and requires municipalities to regulate certain development activities near specified waterbodies through shoreland zoning. *See* MRSA tit. 38, §§ 438-A, 480-D. [*See generally supra* Treatise ch. 61.] Maine provides special protection to designated "outstanding" river segments. *See* MRSA tit. 12, §§ 401–07. Maine also requires maintaining in-stream flows and lake and pond water levels that are protective of aquatic life and other uses, while at the same time recognizing that these interests must be balanced against the potentially competing use from community water systems. *See* MRSA tit. 38, § 470-H. Generally these statutes are administered by the Maine Department of Environmental Protection.

In 2012, the Penobscot Indian Nation, a federally recognized Indian tribe in Maine, sued the State of Maine in federal court, claiming it can regulate both Indian and non-Indian uses of at least the entire 60-mile Maine Stem of the Penobscot River. *Penobscot Nation v. Mills*, No. 1:12-cv-00254 (D. Me. Aug. 20, 2012). The Penobscots have stated that they would close the river for trading and require a permit to access the river for any reason, and thus this case may have significant implications for water rights.

The Penobscot Indian Nation, a federally-recognized Indian tribe in Maine, has recently sued the State of Maine in federal court, claiming it can regulate both Indian and non-Indian uses of at least the entire 60-mile Maine Stem of the Penobscot River. *Penobscot Nation v. Mills*, No. 1:12-cv-00254 (D. Me. Aug. 20, 2012). The Penobscots have stated that they would close the river for trading and require a permit to access the river for any reason, and thus this case may have significant implications for water rights.

Finally, water utilities have the power to exercise eminent domain to obtain new sources, thus ensuring an adequate public water supply, even at the expense of private property owners. *See* MRSA tit. 35-A, § 6501(2).

## VIII. Bibliography.


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