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One Year After SJC Ruling, Rockweed Industry Still Grappling With Change

by Sarah Craighead Dedmon



Canadian vessel loading bags of rockweed on a Maine shoreline before sailing it to Canada.

In the year since Maine's supreme court ruled rockweed is "the private property of the adjacent upland landowner," the state has recorded 12 complaints of illegal harvesting and lists 11 of those as resolved, with no summons issued. The unresolved case belongs to the very same people who initiated *Ross v. Acadian Seaplants*, the lawsuit which moved rockweed from unsettled legal status into private property. Last September, Kenneth and Carl Ross learned many tons of rockweed were cut from their properties on Cobscook Bay, without their permission.

“I was not surprised that some people would take the rockweed without permission,” said Kenneth Ross. “I was surprised at the apparent extent of it without permission, and I was certainly surprised that they came back to the very site that set off the case four-and-a-half years ago.”

Rockweed landings hit a recorded high in 2018 before the *Ross* decision but dropped by 36 percent in 2019. Though all companies harvesting Maine rockweed are required to report landings, there is no official guidance stating they must seek permission to harvest.

Nevertheless, Jake Patryn spent the winter writing letters, making phone calls, and even going door to door asking for permission. Patryn is the Maine Director of Operations for Acadian Seaplants, which uses rockweed to make products for livestock, agriculture and the food industry. Patryn says most landowners are happy to oblige, but if they’re not, that’s okay, too.

“We just respect the wishes of the landowner, if somebody comes out and says I don’t want you here anymore, fair enough,” said Patryn.

Although it’s mostly true that Maine’s upland landowners own the adjoining intertidal zone, which way their property lines extend once they leave shore is unpredictable, and in some cases, the shoreland was deeded away, making intertidal deed research a time-intensive undertaking. Since the court ruled against them in *Ross*, Acadian has adapted to the ruling with one simple policy — ask permission from every landowner next to the shore. That landowner’s deed might show intertidal ownership, it might not. “As of right now... the best we can do is trust what the landowners say,” said Patryn.

Bob Morse, owner of North American Kelp, has a different approach. Morse says he does not ask permission to harvest, but he will honor proof. “If the property owner can show a deed of ownership, then that’s their property and you can’t harvest it. Otherwise, it’s state property,” said Morse, whose company harvests rockweed for horticulture and agriculture.

According to Maine Department of Marine Resources (DMR) spokesperson Jeff Nichols, it's not the DMR's role to interpret the *Ross* decision for businesses. "This isn't something we take a lead on," he said.

Enforcement



Bags of rockweed on a Waldoboro, Maine beach waiting to be picked up and shipped to Canada.

DMR Commissioner Patrick Keliher in a January radio interview said that his department sided with Acadian Seaplants during the lawsuit, but today recognizes *Ross* as “the law of the land” and will enforce it. Though Nichols said marine patrol has no written policy addressing illegal harvesting enforcement — “Each situation is potentially different and each will be handled on a case by case basis” — Keliher said proof of intertidal ownership is necessary for enforcement to occur.

“We need to know that they have an ownership case, because [the charge] is not trespass, it's theft,” said Keliher. “We need good proof of who owns the land, whether a theft took place, and if we can show that we're going to move forward with a case.”

Prior to the *Ross* decision, the state marine resource harvester license application stated that “ownership of the seaweed in the intertidal zone is an unsettled question that only Maine courts can definitively answer.” Earlier this year that verbiage was removed. Today, state regulations stipulate that rockweed’s bottom lateral branches must remain uncut and that harvesters leave 16 inches of growth above the algae’s holdfast, and that’s all.

A coastal landowner speaking on condition of anonymity said they’ve made multiple illegal harvesting complaints to Maine Marine Patrol in the last seven months, including some for cutting too close to the holdfast, but none have been resolved. In one instance, they were asked by the responding sergeant to produce not only a deed but an intertidal survey “showing land and water boundary lines.”

“I questioned the enforcement policy, that we should have the onus put on us to produce these things before they would step up and take action, and he said it was the enforcement policy,” they said.

Attorney Gordon Smith does not agree that proving intertidal ownership is a necessary first step to enforcing the law.

“If someone mows the hay growing on your field, then hauls the hay off in their truck, an investigating police officer is not going to analyze your deed to make sure it’s your hay,” said Smith, who argued *Ross* for the plaintiffs. “Unless the person who took the hay can show they own the land or they have your permission, it’s theft.”

George Seaver of Ocean Organics sees the state’s lack of illegal harvesting summons as reflective of the difficulty of implementing *Ross*, due to challenges like documenting intertidal ownership and pinpointing intertidal property lines at high tide, among others. Ocean Organics manufactures fertilizers based on rockweed.

“And then there’s the question about what is even considered the intertidal zone,” said Seaver, describing rocks which are always partially submerged, yet covered in rockweed. “If you have to walk through water to get to it at low tide,

then I don't think it's your intertidal zone, and the coast of Maine is littered with ledges that are beyond the low tide.”

Challenge

For all of Maine's state history and then some, the Colonial Ordinance of 1641-47 has been interpreted to ascribe ownership of Maine's intertidal zone to private landowners, preserving only a public “trilogy” of rights to fishing, fowl, and navigation.

Seaver and Morse take a different interpretation of intertidal ownership, based on the research of emeritus University of Maine Law Professor Orlando Delogu, author of *Maine's Beaches are Public Property*. Last year Morse and Delogu supported a bill that sought to expand public use of the intertidal zone, and which would have reclaimed the public's ownership of rockweed.

“An Act To Revise the Laws Regarding the Public Trust in Intertidal Lands” failed in the state senate but Delogu said he plans to raise the issue again, this time through the courts. He points to the fact that Maine is one of only a few states where the intertidal zone is private property and said the Colonial Ordinance did not intend to privatize all intertidal land, but only those parcels truly necessary for “wharfing out.”

“The state owns its intertidal lands, they've seemingly allowed their rights to lapse, but the fact is the state's right to intertidal lands cannot lapse,” said Delogu. “The public's rights to publicly-owned land remains until the legislature either uses that land or alienates that land, and no Maine legislature has ever alienated Maine's intertidal lands.”

Though state courts are currently closed due to the coronavirus pandemic, Delogu plans to file a complaint when they reopen. A Declaratory Judgment Affirming Maine's Title to its Intertidal Lands in Trust for the Public Except for Discrete Parcels Alienated to Facilitate Marine Commerce would give the courts a chance to reconsider the state's ownership position in the intertidal zone.

Smith puts the chances of changing Maine’s intertidal ownership laws at nil, because to do so would require overturning centuries of settled law and commerce. “Orlando Delogu has repeated his argument to the Maine Supreme Court on multiple occasions over the years, most recently last summer,” said Smith. “While some might wish that the law was different, there simply is no support – legal or otherwise – for a court to conclude that the intertidal land in Maine is owned by the state.”

Management

Susan Domizi, president and founder of SOURCE, said reduced rockweed access has harmed her company’s business.

“[After the ruling] we received letters from landowners requesting no harvesting, even though we had never had a problem for decades,” said Domizi “We’ve been harvesting these bays and ledges for 40 years, with no problem ever.”

Using Maine seaweeds, SOURCE manufactures micronutrient supplements for horses, dogs, and humans. Domizi, who was instrumental in pushing for more research into rockweed’s role in the ecosystem, fears its newly-private status could harm efforts to conserve it.

“We have no management ability,” said Domizi, pointing to the impossibility of calculating how much rockweed could or should be harvested in an ever-changing landscape of owner permissions. “We all want more knowledge about how to best protect this resource. Privatization is making impossible the careful protection and management of [rockweed] and the whole ecosystem that it’s a part of.”

Seaver agrees. “When seaweed beds come into play and go out of play, you can’t manage the total resource,” said Seaver. “If management is the first step toward ecological responsibility, then you’ve lost a degree of management control because you don’t know how much seaweed there is to manage.”

Still awaiting a resolution to his illegal harvesting complaint, Kenneth Ross says he has given the state his deed, which he says demonstrates ownership of the intertidal zone, along with photographic evidence of the cutting.

“I won’t say nothing has been done, because I don’t know what they’ve been doing internally, but apparently no action has been taken yet,” said Ross who, like Domizi, believes rockweed plays a vital role in the health of Maine’s coastal fisheries.

“We don’t want to see [rockweed] treated the same way a lot of the other resources have been,” said Ross. “We Maine folks have a habit of just going at it until they’re all gone.”