

Rhode Island Navigability Report

Summary

As early as 1644, the King Charles Charter explicitly delineated the rights of royal subjects to fish and to establish appurtenances in support of fishing in and near the public waters of what would become the State of Rhode Island.¹ The Rhode Island Constitution also recognizes the public's right to fish, swim, and traverse the lands near the shoreline.² And the Rhode Island Supreme Court explicitly recognizes these rights in the public waters and tidal lands.³ Indeed, the history of Rhode Island and its law aptly reflects the State's moniker as the "Ocean State."

State Test of Navigability

Rhode Island adheres to the public trust doctrine.⁴ According to Rhode Island case law, the rights of the public in the waterways of the state extend to tidal lands, which are those below the high-water mark.⁵ There is precedent for Rhode Island courts to view the limits of the public trust doctrine to littoral owners.⁶ However, there is U.S. Supreme Court precedent that appears to allow states to extend the public trust doctrine beyond navigable waters to all tidal waters and also expanded the protections afforded by it to safeguard a wide variety of activities.⁷

For the purposes of determining public privileges, case law has interpreted the landward boundary of the shore to be the mean-high water mark, or mean high-tide, as the arithmetic

¹ See *The Earliest Acts & Laws Of The Colony Of Rhode Island & Providence Plantations 1647-1719* vii (J. Cushing ed. 1977). The Kings Charles Charter provides, in relevant part, "[O]ur Express Will and Pleasure is, and We do by these Presents for Us Our Heirs and Successors, ordain and Appoint, that these Presents shall not in any manner, hinder any of our Loving Subjects whatsoever from Using and Exercising the Trade of Fishing upon the Coast of New England in America; But that they, and every, or any of them shall have full and free power and liberty to Continue and Use the Trade of Fishing upon the said Coasts in any of the Seas thereunto Adjoining, or any Armes of the Seas, or Salt Water, Rivers and Creeks when they have been accustomed to Fish; and to Build and Set upon the West-Land belonging to the said Colony & Plantations, such Wharfs Stages and Work-Houses as shall be necessary for the Salting, Drying and Keeping of their Fish to be taken or gotten upon that Coast." *Id.* at 132.

² The Rhode Island Constitution provides, in relevant part, "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore . . ." R.I. Const. art. I, § 17.

³ See, e.g., *Champlain's Realty Assoc. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003) (citing *Greater Providence Chamber of Commerce v. State of Rhode Island*, 657 A.2d 1038, 1041 (R.I. 1995)); see also *State ex rel. Town of Westerly v. Bradley*, 877 A.2d 601, 606-07 (R.I. 2005) ("The public trust doctrine predates our state constitution and requires that the state hold all lands 'below the high-water mark in a proprietary capacity for the benefit of the public.'") (quoting *Greater Providence Chamber of Commerce*, 657 A.2d at 1041).

⁴ E.g., *Bradley*, 877 A.2d 606-07; *Champlain*, 823 A.2d at 1165

⁵ E.g., *Bradley*, 877 A.2d 606-07; *Champlain*, 823 A.2d at 1165.

⁶ *State v. Ibbison*, 448 A.2d 728, 728, 728 n.1 (R.I. 1982) (interpreting the Rhode Island constitution grant of public trust as applicable to "littoral" owners and defining "littoral" as rights concerning "properties abutting an ocean, sea, or lake rather than a river or stream.").

⁷ See *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988). Note that the *Phillips* decision issued after the *Ibbison* decision by the Rhode Island Supreme Court. The *Phillips* court found that the public trust doctrine extends to "all lands beneath the waters influenced by the ebb and flow of the tide." *Id.* at 479-80 (emphasis in original).

average of the high water heights observed over an 18.6-year Metonic cycle, where it is the “line that is formed by the intersection of the tidal plane of mean high tide with the shore,” not simply the high-water mark at any moment.⁸ The state’s ownership of tidal lands applies broadly to all such lands.⁹ Case law has further established that the rights of property owners ends at the high-water mark with the State holding land rights in tidal lands subject to the public trust doctrine.¹⁰

Should questions exist that are unanswered by Rhode Island case law, it is likely that courts interpreting Rhode Island law and applying the public trust doctrine would examine relevant federal law,¹¹ look to the common law of Massachusetts. in certain instances, as well as interpretation of the doctrine by state courts in states that comprised the original colonies.¹² With respect to Massachusetts, its common law may apply to discrete portions of the Rhode Island shore.¹³ However, there is also support for Rhode Island courts looking to the courts of Vermont when interpreting the public trust doctrine as applied to tidal lands.¹⁴

Extent of Public Rights in Navigable and Non-Navigable Rivers

Public waters consist of waters below the high-water mark and “tidal lands” refers to all lands lying seaward of the mean high-water mark.¹⁵ Rhode Island abides by the public trust doctrine whereby the state holds title to tidal lands in trust for the benefit of the public.¹⁶ Accordingly, the public trust doctrine preserve the public’s rights of fishery, commerce and navigation of the tidal lands and public waters.¹⁷ Rhode Island appears to limit such rights to lands associated with property abutting an ocean, sea, or lake rather than a river or stream; however, there is U.S. Supreme Court precedent for states to exercise jurisdiction over all tidal waters.

The public trust doctrine protects the public’s rights in tidal lands and public waters including the rights of “fishery, commerce, and navigation.”¹⁸ Additionally, courts have held that “[i]n absence

⁸ See *Ibbison*, 448 A.2d at 730.

⁹ See *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895) (“The state holds the legal fee of all lands below high–water mark, as at common law, as has been uniformly and repeatedly decided by this court.”).

¹⁰ *Ibbison*, 448 A.2d at 730.

¹¹ See, e.g., *Greater Providence Chamber of Commerce*, 657 A.2d 1042 (“Rhode Island decisional law and this court have never cast aside the public-trust doctrine. As a matter of fact, this court has consistently cited federal decisions that embrace this well-articulated body of general law.”).

¹² See, e.g., *Champlain*, 823 A.2d at 1166 (“After the American Revolution, the original colonies, including Rhode Island, incorporated the public trust doctrine into their law and assumed ownership over tidal lands and the concurrent responsibility for managing them to benefit the public.”).

¹³ See, e.g., *Allen*, 32 A. at 166 (R.I. 1895) (noting that the common law of Massachusetts applies to certain portions of the Rhode Island shore ceded from Massachusetts to Rhode Island).

¹⁴ *Champlain*, 823 A.2d at 1167 (citing *State v. Central Vermont Ry., Inc.*, 153 Vt. 337 (1989) (Vermont Supreme Court decision interpreting the limits of Vermont’s ownership interest in tidal lands)).

¹⁵ See *Champlain*, 823 A.2d at 1165.

¹⁶ *Id.*

¹⁷ See *Greater Providence Chamber of Commerce*, 657 A.2d at 1041.

¹⁸ *Champlain*, 823 A.2d at 1165.

of any express restriction, any inhabitant may take shellfish anywhere in the waters of the state, and on the shores below high-water mark as it exists from time to time.”¹⁹

One court has stated that the public right of passage, navigation, and fishery exist in the public waterways unless the waterways have been “built upon, or occupied as to prevent the passage of boats and the natural ebb and flow of the tide.”²⁰

Though waterfront property owners property interests are protected by trespass laws, such laws prohibit intruders from “knowingly entering upon land of another without having been requested or invited to do so by owner or occupant of land.”²¹ According to case law, municipalities attempting to impose criminal penalties for trespass on waterfront properties “must prove beyond a reasonable doubt that the defendant knew the location of the boundary line and intentionally trespassed across it.”²²

Miscellaneous

Littoral landowners have the right to fill to harbor lines and reflect a legislative determination that “encroachment on the waters to the harbor line would not constitute interference with fishery, commerce, or navigation.”²³ Points beyond harbor lines require approval by the legislature or the appropriate state regulatory body “[e]very erection made into or encroachment upon the public tidewaters of the state . . . shall be deemed to be a public nuisance and shall be prosecuted by the attorney general.”²⁴ Failure to remove the obstruction after receiving notice shall result in a fine of \$100 per day until the obstruction is removed.²⁵

The Rhode Island Rivers Council website provides useful information regarding rivers and waterways of the state, including bacterial levels in the water or any toxic pollutant threats from nearby land uses.²⁶ The Council provides an extensive list of rivers and lakes, discussing the suitability for recreational uses.²⁷ The Rhode Island Rivers Council was created pursuant to the General Laws of Rhode Island to “improve and preserve the quality of rivers and to develop plans to increase the utilization of river areas throughout the state.”²⁸

For additional information on boating and fishing in Rhode Island, including public access points, see the Rhode Island Department of Environmental Management at <http://www.dem.ri.gov/programs/law/boating-safety-topics.php>.

¹⁹ *Allen*, 32 A. at 167.

²⁰ *Rhode Island Motor Co. v. City of Providence*, 55 A. 696, 697 (R.I. 1903).

²¹ See *Ibbison*, 448 A.2d at 733.

²² *Id.*

²³ *Greater Providence Chamber of Commerce*, 657 A.2d at 1044.

²⁴ R.I. Gen. Laws § 46-6-3 (2006); see *Rhode Island Motor Co.*, 55 A. at 697.

²⁵ R.I. Gen. Laws § 46-6-9 (2006).

²⁶ See <http://www.ririvers.org/index.htm>.

²⁷ See “Rivers Classifications,” Part 162-03 at <http://www.planning.state.ri.us/rivers/162-03.pdf>.

²⁸ R.I. Gen. Laws § 46-28-4 (2006).