

Applying the Public Trust Doctrine in Rhode Island

Megan Higgins

Marine Affairs Institute, Roger Williams University School of Law
RI Sea Grant Legal Program

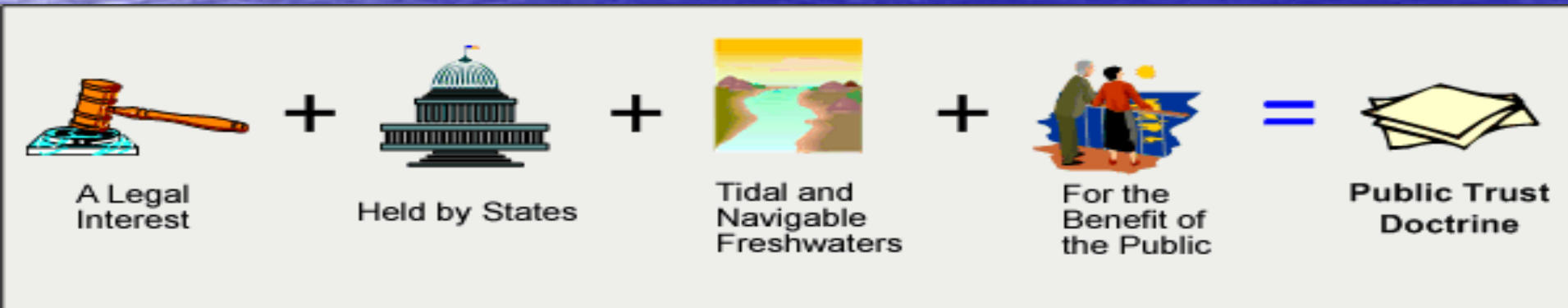


Overview

- Public interests under the Public Trust Doctrine
- Lands and waters subject to the Doctrine
- States interests in Public Trust lands and waters
- Competing uses of submerged lands
- Conclusion

What is the Public Trust Doctrine (PTD)?

Rhode Island Constitution, Article I, Section 17. The 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.



The Public Trust Doctrine

Source: NOAA CSC

What are the interests under the PTD?



Riparian/Littoral Rights

Interpreted broadly, "riparian" and "littoral" rights, enjoyed by the owner of the banks of a river or stream, or of a lake or seashore respectively, may include:

- access to the water;
- the right to wharf out;
- the right to acquire accretions;
- the right to fill;
- the right to continued flow; and
- the right to preservation of the view of the water.

Where are the boundaries of “tidal lands”?

- All lands subject to the ebb and flow of the tide, and all waters navigable in fact, such as rivers, lakes, ponds, and streams, though, the scope has been expanded in some states.
- The Public Trust Doctrine dictates that, “the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.” “[T]he doctrine preserves the public rights of fishery, commerce, and navigation in these waters.”
 - *Greater Providence Chamber of Commerce v. Rhode Island*, 657 A.2d 1038, 1041 (R.I.1995)
- In RI, “tidal lands” refers to all lands lying seaward of the mean high water mark.
 - *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I.1999)

Defining the Mean High Tide Line in RI: *State v. Ibbison* 448 A.2d 728 (1982)

- mean high tide line defined as “the line formed by the intersection of the tidal plane of mean high tide with the shore.”
- Mean high tide is the “arithmetic average of high water heights observed over an 18.6 year Metonic cycle.”

Determining the Mean High Tide Line



Photos: Janet Freedman

Sign says: **PRIVATE PROPERTY** extends seaward 125 feet from this point. **NO TRESPASSING**

Who holds the resources in trust for the public?

- R.I.G.L. § 46-23-6(2)(ii)(A)
 - “CRMC [Rhode Island Coastal Resources Management Council] shall have the exclusive jurisdiction below mean high water for all development, operations, and dredging, consistent with the requirements of chapter 6.1 of this title and except as necessary for the department of environmental management to exercise its powers and duties and to fulfill its responsibilities.”
- R.I.G.L. § 46-23-6(4)(iii)
 - CRMC is responsible for a wide array of activities taking place below the mean high water mark, including aquaculture, dredging, and “use of coastal resources which are held in trust by the state for all its citizens.”

State ownership of tidal lands (RIGL § 46-5-1.2)

- (a) The state of Rhode Island, pursuant to the public trust doctrine long recognized in federal and Rhode Island state case law, and to article 1, § 17 of the constitution of Rhode Island...has historically maintained title in fee simple to all soil within its boundaries that lies below the high water mark and to any land resulting from any filling of any tidal area...no title to any freehold estate in any tidal land or filled land can be acquired by any private individual unless it is formally conveyed by explicit grant of the state by the general assembly for public trust purposes.
- (b) No lease of any tidal land or filled land...can be acquired by any private individual unless the lease/license has been specifically approved for public trust purposes by the general assembly itself or by its authority.
- (d) The general assembly...establishes the policies for the preservation and for the use of natural resources of the state which are held in public trust by the state...

What are the states interests in Public Trust lands and waters?

Coastal Resources Management Council (CRMC)

has a duty to establish a baseline of resources and their use and undertake a planning and management process in prescribed phases to:

- Identify coastal resources;
- Evaluate resources in terms of quantity, quality and use;
- Determine current and potential resource problems; and
- Formulate management plans and programs.
(R.I.G.L. § 46-23-6 A(2))

Forms of Consent

- Consent by Rule
- Easements
- Use and Management Agreements
- Permits and Licenses
- Leases

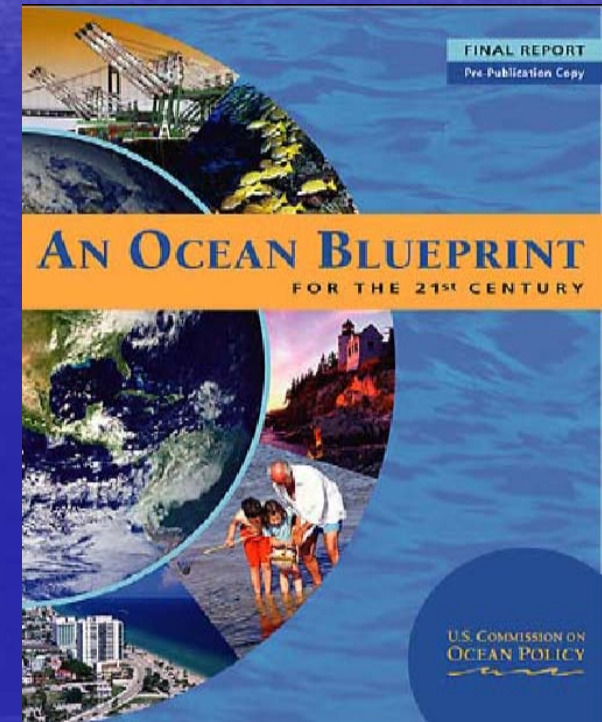
Why should private and public uses be balanced?

U.S. Commission on Ocean Policy

NOAA should expand marine aquaculture research, development, training, extension, and technology transfer ... set priorities for research and technology

President's Ocean Action Plan

U.S. Ocean Action Plan, made a commitment to transmit to the 109th Congress legislation to establish a regulatory structure for offshore aquaculture



Application of the Public Trust Doctrine in RI caselaw: Taking it too far

(State ex. rel. Town of Westerly v. Bradley, 877 A.2d 601 (R.I. 2005))

Under the public trust doctrine, the General Assembly is vested with the authority and responsibility for regulating and preserving tidal lands and may determine appropriate uses for tidal land, grant tidal land to another, or “delegate the authority to regulate that land on the state's behalf.” *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259-60 (R.I.1999) (citing *Greater Providence Chamber of Commerce*, 657 A.2d at 1040) (1995)

The state's plenary authority over tidal lands is nevertheless restricted by article 1, section 17, which preserves “all the rights of fishery, and the privileges of the shore” to the state's inhabitants, “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; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; * * *.” *Id.*

Shifting balance from public to private rights

Privatization of shores:

A littoral owner who fills along his or her shore line, with the express or implied **approval of the state** and improves upon the land in justifiable reliance on the approval, would be able to **establish title** to that land that is free and clear.

-- the littoral owner may not create any interference with the public trust rights of fishery, commerce, and navigation.

-- state may place restrictions on the filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission.

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

A limitation to the Public Trust Doctrine exists when there has been a legislative decree, such as when the legislature transfers property or grants rights to control or regulate property below mean high water to cities or municipalities. *Thornton-Whitehouse*, 740 A.2d at 1259-60.

Conveying title *to a private individual* under the PTD

The RI Supreme Court has held that land owned in fee by the state and subject to the public trust doctrine may be conveyed by the state to a private individual by way of legislative grant, provided the effect of the transfer is not inconsistent with the precepts of the public trust doctrine.

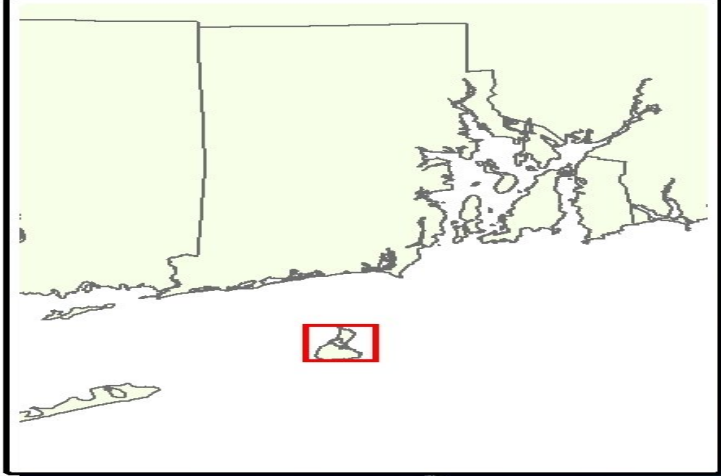
Hall v. Nascimento, 594 A .2d 874 (R.I.1991)

Conveying title to a *municipality*:
Champlin's Realty Associates, L.P. v. Tillson
823 A.2d 1162 (R.I. 2003)

State granted to town all right, title, and interest to pond and thereby conveyed state's ownership interest to town but retained state's responsibilities under public trust doctrine, and thus town did not enjoy exclusive jurisdiction over pond; act lacked specific authorization for town to regulate activities within pond.

Const. Art. 1, § 17





0 0.25 0.5 1 1.5 2 Miles



Public benefit: *Palazzolo v. State*

2005 WL 1645974 (R.I. Super. 2005)

Findings:

- Winnapaug Pond is a tidal body of water
- almost exactly 50% of Plaintiff's property is below mean high water
- the pond and Plaintiff's adjacent property are subject to the public trust doctrine.



Balancing public/private rights (cont'd)

- Function of the PTD is to prevent erosion of enumerated public rights to the use of submerged lands and navigable waters through negligent or improper conversion to private uses
- Purpose is not to preclude a state from granting title to or use of public lands to private parties
 - It creates a presumption that, absent a clear expression otherwise, the state does not intend to dispose of public property in a manner that lessens the public uses to which it is put.

Resources on the PTD

- Archer, Jack H., *The Public Trust Doctrine and the Management of America's Coasts*, Ch. V, "Evolution of a State Public Trust Doctrine Program: Massachusetts Chapter 91," University of Massachusetts Press (1994).
- Coastal States Organization www.coastalstates.org
- Georgetown Environmental Law & Policy Institute
<http://www.law.georgetown.edu/gelpi/>
- Graber, Peter H. F., "The Law of the Coast in a Clamshell, Shore and Beach" (1980-1989).
- NOAA Coastal Services Center <http://www.csc.noaa.gov/ptd/>
- RICRMC <http://www.crmc.ri.gov/presentations/index.html>
- Sax, Joseph, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", 68 MICH. L. REV. 474, 477 (1970).
- Slade, David C. et al, "Putting the Public Trust Doctrine to Work" (2nd edition). 1997.
- Whitelaw, Diana M. and Gerald R. Visgilio, eds., "America's Changing Coasts: Private Rights and Public Trust." 2005.

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Megan Higgins
mhiggins@rwu.edu
(401) 254-5734