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Lateral Access to the Rhode Island Shore: Introductory Report

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Introduction

In Rhode Island, the public right to use the shoreline exists below the mean high water mark. This use has been discussed and identified in both the State's judicial and legislative realms. However, in many cases the mean high water mark is indistinguishable or covered by water. Often the public may traverse the shore to partake in protected uses, such as fishing or swimming, while unknowingly trespassing onto private property.

Historic continuous public use of the shoreline above the mean high water mark may establish a customary public right to access the shore laterally. The Oregon Supreme Court has already successfully adopted this approach by determining that the public has an existing right to lateral access on the dry sand based on custom. Thus, this report provides evidence, mainly through photographs and illustrations, of historic public use of Rhode Island's shoreline above mean high water to support a customary right of lateral access and use.

Background

Public use of the shoreline originates from the Public Trust Doctrine, dating back to the sixth century Institutes of Justinian that formed Roman civil law describing the public nature of the seashore. English common law later adopted these principles, which were passed on to the American colonies, and subsequently the States.[1] Rhode Island acknowledges the public trust doctrine in a provision of the state Constitution:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have heretofore entitled under the charter and usages of this state. [2]

When examining which "privileges" of the shore were constitutional rights, the Rhode Island Supreme Court in *Jackvony v. Powel* concluded that four common law rights existed: 1) fishing

from the shore, 2) gathering seaweed from the shore, 3) leaving the shore to bathe in the sea, and 4) passage along the shore.[3]

Traditionally, Rhode Islanders had used the "seaweed line" (dividing the wet and dry sand portions of the shore) to mark the boundary between state-owned public trust land and private property.[4] However, in *State v. Ibbison*, the Rhode Island Supreme Court established the legal boundary at the mean high water mark.[5] This line is scientifically determined by averages observed over an 18.6-year period. Because waves are constantly reshaping the shoreline, the mean high water line is continually changing and cannot be marked. This application of scientific principles to define public trust boundaries in a highly dynamic coastal environment, such as Rhode Island, has been questioned.[6] Although the line can be determined with scientific certainty, it is not readily identifiable by the casual observer.[7]

In 1986, the State Constitutional Convention considered the meaning of "privileges" of the shore discussed in *Jackvony* and the boundary determined in *Ibbison*. Although popular sentiment desired to increase the public scope of the shore by moving the boundary to the "vegetation line" or "extreme high water mark," the resulting amendment was passed leaving the term "shore" undefined while listing the four privileges previously accepted in *Jackvony*.[8]

In the past few decades, public access to the shore has increased perpendicularly through intensive collaborative efforts among Rhode Island's Coastal Resources Management Council, Department of Environmental Management, local towns, cities, and former Rights-of-Way Commission. Over 300 public rights-of-way have been reviewed and designated providing access to the tidal waters of Rhode Island.[9] However, lateral access to the shore remains restricted to use below the high water mark.

Other States

As the majority of shoreline in the United States above mean high water mark has become subject to private ownership, a number of states have responded by opening access through legislative or judicial means outside of the public trust doctine.[10] In Texas, the Texas Open Beaches Act created a statutory presumption that favors public over private use. Essentially, a presumed prescriptive easement between the mean low tide and the vegetation line exists unless a private owner can prove otherwise.[11]

In Oregon, the common law doctrine of custom was successfully used to increase public access to the shoreline. The doctrine of custom arose from the "supposition that holders of interests in property held for hundreds of years had legally acquired them and should therefore not be penalized, as no formal recording system existed at the time the rights were acquired."[12] In *State ex. rel Thorton v. Hay,* the Oregon Supreme Court in reviewing and upholding a state statute, called the Beach Bill, used the doctrine of custom to establish public recreational rights to the dry sands areas of all Oregon beaches.[13] However, the more recent decision in *McDonald v. Halvorson*[14] qualified the use of the custom doctrine by limiting its application to specific types of coastlines (sections that directly abut the Pacific Ocean).[15]

In *Thorton*, the Oregon Supreme Court reasoned that continuous public use of the beaches for recreation since the area was first settled translated into custom.[16] In order to invoke the doctrine of custom, seven elements must be established by evidence: 1) antiquity, 2) continuity, 3) freedom from dispute, 4) reasonableness, 5) certainty, 6) obligation, and 7) consistency with the law.[17] Of pertinence to this report is the "antiquity" element. In order to be ancient, an area must have been used for so long "that the memory of man runneth not to the

contrary."[18] The evidence provided in this report helps support the "long and general" use sufficient to establish antiquity.[19]

It is important to note that beach use in Oregon does have a unique history, in that there was little development before 1960. Also, the use of the custom doctrine is little used throughout the United States. However, the court in Thorton dismissed both of these concerns as reasons against applying the doctrine.[20]

Rhode Island's Coastline

The first use of Rhode Island's shoreline was by the Native Americans, who utilized its beaches and tidal lands for fishing and shell fishing activities.[21] By the 18th century, the colonial settlers had taken to the shore to conduct similar activities, including the gathering of seaweed to be used as agricultural fertilizer.[22] In fact, the greatest percentage of [perpendicular] rights-of-ways established in colonial times was for the purpose of allowing horse-drawn vehicles to enter onto the shores to secure seaweed for the use of farmers.[23]

The first commercial fishermen used hook and line, beach seine and floating traps. Seasonal "fishing gangs" who stayed in temporary fish houses along the beach worked both the floating fish traps and beach seines.[24] Many trap fishermen utilized the dry sand beach areas to dry their nets and store skiffs, and in the 19th century more permanent fishing communities sprung up along the shore. One of the more well known of these communities was Scalloptown, located on the East Greenwich Bay. Shacks were built along the waterfront, and housed members of the scallop-fishing industry from the 1870s until the 1930s.[25]

The use of the shore as a workspace is also documented in early Bulletins of the United States Fish Commission, such as this one by Captain E.W. De Blois:

> In 1811 two men, one by the name of Christopher Barker, and the other John Tallman, commenced the business of melting oil out of menhaden fish, with the use of two iron pots, upon the shore, a few rods south of what was then called the Black Point wharf, near Portsmouth, R.I. They boiled the fish in the pots or kettles, and bailed the fish and contents into hogsheads, putting on top the fish in the hogsheads pieces of board with stones on top, to press the fish down so that the oil would come on top, and also in order that, the oil could be skimmed off.[26]

In the mid-to-late 1800s, recreation surfaced as a competing use of Rhode Island's shorelines. Seaside resorts became a popular attraction for residents and tourists looking to swim, sunbathe and relax on the shore. Many of the photographs and illustrations to follow depict the historical development of the shoreline as a place for public recreation and relaxation, which continues to this day.

This Report

In order to document the described historical uses of Rhode Island's shoreline in the dry sand areas, photographic and other visual evidence was located depicting the storage of boats and fishing gear, the gathering of seaweed, passage along the shore, and various recreational uses. These depictions were located by examining almost 10,000 historical photographs, illustrations, and records of photographs housed in various collections within the Rhode Island Historical Society, the Mystic Seaport Historic Photography Collection, and the Providence Public Library Rhode Island Images Collection. Because many graphics were often only categorized by town, or not categorized at all, physical examination of individual photographs was required to find those that were relevant. The following section contains two separate

Graphics Logs--one organized by the "use" depicted in the graphic, and one listing all graphics and descriptions in numerical order.

Overview of Findings

Because the practice of photography did not become more readily available until the late 1800s, the majority of photographic evidence depicts more recreational uses of the Newport and Narragansett shorelines. However, a significant number of photographs showing the storage of skiffs onshore, and other working uses, were located. Several illustrations and many postcards also make up this array of supportive evidence. Unfortunately, the exact dates of about half the materials are unknown.

Conclusion

The citizens of Rhode Island are guaranteed by the state constitution the right to use its shore for fishing, gathering seaweed, bathing, and passage. However, lateral access to the shore to engage in these protected uses is hindered by an ineffective boundary between public lands and private property. As utilized in Oregon, the doctrine of custom can help establish a public easement over the dry sands above the mean high water mark. The public in Rhode Island has customarily used this area as a workspace and for recreation. The photographic and illustrative materials included in this report help to establish this long and general public use of Rhode Island's shoreline.

NOTES

[1] Slade, David, R.K Kehoa and J. K. Stahl (1997). *Putting the Public Trust Doctrine to Work*, 2nd ed., Washington, D.C.: Coastal States Organization.
[2] Rhode Island Constitution, Article I, Section 17.
[3] *Jackvony v. Powel*, 21 A.2d 554 (R.I. 1941).
[4] Higgins, M. (2005), Public access to the shore: public rights and private property. *America's Changing Coasts: Private Rights and Public Trust*, 183-190.
[5] S*tate v. Ibbison*, 448 A.2d 728 (R.I. 1982).
[6] Higgins, M. (2005); *see also* Surfrider Foundation RI State of the Beach Report, http://www.surfrider.org/stateofthebeach.
[7] *Ibbison,* 448 A.2d at 732.
[8] Nixon, D. (1990). Evolution of Public and Private Rights to Rhode Island's Shore. *Suffolk University Law Review*. *24*, 313-329.
[9] Daytrippers Guide to Rhode Island website, http://seagrant.gso.uri.edu/daytrip /other/introduction.html.
[10] Nixon, D. (1978). Public Access to the Shoreline: The Rhode Island Example. *University of Rhode Island Marine Reprint No. 108*.
[11] Cameron, Francis X. and Dennis H. Esposito, *Preliminary Report: Lateral Public Beach Access in Rhode Island: A Report to the General Assembly's Special Commission on Beach Access.*
[12] Nixon, D. (1978).
[13] *State ex. rel v. Thorton*, 462 P.2d 671 (Or. 1969).
[14] *McDonald v. Halvorson*, 780 P.2d 785 (Or. 1989).
[15] Pitts, E. (1992). The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, Environmental Law*, *22,* 731-756.
[16] *Thorton*, 462 P.2d at 673.
[17] 1 William Blackstone Commentaries, 76-78.
[18] Ibid.
[19] *Thorton*, 462 P.2d at 677.
[20] Ibid.
[21] Lazzerini, R. (2006). The History of Rhode Island, Kindred Trails, http://www.kindredtrails.com/Rhode_Island_History-1.html.
[22] Jamestown Planning Department (1992). *Shoreline Access and Improvement Plan*, Jamestown, RI.
[23] Report of the Special Commission to Discover the Public Rights-of-Ways to Water Areas of the State to the Governor, (1958). RI.
[24] Hall-Arber, M. et al. (2004), New England's Fishing Communities, Cambridge, MA: MIT Sea Grant.
[25] Kennedy, S and V. Lee (2003), *Greenwich Bay: An Ecological History*, Narragansett, RI: Rhode Island Sea Grant.
[26] DeBlois, Capt. E. W. (1881) The Origin of the Menhaden Industry*,* Bulletin of the United States Fish Commission.