

THE DEMISE OF NORTH CAROLINA'S COASTAL FISHERIES RESOURCES & THE PUBLIC'S RIGHT TO FISH

The Public Trust Doctrine (& Its Incorporation in the North Carolina Constitution)

When most people speak of “laws,” they are referring to the statutes enacted by an elected legislative body, such as the North Carolina General Assembly or the United States Congress. But in addition to statutory law, United States citizens are also governed by “common law.” Common—or “judge-made”—law refers to that part of our body of laws that is derived from custom and judicial precedent rather than legislative statutes. That is, many longstanding public traditions that were viewed to make important contributions to society have been affirmed by the courts as “law common to all,” elevating those traditions to judicially-approved “doctrines” having the same status and effect as statutory laws.

The “public trust doctrine” is one such common law doctrine. It originated in ancient Roman law, was adopted by the British Crown, and was ultimately passed on to the thirteen original American colonies, including North Carolina. Historically, coastal waters—the ocean, sounds, creeks and bays—and the rivers extending inland from them were the primary avenues for public transportation (by boat), the primary routes for moving goods (commerce), and a primary source for public sustenance (by fishing). Given those critical public functions, waters useful for all of those purposes were termed “navigable waters,” and accorded special legal status by common law. Navigable waters were customarily regarded—both by citizens and the courts—as common areas, usable by all, and for the overall public good not subject to private ownership or control.

Accordingly, the public trust doctrine is the concept that the government holds in trust, for use by its citizens, navigable waters, traditional public uses¹ of those waters and the natural resources within those waters. While there is an important body of federal law interpreting the public trust doctrine, the doctrine is ultimately a part of the common law in each state. But regardless of the doctrine’s specifics in any individual state, in every state the doctrine remains one of the sacred components of the compact that the state has with its citizens. In fact, although the doctrine arises from the common law, it is not “ordinary” common law, but best understood as an implied constitutional doctrine—*i.e.*, it involves fundamental citizen rights, thus imposing a higher standard of duty upon the state to safeguard those rights.

In North Carolina jurisprudence, the public trust doctrine dates back to at least 1823, when the North Carolina Supreme Court held that colonial entry and grant laws did not permit the private grant of state-owned lands beneath navigable

¹ Traditional public uses of navigable waters include navigation (for pleasure and commerce), fishing, hunting and swimming.

waters, because the overlying waters were necessary for public uses. One of those public uses was the right of the public to access and harvest the coastal fisheries resources found within navigable waters. The public right to fish in navigable waters was specifically recognized by the North Carolina Supreme Court as a public-trust right in 1842.

Given the public trust doctrine's longstanding significance as a part of our common-law heritage, what does the doctrine actually mean for North Carolinians in terms of their access to and use of public fisheries resources? Under the public trust doctrine, the public's use of state navigable waters—including the public's right to fish for personal use and enjoyment—as well as the fish that swim in those waters are public-trust resources. Thus, both the public right to fish and public fisheries resources are held in trust by the state. The public trust doctrine operates according to the same basic trust principles that govern the trust relationship between financial trustees and beneficiaries. Under those principles, the state—as trustee—owes a fiduciary duty to hold public-trust resources in trust for the benefit of the trust beneficiaries, all current and future citizens of North Carolina.

Consequently, for North Carolina's coastal fisheries resources, the public trust doctrine imposes a fiduciary duty on the state to manage and regulate the harvest of coastal fisheries resources in a way that protects the right of current and future generations of the public to use public waters to fish. However, the right to fish does not exist in the abstract, and the doctrine also imposes a duty on the state to ensure that the public has access to harvestable fish in order to have a meaningful opportunity to exercise that right. As a result, state government may not permit human activities in navigable waters that threaten the rights of current and future generations of citizens to use those waters to fish. The human activities not permitted include allowing the use of commercial harvest gears or methods that generate undue wastage, or through overexploitation impair the long-term viability of coastal fisheries resources.

Under the public trust doctrine, the state does not, for its part, have the option to simply “resign” as resource trustee. Nor may the General Assembly abrogate the state's legal duty under the doctrine. To the contrary, the state's duties in managing public-trust resources for the benefit of the public are unalterable. To that end, the people of North Carolina have in their Constitution mandated that the state uphold its public-trust obligations and respect their public-trust rights. Article I, Section 38 of the North Carolina Constitution provides:

The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by

the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing.

Furthermore, Article XIV, Section 5 of the North Carolina Constitution, entitled “Conservation of Natural Resources,” provides that:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to . . . preserve as a part of the common heritage of this State its . . . estuaries [and] beaches.

The North Carolina Court of Appeals has recently upheld the implicit incorporation of the public trust doctrine into each of those constitutional provisions.

Curiously, the North Carolina General Assembly—the primary trustee for public resources and public rights of use under the public trust doctrine—has explicitly acknowledged its trustee role with respect to coastal fisheries resources in G.S. § 113-131(a). That provision reads: “The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole. The Department² and the Wildlife Resources Commission are charged with stewardship of these resources.” “Stewardship” is the careful and responsible management of something entrusted to one's care. Despite express acknowledgement of its public-trust duties, the state has failed abysmally in its stewardship of public-trust fisheries resources.

In contrast to the public-trust right to fish for personal use and enjoyment, the right of any business or individual to fish in public waters for profit is not a right, but a narrow, limited privilege afforded only by statute, and therefore completely subject to legislative discretion. Similarly, when the state is determining appropriate policies or plans for managing coastal fisheries resources, the limited privilege granted to a relatively few citizens or companies to fish for profit must yield in priority to the constitutionally protected public-trust rights of the broader public. Accordingly, the state cannot legally allow the for-profit harvesting of fish in quantities or through methods that cause overexploitation or undue wastage of North Carolina's coastal fisheries resources.

As we said in last week's paper on the tragedy of the commons, when private entities are freely allowed to profit from the use of public, natural resources, it almost always results in substantial demise of those resources. Again, that is because there is no incentive to conserve resources jointly shared with others, and there is every

² The Department referred to in this statute is the North Carolina Department of Environmental Quality, the parent agency of the North Carolina Division of Marine Fisheries.

incentive to harvest or otherwise use such resources before someone else does so. It is that sad tragedy of the commons that characterizes the use of coastal fisheries resources in North Carolina, and the tragedy can only be prevented or reversed by intentional and decisive government action by the state, as the resource trustee, in meeting its public-trust and constitutional obligations owed to all current and future citizens. That action has been lacking in North Carolina for decades.

But the story is even more disconcerting in the case of state management of North Carolina's coastal fisheries resources. The state has not simply failed to take decisive action to preserve and protect those resources from overexploitation and waste. Instead, the state has facilitated resource demise in many instances, by allowing the commercial-fishing industry to dictate or exert a disproportional influence on North Carolina's coastal fisheries resources management policies and plans. The state has thereby sanctioned the overexploitation of coastal fisheries resources by those citizens who possess the unique privilege to harvest those resources for profit, even though they represent less than one-twentieth of one percent of the North Carolina citizens for whom those resources are held in trust. As we will describe more fully in papers in this series that are to follow, the disparate control or influence of state policy and state agencies by a small segment of North Carolina's citizens reflects "regulatory capture," where the state's regulatory agencies become co-opted to serve the commercial interests they once promoted, but are now charged with regulating.

Nevertheless, just as it was important to note that the tragedy of the commons may occur without greed or wrongdoing, it is important to note here that the root cause of the demise of North Carolina's public-trust, coastal fisheries resources is not commercial fishing, but the state's gross mismanagement of those resources entrusted to its care. Commercial fishing licensees generally use only those gears and harvest methods that the state allows by law.³ Consequently, while commercial overharvest or waste of public-trust resources has been the major factor in the decline of those resources in North Carolina, resource overexploitation and waste have occurred only because the state has permitted them to occur. The state has for decades extended the industry's collective privilege to fish for profit beyond what is permissible in light of the state's public-trust and constitutional duties owed to all current and future citizens of North Carolina.

As will be detailed in future papers in this series, the state's long-term breach of its duties under the public trust doctrine and the North Carolina Constitution through coastal fisheries resources mismanagement has resulted in a decades-long, uninterrupted, dramatic decline in these resources overall, as well as a decline in the

³ It is interesting to note that some of our most resource-destructive commercial gears—shrimp trawls and gillnets—are either banned or highly regulated as to location and use by all other southeastern states. But that is a story for another paper.

health of multiple, specific fisheries traditionally important to the public, including Southern flounder, striped bass, spot, Atlantic croaker, gray trout, river herring and Eastern oyster. Consequently, the public's right to fish has been eliminated or, at a minimum, severely curtailed. As a consequence of that decline, "public fishing limits" for many coastal fish species that have been historically important to the public have steadily become more restrictive over time. The 2022 public season for Southern flounder spanned just 30 days (from September 1st through September 30th, with a harvest limit of 1 fish per person per day. Understandably, many North Carolina residents who once avidly pursued coastal fishing have, out of frustration over extraordinarily restrictive harvest limits and the general inability to catch fish, given it up for other pursuits.

Finally, while North Carolina statutes expressly recognize the historical importance of public subsistence fishing in our state, the state's mismanagement of public-trust fisheries resources and resultant species declines have rendered subsistence fishing virtually impossible coastwide.⁴ Piers that once dotted the coast, where citizens often stood shoulder-to-shoulder to harvest the once reliable annual "runs" of migratory fish species, have slowly disappeared. The piers that remain sit relatively empty much of the time.

The cumulative result of the state's failings as resource trustee under the public trust doctrine has been staggering resource wastage, chronic overfishing of multiple species of coastal finfish, a substantially diminished public right to fish, and the ensuing economic harm to North Carolina's coastal economy. In short, all of this describes a very broken system, where fisheries resources are not adequately conserved and protected because the duties imposed upon the state by the public trust doctrine, as underpinned by the North Carolina Constitution, have largely been ignored. Please stay tuned—in future papers we will describe in detail both that broken system and the state's breach of its fiduciary duties. Our hope is that the full story will compel every citizen to join the fight to "Save Our Fisheries," thereby

⁴ N.C. Gen. Stat. § 113-351(d) provides for the issuance of Unified Inland/Coastal Recreational Fishing License Waivers at no charge to income-qualified residents, for the purpose of subsistence fishing of state fisheries resources, including public-trust fisheries. In the 2019-2020 license year, the state issued 22,635 such waivers to North Carolina citizens in all of North Carolina's 100 counties. In the five previous years, the state issued an average of 31,959 such subsistence license waivers each year. These are the citizen resource owners who financially *need* the sustenance provided by public harvest from properly managed public-trust fish stocks. Yet, under the coastal fisheries management policies of the state, that sustenance is simply not available to subsistence fishers or any other public angler on a reasonable or consistent basis.

reforming state management policies in order to rebuild and restore our public-trust, coastal fisheries resources, as well as our cultural heritage.