Rhode Island Fisheries Law

Rhode Island law as it relates to the marine fisheries is unique and special in many ways. Rhode Island's uniqueness began with being the first state to adopt religious freedom, the first to pay compensation to the native inhabitants for use of their land and the first to sign the Declaration of Independence. But it didn't stop there, Rhode Island's founding Charter signed by King Charles II of England recognized the importance of the trade of fishing to the people of the new colony and with that recognition, sought to protect his loving subjects in pursuit of that trade. After independence was won, the framers and adopters of Rhode Island's new constitution again recognized that the people had enjoyed certain rights and privileges in regard to the fisheries and access to the marine resource. They, with the adoption of the constitution, codified those rights into law beyond the power of the General Assembly to destroy. No other of the thirteen original colonies or the several states that followed identified in their constitutions such special provisions in law that would delineate and dedicate to their residents a fundamental right of access to the marine resources.

1. The Rhode Island State Constitution:

> RI Cont. Art I, Sec 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.*" (emphasis mine)

This provision of RI's constitution recognizes that there are fundamental *"rights of the fishery"* and codifies in law those so called rights and privileges as found in the original Charter signed by King Charles II. Although fundamental in nature, these rights are subject to such conditions that in their practice, all the people shall receive the greatest benefit from the conservation of their interests.

2. The Charter granted by King Charles II (1663):

> *"Provided also, and our express will and pleasure is, and we do by those presents, for us, our heirs and successor, 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 coast**]."* (emphasis mine)

Here the King and subsequently our founding fathers sought to prohibit anyone, including the General Assembly, from denying his loving subjects access to the trade of fishing. This provision was clearly aimed at preventing the establishment of a special class of people who might lay claim to privileged access to the resource. It in no way suggests or could be interpreted to imply that access could be made the exclusive property right of privileged individuals.

3. Rights to the resource, belonging to all the people:

> *"It is self evident that each person does not annually get, and never can get, his or her proportional part of the total catch of lobsters in any year, therefore a division of the catch of lobsters among the people of the state cannot be considered to be a feasible way in which to preserve the [**rights of the people**] in the lobster fishery."* (State v. Constantine Kofines et al., 33 RI 211, 224, [1911]) (emphasis mine)

Again, the court reaffirms the founding fathers recognition of the "*rights of the people*" to the marine resource. Here the Court recognizes that each person is entitled to his or her proportional part of the resource and that there must be a fair or feasible way for individuals to receive that benefit.

4. Rights, beyond the power of the General Assembly to destroy:

> *"that there must have been some such 'privileges' which were then recognized as belonging to the people and which the framers and adopters of the constitution intended to change into [**rights**] beyond the power of the general assembly to destroy."* (Jackvony v. Powel, 67 RI 218, [1941]) (emphasis mine)

In Jackvony, the court reaffirms the founding fathers intent to recognize certain "*rights*" to the marine resource and place them beyond the power of the General Assembly or any other local or city government body to destroy.

5. The marine resource, as a trust for the benefit of the people:

> *"…the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, [**as a trust for the benefit of the people**], and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals, as distinguished from the public good.*" (State v. Constantine Kofines et al., 33 RI 211, 232, [1911]) (emphasis mine)

The court here makes three very important findings. The first is that the marine resource is held in "*common*" by the people and that the "*State*" in exercising control over that resource must do so "*as a trust for the benefit of the people*". The second is clearly aimed at the corruptible nature of government and those in government in that it prohibits the management of the fisheries "*not as a prerogative for the advantage of the government*", or for the personal benefit of those in power, but in a manner that clearly benefits all the people. The third is as important today as the others in that it prohibits the State from developing fisheries management plans that are designed to provide "*not for the benefit of private individuals, as distinguished from the public good*". This can certainly be read to include, not for the personal emolument of those engaged in the business, and not for the primary purpose of sustaining business viability and profits for members of the industry.

6. Licensing fishermen, to exercise the rights of others:

> "*We have already seen that it is impossible for every one of the people of the State personally to exercise the franchise of fishing for lobsters in the public waters of the State, and that if such fishing is to be done for all it must be done by [**agents**] in order that the people may receive the benefits thereof.*" (State v. Constantine Kofines et al., 33 RI 211, 240, [1911]) (emphasis mine)

This finding makes a clear distinction between those who are licensed to fish and the general public who consumes the food resource. Commercial fishermen serve as agents for those who do not, cannot, or choose not to fish for themselves. Those individuals engaged in the trade of fishing do not own the resource nor are they entitled to any greater access to the resource than that of the general public. Rather, they are licensed and granted the privilege of exercising the rights of others. In effect, commercial fishermen serve as the "*agents*" for those who do not fish for themselves. In theory, commercial fishermen do not own the resource even when it has been reduced to possession but rather they are compensated for the service of harvesting that resource for the benefit and availability of others.

7. The people shall receive the greatest benefit from the conservation of their interests:

> "*It goes without saying that people of the state residing in portions of its territory remote from the seashore could hardly afford, even if it were possible for them to do so, to go to the shore and attempt to engage in lobster fishing merely for the purpose of obtaining what they might deem to be their fair share of lobsters from the public waters of the state. All children of tender years, the aged and infirm, together with delicate women would be absolutely debarred from participation in a fishery in which all are interested. In such circumstances [**it is necessary to consider how the people of the state may receive the greatest benefit from the conservation of their interests**] in this regard. The great majority of the people undoubtedly have heretofore bought and in the future will be obliged to buy their lobsters, therefore, it is for their interest to have them plentiful and cheap.*" (State v. Constantine Kofines et al., 33 RI 211, 225, [1911]) (emphasis mine)

This finding clearly and succinctly points to the greater responsibility of the state to provide for the conservation and management of the resource by setting the standard based on "*how the people of the state may receive the greatest benefit from the conservation of their interests*". Again and with particular regard to the development of fisheries management plans, not for the prerogative of those in political office or those employed by government and not for the profits or success of those engaged in the business. The founding fathers understood that avarice is always a compelling drive in a free society and that it must be held in check and directed in such a way that provides the greatest benefit for the public good. Statues and regulation aimed primarily at providing security, viability or profit to those engaged in the business is not what the founders and the law intended. Opportunity, competition and access supported the mandate to provide to the public the food resource both "*plentiful and cheap*". Residents are entitled to the availability and purchase of the resource throughout the year whenever possible and at a competitive price.

8. Discrimination in access prohibited:

> *"[**permitted one class of citizens to take their fish while prohibiting entirely, the taking thereof by another class of citizens**], as for example those who resort to fishery for commercial purposes, would be invalid as discriminatory." (Opinion to the RI Senate 1956) (emphasis mine)*

In this opinion which was requested of the Court by the RI Senate, there was an attempt by recreational fishermen to obtain through a legislative act, exclusive access to the Striped Bass fishery. The Court in rendering its opinion, was very clear in stating that any statue or attempt by the General Assembly to adopt an act that would create different classes of citizens allowing access to some while denying access to others, would be viewed "*invalid as discriminatory*". In this opinion, the Court understood that although "*those who resort to fishery for commercial purposes*", were being "*prohibited entirely, the taking thereof*", they were not being denied access for non-commercial purposes. The Court appears more concerned with any attempt by the Assembly to create an artificial "*class*" of citizens that could be discriminated against in regard to access.

9. Equal access, a fundamental right:

> *"If a statute or regulation contained restrictions that [**infringed upon the fundamental right of the inhabitants of the state to have equal access to the 'rights of fishery'],"** then such a regulation or law would be subject to strict-scrutiny analysis." (Cherenzia v. Lynch et al. 847 A2d 818[2004]) (emphasis mine)*

Here the Court makes an important statement as to the nature of the "*rights of fishery*". These so called [rights] that have been treasured throughout Rhode Island history are identified as being "*fundamental*" and "*subject to strict-scrutiny analysis*". Fundamental rights, rights that are explicitly expressed in the Constitution, are different than ordinary rights in that they are held to a much higher standard of protection than ordinary rights. When a fundamental right is challenged in a Court of law, it is the state that has the burden of proof and it is the state that must show a compelling state interest when attempting to justify any limitation or expungement of that right.

10. Plenary power to regulate the fisheries:

> *"We have stated that in our opinion, notwithstanding the provisions of sec.17, [**the power of the legislature to regulate fisheries in the waters of this state is plenary**]" (Opinion to the RI Senate 1956) (emphasis mine)*

One sees in the Court's Opinion to the RI Senate; State v. Nelson; Windsor v. Coggeshall; State v. Kofines; and Jackvony v. Powel the unequivocal finding and declaration from the Court that the power and responsibility to manage the marine fisheries is with the General Assembly.

In 1981 the General Assembly created the Rhode Island Marine Fisheries Council as a regulatory body that would assume the more detailed management of the marine fisheries. The council, which consisted of representatives from the commercial fisheries, the recreational fisheries and scientist, would accept the Assembly's plenary responsibility to manage the fisheries with specific regulatory authority on matters limited to the following activities:

(1) The manner of taking fish, lobsters, and shellfish;
(2) The legal size limits of fish, lobsters, and shellfish to be taken or possessed;
(3) The seasons and hours during which fish, lobsters, and shellfish may be taken or possessed;
(4) The numbers or quantities of fish, lobsters, and shellfish which may be taken or possessed;
(5) The opening and closing of areas within the coastal waters to the taking of any and all types of fish, lobsters, and shellfish.

In 2001, the Assembly abandoned its plenary responsibility by withdrawing the regulatory authority delegated to the Marine Fisheries Council and granting it to the governor through the director of the Department of Environmental Management. The director, and now the executive branch of government, has been given the full authority and responsibility over the fish, lobsters, shellfish, and other biological resources of the marine waters of the state. The director has been authorized to promulgate, adopt, and enforce any and all rules and regulations deemed necessary to carry out the duties and responsibilities under Title 20 of the General Laws. The director is no longer limited to the enforcement of such regulations but has been granted broad powers in the creation of such laws and regulations. The authority to determine what, where, when and how to fish, now extends to the implementation of limited licenses, privileged access, species access endorsements and the sale or exchange of licensed access.

11. Rights denied:

> *"Reading 'equal access' literally would run counter to our holdings that [**no fundamental right is implicated when the General Assembly enacts legislation for the 'good of the whole,' even when it has been at the expense of a few**]."*
> *"...other ways to get access to these restricted species include [**purchasing the business of a fisherman who has the license or transferring the coveted license between family members**]." (Steven Riley v. RIDEM No.2006-175-Appeal) (emphasis mine)*

Here, and most recently, the Court deviates from its long standing view on the rights of fishery. Riley sought to re-obtain his multi-purpose marine fishing license which he had given up when he went to off to college to earn a degree in engineering. When Riley returned, he was denied a multi-purpose license and appealed to the Court for relief. Judge Flaherty, in writing for the Court, recognized Riley's fundamental right to equal access to the marine fisheries and the trade of fishing but determined that that right had not been implicated when he was denied a multi-purpose license by the director. Riley could still obtain a limited license for species like skates and periwinkles but could not take commercially species like lobster, bass, scup, steamer clams, quahogs and tautog.

In Flaherty's decision, granting exclusive access to the more coveted species only to previous license holders, did not create a subject class or constitute unacceptable discrimination. Judge Flaherty went on to state that the General Assembly has the right to enact legislation that discriminates against individuals, "*for the good of the whole*". Assuming that Flaherty was referencing the responsibility of the General Assembly to conserve and regulate the fisheries for the benefit of the all the people, his eyes were closed to the fact that equal access to the resource and to the trade of fishing is the foundation for that benefit. Conservation, providing the resource both plentiful and inexpensive, is neither hostile nor incompatible to equal access.

Judge Flaherty furthers his support of the implementation of discrimination and limited access by suggesting that Riley could obtain greater access by "*purchasing the business of a fisherman who has the license or transferring the coveted license between family members*". Access to the marine fisheries and to the trade of fishing can no longer be considered a fundamental right, under this dictum, if it has been relegated by the General Assembly to an opportunity by purchase or the gift of inheritance or personal history. Creating a valuable property right out of whole cloth for the benefit of a few at the expense "*of the whole*", was the real question at law.

12. Summary

The aforementioned citations of law represent but a touch of the long history and struggle in RI involving the rights of fishery and access to the marine resources. The citations were chosen because of their significance in the understanding of those rights. Rhode Islanders have long coined their relationship with the coastal shore and fisheries as "the free and common fisheries" believing that they have a free right to the shore, to the marine resources and to the trade of fishing and that these rights exist in common for everyone. This is what Article 1, Section 17 of the RI Constitution means to them and for their children.

The law today is often miss-interpreted by government and self serving interests in order to reflect a desire for what some want rather than what was promised by contract to be. In the town of Narragansett, the town charges a fee for people to walk upon the beach in exercise of their right to the shore; Rhode Islanders are now charged a fee to exercise their right to fish for their own subsistence; those seeking a commercial fishing license are discriminated against and told to purchase that opportunity from others who have either inherited the exclusive right or been granted that exclusivity by regulation or statue. Rhode Islanders are now informed when applying for a commercial fishing license that as new applicants, they are allowed only to take the least valuable of species while a select group of others retain exclusive access to the more desired species. These well defined historical rights have become illusorily to the average person and replaced by a system based on private ownership, exclusivity and avarice. When these circumstances are detailed and described to an unknowing member of the general public, it has shocked the conscience of the average person.

The General Assembly has erred by abrogating its constitutional responsibility of preserving and protecting the people's interest to the executive branch of government. The Assembly has allowed through legislative act, special interest, greed, ignorance or indifference to contribute to the destruction of fishing communities and the loss of people's historical rights. Abandoning the legislative responsibility of making laws to the executive branch of government raises serious questions as to the separation of powers. The governor's office, in accepting the new role of law

maker for the fisheries, has failed to maintain the executive integrity and exclusivism of the office as chief law enforcer. The most resent directors of the Department or Environmental Management, when given the opportunity to defend the constitutional principles at law, have failed in every instance to proactively defend the people's rights. They have solicited the aid and comfort of federal agencies in support of laws, regulations and fisheries management plans hostile to RI law and in violation of the Tenth Amendment to the US Constitution. They have without exception supported consolidation and reduction in access to the resource at the expense of jobs and opportunity, favoritism and privilege over equity and impartiality. The American Revolution was instigated by such abusive actions by government. The Assembly and the people have a narrowing opportunity to reverse this outgoing loss of their "*rights of the fishery*" before they are lost forever.

In this guide, I have tried to lend an understanding of the principals that best represent the intent of our founding fathers, the mounting threat to the preservation of those rights and liberties, and of the true meaning of that indelible contract, the RI Constitution.

Gerald M Carvalho