

Public Rights along the Shoreline

The following text was adapted from Massachusetts Coast Guide to Boston Harbor and the North Shore, developed by the Mass. Office of Coastal Management in 2005 to help the public access and enjoy the coast. The information is posted on mass.gov.

Coastal managers are often asked, "Who owns the sea and shore?" If you have been curious, or perhaps a bit confused about what rights the public has along the shoreline, here's a brief primer on waterfront property law.

Ownership of Tidelands

"Tideland" is the legal term for all land beneath the waters of the ocean, including lands that are always submerged as well as those in the intertidal area (i.e., between the high and low tide marks). In every coastal state, the use of tidelands is governed by a concept in property law known as the Public Trust Doctrine, which dates back centuries to ancient Roman law. The doctrine states that all rights in tidelands and the water itself are held by the state "in trust" for the benefit of the public. In most states, this means that public ownership begins at the high water mark.

The Massachusetts Bay Colony originally followed this rule, until its legislators decided to transfer ownership of certain tidelands to coastal landowners, in order to encourage private wharf construction on these so-called "intertidal flats." This general land grant was accomplished by the Colonial Ordinances of 1641-47, which in effect moved the line between public and private property to the low water mark, but not farther seaward of the high water mark than "100 rods," or 1,650 feet. This intertidal area (now called "private tidelands") is presumed to belong to the upland property owner, unless legal documentation proves otherwise for a given parcel (as is true in certain segments of Provincetown, for example).

Although the Colonial Ordinance changed the ownership of most intertidal flats from public to private, it did not transfer all property rights originally held in trust by the state. For one thing, no rights to the water itself (as distinct from the underlying lands) were relinquished by the Ordinance. Moreover, the law specifically reserved for the public the right to continue to use private tidelands for three purposes—fishing, fowling, and navigation.

Scope of Public and Private Rights

Over the years, Massachusetts courts have ruled that the scope of activities on private tidelands covered by the reserved public rights of fishing, fowling, and navigation is broad, and includes all of their "natural derivatives." For example:

- The right to fish includes the right to seek or take any fish, shellfish, or floating marine plants, from a vessel or on foot;
- The right to navigate includes the right to conduct any activity involving the movement of a boat, vessel, float, or other watercraft, as well as the transport of people and

materials and related loading and unloading activity; and

- The right to fowl includes the right to hunt birds for sport as well as sustenance. (The Massachusetts Attorney General takes the position that the right of fowling also includes other ways that birds can be "used," such as bird watching, but also notes that this issue has not yet been addressed by the courts.)

Clearly, these rights cover a variety of both old and new activities that many people enjoy, such as surfcasting and windsurfing. Still, the courts have imposed some limits. The right of fishing, for example, does not allow the use of structures for aquaculture or the taking of plant debris washed up on the beach. Also, courts have made it clear that the public right to use this area does not include the right to simply stroll, sunbathe, or otherwise engage in recreation unrelated to fishing, fowling, or navigation. Without permission from the landowner, such general recreation is trespassing. There is only one narrow exception to this rule—because there are no private property rights in the water itself, the public is allowed to swim in the intertidal zone provided the swimmer does not touch the private land underneath or use it to enter or leave the water.

The distinction between public and private rights is much simpler on either side of the intertidal zone, i.e. on submerged lands to the seaward side and on the dry shore to the landward side. Except on filled tidelands (which is another story altogether), all rights to use the area above the high water mark generally belong to the upland property owner, and public access on private land can occur only with permission. On the other hand, below the low water (or 100 rod) mark, the public is almost always within its rights to walk, swim, or enjoy other recreational activity. With very few exceptions, these tidelands are still state property.

Respecting the Rights of Others

Respecting the rights of others—private property rights as well as public access and use rights—is an important part of visiting the coast. To prevent infringements on everyone's rights, it may be helpful to follow these guidelines. To help keep the peace, the visiting public should be careful not to trespass or otherwise infringe on the privacy of shorefront property owners, and should minimize their impact on the environment. Likewise, in posting signs and taking other steps to identify their private property, coastal landowners should not attempt to discourage the public from using the water's edge to the full extent allowable by law. In short, mutual respect is the key to meaningful coastal access for everyone.