

1975 WL 29300 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 30, 1975

***1 Title: Navigable Waters Law of South Carolina:**

Trust Property and Navigational Servitude

1. Public Trust Property Doctrine

The State of South Carolina has absolute title to Submerged Lands, (the area below the usual low water mark), in the navigable waters of the State. The State of South Carolina has prima facie title to Tidelands, (the area between the usual high water mark and the usual low water mark), in and adjacent to the navigable waters of the State. The State of South Carolina holds the Tidelands, Submerged Lands and Navigable Waters in trust for and subject to the public purposes and rights of navigation, commerce, fishing, bathing, recreation or enjoyment and other public and useful purposes, or such rights as are incident to public waters at common law, free from obstructions and interference by private persons.

The State of South Carolina has title to the beds of the rivers, streams and lakes, (the area below the usual high water mark), and the Waters of the State. The State of South Carolina holds the beds and waters of the rivers, streams and lakes in trust for and subject to the public purposes, and rights of navigation, commerce, fishing, bathing, recreation and enjoyment, other public and useful purposes, and such other rights as are incident to public waters at common law, free from obstructions and interference by private persons.

The 1895 South Carolina Constitution, as amended, provides, to wit:

Article 14, Section 4. Navigable waters shall forever remain free public highways.

Article 3, Section 31. State lands shall not be sold or granted at less than actual value.

Article 14, Section 1. Boundary rivers are free common highways.

The 1962 South Carolina Code of Laws, provides, to wit:

Section 1-205. Title to all State Lands not specifically set in a state agency is in the Governor and Secretary of State, subject to the direction of the S.C. State Budget and Control Board.

Section 1-793. The S. C. State Budget and Control Board cannot sell trust property. An amendment allows the controlled sale of phosphate rock.

Section 1-794. The S. C. State Budget and Control Board shall not sell state vacant lands at less than actual value.

Section 28-752. 'Bottoms' includes all of the tidelands covered by water when at the stage of ordinary high tide.

Section 28-754. The waters and bottoms of the bays, rivers, creeks and marshes shall remain a common for ??

Section 28-791. The bottoms may be leased as oyster beds.

The bottoms shall not be granted, leased or conveyed otherwise except by grant of the General Assembly.

Section 54-17. The S.C. State Ports Authority is authorized to take and use State bottoms and waters, including riparian rights.

Section 70-1. Navigable waters are free common highways.

Section 70-2. Navigable waters shall not be obstructed.

Section 70-251, et seq. The S. C. Development Board shall acquire areas for the use of the United States in maintaining Intracoastal Waterway.

*2 Section 9-310(5). The S. C. Intra-coastal Waterway Commission duties are given to the S. C. Development Board.

The Court in the case of Cape Romain Land and Improvement Co. v. Georgia-Carolina Canning Co., 148 SC 428, 438, stated that:

'The title to land below the high water mark on tidal navigable streams, under the well settled rule, is in the State not for the purpose of sale, but to be held in trust for public purpose.'

Aside from the impediment on the sale of tidelands by the State, imposed by the Supreme Court in the Cape Romain Case, S. Code Sections 28-752 and 28-754 would appear to create another stumbling block.

'By 'high water mark' is meant 'the line on the shore which is reached by the limit of flux of the usual tide'; that is, the high mark made on the shore as 'the tide ebbs and flows twice each lunar day'; and not the point reached at new or full moon nor when there is an intervening disturbance such as a storm of earthquake.' '. . . ' . . . it is a recognized fact that such lands under rapid changes. What was an island . . . may now be . . . land constantly or continuously covered with water.' Inquiry should be made as to whether or not the land involved is '. . . covered by water after high tide on account of the usual tide or under abnormal condition Cape Romain Land and Improvement Co. v. Georgia-Carolina Canning 148 S.C. 428, 146 S. E. 434.

The boundary line of State owned Tidelands lies at the a high water mark. The boundary fluctuates when the usual high water mark fluctuates due to natural action. The State gains Tidelands when there is erosion of the fastland above the usual high water mark due to natural action. The State loses Tidelands when there is an accretion to the fastland above the usual high water mark due to natural action.

The usual high water mark means the line on the shore which is reached by the limit of the flux of the usual high tide. Tidelands undergo rapid change. What fastlands were above the usual high water mark in some prior year may now be Tidelands or Submerged Lands. Where the usual high water mark is, however, is a question of fact for the trier of the facts determines the location of the usual high water mark at that particular time.

In the case of a tidal navigable stream, the boundary line is the usual high water mark, in the absence of more specific language showing that it is intended to go below high water mark, and the portion of land between high and low water mark remains in the state in trust for the benefit of the public interest. The State owns the lands underlying its navigable waters in its sovereign capacity, that is, as a representative of, and in trust for, the public.

The case of Rice Hope Plantation v. S. C. Public Serv. Auth., 26 S. C. 600, 59 S. E. (2d) 132 (1950), reaffirmed Cape Romain Land and Improvement v. Georgia-Carolina Canning Co., 148 S. C. 428, 146 S. E. 434 (1928), and held that the land below usual high water mark is held in trust by the State for the public and is not held for purposes of sale. Even if certain tidelands were to be declared privately owned, they could not be filled or diked because the area is subject to Federal and State navigational servitude easement.

*3 There is a distinction between those lands held by the State or a governmental unit in a fiduciary capacity and those merely held in a proprietary capacity.

The 1962 South Carolina Code of Laws, Section 1-205, provide that the Secretary of State shall have charge of all State property, the care and custody of which is not otherwise provided by law, and shall hold such property under the directions of the, State Budget and Control Board.

The 1962 South Carolina Code of Laws, Section 1-793, provides that the Budget and Control Board shall not sell any property held in trust by the State for a specific purpose. In view of the fact that the tidelands (lands lying between the usual high and usual low water marks) and the submerged lands (lands lying below the usual low water mark) have been held by decision and statute to be in possession of the State action; in a fiduciary capacity, Section 1-793 does not give the Budget and Control Board the right to sell or alienate these lands.

2. Constitutional Navigational Servitude Doctrine.

The accepted doctrine in this state, as well as in most other jurisdictions may be found in The Daniel Ball, 77 U. S. 557, 563 (1370), wherein it was stated that rivers navigable in fact are navigable in law. See also: Swan Island Club v. White, 114 F. Supp. 95 (1953).

Whether a waterway is navigable is a question which may ultimately be decided by a jury in a trespass action or an action to enjoin further trespass. Navigability in fact has had varied definitions.

The common law definition is set forth in Heyward v. Farmers Co., 42 S. C. 138, 19 S. E. 963 (1894). That to be navigable, a stream should have sufficient depth and width of water to float useful commerce, supra at 150. This definition was in accord with State v. Pacific Guano Co., 22 S. C. 50, 57 (1884), and was later approved in State v. Columbia Water Power Co., 82 S. C. 181, 63 S. E. 884 (1909).

Neither the actual use of the waters nor custom and past use of the water have any materiality, but the stream's capacity for such use is the key factor. State v. Water Power Co., supra at 187. Thus the common law doctrine of navigability is one of a commercial potential test.

This doctrine in no way restricts the rights of non-commercial users. Navigable streams are highways; and a traveler for business is as fully entitled to protection in using a public way as a traveler for pleasure. Heyward v. Farmers Co., supra at 150, State v. Water Co., supra at 189.

The latest statutory definition of navigability may be found in Section 70-1, South Carolina Code of Laws (1962). Section 70-1 provides:

All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by removal of accidental obstructions and all navigable water courses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly. If any person shall obstruct any such stream, otherwise than as in this Title provided, such person shall be guilty of a nuisance and such obstruction may be abated as public nuisances are by law. (emphasis added)

*4 It would appear that the commercial potential test has apparently been abandoned in favor of declaring navigability wherever the shallowest draft vessels known—'rafts of lumber or timber' can navigate the stream.

There is one other requirement for a stream to be navigable,—and that is that the stream must be accessible at one public place or terminus. Manigault v. Ward, 123 F. 707 (1903). A waterway apparently meets this requirement if it is a tributary of one of the state's major rivers.

Section 70-1 South Carolina Code of Laws (1962) is largely a statutory restatement of Article 14, Section 4, Constitution of South Carolina, which provides:

All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost, or wharfage imposed; and no tax, toll, impost, or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly.

Thus right to free use of navigable streams is a constitutional right not subject to statutory abridgement.

Furthermore, by long established principles, the State holds title to navigable streams in trust for the public, as part of its prerogative rights, and not as private property. Such legislation would in effect be a conveyance of property rights, over which the State has no power to convey. See Heyward v. Farmers Co., *supra* at 157, quoting Illinois Cen. R.R. Co. v. Illinois, U.S. 458.

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