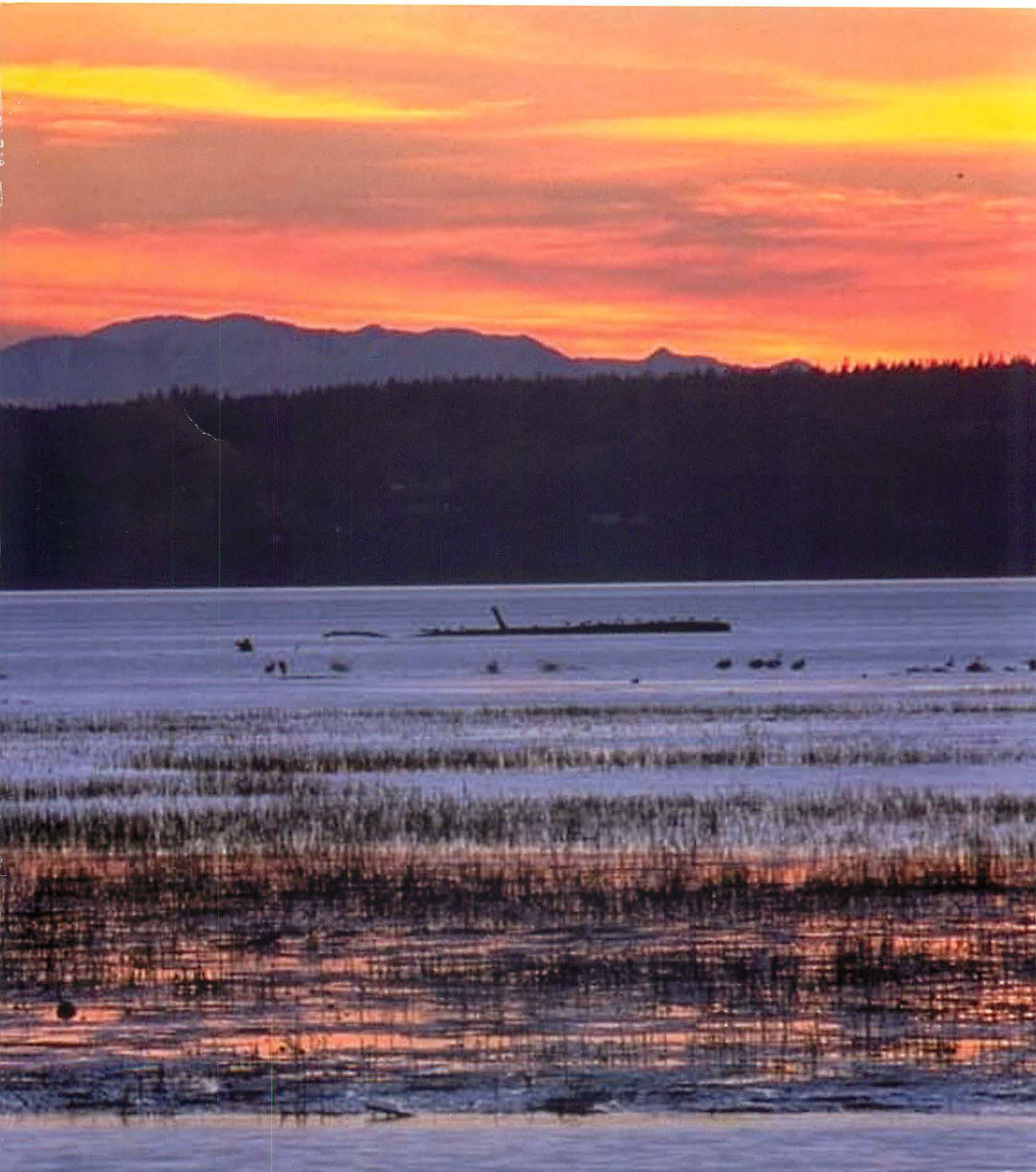
Towards Conservation of Submerged Lands: The Law and Policy of Conservation Leasing and Ownership



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The Nature Conservancy
SAVING THE LAST GREAT PLACES ON EARTH

Roger Williams University
Learning to Bridge the World

Towards Conservation of Submerged Lands: The Law and Policy of Conservation Leasing and Ownership

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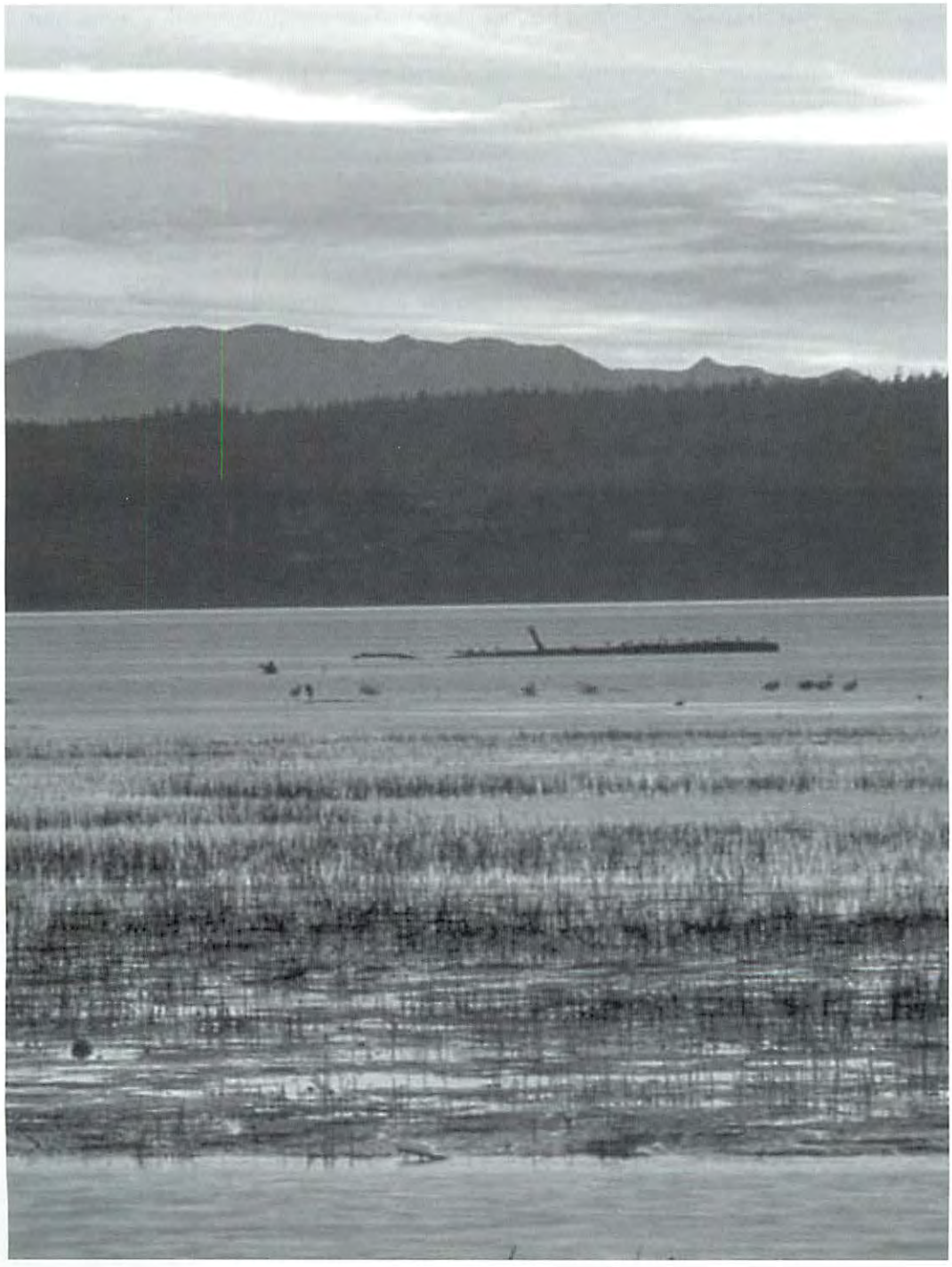

Preface

The mission of The Nature Conservancy is to preserve the plants, animals, and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. The Nature Conservancy is a science-based nonprofit organization that works in collaboration with local residents, partner organizations, government agencies and other stakeholders to identify, protect, and manage significant habitats and natural systems.

Traditionally, The Nature Conservancy has focused on land conservation. More recently, we have recognized that to meet our mission a much greater coastal and marine focus is necessary. As we started to work more in coastal and marine areas, we found that the traditional coastal and marine conservation toolbox is quite limited. If the urgent challenges of marine conservation are to be met, we need both new and innovative approaches for conservation and new partners with whom to work.

Hence we are particularly pleased to have launched this collaborative project with Sea Grant and Roger Williams University. Through it we now have a better understanding of the legal and policy issues in using these new tools for conservation in the marine environment – the leasing and ownership of submerged lands. We also have enhanced our collaborative work nationally with an important partner, Sea Grant.

The current report is part of an ongoing series of resources that The Nature Conservancy and its partners, in particular Sea Grant, are making available to inform managers and practitioners on the potential of using submerged lands leasing and ownership as a potent tool for marine restoration and conservation.

Lynne Zeitlin Hale, Director
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CHAPTER 1 INTRODUCTION AND OVERVIEW OF THE CONSERVANCY'S CURRENT EFFORTS IN SUBMERGED LANDS LEASING AND OWNERSHIP[1]

I. *Introduction*

The coastal waters of the United States—from the kelp beds of the Bering Sea to the marshes of Louisiana to the reefs of Florida and Hawaii— contain a significant and under-recognized element of this nation's biological diversity. This immense biological wealth has been slow to receive just recognition.

Many recent books, scientific articles and agency reports have highlighted the overall poor state of our coasts and the many threats to marine diversity.[2] Most of the U.S. population lives near or on the coast, and this number continues to increase. Many others flock to coastal areas where they spend billions annually for recreation. With this accelerating pressure, degradation of nearshore habitats is widespread and the effects on biological diversity and productivity are alarming. Extensive loss of seagrass beds threatens not only essential feeding, nursing, and spawning grounds for many fish species, but also important habitat for turtles, manatees, migratory waterfowl, and shorebirds. Over the past century we have lost coastal marshes throughout the U.S. Louisiana alone loses more than 25 square miles of marsh every year, threatening 30 percent of the entire commercial fisheries harvest in the lower 48 states, as well as the centuries-old bayou culture and way of life. Shellfish have been lost to a combination of overharvest, poor water quality, invasive species, and disease across the Atlantic, Pacific and Gulf coasts. Once-extensive oyster reefs have been dramatically reduced, and many of the reefs that remain are routinely closed to harvesting due to excess nutrients, pollutants and inadequate sewage treatment. We have lost most of the ecological services provided by shellfish, seagrass, and marshes; from the essential habitat they provide to their roles in reducing erosion and improving water clarity and quality.

The recently issued U.S. Commission on Ocean Policy (USCOP) report has further highlighted these conditions and threats and brought unprecedented attention to U.S. ocean issues, along with identifying management strategies to ameliorate these conditions. Management is hindered due to fractured governance and its failure to consider the value of the entire marine ecosystem. That is, many different agencies have overlapping and sometimes competing mandates in the same waters and few, if any, are taking a holistic approach to understanding and managing the many marine resources and their needs in their natural ecosystem context.

It is clear that we must find innovative ways to manage and protect our rich marine resources. Hopefully, the USCOP and other reports will inspire real improvements in state and federal management of marine resources. Governmental agencies, plagued by budget reductions and increasing workloads, cannot do it alone. In the marine environment, non-governmental organizations (NGOs) have played a substantial role in assisting public agencies to meet their mandates. This assistance has been primarily limited to nearshore habitat restoration. Terrestrially, NGOs have played a large role in developing and testing new and innovative management approaches on the lands that they lease or own. There are substantial benefits to this strategy; if the methods are proven effective, it is then easier for public managers to convince their superiors and stakeholders of their potential wider application on public lands.

It has been commonly assumed that the tools for estuarine and marine conservation must be substantially different from those for terrestrial conservation, in part because it is not possible to own parts of the ocean or to exclude areas from certain historic users. This is an unfortunate misconception; there is significant submerged land available for lease and ownership in the U.S. In this report, submerged lands are defined as "land lying below tidal waters, seaward of the ordinary low water mark including bays, inlets and other arms of the sea, out to the seaward boundary of the State."[3] These submerged lands are ecologically significant and include a diverse array of ecosystems such as kelp forests, marshes, seagrass meadows, oyster reefs, tidal flats, clam beds, scallop beds, sponge and coral gardens.

There are three available forms of ownership rights to submerged lands: leases of submerged lands from states, limited ownership of submerged lands sold by states, and outright ownership (in fee simple) of lands conveyed into private ownership prior to statehood.[4] All coastal states allow leasing in some portion of their waters. Leasing has been used historically as a tool to manage coastal activities and maximize economic benefits to the public.[5] Most privately owned submerged lands were sold by the states and although the private owner

may hold title to the submerged lands, the state retains some rights. Retained rights vary by state and even by parcel but often include rights to access and navigation. These rights have been a source of litigation[6], but, in general courts have held that any rights not clearly granted in the title to a private owner remain with the state.

In many states, it is possible to own submerged lands outright (in fee simple), in which case the states do not retain property rights. This type of ownership stems from conveyances of submerged lands given prior to statehood, in accordance with international treaties, in Native American treaties, and in a few other special cases.[7]

In this report we focus, as a practical matter, on the leasing and ownership of submerged lands as tools for marine conservation, with little consideration of other tools. No tools or sites in the field should be considered in isolation. Moreover, the selection of sites and the use of all tools for marine conservation and management should be guided by overarching plans that recognize the regional ecosystem context of marine resources and diversity. This report is designed to add to the array of tools available for marine conservation and to spur creative thinking about the role of the public in conserving the nation's vital submerged lands.

II. *Conservation Leasing and Ownership of Submerged Lands*

The Nature Conservancy has been pioneering the development of new tools for marine conservation, the leasing and ownership of submerged lands, through science, policy and on-the-ground actions.[8] To date, The Conservancy has developed several on-the-ground projects in New York, Washington, and Texas. The Conservancy is also working with the Washington Department of Natural Resources (DNR) on their new conservation leasing policy, including the development of a training package for Washington DNR submerged land managers. Some of these activities are summarized in the case studies in this volume and in other works. The Conservancy is currently exploring or engaging in work in submerged lands leasing and ownership in a number of other states as well.

Conservation benefits achieved through the leasing and ownership of submerged lands include opportunities to restore ecologically and economically important species, protect diversity in sanctuaries, draw on substantial terrestrial experience in leasing and ownership, buy land cheaply, develop ecologically sustainable harvest practices, partner with fishermen and local communities to improve water quality, create control areas for research, and partake in local management forums as a direct stakeholder.[9] Conservation buyers need to consider that community sentiment does not always favor private rights on submerged lands. Additional considerations include: conservation interest in submerged lands could affect prices, association with incompatible aquaculture practices will be detrimental, and enforcement of restrictions can be difficult.

Conservation leasing and ownership tools are distinct from Marine Protected Areas (MPAs) and marine reserve tools. There is significant controversy about the use of MPAs and marine reserves in the U.S., stemming from the novelty and top-down, regulatory development of MPAs in the States. As shown in this report, conservation leasing and ownership tools differ substantially from marine reserves; these differences need be articulated to avoid confusion among partners and stakeholders. Conservation leasing and ownership is market-based, bottom up, and is already a part of existing state policy (e.g., there are thousands of state submerged land leaseholders nationwide).

Often the leasing of state submerged lands requires some 'productive use'. In our initial surveys, we have found that 'productive use' is not always clearly defined. A productive use can often be interpreted in terms of increasing harvest levels on specific leases. It appears that these are rarely monitored and there is little consideration of how these productive uses may degrade other uses and ecosystem services on the leases. Nonetheless, productive use requirements will affect the type of conservation projects allowable on leases. Investments in restoration that have tangible results to managers in the shortest time will appear to be the most productive. Investments in preservation will likely require a greater level of clarity in terms of measurable results; however, it should be possible to demonstrate these results even on relatively small plots or areas.

The projects by The Conservancy and others, to date, show that it is possible to lease and own submerged lands for conservation purposes in some circumstances. Reactions to these tools include excitement about their potential. There are also uncertainties because submerged lands ownership and leasing spur new discussion about the applicable law and policy. Indeed, the perceptions regarding the law and policy by the public, users, and gov-

ernments is often based on incomplete analysis. Some of the key questions typically raised include:

- Does existing law or policy allow for conservation leasing and ownership in any states?
- Does existing law or policy allow uses to be excluded in furtherance of conservation and restoration?
- What precedents exist that could either support or hinder conservation leasing and ownership?
- If new law or policy is needed, what characteristics would best support conservation leasing?
- Are there states where current law or policy is most amenable to these changes?
- Will claims for conservation leasing/ ownership conflict with or weaken the Public Trust Doctrine?
- Should NGOs pay to protect resources that should already be managed sustainably by government?

To explore the promise, pitfalls, and options for further applications of conservation leasing and ownership of submerged lands, The Conservancy in partnership with Roger Williams School of Law commissioned a series of working papers to review case studies of conservation leasing and ownership and examine legal implications of applications of these tools. We then convened a workshop of lawyers, academics, practitioners, federal and state coastal managers to review these papers, discuss the questions above and suggest next steps that should be taken to further the use of these tools for conservation. The papers contained in this volume are the result of these reviews and discussions. The papers address the evolution of submerged lands management, applications of the Public Trust Doctrine, conflicts between users including coastal landowners, existing marine use policies, and strategies for conservation leasing and ownership of submerged lands.

These tools should be useful to practitioners at a variety of levels from academia, agencies, business, and non-governmental organizations such as land trusts. These tools may be useful to coastal land trusts throughout the U.S. and elsewhere. These land trusts have rarely been involved in marine conservation, partly because of the assumption that their primary skill sets in land acquisition and easement had little place in the marine environment; that attitude should be challenged. Business interests may want to be aware of opportunities to receive tax breaks for their donations of submerged lands for conservation. The Conservancy has received or handled submerged lands donations in New York from an aquaculture company and in Oregon from a timber company. These tools may also be useful to staff in state management agencies that are interested in allowing opportunities for conservation leasing under existing policies or adapting policies to balance resource use with enhancement and preservation.

This book is just one part of a series of resources that is being developed into a toolkit on the Conservation Leasing and Ownership of Submerged Lands. The aim is to get these tools into the hands of practitioners and managers so that they can be used sensibly.

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[1] Primary Author: Michael W. Beck, The Nature Conservancy.

[2] U.S. EPA. 2001. National Coastal Condition Report. US EPA, Washington, DC. The H. John Heinz III Center, 2002. The State of the Nation's Ecosystems: Measuring the Lands, Waters, and Living Resources of the United States, The H. John Heinz III Center, Washington, DC. Jackson, J. B. C. *What was Natural in the Coastal Oceans?* in Proceedings of the National Academy of Sciences of the United States of America 98:5411-5418 (2001).

[3] Slade, David, Kerry Kehoe and Jane Stahl, Putting the Public Trust Doctrine to Work, Second Edition (Coastal States Organization, 1997) [hereinafter Slade, et. al.].

[4] Beck, et. al., *New Tools for Marine Conservation: The Leasing and Ownership of Submerged Lands*, Conservation Biology 18: 1214–1223 (2004) [hereinafter Beck, et. al.].

[5] Archer, J. H., D. L. Connors, K. Laurence, S. C. Columbia, and R. Bowen. The Public Trust Doctrine and the Management of America's Coasts (University of Massachusetts Press, Amherst 1994).

[6] *See* Slade, et. al. (1997).

[7] *Id.*

[8] *See generally*, Beck, et. al. (2004).

[9] *Id.*

CHAPTER 2 THE LEGAL CONTEXT OF SUBMERGED LANDS LEASING & OWNERSHIP[10]

The ancient commons, whose demise is oft referred to as the tragedy of the commons, are still very much in existence when it comes to submerged lands, which serve an increasing number and variety of uses. The rules for their use have long been in existence and have framed not only the management policies applicable to them but also the perceptions of what is and is not allowed on these lands and the waters above them.

Chapter 2 provides the legal backdrop for discussion of conservation leasing and ownership, beginning with those laws and rights developed through our system of common law and concluding with legal authorities based on statutory and constitutional provisions. While a comprehensive analysis of each statute and policy is beyond the goal of this volume, the chapter provides an analysis of the laws applicable to submerged lands rights, interests, and jurisdiction with references to significant case law, emerging legal issues, and timely examples of these laws in use.

I. *Common Law Rights and Responsibilities*

Often, the Public Trust Doctrine (Doctrine) is the first legal and policy concern raised regarding the leasing or ownership of submerged lands. The Doctrine, derived from ancient Roman law, grants title of certain submerged lands to states along with the responsibility for managing those lands in trust for citizens of the states. Over time, the Doctrine has evolved as a diverse and dynamic set of legal principles. Some states have taken the Doctrine beyond its common law status and codified it, to some extent, establishing the scope and extent of public and private interests. While incorporating the Doctrine can provide a state the means to balance public and private uses, coastal user groups and coastal landowners also have interests in the resource. This chapter discusses these interests and authorities to provide the context for specific submerged lands leasing and ownership activities.

A. Public Trust Doctrine

Uses and management of marine resources have evolved within the frame of the Public Trust Doctrine, the origins of which date back at least to the time of the Roman Empire. Although public ownership is one of the primary features and most frequently defines Public Trust issues, the essence of the Public Trust Doctrine is the right of the public to use navigable waters and their shores. Historically, the availability of these lands and waters for public use has been crucial for travel, transportation of goods and sustenance. The Doctrine is built upon the recognition of the need to protect the public's continued use and benefits from these lands.

Though the Doctrine is intended to preserve public uses of navigable waters and the lands beneath, it has long recognized private uses of submerged lands. The creation of private interests in submerged lands has been found to be consistent with the Public Trust Doctrine subject to certain qualifications and limitations. As described in detail below, the leasing of submerged lands has been commonly practiced by states. Extending leasing to new purposes such as conservation is not inconsistent with the Doctrine; however, it should not be assumed that because conservation leasing serves a public purpose, potential interference with protected public rights is not a concern.

While the Doctrine can provide a strong foundation in principles for resolving potential leasing concerns, as a judicially enforced common law doctrine, it is poorly suited for striking a predictable balance between public and private uses. Effective application of the Doctrine to submerged lands leasing requires the establishment and implementation of well thought out administrative programs. In those states where such programs are already in place, additional considerations may need to be incorporated into the programs to take into account the unique nature of conservation leasing.

1. The Doctrine's Boundaries

The original Roman principles descended to the laws of England, Spain, France, the Dutch, and their colonies. Under the English common law, lands covered by tidewaters or subject to the ebb and flow of the tide were considered sovereign lands owned by the monarch but impressed with the public's right to use these lands. The North American colonies, and states following the American Revolution, followed the English common law as to sovereign ownership of tidelands with some variation. Under the constitutional principle that all new states join the Union on an equal footing with the original thirteen states, state ownership of tidelands was extended to all new states regardless of whether ownership was expressly conferred to the state.[11] In its sovereign capacity, each state has defined the Public Trust Doctrine through its courts and legislatures as thought best fit circumstances and societal needs. As a result, the application of the Doctrine by states has been diverse and dynamic.

The United States Supreme Court, in the 1894 case of *Shively v. Bowlby*,[12] stated that "there is no universal and uniform law upon the subject, but that each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public." The Court went on to say, "Great caution . . . is necessary in applying precedents in one State to cases arising in another."

Public Trust lands are owned by states as an incident of sovereignty, though ownership is not determinative of whether the Doctrine applies. These lands are distinct from other public lands. States, as trustees for the public, cannot freely dispose of Public Trust lands as they may other property. The essence of the distinction is the responsibility of each state to preserve public rights of certain uses in these sovereign lands. The terms used in describing public rights under the Doctrine — navigation, commerce and fishing — are broad in their meaning and include many different forms of use which continue to evolve, including the general description of "recreation."

The public nature of navigable waters as highways for navigation and commerce is self-evident. Use of the beach and waters for traveling was one of the original uses protected during the founding years of the nation, though the meaning of the term "navigation" changes from state to state.[13] The right of the public to use Trust lands and waters for recreational purposes has come to be specifically recognized in most states as a form of traditional use. In the earliest U.S. Supreme Court decision on Public Trust rights, *Martin v. Waddell*, the Court noted that the traditional public rights included the right to bathe[14]; recreational activities have been deemed to include "whatever is needed for the complete and innocent enjoyment" of Trust lands.[15] While public rights of recreational use are broadly construed in most states, in those states where private ownership of the shore extends to the low watermark, traditional Public Trust uses may be narrowly construed. Using the shore for recreational forms of traditional uses such as fishing and fowling may be permitted, but using the beach for the express purpose of sunbathing is not.[16]

The rights to public waters include the right to fish in navigable waters. The state, in its sovereign capacity, owns the fish within trust waters for the benefit of the people. (A corollary doctrine extends to wildlife law). As with other public uses of Trust resources, a state may regulate activities which might deplete or destroy fisheries. The preservation of Trust resources is a logical extension of the protection of public use of these resources and has been specifically recognized in several states as a Trust responsibility of the state.[17]

2. Applying the Doctrine

Throughout the nation's history, courts' attempts to apply the Public Trust Doctrine have been complicated greatly by the drive among individuals, communities and legislatures to promote commerce and industry, and, in doing so, establish private rights in trust lands. The filling and appropriation of trust lands was actively promoted as contributing to the public good. The line between activities which contributed to the public good and those which were an appropriation of a public resource was greatly blurred.

The tipping point, where the encroachment on public trust resources came to be generally recognized, came about in the latter part of the Nineteenth Century when transportation monopolies began to acquire control over ports and the railroads that led to and from them. In the historical case of *Illinois Central R.R. v. Illinois*,[18] the United States Supreme Court laid down principles to review private grants of trust lands holding that, by ceding control of the harbor to a private interest, the state had abdicated its responsibility to preserve the waters for the use of the public. The Court held that such grants were so contrary to the public interest that they were not within the legislature's power. What is most significant about the decision in *Illinois Central* is that the Court not only upheld the revocation of the grant, it found that such grants were void. The Court held that the state's responsibility under the Doctrine could only be fulfilled by the management and control of the property in the harbor to ensure that the public interest in these lands was protected. Case law throughout the nation has followed *Illinois Central* firmly establishing that despite legislative acts or the passage of time, the Public Trust Doctrine may be asserted to protect the public's interest in navigable waters and their shores.

Illinois Central established the standard for judicial review of grants of Public Trust lands. A sale must:

1) Be clear and unequivocal;
2) Serve a public purpose; and,
3) Not substantially impair trust resources and their use.

Clear and Unequivocal Intent. To create an exclusive interest in Trust lands, a legislature must do so in clear and unequivocal terms. Unlike the ordinary rule of property law in which ambiguities are generally to the detriment of the grantor, under the Public Trust Doctrine, any ambiguity is to the benefit of the preservation of the Public Trust interest. Private interests should not be raised by inference or presumption. Any doubt favors the preservation of the public interest.

The Public Purpose Requirement. The term "public purpose" has been broadly construed in most states. Generally, uses expressly authorized by legislatures have been upheld as satisfying the public purpose requirement. There are obvious dangers in defining "public purposes" too broadly. If it can mean anything, it means nothing. Without definite parameters, the ambiguity of the term "public purpose" could be exploited at great harm to Public Trust resources and uses.[19]

Some courts have applied a more exacting standard in determining whether a grant of Public Trust lands serves a public purpose by asking:

- What is the primary purpose?
- Who is the primary beneficiary?
- Are the public benefits merely supplemental or incidental?[20]

In an advisory opinion, the Massachusetts Supreme Judicial Court has stated that the test of whether the public purpose requirement is met is "whether the expenditure confers a direct public benefit of a reasonably general character ... as distinguished from a remote theoretical benefit ... and whether the aspects of private advantage ... are reasonably incidental to carrying out a public purpose in a way which is within the discretion of the Legislature."[21]

That states may derive revenue from leasing submerged lands does not satisfy the public purpose requirement. Courts have found that if the raising of revenue, in and of itself, were sufficient to satisfy the public purpose requirement then Public Trust lands would be indistinguishable from other public property to which no Trust responsibilities apply.[22]

The No Substantial Impairment Requirement. Courts are unaccustomed to weighing data to determine the benefits and harm of proposed new uses of Public Trust lands, these are determinations best left to legislatures and administrative agencies. However, courts may not allow legislatures and administrative agencies to rely on presumptions of legislative propriety or administrative discretion when trust lands are involved. Conclusory statements of no substantial impairment will not do. An administrative agency will be expected to demonstrate the expertise and concern for the public interest that it claims to possess.

The Doctrine applies differently in each state and the peculiarities of each state's application must be examined to determine how the doctrine will affect submerged lands leasing or ownership. While the Doctrine is the oldest submerged lands authority in most cases, it has been codified in some states or included in their Constitutions and joins other legal authorities in the states.

3. *The Doctrine & Leasing & Ownership of Submerged Lands*

Since the 1970's, the oyster industry in many parts of the country has collapsed due to a combination of disease, pollution and overharvesting; as a result, many leaseholds have lapsed. As shown below in the New York case study, the abandonment of leaseholds and fee simple title for the production of shellfish opens the door to conservation leasing and ownership. Even so, questions have arisen whether conservation leasing and ownership is permissible under the Doctrine.

Given the historical development and application of the Public Trust Doctrine, extending private stewardship to the acquisition of submerged lands leases or title appears to be consistent with the Public Trust Doctrine. Conservation is certainly consistent with meeting the public purpose requirement for the creation of private interests in submerged lands, but, historically the Public Trust Doctrine has been considered a use doctrine; thus, restricting uses for conservation purposes may place historically protected uses and purposes in conflict. The same applies in analyzing whether leasing or ownership substantially impair public rights. That analysis must extend beyond a resource assessment to whether public rights of use are substantially impaired. Among the issues that may arise in regards to conservation leasing are public access, impediments to navigation, preserving water-dependent uses, riparian rights and the transfer of leasehold interests. Conservation leasing and ownership is likely to raise new questions for policy-makers and courts as the practice evolves.

Ultimately, conservation leasing and ownership should occur within the scope of a compre-

hensive submerged lands management plan to shift the focus from reactive management towards stewardship. Incorporating Public Trust principles as key elements of comprehensive submerged lands programs can enhance the effectiveness of state submerged lands conservation and, to a greater extent, coastal management. The addition of conservation leasing and ownership programs may be particularly effective in strengthening the ability of private citizens and organizations to enhance public resources. As holders of a proprietary interest in the resource, they are likely to have greater standing than members of the general public in bringing claims to protect resources within leaseholds.

The prominence of the Public Trust Doctrine has varied with the changing focus of society. The evolution of the waterfront in the latter 20th century and the rise of private property claims over the last two decades have contributed to a resurgence of interest in the Public Trust Doctrine. Like other areas of law, the Public Trust Doctrine is a dynamic concept that has evolved to meet changes in society: viewed over time, the Doctrine has expanded and contracted according to the needs and priorities of each generation.

B. Riparian Landowner Rights

In the United States there is a long history of reconciliation of the public rights denoted above and private rights in navigable waters, tidelands and submerged lands.[23] Perhaps the most significant private right with regard to submerged lands is the adjoining owner's riparian rights. This section examines the effects that coastal landowner rights (most notably riparian/littoral rights) might have on leasing submerged lands and waters for conservation purposes.

Riparian, or littoral, rights are those enjoyed by owners of land adjoining navigable waters, including both tidal and non-tidal waters. Under English common law, the bundle of riparian rights included the right to:

- Access the water
- Wharf out[24]
- Acquire accretions; and
- Replace land lost to avulsion[25]

The right of water access (including the right to wharf out) is of primary focus for this discussion because it can affect the ability of entities to lease submerged lands for conservation purposes. However, analysis shows that the impact would likely be minimal and, even in states that accord private riparian rights a highly protected status, impact would be minimal – both in scope and geographic range.

The concept of riparian rights is a product of evolving 19th century American jurisprudence. Earlier authorities reflected the view that waterfront property owners possessed no rights to the use of the waterbody different from, or superior to, those of the general public.[26] The waterfront owner's adjacency to the water made it easier for her or him to gain access to the water to exercise public rights, but this access was permissive and could be cut off by the state, without compensation, at any time.[27] However, by the beginning of the 20th century, the view that waterfront property owners possessed unique, valuable rights as part of their ownership of waterfront property, of which they could not be deprived without compensation, prevailed.[28]

By the mid 20th century, the new mantra was that access to deep water is the "first and most basic right of the riparian owner."[29] The right of access protects the riparian owner's ability to reach the navigable portions of adjacent waters without unreasonable impediment, supports the riparian's right to wharf out,[30] and includes the right to erect structures in aid of navigation.[31] While this will apply differently state to state,[32] the U.S. Supreme Court in a 1894 decision noted that the common law riparian right can be modified by "charters, constitutions, statutes, or usages . . . ."[33] As recently as 1988, the Court has found that "it has been long-established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[34]

As uses of public trust waters and submerged lands have intensified, courts and legislatures have modified (and, in general, weakened) the common law riparian right of access – in many ways returning to the earlier 19th century interpretation. In attempting to find balance between public and private rights, law and regulation have modified the common law "to such an extent that what were previously regarded as riparian *rights* can often be described today as merely riparian *privileges*."[35] Every state has evolved differently.

For example, in North Carolina limits are placed on the riparian right of access in order to protect shellfish leaseholders, public trust uses of submerged land and water, and the estuarine environment. Docks and piers are limited in width and length and if they are proposed to extend over a shellfish lease or franchise, notice must be provided

to the owner or leaseholder.[36] Marinas are not allowed on leased submerged lands or submerged lands deeded by the state without written consent of the controlling parties.[37]

At the same time, North Carolina has made some provisions to protect the rights of riparian owners from offshore uses. For example, shellfish leases must be set-off 100 feet from developed shorelines unless the lessee and the riparian owner are the same person. The only other exception is when the riparian owner consents by notarized statement to a lease being closer than 100 feet from their shoreline. [38] There is no clear definition as to what constitutes a developed shoreline.

Also, in North Carolina riparian owners can obtain an easement in lands covered by navigable waters.[39] Easements are only granted for waters directly in front of the tract owned by the riparian owner and can only extend to deep water. This area is often referred to as the "riparian use area" and it is often used in conjunction with building a pier or dock to reach deep water but the easement can be used for "all other reasonable, nonexclusive public uses as specified in the easement application."[40] The statute is clear in stating the easement holder obtains no additional rights to interfere with the approval, issuance, or renewal of shellfish or water column leases or to interfere with the use or cultivation of existing shellfish leases, water column leases or shellfish franchises.[41]

Another consideration is whether or not a landowner has "vested" riparian rights (those that are secured and being exercised) or non-vested rights. The U.S. Supreme Court has held that once vested, the owner can only be deprived of her right in accordance with established law, and if necessary, that it be taken for the public good, upon due compensation.[42] Despite this case, states differ in their determination of whether and when riparian rights vest and thus become compensable property rights. For example, the state of Oregon has sought to impose submerged lands leases upon existing wharves, threatening ejectment actions against those who refused to enter into a lease agreement. A private company had built its wharf before the leasing program was enacted, and challenged the program, arguing that the state's proprietary interest in the submerged lands underlying navigable waterways did not empower it to charge rent to landowners who were merely exercising their riparian rights to build structures in aid of navigation over the submerged lands, and that the leasing program therefore resulted in a taking of their riparian rights without compensation.

The Oregon Supreme Court held that under Oregon law, riparian "privileges" exist only until the State decides otherwise. Judicial recognition that a privilege exists until prohibited by the legislature does not entitle those who choose to exercise that privilege "to assume that the legislature will not act to limit or prohibit it in the future." Consequently, in Oregon, leases might be required of riparian owners who have exercised privileges associated with that status in the past.

In considering what effect coastal landowner rights might have on leasing submerged lands and waters, several key questions emerge for consideration by states.

- How does the state define riparian rights?
- Is there an identified "riparian use area" and if so, what special rights are accorded the riparian owner in this area? For example, is there a set-off requirement for certain uses along developed shorelines (including a set-off for leases)?
- Is there a vested right?
- Lastly, how are these rights tempered by public trust rights and the rights of other adjoining riparian owners? For example, even if riparian rights are protected, does this exclude other uses – including the right to lease?

Other legal authorities temper the common law rights of landowners and the public through the Public Trust Doctrine.

II. *Other Legal Authorities*

Despite legislative acts or judicial opinions, there are few final answers in regards to the Doctrine; a static view of the Doctrine would deprive succeeding generations of the dynamism necessary for the Doctrine's vitality. Other legal authorities that apply to submerged lands often offer more certainty regarding state jurisdiction, authority, and the public and private rights involved. This section provides statutory and constitutional provisions relevant to submerged lands management focusing on state jurisdiction, federal jurisdiction within state waters, and federal jurisdiction outside of state waters.

A. State Jurisdiction over Submerged Lands

1. Submerged Lands Act

State and federal jurisdiction over submerged lands in the United States is governed by the Sub-

merged Lands Act of 1953. The Submerged Lands Act was enacted in response to a 1947 Supreme Court ruling which invalidated the State of California's claim of ownership of the three-mile territorial sea and its right to lease submerged lands to oil companies to extract oil and gas resources.[43] The Court ruled that the federal government had paramount rights in and power over the territorial sea, including full dominion and control of oil and other resources in trust for the people of the United States.

The Court's decision generated so much controversy that it became a major issue in the 1952 Presidential campaign and was overturned in 1953 when Congress enacted the Submerged Lands Act. The Submerged Lands Act conveys title and ownership of the lands and natural resources of the three-mile territorial sea to the states, including the right and power to manage, administer, lease, develop and use such lands and resources.[44] "Natural resources" include oil, gas and other minerals, as well as fish, shrimp, oysters, sponges, kelp and other marine animal and plant life.[45] The Act conveys to the states all lands beneath "navigable waters," including all lands covered by tidal waters up to the mean high tide line seaward to three geographical miles from the state's coast line, or to the international boundary in the Great Lakes. States were also granted ownership rights beyond three geographical miles if so provided in its constitution or laws prior to the time such State became a member of the Union.[46]

Under these provisions, Texas and Florida successfully claimed "historic boundaries" extending ownership to three marine leagues (about ten geographical miles) from shore in the Gulf of Mexico. The boundaries of Great Lake states extend to the international boundaries with Canada, some as far as sixty miles. And, in some instances, the coast line of the state is drawn at the seaward line of formations such as barrier islands, allowing the state to claim title to submerged lands landward (Mississippi claims the ten to thirteen mile Mississippi Sound landward of its Gulf of Mexico barrier islands). All other Atlantic and Pacific coast state boundaries extend three miles seaward from the coast. The U.S. Proclamation of a twelve-mile territorial sea in 1988 for international purposes does not affect the grant of ownership rights to the states to the three-mile territorial sea under the Submerged Lands Act.[47]

The Submerged Lands Act also releases all right, title and interest of the federal government to the lands and natural resources within the three-mile territorial sea to the states, and reaffirms the jurisdiction, power and control of the U.S. beyond state waters.[48] However, within state waters the U.S. retains a navigational servitude for the constitutional purposes of commerce, navigation, national defense and international affairs which is paramount to but does not include proprietary rights of ownership interests vested in the states.[49] Thus the Submerged Lands Act recognizes concurrent federal and state jurisdiction over navigable waters, submerged lands and the natural resources within those lands and waters.

2. State Submerged Lands Leasing Laws

Pursuant to their ownership interests under the Submerged Lands Act, coastal states (and/or local governments) have adopted laws to lease submerged lands in state waters.[50] A submerged lands lease is a contract with the state granting a private or public entity the special use of submerged lands generally for a rental fee. The lease and private use of submerged lands is allowable so long as it does not negatively impact the public interest in such lands as set forth in the state's constitution, laws and the Public Trust Doctrine.

Leases for activities on submerged lands are commonly required for wharfs, docks, marinas, piers, seawalls, jetties, water intakes, dredging, oil, gas and mineral extraction, aquaculture, and other uses that occupy submerged lands. Not all submerged lands may be leased. For example, some of Florida's submerged lands have been designated as aquatic preserves and permanently protected under the Florida Aquatic Preserve Act of 1975 because of their unique biological, aesthetic, or scientific value.[51] Washington State also protects certain submerged lands as aquatic preserves.[52]

States have adopted a variety of approaches to leasing submerged lands. Some have specific criteria to review adverse impacts on public trust uses, limits on the size or character of the lease area (e.g. no natural beds), limits on the length of the lease term and conditions of renewal, specific preferences for uses, competitive bid mechanisms, limits on resources controlled by the lessee, and reservation of leased areas for other pubic trust uses such as recreation, fishing and navigation.[53] While states utilize a variety of approaches, some common features for leasing submerged lands for aquaculture include: scope of the lease (e.g., freshwater, marine, bottom and water column); type of lease (e.g., shellfish, finfish, kelp); lease size and duration (e.g., 50-5,000 acres, 1 year-25 years); exclusivity (protection against pollution, theft and trespassing); and lease fees, bonds and competitive bidding provisions.[54] Anyone seeking a submerged lands lease must carefully review and comply with state procedures.

2a. Aquaculture Leasing: Maine

While reviewing each state's leasing program is beyond the scope of this report, Maine's aquaculture leasing program contains some provisions that are useful to review. The State of Maine has a comprehensive aquaculture siting and leasing law that coordinates the responsibilities of the state's Department of Environmental Protection (DEP) and Department of Marine Resources (DMR). Leases may also be issued by the DMR for scientific research. Before a lease can be granted, the applicant must receive a Water Quality Certificate from the DEP affirming that the proposed project will not have a significant adverse effect on water quality or violate state water quality standards. Less rigorous requirements are applicable for bottom culture of indigenous shellfish species than finfish aquaculture.

Prior to submitting an application for an aquaculture lease in Maine, each applicant must first meet with the DMR. Application fees range from $100-$1,000 for leases ranging from 1-100 acres in size, and baseline site characterization data must be submitted for applications that involve discharges. No person may lease more than 250 acres. Copies of completed applications are sent to the municipal officer, harbormaster, the Corps of Engineers, relevant state agencies and waterfront landowners within 1,000 feet of the proposed site. DMR may schedule a public scoping session at which the applicant can describe the proposal and members of the public can ask questions and voice concerns. DMR then conducts a site visit, dives the site, takes water quality samples and makes other visual observations regarding uses, access and navigation. It prepares a site report, and may conduct a public hearing where the applicant, DMR, other state, local and federal agencies, intervenors and the public can testify. A proposed decision is prepared by a hearing officer and sent to the Commissioner of the DMR with comments from legal parties. The Commissioner must make a final decision on the lease within 120 days of the hearing.[55]

Maine law requires that aquaculture leases not unreasonably interfere with certain uses: access of riparian owners, navigation, fishing, shellfishing, significant wildlife habitat, marine habitat, the ability of the site and surrounding area to support existing ecologically significant flora and fauna, and public use and enjoyment within 1,000 feet of beaches, parks and docking areas. Leases must also not result in unreasonable noise or light, and comply with visual impact criteria with respect to color, height, shape and mass.[56] The Commissioner can impose conditions on the lease to protect multiple uses, support ecologically significant flora and fauna, and preserve the exclusive rights of the lessee. The lessee must record the lease in the registry of deeds, publish notice in the newspaper, submit annual reports to the DMR, secure a performance bond from $500-$25,000 for any structures and discharges, and pay an annual rental fee of $50 per acre. After the lease is granted, the area must be monitored and the lessee may be required to provide information concerning bathymetry, benthic habitat, water column effects, feeding and production, introduction and transfer, disease, the use of chemicals, and any other information deemed necessary.[57]

3. State "Productive Use" Requirements

To encourage commercial shellfish production, many states have adopted productive use requirements, planting and production quotas, and/or active lease requirements in state leasing laws that could impede conservation leasing efforts even though the amount of required production or activity varies by state and restrictions are often not strongly enforced.[58] Other states do not require planting or harvesting quotas (ME, DE, FL, OR, WA), and offer alternatives for conservation-oriented leasing activities for research sanctuaries or reserves.

4. State Constitutional Provisions

State constitutions can limit submerged lands leasing if the state agency incorporates the Public Trust Doctrine or contains specific obstacles to leasing. Virginia's constitution, for example, prohibits the leasing, renting, or selling of natural oyster beds, and requires such beds to be held in trust for the benefit of the people of the Commonwealth.[59] Other state constitutions have provisions that can be construed as supportive of conservation leasing. For example, the Hawaii constitution provides that all public natural resources are held in trust by the state for the benefit of the people, and requires the state to conserve and protect Hawaii's natural beauty and all natural resources for the benefit of the people, including land, water, air, minerals and energy sources.[60] The Massachusetts constitution provides that it is the right of the people of the state to clean air and water and the natural, scenic, historic and aesthetic qualities of the environment. It also declares as a public purpose the right to conservation as well as development and the utilization of natural resources, and requires a two-thirds vote of the legislature for any change in use of public trust lands or

easements.[61] Provisions in the constitutions of North Carolina and Pennsylvania proclaim similar rights of the people of the state to clean air and water and the preservation of natural resources.[62]

Conservation leasing is consistent with state constitutions that provide a right to clean water and conservation, or require the state to conserve natural resources. These provisions can be cited in support of conservation leasing even in states with laws that may provide other roadblocks (like productive use requirements) because state statutes must be consistent with constitutional requirements. However, these provisions will not help in states like Virginia where the constitution prohibits leasing natural oyster beds.

B. Federal Jurisdiction over Submerged Lands within State Waters

1. The Navigational Servitude and the Commerce Clause

As noted above, the ownership interests of states over submerged lands within the 3-mile territorial sea are subject to the federal government's navigational servitude and paramount constitutional rights over commerce, navigation, national defense and international affairs as specifically reserved under the Submerged Lands Act.[63] These federal rights do not include ownership or proprietary interests. But they do include the right of the federal government to regulate commerce with foreign nations and among the states under the Commerce Clause.[64] These federal rights within state waters can affect submerged lands leases in a number of ways.

2. The Rivers and Harbors Act of 1899

Section 10 of the Rivers and Harbors Act of 1899 exercises the federal navigational servitude by prohibiting the construction of any wharf, pier, breakwater, jetty or other structure, or excavating, filling or modifying the navigable waters of the U.S. without authorization of the U.S. Army Corps of Engineers.[65] These provisions extend federal jurisdiction over the obstruction of tidal waters to the mean high water mark in its natural, unobstructed state, including the right to regulate activities on former tidelands that are no longer navigable because they have been diked and filled.[66] Thus leasing and other activities that obstruct navigation within state waters from the mean high water mark to the seaward limit of state jurisdiction require the approval of the Corps of Engineers under Section 10 the Rivers and Harbors Act.

Although section 10 requires Corps' permits for obstructions to navigation, Corps' jurisdiction is not limited to evaluating only navigational impacts on submerged lands. Federal courts have interpreted section 10 also to authorize the Corps to evaluate the environmental impacts of houseboats discharging pollutants into navigable waters,[67] and the filling of tidelands to build a trailer park.[68] Therefore, state submerged lands leasing activities that obstruct navigation must be reviewed for compliance with federal navigational and environmental requirements under the Rivers and Harbors Act, as well as other federal laws such as the Clean Water Act and the National Environmental Policy Act.[69] The jurisdiction of federal agencies under these laws may affect conservation leasing activities where leasing would, for example, exclude vessel traffic or restrict public access.

3. The Clean Water Act Wetland Permits

Federal jurisdiction over submerged lands also extends to non-navigable wetlands adjacent to waters that are susceptible to use in interstate commerce, even if not subject to frequent flooding, as well as waters subject to the ebb and flow of the tide under section 404 of the Clean Water Act.[70] Discharges of dredged and fill material into such wetlands requires a permit from the Army Corps of Engineers pursuant to guidelines adopted by the EPA.[71] Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions," including swamps, marshes, bogs and similar areas.[72] Permits are not required for normal farming, ranching or silvaculture activities,[73] or for discharges into certain isolated wetlands used by migratory birds.[74]

NPDES Permits. Most states have been delegated the authority by the EPA to issue National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into state waters under section 402 of the Clean Water Act.[75] For those states that have not been delegated permit authority (i.e. Alaska, Massachusetts, New Hampshire and U.S. territories in the Pacific and Caribbean), a separate federal permit from the EPA is required for the discharge of pollutants into the navigable waters of the state or territory. NPDES permits, whether issued by states or the EPA, must comply with specific effluent limits and water qual-

ity standards established under the Clean Water Act, and must "restore and maintain the chemical, biological, physical integrity of the nation's waters."[76]

Discharges from activities such as floating fish farms require NPDES permits.[77] Fish farms that exceed certain thresholds (e.g., harvest more than 20,000 pounds per year of cold water species and use more than 5,000 pounds of feed) are considered "concentrated aquatic animal production facilities" and "point sources" of pollution by the EPA and are required to apply for a NPDES permit.[78] Pollutants discharged from fish farms include feed, fish feces, pesticides, antibiotics, and the copper that line the nets as well as the fish themselves.[79] A Maine federal court decision found that fish can be considered "pollutants" where they are non-native species that do not naturally occur in state waters and therefore constitute "biological material" within the definition of the Clean Water Act.[80] The designation of non-native fish as pollutants can have Clean Water Act implications if the facility meets the "point source" threshold, or is considered a "significant contributor" of pollution because of its location, quality of waters, capacity, pollutants and other factors deemed relevant by the EPA.

However, it should be pointed out that case law on this issue is not well settled. A Washington State court found that although the release of Atlantic salmon is regulated under the NPDES permit program, it is not "pollution" within the meaning of state law.[81] In another case from Washington State, a federal appeals court held that mussel-harvesting facilities were not "point sources" with the meaning of the CWA because the mussel shells, feces and other byproducts come from the natural growth and development of mussels and are not waste products.[82]

C. Federal Jurisdiction over Submerged Lands Beyond State Waters

1. Outer Continental Shelf Lands Act and Coastal Zone Management Act

While states have primary jurisdiction over submerged lands within the three mile territorial sea and beyond three miles where states have extended offshore jurisdiction, the federal government has jurisdiction beyond state waters within the 200-mile Exclusive Economic Zone (EEZ) and continental shelf. President Ronald Reagan proclaimed a 200-mile Exclusive Economic Zone (EEZ) for the U.S. in 1983.[83] This is consistent with international law under the U.N. Law of the Sea, which the U.S. has not ratified but recognizes as customary international law. The U.S. also proclaimed jurisdiction and control over "the natural resources of the subsoil and seabed of the continental shelf beneath the high seas contiguous to the coasts of the U.S. and appertaining to the U.S."[84] The continental shelf, as defined under the 1958 Geneva Convention on the Continental Shelf, is the submerged top of the continental platform adjacent to the coast to a depth of 100 fathoms (600 feet) and beyond to the depths of exploitability of the natural resources of the seabed and subsoil, but extending no further than the inner edge of the deep seabed. Federal jurisdiction over submerged lands therefore extends from the seaward boundaries of state waters (three miles in most cases) to the 200-mile EEZ and beyond to the extent of the continental shelf.

Outer Continental Shelf Lands Act. When Congress established state and federal boundaries for offshore waters under the Submerged Lands Act, it created no mechanism to lease the mineral resources of the EEZ and continental shelf. Therefore, the Outer Continental Shelf Lands Act (OCSLA) was enacted in 1953 to authorize the Secretary of the Interior, acting through the Minerals Management Service, to lease tracts of the OCS for oil, gas and mineral exploration and development. The Act establishes four distinct leasing stages: the formulation of a five-year leasing plan; individual lease sales; exploration activities by lessees; and development and production of oil and gas resources. States are authorized to participate in each phase of the process through the submission of comments to the Secretary of the Interior,[85] through the National Environmental Policy Act,[86] and through the federal consistency provisions of the Coastal Zone Management Act (CZMA).[87]

Coastal Zone Management Act. Under the CZMA, federal plans of exploration or development and production from areas leased under the OCSLA that affect any land or water uses or natural resource of the coastal zone must be certified by the coastal state to be in compliance with the enforceable policies of the state's approved coastal management plan. The CZMA consistency provisions apply to all federal permits and activities outside the coastal zone that affect the land and water resources of state coastal zones.[88]

2. Ocean Discharge and Dumping Requirements

There is no specific federal law to govern leasing for purposes other than oil and gas development on the OCS. Therefore, applicants seeking federal leases for other activities (such as aquaculture and conservation leasing) will need to comply with a number of other federal laws including section 10 of the Rivers and Harbors Act (discussed earlier), section 403 of the Clean Water Act, and section 102 of the Marine Protection, Research and Sanctuaries Act.

Ocean Discharges. Activities that result in discharges into ocean waters must receive an NPDES permit under section 403 of the Clean Water Act that complies with EPA ocean discharge guidelines.[89] Under the Clean Water Act, a permit for animal production facilities such as aquaculture operations is required only if the facility is found to be a significant contributor of pollution.[90] It is unlikely that conservation leasing would pose a problem under section 403 unless it was sited in a special area like a marine sanctuary or national park where it could conflict with recreational uses or other activities.[91]

Ocean Dumping. Under the Marine Protection, Research and Sanctuaries Act (or Ocean Dumping Act) the EPA is required to ensure that material transported for ocean disposal must not "unreasonably degrade or endanger human health, welfare or amenities, or the marine environment, ecological systems or economic potentialities."[92] The Act prohibits dumping of radiological, chemical and biological warfare agents and high-level radioactive wastes and medical wastes, and all industrial wastes and sewage sludge except in emergencies.[93] The Act requires a permit from the Corps of Engineers for dumping dredged material into ocean waters,[94] but exempts the deposit of oyster shells or other materials for the purpose of "developing, maintaining, or harvesting fisheries resources" if those activities are otherwise regulated or authorized by law.[95] The EPA can override a Corps permit for the disposal of dredged material if it finds that dumping will result in "unacceptable adverse impacts" on shellfish beds, spawning and breeding areas, wildlife, fisheries or recreational areas.[96] Like the ocean discharge criteria, it is unlikely that conservation leasing would fail to meet the standards of the MPRSA. However, conservation leases may require EPA and Corps approval under both laws depending on the kind of activity proposed.

D. Regulatory Role and Private Property Rights

As noted above, private ownership of submerged lands generally ends at the high tide line except in five states that have historically allowed ownership to the "ordinary low water mark."[97] Privately owned tidelands in these states can not be leased by the state although private tidelands are still subject to the public trust to the high tide line. States that lease publicly owned tidelands are generally not subject to the same private property constraints that apply to state regulation of private property on land. However, while state actions on submerged public trust lands may be less vulnerable they are not immune from "takings" challenges.[98]

As a practical matter, the definition and analysis of a regulatory taking is complex and is beyond the scope of this report; however, in the context of conservation leasing and ownership, it is important to note that the government can "take" private property either directly through eminent domain or indirectly through regulation. It is relatively easy to determine when the government directly and physically takes an owner's property for a dam or highway. In such cases, the government is required to compensate the owner for the loss of the property. However, it is far less clear when government regulation is so burdensome that it violates the Fifth Amendment prescription that no "private property be taken for public use, without just compensation."

The courts have struggled with the definition of a regulatory taking since the 1922 U.S. Supreme Court's decision in *Pennsylvania Coal* in which the Court held that "while property may be regulated to a certain extent, if regulation goes *too far*, it will be recognized as a taking."[99] Unfortunately, "too far" has never clearly been defined. The Supreme Court has stated that such a determination is essentially an ad hoc factual inquiry that considers the economic impacts of the regulation, the extent to which it interferes with the landowner's reasonable investment-back expectations, and the nature of the government action; i.e. do the public interests promoted by the regulation outweigh the burdens on the owner's property rights.[100] Subsequent cases have added to the complexity by determining, among other things, that a taking generally occurs where the regulation results in a physical occupation of the property;[101] denies an owner economically viable use of the property and is not within the background principles of state common law nuisance and property law;[102] or where there is no clear nexus or connection between the govern-

ment regulation and the burdens imposed by the proposed use of the property.[103]

Managing state-held public trust lands and waters is an entirely different proposition than regulating privately-held land.[104] In the former, the state is managing the use of property that it owns and manages for public trust purposes; in the latter the state is regulating the use of privately owned property under its police powers. However, state actions may raise takings challenges when they, for example, impose restrictions on privately held public trust lands, require access to trust lands that affect private property, or expand the scope of public activities.[105]

For example, the State of South Carolina was sued for denying a permit to build a bulkhead and fill two coastal building lots on tidelands. The South Carolina Supreme Court ruled that, under the Public Trust Doctrine, "the state has the exclusive right to control land below the high water mark for the public benefit," and private "ownership rights do not include the right to back-fill or place bulkheads on public trust land and the state need not compensate him for the denial of permits to do what he cannot otherwise do."[106] Another example involved a takings challenge against the State of Washington for adopting coastal and tidelands regulations that prevented the dredging and filling of tidelands to build a residential community. A development company alleged that the state had taken its property without compensation, even though the land in question was tidelands. The court held that the company purchased the tidelands from the state subject to the public trust and therefore had no reasonable investment-backed expectation of any use other than public trust uses – in this case aquaculture and recreation were the only permitted uses.[107] However, the court also noted that if the state prohibited uses that were not inconsistent with the public trust, and denied all economically viable use of the property, the regulation could constitute a taking.[108]

To the extent that protecting and restoring the marine environment is considered consistent with the Public Trust Doctrine in a state, leasing publicly-owned submerged lands for conservation purposes should generally be permitted. However, lessees must be aware of potential takings issues when access to submerged lands requires crossing private property, or where the use of submerged lands could damage the value of adjacent property in some way. Such cases are unlikely to be successful because a conservation lease is not likely to deny an owner all economically beneficial or productive use of his or her property or effect a physical occupation. Nevertheless, lessees should be cognizant that takings litigation is always a possibility even where submerged lands are involved.

E. Conclusions on Legal Authorities for Submerged Lands Management

While states were granted ownership of submerged lands within three miles of their coasts (and beyond three miles in states with extended jurisdiction) under the Submerged Lands Act in 1953, state ownership and the right to use and lease such lands are not unlimited. State leases must not interfere with the federal government's navigational servitude and paramount constitutional rights over commerce, navigation and national defense. This may prevent leases from obstructing navigation or interfering with commerce among the states. State leasing is also subject to federal permitting authority under certain laws including the Rivers and Harbors Act, the Clean Water Act, and the National Environmental Policy Act. These laws may restrict certain activities proposed on submerged lands such as the discharge of pollutants, the obstruction of navigation or the cultivation of non-native species.

State submerged lands leases must also comply with the Public Trust Doctrine, which varies from state-to-state but generally preserves public rights of access, navigation, recreation, and fishing. But, it is important to note that not all of these uses have to be allowed in every single plot or area; for example, the public cannot run its boats through or fish in aquaculture pens. In some states, public trust rights include the protection of aquatic wildlife and the ecological system. In such states, the Public Trust Doctrine may provide support for conservation leasing. State leases are also subject to state constitutional provisions which can limit areas leased (e.g. natural oyster beds), but can also provide support for conservation leasing by requiring the conservation of state's natural resources.

States have adopted a variety of approaches to leasing submerged lands. However, despite disparities, state leasing laws generally have certain common features which include specifying zones that can be leased, activities permitted, size and duration of leases, exclusivity of lessees, and lease fees and rents.[109]

Finally, conservation leasing beyond state waters falls under the jurisdiction of the federal government under a number of different laws. The Outer Continental Shelf Lands Act authorizes the Department of the Interior to issue federal leases for oil, gas and mineral extraction within the continental shelf and EEZ. However, there is no specific federal leasing authority for other activities such as aquaculture, wind farms, and conservation projects. Applicants for such projects in federal waters must determine if their activities fall under a variety of other federal laws including the Rivers and Harbors Act, the federal consistency provisions of the Coastal Zone Management Act, the Clean Water Act ocean discharge requirements, the Ocean Dumping Act, and the National Environmental Policy Act.

The requirements of the common law rights and responsibilities and state and federal laws will depend on the nature of the leasing and ownership activities, as shown in the following case studies in Washington, New York and North Carolina.

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[10] Primary Authors: Tim Eichenberg, Attorney at Law; Kristen M. Fletcher, Rhode Island Sea Grant, Roger Williams University; Kerry Kehoe, Maryland Department of Natural Resources.

[11] Pollard's Lessee v. Hagan, 44 U.S. 212 (1845).

[12] 152 U.S. 1 (1894).

[13] *See* Adams v. Pease, 2 Conn. 481, 483 (1818); Cobb v. Davenport, 32 J.J.L. 369 (1867); West v. Slick, 313 N.C. 33 (1985).

[14] Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842).

[15] Town of Brookhaven v. Smith, 188 N.Y. 74, 87, 80 N.E. 665, 670 (1907).

[16] *See* Bell v. Town of Wells, 557 A.2d 168 (1989).

[17] *See* Nat'l Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709, *cert. denied*, 464 U.S. 977 (1983).

[18] 146 U.S. 387 (1892).

[19] *See* People v. Chicago Park District, 66 Ill. 2d 654, 460 N.E.2d 773 (1976).

[20] Lake Michigan Federation v. Corps of Engineers, 742 F. Supp. 441 (N.D. Ill., 1990).

[21] Opinion of the Justices, 383 Mass. 895, 424 N.E.2d 1092 (1981).

[22] Hayes v. Bowman, 91 So. 2d 795 (Fl. 1957).

[23] *See* SLADE, ET. AL. (1997).

[24] Primarily, the right to wharf out includes building docks but has been expanded in certain circumstances to include the building of bulkheads.

[25] *Id.* Dellapenna, Joseph W., *Introduction to Riparian Rights* in 1 WATER AND WATER RIGHTS 89-90 (Robert E. Beck, ed. 1991) [hereinafter Dellapenna]. Avulsion is the sudden and perceptible alteration of the shoreline by action of the water or a sudden change of the bed or course of a stream whereby it abandons its old bed for a new one.

[26] Eminent Domain, sec. 94, p. 116-17; Kalo, Joe, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the 21st. Century*, draft, 2004.

[27] KALO, ET. AL., COASTAL AND OCEAN LAW (West 2002).

[28] HENRY P. FARNHAM, WATERS AND WATER RIGHTS (1904).

[29] Dellapenna at 90.

[30] United States v. River Rouge Imp. Co., 269 U.S. 411 (1926).

[31] Board of Trustees of the Internal Improvement Trust Fund v. Madeira Beach Nominee, Inc., 272 So. 2d 209, 214 (Fla. App. 1973) ("Riparians appear to have a qualified common law right to wharf out to navigable waters in the absence of a statute.").

[32] For example, this enumeration of rights was accepted in North Carolina in 1903 by the state Supreme Court in Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 44 S.E. 39, 46 (1903).

[33] Shively v. Bowlby, 152 U.S.1 (1894).

[34] Phillips Petroleum v. Mississippi, 484 U.S. 469, 475 (1988) (*citing* Shively v. Bowlby, 152 U.S. 1,26 (1894)).

[35] SLADE, ET. AL. (1997).

[36] N.C. ADMIN. CODE tit. 15A.

[37] *Id.*

[38] N.C. ADMIN. CODE tit. 15A, 0201(a)(1)(B).

[39] N.C. Gen. Stat. § 146-12(a).

[40] N.C. Gen. Stat. § 146-12(g) (9)(d).

[41] N.C. Gen. Stat. § 146-12(g) (3).

[42] Yates v. Milwaukee, 77 U.S. 497, 501-503 (1870).

[43] United States v. California, 332 U.S. 19 (1947).

[44] 43 U.S.C. § 1311(a).

[45] 43 U.S.C. § 1301(e).

[46] 43 U.S.C. §§ 1301, 1312.

[47] Presidential Proclamation 5928 (1988).
[48] 43 U.S.C. § 1302.
[49] 43 U.S.C. § 1314(a).
[50] The Nature Conservancy, *Leasing and Restoration of Submerged Lands*, August 2002 at 7.
[51] Florida Department of Environmental Protection. Performance Audit of Submerged Lands Program. Tallahassee, Florida. 1994.
[52] WASH. REV. CODE § 79.10.210; WASH. ADMIN. CODE § 332-30-151; WASH. ADMIN. CODE § 332-30-106.
[53] Eichenberg and Vestal, *Improving the Legal Framework for Marine Aquaculture: The Role of Water Quality Laws and the Public Trust Doctrine*, 2 TERRITORIAL SEA JOURNAL 359 (1992).
[54] DeVoe and Mount, *An Analysis of Ten State Aquaculture Leasing Systems: Issues and Strategies*, JOURNAL OF SHELLFISH RESEARCH, Vol. 8, No. 1, 233-239 (1989).
[55] See www.state.me.us/dmr/aquacutlure/aqtaskforce/aquaculturereleaseprocess (visited 12-3-04).
[56] ME. REV. STAT. ANN. tit. 12, § 6072.
[57] William J. Brennan, *Aquaculture in the Gulf of Maine: A Compendium of Federal, Provincial, and State Regulatory Controls, Policies and Issues*, Gulf of Maine Council on the Marine Environment, June 1999 at 19-20.
[58] The Nature Conservancy, *Leasing and Restoration of Submerged Lands*, August 2002 at 7.
[59] VA. CONST. art 10, § 3.
[60] HAW. CONST. art. 11, § 1.
[61] MASS. CONST. Amend. art. 97.
[62] *See* SLADE ET AL. at 327-328.
[63] 43 U.S.C. § 1314(a).
[64] U.S. CONST., art. I, § 8.
[65] 33 U.S.C. § 403.
[66] Leslie Salt Co. v. Froehlke, 578 F.2d 742 (1978).
[67] U.S. v. Members of the Estate of Boothby, 16 F. 3d 19 (1994).
[68] Zabel v. Tabb, 430 F.2d 199 (1970).
[69] 42 U.S.C. § 4332. NEPA requires that federal and federally permitted activities be reviewed for impacts on the environment.
[70] U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985).
[71] 33 U.S.C. § 1344.
[72] 33 C.F.R. § 328.3(b).
[73] 33 U.S.C. §1433(f).
[74] Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
[75] 33 U.S.C. § 1342.
[76] 33 U.S.C. § 1251(a).
[77] U.S. Public Research Interest Group v. Atlantic Salmon of Maine, 215 F. Supp. 239 (D. Me. 2002).
[78] 40 C.F.R. § 122.24(b) App. C.
[79] 215 F. Supp. 239 (D. Me. 2002).
[80] 33 U.S.C. § 1362.
[81] Marine Environmental Consortium v. Washington Department of Ecology, No. 99-2-00797, slip op. par. II.VII (Wash. Super. Ct. Dec. 1, 2000).
[82] Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc., 299 F. 3d 1007, 1017-19 (9th Circuit. 2002).
[83] Presidential Proclamation 5030 (1983).
[84] Truman Proclamation on the Continental Shelf (1945).
[85] 43 U.S.C. § 1345.
[86] 42 U.S.C. § 4332.
[87] 16 U.S.C. § 1456(c)(3)(B).
[88] 16 U.S.C. § 1456(c)(1) and (3)(A).
[89] 33 U.S.C. § 1343.
[90] 40 C.F.R. § 122.24.
[91] 40 C.F.R. § 125.121-122.
[92] 33 U.S.C. § 1402(a).
[93] 33 U.S.C. §§ 1412(a), 1412a.
[94] 33 U.S.C. § 1413(a).
[95] 33 U.S.C. § 1402(f).
[96] 33 U.S.C. § 1413(b).
[97] *See* SLADE ET. AL. at 81. The five states are DE, ME, MA, PA, and VA.
[98] *Id.* at 356.
[99] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[100] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).
[101] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[102] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[103] Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
[104] *See* SLADE ET. AL. at 363.
[105] *Id.* at 357.
[106] McQueen v. South Carolina Coastal Council, 354 S.C. 142, 150, 580 S.E.2d 116, 120, S.C., Apr 28, 2003
[107] Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied* 486 U.S. 1022 (1988).
[108] *Id.* at 654.
[109] The Nature Conservancy, *Leasing and Restoration of Submerged Lands*, August 2002 at 7.

CHAPTER 3 WASHINGTON CASE STUDY: CONSERVATION LEASING ON STATE-OWNED AQUATIC LANDS IN WASHINGTON STATE[110]

I. *Introduction*

A. Overview of Conservation Leasing Program Development Project

Under the direction of the Commissioner of Public Lands, the Washington State Department of Natural Resources (WDNR) undertook a new programmatic initiative for the conservation of state-owned aquatic lands: a Conservation Leasing Program (Program) that allows private and public entities to take a lead role in identifying, planning, and implementing conservation activities (preservation, enhancement, restoration, and creation of habitat) on state-owned aquatic lands.

In many ways, the new leasing program is similar to the commonly-used approach of many land trusts that enter into conservation easements for the protection of uplands. The Program allows external entities to acquire a real estate interest in natural areas that are in need of habitat protection and improvement. It differs from many traditional conservation easements in that the leases are not perpetual, require active management, and are located on public lands.

This chapter provides an overview of the Conservation Leasing Program structure and discusses several internal philosophical and policy issues that were identified during the development of the program. In general, the WDNR had to overcome internal perceptions regarding the state's role and responsibilities for implementing its land management responsibilities. Specifically, the internal issues the WDNR encountered in the development of the Conservation Leasing Program included:

- Whether conservation was a "use" that "encumbered" state-owned aquatic lands;
- Whether the WDNR could and/or should relinquish its environmental protection mandate to external entities/conservation proponents;
- Whether the WDNR should partner with, instead of enter into a lease with, conservation proponents;
- Whether conservation is a public trust interest that can supersede other public trust interests;
- Whether conservation satisfies the WDNR's environmental protection mandate;
- Whether conservation is water-dependent;
- Whether historical WDNR leasing practices are inconsistent with conservation leasing practices;
- Whether fees should be charged for conservation activities; and
- Whether there will be future demand for the Conservation Leasing Program.

B. Management Authorities & Mandates

The WDNR is the proprietary manager of approximately 2.4 million acres of state-owned aquatic lands including areas permanently, seasonally, and diurnally inundated with marine or freshwater. Geographically, the aquatic lands include all of the beds of the Puget Sound and outer coastal shelf (extending three nautical miles) and nearly all of the beds of navigable freshwater lakes and rivers throughout the state (including much of the Columbia River). The aquatic lands also include approximately 30% of the existing tidelands (tidally influenced shorelines) and 70% of the existing shorelands (freshwater shorelines). The remaining tidelands and shorelands are in private ownership or are managed by other governmental entities.

The constitutional authority for the proprietary management of state-owned aquatic lands is derived from Articles XV and XVII of the State Constitution. The Legislature delegated the responsibility for management of state-owned aquatic lands under its Revised Code[111] directing the WDNR to manage state-owned aquatic lands to achieve a balance of public benefits[112] including:

- Encouraging direct public use and access;
- Fostering water-depending uses;
- Ensuring environmental protection; and
- Utilizing renewable resources.

Additionally, the WDNR is directed to generate revenue from the use of state-owned aquatic lands when it is consistent with the other public benefits.

C. Authorization of Uses

In implementing its statutory mandates, the WDNR authorizes uses that "encumber" state-owned aquatic lands. An encumbrance conveys some form of spatial and temporal exclusive use to a public or private entity. Entities seeking to encumber state-owned aquatic lands are required to secure proprietary use authorizations (i.e., leases, easements, rights-of-entry, licenses, or permits) from the WDNR in addition to applicable local, state, and federal regulatory permits, depending on the

use. Typical encumbrances include marinas, piers, docks, bridges, port facilities, aquaculture facilities, utility easements, mooring buoys, and park facilities; the agency does not, however, directly regulate "transient" uses that do not encumber state-owned aquatic lands such as recreational boating, fishing, and shellfish harvesting, commercial ship navigation, swimming, and beach walking.[113]

The WDNR currently manages approximately 3,600 use authorizations for encumbrances on state-owned aquatic lands, generating $15-18 million in state revenues per year and processing approximately 100 new use authorizations each year. Some form of use authorization encumbers approximately 92,000 acres of the 2.4 million acres of managed aquatic lands. Nearly all of the remaining acres may be available for encumbrance on a first-come first-serve basis.

The WDNR historically focused on production-oriented uses in the management of its aquatic lands and uplands with geoduck and timber harvesting as the primary revenue sources for the aquatic and uplands programs, respectively. As such, the Conservation Leasing Program challenged the preconceived notions of what constitutes a "use" of public lands. The question was: If public lands are not actively being used for an extractive or recreational purpose, or if the site is not encumbered with a physical, man-made structure, is the site actually being "used"? For the purposes of conservation leasing, the WDNR established that use of aquatic lands for environmental services (i.e., water quality, shellfish production, fish habitat) is a "use" when other uses (that may conflict with the environmental services) are prevented from occurring on the same site. The benefit of this approach is several-fold:

- WDNR's multiple mandate for the management of state-owned aquatic lands will be more balanced in its application;
- The use and protection of aquatic lands for environmental services is legitimized; and
- Conservation project proponents can compete fairly under statutory guidance with non-conservation project proponents.

Conversely, the drawback of conceptualizing conservation as a use similar to other, more "active" uses is that it may prevent the more active uses from occurring on public lands. The public (and the agency) traditionally identifies public lands with active uses which also typically generate public support and appreciation for public lands. Characterizing conservation as a use implies for a site to be truly protected, it has to be encumbered by some form of use authorization. By extension then, if a site is not encumbered by a formal use authorization, it is not protected and may be developed and/or impacted. This latter concept appears to ignore the existing regulatory restrictions on development and degradation of aquatic resources.

Concerns regarding defining conservation as a use reinforced the need to clearly define what "conservation" is[114] and also supported the priorities of active habitat management versus passive habitat protection.[115]

II. *The Need for Conservation Leasing*

A. History

In 2000, members of the public asked the WDNR if they could lease an area of state-owned aquatic lands that had been encumbered by a finfish net pen for the previous 15 years. The individuals who wanted to lease the site lived on uplands near the net pen and wanted to preserve the site in its natural condition. At the time, the WDNR only encumbered state-owned aquatic lands with proprietary use authorizations for three of its four primary mandates: public use and access, water-dependent uses, and renewable resource use.[116] The WDNR did not encumber state-owned aquatic lands with proprietary use authorizations to ensure environmental protection (its other primary mandate), which was essentially the request of the upland property owners. While the public inquiry to encumber the net pen site was not entertained further, the discussion initiated the four-year WDNR effort to develop a Conservation Leasing Program.

Historically, the implementation of the WDNR's environmental protection mandate fell solely on the shoulders of the WDNR or other public entities with regulatory or proprietary authority over aquatic lands. Through various "non-leasing" mechanisms, the WDNR identified areas of state-owned aquatic lands for protection. The WDNR has never, however, relinquished its environmental protection mandate to a private conservation organization through a proprietary use authorization; the Conservation Leasing Program now allows the WDNR to accomplish this.

Conceptually, some WDNR staff found it difficult to believe that external conservation organizations would be willing and able to take on the agency's environmental protection mandate under a leasing scenario. Some staff also questioned, even if private conservation organizations were willing and able, whether it was appropriate or not. Their

rationale was that because the WDNR is the state agency responsible for the management of state-owned aquatic lands, it should continue to be the lead in determining, planning, and implementing environmental protection activities on the aquatic lands. To address these concerns, a rigorous scientific review process for proposed conservation projects was developed.[117] Until the program has established itself as a viable tool and several conservation leases have been successful, the idea that the WDNR should not relinquish its environmental protection mandate to private conservation organizations will likely remain. However, given limited time, limited resources, and differing priorities, there is little certainty that the agency's environmental protection efforts will coincide with or meet the objectives of external entities. While there are some options other than conservation leasing that allow external entities to implement the WDNR's environmental protection mandate on state-owned aquatic lands—fee-title acquisition, nominating sites for aquatic reserve status, or requesting the lands to be withdrawn from leasing—each has significant limitations.

B. Acquisition

Fee-title acquisition of state-owned aquatic lands is limited in Washington State, as the WDNR is not authorized to sell the beds of navigable waters. In addition, the sale of first-class tidelands and shorelands is limited to public entities[118] and the sale of second-class shorelands on navigable lakes is limited to adjacent private property owners.[119] By policy, however, the WDNR does not sell tidelands or shorelands. The WDNR can and does exchange tidelands and shorelands with public or private entities for other tidelands and shorelands that meet specific criteria.[120] Other non-acquisition environmental protection mechanisms offered by the WDNR, such as aquatic reserves and withdrawing areas from leasing, also have limitations.

C. Aquatic Reserves & Withdrawals from Leasing

To designate a site as an aquatic reserve, proponents need to demonstrate, through a public application process, that the area meets strict criteria set forth by the aquatic reserve program.[121] Activities within an aquatic reserve must support the purpose of the reserve over some part of a ninety-year term. The overall management of an aquatic reserve is the WDNR's responsibility unless other arrangements have been made with an external group or agency. The aquatic reserve proponent has no legal obligations to participate in the management of the state-owned aquatic lands within the designated aquatic reserve. Public review of aquatic reserves and associated management plans occur through the State Environmental Policy Act process. Ultimately, the Commissioner of Public Lands (CPL) designates and undesignates aquatic reserves through a rigorous public review process.

The CPL may also withdraw lands from leasing at his or her discretion. The WDNR receives requests from public or private entities to withdraw state-owned aquatic lands from leasing based on a variety of reasons, including in support of state parks and areas of biological interest. Withdrawal from leasing, however, does not necessarily have to be linked directly to conservation activities and could be designated for any purpose. Lands subject to withdrawal are typically not evaluated based on established criteria nor are they typically established within a public process. Furthermore, the lands usually are not subject to a management plan. The WDNR normally maintains ultimate management responsibility for the withdrawn lands. Similar to aquatic reserves, the proponent for withdrawing a site from leasing has no legal obligations to participate in the management of the lands within the designated aquatic reserve.

Aquatic reserves and withdrawn areas are environmental protection mechanisms that are led by the WDNR. External public and/or private entities may nominate sites, be involved in the evaluation process, and/or take part in the long-term management of sites, but there are limitations that may drive external entities to seek other environmental protection schemes. Aquatic reserves and withdrawn areas are both subject to the discretion of the CPL. As a result, the CPL (based on her or his own discretion) may decide at any time not to designate (or to "un-designate") a site as an aquatic reserve or withdraw (or "un-withdraw") an area from leasing. In addition, external entities have no legal standing (beyond the legal standing that any citizen of the state has) to determine activities that should or should not take place within aquatic reserves or withdrawn areas. Many of the limitations regarding external entities and environmental protection on state-owned aquatic lands are resolved if the external entities enter into a landlord-tenant relationship with the state through a proprietary use authorization, such as a conservation lease.

D. Conservation Leasing

Leasing state-owned aquatic lands for conservation purposes is a relatively new idea. Some WDNR staff thought the idea might contradict or undermine other WDNR efforts to partner with conservation organizations and/or efforts as the agency has historically worked with local, state, and federal entities to identify specific habitat improvement projects or to identify the limiting factors of entire watersheds. In some cases, the WDNR has continued these efforts by partnering with the entities through memorandums of understanding in order to implement habitat improvement activities on state-owned aquatic lands. Most often, the WDNR has agreed to set aside certain lands (through its Aquatic Reserve Program or authority to withdraw lands from leasing) and the external entities have agreed to undertake the habitat improvement activities. While this approach has its limitations, it is also appealing because it keeps the WDNR in a lead role and in mutually beneficial relationships with the external entities. Entering into a lease with external entities for conservation purposes potentially removes the WDNR as the lead and, in some cases, may lead to situations in which habitat projects are taking place that the WDNR may not completely agree with.

To convince the WDNR staff of the virtues of conservation leasing, assurances were made that partnering opportunities would still be available to them in the future and that strict criteria would be established to determine whether conservation proposals were appropriate for a given site. The Conservation Leasing Program was advertised internally as a means to achieve habitat work that the WDNR (alone or in partnerships with others) simply will not be able to accomplish due to time, staffing, or financial constraints. There are also advantages to external entities when they enter into a conservation lease with the WDNR.

By entering into a conservation lease with the agency, external entities establish a legal landlord-tenant relationship with the state in which they acquire a real estate interest in state-owned aquatic lands. As a tenant, external entities can assume a lead management role on state-owned aquatic lands, determining, planning, and implementing activities that should and should not take place on the property. A tenant may also have future leasing preference rights and term extension rights for a given site. In some cases, a tenant will be able to limit other uses (including some public uses) on state-owned aquatic lands that may be in conflict with the conservation activities being undertaken on the property. In addition, the CPL will be limited in his or her ability to change the nature of the agreement and the management of the property relative to the terms and conditions of the lease. Most importantly, by establishing and implementing a conservation program through the WDNR's proprietary leasing authorities, conservation proponents have equal footing when competing with other non-conservation proponents for the same site. If and when there are competing applications between conservation proponents and non-conservation proponents, then the WDNR is directed by statute how to determine the most appropriate use for the site.[122] If conservation did not have this standing, the WDNR could not apply the statutory guidance for competing uses and conservation activities may not be prioritized in the same manner.

III. *Authorities Regarding Conservation Leasing*

A. Legal Authorities

The Revised Code of Washington grants the WDNR the authority to lease state-owned aquatic lands.[123] It also states that the management of state-owned aquatic lands shall preserve and enhance water-dependent uses.[124] As a matter of policy, the WDNR has determined that ensuring the protection of the aquatic environment is inherently a water-dependent use. The statute requires the WDNR to consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use. The WDNR may withdraw from leasing those lands that it finds to have significant natural values, or may provide within any lease for the protection of such values. The WDNR implements these legislative authorizations consistent with the Public Trust Doctrine.

B. Public Trust Doctrine

As noted in Chapter 2, the Public Trust Doctrine traditionally protects public interests such as commerce, navigation, and fishing. While Washington case law regarding the Doctrine is not well developed, under the existing case law, "... environmental quality and water quality are probably also protected interests."[125] Taking this into consideration, the WDNR implements its general leas-

ing authorities consistent with the Public Trust Doctrine in two fundamental ways:

- The WDNR imposes term limits and conditions (i.e., revocability) within proprietary use authorizations that maintain the WDNR's ultimate control of the state-owned aquatic lands; and
- The WDNR has determined that its leasing practices do not substantially impair the public interests in the remaining lands and waters of the state.

The WDNR has been authorizing exclusive public and private uses on state-owned aquatic lands for several decades under these premises. Many of these uses have encumbered the lands to such an extent that interests protected under the Public Trust Doctrine have been somewhat infringed upon (such as a private marina that prohibits the public from entering the site). Having established this, the WDNR maintains that the authorization of such uses remains consistent with the Public Trust Doctrine. By extension then, the WDNR maintains that authorizing conservation activities that may infringe upon some interests protected by the Public Trust Doctrine is still consistent with the Doctrine. This may be truer with conservation activities than with other activities because conservation activities that improve water and/or environmental quality could also be considered interests protected by the Doctrine. As such, in the case of conservation leasing, one interest protected by the Doctrine (i.e., public access) may be superseded by another protected interest (in this case, conservation of aquatic resources).

The advantage of this approach to conservation leasing and the Public Trust Doctrine is that conservation activities, which may be impacted by public access to a site (or other activities protected by the Doctrine), may require and achieve active exclusion of the public from the site in order to protect the habitat and/or environmental features of the site. The disadvantage of this approach is that it may put Public Trust Doctrine interests at odds with each other, which is typically not the case. In addition, since this approach has not been upheld in case law, it is open to future challenges.

C. Legal & Policy Basis for Authorizing Conservation

Under the legal authorities in statute and historical leasing practices relative to the Public Trust Doctrine, the WDNR maintains that it has clear authority and ability to:

- Lease state-owned aquatic lands;
- Preserve and enhance water-dependent uses;
- Ensure environmental protection;
- Consider natural values prior to leasing; and
- Lease for the protection of the natural values of aquatic lands.[126]

As such, very little formal policy interpretation, deliberation, and/or development were necessary to establish the legal and policy basis of the Conservation Leasing Program. If conservation of aquatic lands is a form of environmental protection and is water-dependent, then it is an activity the WDNR has leasing authority over and is also an interest protected by the Public Trust Doctrine.

IV. *Defining Conservation*

A. Conservation as a Subset of Environmental Protection

While the WDNR has a mandate to ensure environmental protection, it has never defined "environmental protection" and/or set performance standards against which the environmental protection mandate can be measured. At present, it has not been determined in statute or WDNR policy whether environmental protection means protection of the status quo, improvement from the status quo, or protection and/or improvement of specific habitats and/or species within the aquatic environment. The WDNR also has not established a comprehensive plan to implement its environmental protection mandate.[127]

In developing the Conservation Leasing Program, the WDNR did not step back in an attempt to define environmental protection and/or create a more comprehensive and systematic approach for the application of its environmental protection mandate. Instead, the WDNR made the conceptual leap that conservation was a subset of environmental protection and a component of its overall environmental protection efforts. The benefit of this conceptual leap is that it allowed the WDNR to proceed with the development and implementation of the Conservation Leasing Program. The potential problem with proceeding in this manner is that in the future, when the WDNR succeeds in defining environmental protection and developing a more comprehensive approach to its application,

it may be that the Conservation Leasing Program is inconsistent with and/or contrary to the environmental protection mandate (and/or the other statutory mandates). While this outcome appears unlikely, it remains possible.

B. Conservation as a Water-dependent Activity

In developing the Conservation Leasing Program, the WDNR had to determine whether conservation was a water-dependent activity. To determine whether a use is water-dependent or non-water dependent, the WDNR applies a standard question: Can the use logically exist in any location but on the water (i.e., on uplands)?[128] General conservation activities can occur on uplands. In addition, more specific conservation activities that lead to improved environmental conditions of aquatic resources can also occur on uplands (i.e., watershed based management of run-off). But, conservation activities that involve aquatic habitat manipulation and/or protection cannot logically exist in any location but on the water. They must have a water-based location to achieve the primary goal of the project.

Categorizing conservation activities as water-dependent supports the Conservation Leasing Program in two primary ways. First, the WDNR favors and promotes water-dependent uses over non-water-dependent uses. In doing so, water-dependent activities receive a leasing preference when competing with non-water-dependent uses. And second, a substantial rent discount is given to water-dependent uses over non-water dependent uses. The potential disadvantage of categorizing conservation as water-dependent is that other, non-conservation activities, could try to apply the same logic to gain the same benefits. Activities such as capping of contaminated sediments, aquatic-themed restaurants, and outfalls, all of which the WDNR considers to be non-water-dependent, could try to be re-classified as water-dependent.

C. Conservation Activities

To determine what activities constitute conservation (as well as to provide consistency within WDNR and with external entities), the agency adopted pre-existing regulatory definitions[129] for "preservation," "enhancement," "restoration," and "creation". The standardization of the definitions also assists the WDNR in determining what types of conservation activities are appropriate for state-owned aquatic lands. The WDNR is aware, however, that land management and restoration practitioners in academia, government, and the private sector often do not apply the same definitions to these terms or use different terms to describe the same activities. As such, when the WDNR works with conservation proponents, it is understood that not everyone will agree with or want to apply the WDNR's standardized definitions of restoration, enhancement, preservation, and creation to their proposed work.

Restoration: For the purposes of the WDNR's Conservation Leasing Program, restoration can occur on sites that have been degraded to such an extent that they no longer provide any (or most) of their historically occurring natural aquatic functions. The goal of restoration activities is to return naturally occurring or historic functions to the site. Examples of restoration activities include: removing fill from historic shorelands to re-establish a lake's natural beach, elevation gradient, and aquatic functions; or removing invasive plants (that have colonized a historic saltwater marsh to the extent that it is non-functional) and planting native species.

Enhancement: Enhancement can occur on sites that have been degraded relative to their historic habitat conditions, but still retain some level of aquatic function. Enhancement activities include manipulation of site characteristics to heighten, intensify, or improve specific functions. Enhancement activities also include habitat improvements that increase species abundance or levels of production. Examples of enhancement include: depositing material (cultch) to attract native oyster larvae and increase native oyster populations; installing large-woody debris in river banks to increase channel complexity and habitat available for juvenile fish; or placing gravel on a beach to improve beach spawning habitat.

Preservation: Preservation can occur on sites that are relatively intact compared to their historic habitat conditions. Preservation is accomplished through the removal of a threat to, or preventing the decline of, site conditions by preventing an action in or near the site. Aquatic functions are maintained at current conditions and protected from future activities. Examples of preservation actions may include, among others: encumbering the site as a conservation site; restricting activities on the site; monitoring the site for non-native species and preventing them from becoming established; and education and outreach efforts that call attention to the intrinsic natural values of the site and encourage its preservation.

Creation: Creation can technically occur on any site, regardless of the condition of the site relative to its historic condition. Creation activities include the development of specific types of aquatic species and/or habitats that have not previously existed on the site and are artificially developed (or "created"). Creation can include changing terrestrial habitat to aquatic habitat and/or changing one type of aquatic habitat into a different type. Examples of creation include: creating riverine oxbows or sloughs in areas where they did not historically occur; filling a subtidal area to create intertidal areas; or digging blind tidal channels where none previously existed.

V. *Environmental Considerations*

A. General Considerations

To address concerns that external entities may not achieve the environmental results that the WDNR desires, a rigorous scientific review process was developed. While non-WDNR regulatory review of conservation and non-conservation projects may be similar, the WDNR's review process is more thorough from a scientific perspective for conservation projects than the review process for many non-conservation projects (such as marinas, piers, and aquaculture). This is somewhat ironic since many of the non-conservation projects may have detrimental effects on the aquatic environment. A supportable rationale for this difference is that the WDNR does not have expertise in developing and managing marinas and piers (or other similar activities), but it does have expertise in aquatic habitat restoration and management. As such, the WDNR will thoroughly evaluate if proposed conservation activities are appropriate for the proposed sites. The WDNR's evaluation will be based on environmental considerations, such as:

- Historic and current site conditions;
- Current habitat needs for all affected species;
- Listed species considerations;
- Opportunities for connectivity;
- Feasibility of the activity;
- Appropriateness of the activity with respect to the surrounding landscape; and
- Potential of success for protecting and/or improving natural functions of the aquatic environment.

In general, proposed conservation activities must clearly demonstrate that the likely potential outcomes of the activities will improve the habitat conditions relative to current conditions. Additional preference will be given to projects that demonstrate a connection to conservation activities on adjacent uplands and aquatic lands.

B. Degraded Sites

In areas that have been functionally degraded or completely lost over time, the WDNR prefers and will encourage restoration and enhancement of the historic aquatic habitats and functions. Projects that restore or enhance processes are preferred over those that restore or enhance specific features of a site. For example, a proposal to restore or enhance a feeder bluff in order to remove barriers to nearshore sediment movement may be more desirable than a proposal to re-nourish (i.e., enhance) a beach where the physical processes necessary to keep that beach are not functioning.

C. Functioning Sites

The preservation of naturally functioning habitat is encouraged and preferred when undertaken with other conservation measures within the same project (i.e., preservation and restoration; preservation and enhancement; etc.). Preservation activities ensure that the present conditions of a site are maintained. Preservation activities not done in concert with other conservation activities within the same project will require at a minimum maintenance, monitoring, reporting, and outreach.

D. Unique Sites

Creation is the least desirable form of conservation on state-owned aquatic lands and will likely only be considered on unique sites when it replaces critical habitat or ecological processes lost elsewhere, occurs in degraded areas, does not impact naturally functioning habitats, and when it is supported by landscape level restoration plans. Creation of new habitats and functions that are not historically occurring will be considered in limited cases where alternative conservation activities are not feasible.

E. Consistency with Other Plans

Where possible, the WDNR will also refer to local and regional planning processes when identifying appropriate sites for conservation activities. Project proponents will be asked to identify shore-

line master program plans, watershed plans, species recovery plans, or local/regional conservation or restoration plans that apply to the site. The project proponent will be asked to reference such plans and explain how the proposed conservation activity is consistent with, or inconsistent with, the plan(s). Additionally, the WDNR will take an active role in reviewing the proposed conservation activities on state-owned aquatic lands including how that use supports bay-wide, landscape, ecoregional, and watershed planning efforts.

VI. *Authorizing Conservation*

A. Conflict Resolution

There may be circumstances where a proposed conservation activity conflicts with pre-existing or foreseeable future non-conservation uses of state-owned aquatic lands. In these cases, the Revised Code of Washington states that water-dependent uses (such as conservation leasing) shall be favored over other uses in aquatic land planning and in resolving conflicts between competing lease applications.[130]

In cases of conflict between water-dependent uses, priority shall be given to uses that:

- Enhance renewable resources;
- Enhance water-borne commerce;
- Enhance the navigational capacity of the waters;
- Enhance the biological capacity of the waters; and
- Represent statewide interests as distinguished from local interests.[131]

In most cases, conservation leasing will likely enhance the biological capacity of the waters and be of statewide interest. In some, if not most, cases, conservation leasing may also enhance renewable resources such as fish and shellfish. When evaluating conservation proposals, the WDNR will have to apply the statutory criteria objectively to overcome potential inherent biases towards more "active" and/or traditional uses such as aquaculture production. Since the WDNR has historically focused on authorizing more active uses, the biases could be found within WDNR, non-conservation project proponents, and the public at-large.

After a determination (and subsequent authorization) has been made as to the highest priority use for a site, the WDNR is restricted under terms of the proprietary use authorization from allowing additional uses on the site that will interfere with or substantially impair the authorized use.

Regarding multiple uses, some conservation activities may not be mutually exclusive and could co-exist with other non-conservation uses of state-owned aquatic lands. In situations where conservation activities and non-conservation activities can co-exist, proprietary use authorizations may be given to more than one entity at the same site.

B. Authorization Process

Entities wishing to encumber state-owned aquatic lands for conservation purposes through proprietary use authorizations must go through the same process as other entities that wish to encumber state-owned aquatic lands for other purposes. They must apply for and receive proprietary use authorizations from the WDNR and regulatory permits from local, state, and/or federal agencies.

The WDNR will work with project proponents in an iterative manner to identify appropriate sites and to develop appropriate conservation projects for state-owned aquatic lands. Soon after identifying a possible project and site, conservation project proponents must submit an informal proposal to the WDNR. The WDNR will review the informal proposal relative to environmental, legal, policy, and potential conflicting use perspectives. If the proposal appears appropriate, the project proponent must complete and submit a formal use authorization application. The use authorization application must completely describe the site and the proposed conservation activities (which includes a plan of operations, maintenance, and monitoring and a legal survey of the site). The project proponents are solely responsible for working with the local, state, and federal regulatory entities in pursuit of regulatory permits. The project proponents must also undertake outreach efforts to the local community and constituent groups who may be affected by the proposed project.

After successfully undertaking outreach efforts, acquiring regulatory permits, and meeting the WDNR's needs for the formal use authorization application, the conservation project proponent can enter into a proprietary use authorization (i.e., conservation license or lease). When determining the type of authorization document that will be used for a conservation activity, the WDNR will consider the:

- Duration of the use (i.e., the time needed to carry out, evaluate, and protect the conservation project); and

- Exclusivity of the use (i.e., the degree to which the conservation project will exclude others from using the site).

C. Duration of Use

If the results of the activity depend on long-term protection of the site, or the activity will be carried out over a long time, or several sequential or complex activities will be carried out over time, a lease will be the most appropriate authorization document. An effort to restore a sea grass bed is an example of an activity that requires a longer term to achieve the desired outcome. In contrast, if the conservation activity can be completed in a short time frame and the results do not depend on long-term protection of the site, a conservation license may provide adequate opportunity for the activity. A proposal to remove wood waste from a subtidal area is an example of conservation activity that requires a shorter duration of use. In this latter case, the project proponent would have no guarantee that the habitat improvements made to the site would be maintained over time.

D. Exclusivity of Use

If the result of the activity requires exclusive use of the property (precluding other potential uses of the property), then an authorization document that affords greater rights to the property, such as a lease, would be most appropriate. However, even under a lease, there are provisions for multiple uses. For the examples noted above, proponents for the sea grass restoration would most likely require exclusive use of the site, precluding access and other consumptive uses so that their results are not compromised. Conversely, proponents for the wood waste removal may be more willing to allow multiple uses, including access, to the site because such activities may not impede the overall goal of the activity.

E. Use Authorization Documents

Taking use duration and use exclusivity into consideration, the WDNR developed programmatic guidance on whether leases and licenses should be used for conservation purposes.

Conservation leases can be issued for conservation activities that:

- Occur continuously on a site (i.e., fifteen or more days per month);
- Encumber a site for greater than one year;
- Are exclusive in nature (i.e., the lessee has the expectation that the habitat improvements made to the site will not be disturbed by other DNR use authorizations); and
- Are undertaken by entities that do not have condemnation authority for the proposed conservation activity.

Lease terms are limited in duration by the land classification of the site and never exceed fifty-five years. The lessee has some level of exclusive use of the site and maintains primary responsibility for site management and protection.

Conservation licenses for conservation activities can be issued:

- For five years in duration when the activities are sporadic in nature (i.e., occur on the site less than fifteen days per month). In this case, the project must be completed within the five-year period. Additional five-year licenses should not be issued for the same project. If the project actually exceeds five years in duration, then a lease should be issued.
- For one year in duration when the activities are continuous in nature (i.e., fifteen or more days per month). In this case, the project must be completed within the one-year period. Additional one-year licenses should not be issued for the same project. If the project actually exceeds one year in duration, then a lease should be issued.

Under either scenario, licenses are only used when the project proponent has no expectation that the habitat improvements made to the site will be protected from disturbance by other DNR use authorizations. As such, licenses shall not be used for preservation activities because preservation requires a long-term commitment, but may be used for enhancement, restoration, and creation activities. Licenses can be issued to entities with or without condemnation authority. The license holder does not have exclusive use of the property and has limited site protection responsibilities. Habitat improvements on state-owned aquatic lands completed under a license are not protected beyond the term of the license.

F. Fees

Another institutional hurtle the WDNR faced in developing the Conservation Leasing Program was determining whether the WDNR must charge

for conservation leasing. Even though state statute does not allow the WDNR to authorize conservation projects on state-owned aquatic lands through leases for free, WDNR staff thought it would be counter-productive and a disincentive to charge lease fees for conservation projects. Some WDNR staff wanted to forego lease fees in exchange for the habitat improvements that would be made on state-owned aquatic lands. Ironically, The Nature Conservancy (with which the WDNR was negotiating the first conservation lease) did not recommend making conservation leases completely free, but did think a discounted rent may be appropriate. The Conservancy's rationale for charging at least a discounted lease fee was that when an entity has made a financial investment in a project, it is more likely that the entity will follow through with the project because it has more to lose by walking away. If there was no fee and conservation project proponents did not have to make a financial investment, then there may be some proposals put forth that are not as well-developed or committed to as necessary to assure long-term success. In addition, with no financial investment requirement, less qualified proponents may want to lease state-owned aquatic lands simply to prevent other leasing of the site in the future.

The Revised Code of Washington and Washington Administrative Code describe the procedures the WDNR must use to determine annual rental rates for water-dependent lease activities.[132] At this time, in accordance with the existing statutes and rules, the use of state-owned aquatic lands for conservation activities is valued as water dependent and subject to fees accordingly. However, charging fees may be an interim measure until the WDNR can pursue a legislative change to the statutes to allow for discounted use of state-owned aquatic lands for non-regulatory conservation purposes. Until such time, the existing statutes and rules relating to use authorizations will apply to conservation activities.

Water dependent rent will be charged based on the adjacent upland tax parcel so long as it is used "in conjunction with" the proposed use. This can be applied in a straightforward manner when an adjacent upland parcel is used in conjunction with the conservation activity. When the adjacent upland parcel is not used in conjunction with the conservation activity, an alternate parcel must be determined using a sequential process identified in rule.

In either case, an upland parcel is used to determine the approximate fair market value per acre for the aquatic lands. By state statute, the WDNR then applies a seventy percent discount to the fair market value as a means to promote and enhance water-dependent activities on state-owned aquatic lands. An annual lease fee is then determined by multiplying the seventy percent discounted figure by the real rate of return (normally between five – seven percent). The rent is adjusted annually by the Producer Price Index (less than six percent) and is also revalued every four years.

G. Terms for Conservation Leases

State-owned aquatic lands in Washington take many different legal forms (i.e., classes). Each legal land class designation has associated restrictions on both the type and duration of encumbrances that can take place within them. Proposed conservation activities must be consistent with and/or not conflict with the preferred uses of the land class of the proposed conservation site. In addition, use authorization terms may not exceed the specified maximum term lengths for each land class. In general, either by state statute or WDNR policy, term lengths are restricted as follows:

- 55 years on platted first and second class tide lands and shorelands;
- 30 years on beds of navigable marine and fresh waters;
- 30 years in harbor areas;
- 30 years in waterways;
- 0 years on streets; and
- 0 to 55 years depending on the underlying land class for public places.

H. Proponent Capacity

Based on the formal use authorization application submitted by the conservation project proponent, the WDNR must assure that proponents have the skills, capacity, and resources to complete the project and manage the site, so that environmental protection will not be compromised by an incomplete or failed project. Evidence of a viable project proponent include, but are not limited to, identification of an appropriate site manager, establishment of adequate management resources, and establishment of adequate contingency resources.

Project proponents must designate a site manager for the conservation site. The site manager can be a representative of a private or public entity that will assume the responsibilities of the operations, maintenance, and monitoring plan, and ensure the protection of the conservation improvements but

the manager should have a combination of education and experience that demonstrates competency with aquatic natural resource management.

The WDNR attempts to insure that the activities proposed for state-owned aquatic lands do not degrade the property and/or leave the WDNR with an unwanted structure or improvement. As such, the project proponent must secure funding for the management of the area for the duration of the lease or license. Project proponents should demonstrate that they are able to fulfill this responsibility, either by providing financial information or evidence of previous, comparable projects. To this end, the WDNR created language within the use authorizations that holds the conservation proponents responsible for the success of the activities they undertake on the property. A bond or other type of financial security may be required as a safeguard for the WDNR if it must assume a lead role in restoring the property and/or removing unwanted structures and improvements. The WDNR may require a performance bond, letter of credit, escrow account, or other written financial guarantee for use authorizations[133] to ensure project proponents:

- Pay all rents due;
- Complete proposed habitat improvements;
- Complete activities identified in the operations, maintenance, and monitoring plan; and/or
- Remove undesired improvements to the property after close-out of the lease.

In addition to financial and competency guarantees, the WDNR also holds project proponents responsible for attaining ecological functions on the property. The Conservancy suggested that conservation lessees be required to perform a certain set of activities (identified in the formal project application and plan of operations, maintenance, and monitoring) that lead to physical attributes on the property, as opposed to ecological functions of the property.

I. Liability

Lastly, the WDNR attempts to limit, to the maximum extent possible, the liability associated with project proponents when entering into proprietary use authorizations for encumbrances on state-owned aquatic lands. As such, lessees must typically indemnify the WDNR from all possible claims associated with the property and activities undertaken on the property for the term of the use authorization and must carry insurance sufficient to cover any reasonable claims and name the WDNR as co-insures. Lastly, lessees are encouraged to perform an environmental site assessment to ensure there are no hazardous contaminants on the property that will be disturbed by the proposed activities. The Conservancy posits that the assumption of liability requested by the WDNR is too onerous and requires them to assume potential liability for actions that may be outside of their control. This issue may need to be settled on a case-by-case basis depending on the nature of the activity, the proposed site, and the project proponent.

VII. *The Future of the Conservation Leasing Program in Washington State*

Thus far, it appears as though the future of the Conservation Leasing Program in Washington State depends on the program development process, the results of a pilot lease, and the internal acceptance and external demand for the program.

A. Program Development Process

The WDNR began the development of its Conservation Leasing Program in 2000 with a discussion with an interested private individual. In the ensuing years, the development of the program started and stopped several times due to staffing and resource constraints. During that time, the WDNR completed draft guidance for the issuance of conservation licenses only. Overall program guidance and lease documents were not completed. In addition, there was no external review or input during this time. In 2003, as part of a national effort, The Conservancy raised funds from private sources and was awarded a grant by the Russell Family Foundation to assist the WDNR in the development of a training package for the Conservation Leasing Program and to enter into a pilot conservation lease with the WDNR. The Conservancy then subcontracted with Washington State University (WSU) to assist in the development and implementation of the training package. WDNR's partnership with The Conservancy was pivotal in the completion of the Conservation Leasing Program.

The WDNR used a team approach to finalize the development of the Conservation Leasing Program and associated training package. A planner (designated as the lead staff) coordinated with a team of WDNR aquatic land managers, scientists, and policy makers, WSU education and training

experts, and Conservancy marine resource staff. Once the team was formed, the program development took approximately one year. To complete the Conservation Leasing Program, the WDNR:

- Developed formal program guidance that underwent review under the State Environmental Policy Act;
- Developed lease and license documents and guidance;
- Developed a conservation use authorization application;
- Developed guidance for the conservation plan of operations, maintenance, and monitoring; and
- Developed and gave a formal training presentation to approximately 50 WDNR staff.

One of the interesting obstacles in developing a new program such as the Conservation Leasing Program within a greater leasing program (that has been authorizing the use of state-owned aquatic lands for several decades) is that it has the potential to challenge the operational status quo. In developing the Conservation Leasing Program, the WDNR looked at how it normally processed and authorized requests for non-conservation activities on state-owned aquatic lands. An attempt was made to mimic existing procedures and authorization documents to the maximum extent possible so WDNR staff and the public could recognize and appreciate that leasing for conservation activities is similar to leasing for other, non-conservation activities. In some cases, however, the existing procedures and authorization documents seemed inappropriate and/or insufficient for the purposes of conservation leasing.

Some of the changes to the status quo that were made for the development of the Conservation Leasing Program included:

- Verifying the ability of the proponent to successfully complete the conservation project;
- Establishing term limits and fees associated with the conservation license;
- Proposing the need or lack of need for contingency resources;
- Modifying the process used to determine water-dependent rent;
- Creating a standardized plan of operations, maintenance, and operation;
- Requiring detailed measures of success; and
- Requiring a thorough analysis of the proposed project's appropriateness for the site.

While these changes were made from the status quo for authorizing conservation activities, they were not made to the WDNR's greater use authorization process. If developers of the Conservation Leasing Program attempted to make systematic changes to the WDNR's greater use authorization process, then the Conservation Leasing Program development would have, in all likelihood, not been completed due to organizational resistance.

B. Pilot Lease

To illustrate how conservation leasing can work in Washington State and to work through unresolved issues related to program implementation, a pilot conservation leasing project is being undertaken by the WDNR and Conservancy. The Conservancy first identified a number of sites that would support their goal of conducting a pilot Olympia oyster restoration project, partially based on The Conservancy's ecoregional planning efforts. The Conservancy then contacted local tribes and commercial shellfish representatives to explain the concept and gain their acceptance. Both The Conservancy and the agency then worked together to find a ten-acre parcel in south Puget Sound as the most appropriate site for the pilot. A formal use authorization application and accompanying draft plan of operations, maintenance, and monitoring was then completed. The WDNR is currently processing the application.

C. The Demand for Conservation Leasing

Beyond the details of the pilot conservation lease with The Conservancy, the WDNR views the future of the Conservation Leasing Program with optimism and uncertainty. The question remains whether there will be a demand for conservation leasing. Uncertainties of the future demand for the program were weighed against the substantial amount of staff time the WDNR committed towards developing the Conservation Leasing Program. These uncertainties put into question whether the WDNR should develop and/or implement the program at all. WDNR staff recognized that The Conservancy was interested in a pilot conservation lease, but there was no additional direct interest in the program expressed by other external conservation organizations. In the past, external entities have often conducted short-term habitat improvement projects on state-owned aquatic lands without notifying and/or receiving authorization

from the WDNR. Concerns regarding the future demand for conservation leasing and the return on the WDNR's program development investment will only be resolved after several conservation leases have been successful and external conservation organizations are consistently taking advantage of the opportunity to lease state-owned aquatic lands.

Conservation organizations must be willing and able to assume lead roles in protecting and managing aquatic lands in manners similar to long-established upland conservation strategies. While the WDNR cannot prioritize conservation leasing over other legitimate uses of state-owned aquatic lands, it must dedicate staff time and resources for program implementation. Due to continued limited staffing, there remains a risk that outreach efforts will not be undertaken and/or applications for conservation projects will not be processed as per desired timeframes. Most importantly, however, the WDNR must overcome the internal philosophical obstacles regarding authorization of conservation activities on state-owned aquatic lands.

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[111] The WDNR's management of state-owned aquatic lands is governed by Washington Revised Code Chapter 79.90 through Chapter 79.100 and certain provisions of Washington Revised Code Chapter 79.01 through Chapter 79.80, Chapters 43.12, 43.30, and applicable Washington Administrative Code sections 332-30-100 through 332-30-171.

[112] WASH. REV. CODE § 79.90.455.

[113] The WDNR may indirectly limit transient uses by authorizing activities and/or structures that physically block access to state-owned aquatic lands.

[114] See *infra*, Chapter 3, Section IV.

[115] See *infra*, Chapter 3, Section V.

[116] On a relatively frequent basis, the WDNR also encumbers lands for non-water dependent activities such as outfalls, utility lines, and bridges.

[117] See *infra* Chapter 3, Section V.

[118] WASH. REV. CODE § 79.94.150.

[119] WASH. REV. CODE § 79.94.210.

[120] WASH. REV. CODE § 79.90.457; WASH. ADMIN. CODE § 332-30-170.

[121] WASH. REV. CODE § 79.10.210; WASH. ADMIN. CODE §§ 332-30-151, 332-30-106.

[122] See *infra* Chapter 3, Section VI.A.

[123] WASH. REV. CODE § 79.90.460.

[124] "Water-dependent use" means a use, which cannot logically exist in any location but on the water. Examples include, but are not limited to, water-borne commerce; terminal and transfer facilities; ferry terminals; watercraft sales in conjunction with other water-dependent uses; watercraft construction, repair, and maintenance; moorage and launching facilities; aquaculture; log booming; and public fishing piers and parks. WASH. REV. CODE § 79.90.465 (1).

[125] Johnson, R.W., C. Goeppele, D. Jansen, & R. Paschal, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521 (1992).

[126] Washington State Department of Natural Resources. 2004. Draft Guidelines for Authorization of Conservation Activities on State-owned Aquatic Lands. GL09-20.3.

[127] However, several efforts are underway, such as the Aquatic Lands Habitat Conservation Plan project and implementation of the Aquatic Reserves Program.

[128] WASH. REV. CODE § 79.90.465 (1).

[129] U.S. Army Corps of Engineers. Regulatory Guidance Letter No. 02-2 (2002).

[130] WASH. REV. CODE § 79.90.460.

[131] WASH. REV. CODE § 79.90.460.

[132] WASH. REV. CODE § 79.90.480; WASH. ADMIN. CODE § 332-30-123.

[133] WASH. REV. CODE §§ 79.92.060, 79.90.525.

CHAPTER 4 NEW YORK CASE STUDY: NEW OPPORTUNITIES IN COASTAL UNDERWATER LAND CONSERVATION GREAT SOUTH BAY, NEW YORK[134]

I. *Introduction*

On December 19, 2002, The Nature Conservancy acquired approximately 13,000 acres[135] of underwater coastal lands in Long Island's Great South Bay—about twenty percent of the underwater lands in the Great South Bay. The 13,000 acre tract owned by the Conservancy, known colloquially as the "Bluepoints Property" after one of its previous owners, the Bluepoints Oyster Company, was donated to the Conservancy by the Bluepoints Company, Inc.[136] The Bluepoints Property has a fascinating history; owning it is providing the Conservancy with an invaluable opportunity to champion and advance marine underwater land conservation efforts with rights distinct from those discussed in Chapter 3 that are associated with a lease.

Because the heritage of the Bluepoints Property and the ownership rights accompanying it are so unusual, and because an understanding of these rights inform and instruct how the Conservancy might restore and manage the Bluepoints Property in the future, this chapter explores the history to and property rights associated with the Bluepoints Property and presents the ecological state of the Great South Bay and steps the Conservancy is taking concerning management of and long-term planning for the Bluepoints Property. What the future holds in store for the Property is somewhat unknown, but it clearly has the potential, in whole or in part, to become an important marine restoration and conservation area.

II. *History of the Bluepoints Property: The Legacy of King Charles II*

At the time the Conservancy acquired the Bluepoints Property, it gained ownership of underwater land with a title history—the legal history and the set of rights and encumbrances that comes with that history—described as "one of the most interesting in the United States."[137]

Ownership rights in the Bluepoints Property trace back to various colonial land grants, patents and Native American deeds, including: (i) a 1664 grant from King Charles II of England to his brother James, the Duke of York, which preceded a 1666 patent (the "Nichols Patent") from the Duke of York to the Town of Brookhaven; (ii) a 1686 patent (the "Dongan Patent") from Governor Dongan (acting as agent for King James II) to the Town of Brookhaven; (iii) a 1693 patent (the "Fletcher Patent") from Governor Fletcher (acting as agent for King William and Queen Mary) to Colonel William Smith, and (iv) various Native American deeds to bay bottom lands (among other properties) also acquired by Colonel William Smith.

Ownership, and the attendant rights accompanying ownership, of the portions of Great South Bay underwater lands established by these grants, patents, and deeds was contested between the Smith Family and the Trustees of the Town of Brookhaven until the 1760s, when a series of conveyances occurred through which Brookhaven and the Smith Family became tenants-in-common[138] owners of 31,000 acres of Great South Bay underwater land—the tract of Great South Bay underwater land from which the 13,000 acre Bluepoints Property was later established.

Note that when Brookhaven and the Smith Family became tenants-in-common owners of the 31,000 acre tract of Great South Bay underwater land in the 1760s—indeed, when their respective property interests were first established in the tract one hundred years earlier—neither the United States nor the State of New York existed. As will be discussed later, this is critical to an understanding of the rights that came with the Bluepoints Property when acquired by the Conservancy several years ago.

Brookhaven and the Smith Family's tenancy-in-common ownership of the 31,000 acre Great South Bay underwater tract lasted approximately one hundred thirty years—from the 1760s until the 1890s. During this time the 31,000 acres were used principally for shellfish purposes. In the 1890s, the Smith Family—upset about leasing arrangements Brookhaven established in the property and about the Town's failure to account for income from leasing and shellfishing operations—filed what is known as a "partition action" to separate legally the family from Brookhaven as a tenant-in-common owner of the 31,000 acres. After several years of legal wrangling, the "two parties immediately [agreed] that the Bay should be partitioned equally between the Town and the Smiths,"[139] and a judgment was entered establishing the Smith Family as sole owner of the 13,397 acre western portion of the 31,000 acre tract and Brookhaven as the sole owner of the 17,947 acre eastern portion of the 31,000 acre tract.[140] (See graphic on page 31.)

Thus, the 13,000 acre Bluepoints Property—the Smith Family portion of the 31,000 acre Great South Bay underwater tract came into existence in 1900. The Smith Family divested itself of the Bluepoints Property in 1910, and shellfishing companies owned it for the next ninety years.[141] Through a variety of factors including overharvest and the encroachment of coastal development, the prop-

erty and shellfish harvest was arguably no longer economically viable. With the Property depleted of its shellfish resources by the end of the 1990s, it was then given to the Conservancy in December 2002. Since owning the Property, the Conservancy has joined with a variety of interested parties and begun the management and planning efforts needed to ensure the Property and Great South Bay's future ecological health.

III. *Property Rights in the Bluepoints Property*

Virtually all privately-owned underwater lands, both freshwater and saltwater, give rise to competing public and private rights. Often, private property rights are found to be subordinate to public trust and other inchoate public rights. Consequently, understanding the extent of the private property rights vested in the Bluepoints Property is critical to understanding how the Conservancy and its partners might accomplish the long-term conservation goals now being planned for the Great South Bay of Long Island.

Title to the Bluepoints Property was never held by the State of New York. Instead, it has been in private hands (in conjunction with the Town of Brookhaven) since the late 1600s. This is important, since underwater lands owned by the State of New York and then conveyed to private parties are subject to various restrictions stemming from the Public Trust Doctrine.[142] Because the State never owned the Bluepoints Property, however, it cannot claim that private ownership of the Bluepoints Property is encumbered or otherwise imbued by public trust rights.

Furthermore, although the Town of Brookhaven held a fifty percent undivided interest in the Bluepoints Property from the late 1600s to 1900, a fact allowing for the claim to be made that through such public ownership, public trust rights historically encumbered and currently encumber the Property, a series of decisions by the New York Court of Appeals, the State's highest court, makes clear that this is not the case.

The most important of these decisions is *Smith v. Odell*, a case challenging Brookhaven's right to lease exclusive waterfowl hunting privileges over its post-partition 18,000 acre Great South Bay underwater tract.[143] In upholding Brookhaven's right to enter into such an exclusive lease, the Court of Appeals first pointed out that under the Nichols and Dongan patents, the patentees (i.e., the predecessors in title to the Conservancy's 13,000 acre Bluepoints Property and to Brookhaven's 18,000 acre tract) received not only underwater lands in the Great South Bay, but also "the exclusive right of 'fishing, hawking, hunting, and fowling' together with the power to lease or sell the lands covered thereby."[144]

The court stated that "the patents specifically vested the rights of fishing, hunting and fowling in the trustees and have been confirmed and ratified by the Colonial Laws as well as by the Constitution of New York. . . ."[145] The court also pointed out that "[t]he construction of such patents and the rights conferred by them have been finally and conclusively settled and determined by this court."[146]

In determining that the right of navigation was the sole public right encumbering Brookhaven's Great South Bay underwater land (and thus the only public right encumbering the Conservancy's Bluepoints Property, since the rights in both properties stem from the same title source),[147] the Court of Appeals stated that "...we are quite clear that there is no necessary conflict between the reservation to the public of the right of navigation and the recognition of the exclusive privilege granted to the owner. The public right, whatever it might otherwise be, must be held limited in such a situation to the right to use the waters for the purposes of a public highway .... [T]he easement of passage over navigable waters does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator."[148]

Lower court decisions in New York have picked up on the *Smith v. Odell* decision and furthered its pronouncement concerning the difference between inalienable public navigation rights and other rights the public might hold in navigable coastal waters. Private rights potentially affect other rights the public might hold, but public navigation rights cannot be. In *People of the State of New York v. Johnson*, a case involving shellfishing rights on pri-

vate underwater tidal land, the court stated that "[a]t common law, the public ordinarily had the right to hunt and fish in waters subject to the public right of navigation (citations omitted). Such rights, however, were separate and distinct from the public right of navigation. This is shown by the fact that, although the King was powerless to alienate the public right of navigation by a grant of underwater lands, he had the right to make an express grant of an exclusive (or "several") right of hunting and fishing in any area in which he conveyed the underwater lands, subject, however, to the superior public right to use such lands for all navigable purposes. These principles are established by a long line of cases involving colonial grants of parts of Long Island that included harbors and bays in the areas conveyed."[149]

These decisions and resulting principles lead to the conclusion that, based on the express, exclusive rights established through the original grants, patents and deeds from which the Bluepoints Property is descended, the ratification of such rights through Colonial Law and the New York State Constitution, and a series of decisions from New York's highest court regarding the scope of these rights, the Conservancy's property rights in the Bluepoints Property are quite clearly defined and are quite comprehensive. Other than the public right of navigation across the waters of the Bluepoints Property, there are no public rights that can be asserted within the Property's perimeters. Nothing affecting the bottomlands of the Bluepoints Property, or hunting, fishing (including shellfishing), or fowling within the perimeter of the Property, can occur without the Conservancy's express approval and consent.[150]

As *Smith v. Odell* determined for Brookhaven in regard to its share of the original 31,000 acre underwater tract, the Conservancy not only owns the 13,000 acre underwater Bluepoints Property and the right to control what occurs physically on its underwater tract, but also controls the exclusive hunting, fishing, fowling, and hawking rights associated with the Property too.[151] This is consistent with how the Bluepoints Company managed the property for decades. The Bluepoints Company historically granted annual licenses to members of the public and commercial interests wanting to fish, crab, and undertake other activities within the perimeters of the Bluepoints Property,[152] and closely managed all of the attendant rights that traditionally accompany the control and use of waters within privately-owned property, such as fin fishing and setting of crab and eel traps on underwater lands.

The transfer in ownership of the Bluepoints Property has given rise to some confusion over what public rights exist in and may be exercised over the Bluepoints Property. Nevertheless, both the Conservancy's internal analysis of its legal rights in the Property and the analysis undertaken by outside counsel on behalf of the Conservancy indicate that the establishment, exercise, and management of various rights in the Bluepoints Property are within the control of the Conservancy. The Conservancy, however, is committed to work through the environmental and economic policy and political considerations surrounding the Property in partnership with the Bluepoints Bottomlands Council and others.

VI. *Long Island's Great South Bay: A Once Robust and Now Distressed Aquatic Ecosystem*

A series of bays exist off the south shore of Long Island, lying between the main body of Long Island and its southern barrier beaches, and stretching for over one hundred miles from New York City (Brooklyn) to Southampton.

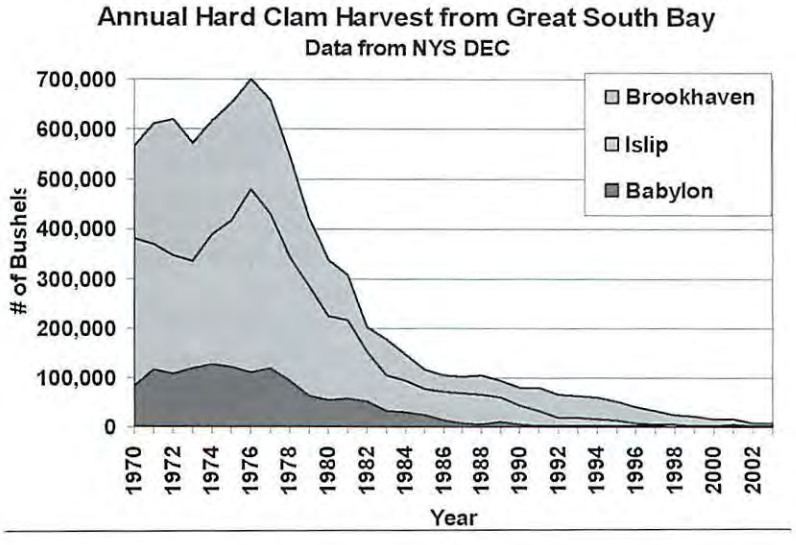
Of these bays—Jamaica Bay, Great South Bay, Moriches Bay, Shinnecock Bay, and Mecox Bay—the Great South Bay is the largest, and due to its size and centrality, arguably the most important economically and ecologically. The mere fact that the underwater lands in the Great South Bay have such a storied and colorful history to them speaks to the economic and ecological importance of the Bay.

The extensive resources of the Great South Bay shaped the rich maritime heritage of many south shore communities and the Bay was renowned for its shellfisheries both nationally and internationally during much of the 1900s. Up into the mid- to late-1900s, the oyster and hard clam populations within the Great South Bay, including the Bluepoints Property, supported a thriving shellfishing industry; now, however, from a biological perspective the Great South Bay's ecosystem is a shadow of what it once was. As is the case with our large predator fish stocks (tuna, swordfish, shark, and others—fish stocks which scientists believe are up to ninety percent (90%) depleted), the Great South Bay's shellfisheries are essentially gone. In its article summarizing the U.S. Commission on Ocean Policy's April 2004 report on the health of the nation's oceans, *Long Island Newsday* stated that "[s]hellfish have been especially hard hit. Hard clams in Great South Bay—once the most productive clamming area on the East Coast—have fallen to only 2 percent of the 1976 amount." (See graph below.)

Indeed, the Conservancy's work at ecological restoration and preservation in the Great South Bay rests on the evidence of the bay's prior state. The evidence indicates that historically, the bay's oyster population once supported a thriving industry. Today oyster sets are rare. As recently as 1976, Long Island's baymen harvested over 700,000 bushels of hard clams from the Great South Bay, comprising over 50% of the national harvest. Yet in 2002, despite municipal hard clam seeding projects, less than 10,000 bushels of hard clams were harvested from its waters. Many scientists believe that the low abundance of filter feeding shellfish such as hard clams, oysters, and bay scallops has disrupted the complex food web, causing harmful algae blooms like brown tide that shade out seagrass meadows and interfere with the survival and growth of already depleted shellfish populations. In some areas shellfish populations are so depleted that they are not likely to recover on their own.[153]

V. *Planning for the Future: The Bluepoints Bottomlands Council*

During the early 2000s, and just as the Conservancy's nascent shellfish restoration work at another location on Long Island, Peconic Bay,[154] was being implemented, a group of organizations and institutions started meeting to discuss the future of the Bluepoints Property and the status of the Great South Bay. Bluepoints Oyster Company (through its parent company First Republic Corporation) had let it be known that it was planning to dispose of the Property. By the late 1990s, there were virtually no shellfish left, and First Republic Corporation's on-site aquaculture efforts were not succeeding. When the Conservancy expressed interest in owning the Bluepoints Property as a way of furthering its conservation and restoration work on underwater marine



lands, including work on restoring shellfish populations in Long Island waters, the Property was given to the Conservancy.

Upon acquiring the Property, the Conservancy recognized that success at accomplishing long-term conservation goals for the Great South Bay required active support and input from a wide range of entities interested in the Great South Bay and the Bluepoints Property, and proposed that the group, now named the Bluepoints Bottomlands Council, stay together and develop long term planning and management goals for the Great South Bay, including the Bluepoints Property.

The Bluepoints Bottomlands Council is comprised of government, business, academic, and environmental community members,[155] and meets regularly to work on how best to plan for and manage the Great South Bay's future. While the Bluepoints Bottomlands Council focused initially on just the Bluepoints Property, the focus has evolved and now recognizes the need to systematically address the Great South Bay's ecological and economic future in its entirety. The Council's ongoing work acknowledges the need for, and will attempt to reconcile, multiple uses of the Great South Bay, and will create and test innovative conservation approaches within the Property and Bay as a way of re-establishing estuarine ecological and economic health.[156]

Since the Conservancy and the Towns of Islip and Brookhaven—just three entities, and all members of the Bottomlands Council—own virtually the entire underwater land in the Great South Bay, a true opportunity exists for undertaking landscape scale conservation and restoration work that allows for a multitude of economic and environmental goals within the Great South Bay to be achieved.

VI. *The Conservancy's Goals for the Bluepoints Property: Creating a Template for Future Underwater Land Sanctuaries*

Given the complexity of identifying all of the factors contributing to the ecosystem decline in the Great South Bay, and the difficulty in understanding how these factors interact and should be prioritized (let alone the difficulty of tackling system-wide stresses to the Great South Bay—barrier island stabilization, shoreline armoring, and watershed development, among others), the Conservancy has identified two ecological targets on which to concentrate initially in its Bluepoints Property restoration work: seagrass meadow restoration and hard clam population recovery.

Over the past year and a half, and with considerable assistance from the Bluepoints Bottomlands Council, the Conservancy accumulated significant background data on the property. An analysis of historic and scientific literature occurred, the benthic community was examined in select places with sonar and other remote sensing equipment and techniques, and shellfish and sediment distribution surveys were undertaken. With this information in hand, the Conservancy is currently identifying locations for hard clam spawner sanctuaries within the Bluepoints Property, as well as locations in which to attempt eel grass and other seagrass restoration efforts. As of November 2004, the Conservancy has already put more than 500,000 clams back into the property.

While these immediate and discrete efforts are underway, coupled with educational and outreach efforts by the Conservancy and Bluepoints Bottomlands Council aimed at getting Long Island's south shore communities and others to better understand what is at stake in restoring the Great South Bay, the overall effort must grapple with the issue of what is the best long-term plan for restoring and maintaining the Great South Bay. As restoration goals regarding Long Island's coastal waters evolve and become more and more sophisticated, it is now clear that what must be addressed is the ecological restoration of the entire Great South Bay itself, not just the Conservancy's Bluepoints Property. With this in mind, how the Conservancy's Bluepoints Property will fit into the larger Great South Bay effort needs careful attention: through the work at the Bluepoints property, it is hoped that The Conservancy and the Council can test new management approaches for restoring and sustaining the ecological system and ecosystem services from the property and that these approaches can be adopted throughout the Great South Bay and elsewhere.

Work remains to be done on all fronts, scientific, ecological, economic, community relations, and political, before an answer emerges to the question of how the Bluepoints Property fits into the long-term planning and management of the Great South Bay. With the Bluepoints Property as the initial focal point, firm, sustained commitments by the Conservancy and the Bluepoints Bottomlands Council should allow for exciting new marine conservation efforts to occur throughout the Great South Bay, with economic and ecological benefits coming from such work in the years to come.

[134] Primary Author: Jonathan C. Kaledin, The Nature Conservancy.

[135] In December 2002, The Nature Conservancy acquired 11,500 acres of the Bluepoints Property—in the Town of Brookhaven, New York—from Bluepoints Company, Inc. The Company retained 1,500 acres of the Property for aquaculture efforts, but recently abandoned these efforts and conveyed the remaining 1,500 acres of the Bluepoints Property to the Conservancy in September 2004.

[136] To more accurately describe the transaction between Bluepoints Company, Inc. and The Nature Conservancy, what occurred was a "bargain sale" transaction. A bargain sale transaction involves part sale and part gift, with the real estate at issue being sold and conveyed to the Conservancy for less than its appraised value and the seller—in this instance Bluepoints Company, Inc, a wholly owned subsidiary of First Republic Corporation—claiming a tax deduction for the difference between the sales price and the appraised value. The Conservancy paid $5,000 for the first 11,500 acres of the Bluepoints Property, and $58,000 for the remaining 1,500 acres.

[137] Letter to the Editor from Attorney John J. McInerny that appeared in the *Suffolk County News* on February 9, 1967. Attorney McInerny was local counsel for the Bluepoints Company, Inc. for many years.

[138] A "tenancy-in-common" is a legal term for a real property ownership relationship in which the owners own an undivided interest in the entire property based on the initial percentage they receive. Where no initial percentage is indicated, the presumption is that equal tenancy-in-common interests are established. Thus, the tenancy-in-common between Brookhaven and the Smith Family established each as a 50% owner of the entire 31,000 acre bay bottom tract.

[139] Jeffry Kassner, *The History of the Blue Points Company*, LONG ISLAND FORUM, January 1984, page 7.

[140] The difference in size between the Smith Family (13,000 acres) and Brookhaven (18,000 acres) apportionment was apparently based on the fact that the western portion of the original 31,000 acre tract was considered to be more productive from a shellfishery perspective, and also was based on the fact that it made more sense geographically for Brookhaven to get the eastern part of the 31,000 acre tract.

[141] The shellfishing or food companies that have owned the Bluepoints Property since 1912—they have either owned the property itself or have owned the Bluepoints Company as a subsidiary—include the Sealshipt Oyster System, Inc., Long Island Oyster Farms, Inc., Bluepoints Company, General Foods Corporation, Cedar Island Oyster Company, Inc., and First Republic Corporation of America.

[142] Coxe v. State, 144 N.Y. 396 (1895).

[143] Smith v. Odell, 234 N.Y. 267 (1922).

[144] *Id.* at 270.

[145] N.Y. CONST. 1777 § 36; N.Y. CONST. art. 7, § 14; N.Y. CONST. 1846 art.1, § 18; N.Y. CONST. 1894 art. 1,§ 18. Smith v. Odell at 270-271.

[146] Trustees of Brookhaven v. Strong, 60 N.Y. 56 (1875). In Trustees of Brookhaven v. Strong, the New York Court of Appeals held that while fishing rights are presumed to be public rights, they can be the exclusive right of the owner of adjacent land—including underwater land—through a grant, patent or deed that is ratified and confirmed legislatively and constitutionally. In analyzing the rights held by Brookhaven and the Smith Family in their 31,000 acre Great South Bay underwater tract [Author's Note: the 1875 Brookhaven v. Strong decision predated by several decades the partitioning of the 31,000 acre tract, and both Brookhaven and the Smith Family were involved in the lawsuit], the Court of Appeals found that the 1693 Fletcher Patent included "inter alia all waters, rivers, bays, fishing, fowling, hunting, and all rights, privileges, royalties and profits thereto appertaining." 60 N.Y. at 58-59. Lewis Blue Point Oyster Company v. Briggs, 198 N.Y. 287 (1910). The case was decided by the Court of Appeals after the partitioning of the 31,000 acre Smith Family-Brookhaven underwater tract occurred, and involved the Bluepoints Property itself. The Court of Appeals recognized that exclusive fishing rights accompany ownership of the Bluepoints property, but stated that dredging on private underwater land (and interfering with shellfishing rights on such property) so as to ensure the public's right of navigation was the paramount right of the federal government: "[a]s the king could not grant to a subject the public right of navigation, he could not grant to a subject a right so blended therewith as to be in effect a part thereof, and, hence, the right to dredge land under water for the improvement of navigation was reserved from the general terms of the grant by necessary implication." 198 N.Y. at 292.

[147] In a September 1969 memo to the Bluepoints Company, Attorney John J. McInerny came to the same conclusion regarding what the Smith v. Odell case meant for the Bluepoints Property. McInerny writes: "...the title discussed in that case [Smith v. Odell] is exactly the same as the Bluepoints Company, Inc. title since both titles came from the same source....Consequently, what the Court said in that case is equally applicable to the title of Bluepoints Company, Inc...."

[148] Smith v. Odell at 272.

[149] People of the State of New York v. Johnson, 7 Misc. 2d 385, 388 (1957).

[150] The public right of navigation, the federal navigational servitude, and riparian rights of access to navigable waters are the only rights that encumber the Bluepoints Property.

[151] The 1893 Final Decree issued in connection with the partition of the original 31,000 acre underwater tract stated, among other things, that the Bluepoints Property owner was "seized and possessed of the bed of the Bay, the water and islands therein and that they are exclusive owners of the fishing therein, embracing shellfish, crabs, mussels and floating fish and all wild fowl and birds and game within the premises aforesaid."

[152] Files turned over to The Nature Conservancy subsequent to its acquisition of the Bluepoints Property contain copies of annual licenses granted to local Great South Bay fisherman, allowing them to fish for finfish and to set crab and eel pots on the Bluepoints Property, provided they agree to follow rules and procedures established by the Bluepoints Company.

[153] From The Nature Conservancy's undated "Bluepoints Bottomlands Project and Long Island's South Shore" memo.

[154] The Peconic Bay is the water body at the east end of Long Island that separates Long Island's north and south forks. Shelter Island is in the middle of Peconic Bay, and the Conservancy's Mashomack Preserve, a 2,300 acre preserve on Shelter Island that includes some underwater land ownership rights, has been the starting point for the Conservancy's underwater shellfish sanctuary work.

[155] There are two tiers—Tier I and Tier II—of members of the Bluepoints Bottomlands Council, with Tier I members forming the core group assisting the Conservancy with the management planning for the property and Tier II members playing more of a consultative role in the overall consortium process. Tier I members include The Nature Conservancy, State University of New York at Stonybrook, the Towns of Brookhaven and Islip (who own the adjacent underwater lands to the east (Brookhaven) and west (Islip) of the Bluepoints Property), Cornell Cooperative Extension, Suffolk County, New York Sea Grant, New York State Department of Environmental Conservation, New York State Department of State, South Shore Estuary Reserve, Fire Island National Seashore, a representative from the baymen community, and the Bluepoints Company. Tier II members include the Long Island Maritime Museum, U.S. Army Corps of Engineers, National Oceanic and Atmospheric Administration, representatives from the recreational boating and fishing communities, Environmental Defense, U.S. Fish and Wildlife Service, New York State Office of Parks, Recreation, and Historic Preservation, Dowling College, St. John's University, and Suffolk County Legislator Ginny Fields.

[156] The February 2003 public meeting the Bluepoints Bottomlands Council held concerning The Conservancy's acquisition of the Bluepoints Property is illustrative of the work before the Council. Extensive comments were received at the February 2003 meeting and were fascinating in regard to the diversity of interests expressed. Recreational boaters and fishermen expressed concern about potentially being excluded from the Property; baymen expressed the need for the public and the Bottomlands Council to understand the historic importance of their role in the local communities and local economy; and academics and members of the environmental community noted the remarkable opportunity held by The Conservancy to establish a marine sanctuary.

CHAPTER 5 NORTH CAROLINA CASE STUDY: STRATEGIES FOR CONSERVING ESTUARINE SUBMERGED LANDS[157]

The final case study applies the factors laid out in Chapters 1-4 to the role of conservation leasing and ownership in an effort in North Carolina to conserve the state's estuarine waters. Four primary tools are considered:

- The purchase or lease of ecologically significant submerged lands currently in private hands;
- Leasing state-owned submerged lands for conservation purposes;
- Using riparian areas for conservation purposes by way of an easement; and
- Contractual arrangements between the state of North Carolina and private parties for the use of state property for conservation purposes.

These tools and their use in North Carolina are considered separately below. We also use examples from current activities by The Conservancy as they are exploring and applying some of these tools in the state. Any holistic conservation strategy for North Carolina (or any state) should be coordinated with on-going state conservation efforts especially the "One NC Naturally Program" and the development of state Coastal Habitat Protection Plans. One NC Naturally is an effort to develop and implement a comprehensive statewide conservation plan, involving government agencies, private organizations, landowners and the public. The Coastal Habitat Protections Planning (CHPP) process is an effort to identify and more effectively manage critical habitat in coastal state waters.[158]

A. Ownership/Lease of Submerged Lands in North Carolina

North Carolina law prohibits the sale of submerged lands: the state's Department of Administration (DOA) has the responsibility to manage, control or dispose of all submerged lands and state law prohibits the fee conveyance of such lands.[159] However, submerged lands have been sold historically in North Carolina. In the 1920s and 1930s, deeds to submerged lands were issued to private individuals through the North Carolina Board of Education, the state Literary Fund and the North Carolina Literary Board. Most of these deeds were for public trust lands located between the Cape Fear River and Topsail Sound. The deeds conveyed private ownership to regularly flooded tidal marshland and lands beneath open tidal waters, primarily for shellfishing.

After several years of conflict, the state legislature recognized the validity of the deeds in 1985.[160] Though title was conveyed, the statute subjects ownership of the submerged bottom to public trust rights. Consequently, the landowner may not interfere with navigation, fishing or any other public trust right (but, incidentally, may restrict bottom fishing).

As a result of the legal recognition of these early conveyances, as well as recognition of colonial King's Grants and Shellfish Franchises, a substantial quantity of submerged land is in private hands. Although the state prohibits the sale of submerged lands currently in *public ownership*, there is no prohibition on the sale or lease of lands in *private ownership*. This could present conservation-minded groups and individuals with an opportunity to conserve ecologically significant submerged lands through private purchase, lease or conservation easement. It is important to note, however, that any use of private submerged lands may be restricted by the state policy of protecting public trust rights even in and over submerged lands held by private parties. [161]

B. Leasing Submerged Lands as Research Sanctuaries

The North Carolina Marine Fisheries Commission has jurisdiction over all coastal fishing waters in North Carolina. Because the Commission has enforcement and regulatory authority over conservation and management, it has been delegated the responsibility to administer a leasing program for the cultivation of shellfish on state-owned submerged lands and in public trust waters.[162] This program is currently the only *active* leasing program in North Carolina for state-owned submerged lands. [163]

Like many states, North Carolina has production requirements associated with areas leased for shellfish.[164] For example, shellfish leases that are inclusive of the water column must produce and market 40 bushels of shellfish per acre per year to meet the minimum commercial production requirement or plant 100 bushels of cultch or seed shellfish per acre per year to commercial production by planting effort. The elimination of the language "to commercial production by planting effort" would allow leaseholders to plant areas without attendant production requirements.

For leases that are part of the research sanctuary program, they are excepted from the production requirement. Under this program, sanctuary status is granted for one-year periods for projects. The sanctuary program is a clear departure from the productive

use requirements historically associated with leasing state-owned submerged lands. However, to date only three research sanctuary areas have been designated – including one small (half-acre) site held by The Conservancy to experiment with different techniques for a larger restoration program in Pamlico Sound.

The research sanctuary program could be used more effectively to improve North Carolina oyster restoration and management. Sensible steps towards this end would be to examine the restrictions on research sanctuary permission such as expanding the allowable acreage, sanctuary time period and allowable uses; examine current policy restrictions regarding production requirements - perhaps linking protected grow-out areas to increased production on adjacent submerged lands; and, examine how public uses such as navigation and recreation can be balanced with conservation efforts in protected areas.

C. Riparian Partners: The Under Dock Oyster Culture Program

Although NCGS 146-12 prohibits the outright sale of submerged lands, it does allow easements to be granted in such lands and waters to adjoining riparian or littoral owners. However, easements are only granted to the submerged lands and waters immediately in front of the tract owned by the riparian or littoral owner. Easements may not extend beyond the deep water line – a line not clearly defined by case law or statute.[165]

Traditionally, riparian use areas (and easements associated with them) have been restricted to the exercise of recognized riparian rights. Of these recognized rights, the right of access to the water is the most pertinent to this discussion. This right is usually exercised by the construction of docks, piers and marinas. Although North Carolina law (NCGS 146-12) was written with docks and marinas in mind, its introductory language is somewhat broad. The statute begins by authorizing the North Carolina Department of Administration to grant riparian owners ...

> easements in lands covered by navigable waters ... *for such purposes and upon such conditions* as it may deem proper, with the approval of the Governor and Council of State.

Although this language seems permissive at first, other provisions of the statute reveal its focus and applicability to docks, piers and marinas. For example, NCGS 146-12(g) limits easements to the "footprint of the structure" – presumably a structure to aide the riparian owner in accessing navigable water.

Another factor that might prove difficult for using easements for conservation purposes is the requirement that the easement ...

> shall not exclude or prevent the public from exercising public trust rights, including commercial and recreational fishing, shellfishing, seine fishing, pound netting, and other fishing rights.[166]

Even so, there has been an increasing interest among riparian owners in growing oysters in containers attached to their docks (in riparian use areas). Besides personal consumption, one of the stated reasons for this interest is water quality enhancement. The interest resulted in the state legislature creating the "Under Dock Oyster Culture Program" in July 2004.[167] This program allows private dock owners to grow oysters in containers attached to their dock in waters open to shellfish harvest. There are no lease requirements and the right appears to be an extension of the riparian right of water access. There are also no production requirements as there are with leases of state-owned waters for commercial shellfish planting and harvest.

There are restrictions. For example, the attachment of the oyster cultivation containers to the dock or pier will be compatible with all lawful uses by the public of other marine and estuarine resources including, but not limited to, navigation, fishing and recreation. Also, the dock or pier must not be located in areas that the State Health Director has recommended closed to shellfish harvest due to pollution or that have been closed to harvest by statute, rule, or proclamation due to suspected pollution. [168]

Although this is a limited extension of the riparian right, it does present an example of state interest in allowing the use of state waters for shellfish propagation without production requirements and for reasons other than consumption. For riparian property owners interested in conservation, it is a "crack in the door" that allows the production of shellfish for pure environmental reasons – in this case, the improvement of water quality.

D. Contractual Management Agreements as a Conservation Tool.

Finally, a contractual management agreement between entities such as the Conservancy and the state of North Carolina *might* prove particularly promising for conservation projects – particularly if it is coupled with the North Carolina Coastal Habitat Protection Planning process and the One North Carolina Naturally Initiative. Under the auspices of

these programs, entities could potentially work with the North Carolina Department of Environment and Natural Resources to *privately manage* state owned submerged lands for resource enhancement purposes. The advantage of such agreements would be their flexibility. They can be tailored to address public trust and other concerns on a site-by-site basis and because they are something less than a property interest, they may not be as contentious as fee simple interests or long-term leases.

North Carolina General Statute 113-224 allows the Department of Environment and Natural Resources to enter into cooperative agreements with public and *private* agencies and individuals for conservation of marine and estuarine resources. To limit conflicts with public trust rights, it might be wise to focus management agreements on areas where shellfish leases are currently prohibited. North Carolina General Statute 113-202(5) and (6) provides that shellfish leases are prohibited in areas ". . . (5) designated for inclusion in the Department's Shellfish Management Program; (6) in areas the State Health Director has recommended closed to shellfish harvest by reason of pollution."

Contractual agreements to manage parts of the Shellfish Management Program might prove attractive to the state's Division of Marine Fisheries. The planting of shellfish in polluted areas that don't contain natural shellfish beds might also be an attractive option.

E: The Conservancy's Uses of Submerged Lands as Tools for Restoration and Conservation: The Oyster Restoration Partnership

These strategic options noted in North Carolina offer a glimpse of how entities and states can review existing policies and programs to craft conservation measures from the conservation leasing and ownership models in use in Washington and New York.

To pursue these conservation opportunities, The Conservancy is working with the Division of Marine Fisheries, the North Carolina Coastal Federation, the Albemarle-Pamlico National Estuary Program, commercial fishermen and others to develop a comprehensive oyster reef habitat restoration program for Pamlico Sound.

To develop the initial groundwork for his project, The Conservancy has contacted state representatives in an effort to learn about private holdings in submerged land. Potentially, the Conservancy could acquire use rights (through ownership or lease) in ecologically significant private holdings for oyster reef restoration. The strategic elements for this case are to conduct an inventory of submerged lands currently in private ownership and ecological assessment of sites, develop a strategy for approaching owners of submerged lands for the donation or sale of an easement or fee simple, and work with the state to interpret policy to find a balance between private conservation use and the protection of public trust rights.

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[157] Primary Author: Walter Clark, North Carolina Sea Grant.

[158] For information on the CHPP, see http://www.ncdmf.net; for information on One NC Naturally, see http://www.cep.unc.edu/oncn/

[159] N.C. GEN. STAT. § 146-3(1).

[160] N.C. GEN. STAT. § 146-20.1.

[161] *See* N.C. GEN. STAT. § 146-20.1(b) which states that "areas of regularly flooded estuarine marshlands within conveyances (validated by the state) remain subject to all public trust rights." This has been interpreted to also include public trust waters.

[162] N.C. GEN. STAT. § 113-202. NCGS 113-202.1 allows the leasing of the water column above (superjacent) to leased bottoms for aquaculture purposes.

[163] N.C. GEN. STAT. § 146-8 gives the Department of Administration the power to lease state submerged lands for the purpose of selling, leasing or otherwise disposing of mineral deposits belonging to the state. Leases are granted at the request of the Department of Environment and Natural Resources. To date, only one such lease exits in North Carolina's estuarine waters – PCS Phosphate holds a lease to 9,209 acres of submerged land under the Pamlico River in Beaufort County.

[164] N.C. ADMIN. CODE. tit. 15, § 3O.201(a). Interestingly, there is no production for mining leases.

[165] N.C. GEN. STAT. § 146-12. Case law and administrative law further provides that areas of riparian access are determined by drawing a line along the channel at deep water in front of the property, then by drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property meets the water's edge. *See* O'Neal v. Rollinson, 212 N.C. 83, 192 S.E. 688 (1937) and N.C. ADMIN. CODE. tit. 15, § 07H .0208 (b)(6)(F).

[166] N.C. GEN. STAT. § 146-12(g)(2).

[167] N.C. GEN. STAT. § 113-210.

[168] N.C. GEN. STAT. § 113-210(b)(1), (3).

CHAPTER 6 CONCLUSIONS[169]

This chapter summarizes key findings based on the chapters within this volume and the results of their review at a workshop of key leaders from academia, non-governmental organizations, and state and federal management agencies. These findings and conclusions address issues of the law, policy, and perception of the conservation leasing and ownership of submerged lands and how these could affect submerged lands management more generally.

Key Findings

1. Leasing and ownership of submerged lands can be significant tools for conservation organizations, land trusts and others to achieve conservation goals.

Case studies and examples of on-going work from New York, Washington, Texas, North Carolina, California and Florida indicate that leasing and ownership are viable tools for meeting coastal and marine conservation goals. There are many opportunities for expanding the use of these tools and in many circumstances these would be needed additions to existing conservation and management of marine resources. Moreover, further use of these tools by conservation interests should help states address balance and fairness in their existing authorizations for uses of the marine environment.

2. Conservation leasing and ownership are supported within the traditional Public Trust Doctrine (PTD).

States have clearly used leasing and ownership to meet their PTD responsibilities and they can also use leasing to meet their environmental mandates associated with the PTD. Most of the issues that have been raised about conservation leasing (e.g., it conflicts with the PTD) are based less in law or policy and based more on perception.

States have clear authority to issue leases and restrict uses for a wide range of purposes. The U.S. Supreme Court has found that: "it has been long-established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[170]

In the landmark U.S. Supreme Court decision, *Illinois Central v. Illinois*, it was found that "each state has defined the Public Trust Doctrine through its courts and legislatures as thought best fit circumstances and societal needs. As a result, the application of the Doctrine by states has been diverse and dynamic."[171]

State submerged lands leases must comply with the Doctrine which preserves public rights of access, navigation, recreation, and fishing. However, the Doctrine is not static; many states recognize that it must remain flexible to address "changing public needs."[172] It is also important to note that while public rights must be preserved they have not and cannot all be preserved universally on every plot or area.

Some states include the protection of aquatic wildlife, including fish, among these public trust uses.[173] Several states also have interpreted public trust rights to include prevention of environmental harm and preservation of trust lands and waters in their "natural state."[174] In such states, leasing submerged lands for conservation purposes would be consistent with the state's public trust responsibilities, and these provisions could even be cited to support conservation leasing where roadblocks are presented by other state policies.

3. Riparian/coastal landowners have clearly established rights of access to and use of submerged lands and public trust waters. However, as uses of public trust waters and submerged lands have intensified, courts and legislatures have modified these common law riparian rights.

Courts also have balanced these traditional riparian landowner rights with the right of public access and conservation. The riparian right of water access could impact the ability of entities to lease submerged lands for conservation purposes. However, the impact would likely be minimal and even in states that accord private riparian rights a highly protected status, impact would be minimal – both in scope and geographic range.

4. Current state policy often requires that leaseholders make productive use of their lands. The common perception among state resource managers is that enhancement through preservation is not a "productive use" whereas restoration is a productive use. This distinction must be recognized for current implementation of projects and should be changed for future projects.

State policies regarding leasing and ownership of submerged lands often are based on those lands being put to a "productive use." Productive use differs state by state but traditionally has been associated with a direct extraction and selling of goods

and services from the environment and is usually associated with the placement of structures such as aquaculture pens or marine pilings. It is clear that conservation leasing and ownership can be used for a range of activities such as enhancing habitat, diversity, and services through preservation. Nonetheless, state agency personnel may not perceive such uses as "productive." Thus, it appears that it may be necessary or least be more acceptable for a conservation leaseholder to engage in restoration as opposed to preservation (i.e., active as opposed to apparently passive management) on leased submerged lands.

While appreciating that restoration is currently viewed more favorably than preservation, there is a need to clarify the many productive uses from conservation and preservation projects. For example, monitoring, research and education can be part of preservation projects and are active and productive uses for management. Moreover, the emerging literature on marine reserves clearly shows the tangible and measurable benefits in terms of diversity and productivity that commonly result from preservation. The marine reserve literature clearly indicates that increases in biomass, size, and diversity are common within preserved areas.[175]

5. Before acquiring a lease or ownership right to submerged lands, the purpose of acquiring these rights should be part of a clear conservation and restoration plan.

There are many factors to consider when determining whether or where to acquire lease or ownership rights. The appropriate sites and strategies should arise from a regional consideration of conservation and management needs.

Site-based goals on leased and owned lands must also be clear so that there can be consideration of conservation costs and benefits. When acquiring submerged lands through leasing or ownership, conservation organizations will take on direct stewardship responsibilities in the marine environment: the purpose, benefits and costs of this stewardship role need to be clearly defined. Conservation interests may acquire lease or ownership rights to invest in restoration and then be able to "steward" their investments over the timeframes it takes for ecological benefits to be realized. Currently, private groups make substantial investments in the restoration of submerged lands (e.g., of shellfish, salt marshes) to assist the states in their stewardship responsibilities. However, once made the conservation groups have heretofore had little opportunity to directly guide and manage their investments. Leasing and ownership rights create this opportunity.

If conservation organizations acquire leases or ownership of large seascape-scale projects (100s-1,000 of acres), they should be aware that the costs of stewardship can be substantial. These costs will be similar if not slightly higher in marine as compared to terrestrial environments.

The purpose of obtaining lease or ownership rights to sites may often be to use them as demonstration sites to attempt new management practices. In the seas as on land, conservation groups have more flexibility in their ability to test new management practices that if worthwhile could then be adopted for much wider use on publicly- and privately-managed submerged lands.

For demonstration sites, the strategy may often be to identify and institute best management practices at sites and then to return these sites to public ownership. Stewardship of privately owned lands by conservation groups should be viewed as useful additions to the public trust responsibilities of states; particularly in situations where groups acquire existing privately-owned lands and add stewardship value. Indeed state resource management agencies may look very favorably on the conservation groups that buy ownership rights in privately held submerged lands if they intend to steward these lands in to public ownership.

6. Inventories of the lease/ownership status of submerged lands and waters are needed.

It appears that no state has comprehensive and readily available knowledge of the submerged lands that are held in state ownership versus private lease or ownership. Indeed in most states, separate agencies are responsible for leasing the bottom versus leasing the water column or natural resources therein. These agencies may not know of overlapping or competing uses for the same lands and waters and it is thus difficult, if not impossible, to fairly and equitably balance access and uses of the marine environment as required in all states.

The opportunities for private ownership of submerged lands could be substantial. There are privately-owned properties within most and probably all states. The Bluepoints case study clearly demonstrates that the size of these parcels can be substantial. Unfortunately, records of submerged lands ownership are poorly kept in most states. An inventory is needed to identify the extent of public and private ownership of state submerged lands to inform conservation and management actions and opportunities.

7. The increasing use of submerged lands and the need for marine ecosystem management calls for the greater incorporation of Public Trust Doctrine responsibilities and local efforts into state agency programs.

In several states, the Public Trust Doctrine has been incorporated, either expressly or by implication, into the state constitution. Some states have incorporated Public Trust principles into the statutory and regulatory framework of coastal management and submerged lands programs. The state and public interests can greatly suffer without a statutory and regulatory framework for administering a state's Public Trust responsibilities. By creating such a framework, state managers may also integrate private conservation efforts into a comprehensive management scheme.

Benefits of explicitly incorporating the Public Trust Doctrine in the management of submerged lands include:

1. Delineating public and private rights;
2. Balancing uses;
3. Advancing stewardship; and
4. Providing a foundation for local management.

Perhaps the most important feature of effective submerged lands management programs is to have a clearly designated lead entity to make, implement and coordinate decisions affecting Public Trust resources and uses. While this may seem obvious, submerged lands issues frequently fall under a variety of agencies according to the use or type of activity. Having a designated lead is particularly important when addressing new management schemes such as conservation leasing as well as for balancing uses and applying principles of fairness. For example in Texas, Texas Parks and Wildlife have primary responsibility for marine resource and coastal zone management while submerged lands are handled by the General Lands Office. In California, one agency handles submerged land leases and another handles leases of kelp forests.

8. The best way to test the extent that state or Federal policy will allow conservation leasing of submerged lands is for groups to apply for leases; these actions will help identify programs where conservation leasing is compatible with existing policy or help spur agency introspection and opportunity for policy change.

State agencies for submerged lands tend to be reactive; when they encounter a new proposed use, they will begin to address it. Hence, if a lease application for conservation purposes is received, the agency will be required to assess internally if and how their policies do or do not allow them to act. Indeed formal applications and internal agency policy review could spark useful consideration of the current (im)balance among existing uses in light of Doctrine mandates. While WDNR was proactive in their development of conservation leasing policy, the move was inspired by informal inquiries about obtaining leases for conservation purposes. The lessons, lease templates, and training package developed and delivered in Washington have utility for other states.

9. Conservation leasing and ownership tools are distinct from MPAs or related marine reserve tools.

It is clear that there is significant concern about the use of MPAs and marine reserves in the United States. Leasing and ownership tools are substantially different than marine reserves as tools for restoration and conservation and these differences should be clearly described to avoid confusion among partners and stakeholders. In general, marine reserves are top-down, new, and often require specialized public policy and public outreach. Leases are market-based, bottom-up, and are a subcategory of existing policy (i.e., part of Standard Operating Procedure), which is used by thousands of stakeholders.

10. Leasing and ownership have different key attributes as tools for conservation and their utility will vary.

Some of the key differences in acquiring lease or ownership rights include variability and clarity in rights, expense, and duration of rights. The variation in rights is likely to be great for privately-owned lands and the search on title rights will be a non-trivial expense. The variation in rights on leased lands can also be variable but usually less so and quite importantly, those rights will be stated clearly in the negotiated terms of the lease. However, for some parcels (particularly those granted prior to statehood) there may be substantial rights gained by ownership and these should be attractive. There may be less public concern about conservation groups acquiring interest in private lands (ownership) than in public lands (leasing). The Bluepoints

example indicates, however, that public concern can still be an issue in the transfer of privately-owned lands. Gaining rights in perpetuity (ownership) may be more favorable than term-limited rights (leasing). However, when the intention is eventually to turn private lands over to public ownership, then term limitation may not be a major issue

Concluding Thoughts on Conservation Leasing and Ownership

In the face of declining marine ecosystems and the services they provide, there is a real need for improvements in marine conservation and management. Some of the greatest improvements can come from enhancing public/private partnerships for conservation. These chapters and findings indicate that conservation leasing and ownership of submerged lands are useful and usable tools and can serve a productive public purpose. These findings are critical for submerged lands management and lend themselves to seeking creative solutions for marine habitat conservation. Policies should emerge that provide fairness and balance in the uses of submerged lands and waters, which should integrate solutions such as conservation leasing and ownership. Such policies inevitably must address perceptions of the limitation on submerged lands leasing and ownership but should be based on legitimate law, policy, and public processes that provide a stewardship role for the public and private entities.

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[170] Phillips Petroleum v. Mississippi, 484 U.S. 469, 475 (1988) (*citing* Shively v. Bowlby, 152 U.S. 1,26 (1894)).

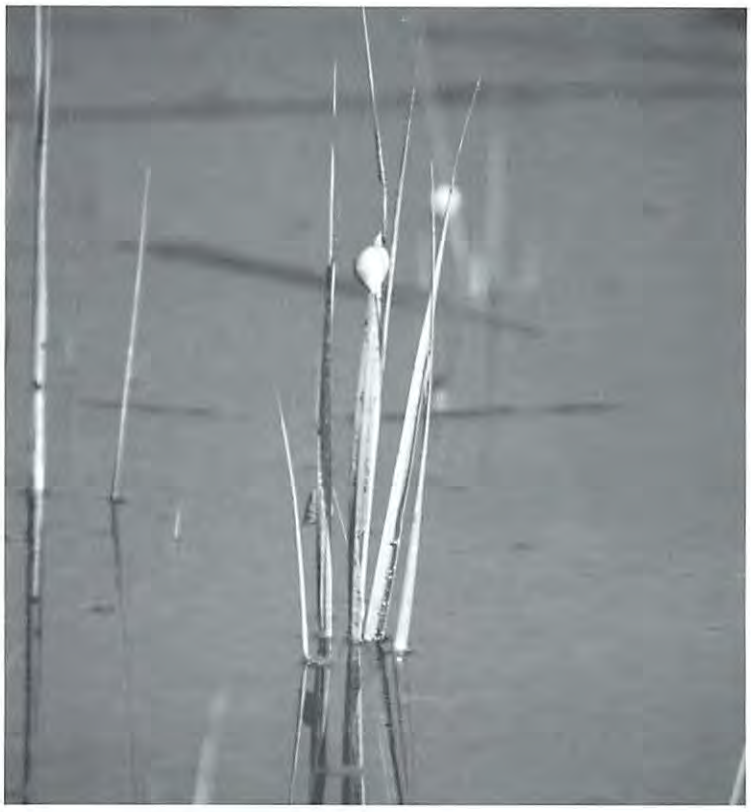
[171] Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

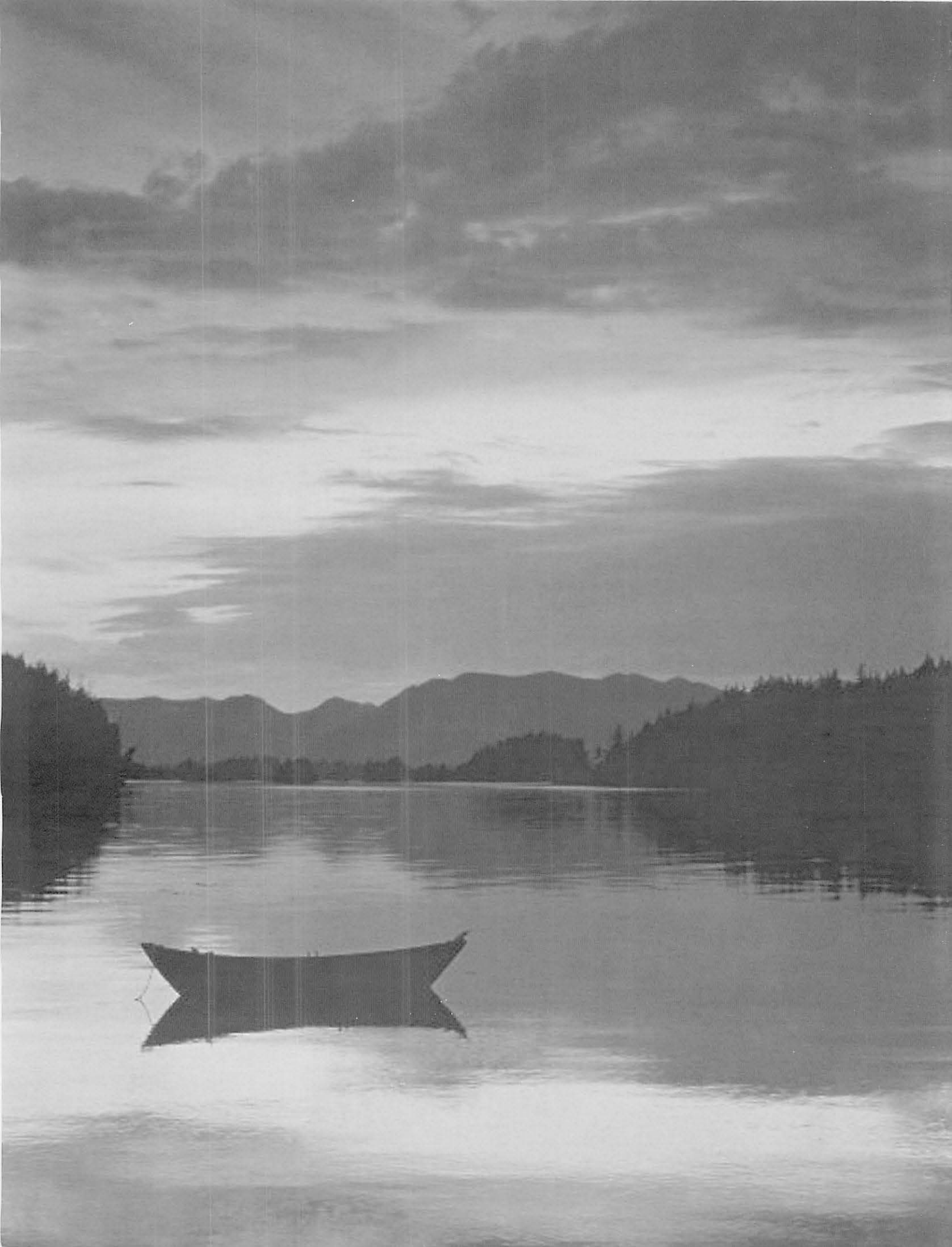
[172] *See* District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984).

[173] These states include CA, FL, MA, NY, NC, OR, TX, and WA.

[174] These states include CA, AK, LA, MI, OR, SC, MS, and WI.

[175] E.g., Halpern, B. *The Impact of Marine Reserves: Do Reserves Work and Does Reserve Size Matter?* Ecological Applications 13:s117-s137 (2003).





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