

Exploring a New Strategy for Marine Protection:

An analysis of Alaska's tidal and submerged land leasing laws,
policy, and conservation potential



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Exploring a New Strategy for Marine Protection: An analysis of Alaska’s tidal and submerged land leasing laws, policy, and conservation potential

Conservationists are currently seeking new strategies to protect marine ecosystems, which are threatened by growing coastal populations and increasing pressure on natural resources. Current marine conservation strategies, however, are limited; only a few have been used successfully.¹ A recent report by The Nature Conservancy, “Leasing and Restoration of Submerged Lands: Strategies for Community-Based Watershed-Scale Conservation,” cites the need for a “broader toolkit” to practice marine and estuarine conservation.² To expand this toolkit, the report suggests adopting leasing, a method of successful terrestrial conservation, to the marine and estuarine environment.³ Due in part to misconceptions about the ownership of tidal and submerged lands, leasing strategies have not yet been widely advocated or used by marine conservationists.⁴ However, there is tidal and submerged land available for lease in every coastal state primarily under programs which were initially set up to maximize economic benefits from coastal resources.⁵ It is important to understand how current state leasing programs could be employed to attain conservation objectives, or – as the Washington State DNR and the Nature Conservancy are attempting to do – develop a program specifically designed for conservation leasing.

Part I: Alaska’s tidal and submerged land leasing policy, process and conservation potential

States received title to their unoccupied and undeveloped tidal and submerged land through the Submerged Lands Act of 1953, which conveyed ownership of such lands to a state upon its entrance into the Union. In general, state-owned tideland includes the area from the mean high to mean low tide line and submerged land encompasses the entirety of land from the mean low tide mark to three miles offshore. States also received ownership of the submerged land beneath its navigable waters, including the land between the ordinary high and low water

¹ p.3, Beck, Michael W., Theresa D. Marsh, Shauna E. Reisewitz, and Marci Bortman. 2003. A New Approach for Marine Conservation: The Leasing and Ownership of Submerged Lands. Marine Initiative, The Nature Conservancy & Institute of Marine Sciences, UC Santa Cruz (unpublished, submitted for publication May 2003).

² p.3 Marsh, T.D., M.W. Beck, S.E. Reisewitz. 2002. Leasing and Restoration of Submerged Lands: Strategies for Community-based, Watershed-scale Conservation. The Nature Conservancy, Arlington, VA.

³ *ibid.*

⁴ p.7, *ibid.*

marks. Each state is responsible for the management of their tidal and submerged lands, and different coastal states have provided for various public and private uses of such lands.

The Public Trust Doctrine (generally) on state-owned tide and submerged lands

The title to tidal and submerged lands given to the states is unique and comes with certain responsibilities. States are expected to use tidal and submerged lands in ways compatible with the Public Trust Doctrine, a doctrine which can be traced back to Roman times and was adopted by the United States from English common law. The doctrine provides that the state must hold the lands “in trust” for the people. David Slade and co-authors of *Putting the Public Trust Doctrine to Work* explain:

The Public Trust Doctrine provides that public trust lands, waters, and living resources in a State are held by the State in trust for benefit of all to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses...The doctrine articulates not only the public rights in these lands and waters. It also sets limitations on the States, the public, and private owners, as well as establishing duties and responsibilities on the States when managing these public trust assets.⁶

The scope of the doctrine, the protected rights of the public, and the specific responsibilities of the state under the doctrine are somewhat flexible, adapted by each state separately to meet the needs of the public. Each state is individually responsible for applying the doctrine to its own trust lands and waters, drawing from common law, federal and state court decisions, relevant legislation, public policy, and public opinion. Yet, there is a “common core of principles” that establish the foundation of the Public Trust Doctrine in each state.⁷ For instance, coastal states have universally protected the public’s right to navigation, fishing and commerce on public trust lands. Some argue that the public’s rights under the doctrine have expanded even more to include recreation, environmental protection and the preservation of scenic beauty as protected trust uses.⁸

In managing tide and submerged lands for the benefit the people, the state may provide land authorizations for both public and private uses. Even if a state sells a portion of its public

⁵ *ibid.*

⁶ p.3, Coastal States Organization, Inc. 1997. *Putting the Public Trust Doctrine to Work*. 2nd Ed.

⁷ *ibid.*

⁸ p.25, Archer, J.H., D.L.Connors, K. Laurence, S.C. Columbia, and R. Bowen. 1994. *The Public Trust Doctrine and the Management of America’s Coasts*. Amherst, MA: University of Massachusetts Press.

trust lands, it is still required to ensure that the rights of the public under the doctrine are met.⁹ Similarly, a state may lease its trust lands for various public and private uses..¹⁰

Ownership and management of Alaska's tidal and submerged lands

In 1959, Alaska received title to its unoccupied and undeveloped tide and submerged lands. Today, over sixty years later, it appears that most tide and submerged land remains state-owned and managed and only rarely is such land sold.¹¹ The Alaska Department of Natural Resources reported in 2003 that the state owns an estimated 65 million acres of tidelands, shorelands and submerged lands, and manages 34,000 miles of Alaska coastline.¹² Management of the tide and submerged lands falls mainly to the Alaska Department of Natural Resources Division of Mining, Land & Water, the statutorily delegated steward of state land. Although the division carries out most managerial responsibilities on state land, certain regulatory powers over natural resources are also afforded to the Alaska Departments of Fish and Game and Environmental Conservation. Article VIII of Alaska Constitution, the Public Trust Doctrine, relevant enabling legislation, court decisions, and public opinion provide the foundation for the Division of Mining, Land & Water's tide and submerged land management policy.

⁹ *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

¹⁰ p.6, Marsh, T.D., M.W. Beck, S.E. Reisewitz. 2002. *Leasing and Restoration of Submerged Lands: Strategies for Community-based, Watershed-scale Conservation*. The Nature Conservancy, Arlington, VA.

¹¹ DNR Division of Mining, Land & Water. Jan. 2000. Fact sheet: Tide and Submerged Land Ownership. as cited on http://www.dnr.state.ak.us/mlw/factsht/tide_sub.pdf (10 September 2003). Rarely can the state sell tide and submerged lands (i.e. convey its fee-interest title). According to 11 AAC 55.020(d): ...Tideland, submerged land, or shoreland may be made available for lease or other less-than-fee disposal, and management rights in that land may be assigned to another state agency. However, the fee interest in tideland, submerged land, or shoreland will ultimately be retained in state ownership unless the conveyance (1) is otherwise required by law, or (2) is a conveyance, authorized by law, to a political subdivision of the state and the commissioner finds that the interests served by the public trust doctrine will be furthered by the conveyance. Certain cities and individuals were also able to acquire title to tide and submerged land they proved had been occupied or developed prior to Alaska's statehood. Today, municipalities are eligible for tide and submerged land conveyances from the states through AS 38.05.825.

¹² Alaska Department of Natural Resources: About Us. <http://www.dnr.state.ak.us/pic/about.htm> (cited 15 Sept. 2003)

¹³ p.5, Cook, Gregory F. 1993. *The Public Trust Doctrine in Alaska*. *Journal of Environmental Law and Litigation*, Eugene, Oregon: Students of the University of Oregon School of Law, Vol. 8, pp.1-49.

Constitutional provisions

Prior to statehood, Alaskans adopted a state constitution with “exceptional provisions regarding natural resources,” which established the foundation for the Public Trust Doctrine in Alaska¹³ and provided a foundation for resource conservation. These constitutional clauses, in addition to relevant enabling statutes passed by the legislature, help to inform the policies of state agencies delegated with land management responsibilities.

Article VIII of the Alaska Constitution addresses natural resource policy by outlining the responsibilities – and limitations – of the state. Section 1 of Article VIII encourages, “the development of [the state’s] resources by making them available for maximum use consistent with the public interest,” a sentiment that is echoed in the Alaska statutes that enumerate public lands policy¹⁴ and the Public Trust Doctrine. Thus, although the development of natural resources is a duty (and priority) of the state, the public interest must be considered.

Another clause, Section 3, further elaborates on the rights of the public: “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.” This clause, which incorporates Public Trust Doctrine principles, prohibits the state from unduly restricting the public’s access to and harvest of natural resources. Some would argue that the “common use” clause allows the public to partake in hunting and fishing activities with as few government regulations as possible.¹⁵ Conservationists, on the other hand, assert that the “common use” clause, together with Section 4, the “sustained yield” clause¹⁶, places an affirmative obligation on the state to protect and conserve natural resources so that the resources will be available for future generations to enjoy.¹⁷ The “common use” clause debate has been taken up by various interest groups, the state legislature, and the state courts. The potential of conservation leasing depends in part on the state’s interpretation of the “common use” clause: if incompatible natural resource extraction activities by outside groups are allowed to take place on land leased for conservation and/or restoration purposes, conservation leasing may not be worthwhile.

¹⁴ see AS 38.04.005

¹⁵ *Owsichuk v. State*, 763 P.2d 488 (Alaska 1988)

¹⁶ Article VIII, Section 4: Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

¹⁷ p.16, Cook, Gregory F. 1993. The Public Trust Doctrine in Alaska. *Journal of Environmental Law and Litigation*, Eugene, Oregon: Students of the University of Oregon School of Law, Vol. 8, pp.1-49.

In the execution of the natural resource management responsibilities enumerated Article VIII, the state is authorized to provide for the leases, sales and grants of state land. Section 8 refers to state leases: “The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses.” An interpretation of this clause suggests that it may be possible for the state, in constructing its lease agreement, to *exclude* uses that are incompatible with a proposed conservation lease activity, as well as to *include* for uses that are compatible.

State land use authorizations under the Division of Mining, Land & Water

Constitutional provisions are enabled by state legislation, which delegated the Division of Mining, Land & Water manager of the state lands and the natural resources associated with them. In carrying out this responsibility, the division attempts to “provide for the use and protection of Alaska’s state owned land and water”¹⁸ through various programs, guided by Article VIII of Alaska Constitution, the Public Trust Doctrine and relevant enabling legislation. Alaska statutes codified in Title 38 enumerate the planning and management policy of state-owned lands. It is the policy of the state to “establish a balanced combination of land available for public and private purposes.”¹⁹ The Alaska Land Act (codified in AS 38.05) provides policy and procedures for the Department of Natural Resources to follow to further these public interest purposes. According to the state law, DNR, through its Division of Mining, Land & Water, is required to manage the land for multiple uses, except on lands specially designated by the legislature to have a more specific purpose (such as a state park or recreation area).²⁰ To carry out its managerial responsibilities, the division develops and administers state land use authorizations for activities state-owned land.²¹

The division’s leasing, claims and permitting programs provide most of the state’s land use authorizations. The FY 2004 Governor’s Budget, lists the following program objectives:

¹⁸ Alaska DNR Division of Mining, Land & Water: About Us. <http://www.dnr.state.ak.us/mlw/aboutus.htm> (cited 17 September 2003)

¹⁹ AS 38.04.005

²⁰ AS 38.05.300

²¹ p.2, State of Alaska FY2004 Governor’s Operating Budget: Claims, Permits & Leases Component Budget Summary. 25 March 2003.

- Provide revenue to the state treasury
- Facilitate job creation from the use of state land
- Assure environmentally responsible use of state land

In administering these programs, the division's claims, permitting and leases programs are expected to take in more funds than it receives from the state treasury. In FY 2002, the programs collectively cost the state \$6.9 million and received \$8.5 million in revenue. The net profit was distributed to Alaska's permanent fund and the school fund.²²

To determine whether a proposed land use is compatible with the objectives of the division and consistent with Alaska laws, the division's director (or his/her delegate) must make a "best interest" finding. Leases on virtually all of the state's tidal and submerged lands may be authorized by the director, provided that the director finds the proposal to be in the state's best interest.²³ The process and policies that guide the best interest findings regarding leases of state-owned land are explained below.

Alaska's leasing program, with an emphasis on Public and Charitable Use leases

The Division of Mining, Land & Water does not actively seek state land lessees. Generally, the leasing process begins when a party comes to the division and indicates its interest in applying for a state land lease. The formal application is then made available to the party by an employee within the division. The application document – Form 102-103 - Rev.10/01: Application for Purchase or Lease of State Land – is two pages long and is fairly straightforward. A \$100 filing fee is required. Non-profit organizations such as The Nature Conservancy, seeking to protect, conserve and/or restore state tide and submerged land by leasing it, would most likely apply for a Public and Charitable Use lease, the requirements for which are found in AS 38.05.810. A lease of tidal and/or submerged state lands by a non-profit organization for conservation purposes, while unprecedented, appears consistent with the statutory and regulatory requirements of Public and Charitable Use leases.

Unlike other leasing programs, which make money for the state treasury, the Public and Charitable Use leasing and sales program runs at a loss. In FY 2003, the Public and Charitable

²² p.7, p.2, State of Alaska FY2004 Governor's Operating Budget: Claims, Permits & Leases Component Budget Summary. 25 March 2003.

²³ 11 AAC 62

Use program cost \$101.9 thousand to run and received \$79.5 thousand in return.²⁴ This loss, however, is consistent with the enabling statute for the Public and Charitable program, through which the director is allowed to demand less from public and charitable organizations than the full market value of the land.²⁵ In contrast, the division's Upland and Tideland lease program, enabling commercial and industrial interests to lease state-owned land, cost \$2.173 million to run and gained \$2.6 million in revenue.²⁶ While money-making is the overall mission of the permits, claims and leasing programs, the Division of Mining, Land & Water acknowledges (through the Public and Charitable Use program) the importance of non-commercial ventures with purposes that could likely extend into the conservation realm.

Lease application²⁷

In applying for a Public and Charitable Use lease, an organization must specify the length of the proposed lease (10 years for a short-term lease, 25-55 years for a long-term lease), as well as the exact location of the lease parcel and the amount of acreage it covers. Additionally, the organization must detail the use of and activity that it proposes on the state land, including any construction or improvement it plans to make. Due to The Nature Conservancy's status as a non-profit corporation, it would qualify under 38.05.810(b-d) for a non-competitive lease. Furthermore, it is possible that The Nature Conservancy could lease the land for less than fair market value. The director of the Division of Mining, Land & Water has the power to "lease for reasonable annual rental" (i.e. less than market value) to non-profits which plan to use the land for strictly non-commercial purposes.

An organization wishing to lease land in the Coastal Zone must also submit a Coastal Project Questionnaire and Certification Statement, which is available at www.dnr.state.ak.us/acmp/Projects/pcpq.html. This document requires contact with other various state and federal agencies and potentially more applications for permits and authorizations. The information on this form is used by state agencies to ensure the proposed use

²⁴ FY 2004 Governor's Budget Report detailed spreadsheets on the Claims, Permits and Leasing programs, provided by Nico Bus, DNR Administrative Services Manager (907-465-2406); see appendix, "FY03 DMLW Overview" (in computer folder for this report).

²⁵ AS 38.05.810(d)

²⁶ FY 2004 Governor's Budget Report detailed spreadsheets on the Claims, Permits and Leasing programs, provided by Nico Bus, DNR Administrative Services Manager (907-465-2406); see appendix, "FY03 DMLW Overview" (in computer folder for this report).

is compatible with the Alaska Coastal Management Program, the statutory basis for which is provided in AS 46.40 and regulated by 6 AAC 50, 6 AAC 80, 6 AAC 85.²⁸ The Alaska Coast Management Program, known as ACMP, has several provisions that encourage conservation practices. For instance, ACMP must be consistent with the following objectives outlined in AS 46.40.020(1)-(3):

- (1) The use, management, restoration, and enhancement of the overall quality of the coastal environment;
- (2) The development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state; and
- (3) The orderly, balanced utilization and protection of the resources of the coastal area consistent with conservation and sustained yield principles.

Other objectives listed in AS 46.40.020(4)-(8) refer to the importance of conservation, while also recognizing the need for the economic development of coastal resources. Additionally, the section provides a preference to water-dependent over non-water-dependent uses in the management of the coastal land and water resources.

The ACMP review is coordinated by the Office of Project Management and Permitting, located within the Department of Natural Resources, if a proposed project requires permits from a federal agency or more than one state agency. If only one agency is involved, that agency will direct the consistency review. If a proposed lease were for a habitat restoration project, for instance, permits from the DNR's new Office of Habitat Management and Permitting, and possibly additional permits from other agencies, would be required.²⁹ In any case, the ACMP coordinating agency would be responsible for ensuring that a proposed project meets statewide standards and coastal district policies, and a summary of review will be included in the state's best interest finding.

State's best interest finding

After submitting the application to the Division of Mining, Land & Water's regional office that oversees land use authorizations in the area of interest, the applicant must wait for the division's director to make a written recommendation that the proposal is in the "state's best

²⁷ see appendix, "DNR Lease Application" (in computer folder for this report).

²⁸ See www.alaskacoast.state.ak.us/Clawhome/handbook/panels/A.htm.

²⁹ For more information on the new DNR Division of Habitat Management and Permitting, see the division's website: <http://www.dnr.state.ak.us/habitat>

interest.”³⁰ Such a finding is mandated by AS 38.05.035(e) and the general procedures that the director or his/her delegate must follow in making the finding are outlined in that section of the statute. Specifically, the director must first establish the scope of an “administrative review,” or the relevant facts and analyses that the director will draw upon in making a finding. The review must be extensive enough to determine and weigh the “reasonably foreseeable, significant effects of the uses proposed to be authorized by the land disposal.”³¹ The scope of the review, however, may be limited to a determination of the applicable statutes and regulations concerning the proposal, in addition to any facts pertaining to the proposal that the director finds “material” to the state’s best interest at the time he/she makes the finding.³²

The statute grants discretion to the director in deciding the information that will be considered in making the finding and, thus, whether or not the finding will consider the proposal to be in the state’s best interest. However, there are certain general considerations that may commonly appear in best interest determinations. Two examples of written decisions which provide additional insight into how the state makes its best interest finding were provided by the Division of Mining, Land & Water. One decision concerned the application for a tideland lease made by Armstrong-Keta, Inc., which desired to expand its commercial fish hatchery. The other, made by the Sitka Maritime Heritage Society, was for a public and charitable lease for a parcel of state upland containing a historic boat house.³³

Included in the two sample “finding and decision” documents were analyses of whether the proposed use was in accordance with the planned use and classification for the area as specified in the DNR’s Area Plans. Additionally, the Armstrong-Keta finding discussed whether the planned use was consistent with the ACMP for the area. Presumably, if the proposed use was compatible with DNR Area Plan, as well as with the ACMP for the area, it would help the applicant attain a favorable best interest determination.

³⁰ The Director’s authority (or the authority of a delegate such as the Regional Manager) to act on behalf of the state is permitted by AS 38.05.035(a)(6).

³¹ AS 38.05.035(e)(1)(A)

³² AS 38.05.035(e)(1)(B)

³³ Armstrong-Keta, Inc. Proposed Tideland Lease ADL 104308 Finding and Decision AS 38.05.035(e). Alaska Department of Natural Resources, Division of Mining, Land & Water. August 22, 2003; Sitka Maritime Heritage Society Proposed Tideland Lease ADL 107009 Finding and Decision AS 38.05.035(e). Alaska Department of Natural Resources, Division of Mining, Land & Water (draft, not dated). Provided by David Cohen at DNR. See appendix, “Sitka Maritime Heritage Society lease” for copy of finding (in computer file for this report).

Other components of the finding were environmental risk assessments and discussions relating to the applicant's ability to provide insurance, both of which were analyzed to protect the state against losing money on the lease and compromising the interest of the public. It is important to note that a finding considers environmental risk, implicitly recognizing that degraded environmental conditions are not in the public's best interest. (On this basis, a proposed lease project that would improve a degraded area or protect an environmentally-sensitive area should, on the face of it, appear to be in the state's best interest.)

The Division of Mining, Land & Water also takes into account the Public Trust Doctrine in making its best interest determination. For the Armstrong-Keta, Inc. lease proposal, which included a parcel of 4.25 acres of tidal and submerged lands, the best interest finding specifically stated that management of the parcel was – and would continue to be – subject to the Public Trust Doctrine.³⁴ A 1996 state policy document on navigability and a DNR Area Plan provide insight as to how state agencies apply the doctrine.³⁵ Both documents report that federal and state court decisions, findings of the Alaska state legislature, the Alaska Constitution, state statutes and public involvement regarding the doctrine influence state land leasing policy and programs.

State agencies protect in their policies the traditional public trust uses of commerce, navigation and fishing, which were adopted by the Alaska Supreme Court in *CWC Fisheries, Inc. v. Bunker*. Further, Public Trust Doctrine guidance is provided by a finding of the Alaska State legislature in 1985. The legislature found that tidal and submerged lands are:

subject to the rights of the people of the state to use and have access to the water for recreational purposes or for any other public purpose for which the water is used of capable of being used consistent with the public trust³⁶

State law, then, supports the addition of recreational and “other” uses to be included under the doctrine. Does this interpretation allow state agencies to consider environmental protection a public right? If so, conservation leasing would perhaps have strong legal standing under the doctrine. Absent any further guidance from the Alaska Supreme Court concerning the addition

³⁴ p.1, Armstrong-Keta, Inc. Proposed Tideland Lease ADL 104308 Finding and Decision AS 38.05.035(e).

³⁵ State Policy on Navigability: Legal and Policy Guidelines Governing Management of Submerged Lands and Public Waters. Division of Mining, Land and Water Navigability Project, State of Alaska. 1996. Cited on http://www.dnr.state.ak.us/mlw/nav/nav_policy.htm (16 Sept. 2003); p.376, Chapter 3: Management Intent for Navigable Waterbodies. DNR Kenai Area Plan. 2001. Cited on: http://www.dnr.state.ak.us/mlw/planning/areaplans/kenai/pdfs/chap_3_nav_water.pdf (20 September 2003).

of public trust uses separate from the ones protected in *CWC Fisheries*, the Alaska Attorney General's Office advised the state and its agencies to assume a "broad definition of public rights protected" similar to the one adopted by the California Supreme Court.³⁷ In addition to recreational uses, the California court in *City of Berkeley v. Superior Court of Alameda* specifically mentioned the public trust value in the "protection of areas for ecological study."³⁸ In accordance with the Attorney General's opinion, the state's current policy endorses the public interpretation of the California court decision, as reflected in the Department of Natural Resources' 2001 Kenai Area Plan:

"In Alaska, [the public trust] doctrine guarantees the public's right to engage in activities such as commerce, navigation, fishing, hunting, trapping, and swimming, while also providing for the protection of areas for ecological study."³⁹

Thus, it appears that the state considers environmental uses to be protected under the doctrine.

DNR's approach to resolve conflicting uses

What happens when uses conflict? To take a classic Alaskan example, does a person have the right to access and fish in public waters that the state – and possibly a segment of the public – wish to protect from the effects of public use including fishing? The state is not required to protect all public trust uses on every parcel of the land it manages. Although the DNR commissioner (or his/her delegate) must generally allow public access easements and rights-of-way on public trust lands it intends to sell or lease, the commissioner may limit or regulate access if such a step is "necessary for other beneficial uses or public purposes."⁴⁰ Consequently, incompatible uses may be specifically excluded by the division in crafting a lease or other land disposal agreement.

³⁶ Sec.1 85 SLA Ch. 82 (1985). This finding by the legislature is included in both of the state policy documents cited in footnote 2 to help guide agency policy regarding public trust land and water.

³⁷ State Policy on Navigability: Legal and Policy Guidelines Governing Management of Submerged Lands and Public Waters. Division of Mining, Land and Water Navigability Project, State of Alaska. 1996. As cited on the http://www.dnr.state.ak.us/mlw/nav/nav_policy.htm (16 Sept. 2003)

³⁸ State Policy on Navigability: Legal and Policy Guidelines Governing Management of Submerged Lands and Public Waters. Division of Mining, Land and Water Navigability Project, State of Alaska. 1996. As cited on the http://www.dnr.state.ak.us/mlw/nav/nav_policy.htm (16 Sept. 2003)

³⁹ p.376, Chapter 3: Management Intent for Navigable Waterbodies. DNR Kenai Area Plan. 2001. Cited on http://www.dnr.state.ak.us/mlw/planning/areaplans/kenai/pdfs/chap_3_nav_water.pdf (20 September 2003).

⁴⁰ AS 38.05.127(a)(2)

Authority of the DNR over natural resources, however, does not extend to the regulation of fish and wildlife. As mentioned previously, that responsibility falls to the Department of Fish and Game and the associated regulatory boards that construct and enact of hunting and fishing regulations. To restrict fishing in the water column over submerged lands would require regulatory support from the Alaska Board of Fisheries (which would be subject to revocation by a future Board). Thus, a conservation lease that would include the regulation of harvest would involve multiple agency jurisdictions, and the public involvement process inherent in the Board of Fisheries or Game regulation-making process.

Furthermore, the DNR Division of Mining, Land & Water would be hesitant to regulate or restrict public access on leased land. The division carefully considers how a potential lease will affect public access to tidal and submerged lands. The state's best interest finding specifically includes a "public access" analysis.⁴¹ The division proactively protects public access on leased property, and is consistent with the traditional application of the Public Trust Doctrine, which limits the state against access restrictions.⁴² Natural resource attorney Gregory Cook suggests that only if a certain kind of access on public trust lands significantly degraded environmental conditions (i.e. all-terrain vehicles on beaches leased for restoration purposes), could the division act to restrict such access activities.⁴³

Public comment and review

While the state has the authority to prefer certain uses over other ones in the leasing process, members of the public are invited to participate in the land leasing process so that all public trust rights are satisfactorily considered and competing interests may be balanced. The director's preliminary best interest finding is subject to public review. It is statutorily and constitutionally mandated that prior to the state's final finding and decision, a draft must be made available for the public to comment on.⁴⁴ To ensure public input on the proposal and preliminary finding, the state solicits comments through a public notice in local newspapers and

⁴¹ Armstrong-Keta, Inc. Proposed Tideland Lease ADL 104308 Finding and Decision AS 38.05.035(e). Alaska Department of Natural Resources, Division of Mining, Land & Water. August 22, 2003; Sitka Maritime Heritage Society Proposed Tideland Lease ADL 107009 Finding and Decision AS 38.05.035(e). Alaska Department of Natural Resources, Division of Mining, Land & Water (draft, not dated). Provided by David Cohen at DNR.

⁴² *ibid.*

⁴³ Gregory Cook. Personal interview. Juneau, AK. 25 Sept. 2003.

⁴⁴ Alaska State Constitution, Article VIII, Section 10; AS 38.05.945(b)

contacts town officials and parties with an interest in the land adjacent to the proposed lease site.⁴⁵ A person or party that does not submit written comment during this process has no legal right to appeal the final decision.⁴⁶ A second round of public comment may be held if the comments necessitate significant changes to the preliminary finding.⁴⁷ Only after adequate public comment, may the director issue final written recommendation.

Lease agreement

Following the best interest finding confirming final approval, a lease agreement is drawn up (Form 102-111 - revised 9/25/2001). In addition to the compensation agreement, the lease enumerates certain rights that the state retains and standards that the lessee must meet. For instance, sections of a sample lease agreement indicate that although the state is allowing the lessee certain use authorizations, the state still retains certain managerial responsibilities under the Public Trust Doctrine, which

“guarantees public access to, and the public right to use, navigable and public waters and the land beneath them for navigation, commerce, fishing, and other purposes...The lessor reserves the right to grant other interests to the leasehold consistent with the Public Trust Doctrine”⁴⁸

In addition to public trust access requirements, the state may allow additional “reasonable concurrent uses” on the property, as authorized by Article VIII, Section 8 of the Alaska Constitution.⁴⁹

To ensure that a conservation and/or restoration lessee’s objectives are met, certain adjustments to the standard lease document may be necessary. These may include an elaboration on “reasonable concurrent use,” the explicit recognition of certain public access restrictions, and a more concrete definition of the Public Trust Doctrine and its application to the lease. However, a provision in the lease agreement heavily limiting public access to the site would likely be hard to attain, due to DNR’s proactive efforts to secure public trust easements.

⁴⁵ AS 38.05.945(b)

⁴⁶ AS 38.05.035(i)(1)

⁴⁷ AS 38.05.035(e)

⁴⁸ Rivett Family Trust Lease Agreement. ADL 106054. Alaska DNR Division of Mining, Land & Water, Southeast Region. Form 102-111- revised 9/25/2001. 1 July 2003. (for a copy of an actual lease agreement, see appendix, “Pelican Public/Charitable Lease Agreement,” in computer file for this report).

⁴⁹ *ibid.*

Appealing the DNR best interest finding

(AS 38.05.035(i-m))

After a final best interest finding is issued by director of the Division of Mining, Land & Water or a delegate, an individual or party involved in the public decision-making process may appeal the decision. In accordance with the statute, only someone who submitted a written statement during the public comment stage may appeal the final finding. The appeal is subsequently reviewed by the commissioner of the Department of Natural Resources. If the commissioner fails to reconsider the finding of the director, the person or party may appeal to the state superior court.

Part II: Anticipating the response of Alaska courts to conservation leasing proposals

In accordance with AS 38.05.035(i-m), best interest findings regarding lease proposals may be appealed to the Alaska courts.⁵⁰ However, as the court is not a policy-making body, the final DNR decision is subject to “deferential review” by the court.⁵¹ The party seeking the review of a DNR determination has a burden to establish its invalidity.⁵² To persuade the court that the DNR decision is subject to reversal, the party bringing suit must prove that the decision meets the standard set forth by the Alaska Supreme Court in *Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982). A DNR best interest finding may be reversed by the courts when it is found:

arbitrary, unreasonable, or an abuse of discretion or in violation of the Alaska Constitution, Article VIII, Section 1, the Alaska Land Act, or the Alaska Coastal Management Program⁵³

In adopting this standard, the court has repeatedly noted in opinions that DNR findings are mostly policy decisions and it is not the court’s responsibility to determine whether the best interest of the public has been served.⁵⁴ At the same time, the court has acknowledged its responsibility to review whether the DNR decision had a “reasonable basis.”⁵⁵ The court must

⁵⁰ AS 38.05.035(l)

⁵¹ *Trustees for Alaska v. State, DNR*, 865 P.2d 745, at 747 (Alaska 1993)

⁵² AS 38.05.035(m)

⁵³ AS 38.05.037, notes citing court cases at end of text

⁵⁴ for examples see *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971); *Moore v. State*, 533 P.2d 8 (Alaska 1976); *Camden Bay*, 795 P.2d 809; *Alaska Survival v. State* 795 P.2d 1281 (Alaska 1986).

⁵⁵ *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971)

further “ensure that DNR has taken a ‘hard look’ at the salient problems and has genuinely engaged in reasonable decision making” prior to the written finding.⁵⁶

As a party has not yet attempted to obtain a tidal or submerged lease for conservation purposes, it is hard to predict how the court might rule on hypothetical DNR decision not to grant one. The cases that have challenged DNR best interest findings have often been brought forth by those opposed to a particular land lease or sale that the DNR approved. For instance, in *Trustees for Alaska v. State, DNR*, 865 P.2d 745 (Alaska 1993), seven environmental groups and the City of Kaktovik allied against the DNR’s decision which allowed the sale of offshore oil and gas exploration and development rights on submerged lands located adjacent to the Arctic National Wildlife Refuge.

In making their case in *Trustees for Alaska v. State*, the plaintiffs argued that the DNR failed to consider several important issues in its determination of the state’s best interest. The plaintiffs asserted that the DNR did not fully consider the potential environmental risks associated with transporting oil from the sale area to market and the effects that oil and gas exploration and development might have on the caribou herds in the area nearby. Because of these omissions, the Alaska Supreme Court declared that the DNR failed to make a best interest finding that satisfactorily met the conditions set by the Court in *Hammond v. North Slope Borough*.

Decisions such as the 1993 *Trustees of Alaska v. State, DNR*, which reversed a DNR best interest finding that may have threatened wildlife populations in the Arctic, order the state to thoroughly consider environment risks in its authorization of agency leases and sales on submerged lands. Consequently, the DNR has an obligation to ensure that negative environmental impacts are reduced as much as possible during offshore development projects. But does the DNR (and/or the State of Alaska) have an obligation to actively protect certain areas by allowing or even promoting leases of tidal or submerged lands for conservation purposes? An examination of judicial interpretations of the Public Trust Doctrine, Alaska’s Constitution, and relevant statutes illustrate that the court considers state conservation to be in the public’s interest, but is critical of state actions – for conservation and other purposes – that limit public access to trust resources.

⁵⁶ *Trustees for Alaska v. State, DNR*, 865 P.2d 745, citing *Alaska Survival v. State* 795 P.2d 1281 (Alaska 1986)

History of the Public Trust Doctrine

As mentioned in the Part I of this report, the tidal and submerged lands that Alaska was awarded ownership at statehood are subject to the Public Trust Doctrine. It is the responsibility of the state to manage these lands – and their waters and living resources – for the benefit of the people.⁵⁷ But what exactly does this doctrinally-imposed state responsibility entail? What challenges and opportunities does the doctrine pose for conservation leasing? We can better understand and apply the Public Trust Doctrine by more thoroughly examining its historical roots and contemporary significance.

The Public Trust Doctrine has a history that dates back to Roman times, where it was codified in the sixth century's Institutes of Justinian. An often quoted section of the Institutes elaborates on the public character of tidal and submerged lands:

By law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the laws of nations.⁵⁸

Later, when substantive passages of Roman civil law were incorporated into English common law, the Public Trust Doctrine protected tidelands and waters in the king's name for English subjects.⁵⁹ At the time of the America's founding, the doctrine became a part of United States law.⁶⁰

In the United States, Supreme Court opinions acknowledge the doctrine and have incorporated it into common law. Each state is given the authority to apply the doctrine to their own trust lands and waters, but the title of tidal and submerged public trust lands conveyed by the federal government is unique and comes with certain responsibilities:

...public trust land is vested with two titles, one dominant and the other subservient...The dominant title is *jus publicum*, simply described as the bundle of trust rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes. The subservient title is the *jus privatum*, or the private property rights in the use and protection of trust lands⁶¹

⁵⁷ p.3, Coastal States Organization, Inc. 1997. *Putting the Public Trust Doctrine to Work*. Second Edition.

⁵⁸ p.4, Coastal States Organization, Inc. 1997. *Putting the Public Trust Doctrine to Work*. Second Edition.

⁵⁹ p.5, *ibid.*

⁶⁰ *ibid.*

⁶¹ p.6, *ibid.*

⁶² *Illinois Central Railroad v. Illinois*, 146 U.S. 378 (1892)

Thus, even if a state were to sell tidal or submerged land to a private party, the state remains accountable to the public interest.

Protected uses and rights of the public on trust lands

The Public Trust Doctrine acts as a check to counter state power. The state must, in managing trust lands, consider that it is ultimately the public – not the state – which owns the land. For this reason, the public uses most commonly protected by the Public Trust Doctrine have been those which allow citizens the right to access public lands to use for various public purposes. In the landmark United States Supreme Court case *Illinois Central Railroad v. Illinois*, 142 U.S. 378 (1892), the Court ruled that the state’s title to navigable waters and submerged lands was “a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein.”⁶² As a result of this ruling, a trilogy of citizen uses of public lands and waters – navigation, fishing and commerce – became highly protected by the states in their separate applications of the Public Trust Doctrine.

Yet it is important to point out that the Public Trust Doctrine is inherently dynamic and subject to change, as it was under English common law – change that may or may not be officially recorded in legislative statutes.⁶³ Since the *Illinois Central Railroad v. Illinois* decision, public uses protected under the doctrine have expanded past the traditional uses of commerce, navigation and fishing to address modern concerns and needs. Some state courts and legislatures have specifically extended the Public Trust Doctrine to include recreation, environmental protection, and the preservation of scenic beauty as valid uses consistent with the public trust.⁶⁴

Of the categories of uses most protected by the state, public access has been traditionally recognized and protected by the courts. According to the NY/NJ Baykeeper’s Public Trust Doctrine Manual, there is a “strong precedent for application of the Doctrine to cases dealing

⁶³ p.172, Coastal States Organization, Inc. 1997. *Putting the Public Trust Doctrine to Work*. Second Edition.

⁶⁴ p.173-174, *ibid*.

⁶⁵ p.10, NY/NJ Baykeeper, *Public Trust Doctrine Manual*, as cited on:
<http://www.nynjbaykeeper.org/photo/PTDMANUAL.pdf> (15 Sept. 2003)

with waterfront access.”⁶⁵ The law, however, is less clear about what proactive measures that the state is obligated to take regarding environmental protection.

Environmental protection and state responsibility under the Public Trust Doctrine

Specifically relevant to the question of whether tide and submerged lands may be leased by parties for conservation purposes is a California case, *Marks v. Whitney*, which recognizes environmental protection as an important public trust use, worthy of state action:

[O]ne of the most important public uses of the tidelands...is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environmental which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area”⁶⁶

While the *Marks v. Whitney* case is a California decision, state courts in Washington and New York have followed suit by extending the uses protected under the Public Trust Doctrine to include the protection of wildlife and their habitats.⁶⁷ An appeals court in Oregon also recognized the value of protecting natural resources in its decision, *Morse v. Division of State Lands*:

These resources, after all, can only be spent once. Therefore the law has historically and consistently recognized that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.⁶⁸

Although the Oregon Supreme Court declined on the *Morse* appeal to attach as much importance to preserving natural resources under the Public Trust Doctrine, the earlier decision validates a strong argument to cite environmental protection as a public interest use.⁶⁹ Also affirming the environment as a legitimate public trust interest was a New Jersey decision, *NJ DEP v. Jersey*

⁶⁶ *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), as cited in *Putting the Public Trust Doctrine to Work*, p.173

⁶⁷ *Orion Corporation v. State*, 747 P.2d 1062 (Wash. 1987); *People of the Town of Smithtown v. Poveromo*, 336 N.Y.S.2d 764 (NY 1972), as cited in Slade, et al., *Putting the Public Trust Doctrine to Work*, p.174

⁶⁸ *Morse v. Division of State Lands*, 340 Or. App. 853, 581 P.2d 520 (1978), as cited in “The Public Trust Doctrine in Ocean and Coastal Resources Management,” by Richard G. Hildreth. As cited on: <http://www.ecy.wa.gov/programs/sea/pubs/93-53/resource.html> (16 Sept. 2003).

⁶⁹ Hildreth, Richard G. 2003. The Public Trust Doctrine in Ocean and Coastal Resources Management. As cited on: <http://www.ecy.wa.gov/programs/sea/pubs/93-53/resource.html> (16 Sept. 2003).

⁷⁰ *NJ DEP v. Jersey Central Power and Light*, 5 ELR 20370 (N.J. Super. Ct. App. Div. March 21, 1975), as cited in NY/NJ Baykeeper, *Public Trust Doctrine Manual*, on: (<http://www.nynjbaykeeper.org/photo/PTDMANUAL.pdf> (cited 15 Sept. 2003))

Central Power and Light, 5 ELR 20370 (N.J. Super. Ct. App. Div. March 21, 1975), which ruled “The State not only has the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected.”⁷⁰

Competing public trust uses

At the same time environmental protection is gaining acceptance as a public interest use the state must proactively accommodate, the traditionally protected public trust uses continue to be afforded protection. How does the court rule when a segment of the public wants, for instance, a wildlife resource such as salmon be protected, while an opposing segment wants to harvest the resource? Jack Archer, the primary author of a book on coastal management and the Public Trust Doctrine, notes that a “continuing problem” in states’ application of the doctrine is the lack of a hierarchy that allows a court to clearly and definitively choose among incompatible uses:

“While a number of state courts have held that the public trust doctrine does not prevent a state from selecting between appropriate or protected uses, their decisions have not been very clear as to the appropriate mechanisms for choosing among those uses”⁷¹

As a result, Archer reports that courts are inclined to uphold the state’s decision to favor a particular public trust use over a competing one provided the state has thoroughly considered and attempted to balance competing uses.⁷² However, this is not to say that there is no hierarchy whatsoever. Archer asserts that the traditional trilogy of protected trust uses – fishing, commerce, and navigation – generally receive more protection in state case law and statutes than other newly-established trust uses and water-dependant uses are similarly favored over non-water dependant uses.⁷³

Analogies to private trust law

To help guide policy makers, who may have to choose between trust uses, interpreters of the doctrine have compared elements of the public trust doctrine to private trust law.⁷⁴ Private

⁷¹ p.27, Archer, Jack H. et.al, *The Public Trust Doctrine and the Management of America’s Coasts*, Amherst, MA: University of Massachusetts Press, 1994.

⁷² p.29, *ibid.*

⁷³ *ibid.*

⁷⁴ p.35, *ibid.*

trust law establishes certain duties that the trustee is obligated to meet in managing the trust for his beneficiaries.⁷⁵ Included in these responsibilities are: a duty of loyalty; duty not to delegate; duty to furnish information; duty to take and keep control of trust property; duty to preserve the trust property; duty to deal impartially with beneficiaries; duty to enforce the claims of beneficiaries; and duty to make the trust property productive.⁷⁶ While this analogy to private trust law has not been fully adopted by American courts, it provides a set of affirmative principles that potentially allow the state greater control over public trust resources and power to conserve trust resources.⁷⁷

Alaska's courts' interpretation of the Public Trust Doctrine

While the Submerged Lands Act, Supreme Court cases such as *Illinois Central Railroad v. Illinois*, similar state court decisions, and common law principles provide a national context for understanding Public Trust Doctrine, there are some significant differences in the way that coastal states apply the doctrine.⁷⁸ Consequently, it is important to determine the particular foundations of the Public Trust Doctrine in Alaska and the measures taken by the state's legislative, executive and judicial branches, as well as its citizens.

In *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988), the Alaska Supreme Court embraced the Public Trust Doctrine on tidal and submerged lands and applied it consistent with the United States Supreme Court decision, *Illinois Central Railroad v. Illinois*.⁷⁹ In the decision, the Alaska court ruled that tideland sold to a private party that had occupied the area prior to statehood was still subject to the "public trust easements." The petitioner in the case had been denied access onto privately-owned tidelands adjacent to publicly-owned waters, where he planned to fish. The court ruled that since the petitioner desired to fish in publicly-owned waters, a right he was entitled to under the Public Trust Doctrine, the petitioner ought to be allowed to access the water via privately-owned tidelands. In addition to the right of the public

⁷⁵ Private law trustee's responsibilities enumerated in *Restatement(Second) of Trusts* 170(1) (1959), as summarized by Gregory Cook (see footnote 79 for citation).

⁷⁶ p.24, Cook, Gregory F. 1993. The Public Trust Doctrine in Alaska. *Journal of Environmental Law and Litigation*, Eugene, OR: University of Oregon School of Law, Vol.8, pp.1-49.

⁷⁷ p.44, Archer, Jack H. et al, *The Public Trust Doctrine and the Management of America's Coasts*, Amherst, MA: University of Massachusetts Press, 1994.

⁷⁸ see, for example: Doctor, Katy. 2003. The Public Trust Doctrine in Application to TNC's Leasing and Ownership of Submerged Lands. TNC Marine Initiative.

⁷⁹ *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988)

to fish, the Alaska court also cited navigation and commerce as public trust uses.⁸⁰ The Alaska Supreme Court has not specifically endorsed any public trust uses on tidal and submerged lands beyond the traditional trilogy. The state legislature, on the other hand, has endorsed an expansive interpretation of the doctrine (protective of more than the traditional public trust uses) by finding that protected public trust uses included recreation and “other purposes capable of being used consistent with the public trust.”⁸¹ As mentioned in Part I, the expansive Public Trust Doctrine interpretation adopted by the legislature is currently incorporated into state policy.

Furthermore, in response to a ballot initiative in 1983, the legislature statutorily established the scope of state’s public trust responsibility in AS 38.05.502, declaring, “the state holds title to the [unappropriated] land and minerals in trust for the people of the state.” The Alaska Supreme Court has elaborated on the state’s role as a trustee and the public’s as the receiver in *Baxley v. State*, 958 P.2d 422 (Alaska 1988), where the court cited the “fiduciary duty” of the state to “manage [wildlife, minerals and water] resources for the common good of the public as a beneficiary.” According to the court’s interpretation of the Alaska Constitution, the public beneficiaries include not only current citizens, but future generations of Alaskans,⁸² and so state policies must inevitably be conservationist.

To more concretely describe the state’s fiduciary obligations, state courts and public trust scholars have looked to parallels with private trust law.⁸³ Private trust law principles include the responsibility of the fiduciary to take and keep control of the trust property, to preserve the trust property, and to make the trust property productive. The Alaska Supreme Court, however, has recently cautioned against such comparisons as a way to better understand the state’s responsibilities. In *Brooks v. Wright*, the court stated that “application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources.”⁸⁴ While private trustees are required to maximize the economic yield for their beneficiaries, the Alaska court declared that “income generation is not the sole purpose of the [public] trust relationship,” and the state is required to preserve as well as develop natural

⁸⁰ *ibid.*

⁸¹ 85 SLA Ch. 82 (1985)

⁸² p.16, Cook, Gregory F. 1993. The Public Trust Doctrine in Alaska. *Journal of Environmental Law and Litigation*, Eugene, OR: University of Oregon School of Law, Vol.8, pp.1-49.

⁸³ see earlier section in this report on general private trust parallels to public trust law

⁸⁴ *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999)

resources on the trust property.⁸⁵ The Alaska court thus recognizes that conservation is an important responsibility of the state in managing public trust resources.

At the same time, the Alaska court has not yet endorsed a system to evaluate whether the state has breached its fiduciary responsibilities. Instead of wholly incorporating and relying on private trust law principles, the court impressed the importance of the “plain language of statutory and constitutional provisions when determining the scope of the state’s fiduciary duty or authority.”⁸⁶ The court’s interpretations of constitutional provisions such as the “common use” clause, and related statutes support the “conservation and universal use” of natural resources.⁸⁷ Consequently, because conservation leasing aims to protect natural resources for the public’s future enjoyment and use, its goal appears consistent with court interpretations of constitutional provisions, statutes and state agency policy. However, conservation leases that restrict access to public trust tidal and submerged lands, or unduly infringe on the public’s right to harvest fish, might succumb to court challenges.

Courts’ potential public access/common use challenges to conservation leasing

Although the Alaska courts have not defined the public trust uses that the state must affirmatively support nor enumerated specific obligations of the state as trustee, court opinions describe the process by which public trust issues are interpreted. In recent decisions, the Alaska Supreme Court has described the historical reasons for the Public Trust Doctrine and the “common use” clause of the Alaska Constitution, which incorporates elements of the doctrine. These historical contributions emphasize public rights of access to trust resources.

Drawing from historical precedent, the Court held in *Brooks v. Wright* (Alaska 1999) that “the State of Alaska acts as a trustee over...wildlife not so much to avoid *public* misuse of these resources as to avoid the *state’s* improvident use or conveyance of them.”⁸⁸ The court interprets the doctrine historically as one that should act more to restrict the actions of the state than the actions of the public. Any action that the state takes to limit public use of trust resources – for a purpose, for example, like conservation – will be closely scrutinized by the court, as it was in

⁸⁵ *ibid.*, at 1032

⁸⁶ *ibid.*, at 1033

⁸⁷ *ibid.*

⁸⁸ *Brooks v. Wright*, 971 P.2d 1025 at 1031 (Alaska 1999).

Owsichек v. State.⁸⁹ In *Owsichек*, the court referred to the framers of the Alaska Constitution, arguing that “a careful reading of the constitutional minutes establishes that the provisions in article VIII were intended to permit the broadest possible access to and use of the state waters by the general public.”⁹⁰ The court further asserts that “the common use clause was intended to engraft in the [Alaska] constitution certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state.”⁹¹ Through analyses of *Wright*, *Owsichек*, and precedents from cases the court recently endorsed, it is apparent that the Alaska courts have strongly supported public access to hunting and fishing areas.

The Alaska courts’ strong support for public access to natural resources complicates potential conservation leasing plans. Even if the director of the Division of Mining, Land & Water closed public access to a fishing area to reduce the number of fish caught, the director’s action might be challenged by the courts. Although conservation is assuredly a valid use of public lands, the decision of whether or not to close an area to fishing for conservation purposes is generally under the jurisdiction of the Department of Fish and Game, not DNR. Furthermore, even if DNR reached some kind of agreement with DFG, public access to state lands is vigilantly protected by the courts, which look to the historical reasons in interpreting the Public Trust Doctrine and the common use clause. It is possible that the courts might cite historical precedent and favor public access and fishing rights above environmental protection and conservation leasing.

Restoration leasing alternative

An alternative to preservation-oriented conservation leasing proposals that eliminate fishing activities are leases for restoration purposes, which may not unduly restrict public access, and thus are less likely to face a closely scrutinizing judicial review. Alaska courts have cited the importance of conservation of public trust resources, noting that the state has a “duty to manage fish, wildlife and natural resources for the benefit of [all people],” including future

⁸⁹ *Owsichек v. State*, 793 P.2d 488 (Alaska 1988): a challenge to the state’s grants of exclusive guiding rights (not directly related to resource conservation; in this case the plaintiff argued that his right to the common use of the state’s natural resources was compromised by the state’s restrictive action).

⁹⁰ *Owsichек v. State*, 793 P.2d 488 (Alaska 1988) citing *Wernberg v. State* 516 P.2d 1191 (Alaska 1973). The opinion more specifically stated that “the common use clause was intended to guarantee broad public access to natural resources,” drawing on *Wernberg* and other Alaska Supreme Court cases such as *CWC Fisheries v. Bunker*, 755 P.2d 115 (Alaska 1988) and *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983).

generations.⁹² And although the Alaska courts have not officially recognized public trust uses beyond fishing, commerce and navigation, the court implicitly affirmed the duty of the state to preserve natural resources for future generations, noting in *Brooks v. Wright* that income generation was not the sole purpose of the trust relationship.⁹³ Conservation, then, is a court-sanctioned, valid use of state public trust lands. Thus, a restoration lease that does not unduly restrict public use appears consistent with the court's interpretations of the Alaska Constitution, current state statutes and policy, and the Public Trust Doctrine.

Part III: A summary of the potential for conservation leasing in Alaska

The State of Alaska owns most of its coastline's tide and submerged lands, as well as the lands beneath navigable waters, the title to which it received at statehood under the federal Submerged Lands Act of 1953. Guidance for the management of these lands and their resources is provided by Article VIII of the State Constitution, the Alaska Public Lands Act (codified under AS 38.05), interpretations of the Public Trust Doctrine, and public opinion.

The state, which has authorized Department of Natural Resources Division of Mining, Land & Water to direct most land use authorizations, is constitutionally and statutorily mandated to manage such lands and associated natural resources for the public's benefit. The Division of Mining, Land & Water acts as the state's land steward; the Alaska Department of Fish and Game manages the fish and wildlife resources on the land. At times these agencies may have competing interests or overlapping authority on public trust tide and submerged lands, but they are expected through the Alaska Coastal Management Program (ACMP) to coordinate their efforts to best address public's best interest.⁹⁴ Objectives of ACMP include conservation-oriented goals, specifically mandating the "orderly, balanced utilization and protection of the resources of the coastal area" and the "restoration and enhancement of the overall quality of the coastal environment."⁹⁵

⁹¹ *ibid.*

⁹² *Owsichek v. State*, 763 P.2d 488 (Alaska 1988)

⁹³ Cook, Gregory. 2003. Notes updating "Public Trust Doctrine in Alaska," a 1993 law journal article he authored.

⁹⁴ Coast project review FAQs: What is the Alaska Coastal Management Program? As cited on: <http://www.alaskacoast.state.ak.us/Projects/pfirst1.html> (25 September 2003).

⁹⁵ AS 46.40.020(1),(2)

To execute public trust stewardship responsibilities authorized by the state, the Division of Mining, Land & Water has established several land disposal and leasing programs. Of particular relevance to organizations such as The Nature Conservancy are Public and Charitable Use leases, which were established to advance strictly non-commercial proposals by non-profit groups and government entities. Although a lease for conservation purposes is unprecedented in Alaska, such a lease appears consistent with the Public and Charitable Use statute. Furthermore, according to AS 38.05.810(b-d), a conservation lease is most likely eligible for a non-competitive lease for a rate less than market value.

As with many other leases of state land, the director of the division (or an authorized delegate) is statutorily obligated to make a finding that the proposed lease is in the state's "best interest" before the lease can proceed. The finding establishes and executes an administrative procedure through which the interests of the public can be considered.

Support for a favorable "best interest" finding for conservation leasing can be found through an analysis of selected findings, as well as of DNR land use plans and the state's navigability policy. Based on these documents, a conservation lease would not necessarily be inconsistent with the state's policy regarding leases of public trust tide and submerged land. The state policy reflects a broad interpretation of the Public Trust Doctrine, which includes environmental protection as a public right and legitimate "use" of public trust land. Furthermore, under the Article VIII, Section 3 of the Alaska Constitution, the state's natural resources are held in trust for the "common use" of the people, including future generations, who may value natural resource protection.

At the same time, there are several challenges to conservation leasing that a potential lessee would have to take into account. To begin with, conservation leasing is unprecedented: there are no statutory or DNR policies that directly mention or anticipate the possibility of such a lease (though the Public and Charitable Lease program appears readily adapted to this purpose). Secondly, the DNR's Division of Mining, Land & Water, which authorizes uses of state-owned land, does not have the authority to regulate the harvest of fish and wildlife. To restrict harvests, a potential conservation lessee would also have to consult with ADF&G and seek regulatory action through the appropriate regulatory Board (Board of Fisheries or Board of Game). An alternative would be to attempt to have the Division of Mining, Land & Water use its authority to restrict public access, so that indirectly harvest activities would not occur. This possibility,

however, would need strong justification, and so from a practical standpoint is unlikely and could be unenforceable. In applying the Public Trust Doctrine, DNR protects the public's right to access public land and considers restrictions only as a last resort.

However, a lease that does not unduly limit public access, such one for a habitat restoration project, appears to be compatible with state courts, laws and policy. A pilot lease could be attempted without much delay. Soon after a parcel has been selected for a proposed conservation lease and prior to the filing of the Public and Charitable Use application, talks should be initiated with the DNR's Division of Mining, Land & Water so that issues can be highlighted and more concrete policy discussions can take place if needed. To ensure the proposed lease has the highest possibility of a favorable best interest finding, the parcel should be in an area where the uses of conservation and/or restoration is consistent with both the district's ACMP use plan and the DNR Area Plan. Additionally, steps should be taken to provide continued public access (in accordance with the Public Trust Doctrine) to the extent compatible with the objectives of the conservation lease.

If a conservation lease proposal is rejected by the director of the Division of Mining, Land & Water, the decision can be appealed to the Commissioner of DNR. If unsuccessful, the decision can be appealed to the Alaska courts. However, the courts generally defer to state agencies in deciding cases regarding state trust property.⁹⁶ A DNR decision would usually have to be "arbitrary, unreasonable, or an abuse of discretion or in violation of the Alaska Constitution, Article VIII, Section 1, the Alaska Land Act, or the Alaska Coastal Management Program" in order to be overturned.⁹⁷ Thus, it is important to make the best case for the lease directly to the state agencies, which is afforded a fair amount of discretion in making best interest findings.

In summary, in Alaska a lease for a conservation or restoration purpose that does not substantially limit public access and improves fish and/or wildlife habitat is consistent with current state management, Alaska court precedents, and interpretations of the Public Trust Doctrine.

⁹⁶ *Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982).

⁹⁷ *ibid.*

Part IV: Future Alaska policy recommendations

Momentum for the exploration of conservation leasing in Alaska has largely come as a result of recent developments in Washington State, where The Nature Conservancy is working with the Washington Department of Natural Resources to begin a conservation leasing program. As is the case in Alaska, the Washington Department of Resources is the authorized land manager; the DNR's Division of Aquatic Resources runs submerged lands leasing programs. Different from Alaska, however, is that in Washington tidelands can be more easily purchased by private parties.⁹⁸ Yet Washington, like Alaska, still has a substantial amount of state-owned tidal and submerged land available for leasing.⁹⁹

When The Nature Conservancy began to look into the possibility of leasing tidal and submerged lands in Washington State, it found that the DNR's lease and easement policies in practice were not compatible with conservation and restoration projects.¹⁰⁰ The Nature Conservancy discovered that the Division of Aquatic Resources – like Alaska's Division of Mining, Land & Water – had concentrated much of its efforts on revenue-yielding activities (such as leases for commercial purposes) and did not have the time to fully develop policies to encourage conservation and restoration activities.¹⁰¹ To help balance conservation with commercial uses, The Nature Conservancy is presently seeking funds to develop a conservation leasing program in Washington State. With the funding, The Nature Conservancy hopes to create collaborative partnerships with the Washington DNR and the Washington Department of Fish and Wildlife (DFW). Cooperation between the state agencies appears necessary for a conservation leasing program as the former manages submerged land and the latter manages the aquatic animal life.

Support for the establishment of a conservation leasing program can be found in state statutes. In Washington, the management of state-owned aquatic land and resources is guided by the 1984 Aquatic Lands Act (codified in Revised Code of Washington 79.90-96). The act describes the benefits that aquatic lands offer and specifically provides for the environmental

⁹⁸ Dye, Paul and The Nature Conservancy. 2003. The Russell Family Foundation Grant Proposal Template: Transforming Nearshore Habitat Conservation in Puget Sound.

⁹⁹ *ibid.*

¹⁰⁰ Dye, Paul and The Nature Conservancy. 2003. The Russell Family Foundation Grant Proposal Template: Transforming Nearshore Habitat Conservation in Puget Sound.

¹⁰¹ *ibid.*

¹⁰² RCW 79.90.455

protection of aquatic resources.¹⁰² Jay Udelhoven, Assistant Division Manager of Aquatic Resources in Washington State, cites Washington statutes which require environmentally-responsible leases of state aquatic lands:

“RCW 79.90.460 states that leasing ‘...priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigation and biological capacity of the waters...’ and that ‘...[the Washington DNR] shall consider the natural value of state-owned aquatic lands as wildlife habitat, natural area preserve, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any changes in use.”¹⁰³

Udelhoven and the Washington DNR conclude that a conservation leasing program “provides an opportunity for private and public entities to restore, enhance, and/or preserve state-owned aquatic lands [in a way that is] consistent with [DNR’s] mandate and in the public’s best interest.”¹⁰⁴

In developing the Washington Conservation Leasing program, DNR and The Nature Conservancy have created three categories of land use authorizations: a conservation lease – which often requires exclusive use of the site and/or complete control of the site – as well as conservation easements and licenses – use authorizations that are less restrictive of public access or public uses.¹⁰⁵ Because restrictive conservation leases may require devolving some management of aquatic resources to the lessor, an understanding between the Washington DFW and DNR is necessary. Currently, The Nature Conservancy is seeking funds to assist the Washington DFW and DNR in working together to establish conservation priorities and identify potential conservation leasing sites.¹⁰⁶

The Nature Conservancy proposes that the Washington Conservation Leasing program under development should eventually serve as the template for the rest of the United States, including Alaska.¹⁰⁷ Although it is possible that a conservation lease may be obtainable without the creation of a new DNR program in Alaska, such a program would definitively establish conservation as a legitimate leasing purpose and standardize the process by which a conservation

¹⁰³ Udelhoven, Jay, “Washington State Department of Natural Resources Aquatic Resources Program,” Mashomack Preserve, Long Island, NY, 5 February 2002.

¹⁰⁴ *ibid.*

¹⁰⁵ see appendix, “Washington State Conservation Leasing Program” (in computer folder for this report) for detailed descriptions of the types of conservation use authorizations under development by the Washington State DNR.

¹⁰⁶ The Nature Conservancy. 2003. The Russell Family Foundation Grant Proposal Template: Transforming Nearshore Habitat Conservation in Puget Sound.

¹⁰⁷ *ibid.*

lease might be obtained. Additionally, a conservation leasing program – if supported by the Alaska Department of Fish and Game (ADF&G) as well as other state agencies – would help to consolidate and enhance current aquatic conservation efforts by identifying and meeting conservation priorities of the state agencies.

There are certain considerations, however, that must be taken into account before adopting an Alaska program based on the emerging Washington program. Alaska does not have legislation comparable to Washington’s Aquatic Lands Act, which specifically addresses the management of tidal and submerged lands. Guidelines for the management of tidal and submerged lands in Alaska are included with all state-owned lands in the Alaska Land Act (Alaska Statute 38.05). Leasing programs enabled by the Alaska Land Act statutes cater to commercial uses, and encourage uses which will provide economic gain for the state. Washington State, on the other hand, specifically authorizes environmental enhancement as a priority use for state leases of aquatic lands.¹⁰⁸

This is not to say that the current Alaska leasing programs do not take into account protection of the environment. When making the best interest determination, the director of the Division of Mining, Land & Water must consider “environmental risks” of a proposed lease.¹⁰⁹ Additionally, the division is responsible for assuring “environmentally responsible” land use authorizations.¹¹⁰ Both of these policies suggest that the division should do what it can to lessen the negative environmental impacts of development, but do not encourage the division to proactively protect natural resources. Thus, there is not an affirmative pro-environment mandate comparable to the one in Washington that supports the establishment of a special leasing program for conservation and/or restoration uses.

Furthermore, a new program in Alaska would require the active cooperation of the Alaska DNR and ADF&G, two state agencies that have traditionally facilitated private use of state land for purposes such as mining, oil and gas drilling, and the harvest of fish and wildlife. Controversy both within the agency and among outside commercial entities that have benefited

¹⁰⁸ RCW 79.90.460

¹⁰⁹ Although environment *enhancement* is not one of the explicit purposes for the Alaska leasing program (as it is in Washington; see fn 108), an evaluation of the environmental *risk* a potential lease poses must occur. This environmental impact assessment is not mandated by Alaska statutes, but has come to be incorporated into DNR policy after Alaska courts ruled that best interest findings that did not fully consider environmental risk were not valid (see, for example, *Trustees for Alaska v. State, DNR*, 865 P.2d 745).

¹¹⁰ p.2, State of Alaska FY 2004 Governor’s Operating Budget, Department of Natural Resources Claim, Permits & Leases Component Budget Summary. 25 March 2003.

from traditional tidal and submerged land leasing programs might make the establishment of a conservation leasing program politically unfeasible.

Alternatively, a more modest policy change might face less political and bureaucratic opposition. Gregory Cook suggests drafting and lobbying for the insertion of a small provision, within Division of Mining, Land & Water's standard best interest considerations, which recognizes the importance of aquatic resources and wildlife habitat.¹¹¹ Although current documents include environmental risk assessments (thus implicitly acknowledging the importance of such resources), an explicit provision makes it easier for the division to declare that conservation and restoration are appropriate and legitimate lease uses of state lands. The provision might have the added benefit of eventually requiring developers and polluters of tidal and submerged land to perform mitigation activities.

Thus, while the Washington State conservation leasing program should be studied more carefully for its potential application in Alaska, there are certain political and bureaucratic challenges that impede the implementation of such a program in Alaska. Although Alaska's current policy requires that leases must undergo environmental risk assessments, there is not an affirmative mandate that prioritizes environmental enhancement leasing activities. Additionally a conservation leasing program may be perceived as controversial by state agencies and members of the public who have benefited from traditional state leases. A more modest, yet progressive, adjustment to the best interest finding that explicitly recognizes the value of aquatic resources might be more successful.

Currently however, a conservation lease appears consistent with state management policy and guidelines. Potential benefits to using the present leasing program include a lower profile pilot lease and a faster approval that does not require time-consuming policy changes. Because it is possible that a restoration-oriented lease might gain approval without policy or statutory modifications, The Nature Conservancy should first attempt to secure such a lease through existing bureaucratic channels.

¹¹¹ Cook, Gregory. Personal interview. Juneau, AK. 25 September 2003.