

Submerged Lands Management in California

The Potential for Conservation Leasing

by Daniel Klaus

Introduction

In an effort to expand the available tools used for protection of the marine environment, The Nature Conservancy initiated several pilot projects to evaluate the potential for ownership or leasing of submerged lands.¹ This strategy fits in line with the organization's traditional methods of purchasing titles or easements on land, but it presents some unique obstacles. Submerged lands, defined as lands below the ordinary low water mark seaward to the boundary of the state, do not carry title in the same sense as property on land.² Rather than fee simple ownership, submerged lands are subject to the Public Trust, a common law doctrine. The complication is that as a part of common law, the Public Trust evolves through the courts, and is thus different for each state. The Nature Conservancy has begun evaluating the interpretations of the Public Trust Doctrine in some states, but not all. In this paper, I will discuss the application of the Public Trust over submerged lands in California, in order to determine the potential for conservation leasing in the State. Throughout the paper, I will focus on issues related to the extent of legislation and the lessee's rights, lease terms and fees, and leasing procedures. Specifically, I will describe the evolution of the Public Trust, applicable Federal cases and codes, California legislation, California court interpretations of the Public Trust in relation to

¹ Beck MW, K Fletcher, T MacDonald, and J Udelhoven. 2005. THE LEASING & OWNERSHIP OF SUBMERGED LANDS FOR CONSERVATION: ISSUES & OPPORTUNITIES IN LAW, POLICY AND PRACTICE. Proceedings of the 14th Biennial Coastal Zone Conference. [Beck et al. 2005],

² Slade, DC, (preparer). 1990. Putting the Public Trust Doctrine to work : the application of the Public Trust Doctrine to the management of lands, waters, and living resources of the coastal states. Connecticut Dept. of Environmental Protection, Coastal Resources Management Division. Hartford, Conn. at 7. [Slade 1990]. Further discussion in Evolution of the Public Trust.

submerged lands, and then conclude with an analysis of the potential for conservation leasing in the state.

Evolution of the Public Trust

In order to understand State and Federal jurisdiction over submerged lands, it is necessary to first understand the rights conferred by the Public Trust. The Public Trust, which applies to navigable waters and the lands beneath them, has its roots in the sixth century Institutes of Justinian, which held that the sea and its uses in trust for the good of all people.³ That is, the State acts as trustee over the trust of the waters, with the public as the beneficiaries. The English, and subsequently the American colonies, adopted the ideas of the Public Trust into common law. As opposed to fee simple title in real estate, Public Trust land has two titles, the *jus publicum*, rights held for the use of the public, and the subservient *jus privatum*, rights specific to the proprietor.⁴ The State holds both titles, but may only convey that of *jus privatum*.

Two nineteenth century US Supreme Court cases are critical to understanding the evolution of the Public Trust in the United States: *Martin v. Waddell*⁵ and *Illinois Central Railroad v. Illinois*⁶. In *Martin*, the court decided that the States held sovereign rights over tidelands—lands lying between the ordinary high and low water marks subject to the ebb and flow of tides—and their oyster beds. Justice Taney said:

³ Slade 1990 at 4.

⁴ Slade 1990 at 7.

⁵ 41 U.S. 367 (1842)

⁶ 146 U.S. 387 (1892)

When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use.

In *Illinois Central*, the court declared that the State could not transfer or dispose of its duties as the trustee in the protection of the traditional public trust activities of fishing, commerce, and navigation. The court declared :

[The Public Trust] is 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 freed from the obstruction or interference of private parties. . . . The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

The original thirteen states adopted English common law as it pertained to the Public Trust, and therefore acquired the trusteeship therein. As states joined the Union, they gained the same rights under the equal footing doctrine.⁷ Each state then has the authority to interpret what constitutes navigable waters, and what other activities are held within the Public Trust through legislation and common law.

⁷ Slade 1990 at 18. According to the Ordinance of 1787, any state joining the Union is admitted on equal footings with the original states in all respects.

Federal Codes Pertaining to Submerged Lands

The Supreme Court cases of *Martin* and *Illinois Railroad* only ruled on the Public Trust nature of tidelands, but each of the States claimed dominion over submerged lands.⁸ Under their authority granted by the Public Trust, many states leased submerged lands for development of harbors, oyster farming, and oil and gas exploration. There was little contention over the States' Public Trust powers over submerged lands—some States even incorporated it into their Constitutions—until the discovery of offshore oil and gas. In 1921, the California legislature authorized permits to prospect off its coast and collected royalties for any petroleum extracted.⁹ As other states followed suit, and the federal government saw the potential revenues, it challenged California's claim over submerged lands seaward of ordinary low water. In 1941, the Supreme Court found in favor of the federal government. Justice Black, in the opinion of the court wrote:

The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from was waged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use.¹⁰

⁸ Slade 1990 at 27.

⁹ Cal Stats 1921, c. 303

¹⁰ United States v. California, 332 U.S. 19 at 35.

The States, who had been managing their submerged lands according to the Public Trust for over 150 years, turned to Congress to regain control of submerged lands.

In 1953, Congress passed the Submerged Lands Act¹¹, granting Public Trust powers back to the states. Congress returned Public Trust title to lands beneath navigable waters, now defined to include lands seaward to three geographical miles from the coast¹², including “power to manage, administer, lease, develop and use said lands and natural resources.”¹³ Additionally, any revenues collected by the Departments of Interior, Navy, or Treasury under the submerged land leases were returned to the respective States. However, the United States retained the rights and control of the navigable waters for “commerce, navigation, national defense, and international affairs.”¹⁴ Thus, the States regained the right to manage and lease their submerged lands according to their interpretation of the Public Trust.

Review of California State Laws Pertaining to Submerged Lands

California Constitution

California is clear that it prohibits sale or private ownership of submerged lands. Article X Section 3 of the California Constitution states that all tidal and submerged lands within two miles of any city, county, or town “shall be withheld from grant or sale to private persons, partnerships, or corporations.” Similarly, Article X Section 4 states that private parties who own waterfront property may not exclude anyone the right of way for “any public purpose, nor to destroy or obstruct the free navigation of such water.” The exception to ownership is that some individuals purchased land from Mexico before California became a state, and some individuals

¹¹ 43 USC 1301-1314.

¹² 43 USC 1301. In the case of the gulf states, the area extended three leagues (9 miles)

¹³ 43 USC 1311. The rights were conferred on the States or persons who were on June 5, 1950, granted those rights.

¹⁴ 43 USC 1314(a).

purchased land in San Francisco Bay between 1850 and the enactment of Article X Section 3 in 1876. However, the California Supreme Court ruled that even these private lands are subject to a Public Trust easement held by the State.¹⁵ Technically, the Constitution only limits sale to a two mile boundary instead of the three mile State water boundary, but based on California Court rulings it is unlikely that this ownership would be fee simple and free of any Public Trust easement. Effectively, the only viable method of submerged land conservation for the Nature Conservancy would be through leases.

California Fish and Game Codes

The Nature Conservancy has been particularly interested in leasing shellfish beds since many states have specific provisions for shellfish harvest, and the filtration capacity of bivalves make restoration effective.¹⁶ California allows such leasing of “bottom waters” under the management of the California Department of Fish and Game under the Fish and Game Codes.¹⁷ The State Lands Commission, who initially authorizes the leases of submerged lands may lease water bottoms to any person for aquaculture as long as the lease is in the public interest. Species that have been cultured under such leases include: kelp, abalone, oysters, scallops, clams, and mussels.¹⁸ The lease is subject to a \$500 filing fee, and the lessee must register as an aquaculturalist for \$549 before bidding on any areas.¹⁹ After an application is submitted, the Commission publishes a public notice, and the award goes to the highest responsible bidder. The

¹⁵ *People v. California Fish Co.* (1913). 166 Cal. 576; *Bekeley v. Alameda* (1980). 26 Cal. 3d 515; *Los Angeles v. Venice Peninsula Properties* (1982). 31 cal 3d. 288.

¹⁶ 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. [Marsh et al 2002]

¹⁷ CA Fish and Game Code 1500 et seq.

¹⁸ DeVoe MR and AS Mount. 1989. An analysis of ten state aquaculture leasing systems: issues and strategies. *Journal of Shellfish Research*. 8(1):233-239.

¹⁹ CA Fish and Game Code 15101. Registration as an aquaculturalist only requires a name, species grown, and location of existing leases.

minimum rent for a lease is two dollars per acre, and oyster leases are subject to a tax of four cents per packed gallon, or 100 harvested oysters. In terms of exclusion, throughout the lease, the lessee exclusively owns all cultivated organisms, and they may limit public access or prohibit recreational activities that may damage the leasehold or its culture. However, the lessee may not “unreasonably impede public access.”²⁰ Leases are limited to twenty five year periods, subject to renewal if the lessees remain “actively engaged” in aquaculture. Upon termination, all structures must be removed from the lease site. The length of lease and exclusionary mechanisms allowed under California aquaculture leases seem to be amenable compared to that of many other states reviewed by the Nature Conservancy.²¹

Public Resources Code

In addition to the aquaculture leases authorized under the Fish and Game Codes, the State Lands Commission permits leases under the Public Resources Code that may allow alternative types of conservation leasing. Generally, the Public Resources Code allows leasing of public lands “including, but not limited to, grazing leases and leases for commercial, industrial, and recreational purposes.”²² for oil²³ and mineral leases, construction of marinas and harbors, and other trust purposes.²⁴ The categories of leases include, but are not limited to, a wide range of uses, including restaurants, clubhouses, and gas service facilities, and non-income producing uses like buoys and floats.²⁵ Similar to the aquaculture leasing, any person desiring to lease state lands, including submerged lands, “for any purpose not prohibited or otherwise provided for by

²⁰ CA fish and Game Code 15411.

²¹ Beck MW, TD. Marsh, SE. Reisewitz, and ML Bortman. 2004. New Tools for Marine Conservation: the Leasing and Ownership of Submerged Lands. *Conservation Biology* 18(5). 1214–1223. [Beck et al. 2004]

²² CA Pub Res. Code 6501.1

²³ Currently there is a moratorium on offshore oil and gas leases in the Santa Barbara Channel.

²⁴ Division 6, Part 1, Chapter 4, CA Pub. Res. Code. 6301 et seq., 6501 et seq.

²⁵ State Lands Commission Regulations, Article 2 Section 2002(a). Available at: http://www.slc.ca.gov/Regulations/Article_2.htm

law²⁶ may apply for the lease for a reasonable filing fee. The Commission has up to 180 days to review the lease and determine the annual rent. While recreational leases may not be longer than ten years, general leases or rentals may be up to 49 years.²⁷ The benefit of applying for a conservation lease under a general lease rather than an aquaculture lease is that it may allow for a longer period and will not have the active use requirement. The difficulty is that the lease must be viewed as in the public interest, which depends on how the State Lands Commission interprets the Public Trust. In determining the public interest, the State Lands Commission uses the following criteria²⁸:

- (a) Consistent with current Commission policies, practices and procedures used for administering lands within its jurisdiction;
- (b) economically viable, necessary and desirable;
- (c) appropriate for developmental mix;
- (d) conducive to public access;
- (e) consistent with environmental protection;
- (f) otherwise in the best interests of the state.

Since a conservation lease would be "consistent with environmental protection," it seems that it would be acceptable. Part of the reason that conservation leases are not explicitly allowed is that it is a use that has not been commonly proposed.

Government Code

²⁶ CA Pub. Res. Code 6502.

²⁷ State Lands Commissions Regulations. Article 2 Section 2004.

²⁸ State Lands Commissions Regulations. Article 9 Section 2802.

Another consideration that the Nature Conservancy must take into account is that submerged lands may be granted to public entities such as cities, counties, and towns. Grants are completed through legislation, and there are currently 85 grants, including Los Angeles, Long Beach, San Francisco, San Diego, Oakland, and Eureka.²⁹ The grantees gain the same powers given to the State Lands Commission under the Public Resources Code.³⁰ However, even in the case of granted lands to public entities, the State maintains *jus publicum*, and the Commission monitors them to ensure compliance.³¹ Under the California Government Code, the grantee may lease tidelands for up to 50 years, and uses may include “park, recreational, residential, or educational purposes, under conditions not inconsistent with the trust.”³² The complication with granted lands is that in some cases, the lease would have to be sought from the city or jurisdiction that manages the lands. Although the State may have ultimate authority upon deciding the Public Trust, some cities may be more or less accepting of conservation leases than others.

California Interprets the Public Trust

Although the traditional interpretations of Public Trust protection for navigable waters, as described in *Illinois Railroad*, were limited to commerce, navigation, and fishing, California courts have broadened that interpretation over time. California has well developed case law and judicial interpretations of the Public Trust. In terms of the commercial developments allowed under the Public Resources Code, the court of appeals even found that restaurants, cocktail lounges, and yacht harbors all fell within the definition of the public trust, as they fostered public

²⁹ State Lands Commission Land Management Division Brochure. 2005. Available at: http://www.slc.ca.gov/Division_Pages/LMD/lmd%20brochure.pdf

³⁰ CA Pub. Res. Code 6305.

³¹ State Lands Commission Land Management Division Brochure. 2005.

³² CA Gov. Code 37384 and 37387.

visitation.³³ The ruling in *Marks v. Whitney*, however, provides a good example of the State's broad interpretations of the Public Trust.³⁴ Justice McComb explained that:

Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.

The court continued to broaden its interpretation by including preservation value in the definition of the public trust, when McComb declared:

There is a growing public recognition that one of the most important public uses of the tidelands -- a use encompassed within the tidelands trust -- 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 environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

In *Carstens v. California Coastal Commission*³⁵, in explaining the court's previous decisions, the court recognized the inherent conflicts that may arise between competing Public Trust interests and explained that the State Constitution "does not prevent the state from preferring

³³ *Martin v. Smith* (1960). 184 Cal App.2d 571.

³⁴ *Marks v. Whitney* (1971). 6 Cal. 3d 251.

³⁵ *Carstens v. California Coastal Commission*. 182 Cal. App. 3d 277

one trust use over another.” The Court also cited the 1976 California Coastal Act (Pub. Res. Code 30000 et seq) and its emphasis on protection of public resources in such conflicts, when Justice Weiner stated:

The Legislature also provided guidance in resolving policy conflicts in section 30007.5, which states in part: "The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources."

The courts in California have consistently expanded the definitions of Public Trust protections, especially in terms of environmental preservation, and such interpretations can only be beneficial in terms of pushing forward new submerged land lease options such as conservation leasing.

Conclusions

It appears that California, with its clear legislation, provides an inviting environment for conservation leasing. Conservation leases in California are relatively inexpensive—especially compared to fee simple land purchases—they provide for longer terms than many other states, and they allow for some excludability. Although aquaculture leasing requirements for kelp beds and other areas are well defined, its active use requirements may make a general lease under the Public Resources Code more appropriate. Additionally, conservation organizations should consider the attitudes of the managing authority toward environmental protection, especially in

the case of granted lands. In terms of the State Lands Commission, in 2000, the Chief of the Land Management Division stated that “preserving the environmental integrity of the lands and reserves for future generations” was the top issue related to management of submerged lands.³⁶ Based on Judicial interpretations of the Public Trust in California, conservation and environmental protection may be important goals for the state, and leasing of submerged lands for conservation purposes may be viewed as supplementing the State’s managed area system.

³⁶ Rhode Island Coastal Resources Management Council, compiler. 2000. Submerged Lands Survey: Update 2000. As Presented At The:19th Annual International Submerged Lands Management Conference Newport, RI October 1-5, 2000. Available at: www.crmc.state.ri.us/pubs/pdfs/Survey00.pdf