

THE LEASING & OWNERSHIP OF SUBMERGED LANDS FOR CONSERVATION: ISSUES & OPPORTUNITIES IN LAW, POLICY AND PRACTICE

*Michael W. Beck, Marine Initiative, The Nature Conservancy
Kristen Fletcher, Marine Affairs Institute, Roger Williams School of Law & RI SeaGrant
Tony MacDonald, Coastal States Organization
Jay Udelhoven, Washington Department of Natural Resources*

Keywords: submerged land, lease, underwater rights, shellfish

The coastal waters of the United States—from the kelp beds of the Bering Sea to the marshes of Louisiana to the reefs of Florida and Hawaii— contain a significant and under-recognized element of this nation’s biological diversity.

With the increasing U.S. population living near or on the coast, and many others flocking to coastal areas annually for recreation, degradation of near-shore habitats is widespread and the effects on biological diversity and productivity are alarming. We have lost many of the ecological services provided by shellfish, seagrass, and marshes; from the essential habitat they provide to their roles in reducing erosion and improving water quality.

The recently issued report by the U.S. Commission on Ocean Policy has highlighted these conditions and threats and brought unprecedented attention to U.S. ocean issues, along with identifying management strategies to ameliorate these conditions. Hopefully, the recent findings regarding the poor state of the nation’s coasts will inspire real improvements in state and federal management of marine resources. Governmental agencies, plagued by budget reductions and increasing workloads, cannot do it alone.

In the marine environment, non-governmental organizations (NGOs) have played a substantial role in assisting public agencies but primarily have limited their work to habitat restoration. Terrestrially, NGOs have played a large role in developing and testing new and innovative management approaches on the lands that they lease or own. There are substantial benefits to this strategy: if the methods are proven effective, it is then easier for public managers to convince their superiors and stakeholders of their potential wider application on public lands.

It is clear that we must find innovative ways to manage and protect our rich marine resources. It has been commonly assumed that the tools for estuarine and marine conservation must be substantially different from those for terrestrial conservation, in part because it is not possible to own parts of the ocean or to exclude areas from certain historic users. This is an unfortunate misconception: significant submerged land is available for lease and ownership in the U.S.

The groups that our panel members represent have been exploring the conservation leasing and ownership of submerged lands in law, policy, and practice. The Nature

Conservancy (TNC) has several on-the-ground projects developing in New York, Washington, Texas, and California. The Washington Department of Natural Resources (DNR) has developed new state policy on submerged lands leasing for conservation and restoration. The Marine Affairs Institute at the Roger Williams School of Law in partnership with TNC has examined legal and policy issues in the use of these tools.

We will describe ongoing projects and examine some of the benefits and considerations in the conservation leasing and ownership of submerged lands. The goal of the session is to engage participants in a dialogue about the potential application of these tools for conservation and restoration in State waters.

SUBMERGED LANDS LEASING & OWNERSHIP

There are three forms of ownership of state submerged lands possible: leases of submerged lands from states, limited ownership of submerged lands sold by states, and outright ownership (in fee simple) of lands conveyed into private ownership prior to statehood.

Current projects by TNC and others show that it is possible to lease and own submerged lands for conservation purposes in some circumstances. Reactions to these tools include excitement about their potential. There are also uncertainties because submerged lands ownership and leasing spur new discussion about the applicable law and policy. Indeed, the perceptions regarding the law and policy by the public, users, and governments is often based on incomplete analysis. Some of the key questions typically raised include:

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

KEY FINDINGS TO DATE

Below we illustrate some of the key findings and lessons to date from our work in policy and practice on the conservation leasing and ownership of submerged lands. The discussions in the session at the Coastal Zone Management Conference 2005 are meant to review these findings and more importantly to discuss new issues, constraints, and opportunities in the leasing and ownership of submerged lands.

Leasing and ownership of submerged lands can be significant tools for conservation organizations, land trusts and others to achieve conservation goals. Case studies and on-going examples of work from New York, Washington, Texas, North Carolina, California and Florida indicate that leasing and ownership are viable tools for meeting coastal and marine conservation goals. Many opportunities exist for expanding the use of

these tools and often are necessary additions to existing conservation and management of marine resources. Further use of these tools can help states address balance and fairness in their existing authorizations for uses of the marine environment.

Conservation leasing and ownership are supported within the Public Trust Doctrine. States have clearly used leasing and ownership to meet their Public Trust Doctrine responsibilities and they can also use leasing to meet their environmental mandates. It appears that potential conflicts are based less in law or policy and based more on perception.

Riparian/coastal landowners have clearly established rights of access to and use of submerged lands and public trust waters. However, as uses of public trust waters and submerged lands have intensified, courts and legislatures have modified these common law riparian rights. Courts also have balanced these traditional riparian landowner rights with the right of public access and conservation. The riparian right of water access could affect the ability of entities to lease submerged lands for conservation purposes; however, even in states that accord private riparian rights a highly protected status, the impact would likely be minimal.

Current state policy often requires that lease holders make “productive use” of their lands; the common perception is that while restoration is a productive use, conservation and preservation are not. This distinction must be recognized for current implementation of projects and should be changed for future projects. Productive use differs state by state but traditionally has been associated with a direct activity on the land such as the placement of aquaculture pens or marine pilings. Even though it is clear that conservation leasing and ownership can be used for a range of activities such as natural habitat enhancement, research, and monitoring, state agency personnel may not perceive such conservation uses as “productive.” Thus, it may be more acceptable for a conservation leaseholder to engage in restoration as opposed to preservation (i.e., more active as opposed to less active management).

Before acquiring a lease or ownership right to submerged lands, the purpose of acquiring these rights should be part of a clear conservation and restoration plan. Many factors need to be considered regarding whether or where to acquire lease or ownership rights. The appropriate sites and strategies should arise from a regional consideration of conservation needs. Site-based goals on leased and owned lands must also be clear so that there can be consideration of conservation costs and benefits. When acquiring submerged lands through leasing or ownership, conservation organizations will take on direct stewardship responsibilities in the marine environment: the purpose, benefits and costs of this stewardship role need to be clearly defined.

Leasing and ownership have different key attributes as tools for conservation and their utility will vary. Some of the key differences in acquiring lease or ownership rights include variability and clarity in rights, expense, and duration of rights. The variation in rights is likely to be great for privately-owned lands and the search on title rights will be

a non-trivial expense. The variation in rights on leased lands can also vary but usually less so and those rights will be stated clearly in the negotiated terms of the lease.

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

Opportunities for ownership can be substantial. There are privately owned properties (sometimes substantial) within most states and the size of these parcels can be substantial. Because the records of submerged lands ownership are poorly kept in most states, an inventory is necessary to identify the extent of public and private ownership of state submerged lands.

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

The best way to test the extent that state or Federal policy will allow conservation leasing of submerged lands is for groups to apply for leases. State agencies for submerged lands tend to be reactive; when they encounter a new proposed use, they will begin to address it. Hence, if a lease application for conservation purposes is received, the agency will be required to assess internally if and how their policies do or do not allow them to act. Indeed, formal applications and internal agency policy review could spark useful consideration of the current balance among existing uses in light of Public Trust Doctrine mandates.

Michael W. Beck, Ph.D.
The Nature Conservancy
100 Shaffer Road, LML
University of California
Santa Cruz, CA 95060

Phone: 831.459.1459
E-mail: mbeck@tnc.org

*Proceedings of the 14th Biennial Coastal Zone Conference
New Orleans, Louisiana
July 17 to 21, 2005*

www.nature.org/initiatives/marine