

## **OBTAINING PROPRIETARY RIGHTS FOR OCEAN AND COASTAL CONSERVATION**

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### **INTRODUCTION**

Over the past several years The Nature Conservancy (TNC) has collaborated with local, state, and federal agencies and organizations to assess and develop opportunities for private organizations to acquire proprietary interests in ocean and coastal lands and resources for conservation purposes. To-date, TNC's efforts have included: identifying existing and undertaking new, in-water projects; assessing relevant laws, policies, and data; exploring opportunities in the U.S. Exclusive Economic Zone and abroad; and developing a web-based resource for marine practitioners.

### **BACKGROUND**

It is no secret that private entities have been acquiring rights from local, state, and federal agencies to use and occupy lands and resources lying between the high tide line of individual states and the seaward extent of the Exclusive Economic Zone (EEZ) of the United States for hundreds of years. The transfers of rights have come in numerous forms, been labeled with various terms, included different privileges and obligations, and followed an array of processes. Historically, private commercial and residential entities were the primary benefactors of these transfers. Their activities often excluded the public from specific ocean and coastal areas while degrading the marine environment. Over the past several years, however, TNC and other conservation organizations have been challenging many of the traditional ideologies concerning ocean and coastal land and resource use by implementing in-water, proprietary projects (primarily leasing and ownership) that establish conservation as a legitimate and defensible "use". The goal of TNC's effort is to create opportunities for site-specific conservation while building a platform to comprehensively address a balance of ocean and coastal uses through planning, zoning, and ecosystem-based management.

### **IN-WATER LEASING & OWNERSHIP PROJECTS**

The Nature Conservancy identified existing private leasing and ownership projects as a means to understand where and under what circumstances organizations have acquired proprietary rights to ocean and coastal lands and resources for conservation purposes (see Table 1). TNC worked with project managers at the identified sites to develop case studies and lessons learned that can be applied as general decision-making criteria and procedural steps when organizations are contemplating the use of leasing and ownership as strategies. Additional existing and proposed projects are known, but the details are either unclear or not available to the public at this time. TNC expects that leasing or ownership projects involving lands and resources below the high tide line will likely be discovered in nearly every state of the United States in addition to other countries.

| State/Country         | Ownership | Leasing  | Total Inter/Sub-Tidal Acres | Organization(s)                 |
|-----------------------|-----------|----------|-----------------------------|---------------------------------|
| California, USA       | 1         | 2        | 4,460                       | Audubon, Sonoma Land Trust, TNC |
| Connecticut, USA      |           | 1        | 1.5                         | Private individual              |
| Florida, USA          | 1         | 1        | 10,000 +/-                  | Audubon, TNC                    |
| Massachusetts, USA    | 1         |          | 230                         | Audubon                         |
| New York, USA         | 2         |          | 13,000 +/-                  | TNC                             |
| North Carolina, USA   | 1         |          | 1,100                       | TNC                             |
| Tanzania              |           | 1        | 74                          | Chumbe Island Coral Park Ltd.   |
| Texas, USA            | 2         | 1        | 2,800                       | Galveston Bay Foundation, TNC   |
| United Kingdom        | numerous  | numerous | (700 miles of coast)        | National Trust                  |
| Virginia, USA         | 1         |          | 300                         | TNC                             |
| Washington State, USA | 3 +       | 1        | 4,530 +                     | Skagit Land Trust, TNC          |

**Table 1: Summary of In-Water Proprietary Projects**

The cumulative impact of the identified projects pales in comparison to the impact of existing projects undertaken for terrestrial conservation. For example, TNC has protected 117 million acres of land throughout the world since the early 1950s while land trusts have protected nearly 34 million acres in the United States (TNC 2007a; Land Trust Alliance 2005). Much of this protection has been through proprietary acquisition of terrestrial areas. Recognizing differences and resultant limitations in land and sea tenure, the success of terrestrial conservation efforts sheds some light on the potential growth that leasing and ownership of coastal and ocean lands and resources could achieve.

#### LAW, POLICY, & DATA ASSESSMENTS

Since 2001, TNC has collaborated with management practitioners, academics, attorneys, and scientists to assess and develop the legal, policy, and data aspects of conservation leasing and ownership. As a result of this work, two national-level assessments were developed: *Leasing and Restoration of Submerged Lands - Strategies for Community-Based, Watershed-Scale Conservation* (Marsh et al. 2002) and *Towards Conservation of Submerged Lands - The Law and Policy of Conservation Leasing and Ownership* (Beck et al. 2005). These national-level assessments have been and continue to be complemented through state-level assessments by TNC and others in Alaska, California, Hawaii, Rhode Island, South Carolina, Washington State, and the eight Great Lakes states (for example, TNC 2005; Washington Department of Natural Resources 2004).

Further, in 2005-2006, the Coastal States Organization, the National Oceanic and Atmospheric Administration's Coastal Services Center (CSC), Roger Williams University, and TNC worked with local and state entities to assess proprietary mechanisms available to private organizations to conserve marine biodiversity on intertidal<sup>1</sup> and subtidal<sup>2</sup> lands in Massachusetts and Oregon (TNC 2007b; TNC 2007c). The project found in both states that private organizations can purchase fee-title interests in existing private lands lying between the high tide line and the low tide line for conservation purposes (see Table 2). We also found, while unprecedented, state programs exist (Chapter 91 Licensing in Massachusetts and Waterway Leasing in Oregon) that can

<sup>1</sup> "Intertidal Lands" meaning those lands lying between the high tide line and low tide line.

<sup>2</sup> "Subtidal Lands" meaning those lands lying between the low tide line and the seaward extent of state jurisdiction, which in most cases is three nautical miles.

be adapted to authorize long-term conservation projects on public lands lying below the high tide line and the seaward extent of state jurisdiction.

| <b>Issue</b>   | <b>Massachusetts</b>  | <b>Oregon</b>  |
|--|---|--|
| Lands lying between high tide and the state's seaward jurisdictional limit | Flowed Tidelands (1,600,000 acres*)   | No specific term (1,000,000 acres*)  |
| Intertidal lands   | Tidal Flats (45,000 acres*)   | Submersible Lands (acres not discernable with current data)  |
| Subtidal lands   | Submerged Lands (1,555,000 acres*)  | Submerged Lands (acres not discernable with current data)  |
| Existing Private Ownership   | Approx. 75% of intertidal lands (33,300 acres*); subtidal ownership exists but in unknown locations and quantities. | Estimation for intertidal and subtidal lands within estuaries is 32%*.   |
| Existing Public Ownership  | Approx. 25% of intertidal lands (11,700 acres*); Nearly all of the subtidal lands with some exceptions.             | Estimation for intertidal and subtidal lands within estuaries is 68%*; All subtidal lands on outer coast are public. |
| Options on existing private lands  | Fee-title and less-than fee-title ownership possible primarily on intertidal lands.                                 | Fee-title and less-than fee-title ownership possible on intertidal and subtidal lands within estuaries.              |
| Options on existing public lands   | Chapter 91 License; up to 30 years.   | Waterway Lease; up to 15 years.  |
| Parcel Data Availability   | Digital spatial data available only from a subset of coastal counties   | Digital spatial data available from all coastal counties.  |
| Leasing/Licensing Data Availability  | Digital spatial data as points for many authorized uses.  | Only limited digital spatial data available for shellfish aquaculture.   |

***Table 2: Summary of Pilot Project Findings***

(\*All figures in Table 2 are approximations and should not be cited without the appropriate caveats within the project reports.)

As part of the project in Massachusetts and Oregon, a standardized marine lands leasing and ownership spatial database template was developed to serve as a guide and method of comparison between the two states (Murphy & Udelhoven 2006). Data were collected, developed, and analyzed in both states to reveal several patterns: the geographic extent of intertidal and subtidal lands; ownership of subtidal, intertidal, and adjacent upland parcels; and leasing and licensing locations and uses (Kelly 2007; Murphy 2007). While errors and gaps in the data were identified, the information serves as a starting point to paint a picture and establish a baseline for future work. The data populated a personal geo-database which was also developed as part of the project.

#### **EXCLUSIVE ECONOMIC ZONE**

There are over 140 federal laws and more than 20 federal entities that relate to ocean management within the jurisdiction of the United States (Pew Oceans Commission 2003). Jurisdictional authority over some activities is well-established, such as for off-shore fisheries and oil exploration, while for other activities is poorly established, such as for aquaculture and bioprospecting (U.S. Commission on Ocean Policy 2004). Given this complicated framework, an exhaustive review is needed to determine if opportunities exist for private conservation organizations to acquire proprietary interests in ocean lands and resources within the Exclusive Economic Zone (EEZ).

Despite recent assertion that it is not legally possible or functionally necessary to privatize ocean lands and resources lying within the EEZ of the United States (Osherenko 2007), private entities have already acquired proprietary rights for oil, natural gas, sand, gravel, salt, sulfur, and utility transmission lines. For example, the Minerals Management Service (MMS) currently has 8,270 active oil and gas leases that cover 44 million acres

of the EEZ (MMS 2006). Other existing uses include hazardous material sites, shipping channels, dumping areas, artificial reefs, and marine protected areas. The Nature Conservancy made initial investigations of proprietary conservation opportunities within the fragmented management system of the EEZ and will be seeking to undertake a more comprehensive assessment in the near future.

#### INTERNATIONAL OPPORTUNITIES

The Nature Conservancy operates in 30 countries throughout the world. The land and sea tenure systems in countries outside the U.S. differ greatly from one another and from those of the U.S. An initial review revealed that in some countries outside the U.S. it is possible for private entities and communities to own or lease coastal, inter-tidal, or sub-tidal lands and resources. In Tanzania, for example, a private organization has acquired a long-term lease at Chumbe Island for lands below the high tide line to create and run a coral reef park. Private conservation organizations may be able to own, lease, or acquire concessions to lands below the high tide line for sustainable uses such as fisheries, eco-tourism, aquaculture, and seagrass cultivation within Central America, South America, and the South Pacific. TNC will further evaluate these international proprietary mechanisms to determine if they can be adapted to help meet conservation goals.

#### TOOLKIT DEVELOPMENT

There is no single source of information for organizations to turn to when contemplating proprietary strategies within the ocean and coastal environment. Given the fragmented and complicated nature of local, state, federal, and international ocean and coastal management regimes, the lack of an information portal only serves to slow or prevent private organizations from taking advantage of proprietary conservation mechanisms. Given this, The Nature Conservancy is developing a web-based *Practitioner's Toolkit for Conservation Leasing and Ownership of Ocean and Coastal Lands and Resources*. The toolkit is projected to be available through the Internet, workshops, and CDs beginning in the fall 2007. The toolkit will provide: introductory information specific to proprietary conservation strategies and geographies; decision-making criteria; planning materials; project implementation considerations; and support contacts.

#### CONCLUSION

Obtaining proprietary rights to ocean and coastal lands and resources is a relatively new and unexplored strategy. While in some limited circumstances it has taken place for several years, in most cases the strategy is nascent or not applied at all. More than likely, proprietary rights to oceans and coasts have been acquired by private commercial entities for purposes that do not protect and ultimately degrade the environment. Given this scenario, The Nature Conservancy is reaching out through several avenues to relevant management agencies and private conservation organizations to explore and promote proprietary conservation opportunities. Recognizing that numerous ocean and coastal conservation strategies exist, it is not TNC's assumption or goal that proprietary rights can be applied in all places under all circumstances. TNC's goal is to understand where and under what conditions proprietary rights can and should be used to conserve ocean and coastal lands and resources. Proprietary rights can then be used to establish a stakeholder interest in comprehensive efforts to conserve the oceans and coasts.

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