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The Shellfish Corner: Shellfish Aquaculture in the Commons

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SHELLFISH AQUACULTURE IN THE COMMONS

By Michael A. Rice*

The major common denominator of shellfish aquaculture in coastal or estuarine waters worldwide is that most culture operations are conducted in common or public trust waters, necessitating constant interaction in the political arena with other competing interests.

Unlike many forms of finfish and crustacean aquaculture conducted in ponds or indoors on land that is privately owned, or is rented or leased from a landlord conferring private land and water usage rights, the vast majority of shellfish farmers are faced by the problem of conducting their aquaculture operations in estuaries or coastal waters that are common property, technically owned and administered by some governmental agency. There are indeed some exceptions to this general rule. For example, in 1895, legislature in the State of Washington in the United States enacted the Bush and Callow Acts that allowed sale and private ownership of tide-

lands. This provision for private ownership of intertidal lands for the purpose of shellfish culture is unique to Washington among all of the United States, and it is credited as being an important legal foundation of Washington's successful shellfish industry.

In all other states in the United States, and indeed in many other parts of the world, intertidal lands, submerged lands and the water column above them are considered to be common property held in some fashion within the public trust. Whether it is in the United States or elsewhere, it is useful for shellfish farmers to have at least an understanding of the legal underpinnings and the principles of the public trust doctrine as it may apply to their specific jurisdiction, because the very nature of operating a farm in public trust waters means that conflicts will inevitably arise with other user groups. And successful resolution of these user conflicts is frequently critical to whether or not shellfish farms are allowed to even exist.

In the United States, the principle of state sovereignty over public trust waters stems from a landmark court case of disputed ownership of 100 acres of oyster grounds in Raritan Bay within state waters of New Jersey in the Town of Perth Amboy. In 1835, an oyster farmer leasing 100 acres from William C.H. Waddell brought suit in federal court against Merritt Martin and others who had been granted exclusive rights to the same oyster grounds under a law passed by the State of New Jersey in 1824. At issue was the continued validity of royal grants made in 1674 by King Charles II of England to the Duke of York (later to become King James II), the proprietor of the Colony of East Jersey and the subsequent transfers of that royal grant title down to Waddell. The Federal Circuit Court of New Jersey first found in favor of Waddell, arguing that existing property rights cannot be violated by the state with-



Figure 1. Picking oysters by hand from intertidal lands covered by the 1895 Callow Act at Willapa Bay, Washington, October 1969. Photo by Bob Williams, NOAA Fisheries Photo Collection.

out proper compensation. The case, however, was appealed to the U.S. Supreme Court and the decision of the lower court was overturned by a majority decision written by Chief Justice Roger Taney in 1842 that at its heart stated:

For 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, subject only to the rights since surrendered by the constitution to the general government. A grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual, in trust for the whole nation.

In other words, the state, acting on behalf of its citizenry, has the exclusive right to manage their common waters in trust for the common good. Of course exactly what constitutes the common good is certainly the object of considerable political controversy and it does not exclude actions such as those by the State of Washington to grant private property rights to individuals as they had done with the Bush and Callow Acts, if they so deem it to be in the public interest.

Although the *Martin v Lessee of Waddell* decision set forth the principle of Public Trust Doctrine as it applies to management of common property marine resources in the U.S., each of the states and their respective legislatures developed a different system for management of public waters and public lands, particularly how aquaculture farms are to be established and managed. For example, in my home state of Rhode Island, the granting of leases for aquaculture in coastal waters is handled at the statewide-level with the coastal resources management agency taking the lead on granting permits and leases and coordinating the multi-agency review attendant to the process. Massachusetts, an adjoining state, on the other hand has



Figure 2. Matunuck Oyster Farm 2017, South Kingstown Rhode Island. Photo by Michael A. Rice.

a long historical legal tradition of town by town ‘home rule,’ so decision making is done at the local level. As a result there is a wide range of policies and attitudes toward aquaculture development in the various towns depending upon the nature of the local politics.

In Connecticut, another adjoining state, the situation is complicated in that both municipal and state agencies are involved in leasing decisions depending upon the location of the proposed aquaculture farm in their coastal waters. I am currently involved in a project with aquaculture extension professionals from the northeastern United States led by Matthew Parker of the University of Maryland to compile the laws, regulations and procedures from each of our respective states and identify which of these may be acting as unintentional or unreasonable hindrances to the development of aquaculture businesses.

One example of an unintentional hindrance to aquaculture business development rests in the very nature of aquaculture leases in public trust waters. Often, aquaculture leases are granted for a fixed period of time ranging from a few years to ten years or more with provisions for revoca-

tion of a lease by the state if there is no performance on the lease (i.e. there is no actual farming on the site) or there are legal violations and so forth. Even in the case of the 1895 Callow Act in Washington, there have been provisions to revoke private ownership privileges by the state if shellfish aquaculture was not occurring on the tidelands.

From the point of view of protecting the public trust, these provisions for periodic lease review and renewal, and revocation for cause, seem to be quite reasonable. However the unintended consequence of having too short of a lease renewal cycle or a perceived willingness of

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the state to capriciously revoke leases for even minor infractions hampers aquaculturists in securing business loans or capital investments. The banking system as it is set up in most countries favors long-term business stability and assurances that loaned or invested funds will be paid back with a high degree of certainty. Short-term business insecurity issues rarely arise in instances of privately owned land, because the land itself can be offered as collateral in support of project financing.

Outside of the U.S., variants of the public trust doctrine govern the establishment and maintenance of aquaculture as well but are founded upon differing legal foundations and definitions of the public trust. For example in the Philippines, aquaculture permitting and leasing is handled strictly at the level of local governments with little provision for involvement the national government other than the case of the very rare declaration of a national emergency. In many municipalities in the Philippines, lease fees for oyster farms using off-bottom methods of oyster culture are modest and help defray the costs of some of the aquaculture management program. However these farms are capable of producing upwards of 2.5 kg of shucked oyster meats per square meter of farm area if they are managed properly. Other countries in

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Figure 3. Oyster Farm at Carael, Dagupan City, Philippines, January 2018. Photo by Michael A. Rice.

the Southeast Asian region manage shellfish aquaculture operations on a local or regional basis as well.

The major common denominator of shellfish aquaculture in coastal or estuarine waters worldwide is that most culture operations are conducted in common or public trust waters, necessitating constant interaction in the political arena with other competing interests. As a matter of practicality, the best systems for managing aquaculture lease policy in an equitable manner are on a local enough scale to facilitate stakeholder involvement, and to allow shellfish aquaculturists to organize into professional trade organizations so that the collective interest of the industry is heard in the process.

Natural resource economist Susan S. Hanna from Oregon State University in 1990 pointed out that management of the public trust in coastal and ocean waters has much in common with the historical local management of common farmlands in 17th Century England prior to the enclosure movement that established the now predominant system of private ownership of terrestrial farmland in most English-speaking countries, and much of the rest of the world as well. On the topic of the annual process for allocating land from the 17th Century com-

mons to individual families, Hanna stated, “The smooth functioning of the English commons relied on the active participation of people with the greatest stake in its survival--the resource users.” Such advice could not be any more appropriate for the farmers of the 21st Century Commons as well. ^{END}



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¹The ownership of intertidal lands for shellfish aquaculture under the 1895 Bush & Callow Acts of Washington State was further clarified in 2002 and codified in Washington Laws as Section 79.135.010.

²U.S. Supreme Court, *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842).

³For more information see: Lowry, K., A. White, and C. Courtney. 2005. National and local agency roles in integrated coastal management in the Philippines. *Ocean and Coastal Management* 48:314-335.

⁴Hanna, S.S. (1990). The Eighteenth Century English Commons: A Model for Ocean Management. *Ocean and Shoreline Management* 14:155-172