



**DEPARTMENT OF FISH AND GAME
OFFICE OF THE GENERAL COUNSEL**

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L425
02-106
May 15, 2007

Mr. Don Neubacher, Superintendent
Point Reyes National Seashore
Point Reyes Station, California 94956

Re: Drake's Bay Oyster Company

Dear Superintendent Neubacher:

The purpose of this letter is to memorialize the position of the Department of Fish and Game (Department) regarding the lease status of the above-referenced mariculture operation at Drakes Estero, within the Point Reyes National Seashore (PRNS). For the reasons discussed below, we conclude that the mariculture operation in question is properly within the primary management authority of the PRNS, not the Department.

By way of review, the leasing of state water bottoms at Drakes Estero dates to at least 1934. In 1965, the California Legislature granted to the United States, subject to certain limitations, "all of the right, title, and interest...to all of the tide and submerged lands or other lands beneath navigable waters" situated within the boundaries of the PRNS (Chapter 983, Statutes of 1965). The tidelands and submerged lands encompassed by this legislative grant include the leased state water bottoms. Consistent with article 1, section 25 of the California Constitution, this conveyance carried a reservation of the right to fish in the waters overlying these lands. Although the right to fish extends to both commercial and sport fishing, it does not extend to aquaculture operations. Regardless of whether its purpose is commercial or recreational, *fishing* involves the take of public trust resources and is therefore distinct from aquaculture, which is an agricultural activity involving the cultivation and harvest of private property (Fish and Game Code §§ 17, 15001, 15002, 15402). In November 1972, the Johnson Oyster Company (Johnson) conveyed its property to the United States, subject to a reservation of occupancy and use in the grant deed, which provided:

"Upon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property...provided, however, that such permit will run concurrently with and will terminate upon the expiration of State water bottom allotments assigned to the Vendor. Any permit for continued use will be issued in accordance with National Park Services regulations in effect at the time the reservation expires."

The reservation specifies a 40-year term and additionally requires, among other things, that Johnson comply with all applicable health and safety laws, and all rules and regulations of the National Park Service. This reservation expires in November 2012.

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ARNOLD SCHWARZENEGGER, Governor
National Seashore

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DRAKES ESTERO MARICULTURE

After that time, aquaculture operations must continue subject to a special use permit that would run concurrently with, and would terminate upon, the expiration of the assigned State water bottom allotments. Since such allotments are subject to a maximum lease term of 25 years, both the grantor and grantee apparently contemplated that the state water bottom leases then in effect could be renewed, and this was in fact done in 1979. In June 2004, the Fish and Game Commission (Commission) renewed the state water bottom lease for an additional twenty-five years, contingent on this reservation, and also required Johnson to comply "with all rules and regulations now or hereinafter promulgated by any governmental agency having authority by law..." In March 2005, the Commission authorized the assignment of the state water bottom lease to Johnson's successor, Drakes Bay Oyster Company.

The 2004 lease renewal is expressly contingent upon the aquaculture facility's compliance with the 1972 grant reservation and, after its expiration, with any special use permit that PRNS may issue in its discretion. The reservation requires compliance with all applicable health and safety laws and, specifically, with all rules and regulations of the National Park Service. Conversely, the renewal imposes an additional requirement of compliance with all other applicable laws, which reasonably includes those of the National Park Service and of PRNS in particular. For these reasons, we believe the mariculture operation in Drakes Estero is properly within the primary management authority of the PRNS, not the Department.

Should you or any of your staff require any additional assistance, please contact Senior Staff Counsel Joseph Milton, Office of the General Counsel, at (916) 654-5336 or jmilton@dfg.ca.gov.

Sincerely,

 CDD
for L. RYAN BRODDRICK
Director

cc: Mr. Ralph Mihan, Office of the Solicitor
U.S. Department of the Interior

Mr. Joseph Milton, Senior Staff Counsel
Department of Fish and Game