

Synopsis and Explanation of Statutes in the
Commercial Fishing Law Relating to
State Oyster Lands

The following is a brief explanation of the various sections in the commercial fishing laws relating to state oyster lands and our analysis of such provision.

1. ORS 509.455 and 509.510 provide that public lands which have been marked out as oyster claims "...shall be deemed and protected as private property." According to oystermen, the right of public access for fishing, hunting and taking of shellfish other than oysters may be prohibited under this provision. However, the Division of State Lands advises that the public cannot be excluded from such public lands but only prohibited from injuring or taking up the oysters growing thereon.

2. ORS 509.455 restricts the size of oyster plantations in certain areas of Yaquina Bay to two acres and provides for regulation by a local oystermen's association.

We believe restriction to two-acre claims is unrealistic. Regulation by a local oystermen's association, according to Assistant Attorney General George Woodworth, is probably an unconstitutional delegation of authority in that it gives a nongovernmental body rule making power over public oyster lands.

3. ORS 509.465 grants the Fish Commission authority to lease natural oyster bed areas to any person for periods up to ten years. The legislature did not define a natural oyster bed area. We have defined as a natural bed any area where oysters were found living and reproducing when the white man first arrived in this country and are continuing to reproduce and replenish themselves in any number.

Using this definition, a major portion of Yaquina Bay is considered as natural oyster bed area and a limited portion of Netarts Bay would be a natural oyster bed area. There are no other natural oyster bed areas in Oregon, although there are other oyster bed areas where oysters are cultivated artificially.

We believe a need exists to uniformly administer leases on all oyster beds, be they natural or artificial. The overlapping authority in leasing of public lands between the Division of State Lands and the Fish Commission needs to be resolved.

Another unusual provision in ORS 509.465 is the restriction placed upon the Fish Commission to lease Oysterville Flat and Lewis Flat in Yaquina Bay only to local oystermen. In opinions of the Attorney General, 1942-1944, page 278, it is indicated such a restriction means that we could only lease such area to a person who "must be or has been, when permissible, engaged in gathering or propagating oysters on Yaquina Bay for commercial purposes at the time a lease is granted and must be a resident of the locality."

4. ORS 509.480, 509.485, 509.490, 509.495 and 509.500 all were enacted in 1939 and relate to the manner in which an oyster claim is to be filed with the county clerk. Possibly necessary at one time, such requirements as

"...black India ink upon a good quality of white cold pressed, double mounted drawing paper 18 inches x 24 inches in size with the muslin extending 3 inches at one end for binding purposes" are unnecessary restrictions on the county clerk and should be repealed.

5. ORS 511.625 relates to Netarts Bay, designating a certain portion as set aside for natural oyster beds and another as set aside for artificial oyster plantations. Again, we have a reference to local regulations by any local association of oystermen with claims restricted to no more than two acres. There are about 476 claims in Netarts Bay. In opinions of the Attorney General, 1934-1936, page 715, it is indicated that no one person may hold more than two acres in the aggregate. The situation in Netarts Bay is quite confusing. No provision is made regarding where two-acre claims are to be filed. If natural oyster bed areas are set aside for artificial cultivation, should they be filed with the Fish Commission, Division of State Lands, or Tillamook County Court?

One man claims ownership of a large portion of this bay. Several other persons have filed two acre claims with the Tillamook county clerk and another is apparently actively operating about thirty claims (60 acres).

We believe clarification is needed on who owns what, who has valid two-acre claims and where these claims should be filed. Also, we believe the restriction to two-acre claims is unrealistic.

6. ORS 511.640, 511.645, 511.650, 511.655 and 511.660 all relate to Tillamook Bay and were enacted into law in 1949, some being based on prior statutes dating back to the 1930's.

Under ORS 511.640 all tidelands and all lands under the waters of Tillamook Bay lying west of the old ship channel are withdrawn from the lands of the state which may be sold or leased and are set aside for oyster cultivation.

Any future more valuable use of such land is not possible without legislative action to remove the restriction setting aside and reserving such lands.

ORS 511.645 permits any citizen of Oregon or an Oregon corporation to file for a fifty-acre claim with the county clerk. Based upon records received from the Tillamook county clerk in 1966, of the some 2,450 acres of state owned oyster lands in Tillamook Bay, one man has 2,000 acres, another 250 acres and a third 200 acres. Incidentally, at a meeting with these individuals on March 9, 1967, at the Tillamook County Courthouse, one oysterman advised us that he had purchased four of his five fifty-acre claims for the sum of \$10,000 believing that he had purchased full titles to such lands.

Using the purchase price of the four claims as an indicator of value, the 2,450 acres of public oyster lands in Tillamook Bay would be worth \$122,500. At the present time neither the state nor county derives any revenue from such land.

In this connection the Oregon Supreme Court ruled in the case of Union Land Associates v. Ussher in 1944 (174 Or. 453).

"7. It is certain that the state has never intended to part with title to the bed of Tillamook bay which, as said before, is a navigable body of water. Defendant did not acquire any fee simple title to the land. He was merely granted, subject to the paramount right of navigation, the right to the use of the land for a specific purpose in keeping with the provisions of the statute. The rights acquired, however, constitute an interest in real property. There is no statutory provision in this state, as in some jurisdictions, which prohibits the assignment of such rights without the consent of the state."

ORS 511.650, 511.655, and 511.660 relate to filing an affidavit with the county clerk indicating that a minimal amount of work was performed on the Tillamook Bay oyster land in order to continue possession of such land. The filing of the affidavit is prima facie evidence of the work completed. Loss is provided in the event the affidavit is not filed. As stated earlier in regard to Tillamook Bay, the question is whether the state should have some control and authority over these public oyster lands and should collect revenue for their use.

There are a number of other provisions in the commercial fishing laws relating to oysters and regulation of the oyster industry, however, these provisions are not directly connected with the question of public lands and for that reason have not been included in this presentation.

FISH COMMISSION OF OREGON
January 31, 1968