Policy Issues in Developing Recreational Fisheries: A Focus on Marinas and Sovereign Lands

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ABSTRACT

Boaters must, by the nature of their activity, use the water. Facilities such as marinas cover sovereign lands under those facilities, preempting the right of passage for some and aiding the use of the water by others. These issues require policies which guide the right to use sovereign lands by all citizens. A use policy can include charging a fee by the state on behalf of its citizens for preempting the use of sovereign lands. Issues important to this policy will be discussed. They include: (1) What is the private right to preempt public use of sovereign lands? (2) Should a charge be imposed for this right? (3) On what should it be based? (4) Should environmental or economic factors be used in determining a fee?

Growing recreational fisheries place a demand not only on the stocks of fish, but also the support systems such as launching ramps and marinas upon which people must rely to get to the fish. At the same time, these support facilities can potentially impact the fish stocks by displacing nursery areas and/or impacting the habitat through pollution, runoff and the other negative impacts of coastal zone development. Support services are, of course, necessary, but at the same time care must be taken to not adversely impact the coastal zone. A major policy issue concerns what measures both the government and the public at large should take to protect these biologically and environmentally sensitive resources.

Often support and service facilities are placed on sovereign lands. Since these lands are public, policies must be developed and followed to manage these lands in the public interest. Private use of sovereign lands means private entities are assigned property rights to the public lands. This preempts the right of the remaining public to use these lands. Should the public be compensated? Should government try to meet the demand for marinas to service the recreational fishing and boating public on an essentially free basis? Is the public prepared to pay the price to maintain the quality of the recreational experience? Can some means be devised to effectively provide services to a certain sector of the public, yet at the same time provide just compensation for preempting the rights of others? Should our valuable coastal resources be allocated to recreation and development and other uses simply on the basis of the comparative value for each purpose? If not, on what other basis? How can private enterprise effectively be persuaded to use sovereign lands to serve the public and at the same time earn a profit?

The policy questions are many. The purpose of this paper is not to provide an exhaustive list of policy issues that require resolution in developing coastal resources, but to illustrate those of current concern in Florida as the marina sector (and other associated users) has developed on both private land and sovereign submerged lands. Hopefully, regions and countries where marine recreational facilities are now just developing will benefit and will be able to develop use and development policies before, rather than after, major development occurs. Any use of sovereign submerged lands has important equity, economic, administrative and political concerns. Decisions can rarely be reached on the basis of partial consideration without creating serious problems of other kinds.

POLICY GUIDANCE

Any lands management program must be based on an accepted policy. From this general policy evolve the many guidelines, regulations and leasing and fee structures that specifically govern or manage the lands. For example, a policy statement that highlighted the use of submerged sovereign lands for marinas and recreational fishing support facilities would then lead to specific management guidelines that carried out this policy and insured continued use and development of the submerged lands for that purpose. It must be recognized that the submerged lands are also limited in their capacity to support human activities without some alteration of the environment. These conflicts further necessitate a guiding policy.

Marina Policy

A marina policy should recognize the tremendous values of the submerged lands and the enjoyment and economic benefit that is derived from or dependent upon these valuable lands by the boating and fishing public.

The ability of the waters and submerged lands to meet public demands for food, recreation and transportation should be preserved. Environmental and aesthetic values must continue to be assured prior to authorizing encroachment and development.

Proper public uses of these valuable natural resources should be encouraged, but environmental integrity must be maintained to the fullest extent of the laws of the state. Preemptive uses should only be granted on a fair and equitable basis with riparian rights considered.

Water dependent uses such as marinas and boating should take precedence over non-water dependent uses. Extra caution and consideration shall be given prior to authorizing uses of areas with high environmental values.

Locations which are currently or have historically been used for water access or boating related activities should be maintained for such uses. New sites should be located near well-flushed deep waters with reasonable access and sufficient public demand where possible. Significant degradation of the waters should not be allowed. It must be recognized that each body of water is different in natural quality and proper balance of allowable uses against the ability of the resource to continue to support such uses must be maintained.

Marina Siting Policy

Meaningful recommendations for site-specific locations of marina facilities are dependent on many factors including the demand for such facilities and private entrepreneurial development. Although these data are often lacking, general recommendations for marina siting can be made based on certain demographic, socioeconomic and environmental characteristics. (1) Priority should be given to the expansion of existing facilities, if environmentally sound, over new facilities. Location of marinas in previously disturbed areas and in areas that have historically been used for marine related activities should be encouraged. (2) Marinas should be located as close as possible to demand. (3) Marina development should be encouraged where adequate uplands are available to develop related support activities and allow for possible future expansion. (4) Hurricane protection needs for marinas should be considered. (5) Input from local governments should be considered in evaluating lease requests. (6) Location of marinas in highly productive habitat should be discouraged. (7) Location of marinas in or near well-flushed, deep water areas should be encouraged. (8) Piling construction and other non-dredge and fill techniques should be utilized where possible to minimize habitat destruction. (9) Pollution pre-

vention including sanitation and spill containment needs should be assessed and safeguards required as appropriate. (10) Impact upon designated environmental and marine mammal sanctuaries should be considered. Particular marina locations or design features which threaten conditions in these areas should be discouraged.

Leasing and Fee Structure Policy

Prices (or lease fees) play many roles in the management of submerged lands. Prices serve to allocate natural resources, capital, labor and management among various uses. In the case of submerged lands, prices could aid in the allocation of these lands toward use for marinas or no use at all. A high cost of using submerged lands might encourage more dry stack storage, rather than wet slip storage. Prices also play a role in helping boaters choose among ways of using their own incomes. A higher price on using submerged lands might mean fewer marinas, and fewer marinas would lead to higher prices on the available slips. Higher slip prices means fewer boaters, and fewer boaters mean less recreational fishing. Prices can be used as a management tool to bring about more efficient use of submerged lands.

The "price" for using certain environmentally sensitive lands could be higher, thus, preserving these lands. Price is also a factor in investment decisions. The size and/or location of a marina is dependent on the price it must pay for using submerged lands. Finally, pricing can be used as one way to generate money for managing submerged lands.

Given the role of prices or lease fees in submerged lands management, certain guidelines can be followed in levying lease fees. These are: (1) Avoid leases which are administratively unworkable or unsound. This would include costs out of proportion with revenues, leases which are easy to evade, and impossible collection schemes. (2) Define carefully the goal to be satisfied by charging a lease fee. Is it to raise revenue, allocate the resource, manage the resource, or other reasons? (3) Set lease fees appropriate to the goal. If the objective is to shift use from one area to another, the difference in the charge may be more important than the level. If the objective is to raise revenue, something must be known about the demand for the resource. If the purpose is to manage, the cost of management must be known. (4) Tell the users and leasees why a charge is levied and what will be done with the funds. (5) Consider the equity considerations in the fee schedule. Anticipate the side effects and eliminate the undesirable ones.

FLORIDA'S EXPERIENCE

Florida achieved statehood in 1845 and with this came the state's ownership of sovereign lands with other wetlands added to state ownership by virtue of the Swamp and Overflow Act of 1850. As the state began its early development, draining the lowlands was encouraged and given a high priority as being necessary for future growth. Then came the coastal development that required extensive dredge and fill that was, likewise, encouraged as necessary to build good water access and an economic base. During this period the state conveyed millions of acres of upland and submerged lands to private ownership.

It was not until the 1960's that Florida began to recognize the tremendous value of its sovereign lands and began reversing this policy. By the 1970's many far-reaching environmental laws were implemented. Next came wetlands protection and for the first time serious land management policies.

The legislature required that all state lands be inventoried, required state agencies to develop land management plans and created a Division of State Lands. Commercial uses of Florida's submerged lands came under formal control on 10, March 1970, with the beginning of a leasing program for new commercial uses, while

grandfathering in existing commercial uses.

There were many problems with the submerged land leasing program in the early 1970's, primarily due to the problems of determining a fair and equitable fee assessment. The original fee was set at 2 cents per square foot per year. Considerable unsuccessful effort was expended over the years to improve the method of assessment. In 1979, the Governor and Cabinet as the Board of Trustees of the Internal Improvement Fund, increased the 2-cent fee based upon the rate of inflation to 3.7 cents per square foot per year and charged the Department of Natural Resources with the responsibility to develop and recommend a more permanent and equitable method of assessment. Draft recommendations were developed and several public hearings held. However, the recommendations were unacceptable because the basic premise of basing the fee upon adjacent upland property values created too many inequities.

Early in 1982, the Governor and Cabinet again felt it necessary to increase the lease fees based upon the rate of inflation to 4.5 cents per square foot per year and at the same time appointed a Blue Ribbon Marina Committee to develop recommendations for a more comprehensive solution.

The Governor and Cabinet charged the Committee with: (1) A complete review of Florida's marina policy — examining where new marinas shall be established, the development of a proactive policy determining marina needs, types of marinas, and location of these new or additional facilities; (2) the development of a policy to establish a new formula of submerged land lease fees taking into consideration an equitable rate structure which is fair to the people of Florida and to the marina operators, including a formula which would be adjusted according to the annual rate of inflation as well as taking into account a geographical difference for submerged land lease fees; and (3) recommendations for marina policy in aquatic preserves. The Committee did not attempt to set fees for aquaculture activities, oil and gas exploration and development, dead shell and other mining nor subaqueous utility easements.

The remainder of this paper will be devoted primarily to the recommendations that have evolved from that committee. The general marina policy and marina siting policy recommendations are basically those outlined in the above policy section. The Florida policy recommendations are more specific than those shown, with the intent being to present general statements of wide applicability. The leasing fee structure recommendations are presented in much more detail and in three basic categories: (1) basic leasing and fee policy, (2) managing leases and (3) actual fee structures.

Basic Leasing and Fee Policy

There are certain inalienable rights to proper use of sovereign waters but these do not include the right to charge fees and make profits without just compensation to the general public who own the lands.

A leasing fee based on the philosophy of generating monies to fund a state lands management program, including necessary planning and management studies, would be different from a fee based on the concept of generating monies for the public coffers from the use of a state-owned economic resource, that is the state-owned submerged lands.

One of the reasons underlying a fee for use of submerged lands should be the shared cost of funding a comprehensive sovereignty submerged lands management program, and the actual fee on a square foot basis should be derived from that shared cost. Elements of the comprehensive sovereign lands management program should include adequate research and study and the preparation of management plans at a level of detail sufficient to project and identify the most environmentally desirable

sites for the location of water dependent facilities. Particular concern should be focused in areas of environmental sensitivity where controversies and permitting delays are often prone to arise. Specific leasing and fee policies are discussed below.

A lease or other formal approval should be required to use state-owned submerged lands. Requiring a formal approval for all uses, even if at no charge, one-time charge or annual charge, would allow the state to identify the extent of use of submerged lands and put in place a mechanism for proper control and impact evaluations. In addition to leases, other forms of approval include licenses, consents of use, management agreements, easements and registration.

Both revenue generating, income related users and non-revenue generating, non-income related users of state-owned submerged lands should be charged for that use. There should be some types of differential charges. It can be questioned whether or not there is any public interest benefit in charging a differential rate from one end of the state to the other based on appraisals or some other theory of higher or lower value. Various concepts connected to the principle of highest and best use value all have extremely high overhead cost to implement, and evaluation of the cost/benefit ratio makes these concepts less acceptable. Although a high degree of interest always exists for applying the geographic differential concept between developed and underdeveloped areas, a cost effective basis must be developed before this differential should be applied.

Commercial uses should pay more than non-commercial, private uses. Lease fees can be used to reimburse the public for the submerged lands private property status given to the commercial users.

Government uses for which a user fee is charged should be treated the same as private uses for which a fee is charged. Some governments control submerged lands and, thus, also preempt their use by some. Charging those who use these lands, thus, creates income to the government. However, there should be waivers or exclusions from payment of the fees for government or charitable organizations in the event that the proposed users are in the public interest, water dependent and non-revenue producing.

There should be a differential fee in all or part of submerged lands areas specifically determined to be of exceptional environmental value. The intent is to use fees collected in environmentally sensitive areas for site-specific management needs that may be more intense than for areas not so sensitive.

There should be a differential between water dependent and non-water dependent uses, with substantially higher charges for non-water dependent uses. New non-water dependent uses should be prohibited, except in instances where the board determines that issuance of a lease for such use is necessary and in the public interest. The concept of charging a higher fee for non-water dependent activities emphasizes the fact that certain sites for water dependent activities that must be located in, over, or adjacent to the water, and that these sites must be preserved for that purpose.

The Florida Administrative Code defines water dependent activity as "an activity which can only be conducted on, in, over, or adjacent to water areas because the activity requires direct access to the water body or sovereignty lands for transportation, recreation, energy production or transmission, or source of water, and where the use of the water or sovereignty lands is an integral part of the activity." Under this definition, such activities as condominiums, pools, hospitals, restaurants, airports, motels and restaurants, if located over the water, are non-water dependent uses. However, docks associated with those uses are water dependent.

The term of the lease should be up to 25 years. A 25-year term appears to be optimum but allowing or requiring shorter terms in certain instances may be necessary. A 25-year lease would provide the owner with something that is "saleable" if the lease is transferable. A marina or other substantial structural facility that has an

amortization of the investment requires a 25 year lease, but there are leases for lesser things of a temporal nature, such as a small boat rental area, that do not necessarily justify 25 years. Because leases are only granted to the upland riparian owner or his legally authorized agent, and because no preemption takes place until construction begins, the applicant should not be required to start paying the lease until construction is started.

Private docks, like other uses, do have some environmental impact, preempt use and obstruct navigation to some extent. The one-time lease fee or consent of use fee for non-revenue generating, non-income related uses, such as private residential docks, can be considered a "registration" fee that would cover processing and management costs. The state would be issuing a document for inventory/identification purposes, but would not require a survey for those uses that now require only a consent of use, or require nothing from the state due to the fact that they fall below size thresholds.

One problem with 25-year leases is that the leasee needs to know the lease fee over that 25-year period for financial planning purposes. Rather than project lease fees for a 25-year period, it is possible to set the fee schedule at an initial base and then adjust the rate schedule by the Consumer Price Index. The rate for all new leases can be determined according to the fixed rate schedule for the year in which the lease is granted. The fee charged for individual leases can be adjusted every 5 years according to the fixed rate schedule and a cap can be placed on the increase or decrease of the schedule during any given year.

There are many legal ramifications of doing away with any grandfather provision. The grandfather exemption in Florida has resulted in an inaccurate means of inventorying submerged land use, and has generated unfair competition among marina owners. While the original grandfather provision was instituted to protect the owner who had a 20 or 30 year amortization schedule on his property, a new owner would know what a particular marina cost to operate including what state lease fees would be, and therefore the grandfather status on a facility should no longer apply if that property is sold.

Requiring grandfathered facilities to register in a reasonable time frame would provide a mechanism to identify grandfathered facilities for inventory purposes and would provide a means of determining when those facilities changed hands. A grandfathered facility should be guaranteed the right to transfer that facility to a new owner, and the new owner should be guaranteed continuation of use of the facility if the terms of the granted lease are met. Such leases should be treated more or less like "renewals" rather than "new" facility leases. The guarantees are consistent with the previous recommendation that currently used marina sites be maintained for such use.

Essentially, there are three types of approaches to assessing fees: arbitrary administrative fee; percentage of gross income related to the monies derived from the facility that is located over the state-owned water bottoms; and an appraisal approach. There are various types of data used and methods applied in the appraisal approach including market data, income, substitution, shore contribution and extension.

Site specific evaluations by experts which could include professional appraisers, accountants, attorneys and surveyors may not be cost effective. They will also most likely result in a great variance in fees. The level of professional training and expertise required to properly evaluate submerged lands highest and best use values is limited to a small segment of the appraisal profession. The complex nature of these type appraisals coupled with the absence of market data create additional problems for a fee system based upon site specific highest and best use appraisals. Thus, a simple statewide base rate may be the most cost effective.

Actual Fee Structure

Based on the philosophy that the cost of funding a comprehensive sovereignty submerged land management program should be derived from a shared cost of all users, the cost of such a program becomes one of the prime considerations. Fee recommendations must be based on the level of required budget. Based on that consideration, the following recommendations were made for Florida: (1) The base rate for all uses requiring a lease should be 5 cents per square foot per year. (2) There should be a discount of 2 cents per square foot per year for all uses requiring a lease that are open to the public on a first come, first served basis. (3) An additional 20% of the base rate should be charged to cover the additional processing costs for revenue generating, income producing uses. The total fee for the first year would thus be 120% of the base rate. (4) There should be a maximum differential lease fee of up to three times the then-existing base rate in all or part of certain areas of exceptional environmental value as specifically determined by the Governor and Cabinet based upon a staff recommendation. (5) In the event that new non-water dependent uses are permitted, the fee should be 10 times the base rate or an amount equal to the appraised value of adjacent uplands, whichever is greater. (6) All non-income producing, non-revenue generating uses not requiring a lease should pay a $50 one-time registration fee. (7) All holders of grandfather status for facilities should pay a $200 registration fee for such facilities.

EXPERIENCE OF OTHER STATES

A number of other states also have submerged lands lease programs, and many of those that don't are currently working on the issue. The type of approach, term of the lease and other unique items are pointed out for several states. Each state acquired its land by virtue of sovereignty, and has the same problem of having no comparable market data for sales of submerged lands to use for an appraisal approach in valuing the lands.

IDAHO uses an appraisal approach called the extension method — extending a value derived from the adjacent upland property onto the waterfront. The fee averages 7% of the value of the property a year. In some cases they also use a percentage of gross income (4%). Leases are 10-year terms and the rate can be adjusted yearly.

ALASKA uses an appraisal approach using appraised market value and, like Florida, has trouble getting good market data. Terms of the leases are 10 years, and rental is adjusted every 5 years.

LOUISIANA currently doesn't charge for submerged land leases, but does charge for easements.

MAINE uses an administrative fee approach charging 3 cents per square foot per year, with a 30-year lease term renegotiable every 5 years. They are also experimenting with an appraised value approach. They are currently proposing raising the 3 cents fee to 8 cents. While Florida charges based on the "preempted area," Maine charges on the basis of the actual square feet of the structure. Maine also has a grandfather clause.

CALIFORNIA uses all of the approaches depending on the particular situation, and has complete flexibility to use any one on a case-by-case basis. They also use a "volumetric rental" related to the value of the product that passes through the lease area, to determine the lease fee. In their appraisal approach, they derive a value for the submerged lands and charge a rental fee of 9% of that value per year. Industrial lease fees such as tanker terminals employ a "substitution" approach based on the value of comparable industrial upland. Length of leases vary depending on use. Marina lease terms vary from 20-30 years, with rental renegotiated every 5 years.

California has no grandfather clause. California has three fulltime appraisers for tidelands work, 25-30 people that deal with leasing alone, and they process about six commercial marinas a year. Florida processes 60-80 marina leases a year with four people.

California does not consider condominium docking facilities as being in the public interest, and does not allow them. While California only had six marina applications in a year, the smallest one accommodates 1200-1500 boats, and they are all being put in by public bodies.

California also uses a percentage of gross income from wet slip rentals that varies from 5-12%. The percentage is tied to the number of slips—the more slips the higher the percentage charged. Marinas with less than 75-80 slips are not surviving in California. The percentage of gross income approach is time consuming. There are 40-50 marinas currently under lease in California compared to 500 submerged land leases (all types) in Florida.

TEXAS is most comparable in terms of geography to Florida. Appraised values are used where market data exist, and the charge is 10% per year of the value of submerged land. They can also use a percentage of gross income ranging from 3% to 10% and have an upper and lower coast differential in lease fees. They derive an average cost per linear foot for the regions, and bill 3-10% based on projected income at full capacity. Lease terms are 20 years for marinas adjusted every 5 years, and they have no grandfather clause. Texas also uses different approaches for different uses.

OREGON charges 3% of gross income and is proposing an appraisal approach of 10% of the adjacent upland land value. They make a distinction between water dependent and water-related facilities charging 10% of the appraised value for water dependent, and 15% for water related. Oregon also exempts marina facilities under 2,250 square feet, as does Maine.

WASHINGTON uses all five of the appraisal approaches depending on the use. Washington and Oregon are non-riparian rights states and rights to the shorelands must be purchased by the upland owner before a use can be made. Washington, like Florida, is currently restudying their procedures. Washington has no grandfather clause.

SUMMARY

Developing any kind of submerged lands lease fee policy is difficult when the region is already highly developed. It is hoped that these comments and an overview of Florida's experience will aid countries who have developing coastal zone areas and industries in those areas which place demands on environmentally sensitive areas and on lands owned by the public. Development is much more efficient with an adequate policy in place to guide that development. There are a number of major policy issues that must be faced.

The *demand* on resources must be considered. Should submerged lands be used in any amount as suggested by demand? How far must demand for other uses be reconciled with the demand for use as marinas when they compete for the use of natural resources? How far should government stimulate the free use of its own submerged lands? Should tax relief be given to certain uses of submerged lands, such as marinas, when taxes based on highest and best use would make marina use uneconomical?

Maintaining an *environmental quality* is also a major policy issue. Who sets the quality standards? Is the public prepared to pay the cost of quality maintenance? Who should enforce design criteria on marinas for environmental protection? Should cumulative impacts of marina siting be considered?

Effective planning is a must. All agencies and groups will have to plan cooperatively to recognize both impacts of demand and environmental quality. All local, state and federal planning groups should consider water dependent activities in their comprehensive plans. Finally, the role of government must be determined. How involved should government be in financing, developing, managing and regulating submerged lands?

ACKNOWLEDGMENTS

During early 1982, the Governor and Cabinet of the State of Florida appointed a Blue Ribbon Marina Committee and charged the committee to recommend a marina policy and submerged lands lease fee formula for the state. I served as chairman of the committee. The considerations addressed in this paper result primarily from the work of that committee. They are to be commended for their diligent service to the people of the state of Florida. The committee members and staff were: Alex Balfe, Sr., Fran Beaird, Al Behrendt, David Block, Hugh Brown, Douglas Crane, Don Duden (staff), Roland Eastwood, John Graham, Anna Marie Hartman (staff), Charles Lee, Kermit Lewin, Terry Lewis, Jeff Lincer, John Lowe, Joni Scott (staff), and O. J. Weber.

It should also be noted that the committee recommendations were not final at the time this paper was written. The exact marina policy and fee structure will be determined by the Governor and Cabinet of Florida after consideration of these recommendations.