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Key Points of Report

A Joint Study Report on The Parks and Wildlife Department's Commercial Fishery Programs and The General Land Office's Leases of State-Owned Lands

December 2000

Overall Conclusion

Neither the Parks and Wildlife Department (Department) nor the General Land Office (Office) is recovering the full cost of administering certain revenue-generating programs related to commercial fisheries and surface leases of state-owned land. Lack of sound cost allocation for these programs prevents the two agencies from adequately analyzing their cost and fee structures. In addition, the private oyster-bed leases administered by the Department do not appear to have basic terms and conditions to protect the interests of the State. It appears that the value of the Department's oyster-bed leases and the Office's coastal cabin lease permits exceed the income realized by the State for these leases.

Key Facts and Findings

Parks and Wildlife Department

- The Department did not recover approximately \$9.3 million of the costs for administering the commercial fishery programs in fiscal year 1999.
- The Department estimates that it spent approximately \$95,190 in fiscal year 1999 to manage and enforce the private oyster-bed leases. During the same period, the leases earned \$47,404 in license fees and lease revenue.
- The Department manages approximately 2,327 acres of private oyster-bed leases, recovering \$3 per acre per year. The estimated value of such leases is approximately \$1,000 per acre, based on the sales comparison method of appraisal performed by an independent appraiser.

General Land Office

- The Office did not recover the costs of administering four of its seven surface lease types for fiscal years 1998 and 1999, with one lease type not recovering approximately \$1 million of its costs. However, in total, these seven lease types collect more revenue than it costs to administer them.
- The majority of the revenue collected from the leases goes to the Texas Education Agency's Available School Fund and Permanent School Fund. The costs to administer the leases are paid from the Office's General Revenue Fund appropriations.
- The Office issues lease permits for 435 coastal cabins. The cabin structures are built, paid for, and maintained by the permit holders, but are owned by the State. The Office assesses an annual rent of \$0.60 per habitable square foot. The estimated value of the structures is \$18 per square foot, based on a depreciated replacement cost appraisal performed by an independent appraiser.

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This audit was conducted in accordance with Government Code, Section 321.013(f).

Executive Summary

Legislative Issues

Neither the Parks and Wildlife Department (Department) nor the General Land Office (Office) is recovering the full cost of administering certain revenue-generating programs related to commercial fisheries and surface leases of state-owned land. The amounts not recovered in these programs (estimated at \$9.3 million for the Department and \$1 million for one surface lease type at the Office in fiscal year 1999) are being funded through sales of other licenses and appropriated funds. The Legislature has not mandated that these programs be self-supporting through statutory guidance. Therefore, the agencies have not held that as an expectation.

Not only do the costs exceed the revenues, but the State is also not earning any return on its investment in these state resources. The estimated value of the Department's oyster-bed leases and the Office's coastal cabin permits exceed the income realized by the State for these leases.

The Legislature may wish to provide guidance to these agencies on the expectations for administering the programs so that the State's interests are protected. On page 3 of this report, the State Auditor's Office provides a list of possible options for the Legislature to consider. There are most likely other options available that are not listed due to the limited nature of this study.

Agency Issues

Neither agency has analyzed costs and revenues by individual fishery or lease type to determine if these activities were recovering their costs. When the State Auditor's Office requested this information, the agencies did not have a method for collecting it. The State Auditor's Office established a cost allocation methodology based on estimates to arrive at the numbers presented in this report.

Without accurate cost information by activity, the agencies could not assess whether costs could be reduced or whether

the fee structure is reasonable. The agencies should establish a cost allocation method so that they may collect this information. According to the agencies, management currently reviews cost by function rather than by individual fishery or lease type. Analyzing costs by individual fishery or lease type in conjunction with current practice would provide a complete picture for making management decisions.

The Department's private oyster-bed leases and the Office's coastal cabin permits share several characteristics that may not be in the State's best interest. No new leases are being issued, and because leases are consistently being renewed by the same individuals, the State does not benefit from a competitive environment.

Summary of Agency Responses

The management of the Parks and Wildlife Department and the General Land Office generally agree with this report's findings, options, and recommendations. The full text of the Parks and Wildlife Department's response begins on page 20. The full text of the General Land Office's response begins on page 33.

Summary of Objective and Scope

The State Auditor's Office and the Comptroller of Public Accounts performed this joint study at the request of Senator Bill Ratliff, Chairman of the Senate Finance Committee.

The State Auditor's responsibilities were to:

- Provide detailed information on the revenues collected compared to the costs incurred for administering the programs and leases.

Executive Summary, concluded

- Compare the General Land Office's and the Parks and Wildlife Department's leases to similar leases of state-owned land at other agencies.
- Examine lease terms and conditions to ascertain whether they represent the best interests of the State of Texas.

The Comptroller of Public Accounts' responsibility was to provide supplementary background research. In addition, the Comptroller of Public Accounts hired an independent appraiser to establish an estimated value of the leases.

The scope of the study included the commercial fishery programs at the Parks

and Wildlife Department and surface leases of state-owned land managed by the General Land Office. The study did not include oil and gas exploration and/or production lease programs, nor did it specifically include the Department of Health's role in the commercial fishery programs.

This study focused only on the financial aspects of the commercial fisheries and surface leases of state-owned land. This report does not discuss other aspects of the programs, such as environmental protection or economic impact.

Options for Legislative Consideration

Information provided by the State Auditor's Office

The Legislature may wish to consider providing guidance to the Parks and Wildlife Department and the General Land Office on expectations regarding the self-sufficiency and revenue-generating potential of the commercial fishery programs and leases of state-owned surface land.

Options could include:

- ★ Require full or partial cost recovery of all administrative and operational costs.
- ★ Mandate the agencies to report periodically on the costs of the programs.
- ★ Require the agencies to reduce the costs by a specified percentage.

The Legislature may wish to consider requiring the agencies to analyze the costs and benefits of the programs and report the results. The Legislature could consider the results and whether the State would be best served by continuing the programs.

The Legislature may wish to consider amending the Parks and Wildlife Code, Chapter 76, to:

- ★ Require the Parks and Wildlife Commission (Commission) to consider the commercial value of the oyster-bed leases when setting the fees.
- ★ Declare the interests that the State may have, if any, in the transfer and sale of the oyster-bed leases.
- ★ Provide authority to the Commission to prohibit or restrict the transfer and sale of the oyster-bed leases.
- ★ Incorporate other sanctions or penalties in addition to termination of the lease for leaseholders who do not pay by the due date.
- ★ Clarify the State's intentions regarding the current statutory prohibition disallowing one individual to "own or control" more than 100 acres.

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The Parks and Wildlife Department's Commercial Fishery Programs

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Summary

The Parks and Wildlife Department (Department) is not recovering the full cost of administering its commercial coastal and inland fishery programs. The Department did

Figure 1:
The Department did not recover approximately \$9.3 million of commercial fishery administration costs.

Fiscal Year 1999 Commercial Fishery Programs			
Program	Revenue	Costs	Deficit
Coastal Fisheries	\$ 3,234,145	(\$ 9,337,376)	(\$ 6,103,231)
Inland Fisheries	\$ 3,429	(\$ 3,195,556)	(\$ 3,192,127)
Total	\$ 3,237,574	(\$ 12,532,932)	(\$ 9,295,358)

Source: The State Auditor's Office developed estimates based on the Law Enforcement Division's timekeeping data and other divisions' staff estimates, and applied them based on the number of licenses issued by fishery.

not recover approximately \$9.3 million of the costs for administering the commercial fishery programs in fiscal year 1999.

The Department has not assessed the financial status of the individual fishery programs to determine whether costs could be reduced or whether the fee structure is reasonable. The Department cannot accurately determine the amount of resources it expends on administering each fishery or oyster-bed lease because it does not have a sound cost

allocation method. Also, the oyster-bed leases do not appear to protect the interests of the State because they lack basic terms and conditions. For example, the lease agreements do not include:

- Defined time period for the length of each lease
- Clear terms for consideration/amount due per acre leased
- Provisions that allow the State to buy back the leases
- Provisions that reserve the State's right to renew, amend, cancel, or otherwise modify the agreements

In addition, the estimated value of the Department's oyster-bed leases exceeds the income realized by the State for these leases.

The State Auditor's Office did not review the Department of Health's role in the commercial fishery programs, nor did we audit the financial systems that produced the numbers used in this report. This study focused on the financial aspects of the commercial fisheries, not on assessing economic impact or environmental concerns.

Oyster-Bed Leases, Coastal Commercial Fisheries, and Inland Commercial Fisheries Did Not Recover Approximately \$9.3 Million of Their Costs in Fiscal Year 1999

Information provided by the State Auditor's Office

In fiscal year 1999, the Parks and Wildlife Department (Department) did not recover approximately \$9.3 million of the costs of administering its commercial fishery programs.

Not only is the Department not recovering what it costs to administer the programs, but the State is also not earning any money for the fish and shellfish that are harvested or for the use of submerged state-owned land. The revenue for the programs comes from the sale of commercial fishing licenses and rent. The Department does not have a sound method for accurately determining the costs of administering each individual commercial fishery program, which prevents it from knowing whether it could reduce its costs or restructure its fees. As a result, the costs not recovered for these programs are financed by revenue from recreational and other licenses.

Commercial Fisheries
Inland Commercial Fisheries
• Shellfish (mussels and clams)
• Finfish
Coastal Commercial Fisheries
• Crab
• Oysters
• Oyster-Bed Leases
• Shrimp
• Finfish
• Menhaden

Many areas within the Department (including law enforcement, regulatory oversight, environmental protection, and administrative services) support the commercial fishery programs. Because most of these areas do not have estimated percentages to allocate cost by fishery program or to track staff time at a detailed level, the Department has to rely on broad estimates when budgeting for the fishery programs. According to the Department, its focus has been to protect the State's resources; therefore, the Department reviews costs by resource rather than by individual commercial fishery program. In addition, Department staff members expressed the difficulty some divisions have in tracking resource management costs by individual fishery because costs are incurred through

sampling activities that benefit numerous fishery programs.

Currently, the Department allocates an estimated percentage of its budget to commercial fisheries, which includes all coastal and inland fishery programs (see text box). The Department develops this percentage by having each division estimate the benefits it provides to groups of the public, such as anglers, commercial fisherman, and boaters. This exercise results in broad estimates, not the information by commercial fishery program that the Department needs to determine whether it could reduce its costs or restructure its fees. In addition, the areas could not provide support to show how the estimates were derived. (One exception is the Law Enforcement Division, which tracks staff time at a detailed level. The Law Enforcement Division incurs most of the costs related to the commercial fishery programs. Law Enforcement costs include not only costs to enforce laws and regulations but also costs to protect the State's natural resources.)

The Department has no accurate way to determine the actual costs associated with the individual commercial fishery programs. Although the Department did not have a sound cost allocation method, the State Auditor's Office developed estimates based on the number of licenses issued and applied them based on the Law Enforcement Division's timekeeping data and other divisions' staff estimates.

Section 1-A of this report provides detailed cost and fee information on the oyster-bed leases. Section 1-B contains detailed information on all of the coastal commercial fishery programs, including the oyster-bed leases. Section 1-C discusses the costs and fees for inland commercial fishery programs.

Section 1-A: Information provided by the State Auditor's Office

The Oyster-Bed Lease Program Cost \$1 for Every \$0.50 of Revenue It Generated in Fiscal Year 1999

Table 1

Revenue and Costs for Oyster-Bed Leases			
Fiscal Year	License Fees and Lease Revenue	Management and Enforcement Costs	Deficit
1998	\$ 50,119	(\$ 96,810)	(\$ 46,691)
1999	\$ 47,404	(\$ 95,190)	(\$ 47,786)

Source: The State Auditor's Office developed estimates based on the Law Enforcement Division's timekeeping data and other divisions' staff estimates and applied them based on the number of licenses issued.

The Department spent \$1 for every \$0.50 of revenue the private oyster-bed lease program generated (see Table 1). Because the Department has not assessed the costs associated with administering the oyster-bed leases, it cannot determine the reasonableness of its

fee structure. Parks and Wildlife Code, Chapter 76, Section 301, Subsection 5, which establishes the oyster-bed leases, states that the "[Parks and Wildlife] Commission shall consider measures, where practicable, that will minimize cost and avoid unnecessary duplication in their administration."

The Department provides oyster licensing services and production and game law enforcement services. The Department charges rental fees, license fees, and permit fees. These fees may be too low to cover the Department's costs for providing these services. While the Parks and Wildlife Code allows the Parks and Wildlife Commission to charge more for leases and fees than the minimums prescribed in statute, the Commission has not raised the leases and fees.

- In 1983, the Legislature increased the statutory minimum rental fee for the oyster beds in the Parks and Wildlife Code to \$3 per acre per year. In 1985, the Legislature amended the Code to allow the Parks and Wildlife Commission to set a higher rental fee for the oyster-bed leases. The fee has not been increased since 1983. Due to the limited entry into the private oyster-bed leases, a competitive market has been created for these leases. An independent appraiser estimated the value of these leases at \$1,000 per acre (see Section 2). This estimated value is the amount that individuals are willing to pay for the rights to the private oyster-bed leases.
- Oyster Boat and Oyster Fisherman licenses originated in 1989, and the fees have not been adjusted since. The Oyster Boat license fee is \$350 for resident fishermen and \$1,400 for non-resident fishermen. The Oyster Fishermen license fee is \$100 for resident and \$250 for non-resident fishermen. These

licenses must be renewed annually. These licenses allow people to take or attempt to take oysters from the public waters of the State for the purpose of sale, barter, or exchange, or for any other commercial purpose.

- In 1993, an Oyster Boat Captain license was added, and the fee has not been adjusted since. The fee is \$25 for resident fishermen and \$100 for non-resident fishermen and must be renewed each year. These licenses allow people to operate commercial oyster boats while taking or attempting to take oysters from the public waters of the State.

(Oyster Boat, Oyster Fisherman, and Oyster Boat Captain licenses are required for leaseholders as well as for oystermen using the public reefs.)

According to the Parks and Wildlife Code, Section 76.017, rental fees from oyster-bed leases are due on March 1 of each year, and failure to pay when due terminates the lease. The Department did not receive all 1998 and 1999 payments by the deadline. Although the amount of the overdue rental fees is insignificant, the Department has never imposed a late fee or terminated a lease for non-payment. Furthermore, the Department granted permits to transplant and harvest oysters to the leaseholders that had not paid their rental fees:

- Thirty-five percent (15 of 43) of the March 1, 1999, lease payments were late. Two of these late payments were not received until one year after the due date.
- None of the 43 leaseholders paid the rental fee by the March 1, 1998, due date. The amount of time that lapsed between the due date and the date payment was received ranged from a few days to five months.

In addition, the agreements for these leases do not appear to protect the interests of the State (see Section 3). While only the oyster-bed lease program has been discussed in detail in this section, similar issues exist with the other commercial fishery programs.

Section 1-B: Information provided by the State Auditor's Office

The Coastal Commercial Fishery Programs Did Not Recover Approximately \$6.1 Million of Their Costs in Fiscal Year 1999

The coastal commercial shrimp, crab, finfish, oysters, and oyster-bed lease fishery programs did not recover approximately \$6.1 million of their costs in fiscal year 1999 (see Table 2 on the next page). Because the Department has not assessed its costs associated with administering the individual fishery programs, it cannot determine the reasonableness of its fee structure or whether costs could be reduced. The menhaden fishery is the only commercial fishery program with a positive cash flow into the Department.

See Appendix 7 for a complete table of the coastal commercial fishery programs' license revenues and costs for fiscal years 1998 and 1999.

The Coastal Fishery Division prepared revenue and cost estimates over a year ago for the fishery programs based on budget and fee estimates. The Coastal Fishery Division stated that the “figures should be considered estimates since there are few accounting methods available to accurately charge Department work performed to a specific fishery. The results should be used with caution.” The State Auditor’s Office found that the Department still does not have a sound method in place to allocate costs by commercial fishery or to analyze such information.

According to the Department, its focus has been to protect the State’s resources; therefore, the Department reviews costs by resource rather than by individual

commercial fishery program. In addition, the Department expressed the difficulty that some divisions have in tracking resource management costs by individual fishery because costs are incurred through sampling activities that benefit numerous fishery programs.

Commercial licenses and fees may be too low to generate sufficient revenue to cover the Department’s

Table 2

Fiscal Year 1999 Revenue and Costs for Coastal Commercial Fishery Programs			
Fishery	License Fees, Grants, and Lease Revenue	Management and Enforcement Costs	Contribution/(Deficit)
Shrimp	\$ 2,548,232	\$ 6,128,429	\$ (3,580,197)
Crab	177,584	482,842	(305,258)
Finfish	183,094	1,874,274	(1,691,180)
Oysters	142,351	727,289	(584,937)
Oyster-bed Leases	47,404	95,190	(47,785)
Menhaden	77,939	29,353	48,586
Other ^a	57,540	N/A	57,540
Combined	\$ 3,234,145	\$ 9,337,376	\$ (6,103,231)

^a Includes General Fishing Commercial License revenue. There is no method to accurately determine what would constitute a “general fishery.” Therefore, it is assumed that revenues benefit the whole coastal program and that related Department costs were absorbed by the other fisheries.

Source: The State Auditor’s Office developed estimates based on the Law Enforcement Division’s timekeeping data and other divisions’ staff estimates and applied them based on the number of licenses issued.

management and enforcement costs. The fees for some commercial fishing and boat licenses have not been increased in the past 10 years. The Parks and Wildlife Code allows the Commission to set fee amounts for commercial licenses. Increasing the fees charged for these licenses is one way to help reduce future deficits between fishery revenues and the costs expended by the Department to manage, regulate, and enforce them. According to the Department, any increase in fees should be prudent to minimize disruption to the economic stability of the fisheries, given their current economic conditions.

Section 1-C: Information provided by the State Auditor’s Office

The Inland Commercial Fishery Programs Recovered Less Than 1 Percent of Their Costs

The inland commercial finfish and shellfish programs recovered less than 1 percent of what it costs to manage and enforce them (see Table 3 on the next page). These two

small programs are the only commercial fishery programs administered by the Inland Fisheries Division. Because the Department has not assessed the costs associated with administering these fishery programs, it cannot determine the reasonableness of its fee structure or whether costs could be reduced. (See Appendix 7 for a complete table of the inland commercial fishery programs' license revenues and costs for fiscal years 1998 and 1999.)

These two small commercial fishery programs require very little administrative oversight by the Inland Fisheries Division, and the costs to the Division for administration are negligible. However, the enforcement costs for these programs are significant. Law enforcement efforts are spent on deterring illegal commercial activity on the State's freshwaters. Although the inland programs are small in comparison to the coastal program, the inland fisheries are spread out across the State's freshwater reservoirs and rivers, while the coastal fisheries are concentrated in the coastal bays. Therefore, some of these costs may be unavoidable.

Table 3

Fiscal Year 1999 Revenue and Costs for Inland Commercial Fishery Programs			
Fishery	License Fees	Management and Enforcement Costs	Deficit
Non-Game Fish (Finfish)	\$ 3,100	(\$ 2,677,203)	(\$ 2,674,103)
Mussel and Clam (Shellfish)	329	(518,353)	(518,024)
Combined	\$ 3,429	(\$ 3,195,556)	(\$ 3,192,127)

Source: The State Auditor's Office developed estimates based on the Law Enforcement Division's timekeeping data and other divisions' staff estimates and applied them based on the number of licenses issued.

Commercial licenses and fees may be too low to generate sufficient revenue to cover the Department's management and enforcement costs. The \$50 fee for the permit to sell non-game fish has not been increased since 1991, and the \$30 resident and

\$800 non-resident mussel and clam fishing license fee has not increased since 1993. The Parks and Wildlife Code allows the Commission to set fee amounts for commercial licenses.

According to the Department, the freshwater shellfish (mussels and clams) fishery provides very little economic benefit to the State. Furthermore, the current harvesting of freshwater mussels could be negatively affecting the health of the resource and putting the State in danger of further federal environmental restrictions. In addition, only 11 Resident Commercial Mussel and Clam Fisherman licenses were sold in fiscal year 1999. For these reasons, the program may be susceptible to elimination.

Estimated Value and Appraisals of Oyster-Bed Leases

Information provided by the Comptroller of Public Accounts

The estimated value of the 2,327 acres held in 43 leases is \$1,000 per acre, for a total value of \$2,327,000. A moratorium on new leases increases the value of current leases that can be, and are, passed down through generations and privately bought and sold among a limited group of individuals. Although leases have been bought and sold for a century, little information exists on the actual sale prices. State law requires only that the leaseholders file a request with the Department to transfer the permit to new ownership. Official lease transfer notices filed in the county clerks' offices and obtained for this study state only that the new leaseholder paid either \$1 or \$10 "and other consideration."

However, Department staff in the Seabrook office kept track of sale amounts through personal conversations and word-of-mouth. In addition, a certified appraiser conducted personal interviews with leaseholders. Of the 13 known sales since 1985, the average sale price was \$665 per acre. Adjusted for inflation by the Consumer Price Index, that figure rises to \$745 per acre in year 2000 dollars. (See Table 4.) Four sales in particular were considered by the appraiser to be a good indication of value, raising the estimated value to \$1,000 per acre. (See Appendix 3.)

Table 4

Known Lease Sales						
Lease No.	Acres	Actual Sales Price	Date	Actual Price per Acre	Adjusted price per Acre (2000)	Adjusted Sales Price (2000)
268-A	50.00	\$ 5,000	8-10-87	\$ 100	\$ 150.79	\$ 7,540
299-A	100.00	\$ 106,074	6-11-91	\$ 1,061	\$ 1,334.43	\$ 133,443
301-A	100.00	\$ 20,000	1-24-85	\$ 150	\$ 238.80	\$ 23,880
357-A	33.32	Sold With 301-A				
403-A	46.60	\$ 50,000	5-18-94	\$ 1,073	\$ 1,240.25	\$ 57,796
404-A	45.80	\$ 11,000	5-27-94	\$ 240	\$ 277.41	\$ 12,705
405-A	11.00	\$ 45,000	4-24-95	\$ 2,005	\$ 2,253.65	\$ 24,790
406-A	11.44	Sold With 405-A				
407-A	17.08	\$ 17,080	5-18-94	\$ 1,000	\$ 1,155.87	\$ 19,742
411-A	21.77	\$ 21,770	5-18-94	\$ 1,000	\$ 1,155.87	\$ 25,163
424-A	61.23	\$ 34,000	5-27-94	\$ 555	\$ 641.51	\$ 39,280
425-A	37.20	\$ 11,000	5-27-94	\$ 296	\$ 342.14	\$ 12,728
426-A	44.73	\$ 65,000	5-24-94	\$ 1,453	\$ 1,679.48	\$ 75,123
Totals	580.17	\$385,924				\$ 432,190
		Weighted Averages		\$ 665.19		\$ 744.94

Sources: Parks and Wildlife Department and U.S. Department of Labor Consumer Price Index

Both the private oyster-bed reefs and the oyster shells (whether or not the oysters themselves are alive) are state property. Live oysters on private oyster-bed leases are personal property, according to state law.

Oyster-Bed Lease Agreements Do Not Appear to Protect the Interests of the State

Information
provided by the
State Auditor's
Office

The 43 active oyster-bed lease agreements do not appear to contain basic terms and conditions to protect the interest of the State. The Department is authorized to issue oyster-bed leases under Parks and Wildlife Code (Code), Chapter 76. However, the Code does not provide specific guidance as to the nature, terms, or conditions according to recently issued Attorney General Opinion JC-0237.

The oldest existing lease was issued in 1954. The most recent issuance was in 1983. In 1989, the Department instituted a moratorium on the issuance of new leases, which continues to this day.

The Department did not use a competitive process to issue these leases. Leaseholders simply completed the paperwork, marked the lease site, paid the application fee, participated in a public hearing, and received a certificate of location agreement for a private oyster bed. These private leaseholders have advantages over other oystermen because:

- They can harvest from the public reef during Texas' oyster season (November 1 to April 30).
- They can transplant oysters from the restricted reefs and later harvest them from their private leases when the public reef season is closed (May to October by permit).
- The Department patrols and protects their leases from poachers.

The oyster-bed lease agreements issued between 1954 and 1983 do not include:

- Defined time period for the length of each lease
- Clear terms for consideration/amount due per acre leased
- Provisions that allow the State to buy back the leases
- Provisions that reserve the State's right to renew, amend, cancel, or otherwise modify the agreements

Lease agreements issued in the 1950s and 1960s require leaseholders to notify the Department of transfers or changes in assignment. Lease agreements issued in the 1970s and 1980s require leaseholders to secure prior written consent from the Department for transfers and changes in assignment. In addition, the Code allows U.S. residents and domestic corporations (corporations for profit incorporated under the laws of Texas) to lease private oyster beds, but limits them to no more than 100 acres.

Because the lease agreements do not contain specific terms and conditions, and the Code does not provide specific guidance, private oyster-bed leases have been:

- Virtually held in perpetuity over the years. The leases issued by the Department did not have terms, so leaseholders held ownership with no competition for renewal of the leases as long as they paid the annual rental fee. In addition, the Department never reissued the original lease agreements to incorporate and update terms and conditions.
- Sold and transferred by leaseholders many times over the years. For example, the original owner of a lease issued in 1954 held the lease until he sold it in 1976. The individual that bought the lease still owns it today. Neither of these individuals was required by the Department to renew the lease in a competitive process. According to research information provided by the Comptroller of Public Accounts' independent appraiser, recent transaction values indicate that leases were sold for an average of \$665 per acre. Although leaseholders are authorized to sell their oyster-bed leases, the State realizes no income from these sales.
- Purchased and held on behalf of minor children in what may be an attempt to circumvent the intent of the 100-acre limit. A 37.2-acre lease was purchased from an existing leaseholder in 1986. The assignment of the lease was recorded in the name of the trustees for two minor children and signed by the trustees. At the same time the trustees purchased leases in each of their names. One trustee purchased leases totaling 84.25 acres, and the other trustee purchased 83.00 acres and an additional 92.4 acres as the president of a company. All of these leases were sold in 1994. These transactions are not atypical. Other related parties simultaneously held leases in excess of 100 acres.
- Purchased and held by a non-Texas corporation. One lease appears to be in conflict with the Parks and Wildlife Code. A corporation incorporated in Louisiana purchased a 61-acre lease from a leaseholder in 1994. This corporation still holds the lease today.

Senator Bill Ratliff requested an Attorney General Opinion regarding Parks and Wildlife Code, Chapter 76, due to the lack of terms and conditions in the agreements. In addition, it was unclear as to whether the leases were held in perpetuity by current leaseholders.

The Attorney General recently issued an opinion (JC-0237) regarding the State's oyster-bed leases, concluding:

- An oyster-bed lease authorized under Chapter 76 of the Parks and Wildlife Code is a periodic, year-to-year lease that may be terminated at the end of any lease year by the State after giving reasonable notice of termination. A Chapter 76 oyster-bed lease does not create a perpetual leasehold interest.
- An oyster-bed leaseholder is authorized to sell or convey the oyster-bed lease. The lease does not expire on the death of the leaseholder.
- Chapter 76 does not prohibit a family member or family business partner from acting as an agent for other leaseholders; rather, it proscribes the "control" of more than 100 acres of submerged land by the same person. No person may

exercise power or authority over more than 100 acres of submerged land pursuant to one or more oyster-bed leases. Control over more than 100 acres of land covered by water pursuant to another person's oyster-bed lease is not a "lease-breaking condition" that allows the State to cancel the lease by which such control is exercised.

The Attorney General Opinion clarifies that the Department has the authority to terminate existing leases and to change the method of awarding these leases. See Appendix 2 for a complete copy of the Attorney General Opinion.

Comparison With Other States' Oyster-Bed Programs

Information
provided by the
Comptroller of
Public Accounts

According to the National Marine Fisheries Service, 19 other states also harvest oysters. In 1998, Texas production ranked third behind top producers Louisiana and Washington State. Other top producers—Mississippi, Connecticut, and Florida—were also surveyed. These states comprise 93 percent of the total 1998 oyster production. (See Appendix 6 for information on state oyster landings.)

Louisiana

Louisiana's oyster program began in 1870. Jurisdiction over the program resides with the Louisiana Department of Natural Resources (DNR). Louisiana approves leases on a first-come, first-served basis, with few restrictions. This means that leases are awarded to individuals as long as they provide DNR with a survey of the area proposed for lease, certify that the area is not already leased, and provide an affidavit that they will comply with certain conditions.

Leases have a 15-year term at an annual fee of \$2 per acre. Leaseholders are allowed to hold more than one lease and up to a maximum 1,000 acres per entity. A shorter term may be required if the area is in a coastal restoration impact area. A leaseholder may break a lease at any time. State residency is required for leaseholders. A lease renewal application is required, and the Department approves renewals. Leases can be transferred as long as the transfer is recorded with the Department; no approval is required.

As of January 2000, there were over 8,800 leases covering more than 415,000 acres of submerged land. Records dating back to 1959 indicate that both the number of acres leased and the number of individual leaseholders increased every year. Lease sizes vary, although they are most commonly 20 to 50 acres.

Lease areas are subject to enforcement patrol, gaming inspections, and health inspections. The DNR provides enforcement patrol and gaming inspections and mediates disputes between leaseholders. The Department of Health and Hospitals conducts health inspections.

Oil and gas leases share many of the same areas with oyster-bed leases. Conflicts between oil and gas companies and fishermen occasionally develop when oil and gas rigs tear out the oyster bottoms. DNR established an Oyster Lease Damage Evaluation Board to help with such disputes, although many are resolved in court. Oil and gas seismic surveys must be coordinated with individual leaseholders.

Washington

The Department of Natural Resources (DNR) administers the state's oyster leasing program. The state began leasing oyster bottoms in 1895. The Department of Health determines water quality and product quality issues. The Fish and Wildlife Department (FWD) oversees the biology aspect of aquaculture farming.

The DNR's standard lease agreement has a 10-year term. DNR manages approximately 250 leases for 80 leaseholders. Currently, leaseholders are not limited to the number of acres they may lease. Leases are not renewed automatically; leaseholders must apply for renewal. Barring any violations or unpaid rents, leases are usually extended. An oyster lease may be sold or assigned to another party. If leaseholders sell or assign their leases, they must notify DNR of the lease assignment and file proper documentation.

FWD classifies oyster grounds into four groups by productivity. It further classifies oyster grounds into either "on-ground" or "off-ground" cultures. (Off-ground cultures involve placing nets and fences underwater from which oysters hang in sacks or packets.) After determining the class and type of culture, annual rental charges are based on the number of acres leased and the average of the previous five years' production.

Generally, the leaseholders in Puget Sound pay \$145 per acre per year for on-ground culture and \$116 per acre per year for off-ground culture. On the West Coast, class two beds pay \$141 per acre per year, class three pay \$85 per acre per year, class four pay \$48 per acre per year and class five \$32 per acre per year for buffer land.

Mississippi

Mississippi's oyster lease program dates back to the 1890s. The Mississippi Department of Marine Resources (DMR) oversees the oyster program. A leaseholder must have been a resident of the state for at least five years. One lease per individual is allowed with a maximum 100 acres per lease. The lease fee is \$1 per acre. The state shell retention fee for both public and lease areas is \$0.15 per sack.

Leases are renewable every year over a 25-year period. After the 25-year period, leaseholders must rebid for the lease. If the original leaseholder does not receive the bid, the new leaseholder must compensate the original leaseholder for any upgrades. Currently three leases exist.

Leases are transferable with Department approval. Leaseholders are required to work the lease areas every year and must provide a brief annual report to DMR. Leaseholders are also responsible for obtaining all required environmental permits, including those for wetlands. The wetlands permit fee is \$500. Any oil and gas operator planning seismic surveys in or near oyster grounds must coordinate with individual leaseholders.

DMR conducts health inspections and mediates disputes between leaseholders.

Connecticut

Connecticut's oyster program dates back to the 1840s when a Town Oyster Ground Committee provided oversight. By the 1860s, a state program was needed to oversee the industry leasing. The state came up with a perpetual grant or franchise. The oystermen took ownership and were required to pay an annual fee of \$0.60 per acre, which gave them the right to plant, cultivate and harvest shellfish. These grants were

grandfathered when a new leasing system was established in 1915. Today, if the taxes owed on the franchise remain unpaid for five years, the lease reverts back to the state.

In 1915, the state began a competitive bid lease program. If a person wants to lease acreage, the Connecticut Department of Agriculture will advertise the lease through public notice and accept sealed bids. The state does not initiate leasing. The minimum bid is \$2 per acre. Acreage bids can range from \$50 to \$200 per acre depending on the attributes of the lease, water quality and competition in the area. Once a bid is accepted and a lease signed, lease terms range from a minimum of 3 years to a maximum of 10 years.

On average, the leases usually rent for \$24 per acre annually. Lease size is limited to 500 acres, and an individual cannot own more than two leases. The state has a transplant relay program to move mildly polluted oysters to private leases.

Connecticut has approximately 61,000 acres of oyster reefs being farmed by 35 companies. The state also has public oyster lands that were recognized by court decree establishing a boundary around the beds. However, private oystermen find strict limitations on the types of equipment they can use on public reefs make harvesting from these reefs economically infeasible.

Florida

The aquaculture division of the Department of Agriculture oversees Florida's oyster-bed leasing program. There are approximately 3,500 acres and 770 leaseholders. About one-half of the leases are under an older, expired program, and about one-half are under a program that was initiated in the 1980s.

The new program provides leases on a first-come first-serve basis with a \$15 per acre per year rental fee and a \$200 upfront processing fee. Leases are for a 10-year term. The applicant must include a business plan, which is referenced in the lease. Generally, lease renewal is automatic, but more controversial leases must be reviewed before the Board of Trustees consisting of the governor and six cabinet members.

State Auditor's Recommendations

1. The Department should immediately begin capturing accurate cost information on the commercial fishery programs. Management should develop a sound cost allocation method. The methodology and basis used should be documented. With a good cost allocation method in place, management can determine whether costs could be reduced.
2. Management should determine whether the fee structure for the commercial licenses is reasonable, based on the results of program costs analysis. The Department should establish a review schedule of costs and fee structure. Management should make the necessary recommendations to the Parks and Wildlife Commission for any fee increases. Department management and the Commission should take into consideration the commercial value of the licenses when setting the fees.
3. The Department should determine whether the State would be best served by continuing the private oyster-bed leases and whether additional leases would benefit the State.
4. Management should determine whether the rental fee for the oyster-bed leases is reasonable, based on the results of program costs analysis. It should make recommendations to the Parks and Wildlife Commission concerning any adjustments to the rental fee for the lease period commencing March 1, 2001, or as soon as possible thereafter. Management and the Commission should take into consideration the commercial value of the leases when setting the fees. At the same time, management should reissue the lease agreements to incorporate terms and conditions to protect the interests of the State.
5. Management should enforce Parks and Wildlife Code, Chapter 76, Section 76.017 (d), which states that "failure to pay any rental when due terminates the lease."
6. The oyster-bed lease agreements should be reissued when any transfer or sale of a current lease occurs to incorporate terms and conditions to protect the interests of the State.
7. Management should consider setting an expiration term for the existing private oyster-bed leases. At the end of this time period, leases would be renewed under some type of competitive process. In determining how to structure the competitive process, safeguards should be built in to ensure that the oyster beds are not destroyed or over-harvested.

The Parks and Wildlife Department's Response



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EXECUTIVE DIRECTOR

December 5, 2000

Mr. Lawrence F. Alwin, CPA
State Auditor
Office of the State Auditor
1501 North Congress Avenue
Austin, Texas 78701

Dear Larry:

Please find enclosed the department's response to the final draft of "A Joint Study Report on the Parks and Wildlife Department's Commercial Fisheries Programs and the General Land Office's Leases of State-Owned Lands."

The Report does a good job of describing and analyzing some very complex issues. The long history of these commercial fisheries and lease programs makes it especially appropriate that such a thorough review was conducted. The conclusions in this Report will be most useful in addressing these important issues.

I want to compliment you on the professionalism displayed by all of your staff on this project. It was a pleasure to work with them. If you require additional information, please contact Gene McCarty, Chief of Staff, at 389-4651.

Sincerely,


Andrew Sansom
Executive Director

AS:HRO:klp

Enclosure

*Give Thanks for
the Memories...*



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*To manage and conserve the natural and cultural resources of Texas for the
use and enjoyment of present and future generations.*

1. *The department agrees that these cost accounting methodologies should be reviewed for possible improvement. The department will begin that task immediately. However, the department believes that a cost benefit analysis should be a consideration before changing cost accounting procedures. The department does capture cost information for its fishery operations, although it is not as detailed as some other operations. The department believes this information is, in general, adequate to determine cost reduction needs.*

The department has not seen a need in the past to differentiate between commercial and recreational fishery costs. Our mandate is to manage and protect the fishery resource. In doing so, the department does not view the resource as commercial versus recreational. In addition, as the Auditor has stated, the commercial fishery program has not been mandated as a self-supporting program.

Allocation of time to commercial and recreational fisheries, especially with field sampling, is difficult because sampling gear is not specific to these two activities. For example, a trawl sample will catch shrimp, crabs, and fish, all of which can effect both the management of commercial and recreational fisheries and non-consumptive use.

2. *The department agrees that a formal review schedule to examine license fees would be beneficial. The department does periodically review the fee structure for its commercial licenses. For example, in August, 2000 the department increased the shrimp and seafood dealer license fees. Since the commercial fisheries program is not mandated by statute as a cost recovery program, license fees have not been tied to costs.*

Recovering resource rent (monies earned beyond a reasonable business profit) from commercial fisheries is a management goal in all of the department commercial fishery management plans. However, many of these commercial fisheries are economically depressed and essentially have no resource rent to provide.

In most cases, the department would have to raise license fees substantially to recover its operational and administrative costs. Economic impact analysis has shown that the local and regional value of fisheries could be jeopardized if large license fee increases were imposed. In addition, fisheries contribute to the economic health of the state more than just through the license fees paid.

3. *The Oyster Fishery Management Plan adopted by the Commission in 1988 specifically addressed the functioning of the oyster lease program. It recommended a continuation of the program because of the social, economic, and health benefits to the state. However, it recommended a moratorium on issuing any new leases because the current amount was adequate for the management goal. The department has annually reviewed the request for new leases and found the present strategy and number appropriate. The department agrees that these annual reviews should continue in conjunction with input from other state agencies.*

4. *The department will review the rental fee for the oyster leases to determine if it is reasonable and, if appropriate, will provide recommendations to the Parks and Wildlife Commission.*

The department agrees that new terms and conditions should be developed with oyster lease holders. Outreach efforts with appropriate stakeholders will begin as soon as possible to discuss options for new conditions, such as the appropriate length of a lease and transfer of leases.

5. *The Department will enforce the terms of Chapter 76 that require the termination of a lease when the rental fee is not received by the due date.*
6. *The department agrees that lease agreements should be reviewed based on the Attorney General opinion issued June 22, 2000. The recent Attorney General's opinion regarding oyster leases noted that the current statutes provide little guidance in many areas of the program's administration. The department has not historically inferred powers on itself for regulating industries when the statutes are silent or ambiguous. Legislative clarification on some broad management authority and principals would be helpful in developing new lease program terms and conditions to protect the interest of the state.*

The department agrees that new terms and conditions should be developed with oyster lease holders. Outreach efforts with appropriate stakeholders will begin as soon as possible to discuss options for new lease conditions, such as the appropriate length of a lease and transfer of leases.

7. *The department agrees that new terms and conditions of oyster leases, including expiration and renewal issues, should be developed as soon as possible.*

Chapter 76 of the Parks and Wildlife Code does not set an expiration term or mention a competitive award process. The Attorney General opinion does state that the leases are periodic, year-to-year leases that may be terminated at the end of any lease year after giving reasonable notice of termination. The Opinion does not address the award process. Legislative clarification on these issues would be helpful in developing new lease program terms and conditions to protect the interest of the state.

Conditions for renewing leases have historically been a very contentious issue for all fisheries managed with these types of license limitation systems. Once a business invests capital in a fishery, there is incentive to know that capital is protected for the long term. Developing a competitive process for lease renewals is a logical goal for the state to maximum its return on the harvest of public resources. However, the stability of businesses is also something the state benefits from in the form of tax revenues, employment, etc. The development of these renewal policies should be done with maximum input from all appropriate stakeholders.

The General Land Office's Leases of State-Owned Lands

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Summary

The General Land Office (Office) is not recovering the full cost of administering four of its seven surface lease types, with one lease type not recovering approximately \$1 million in fiscal years 1998 and 1999. However, in total, these leases collect more revenue than it costs to administer them.

- Coastal easements earned less than 15 percent of the costs incurred to manage the leases, with costs not recovered of approximately \$1 million in fiscal year 1998 and again in 1999.
- Coastal leases earned less than 2 percent of the expenditures incurred to manage the leases, with costs not recovered of approximately \$81,000 in fiscal year 1999 and \$74,000 in fiscal year 1998.
- Coastal surface lease revenue was just over half of the costs incurred to administer the leases. The coastal surface leases did not recover approximately \$37,000 in fiscal year 1999 and \$33,000 in fiscal year 1998.
- Coastal cabin permit revenue was just over half of the costs incurred for administration. The cabin permits did not recover approximately \$114,000 in fiscal year 1999 and \$97,000 in fiscal year 1998.

Table 1

Lease (Assignment) Type	Fiscal Year 1999		Contribution/ (Deficit)
	Revenues	Expenditures	
Coastal Easements	\$ 169,097	\$ 1,236,920	\$ (1,067,823)
Coastal Leases	1,645	82,828	(81,183)
Commercial Leases and Easements	1,025,311	221,471	803,840
Surface Leases – Uplands	876,321	321,533	554,788
Surface Leases – Coastal	43,517	80,095	(36,578)
Cabin Permits	198,624	312,604	(113,980)
Miscellaneous Easements	819,913	679,631	140,282
Total	\$ 3,134,428	\$ 2,935,082	\$ 199,346

Source: The State Auditor's Office developed estimates and applied them based on the division staff estimates.

In addition, the estimated value of the Office's coastal cabin permits appears to exceed the income realized by the State for these leases. The Office issues permits for cabins along the Texas coast that are built and maintained by the permit holders.

It assesses an annual rent of \$0.60 per habitable square foot. The estimated value is \$18 per square foot, based on a depreciated replacement cost analysis performed by an independent appraiser. Permits are sometimes sold privately if the Office approves a transfer of the permit from one individual to another. The estimated value of such sales for cabin permits varies considerably with location and amenities. Permits in less desirable fishing areas can be valued at \$20,000 to \$30,000. Permits in highly desirable areas can be valued at or above \$50,000.

The commercial leases and easements, upland surface leases, and miscellaneous easements earned more than they cost to administer. The majority of the revenue collected from leases goes to the Texas Education Agency's Available School Fund and the Permanent School Fund. The costs to administer the leases are paid from the Office's General Revenue Fund appropriations.

When the State Auditor's Office requested the cost information, the General Land Office did not have a method to capture actual cost information by type of lease. In addition, the General Land Office has not assessed its costs by lease type to determine whether costs could be reduced or whether the fee structure is reasonable. The General Land Office cannot accurately determine the amount of resources it expends on administering each lease type because it does not have a sound cost allocation method.

The State Auditor's Office did not review leases related to oil and gas or minerals, nor did we audit the financial systems that produced the numbers used in this report. This study focused on financial aspects of the surface leases of state-owned land, not on assessing economic impact or environmental concerns.

Four of the General Land Office's Seven Types of Surface Leases Did Not Recover Their Costs, With One Lease Type Not Recovering Approximately \$1 Million

Information
provided by the
State Auditor's
Office

The General Land Office (Office) is not taking advantage of the revenue-generating potential of certain programs. The Office is not recovering the costs of administering four of its seven surface lease types, with one lease type not recovering approximately \$1 million of its costs. Not only is the Office not recovering its costs to administer these four lease types, but the State is also not maximizing its revenue opportunities for the use of state-owned land. However, in total these leases collect more revenue than it costs to administer them.

The commercial leases and easements, upland surface leases, and miscellaneous easements earn more than they cost to administer. The majority of the revenue collected from leases goes to the Texas Education Agency's Available School Fund and the Permanent School Fund. The costs to administer the leases are paid from the Office's General Revenue Fund appropriations.

The four lease types that did not recover their costs are coastal easements, coastal leases, coastal surface leases, and cabin permits. Specific details on the costs not recovered for the four lease types during fiscal years 1998 and 1999 are as follows:

- The coastal easement leases earned less than 15 percent of the costs incurred to manage the leases, with costs not recovered of approximately \$1 million in each of the fiscal years 1998 and 1999.
- The coastal leases earned less than 2 percent of the expenditures incurred to manage the leases, with costs not recovered of approximately \$81,000 in fiscal year 1999 and \$74,000 in fiscal year 1998.
- The cabin permits earned \$0.64 for every dollar spent to administer them, with costs not recovered of approximately \$114,000 in fiscal year 1999 and \$97,000 in fiscal year 1998
- The coastal surface lease revenue was just over half of the costs incurred to administer the leases, with costs not recovered of approximately \$37,000 in fiscal year 1999 and \$33,000 in fiscal year 1998.

The effect for the State is that General Revenue appropriations paid at least \$1 million more in fiscal years 1998 and 1999 for these lease activities than the Available and Permanent School Funds received in revenues. (See Appendix 8 for a complete table of fiscal year 1998 revenues and costs.)

Table 2

Fiscal Year 1999			
Lease (Assignment) Type	Revenues	Expenditures	Contribution/(Deficit)
Coastal Easements	\$ 169,097	\$ 1,236,920	\$ (1,067,823)
Coastal Leases	1,645	82,828	(81,183)
Commercial Leases and Easements	1,025,311	221,471	803,840
Surface Leases – Uplands	876,321	321,533	554,788
Surface Leases – Coastal	43,517	80,095	(36,578)
Cabin Permits	198,624	312,604	(113,980)
Miscellaneous Easements	819,913	679,631	140,282
Subtotal	3,134,428	2,935,082	199,346
Mental Health and Mental Retardation ^a	290,159	158,779	131,380
Other State Agencies ^a	98,142	13,333	84,809
Total	\$ 3,522,729	\$ 3,107,194	\$ 415,535

^a The Office assists other agencies that have state-owned land with their leases. The Office's involvement in the leasing process varies, depending on the need of the agency. The Office does not usually receive any compensation for costs it incurs. The Office will sometimes receive reimbursement for some of its costs through a clause in the lease agreement or through a memorandum of understanding with the other agency. The expenditures are for the Office's costs associated with assisting the other agencies with leases. However, the revenues are deposits to other agencies.

Note: The table shows total revenues and expenditures for each of the seven lease types reviewed, with the resulting contribution/deficit. In addition, system developmental costs of \$71,125 have been deducted from the expenditures because the grant revenue for the system was realized in a prior year.

Source: The State Auditor's Office developed estimates and applied them based on the division staff estimates.

The Office has not reviewed the financial status of these leases by individual lease type for 1998 or 1999 to determine if it could possibly reduce costs or whether the fee structures are reasonable. According to the Office, its primary focus has been to preserve the State's resources; therefore, the Office reviews costs by function rather than by individual lease type. The Office cannot accurately determine the amount of resources it spends on administering the individual lease types because it does not have a sound cost allocation method. The Office does not have a method for determining actual costs for each lease type because:

- The Office does not adequately track time spent administering various lease types or have a sound basis for the estimated percentages of time spent on the individual lease types. (The costs provided in Table 2 above are allocated using a percentage based on the divisions' estimates.)
- The Office recognizes fees and rent (revenues) from leases when they are received, not when they are earned. For example, a leaseholder may pay his or her lease rent three years in advance. The Office does not allocate the rent over the three years, but in the fiscal year that it is collected. However, the costs are recorded in each fiscal year. While this is correct governmental accounting for the financial statements, it does not provide a true picture for analyzing cost recovery and fee structure.

As a result, there is no accurate way to determine the actual costs by individual lease type associated with administering the various leases. The estimated numbers in this report are based on information from division staff members who estimated the percentage of time spent administering each lease type.

Estimated Value and Appraisals of Coastal Cabins

Information
provided by the
Comptroller of
Public Accounts

The Office renews permits for 435 existing coastal cabins. No permits are issued for new cabin locations and structures. This increases the value of the current permits, which can be and are passed down through generations and privately bought and sold. The land and cabin structures are owned by the State but built and maintained by permit holders. The permit only gives the individual the right to inhabit the cabin. The Office assesses an annual rent of \$0.60 per habitable square foot. The average rental payment to the Office for a cabin permit is \$628 annually. The estimated value of the cabin structures is \$18 per square foot, based on a depreciated replacement cost analysis performed by an independent appraiser.

The real value for the State relates to the permit itself rather than the cabin structures because the number of permits is limited. However, it is not possible to assess a value for the permit because the permits are sold in private transactions. The permit holder must get approval from the Office to transfer his permit to another individual and pay a transfer fee, but the value of the transferring permit is not disclosed to the Office. Therefore, to make some assessment of the relative value of the cabin lease permits compared to the revenue received, the cabin structures were appraised. This approach seemed reasonable because the revenue collected is based on the habitable square footage of the structures. However, interviews and discussions with local Office staff members, local residents, and local chief appraisers indicate that the sale value of a permit in a private transaction could range from \$7,000 for a poor cabin in a relatively inaccessible location to \$80,000 and up for premium cabins in popular fishing areas.¹ Sizes of the cabins vary from 284 square feet to over 6,000 square feet.

Half of all current cabin permits are issued for cabins along the intracoastal and bay waters of Kenedy and Kleberg counties. The remainder are issued for cabins along the waters of Brazoria, Jackson, Calhoun, Aransas, Refugio, San Patricio, Nueces, Willacy, and Cameron counties.

¹ Interviews with General Land Office Coastal Coordination Council permitting assistance coordinator in Corpus Christi, Texas, field office (since retired), November 2000; also, Willacy County Navigation District staff, November 2000.

Issuance of Cabin Permits and Other Leases Could Be Enhanced to Further Protect the State's Interests

Information
provided by the
State Auditor's
Office

Overall, the Office's agreements for the cabin permits and other leases appear to contain the basic terms and conditions needed to protect the interests of the State. The agreements might be strengthened with additional clauses that were found in similar lease agreements used by other state agencies. For example, the leases and permits could possibly be strengthened with clauses that allow the Office to adjust the rent or fees during the term of each lease.

As in the case of the Parks and Wildlife Department's oyster-bed leases, the Office does not use a competitive process to issue the cabin permits. Cabin permits are issued for five-year terms. At the end of the term, the leaseholder simply renews the permit for another five-year term after an inspection by the Office. In addition, leaseholders may transfer permits to someone else. The leaseholder must notify the Office of any permit transfer, which the Office must approve. The Office charges a \$325 transfer fee, but the State realizes nothing if the permit holder engages in a private sale of the transferred permit.

Some cabin permits issued by the Office may be in violation of the Texas Natural Resources Code, Sections 33.124 and 33.125, and Texas Administrative Code, Title 31, Section 155.4. Both codes state that the School Land Board may not grant a permit authorizing continued use of a structure located within 1,000 feet of a state or federal wildlife sanctuary or refuge. In 1991, the Brazoria National Wildlife Refuge boundaries were expanded. Some existing cabin structures were located in the expanded boundaries. There are approximately 66 cabins that may be in violation of this law. According to the Office, it has terminated 14 of these permits within the past year and is working to terminate the remainder.

Comparison With Other States' Lease Programs

Information
provided by the
Comptroller of
Public Accounts

The federal Submerged Lands Act of 1953 granted states the rights to natural resources of the submerged lands from the coastline to no more than 3 nautical miles (5.6 km) into the Atlantic, Pacific, the Arctic Oceans, and the Gulf of Mexico. A major exception is the coastal waters of Texas and western Florida, where state jurisdiction extends from the coastline to no more than 3 marine leagues (16.2 km) into the Gulf of Mexico.²

As with Texas, the most common forms of coastal leases in the states surveyed for this report are issued for mineral exploration and production, commercial purposes, and docks and piers. For the purposes of this report, we surveyed the residential and recreational lease, permit, or license programs of several Atlantic, Pacific, and Gulf Coast states.

Alaska

The State of Alaska has a Personal Use Cabin Permit Program, developed specifically as a one-time solution to the large number of unauthorized cabin structures on state land. (Most cabins were used for duck hunting and sheltering winter snow machines.) The program was intended to phase out the cabins. It was based on a lifetime estate or permit granted to those names on the original application. When all of the owners of a particular cabin are deceased, the cabin is either removed or can be converted to a public use cabin. The permits are for the foot print of the cabin and do not include any land acreage. The permits are renewed every six years at a cost of \$100 annually. The original cabins may not be improved or replaced in the event of a loss. The permit is not assignable.

When the state began this program, and moved to identify and permit unauthorized cabins (which Alaskans call "duck shacks"), it discovered many new unauthorized cabins whose owners would also like to be rewarded with a cabin permit.

Alaska has other 10-year non-renewable leases available for commercial purposes, for a \$100 non-refundable application fee, public notice costs and survey and appraisal costs if necessary. These leases may be renewed after a new public review process, but the procedure is not automatic. The annual lease fee varies from regulation to regulation for different programs. Some commercial guide camp leases rent for \$2,000 per year based on fair market value. Other 10-year lease rentals also based on fair market value are computed at a per acre basis ranging from \$250 to \$1,500 an acre.

Leases issued by the State of Alaska can be assigned provided the leaseholder is in good standing, the site is used according to the development plan and the rent is paid. Damaged or destroyed structures under this program can be replaced.

² U.S. Minerals Management Service, Federal Offshore Statistics through 1998 (Washington, D.C., 1999), p. 1. (Internet document.) www.mms.gov/stats/PDFs/Fedlands.pdf

Florida

The Florida Department of Environmental Protection acquires and disposes of lands as directed by the Board of Trustees of the Internal Improvement Trust Fund. The Department oversees approximately 11 million acres of state lands, including more than 7,000 lakes and 4,510 islands of 10 acres or more in size. The department provides upland leases for educational facilities, vegetable farming, and mineral, oil, and gas exploration.

Florida has a program similar to the Office's cabin leases, but on a much smaller scale. The Florida Department of Environmental Protection's Submerged Land section monitors 20 "stilt houses" in state waters on Florida's western coast in Pasco, Charlotte, and Lee counties. The houses are privately owned.

In the 1970s, the state required owners of these houses to register with the state. In the 1980s, the state told all registered owners they would have to pay a fee for being on state land beginning in 1998. At that point, no more stilt houses could be built. These owners paid \$200 for the 20-year lease with the state that requires annual rental adjustments every five years. Leases are renewable, are not competitively bid and do allow for rebuilding. The current annual lease rate is \$841 dollars. The next adjustment will be in 2002.

Louisiana

The Louisiana Department of Natural Resources provides staff support to the State Mineral Board in granting and administering leases on state-owned lands and water bottoms. Leases issued are exclusively for the production and development of minerals, primarily oil and gas, and for the purpose of optimizing revenue to the state from the royalties, bonuses, and rentals generated therefrom.

No evidence could be found that the state has a program similar to the Texas cabin lease program.

Maine

Maine's Bureau of Parks Land grants standard leases and constructive easements on the submerged lands along the state's rocky Atlantic Coast. Standard leases are issued for all structures that in total area occupy more than 500 square feet and are limited to commercial fishing use. The minimum annual rental fee is \$100.

For both permanent and non-permanent structures occupying less than 500 square feet, the state may grant a 30-year lease or easement, to be renewed at the Bureau's option. Leases are transferable with the Bureau's prior written approval.

All structures on submerged lands existing before October 1, 1975, were granted constructive easements; however, all easements are due to terminate by September 30, 2005.

For the easements, Maine charges a \$50 application processing fee and a five-year \$50 registration fee payable when the lease is executed and every five years thereafter. Any lease transfers, assignments, and amendments have a \$10 administrative processing fee.

The non-commercial easements are usually for private berthing and docking spaces. Leaseholders are prohibited from renting these facilities out or charging a fee for their use.

State Auditor's Recommendations

1. The Office should immediately begin capturing cost information by individual lease type. Management should develop a sound cost allocation method. The methodology and basis used should be documented. With a sound cost allocation method in place, management can determine whether costs can be reduced. Analyzing costs by individual lease type in conjunction with current practice would provide a complete picture for making management decisions.
2. Management should determine whether the fee structure for leases is reasonable based on the results of program cost analysis. Management should make the necessary recommendations to the School Land Board for any fee increases. Management and the School Land Board should take into consideration the commercial value of the permits and leases when setting the fees.
3. The Office should determine whether the State and its citizens would be best served by continuing each cabin permit and make a recommendation to the School Land Board. If not, structures should be removed from the property at the earliest possible time.
4. The School Land Board should review its current rules regarding damage and removal of structures. The Office should determine the best method to recover the State's costs for removing the structures and remediating environmental damage if the permit holder fails to satisfy its contractual obligation. These methods may include requiring a bond or non-refundable deposit from leaseholders, or increasing damage fees.
5. The Office should determine which surface lease types, if any, would best benefit the State by issuance through a competitive process. At the end of lease terms, the Office should renew leases using a competitive process to ensure that the State receives maximum benefit for the use of state-owned resources. The Office may want to follow its competitive bidding procedures for oil and gas lease sales.
6. Permits and lease agreements could possibly be strengthened with additional clauses wherever applicable that would increase benefits to the State.
7. Cabin permits still in violation of state laws should be terminated as soon as possible.

The General Land Office's Response

Texas General
Land Office



David Dewhurst
Commissioner

December 5, 2000

Mr. Lawrence F. Alwin, CPA
P.O. 12067
Austin, Texas 78711-2067

Dear Mr. Alwin:

Management of the General Land Office (Office) generally agrees with the report's conclusion that some of the surface lease types did not fully recover their administrative costs, but that overall the net of revenues over costs for the surface lease program exceeded \$415,000 during the review period. As the auditors stated, there is no statutory requirement for the surface lease program to recover its costs; however, the program did so. One of the primary responsibilities of the surface lease program is to preserve coastal public land, which does not necessarily imply revenue maximization. The Office has charged fees that are relevant to the type of lease instrument issued. As such, lease types with a coastal protection or regulatory purpose do not necessarily result in revenues commensurate with those resulting from commercial lease instruments, even though the costs of administering the leases may be comparable.

The Office would like to emphasize that revenues generated from surface leases other than cabin permits are not used for program operations but instead are deposited directly into the State Treasury, primarily into the Permanent School Fund and the Available School Fund. On the other hand, program operations are funded from appropriations the Office receives from the Legislature.

The Office disagrees with the report's comparison between the \$.60 per square foot annual rental fee charged for cabins and the \$18 per square foot estimated depreciated replacement value of the structures, which the permit holders actually built and paid for. As the report indicates, some permit holders may be receiving compensation from new permit holders when they have their permits transferred to them. The compensation would represent a value in the permit itself, which the Office does not currently receive any part of.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry R. Soward".

Larry R. Soward
Deputy Land Commissioner/Chief Clerk

LRS: HSY

Stephen F. Austin Building

1700 North
Congress Avenue

Austin, Texas
78701-1495

512-463-5001

1. *The Office agrees with the importance of capturing accurate cost information and will continue to capture such data along the major functional lines of accountability for the lease program, as it has been doing. Costs will also be directly attributed to the instrument types where feasible or allocated on the basis of the proportional effort involved, such as the number of inspections performed.*

The Office has taken actions to reduce costs associated with the lease program through the years. One example of actions taken to reduce costs that resulted from internal cost analysis involved a re-organization and staff reduction in 1999 that resulted in approximately 12 full-time positions being eliminated or left unfilled. Another example is the proposed rule changes that the Office will present to the School Land Board (SLB) at the January 2001 meeting which will streamline lease operations, thereby further reducing program costs.

2. *The Office agrees with the benefit of assessing the reasonableness of the fee structures for surface leases. Staff consideration has been given to whether changes are warranted and should be recommended to the SLB, which holds the ultimate authority for establishing the fee structure for surface leases. Fee increases for surface leases were last made effective in 1996 and have continued to be evaluated. It should be noted that the amount of fees charged for the various surface lease instruments is not based solely on the costs associated with administering the lease instruments. Also, the statutory provisions that authorize surface leases do not mandate cost recovery.*

The surface lease fee structures take into consideration the type of activity being licensed, including whether the instrument is for public recreational use, such as public piers and public park boat ramps; for private use, such as residential piers; or for commercial uses, such as for marinas or restaurants. The fee structures also consider any benefits provided to the State and its land, such as habitat restoration and protection projects contributed by lessees under leases for which a token amount of fees is collected. Also, the fees for coastal surface leases take into account that many of the leases are issued to oil and gas companies to encourage offshore oil and gas drilling, from which the Permanent School Fund receives very sizeable royalties that were not included in the revenues presented in this study.

3. *The Office agrees that dilapidated or derelict cabin structures should be removed at the earliest practicable time. The Office has, and will continue to use, a process in which staff analyzes every cabin permit application or transfer request and makes recommendations to the SLB. The SLB makes the final determination of whether the permit is in the best interest of the State and the public. Every cabin permit has been, and will continue to be, reviewed individually to ensure compliance, consistency and fairness.*

4. *The Office is currently addressing the concern about removing damaged or unauthorized structures. The cabin contract contains a provision that specifies the cabin permittee is responsible for the costs of removing unauthorized structures and remediating any environmental damage. The Office is evaluating practicable means of ensuring sufficient funds for*

removing unauthorized structures in an environmentally sound manner for those instances in which the permittee fails to satisfy its contractual obligation for structural removal. Consideration is being given to opportunities presented by the economies of scale resulting from removing multiple structures simultaneously.

5. *The Office has considered whether there are surface lease types which would best serve the State by being issued on a competitive basis. After consideration of the financial and environmental impacts, some lease types in certain circumstances have been found to benefit from, and have been issued using, a competitive bid process. Some examples include the commercial leases of Central Market and the Triangle in Travis County.*

Surface leases are unique in that many of the instruments are issued to adjacent property owners, which does not make them conducive to a competitive bidding process. Also, unlike oil and gas leases, surface leases are not issued in a commodity market. Therefore, different factors must be considered in the lease issuance process, including the impact on the lessee's investment and maintenance decisions; the costs of administering the bidding and amendment process; and changes to the lease term that may be needed to satisfy a competitive market.

6. *The Office has continually revised and strengthened the terms of its lease agreements and would welcome specific suggestions for consideration. The cabin permit was most recently revised to strengthen its terms. It now specifies that no waste may be disposed of on State land and also contains specific configurations for docks and piers, which are intended to reduce the impact on natural resources.*

7. *The Office has been engaged in an effort to terminate cabin permits that are in violation of state law. It should be noted that the cabins in proximity to the Brazoria Refuge were initially granted an exemption from the 1000-foot restriction, which, for many of the cabins, expired in 1998. None of the permits have since been renewed. Also, many of the 66 cabins are addressed in the Christmas Bay Coastal Preserve Management Plan, which will be presented to the SLB for approval on December 12, 2000, and then forwarded to the Parks and Wildlife Commission for ratification. Some of the cabins remain because of the cost of removing the structures and the risk of adverse environmental impact to sensitive habitats. The Office continues to work to resolve the issue in a satisfactory and reasonable manner.*

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Appendices

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Objective, Scope, and Methodologies

Joint Objective

The primary objective of this project was to determine whether the Parks and Wildlife Department's commercial fishery programs and the General Land Office's leases of state-owned land charge sufficient revenues to cover the costs of administering these programs and whether the lease agreements protect the interests of the State of Texas.

Joint Scope

In his letter dated June 24, 1999, Senator Bill Ratliff, Chairman of the Senate Finance Committee, requested that the State Auditor's Office and the Comptroller of Public Accounts conduct a joint study. On November 4, 1999, a meeting was held with Senate Finance Committee staff to finalize the scope of the study. The agreed upon scope was as follows:

The study would examine all of the Parks and Wildlife Department's commercial fishery programs and leases of state-owned lands for recreational or business operations by the General Land Office for fiscal years 1998 and 1999. The study would not include oil and gas exploration and/or production lease programs, nor would it specifically include the Department of Health's role in the commercial fishery programs.

This study focused only on the financial aspects of the commercial fisheries and surface leases of state-owned land. This report does not discuss other aspects of the programs such as environmental protection or economic impact.

The State Auditor's responsibilities were to:

- Provide detailed information on the revenues collected and the costs incurred for administering the programs and leases.
- Compare the General Land Office's and the Parks and Wildlife Department's leases to similar leases of state-owned land managed by other agencies.
- Examine lease terms and conditions to determine whether they represent the best interests of the State of Texas.

The Comptroller of Public Accounts' responsibility was to provide supplementary background research. In addition, the Comptroller of Public Accounts hired an independent appraiser to establish an estimated value of the leases.

Methodologies

The methodology used by the State Auditor's Office included:

- Nine interviews with Parks and Wildlife Department and General Land Office executive management, divisional management, and field staff members.
- Documentary evidence such as:
 - Unaudited revenue and cost data generated by the Department's Chief Financial Officer and divisions. Some costs were allocated using percentages from staff estimates.
 - Unaudited revenue and cost data generated by the Office's various divisions. Some costs were allocated using percentages from staff estimates.
 - Forty-three active lease agreements for the private oyster-bed leases and all subsequent transfer and sale documents on record.
 - "Boiler plate" lease agreements for the seven lease types at the Office.
 - The Sunset Advisory Commission report for the Department.
 - Newspaper articles and reports related to the commercial fishery programs and leases.
 - Similar lease agreements from other state agencies.
- Procedures and tests conducted:
 - Direct observation of the oyster-bed lease tracts and dredging activities in Galveston Bay.
 - Direct observation of an oyster processing plant.
 - Direct observation of the condition of and types of cabins in Bastrop Bay and Christmas Bay.
 - Direct observation of recorded documents at the Galveston County Courthouse and the Chambers County Courthouse.
 - Review of the 43 oyster-bed lease agreements administered by the Parks and Wildlife Department and subsequent transfer and sale documents.
 - Review of the oyster-bed lease rental fee payments for fiscal years 1998 and 1999
 - Review of the Office's "boiler plate" lease agreements for the seven lease types.
 - Comparison of the Office's "boiler plate" lease agreements to similar agreements of other state agencies.

- Analysis techniques used:
 - Data comparison.
 - Cost allocation.
- Criteria used:
 - State Auditor’s Office Accountability Project Methodology general and specific criteria.
 - Texas Statutes and Administrative Code.
 - The General Appropriations Act.
 - Other standards and criteria developed through secondary research sources, both prior to and during fieldwork.

The methodology used by the Comptroller included:

- General performance review-style research.
- Interviews with Parks and Wildlife Department and General Land Office staff members were conducted by telephone and in person.
- Tours (with State Auditor’s staff) of oyster-bed and cabin leases in Galveston Bay.
- Interviews of staff in the chief tax appraisers’ offices in several counties along the southern Texas coast.
- Research and contact with agency staffs in several states.

Other Information

Fieldwork at the agencies was conducted from October 1999 to August 2000. Although this study was not an audit, the State Auditor’s Office did follow (1) government auditing standards related to the sufficiency and competency of evidence, and (2) requirements for quality control review.

The following members of the State Auditor’s staff performed work:

- Kim McDonald (Project Manager)
- Marios Parpounas
- Juan R. Sanchez, MPA
- Sherry Sewell
- John Swinton, CGFM, MPAff
- Tracy Waite
- Susan A. Riley, CPA (Audit Manager)
- Craig D. Kinton, CPA (Audit Director)

The following members of the Comptroller of Public Accounts’ staff performed work:

- Laure McLaughlin
- Susan Kimbrough

Appendix 2:

Attorney General Opinion

In June 2000, Senator Bill Ratliff requested an Attorney General Opinion regarding the oyster lease agreements and the Park and Wildlife Code, Chapter 76, due to the lack of terms and conditions in the agreements. In addition, it was unclear in both the lease agreements and the Code whether or not the leases were held in perpetuity by current leaseholders.

The request was submitted by Senator Bill Ratliff, Chairman of the Senate Finance Committee on December 15, 1999. The Attorney General issued Opinion JC-0237 on June 22, 2000.

The Attorney General's Opinion follows.



OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS
JOHN CORNYN

June 22, 2000

The Honorable Bill Ratliff
Chair, Senate Finance Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Opinion No. JC-0237

Re: Whether an oyster-bed lease authorized by chapter 76 of the Parks and Wildlife Code is a perpetual lease or an annual lease, and related questions (RQ-0163-JC)

Dear Senator Ratliff:

You ask a number of questions regarding oyster-bed leases under chapter 76 of the Parks and Wildlife Code. Because you do not ask about any particular lease or situation, we answer your questions in general terms and only with reference to chapter 76. We conclude that a chapter 76 oyster-bed lease is a periodic, year-to-year lease that may be terminated at the end of any lease year by giving reasonable notice of the termination; it is not a perpetual lease. We also conclude that an oyster-bed leaseholder is authorized to sell or convey the oyster-bed lease, and that the lease does not expire when the leaseholder dies. Additionally, chapter 76 does not prohibit a family member or family business partner from acting as an agent for other leaseholders; rather it proscribes the "control" of more than 100 acres of submerged land by the same person. No person may exercise power or authority over more than 100 acres of submerged land pursuant to one or more oyster-bed leases. Finally, we conclude that control of more than 100 acres of land covered by water pursuant to another person's oyster-bed lease is not a "lease-breaking condition" that allows the state to cancel the lease by which such control is exercised.

Your first series of questions pertains to the terms and conditions of an oyster-bed lease:

In a lease between the state and an individual, does the absence of a stated term of the lease grant that leasehold in perpetuity, or does a lessee's payment of annual rent on leased lands render the lease an annual one? If the state, at some point in the future, revokes or renegotiates terms of these leases, will it owe compensation for lost property rights to these leaseholders? If the leasehold is indeed granted in perpetuity, does the leaseholder have an unlimited right to sell or convey the lease? Does the lease expire when the leaseholder dies, or can it be conveyed to heirs?

Letter from Honorable Bill Ratliff, Chairman, Senate Finance Committee, Texas State Senate, to the Honorable John Cornyn, Texas Attorney General, at 1 (Dec. 15, 1999) (on file with Opinion Committee) [hereinafter "Request Letter"].

Before addressing your specific questions in detail, we review the statutes regarding oyster-bed leases. All beds and bottoms and the products of the beds and bottoms of bays and inlets in this state and that part of the Gulf of Mexico within the jurisdiction of the state are state property. See TEX. PARKS & WILD. CODE ANN. § 1.011(c) (Vernon 1991). The state may permit use of the waters and the bottoms and taking of products therefrom. See *id.* The Parks and Wildlife Department (the "Department"), a state agency, is directed to regulate the taking and conservation of all forms of marine life and shells, and to administer the laws relating to fish, oysters, and marine life in accordance with the Parks and Wildlife Code (the "Code"). *Id.* §§ 1.011(d), 11.001, 12.001(a); see also 31 TEX. ADMIN. CODE ch. 58 (1999) (Oyster and Shrimp). Chapter 76 of the Code deals with oyster-bed leases and is the codification of various statutes enacted in 1919 and earlier. See Act of July 21, 1919, 36th Leg., 2d C.S., ch. 73, 1919 Tex. Gen. Laws 191; Act of May 30, 1975, 64th Leg., R.S., ch. 545, subit. D, 1975 Tex. Gen. Laws 1405, 1568. Under chapter 76, an oyster bed or reef, other than a natural oyster bed, is subject to "location" by the Department. See TEX. PARKS & WILD. CODE ANN. § 76.003 (Vernon 1991); see also *id.* §§ 76.001 ("A natural oyster bed exists when at least five barrels of oysters are found within 2,500 square feet of any position on a reef or bed."), 76.004(c) (natural oyster bed, bay shore area within 100 yards of shore, area subject to riparian rights, and area already under certification as location are not subject to location). Any United States citizen or domestic corporation may apply for a certificate authorizing the applicant to plant oysters and make a private oyster bed at a described location. See *id.* § 76.006(a), (b). If the location is subject to certification, see *id.* § 76.009, the Department must issue a certificate that describes the location by metes and bounds and with reference to compass points and natural objects, see *id.* § 76.012.

Chapter 76 provides little guidance as to the nature, terms, or conditions of an oyster-bed location certification. Only section 76.017 deals to a limited extent with the terms and conditions of an oyster-bed location certification, referring to it as a "lease" and providing that:

- (a) No rental fee is owed on any location when oysters are not sold or marketed from the location for a period of five years after the date of the establishment of the location.
- (b) When oysters are sold or marketed from the location and thereafter, the holder of the certificate shall pay to the department \$3 per acre of location per year. In lieu of that payment, the commission may set the required payment under this section in a greater amount.
- (c) Rental fees are due annually by March 1.
- (d) The failure to pay any rental when due terminates the *lease*.

Id. § 76.017 (emphasis added); see also 31 TEX. ADMIN. CODE § 58.30 (1999) (Private Oyster Leases). While section 76.017(b) allows the Department to set a higher rental than \$3 per acre per year, the Department has not done so. See 31 TEX. ADMIN. CODE § 58.30(d)(5)(B) (1999). The Department's rules track the statutory rental provisions with one exception. Section 58.30(d)(5)(E) of the Department rules provides that "[i]f oysters from the lease are not sold or marketed within five years from the date of establishment of the lease, the lease is void." *Id.* § 58.30(d)(5)(E). Section 76.017 does not specifically state the type of leasehold interest created by an oyster-bed lease, i.e., whether it is annual or perpetual. Moreover, we have found no Texas cases construing a chapter 76 oyster-bed lease.

Based on the limited provisions of section 76.017 of the Code, we conclude that an oyster-bed lease authorized under chapter 76 is a periodic, year-to-year lease that is terminable at the end of any lease year with reasonable notice. At common law, there are four kinds of tenancies, classified as follows: (1) tenancy for a definite term or term for years; (2) periodic tenancy, as from year-to-year or month-to-month; (3) tenancy-at-will; and (4) tenancy at sufferance. See generally 49 TEX. JUR. 3D *Landlord and Tenant* §§ 24-27 (1986); RESTATEMENT (SECOND) OF PROPERTY §§ 1.4, 1.5, 1.6 (1977). The classification is important because it determines the incidences of a tenancy. See generally 49 TEX. JUR. 3D *Landlord and Tenant* §§ 24-27 (1986); RESTATEMENT (SECOND) OF PROPERTY §§ 1.4, 1.5, 1.6 (1977). To classify the oyster-bed lease, we look at its terms under section 76.017. No rent is required for a five-year period if no oysters are sold or marketed from that location; and the lease terminates at the end of that period if no oysters are sold or marketed. See TEX. PARKS & WILD. CODE ANN. § 76.017(a), (b) (Vernon 1991); 31 TEX. ADMIN. CODE § 58.30(d)(5)(E) (1999). As soon as oysters are sold and marketed, a leaseholder must pay annual rent by March 1, even during the initial five-year period; otherwise the lease terminates. See TEX. PARKS & WILD. CODE ANN. § 76.017(c), (d) (Vernon 1991). Once oysters are sold and marketed, section 76.017 thus provides for periodic rent and termination of the lease if the rental is not paid by March 1, but it does not provide for an absolute lease termination date or the number of annual periods for which the lease may be held. The duration of the lease is uncertain. A lease for an uncertain duration that requires periodic rent creates a periodic tenancy. See *Panola County Appraisal Review Bd. v. Pepper*, 936 S.W.2d 10, 12 (Tex. App.—Texarkana 1996, no writ) ("Periodic tenancies are those where the agreement provides no fixed term, but is for period to period at the will of the lessor or lessee."); RESTATEMENT (SECOND) OF PROPERTY § 1.5 cmt. d (1977) (parties may expressly provide for periodic tenancy, agreement may be apparent from circumstances, or where no duration is stated but periodic rent is reserved, periodic tenancy is presumed).

Our construction of a chapter 76 oyster-bed lease as a periodic, year-to-year lease is supported by Texas case law dealing with leases generally. By way of background, an at-will tenancy is one that is terminable at the will of either party to the lease at any time, see *Holcombe v. Lorino*, 79 S.W.2d 307, 310 (Tex. 1935); RESTATEMENT (SECOND) OF PROPERTY § 1.6 cmt. a (1977); and a lease for an uncertain term is prima facie an at-will lease, see *Holcombe*, 79 S.W.2d at 310. Where parties enter into a lease of uncertain duration, but periodic rent is required or paid, Texas courts – conflating a tenancy-at-will and a periodic tenancy – characterize the arrangement

as an "at-will lease," but one that establishes a tenancy from month-to-month or year-to-year and is terminable at the end of the specified period "at the will" of either party. See, e.g., *Virani v. Syal*, 836 S.W.2d 749, 751-52 (Tex. App.-Houston [1st Dist.] 1992, writ denied); *Sellers v. Spiller*, 64 S.W.2d 1049, 1051 (Tex. Civ. App.-Austin 1933, no writ); *Hill v. Hunter*, 157 S.W. 247 (Tex. Civ. App.-Austin 1913, writ ref'd); but see RESTATEMENT (SECOND) OF PROPERTY § 1.5 cmt. d (1977) ("Where the parties enter into a lease of no stated duration and periodic rent is reserved or paid, a periodic tenancy [rather than a tenancy at will] is presumed."). In *Virani v. Syal*, for example, the court considered a lease where the parties did not agree to the lease term, but agreed on a rent of \$800 per month. See *Virani*, 836 S.W.2d at 750. The *Virani* court held that the tenants "were tenants at will occupying the property on a month-to-month basis." *Id.* at 752. Similarly, in *Sellers v. Spiller*, the court stated with respect to an agreement to lease at a specified monthly rental, but for an unspecified time, "[s]uch contracts have uniformly been held to be merely tenancies from month to month, subject to termination by either party upon reasonable notice to the other." *Sellers*, 64 S.W.2d at 1051. Finally, in *Hill v. Hunter*, the court determined that a lease for an uncertain term after expiration of an annual holding, was "a mere tenancy at will; and that in the present case, where there was a holding over[,] under the former annual holdings, and the rent payable annually, the tenancy was from year to year, terminable at the end of any year at the will of either party." *Hill*, 157 S.W. at 253. In sum, under these cases, a lease of uncertain duration, but that requires periodic payment, is both a periodic tenancy because it is a "year-to-year" or "month-to-month" tenancy terminable only at the end of the particular period and an at-will tenancy because it may still be terminated "at the will" of either party.

The Texas courts' conflation of at-will and periodic tenancies is relevant for our purposes because it has implications for the lessee's right to notice of termination. A periodic tenancy is differentiated at common law from other tenancies by the notice requirement: "[The periodic tenancy] was developed by the English judges for purpose of relieving the injustice resulting from the power of both the landlord and the tenant to summarily terminate the tenancy at will. . . . The implication in law of an agreement to give notice to terminate the tenancy was the vehicle by which the courts sought to remove the old injustices of the tenancy at will. This requirement of notice was a distinguishing factor between the year to year tenancy and the other tenancies." See generally Edward G. Northcut, *Creation and Termination of Periodic Tenancies*, 15 BAYLOR L. REV. 329 (1963) (footnotes omitted). But with respect to the Texas case law, it has been noted that: "As to year to year tenancies it seems to be the law in Texas, that a year to year tenancy terminates 'at the end of each year at the will of either party.' Evidently no notice is required to terminate a year to year tenancy and either party may end this tenancy, presumably, at the end of any year he desires." *Id.* at 338 (footnotes omitted).

No Texas case, however, has specifically addressed the notice requirement for a year-to-year tenancy. *Sellers v. Spiller*, dealing specifically with the sufficiency of notice to terminate a month-to-month tenancy appears to adopt the common-law rule that such tenancy may be terminated only upon reasonable notice: "it appears that [notice to vacate] was not given within a reasonable time of the date on which Spiller sought to terminate his tenancy. In contracts from month to month, a month's notice in advance of intention to vacate, where time of notice is not prescribed by statute

nor by the terms of the contract, has been held to be a reasonable time." *Sellers*, 64 S.W.2d at 1051 (citations omitted). A more recent Texas Supreme Court case, *Bockelmann v. Marynick*, 788 S.W.2d 569, 571 (Tex. 1990), suggests that notice may be required when a lease does not have a definite duration. The *Bockelmann* court concluded that a notice was not required to terminate the tenancy at issue stating: "The lease created a tenancy for a definite term (a tenancy with a specified beginning and ending date). The general rule is that a tenancy for a definite term does not require a tenant to give notice in order to terminate the tenancy, because a tenancy for a definite term simply expires at the end of the contract period." *Bockelmann*, 788 S.W.2d at 571.

We believe that a termination notice is required to terminate a periodic, year-to-year oyster-bed lease because its ultimate duration is uncertain.¹ *Cf. Bockelmann*, 788 S.W.2d at 571 (lease for definite term, with a beginning and ending date, does not require termination notice because tenancy for definite term simply expires at end of the lease term). If rental is paid by March 1, the lease continues for an additional year and there is no statutory limit to the number of years for which it may be so continued. There is no final lease ending date because the annual period does not define the duration of the lease. Thus, although the lease terminates upon failure to pay the annual rent, and it is *terminable* at the end of any lease year, the particular year in which it will terminate is unknown. Notice in these circumstances is not only reasonable, but necessary to protect the lessee. We believe a Texas court confronted with this issue would follow the common-law rule requiring notice to terminate a year-to-year lease. *See Sellers*, 64 S.W.2d at 1051 (adopting common-law rule that *reasonable* notice equal to one month required to terminate a month-to-month tenancy); RESTATEMENT (SECOND) OF PROPERTY § 1.5 cmt. f (1977) (if no notice of termination is given, periodic lease will continue for another period). At common law, a six-month notice was required to terminate a periodic year-to-year lease, but a shorter "reasonable" period may be sufficient. *See RESTATEMENT (SECOND) OF PROPERTY § 1.5 cmt. f (1977)*.

A chapter 76 oyster-bed lease, in our opinion, is not a lease for one year or a definite term such as would not require notice of termination. A lease creates a tenancy for a definite term if the tenancy has a specified beginning and ending date. *See Bockelmann*, 788 S.W.2d at 571 ("The lease [for a twelve-month term ending on February 28, 1985] created a tenancy for a definite term (a tenancy with a specified beginning and ending date)."); accord RESTATEMENT (SECOND) OF PROPERTY § 1.4 cmt. a (1977) ("A lease is for a fixed period of time when it specifies its beginning date and its termination date as calendar dates. A lease is for a computable period of time when it specifies a formula for determining the beginning and termination dates."). Again, chapter 76 does not provide an ending date for the oyster-bed lease: if rental is paid by March 1, the lease continues for an additional year and there is no statutory limit to the number of years for which it may be so continued.

¹Notice to terminate a month-to-month tenancy is no longer an issue because it is specifically required by statute. *See* TEX. PROP. CODE ANN. § 91.001 (Vernon 1995) (specifying notice for termination of tenancies from month-to-month or periodic tenancies).

Neither is a chapter 76 oyster-bed lease, in our opinion, a perpetual lease. Perpetual leases are not favored by Texas courts, and a lease will not be construed to create a perpetual leasehold interest unless the intent to create such interest is evidenced by clear and unequivocal language. See *Philpot v. Fields*, 633 S.W.2d 546, 548 (Tex. Civ. App.—Texarkana 1982, no writ); *Hull v. Quana Pipeline Corp.*, 574 S.W.2d 610, 611-12 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); *Oglesby v. McCoy*, 255 S.E.2d 773, 776 (N.C. Cl. App. 1979). In *Philpot v. Fields*, the court considered a lease for a term of twenty years "and so long thereafter as the lessee . . . may use the premises for the purpose of maintaining and operating a LTX separator . . . in connection with processing, refining, treating, and storing natural gas." *Philpot*, 633 S.W.2d at 547. The *Philpot* court determined that the lease created a perpetual lease as long as the land was used for the stated purpose. See *id.* at 548. The court distinguished its case from the line of Texas cases finding tenancy-at-will when the lease term is uncertain on the grounds that (1) those cases did not involve a complete, written lease clearly expressing the parties' intent and (2) those cases did not tie the agreement's termination to a definite, ascertainable use of the land. See *id.* But the court also stated that it would not apply the rationale of the earlier cases even if they were not distinguishable because the lease in question was "specific in expressing rights, obligations, and duties of the parties" and that:

Although there is no definite ending date after the 20 year term, that date is tied to the cessation of the use of the land for certain definitely ascertainable purposes. . . . It appears that the parties intended to create a perpetual right to lease the land. When the parties' intent is made clear, courts should enforce the agreement as written, even though perpetual rights are not favored.

Id.

While we are not convinced that *Philpot* correctly states the law, a chapter 76 oyster-bed lease is distinguishable from the *Philpot* lease. We do not have before us the language of a particular oyster-bed lease, but we note that such a lease is a creature of chapter 76. Chapter 76 does not evidence a clearly expressed intent to authorize a perpetual leasehold interest. See also *Oglesby*, 255 S.E.2d at 775-77 (holding that oyster-bed lease did not provide clearly and unambiguously for perpetual renewal where no language in lease or in statute indicated an instrument in perpetuity). Oyster beds are the property of the state, of which the state may allow the use by private persons. See TEX. PARKS & WILD. CODE ANN. § 1.011(c) (Vernon 1991). They are also natural resources that the state has an interest in protecting and regulating. See Act of July 21, 1919, 36th Leg., 2d C.S. ch. 73, 1919 Tex. Gen. Laws 191 (the Act, among other things, is for the protection of oyster and marine life, to protect natural oyster beds, and provide for location of private oyster beds) (caption). Given the state's vested interest in oyster beds and the significance of alienating state property by granting a perpetual interest therein tantamount to a fee title, we believe that if the legislature intended an oyster-bed lease to be perpetual, it would have expressly and unambiguously so provided. Accordingly, we determine that chapter 76 does not authorize a perpetual oyster-bed lease.

Furthermore, because chapter 76 does not authorize a perpetual leasehold interest, the Department may not enter into or provide for a perpetual lease. The Department, like any state agency, is a legislative creature and possesses only such powers as are delegated to it expressly and impliedly by the legislature. *State v. Jackson*, 376 S.W.2d 341, 344 (Tex. 1964); *Texas Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 148 (Tex. App.—Austin 1998, no pet.). Specifically, the Department may regulate taking of marine life and administer the laws relating to oysters only in accordance with the Code. TEX. PARKS & WILD. CODE ANN. §§ 1.011(d), 11.001, 12.001(a) (Vernon 1991). Chapter 76 does not expressly provide for a perpetual lease. And because the intent to create a perpetual lease must be evidenced by clear and unequivocal language, such authority may not be implied.

You also ask in your first series of questions: "If the state, at some point in the future, revokes or renegotiates terms of these leases, will it owe compensation for lost property rights to these leaseholders?" Request Letter at 1. While not completely clear, you appear to ask about possible, unspecified claims of unconstitutional "taking" of unspecified vested rights under an oyster-bed lease contract arising from unspecified actions taken by the state, assuming the oyster-bed leases are perpetual. In view of our conclusion that a chapter 76 oyster-bed lease is not a perpetual lease, we do not address this question. Moreover, we note that such a determination cannot be made in the abstract, dependent as it is on, among other considerations, the particular actions complained of taken by the state, the legal theory of the taking claim, and the particular property interest affected. See, e.g., *State v. Operating Contractors*, 985 S.W.2d 646 (Tex. App.—Austin 1999, pet. denied) (discussing necessary elements of claim of constitutional "taking" based on legislative change affecting contractual right); *Callaway*, 971 S.W.2d 145 (discussing claim of inverse condemnation of contractual property easement); *Bryant v. Hogarth*, 488 S.E.2d 269 (N.C. Ct. App. 1997) (discussing timing of government regulation as affecting taking claim relating to franchise to cultivate shellfish); *Working Waterman's Ass'n of Va., Inc. v. Seafood Harvesters, Inc.*, 314 S.E.2d 159 (Va. 1984) (looking at whether statute complained of in fact substantially impaired oyster and clam planting contract rights); *Oglesby*, 255 S.E.2d at 773 (looking at timing of legislative change increasing rental for oyster-bed lease in regard to claim of impairment of contract).

You additionally ask in your first series of questions whether a leaseholder has an "unlimited" right to sell or convey the lease or whether the lease expires on the death of the leaseholder. See Request Letter at 1. These questions also appear to be premised on a conclusion that an oyster-bed lease creates a perpetual leasehold interest. However, we do not believe that these questions arise only in the context of a perpetual lease.

We first conclude that chapter 76 implicitly authorizes an oyster-bed leaseholder to sell or convey an oyster-bed leasehold interest. Section 76.039 of the Code, which prohibits certain acts relating to oyster-bed locations, provides as follows: "This section does not affect the right of a person to sell or assign an oyster location or private bed." TEX. PARKS & WILD. CODE ANN. § 76.039(b) (Vernon 1991). By its terms, this provision clearly assumes that the right to sell or convey oyster-bed leases exists and reiterates that this right continues. We find no express restrictions in chapter 76 on a leaseholder's right to sell or convey an oyster-bed lease. Of course, the leaseholder cannot convey any more interest than the leaseholder has under the lease. Cf.

Shipman v. Mitchell, 64 Tex. 174 (1885) (person who acquired unexpired term of lease from original lessee bound by time of expiration agreed to in original contract).

We conclude second that a chapter 76 oyster-bed lease does not expire on the death of the leaseholder. Again, no provision in chapter 76 addresses this issue, but under the common law, a periodic tenancy does not terminate on the death of the leaseholder. RESTATEMENT (SECOND) OF PROPERTY § 1.5 cmt. f (1977) ("The death of one party to a periodic tenancy does not terminate the lease."); see also *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971) (three-year lease did not terminate on lessee's death but constituted community asset and vested in widow and heir, citing *Wilcox v. Alexander*, 32 S.W. 561 (Tex. Civ. App. 1895, no writ)); *Wilcox*, 32 S.W. at 561 (as a general rule, lease is not extinguished at death and upon death of lessee, lease in question became part of estate). In contrast, a tenancy-at-will under the common law terminates on the death of the leaseholder. See *McNeely v. Southwestern Settlement & Dev. Corp.*, 282 S.W.2d 932, 935 (Tex. Civ. App.—Beaumont 1955, no writ) (rights of ancestor under tenancy-at-will ended at his death and did not pass to his heirs under statutes of descent and distribution); accord RESTATEMENT (SECOND) OF PROPERTY § 1.6 cmt. e (1977) ("The continuance of the tenancy-at-will depends upon the presence of landlord's and tenant's wills that the tenancy continue. The death of either ends the presence of the will of the deceased, thereby bringing the tenancy to an end."). Accordingly, an oyster-bed leasehold interest may be conveyed to a leaseholder's heirs.

In this regard we note that the Texas cases conflating at-will and periodic tenancies when a lease is of uncertain duration, but rent is paid or accepted periodically, see *Virani*, 836 S.W.2d at 749; *Hill*, 157 S.W. at 247, are problematic. This is so because it is unclear whether an "at-will" lease that nevertheless creates a "periodic tenancy," is an at-will lease that terminates with the death of the lessee, or a periodic tenancy that does not. We believe, a court confronted with this issue, would follow the common-law position of the *Restatement of Property* and treat the hybrid lease as creating a periodic tenancy that does not end when the lessee dies.

Your next three questions pertain to the meaning and consequences of "control" of more than 100 acres of submerged land that is prohibited by section 76.007 of the Code:

When a family member or family business partner acts as an agent for several oyster bed leaseholders, does that violate Parks and Wildlife Code, Sec. 76.007 . . . ? What constitutes 'control'? If it is proven that individuals do indeed control more than 100 acres at a time, is that a lease-breaking condition?

Request Letter at 2.

Section 76.007 of the Code provides that: "No person may own, lease, or control more than 100 acres of land covered by water under certificates of location." TEX. PARKS & WILD. CODE ANN. § 76.007 (Vernon 1991). But neither section 76.007 of the Code nor another provision provides a remedy for a violation of section 76.007.

With respect to your first question, neither section 76.007, or any other provision we have found prohibits a family member or family business partner from acting as an agent for other oyster-bed leaseholders. Section 76.007 does not prohibit an agency relationship. Rather, it proscribes "control" of more than 100 acres of submerged land by the same person pursuant to an oyster-bed lease.

Neither section 76.007 nor another provision defines "control." When the legislature fails to define a word or term, we must ascribe to the word or term its ordinary meaning. See *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993); see also TEX. GOV'T CODE ANN. § 311.011 (Vernon 1998) (statutory words and phrases are to be read in context and construed according to common usage unless they have acquired technical or particular meaning). The ordinary meaning of "control," in the present context, is "to exercise power or authority over." III OXFORD ENGLISH DICTIONARY 853 (2d ed. 1989); see also BLACK'S LAW DICTIONARY 330 (7th ed. 1999) ("To exercise power or influence over."); accord *American Fidelity & Cas. Co. v. Traders & Gen. Ins. Co.*, 334 S.W.2d 772, 775 (Tex. 1959) ("control" means "[p]ower or authority to manage, direct, govern, administer, or oversee."). Ascribing this meaning to "control" as used in section 76.007 of the Code, we determine that no person may exercise power or authority over more than 100 acres of submerged land pursuant to one or more oyster-bed leases. Whether a particular person exercises power and authority over submerged lands in excess of 100 acres pursuant to one or more oyster-bed leases requires investigation and resolution of fact questions, which cannot be done in an attorney general opinion.²

While control of more than 100 acres of land under water pursuant to an oyster-bed lease is prohibited, we do not believe it is a "lease-breaking condition" that allows the state to cancel a lease by which such control is exercised for the following reasons. Texas courts generally do not favor conditions or limitations, the violation of which results in the termination of a leasehold interest. See *Sirtex Oil Indus., Inc. v. Erigan*, 403 S.W.2d 784, 787 (Tex. 1966); *Hearne v. Bradshaw*, 312 S.W.2d 948, 951 (Tex. 1958); *Henshaw v. Texas Natural Resources Found.*, 216 S.W.2d 566, 570 (Tex. 1949); *Johnson v. Gurley*, 52 Tex. 222, 224 (Tex. 1879). At common law, a lessee does not forfeit his or her lease for using the "premises" for an unlawful purpose in the absence of a provision in the lease contract permitting a forfeiture in such a case. See, e.g., *Wilson v. Boyd*, 556 S.W.2d 121, 124 (Tex. Civ. App.—Eastland 1977, no writ); *Moore v. Kirgan*, 250 S.W.2d 759, 767 (Tex. Civ. App.—El Paso 1952, no writ). See generally Annotation, *Lease Provisions Allowing Termination or Forfeiture for Violation of Law*, 92 A.L.R. 3d 967 (1979 & Supp. 1999). Accordingly, absent such a forfeiture provision in the lease, a lessor may not cancel a lease for a violation of the law unless a statute expressly provides for the forfeiture. See *Moore*, 250 S.W.2d at 767. In the present case, we presume that an oyster-bed lease does not contain a provision that allows the state to cancel the lease for a violation of section 76.007. Additionally, section 76.007 does not authorize termination of a lease for violation of that section. Compare TEX.

²See, e.g., Tex. Att'y Gen. Op. Nos. JC-0020 (1999) at 2 ("[I]nvestigation and resolution of fact question[] . . . cannot be done in the opinion process."); DM-98 (1992) at 3 ("[Q]uestions of fact . . . cannot be resolved in the opinion process."); O-2911(1940) at 2 ("Whether [buildings are owned and used exclusively for school purposes] presents a fact question which we are unable to answer.").

PARKS AND WILD. CODE ANN. § 76.007 (Vernon 1991), with *id.* § 76.017 (d) (Vernon 1991) (failure to pay rent when due will terminate lease).

Additionally, with respect to a contract that is not on its face illegal, determining whether the contract violates a statute requires looking at the specific facts of the case and the intention of the parties in executing the contract. See *Texas Employers' Ins. Ass'n v. Tabor*, 283 S.W. 779, 780 (Tex. Comm'n App. 1926, judgment adopted); *Peniche v. Aeromexico*, 580 S.W.2d 152, 156 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ). While it is the general rule that a Texas contract made in violation of the express provisions of a state statute, or one that cannot be performed without such violation, is void and unenforceable, where the illegality does not appear on the face of the contract it will not be held void unless the facts showing its illegality are before the court. See *Lewis v. Davis*, 199 S.W.2d 146, 148-49 (Tex. 1947); *Texas Employers' Ins. Ass'n*, 283 S.W. at 780; *Peniche*, 580 S.W.2d at 156. Furthermore, a contract that could have been performed in a legal manner will not be declared void because it may have been performed in an illegal manner. *Lewis*, 199 S.W.2d at 149.

In the present case, it is not clear to us that any illegality, i.e., violation of section 76.007, appears on the face of an oyster-bed lease. Clearly, a person who controls 100 acres of land under water pursuant to an oyster-bed lease is ineligible to control additional locations under section 76.007 through a lease in his or her name. And the Department does not, we assume, grant a lease to a person who already leases or controls 100 acres pursuant to an oyster-bed lease given section 76.007's proscription. Consequently, we presume that control over more than 100 acres is acquired or exercised through a lease in another person's name, and the lease that "violates" section 76.007 is with a person other than the "violation" of the statute, i.e., the person controlling more than 100 acres of submerged land. Thus, a lease by which control over more than 100 acres is exercised would not on its face show a violation of section 76.007. To support a termination of such a lease for violation of section 76.007 and prevail, the state would have to show a court facts and intentions surrounding the questionable lease establishing its illegality when it was executed.

S U M M A R Y

An oyster-bed lease authorized under chapter 76 of the Parks and Wildlife Code is a periodic, year-to-year lease that may be terminated at the end of any lease year by the state after giving reasonable notice of termination. A chapter 76 oyster-bed lease does not create a perpetual leasehold interest. An oyster-bed leaseholder is authorized to sell or convey the oyster-bed lease. The lease does not expire on the death of the leaseholder. Chapter 76 does not prohibit a family member or family business partner from acting as an agent for other leaseholders; rather it proscribes the "control" of more than 100 acres of submerged land by the same person. No person may exercise power or authority over more than 100 acres of submerged land pursuant to one or more oyster-bed leases. Control over more than 100 acres of land covered by water pursuant to another person's oyster-bed lease is not a "lease-breaking condition" that allows the state to cancel the lease by which such control is exercised.

Your very truly,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

CLARK KENT ERVIN
Deputy Attorney General - General Counsel

ELIZABETH ROBINSON
Chair, Opinion Committee

Sheela Rai
Assistant Attorney General - Opinion Committee

Appraiser's Detailed Reports on Estimated Value of Leases

Appendix 3-A: Information provided by the Comptroller of Public Accounts

Parks and Wildlife Department's Oyster-Bed Leases

Summary Appraisal Report Of

43 Submerged Land Leases in Galveston Bay (Primarily Used for Oyster Production)

Known As

Lease Nos. 268-A, 299-A, 301-A, 357-A, 381-A, 386-A, 387-A, 390-A, 391-A, 392-A, 403-A, 404-A, 405-A, 406-A, 407-A, 408-A, 409-A, 410-A, 411-A, 412-A, 413-A, 414-A, 415-A, 416-A, 417-A, 418-A, 419-A, 420-A, 422-A, 423-A, 424-A, 425-A, 426-A, 427-A, 428-A, 429-A, 430-A, 431-A, 432-A, 433-A, 434-A, 435-A, and 436-A

Prepared for

Carole Keeton Rylander
Texas Comptroller of Public Accounts
LBJ State Office Building
111 E. 17th Street
Austin, Texas 78774

October 24, 2000

By

A. CHARLES DEAN, CCRA/CREA
State Certified General Real Estate Appraiser

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October 24, 2000

Hon. Carole Keeton Rylander
Texas Comptroller of Public Accounts
LBJ State Office Building
111 E. 17th Street
Austin, Texas 78774

Dear Comptroller Rylander:

At your request, I have made an appraisal of 43 submerged land leases in Galveston Bay, known colloquially in the oystering industry as "private oyster leases". These leases are used primarily for oyster production on man-made reefs. Specifically, these leases are known as Lease Nos. 268-A, 299-A, 301-A, 357-A, 381-A, 386-A, 387-A, 390-A, 391-A, 392-A, 403-A, 404-A, 405-A, 406-A, 407-A, 408-A, 409-A, 410-A, 411-A, 412-A, 413-A, 414-A, 415-A, 416-A, 417-A, 418-A, 419-A, 420-A, 422-A, 423-A, 424-A, 425-A, 426-A, 427-A, 428-A, 429-A, 430-A, 431-A, 432-A, 433-A, 434-A, 435-A and 436-A.

Their legal descriptions, metes and bounds and surveys are included in the Addendum of this report.

These leases are state-owned submerged lands in Galveston Bay which are improved with man-made oyster reefs and harvested by the lessees or their assignees.

The purpose of this appraisal is to estimate market value of each lease, leased fee estate interest, for use by the State of Texas. Specifically, it should be noted that the market value estimated in this report is for the value of the submerged land and includes the permanent improvement of the oyster reef that has been created on it. The value does not include the living oysters that can be moved by harvest or transplanting.

The submerged leases are identifiable above water visually by buoys; the appraiser used acreages based on figures and surveys furnished by Texas Parks & Wildlife, or found in deed records in the Galveston County Clerk's Office.

The conclusions presented in this report are based on the assumption that no environmental detriments are present. Admittedly, in the oyster industry, pollution and detrimental environmental effects do occur intermittently with great impact, but the appraiser is unable

to predict future occurrences.

After consideration of all known factors affecting value, it is my opinion that the market value of the subject property as of October 15, 2000:

**TWO MILLION THREE HUNDRED TWENTY SIX
THOUSAND EIGHT HUNDRED FORTY DOLLARS
\$2,326,840**

Respectfully submitted,

A handwritten signature in black ink that reads "A. Charles Dean". The signature is written in a cursive style and is positioned above a horizontal line.

A. CHARLES DEAN, CCRA/CREA
STATE CERTIFIED GENERAL REAL ESTATE APPRAISER
No. 1321389-G, Expires June 30, 2001

Summary Of Individual Estimated Values - Private Oyster-Bed Leases

Lease No.	Size/Acres	Estimated Value
268-A	50.00	\$50,000
299-A	100.00	\$100,000
301-A	100.00	\$100,000
357-A	33.32	\$33,320
381-A	59.12	\$59,120
386-A	45.88	\$45,880
387-A	75.72	\$75,720
390-A	38.86	\$38,860
391-A	65.86	\$65,860
392-A	60.73	\$60,730
403-A	46.60	\$46,600
404-A	45.80	\$45,800
405-A	11.00	\$11,000
406-A	11.44	\$11,440
407-A	17.08	\$17,080
408-A	94.69	\$94,690
409-A	92.43	\$92,430
410-A	96.01	\$96,010
411-A	21.77	\$21,770
412-A	56.25	\$56,250
413-A	63.03	\$63,030
414-A	77.72	\$77,720
415-A	36.02	\$36,020
416-A	99.96	\$99,960
417-A	76.64	\$76,640
418-A	99.91	\$99,910
419-A	31.66	\$31,660
420-A	37.43	\$37,430
422-A	41.60	\$41,600
423-A	47.63	\$47,630
424-A	61.23	\$61,230
425-A	37.20	\$37,200
426-A	44.73	\$44,730
427-A	31.08	\$31,080
428-A	52.34	\$52,340
429-A	47.09	\$47,090
430-A	64.45	\$64,450
431-A	21.10	\$21,100
432-A	44.11	\$44,110
433-A	78.70	\$78,700
434-A	39.76	\$39,760
435-A	33.26	\$33,260
436-A	37.63	\$37,630
Totals	2326.84	\$2,326,840

SUMMARY OF SALIENT FACTS AND CONCLUSIONS

Property Location	Various locations, Galveston Bay
Legal Description	Lease Nos. 268-A, 299-A, 301-A, 357-A, 381-A, 386-A, 387-A, 390-A, 391-A, 392-A, 403-A, 404-A, 405-A, 406-A, 407-A, 408-A, 409-A, 410-A, 411-A, 412-A, 413-A, 414-A, 415-A, 416-A, 417-A, 418-A, 419-A, 420-A, 422-A, 423-A, 424-A, 425-A, 426-A, 427-A, 428-A, 429-A, 430-A, 431-A, 432-A, 433-A, 434-A, 435-A, 436-A Copies of surveys, and metes and bounds descriptions are included in the Addendum.
Purpose of Appraisal:	To estimate market value, leased fee estate interest.
Function of Report:	To estimate market value for internal purposes of client.
Land Area:	Total private lease area is 2,326.84 acres, more or less.
Improvements:	Man-made, submerged oyster reefs of varying sizes
Year Built:	Varies
Highest and Best Use:	Seasonal oyster harvesting
Final Estimate of Market Value:	\$2,326,840 in total

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SUMMARY APPRAISAL REPORT - COMPLETE APPRAISAL

This is a Summary Appraisal report which is intended to comply with the reporting requirements set forth under Standards Rule 2-2(b) of the Uniform Standards of Professional Appraisal Practice for a Summary Appraisal Report. As such, it presents only summary discussions of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser's opinion of value. Supporting documentation concerning the data, reasoning, and analysis is retained in the appraiser's file. The depth of discussion contained in this report is specific to the needs of the client and for the intended use stated below. The appraiser is not responsible for unauthorized use of this report.

43 Submerged Land Leases in Galveston Bay
(Primarily Used for Oyster Production)
Known As

Lease Nos. 268-A, 299-A, 301-A, 357-A, 381-A, 386-A, 387-A, 390-A, 391-A, 392-A, 403-A, 404-A, 405-A, 406-A, 407-A, 408-A, 409-A, 410-A, 411-A, 412-A, 413-A, 414-A, 415-A, 416-A, 417-A, 418-A, 419-A, 420-A, 422-A, 423-A, 424-A, 425-A, 426-A, 427-A, 428-A, 429-A, 430-A, 431-A, 432-A, 433-A, 434-A, 435-A, and 436-A

CLIENT: Hon. Carole Keeton Rylander
Texas Comptroller of Public Accounts
LBJ State Office Building
111 E. 17th Street
Austin, Texas 78774

APPRAISER: A. Charles Dean, CCRA/CREA
914 FM 517 West, Ste. 101
Dickinson, Texas 77539

SUBJECT:
The subject property is a plottage of 43 separate parcels, being 43 Submerged Land Leases in Galveston Bay, primarily used for oyster production, and known as Texas Parks & Wildlife Department Lease Nos. 268-A, 299-A, 301-A, 357-A, 381-A, 386-A, 387-A, 390-A, 391-A, 392-A, 403-A, 404-A, 405-A, 406-A, 407-A, 408-A, 409-A, 410-A, 411-A, 412-A, 413-A, 414-A, 415-A, 416-A, 417-A, 418-A, 419-A, 420-A, 422-A, 423-A, 424-A, 425-A, 426-A, 427-A, 428-A, 429-A, 430-A, 431-A, 432-A, 433-A, 434-A, 435-A, and 436-A.

PURPOSE OF THE APPRAISAL:

The purpose of this appraisal is to provide the appraiser's best estimate of the market value of the subject real property as of the effective date. Market Value is defined by the federal financial institutions regulatory agencies as follows:

Market Value means the most probable price, which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- 1) Buyer and seller are typically motivated;
- 2) Both parties are well informed or well advised, and acting in what they consider their own best interests;
- 3) A reasonable time is allowed for exposure in the open market;
- 4) Payment is in terms of cash in U. S. dollars, or in terms of financial arrangements comparable thereto: and
- 5) The price represents the normal consideration for the property sold and is
- 6) Unaffected by special creative financing or sales concessions granted by anyone associated with the sale.

(Source: Office of the Comptroller of the Currency under 12 CFR, Part 34, Sub-part C-Appraisals, 34.42 Definitions [f].)

INTENDED USE OF REPORT:

This appraisal is intended to assist the client, Carole Keeton Rylander, Texas Comptroller of Public Accounts, in administration of her duties for the State of Texas.

INTEREST VALUED: Leased fee estate, including reef improvements but not live oysters.

EFFECTIVE DATE OF VALUE: October 15, 2000

DATE OF REPORT: October 15, 2000

APPRAISAL DEVELOPMENT AND REPORTING PROCESS: In preparing this appraisal, the appraiser performed a complete appraisal process, as defined by the Uniform Standards of Professional Appraisal Practice. This means that no departures from Standard 1 were invoked.

This Summary Appraisal Report is a brief recapitulation of the appraiser's data, analyses, and conclusions. Supporting documentation is retained in the appraiser's file.

Although oyster production is not a common real estate use, the appraiser relied nevertheless on definitions and techniques accepted in the typical dry land real estate

market. For the purpose of calibrating for the reader the techniques used herein, the appraiser offers some of them here:

Real Estate is the physical land and appurtenances affixed to the land; that is, all things that are a natural part of the land (trees, minerals) and things which become more or less permanently attached to it by people (buildings, pavements). An improvement is considered permanent if it cannot be removed without considerable difficulty or expense. ***Applying this definition to the subject parcels, then the submerged land and its built-up oyster reefs are the two main components of the market value estimate; the living oysters which can be harvested are not real estate and are not included.***

Real Property includes all interests, benefits and right inherent in the ownership of physical real estate, otherwise known as the bundle of rights, including the right to use it, to sell it, to lease it to another, to give it away, to farm it, etc. In this case, the state owns the land but has leased away its right to use the land as it wants; the lessee has the right to use it for oyster production. The state's ownership is a leased fee estate; that is, an ownership interest held by a landlord with the right to use and occupy, called the leasehold estate, conveyed by lease to others (Lessees). The rights of each are specified in a contract, the terms of which are likely to be subject to revision following the recent *Texas Attorney General Opinion JC-0237*.

Oyster Reef Developer is one who organizes, manages and assumes the risks of the business of building an oyster reef for the purpose of producing oysters for market. In this case, it is one who does all these on state land leased to him/her for private purposes. (The appraiser may be coining a new term here, but this is how it is used in this report).

DESCRIPTION OF THE REAL ESTATE APPRAISED:

Location Description

The 43 leases are located in Galveston Bay and East Bay (the eastern part of greater Galveston Bay); the pattern is scattered (see map in Addendum). Six leases are offshore near Smith Point (Chambers County); 12 leases are clumped offshore of Eagle Point (Galveston County); nine leases are mid-Bay by the Houston Ship Channel; the remaining 16 leases are offshore in East Bay north of Sievers Cove on Bolivar Peninsula. In some cases, the properties are clumped and abut one another. The lease surveys are required to be marked by buoys, according to state law.

Lease Sizes

Leases range in size, according to recorded surveys, between 11 acres to 100 acres. Most of them are in the 30 acres-to-50 acres range. No leases are larger than 100 acres, because state law provides that no individual may lease more than 100 acres.

Lessees, Leasehold Rights and Market Value

The subject properties are leased from the State of Texas by private individuals and companies for the purpose of building/managing man-made reefs to grow and harvest oysters. Lease contracts are controlled by the Texas Parks & Wildlife Department, which

also monitors and regulates the oyster harvest. It is legal and common for a lessee to contract for more than one lease, providing the combined acreage is 100 acres or less. It is also legal and common for leasehold rights to be sold to other individuals, and for harvest rights to be subcontracted to agents.

The original oyster leases, originating from the late 1800s, were contracted for a term considered by some to be perpetual. Although the State of Texas retained ownership, the effect of this lease term was, in practicality, to give the lessee almost the equivalent of the full bundle of rights that goes with real estate ownership. In the market analysis, the appraiser identified 27 sales of private oyster leases and obtained information to establish or estimate sales price on 13 private oyster leases. Based on the terms of the lease, the appraiser assumed that although the rights being sold were leasehold rights, the real use did not greatly differ from fee simple rights and, in terms of estimating market value, they can be considered similar.

Texas Attorney General Opinion JC-0237

The Texas Senate requested the Texas Attorney General to address this issue, and in response Texas Attorney General Opinion No. JC-0237 concluded June 22, 2000, that such a lease is not a perpetual lease, but is a periodic, year-to-year lease that may be terminated at the end of any lease year by giving reasonable notice of the termination. The appraiser mentions JC-0237 to show he is aware of it, and to explain its effect on the analysis of value in this report.

The appraiser assumes that, barring no further legal action, the private oyster leases eventually will be rewritten to a different term, possibly longer than one year but certainly shorter than perpetuity. The length of this new term, depending on how long it is, will doubtless affect market value by making it higher, lower, or stabilizing it. However, it has not occurred and the appraiser cannot predict it.

STATE OF TEXAS PRIVATE LEASES AND THE OYSTER INDUSTRY

In Texas, oysters are produced on public reefs and private reefs. Put simply, public reefs are made by nature; while private reefs are man-made. Beginning in 1891, Texas has increased oyster production by leasing its state-owned submerged lands to private entrepreneurs for the purposes of culturing and harvesting oysters for market; in other words, to increase the amount of oyster reef acreage in Texas. The effort was successful and oysters were produced on over 6,400 leased acres along the Texas coast. Oyster harvesting is always sensitive to many different factors - predators, pollution, siltation, weather, etc. - but World War I wrecked that oyster market, and by 1919 only 609 acres were still held leased. During the 1930s, interest rose again and several private companies leased reefs, but actual production levels did not recover dramatically. World War II had its detrimental influence on the number of leased acres, but the numbers steadily increased until the Legislature imposed a moratorium on leasing from 1968 to 1973. Today, the Texas Parks & Wildlife Department regulates only 43 private leases totaling 2,327 acres, limited to Galveston Bay, but the market is considered active and profitable.

International and National Market

Worldwide markets (for about 10 different species) are found in Europe, Australia, Japan, China, India, Africa, North and South America. These markets compete with Texas oysters predominantly as canned oysters on supermarket shelves. In North America, the chief edible species is named scientifically *Crassostrea virginica*, which is found along the Atlantic and Gulf coasts of Canada, the US and Mexico. The Texas market competes mainly with Louisiana and the Gulf Coast, but usually moderate temperatures give it a marketing advantage during the hot summer months over other latitudes. Due to a number of causes, both man-made and natural, Texas commercial oysters are cultured in Galveston Bay where brackish waters (diluted salinity occurring where fresh and salt waters mix) and moderate temperatures, and some protective features, combine for good growing conditions.

Hazards to the Market

The oyster market anywhere is public relations driven; sales drop when the public perceives a health threat. Thus, one of the more serious threats is **sewage pollution** which allows unsafe levels of bacteria and virus to concentrate in oysters; this doesn't harm the oyster, but makes it dangerous for humans to eat raw oysters. Pollution is closely monitored by government health departments which act by closing oyster harvesting until the polluted waters become safe. Another serious health concern to humans is bacteria of the Vibrio strain. These bacteria are naturally occurring organisms in estuarine waters. They are very prolific in summer months and, when present in oysters later eaten by humans, can cause illness and death in the most severe instances. Ever and always present is the threat of **siltation**, the build-up of silt, from a number of causes which can smother oysters or completely bury a reef. Silt is brought in from rivers and bayous, particularly in times of flooding, as well as severe storms and hurricanes which disrupt the bay bottom and bury oysters. Man-made silt from dredging, such as the Houston Ship Channel, causes serious damage. Severe uplands **flooding** can inject fresh water into the bay and lower salinity; if this is long term, it can cause severe oyster damage. However, short flood periods can benefit oysters by bringing in nutrients and killing off natural oyster enemies. **Oyster predators** include the oyster drill (a small snail), crabs and drum fish. **Fouling organisms** do not prey directly on oysters but compete for food or space. This category includes mussels, clams, barnacles, algae, worms, fungus and other parasites. All of these organisms can ruin oyster beds much as weeds ruin gardens.

It should be noted that the oyster's filtering system cleans and benefits the water around the reef, and that sewage pollution will not permanently contaminate the oyster. Live oysters can be transplanted - that is, moved from one reef to another - so that oysters in contaminated reefs can be moved to pollution-free reefs, and the pollution will be filtered out of their bodies and they will be safe to eat.

Oyster Life Cycle and the Oyster Market

The oyster cannot run or fight, but it has some natural advantages: it has a hard protective shell, and it can change from one sex to another over its lifetime, but it cannot fertilize its own eggs. Growth occurs all year long in Texas, peaking in late winter and early spring,

and slowing in hot months. During spawning in May-June, fertilization takes place in the water, a phenomenon which stimulates other oysters to spawn so that the majority of the reef is reproducing. A female can discharge several million eggs and spawn several times in a season. The swimming oyster larvae begin to grow a shell and then shortly thereafter cement to the reef for the rest of its life. The act of attachment is called **setting**, and at this stage the young oyster is called a **spat**. If it doesn't find a suitable site (called a **cultch**), it will die; fortunately a suitable place is anywhere above the mud or silt where the mature oyster can strain food out of the water through its gills (from five to 30 quarts per hour), but as a spat it is particularly vulnerable to the other threats already mentioned. Oysters in soft mud tend to sink as the shells gain weight; it might adapt successfully by growing lengthwise to keep the bill above the mud; otherwise the shell is broad and well-cupped. As the oyster grows, its shell becomes larger, and growth rings form a pattern; after 18-24 months on average, at three inches, the oyster becomes legal to harvest.

Oyster Reef and Created Real Estate Value

Oysters grow on oyster reefs which are built-up on the shells of dead oysters. It has been described as "living animals growing on the graveyard of their forebears". A reef becomes a community of animals and plants, not just a collection of oysters. When they die, the reef dies and becomes buried. Reef sizes and boundaries constantly change, but a reef must initially have a hard bottom of mud, clay or gravel. When oysters first appear, they attach to some support on the bottom and succeeding generations build up on these oysters and the dead shells. **Live oysters are harvested from a crust only a few inches thick.** Oyster reefs may be a few yards in length and inches in thickness, or maybe several miles long and many feet thick. Besides salinity and temperature, reef development depends largely on direction of wave action and water currents. Reefs can be man-made; **Texas private leases are man-made.**

(Reef development has stages of growth like other real estate investments. Although legal nuances may change as state agencies react to the Attorney General Opinion, the appraiser views this development much like a typical dry land lease. In that scenario, a developer leases unimproved land for a stated long term, say 50 years, and then improves it with a building which he may occupy or sublease for his own profit. When the lease is fulfilled or terminated, then full use of the real estate reverts back to the landowner, including land and any permanent improvement. This is spelled out in the land lease, and the lease term is for an extended period to allow the lessee enough time to make such profit as will offset the loss of his/her building costs.)

To build an oyster reef, the reef developer must first lay down a layer of base material: the first risk for the reef developer is to find an area with a suitable stiff mud, so as to limit the cost of building the base. In soft mud, the base material will keep sinking below the surface until enough material is added to support oysters up above the mud line. Thus, not every acre of submerged land is cost effective for building reefs. Once the initial base is confirmed, it takes succeeding generations of oysters to build up the reef. Fortunately, **oysters are successfully transplanted from one reef to another**; the developer doesn't have to wait for bay oysters to "find" the new reef, but can "plant" as many as the reef can

support. Transplant oysters are supplied by oysters taken from restricted public reefs; such transplanting is monitored and regulated by the Texas Parks & Wildlife Department. Of course, this represents another expense and the second phase risk for the reef developer.

Harvesting

Oysters can be harvested year-round; the adage about eating oysters only in months containing the letter “R” is a myth, at least for the Galveston Bay area. Oysters can be harvested through several methods, including handpicking in shallow waters, but commercial harvesting is predominantly by the oyster dredge, pulled by an oyster or shrimp boat. The dredge is a heavy metal frame basket with teeth along the bottom edge. The dragging forces the oysters into the basket and it is hauled to deck by hands or winch, emptied and dragged again. Basket sizes vary; the average basket hauls about two bushels. Oyster harvesting is brutal, weather-exposed work. During harvesting, market oysters (3” or larger) are culled out from small oysters, dead shells, and other material, which is returned to the reef to maintain and expand it. The harvest oysters are washed and sacked into bushels. Three 110-pound bushels make a barrel.

Processing, Marketing Oysters

Typically, the oyster man with a full cargo, limited to 150 bushels cargo, returns to a licensed oyster dealer pier to sell his catch to any licensed oyster dealer, at anywhere between \$40 to \$60 per barrel. (At this point, he is competing with the harvest from public oyster reefs, but in many cases, he is harvesting from both.) The dealer is regulated by the state health agency which monitors and tests. The dealer buys wholesale, and processes the oysters, selling either in the shell or shucked. Dealers hire shuckers to open the oysters; although no education is required, shucking oysters is an art acquired through long practice. Shucked oysters are sold fresh, frozen or canned. In Galveston Bay, many of the oysters are sold locally, freshly shucked. Shell oysters are sold to restaurants and oyster bars mainly. After shucking, oysters are washed and packed in pints, quarts and gallons. There are no canneries on the Texas coast.

Oyster Market Trends

In the state’s history, most oyster production has been from natural reefs, called public reefs because they can be harvested by anyone with a proper license. Natural reefs are vulnerable to failure for many reasons, including first-come-first-served competition, natural causes, over-harvesting, and the fact that no one individual is responsible for its maintenance. When a public reef fails, the harvesters simply move on to another reef. The public reefs harvest cannot meet market demand. Oysters from private leases play a significant part in meeting demand. Oyster sales follow the money; oysters harvested from Galveston Bay private leases may end up on a dinner table anywhere along the Gulf and Atlantic Coasts, say up to 200 miles inland, because that is where oysters are eaten. At present, demand comes from limited geographic areas which have an acquired taste for oysters because of easy supply. It is reasonable to assume that if supply were to increase, more areas would acquire the taste; hence, future growth of demand appears strong and without limits. The appraiser assumes that today, the demand for oysters is undersupplied, though not dramatically.

Obviously, the key to strength in the oyster industry is maintenance of the overall reef system, both public and private. No reefs, no oysters. The state has a shell replacement program to maintain reefs, but shell is not the only material that can be used. The US Corps of Engineers is building reefs (for mitigation purposes) using limestone. Any material which builds up and doesn't contaminate the waters can be considered.

In terms of real estate demands for oyster reefs; demand appears strong for good, producing reefs. There appears to be a limited area of hard bottom submerged lands available for new reef construction. Profitable on-shore oyster farms are still a concept of the future. Another consideration for new reefs could be for locations in more brackish waters; such conditions don't favor new spat sets, the larger market oysters perhaps can be grown there for a short period of time.

HIGHEST AND BEST USE ANALYSIS

The Appraisal of Real Estate, Ninth Edition, Copyright 1987 by The American Institute of Real Estate Appraisers, page 42, defines highest and best use as:

“The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and results in the highest value.”

Applying these four criteria to the subject in a Highest and Best Use Analysis produces the following results: a) legally permissible - the subjects' uses conform to state and federal agency codes, b) physically possible - the subjects' sizes are large enough to accommodate most fishery uses, and the physical aspects of the properties do not present a problem; on the other hand, the nature of the property does not accommodate any other regular real estate use, other than fishery; c) financially feasible - current use is established as a feasible long-term use with consideration to the legal requirements and general character of the surrounding area, and, d) maximally supportive - the size and construction of the improvements to the current use; the property as improved is financially feasible and results in the highest value.

SALES APPROACH

To reiterate the real estate basis for this valuation; the state owns submerged lands which are leased to private individuals for the purpose of cultivating oysters for market. These individuals own the right of leasehold estate, a right which can be sold or given to another individual, particularly when the lease term is considered to be perpetual. In the market analysis, the appraiser researched the chain of title for each private lease as recorded in the Deed Records of the Galveston County Clerk. Research identified 27 private lease sales beginning as far back as 1966. Texas law does not require full price disclosure for real estate. The appraiser was able to identify sales prices for 13 private leases, as follows:

Table

Sale	Lease No.	Size/Acres	Sales Price	Date	Price/Acre
1	268-A	50	\$5,000	8-10-87	\$100
2	299-A	100	\$106,074	6-11-91	\$1,061
3	301-A	100	\$20,000	1-24-85	\$150
4	357-A	33.32	(w/ 301-A)		
5	403-A	46.6	\$50,000	5-18-94	\$1,073
6	404-A	45.8	\$11,000	5-27-94	\$240
7	405-A	11	\$45,000	4-24-95	\$2,005
8	406-A	11.44	(w/ 405-A)		
9	407-A	17.08	\$17,080	5-18-94	\$1,000
10	411-A	21.77	\$21,770	5-18-94	\$1,000
11	424-A	61.23	\$34,000	5-27-94	\$555
12	425-A	37.2	\$11,000	5-27-94	\$296
13	426-A	44.73	\$65,000	5-24-94	\$1,453

These sales range in date from August 1987 to July 1994. The price-per-acre range is almost \$300 per acre to \$2,000 per acre. Four sales can be rounded to \$1,000 per acre. As a caution, the oyster business is such that contributory factors in each sale may never be discovered, such as 1) the amount of living oysters included in the sale, 2) the actual condition of the reef, and 3) market-related conditions at time of sale, and 4) the seller's motivation and/or knowledge of the oyster business. Some conditions of the sale known and confirmed, however. The known conditions of each sale, including the average per-barrel oyster harvest over the succeeding five years, are discussed below:

Sale No. 1 - Lease 268-A; 5-yr harvest average 2,675 barrels per year. A knowledgeable oysterman confirmed he paid \$5,000. Harvest records before and after the sale indicate it was at least an average quality reef. Buyer indicated the sale price did not include living oysters as a contribution to value. This sale may have been below market by a seller wanting out of the oyster business.

Sale No. 2 - Lease 299-A; next 5-yr harvest average 1,828 barrels per year. Buyer confirmed the sale price. Harvest records indicate an average quality reef. Buyer indicated the sale price did not include living oysters as a contribution to value.

Sales No. 3 & 4 - Leases 301-A and 357-A; next 5-yr harvest average 3,663 barrels per year. Buyer indicated he paid \$20,000 for both leases, which total 133.32 acres. Harvest records indicate these reefs had zero harvest barrels in several of the years prior to sale, but Buyer was able to harvest the next five years. Buyer indicated the sale price did not include living oysters as a contribution to value.

Sale No. 5 - Lease 403-A; next 5-yr harvest average 1,399 barrels per year. Confirmed by deed records. Harvest records before and after the sale indicate it was at least an average quality reef. Buyer indicated the sale price did not include living oysters as a contribution to value. Seller sold all his private leases but still continues his oyster dealership. This is considered a good indicator of a sale between two knowledgeable, experienced oystermen.

Sale No. 6 - Lease 404-A; next 5-yr harvest average 548 barrels per year. Harvest records before and after the sale indicate it was a below average quality reef. Confirmed by deed records. This is considered a good indicator of a sale between two knowledgeable, experienced oystermen.

Sales No. 7 & 8 - Lease 405-A and 406-A; next 5-yr harvest average 834 barrels per year. Confirmed by deed records. Harvest records before and after the sale indicate average harvest, but both leases were idle the year prior to sale. Buyer paid top dollar for a smaller reef, but is considered a very competent oysterman. This sale may have included living oysters as part of contributory value.

Sale No. 9 - Lease 407-A; next 5-yr harvest average 2,052 barrels per year. Buyer is very active in oystering. Harvest records before and after the sale indicate it was a good producing lease. This is considered a good indicator of a sale between two knowledgeable, experienced oystermen.

Sale No. 10 - Lease 411-A; next 5-yr harvest average 1,607 barrels per year. Harvest records before and after the sale indicate it was at least an average quality reef. Good fair market sale.

Sale No. 11 - Lease 424-A; next 5-yr harvest average 2,117 barrels per year. Harvest records before and after the sale indicate it was at least an average quality reef.

Sale No. 12 - Lease 425-A; next 5-yr harvest average 1,055 barrels per year. Harvest records before and after the sale indicate it was at least an average quality reef. Appraiser could not identify Buyer.

Sale No. 13 - Lease 426-A; next 5-yr harvest average 3,349 barrels per year. Harvest records before and after the sale indicate it was a good producing reef.

SUMMARY OF ANALYSIS AND VALUATION

In the final reconciliation, the appraiser considered three main factors: 1) whether the sale was fair market sale between a knowledgeable buyer and seller (both competent oystermen), 2) whether the reef was good repair and harvest activity, as indicated by harvest records over the long-term, and 3) the reliability of the confirmed sales price. In the appraiser opinion, the most reliable sales were Sales 2, 5, 9, 10 and 13, ranging between \$1,000 per acre to \$1,450 per acre, but with four sales in the \$1,000-per-acre range. In the appraiser's opinion, the most reliable indicator rests at \$1,000 per acre.

CONCLUDED VALUE: \$1,000 per Acre

\$1000 x 2,326.84 acres, or \$2,326,840 market value in total

INDICATED EXPOSURE TIME: 6 months

ESTIMATED MARKETING TIME: 6 months

Sincerely,



A. Charles Dean, CCRA/CREA

State Certified General Real Estate Appraiser

TX-1321389-G; expires 6-01

DEAN APPRAISAL SERVICES
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CERTIFICATE OF VALUE

I hereby certify:

That no other than the undersigned prepared the analysis, conclusions and opinions concerning real estate values that are set forth.

That to the best of my knowledge and belief, the statements contained herein set forth are true, and the information upon which the opinions expressed therein are based is correct; subject to the limiting conditions therein set forth.

That neither my employment nor my compensation for making this appraisal and report are in any way contingent upon the values reported herein.

That this report has been made in conformity with the Ethics and Standards of Professional Independent Appraisers.

That I have no direct or indirect, present or contemplated future personal interest in such property or in any way benefit from the sale of such property appraised.

That my opinion of the Fair Market Value of the subject property, as proposed for remodeling and per completion according to the specifications and plans attached to this report, as of October 15, 2000, is as follows:

**TWO MILLION, THREE HUNDRED TWENTY SIX THOUSAND, EIGHT
HUNDRED FORTY DOLLARS**
\$ 2,326,840

based upon my independent appraisal and the exercise of my professional judgment.



A. Charles Dean, CREA/CCRA
State Certified General Real Estate Appraiser
TX-1321389-G; expires 6-01

Summary Appraisal Report
Of
Coastal Cabin Permits

Prepared for

Carole Keeton Rylander
Texas Comptroller of Public Accounts
LBJ State Office Building
111 E. 17th Street
Austin, Texas 78774

November 3, 2000

By

A. CHARLES DEAN, CCRA/CREA
State Certified General Real Estate Appraiser

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November 4, 2000

Hon. Carole Keeton Rylander
Texas Comptroller of Public Accounts
LBJ State Office Building
111 E. 17th Street
Austin, Texas 78774

Dear Comptroller Rylander:

At your request, I have made an appraisal of the cabins along the Texas coast permitted for use by the General Land Office. This appraisal includes only the cabins for which data is available. The total estimated value is \$7,182,126.

The values are for improvements only; in a market sale, the price would be affected by the site area attached to the cabin. Since the cabins are on state land, which cannot be sold, estimates are based on improvements only. If land were to be included, the estimated value of one acre would be between \$1,000 to \$2,000 additional value, depending on whether the land is submerged or marshy.

The appraiser has not personally inspected all the cabins. The values expressed herein are based on the assumptions that construction quality is rated fair, that many components found in regular houses are not present (plumbing, kitchens, etc.), that interior and exterior conditions are rated fair and no expensive repairs or replacements are needed, and that accrued depreciation from all causes is between 35% to 40%.

The appraiser used a base cost new of \$30 psf Gross Building Area (GBA), taken from his knowledge of coastline building costs as well as the Marshall & Swift Cost Calculator. The final values expressed are Depreciated Replacement Cost New estimates from the Cost Approach technique, as I was instructed. The resulting per square foot value is \$18.

Individual estimates of value are subject to change, of course, if subsequent inspections make discovery of conditions other than the above assumptions.

Respectfully submitted,



A. Charles Dean, CCRA/CREA
State Certified General Real Estate Appraiser
TX-1321389-G; expires June 30, 2001

Office Cabin Lease No.	Gross Bldg. Area (in square feet)	Estimated Value	Office Cabin Lease No.	Gross Bldg. Area (in square feet)	Estimated Value
PC 1008	394	\$ 7,092	PC 1129	683	\$12,294
PC 1023	1,146	\$20,628	PC 1130	1,757	\$31,626
PC 1024	2,039	\$36,702	PC 1138	766	\$13,788
PC 1027	1,882	\$33,876	PC 1140	1,889	\$34,002
PC 1030	4,500	\$81,000	PC 1141	2,145	\$38,610
PC 1031	1,453	\$26,154	PC 1142	1,469	\$26,442
PC 1032	1,593	\$28,674	PC 1143	2,012	\$36,216
PC 1036	1,736	\$31,248	PC 1145	1,335	\$24,030
PC 1037	782	\$14,076	PC 1148	2,028	\$36,504
PC 1042	1,548	\$27,864	PC 1149	1,212	\$21,816
PC 1043	816	\$14,688	PC 1150	553	\$ 9,954
PC 1044	1,226	\$22,068	PC 1155	1,148	\$20,664
PC 1047	3,162	\$56,916	PC 1158	2,526	\$45,468
PC 1050	1,236	\$22,248	PC 1160	2,657	\$47,826
PC 1051	2,271	\$40,878	PC 1162	838	\$15,084
PC 1055	1,615	\$29,070	PC 1165	1,181	\$21,258
PC 1056	1,941	\$34,938	PC 1167	1,449	\$26,082
PC 1057	1,350	\$24,300	PC 1168	2,492	\$44,856
PC 1058	1,517	\$27,306	PC 1170	970	\$17,460
PC 1063	2,330	\$41,940	PC 1171	1,993	\$35,874
PC 1066	2,838	\$51,084	PC 1173	1,347	\$24,246
PC 1067	2,123	\$38,214	PC 1174	1,756	\$31,608
PC 1069	2,060	\$37,080	PC 1179	594	\$10,692
PC 1070	2,373	\$42,714	PC 1181	2,017	\$36,306
PC 1071	1,695	\$30,510	PC 1182	1,375	\$24,750
PC 1072	1,031	\$18,558	PC 1184	1,428	\$25,704
PC 1073	2,453	\$44,154	PC 1187	2,056	\$37,008
PC 1074	1,128	\$20,304	PC 1188	1,612	\$29,016
PC 1080	1,052	\$18,936	PC 1190	1,015	\$18,270
PC 1081	995	\$17,910	PC 1191	2,261	\$40,698
PC 1082	1,053	\$18,954	PC 1194	1,785	\$32,130
PC 1083	523	\$ 9,414	PC 1196	673	\$12,114
PC 1084	1,581	\$28,458	PC 1197	2,001	\$36,018
PC 1085	1,084	\$19,512	PC 1198	1,123	\$20,214
PC 1087	1,026	\$18,468	PC 1200	712	\$12,816
PC 1088	2,178	\$39,204	PC 1201	2,104	\$37,872
PC 1091	1,400	\$25,200	PC 1202	1,620	\$29,160
PC 1098	2,573	\$46,314	PC 1203	2,013	\$36,234
PC 1103	903	\$16,254	PC 1205	1,517	\$27,306
PC 1107	1,608	\$28,944	PC 1206	604	\$10,872
PC 1108	1,672	\$30,096	PC 1208	604	\$10,872
PC 1111	2,063	\$37,134	PC 1209	653	\$11,754
PC 1112	3,189	\$57,402	PC 1211	2,391	\$43,038
PC 1116	1,098	\$19,764	PC 1213	1,409	\$25,362
PC 1119	1,672	\$30,096	PC 1214	1,812	\$32,616
PC 1121	3,023	\$54,414	PC 1215	3,164	\$56,952
PC 1122	1,400	\$25,200	PC 1217	885	\$15,930
PC 1124	3,189	\$57,402	PC 1219	1,120	\$20,160

Office Cabin Lease No.	Gross Bldg. Area (in square feet)	Estimated Value	Office Cabin Lease No.	Gross Bldg. Area (in square feet)	Estimated Value
PC 1220	522	\$ 9,396	PC 1315	889	\$16,002
PC 1221	502	\$ 9,036	PC 1316	665	\$11,970
PC 1224	1,041	\$18,738	PC 1319	1,079	\$19,422
PC 1226	2,425	\$43,650	PC 1321	1,737	\$31,266
PC 1229	1,243	\$22,374	PC 1322	425	\$ 7,650
PC 1231	2,067	\$37,206	PC 1323	2,058	\$37,044
PC 1232	1,525	\$27,450	PC 1326	1,523	\$27,414
PC 1233	1,440	\$25,920	PC 1327	458	\$ 8,244
PC 1235	1,935	\$34,830	PC 1328	1,510	\$27,180
PC 1236	1,356	\$24,408	PC 1329	1,157	\$20,826
PC 1239	901	\$16,218	PC 1330	1,269	\$22,842
PC 1240	1,953	\$35,154	PC 1331	1,392	\$25,056
PC 1241	1,126	\$20,268	PC 1333	1,220	\$21,960
PC 1242	608	\$10,944	PC 1334	1,701	\$30,618
PC 1243	1,977	\$35,586	PC 1335	1,412	\$25,416
PC 1245	2,215	\$39,870	PC 1337	1,209	\$21,762
PC 1246	1,070	\$19,260	PC 1345	546	\$ 9,828
PC 1250	1,073	\$19,314	PC 1347	1,499	\$26,982
PC 1251	3,588	\$64,584	PC 1349	1,655	\$29,790
PC 1253	552	\$ 9,936	PC 1354	973	\$17,514
PC 1255	3,333	\$59,994	PC 1356	1,771	\$31,878
PC 1256	1,072	\$19,296	PC 1359	1,575	\$28,350
PC 1257	1,276	\$22,968	PC 1361	2,103	\$37,854
PC 1259	1,736	\$31,248	PC 1364	1,266	\$22,788
PC 1261	1,562	\$28,116	PC 1365	983	\$17,694
PC 1264	1,346	\$24,228	PC 1367	1,026	\$18,468
PC 1266	887	\$15,966	PC 1368	1,538	\$27,684
PC 1267	1,999	\$35,982	PC 1371	826	\$14,868
PC 1270	1,444	\$25,992	PC 1373	2,928	\$52,704
PC 1272	1,051	\$18,918	PC 1378	1,517	\$27,306
PC 1273	1,074	\$19,332	PC 1380	1,140	\$20,520
PC 1274	1,268	\$22,824	PC 1382	1,636	\$29,448
PC 1276	1,880	\$33,840	PC 1387	1,042	\$18,756
PC 1277	704	\$12,672	PC 1388	2,117	\$38,106
PC 1278	287	\$ 5,166	PC 1391	2,223	\$40,014
PC 1279	1,637	\$29,466	PC 1396	1,025	\$18,450
PC 1280	2,731	\$49,158	PC 1397	1,298	\$23,364
PC 1282	1,523	\$27,414	PC 1399	1,565	\$28,170
PC 1285	659	\$11,862	PC 1400	1,661	\$29,898
PC 1291	551	\$ 9,918	PC 1406	1,480	\$26,640
PC 1292	1,478	\$26,604	PC 1407	1,452	\$26,136
PC 1295	284	\$ 5,112	PC 1408	1,825	\$32,850
PC 1296	1,225	\$22,050	PC 1409	1,387	\$24,966
PC 1302	310	\$ 5,580	PC 1410	1,743	\$31,374
PC 1303	1,705	\$30,690	PC 1411	1,640	\$29,520
PC 1304	1,318	\$23,724	PC 1413	1,520	\$27,360
PC 1308	1,394	\$25,092	PC 1414	2,490	\$44,820
PC 1313	2,813	\$50,634	PC 1415	3,798	\$68,364

Office Cabin Lease No.	Gross Bldg. Area (in square feet)	Estimated Value	Office Cabin Lease No.	Gross Bldg. Area (in square feet)	Estimated Value
PC 1416	629	\$11,322	PC 1518	1,140	\$20,520
PC 1417	2,401	\$43,218	PC 1519	1,342	\$24,156
PC 1418	2,138	\$38,484	PC 1521	1,493	\$26,874
PC 1424	1,332	\$23,976	PC 1522	734	\$13,212
PC 1425	1,650	\$29,700	PC 1525	1,134	\$20,412
PC 1430	2,055	\$36,990	PC 1527	697	\$12,546
PC 1431	1,351	\$24,318	PC 1528	2,460	\$44,280
PC 1432	2,275	\$40,950	PC 1529	1,804	\$32,472
PC 1434	2,657	\$47,826	PC 1532	1,008	\$18,144
PC 1435	1,304	\$23,472	PC 1533	425	\$ 7,650
PC 1439	428	\$ 7,704	PC 1534	610	\$10,980
PC 1446	2,179	\$39,222	PC 1535	1,882	\$33,876
PC 1447	1,035	\$18,630	PC 1539	2,140	\$38,520
PC 1454	715	\$12,870	PC 1540	888	\$15,984
PC 1457	2,210	\$39,780	PC 1544	632	\$11,376
PC 1458	1,714	\$30,852	PC 1546	1,475	\$26,550
PC 1461	1,175	\$21,150	PC 1549	1,250	\$22,500
PC 1462	2,816	\$50,688	PC 1551	1,587	\$28,566
PC 1466	2,180	\$39,240	PC 1557	832	\$14,976
PC 1473	1,343	\$24,174	PC 1558	800	\$14,400
PC 1475	1,317	\$23,706	PC 1559	839	\$15,102
PC 1476	1,632	\$29,376	PC 1561	1,112	\$20,016
PC 1484	2,131	\$38,358	PC 1569	478	\$ 8,604
PC 1489	1,470	\$26,460	PC 1570	2,741	\$49,338
PC 1492	1,704	\$30,672	PC 1573	631	\$11,358
PC 1493	1,530	\$27,540	PC 1582	2,226	\$40,068
PC 1495	1,771	\$31,878	PC 1583	1,547	\$27,846
PC 1496	3,445	\$62,010	PC 1592	1,040	\$18,720
PC 1501	650	\$11,700	PC 1593	499	\$ 8,982
PC 1503	1,602	\$28,836	PC 1598	1,098	\$19,764
PC 1504	803	\$14,454	PC 1602	2,108	\$37,944
PC 1505	1,393	\$25,074	PC 1604	6,069	\$109,242
PC 1506	1,425	\$25,650	PC 1605	1,641	\$29,538
PC 1509	2,141	\$38,538			
PC 1510	1,152	\$20,736			
			Total Estimated Value		\$7,182,126

Parks and Wildlife Code, Chapter 76, Subchapter A

The statute establishes and sets forth guidelines for the private oyster-bed leases including the rental fee, who can apply for a lease, the 100-acre limit, and the marking of the leases.

SUBTITLE D. CRUSTACEANS AND MOLLUSKS

CHAPTER 76. OYSTERS

SUBCHAPTER A. PUBLIC AND PRIVATE OYSTER BEDS

§ 76.001. Natural Oyster Bed

- (a) A natural oyster bed exists when at least five barrels of oysters are found within 2,500 square feet of any position on a reef or bed.
- (b) In this section, a barrel of oysters is equal to three boxes of oysters in the shell. The dimensions of a box are 10 inches by 20 inches by 13-1/2 inches. In filling a box for measurement, the oysters may not be piled more than 2-1/2 inches above the height of the box at the center. Two gallons of shucked oysters without shells equals one barrel of oysters in the shell.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.002. Designation of Public and Private Beds

- (a) All natural oyster beds are public.
- (b) All oyster beds not designated as private are public.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.003. Beds Subject to Location

Except as provided in Section 76.004 of this code, an oyster bed or reef, other than a natural oyster bed, is subject to location by the department. This section does not apply to a bed or reef that has been exhausted within an eight-year period.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.004. Riparian Rights

- (a) The lawful occupant of a grant of land in this state has the exclusive right to use any creek, bayou, lake, or cove included within the metes and bounds of the original grant for the planting or sowing of oysters.
- (b) If the creek, bayou, lake, or cove is not included in the original grant, a riparian owner has an exclusive right in the creek, bayou, lake, or cove for the planting and sowing of oysters to the middle of the creek, bayou, lake, or cove or to 100 yards from the shore, whichever distance is shorter.
- (c) The right of a riparian owner of land along any bay shore in this state to plant oysters extends 100 yards into the bay from the high-water mark or from where the land survey ceases. The right to a natural oyster bed under this subsection is not exclusive.

| Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.005. Affidavit of Riparian Rights

- (a) The department may require the owner of riparian rights described in Section 76.004 of this code when offering oysters for sale to make an affidavit stating that the oysters were produced on his property.
- (b) The failure of an owner of riparian rights described in Section 76.004(a) of this code to have an affidavit when required by the department or to show it to a game management officer on request or to the person to whom the oysters are offered for sale when required by the department is prima facie evidence that the oysters were produced from public beds.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.006. Application for Location; Fee

- (a) Any citizen of the United States or any domestic corporation may file a written application with the department for a certificate authorizing the applicant to plant oysters and make a private oyster bed in the public water of the state.
- (b) The application must describe the location desired.
- (c) The application must be accompanied by a fee of \$20 or an amount set by the commission, whichever amount is more.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975. Amended by Acts 1985, 69th Leg., ch. 267, art. 2, § 65, eff. Sept. 1, 1985.

§ 76.007. Maximum Acreage Under Location

No person may own, lease, or control more than 100 acres of land covered by water under certificates of location.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.008. Lease or Control by Foreign Corporation Prohibited

No corporation other than those incorporated under the laws of this state may lease or control land under a certificate of location.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.009. Examination and Survey of Location

- (a) On receipt of an application for a location, the department shall examine the proposed location as soon as practicable by any efficient means.
- (b) If the location is subject to certification, the department shall have the location surveyed by a competent surveyor.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.012. Locator's Certificate

- (a) The department shall issue to each locator a certificate signed and sealed by the director.
- (b) The certificate must contain:
 - (1) the date of the application;
 - (2) the date of the survey; and
 - (3) a description of the location by metes and bounds with reference to points of the compass and natural objects by which the location may be found and verified.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.015. Rights of Locator

- (a) The holder of a certificate of location as provided for in Section 76.012 of this code is protected in his possession of the location against trespass in the same manner as are freeholders.
- (b) This section applies only as long as the stakes or pipes and buoys required by this chapter are maintained in their correct positions and the locator complies with the law and the regulations governing the fish and oyster industries.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.016. Fencing of Location

A locator or his assignee may fence all or part of his location if the fence does not obstruct navigation into or through a regular channel or cut leading to other public water.

Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975.

§ 76.017. Location Rental

- (a) No rental fee is owed on any location when oysters are not sold or marketed from the location for a period of five years after the date of the establishment of the location.
- (b) When oysters are sold or marketed from the location and thereafter, the holder of the certificate shall pay to the department \$3 per acre of location per year. In lieu of that payment, the commission may set the required payment under this section in a greater amount.
- (c) Rental fees are due annually by March 1.
- (d) The failure to pay any rental when due terminates the lease.

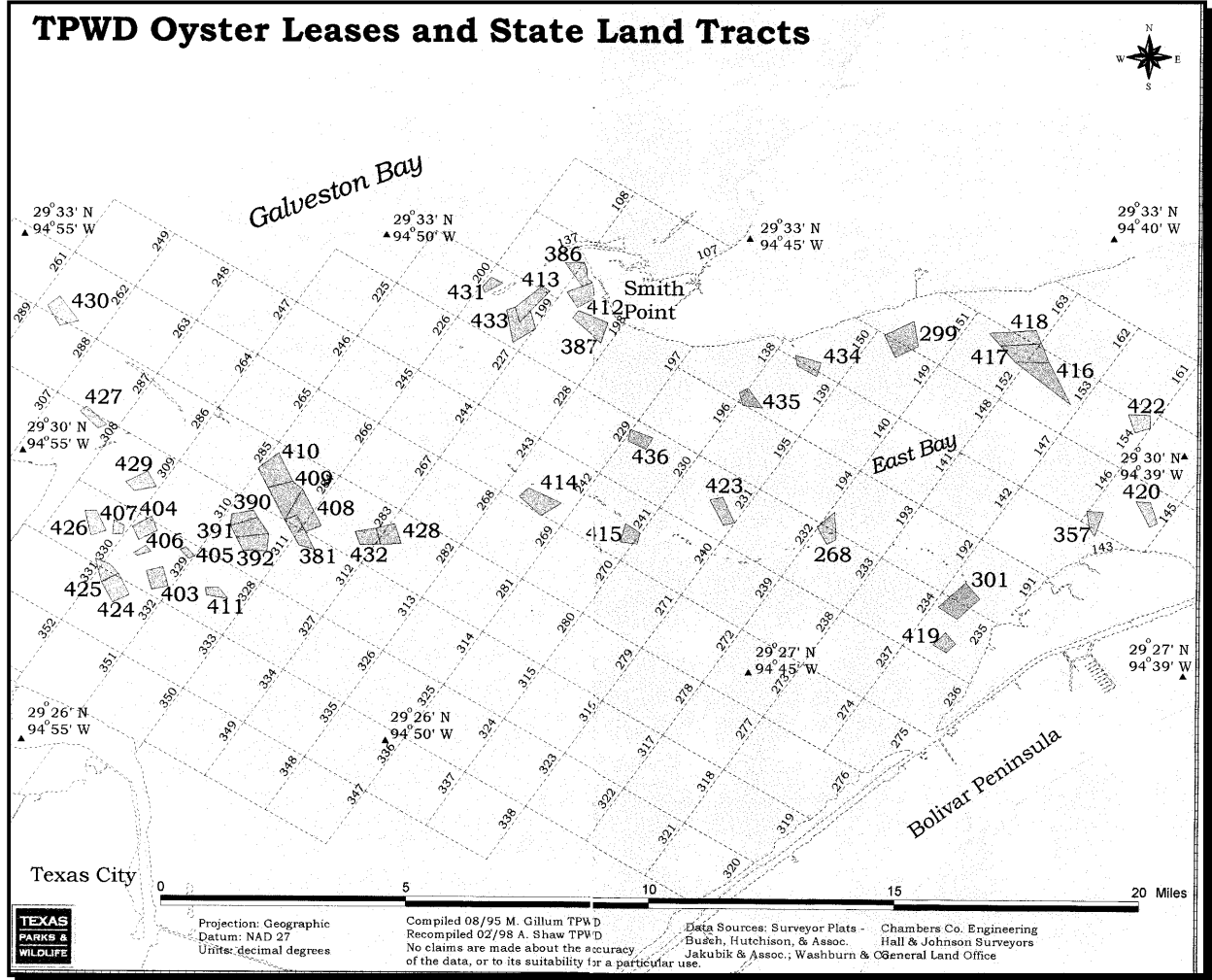
Acts 1975, 64th Leg., p. 1405, ch. 545, § 1, eff. Sept. 1, 1975. Amended by Acts 1979, 66th Leg., p. 908, ch. 416, § 2, eff. Aug. 27, 1979; Acts 1983, 68th Leg., p. 1338, ch. 277, § 46, eff. Sept. 1, 1983; Acts 1985, 69th Leg., ch. 267, art. 2, § 66, eff. Sept. 1, 1985; Acts 1989, 71st Leg., ch. 448, § 1, eff. Jan. 1, 1990.

§ 76.020. Oyster Shell Recovery and Replacement Program

The commission by proclamation may establish and conduct a program to require the recovery of oyster shell from and replacement of oyster shell in the coastal waters of the state to maintain or enhance public oyster reefs.

| Added by Acts 1991, 72nd Leg., ch. 644, § 1, eff. Aug. 26, 1991.

Map of Oyster-Bed Leases



Source: Texas Parks and Wildlife Department

Oyster Landings

1998 Oyster Landings					
1998	Metric Tons	Pounds	Value (\$)	Value Per Pound	Market Share (Metric Tons)
Louisiana	5,831.5	12,856,173	\$30,994,392	\$2.41	41.41%
Washington	3,256.7	7,179,697	\$18,268,958	\$2.54	23.13%
Texas	1,559.4	3,437,926	\$8,282,479	\$2.41	11.07%
Maryland	1,116.3	2,460,954	\$7,635,153	\$3.10	7.93%
Florida, State Total	710.5	1,566,456	\$2,514,092	\$ 1.60	5.05%
Connecticut	627.2	1,382,627	\$8,978,088	\$ 6.49	4.45%
New Jersey	318.8	702,849	\$2,686,411	\$ 3.82	2.26%
Alabama	154.3	340,186	\$ 783,499	\$ 2.30	1.10%
New York	107.3	236,552	\$1,355,848	\$ 5.73	0.76%
North Carolina	107.1	236,030	\$ 974,409	\$ 4.13	0.76%
Virginia	101.1	222,775	\$ 657,650	\$ 2.95	0.72%
South Carolina	92.3	203,542	\$ 730,010	\$ 3.59	0.66%
Rhode Island	88.7	195,505	\$ 685,886	\$ 3.51	0.63%
Maine	8.5	18,656	\$ 70,111	\$ 3.76	0.06%
Georgia	3.2	6,956	\$ 17,211	\$ 2.47	0.02%
Massachusetts	-	3	\$2	\$ 0.67	0.00%
Delaware	-	-	-	-	0.00%
Mississippi	-	-	-	-	0.00%
California	-	-	-	-	0.00%
Oregon	-	-	-	-	0.00%
Totals	14,082.9	31,046,887	\$ 84,634,199		

Source: National Marine Fisheries Service

1997 Oyster Landings					
1997	Metric Tons	Pounds	Value (\$)	Value Per Pound	Market Share (Metric Tons)
Louisiana	5,997.3	13,221,705	\$ 29,770,615	\$ 2.25	37.98%
Washington	2,698.5	5,949,028	\$ 14,884,580	\$ 2.50	17.09%
Texas	2,077.1	4,579,092	\$ 11,200,249	\$ 2.45	13.15%
Mississippi	949.4	2,093,148	\$2,671,554	\$ 1.28	6.01%
Florida, State Total	864.3	1,905,399	\$2,812,046	\$ 1.48	5.47%
Connecticut	685.6	1,511,456	\$5,103,618	\$ 3.38	4.34%
Maryland	648.4	1,429,409	\$4,507,620	\$ 3.15	4.11%
California	425.4	937,815	\$3,586,000	\$ 3.82	2.69%
Alabama	315.4	695,320	\$1,397,908	\$ 2.01	2.00%
New Jersey	268.9	592,870	\$2,262,315	\$ 3.82	1.70%
New York	239.9	528,917	\$2,441,822	\$ 4.62	1.52%
Oregon	151.3	333,466	\$1,333,852	\$ 4.00	0.96%
Virginia	137.6	303,359	\$ 959,368	\$ 3.16	0.87%
Rhode Island	116.3	256,325	\$ 748,524	\$ 2.92	0.74%
North Carolina	112.9	248,983	\$1,010,933	\$ 4.06	0.71%
South Carolina	90.5	199,451	\$ 770,829	\$ 3.86	0.57%
Maine	9.4	20,690	\$76,771	\$ 3.71	0.06%
Georgia	3.4	7,480	\$18,428	\$ 2.46	0.02%
Delaware	-	-	-		0.00%
Totals	15,791.6	34,813,913	\$ 85,557,032		

Source: National Marine Fisheries Service

1996 Oyster Landings					
1996	Metric Tons	Pounds	Value (\$)	Value Per Pound	Market Share (Metric Tons)
Louisiana	5,867.2	12,934,925	\$ 26,675,678	\$ 2.06	34.18%
Washington	3,320.9	7,321,344	\$ 16,826,475	\$ 2.30	19.35%
Texas	2,533.9	5,586,159	\$ 12,262,589	\$ 2.20	14.76%
Connecticut	1,836.5	4,048,729	\$ 28,919,666	\$ 7.14	10.70%
Mississippi	1,186.4	2,615,515	\$4,463,877	\$ 1.71	6.91%
Florida, State Total	657.0	1,448,514	\$3,556,953	\$ 2.46	3.83%
California	515.2	1,135,862	\$4,017,690	\$ 3.54	3.00%
Maryland	403.2	888,863	\$2,852,786	\$ 3.21	2.35%
Alabama	281.6	620,910	\$1,193,043	\$ 1.92	1.64%
New Jersey	156.1	344,213	\$1,306,353	\$ 3.80	0.91%
South Carolina	117.1	258,207	\$1,034,681	\$ 4.01	0.68%
North Carolina	99.5	219,397	\$ 825,023	\$ 3.76	0.58%
Oregon	95.5	210,525	\$ 818,040	\$ 3.89	0.56%
Virginia	61.5	135,498	\$ 435,552	\$ 3.21	0.36%
Rhode Island	32.4	71,349	\$ 218,881	\$ 3.07	0.19%
Georgia	1.9	4,269	\$ 9,227	\$ 2.16	0.01%
Delaware	-	-	-	-	0.00%
New York	-	-	-	-	0.00%
Totals	17,165.9	37,844,279	\$ 105,416,514		

Source: National Marine Fisheries Service

1995 Oyster Landings					
1995	Metric Tons	Pounds	Value (\$)	Value Per Pound	Market Share (Metric Tons)
Louisiana	6,259.7	13,800,076	\$ 25,827,277	\$ 1.87	33.65%
Washington	3,597.0	7,930,071	\$ 18,261,269	\$ 2.30	19.34%
Texas	2,493.1	5,496,188	\$ 10,012,679	\$ 1.82	13.40%
Connecticut	2,268.0	5,000,000	\$ 32,000,000	\$ 6.40	12.19%
Mississippi	1,019.7	2,248,065	\$3,082,461	\$ 1.37	5.48%
Florida, State Total	690.7	1,522,656	\$1,895,902	\$ 1.25	3.71%
California	633.4	1,396,450	\$4,777,959	\$ 3.42	3.40%
Maryland	543.3	1,197,759	\$3,175,068	\$ 2.65	2.92%
Alabama	322.1	709,992	\$1,117,548	\$ 1.57	1.73%
Virginia	182.3	401,794	\$1,321,824	\$ 3.29	0.98%
New York	159.9	352,508	\$1,682,829	\$ 4.77	0.86%
South Carolina	127.4	280,759	\$1,019,791	\$ 3.63	0.68%
Oregon	112.7	248,395	\$ 965,192	\$ 3.89	0.61%
North Carolina	105.5	232,500	\$ 858,797	\$ 3.69	0.57%
New Jersey	70.9	156,291	\$ 504,054	\$ 3.23	0.38%
Delaware	8.4	18,500	\$ 70,000	\$ 3.78	0.05%
Rhode Island	3.5	7,650	\$ 29,394	\$ 3.84	0.02%
Georgia	2.9	6,340	\$ 15,571	\$ 2.46	0.02%
Washington	1.9	4,178	\$ 109,168	\$ 26.13	0.01%
Totals	18,602.4	41,010,172	\$ 106,726,783		

Source: National Marine Fisheries Service

1994 Oyster Landings					
1994	Metric Tons	Pounds	Value (\$)	Value Per Pound	Market Share (Metric Tons)
Louisiana	5,138.2	11,327,730	\$ 20,160,789	\$ 1.78	30.95%
Washington	3,417.0	7,533,264	\$ 18,232,265	\$ 2.42	20.58%
Connecticut	2,281.8	5,030,387	\$ 32,345,924	\$ 6.43	13.74%
Texas	2,093.0	4,614,316	\$7,899,003	\$ 1.71	12.61%
Florida, State Total	957.8	2,111,459	\$2,796,782	\$ 1.32	5.77%
Mississippi	810.2	1,786,130	\$2,456,365	\$ 1.38	4.88%
California	735.4	1,621,187	\$4,268,208	\$ 2.63	4.43%
Maryland	371.0	817,829	\$2,647,295	\$ 3.24	2.23%
Alabama	323.0	711,992	\$1,077,783	\$ 1.51	1.95%
South Carolina	137.6	303,287	\$1,060,518	\$ 3.50	0.83%
North Carolina	89.8	197,889	\$ 681,535	\$ 3.44	0.54%
Oregon	85.7	188,974	\$ 734,298	\$ 3.89	0.52%
New York	57.4	126,648	\$ 755,893	\$ 5.97	0.35%
Virginia	53.8	118,637	\$ 368,791	\$ 3.11	0.32%
Delaware	21.8	48,000	\$ 144,000	\$ 3.00	0.13%
Maine	20.3	44,776	\$ 167,911	\$ 3.75	0.12%
Georgia	6.2	13,624	\$ 29,765	\$ 2.18	0.04%
Rhode Island	1.0	2,166	\$ 13,519	\$ 6.24	0.01%
New Jersey	-	-	-	-	0.00%
Totals	16,601.0	36,598,295	\$ 95,840,644		

Source: National Marine Fisheries Service

Parks and Wildlife Department Commercial Fishery Detailed Costs and License Revenue for Fiscal Years 1998 and 1999

Appendix 7-A:
Inland Commercial Fisheries

This table provides detailed license revenue information by license type for the mussel and clam fishery program and the non-game fish program administered by the Department.

Inland Commercial Fisheries License Sales and Revenue						
Type of License	1999			1998		
	No. of Licenses Sold	Fee	Revenue	No. of Licenses Sold	Fee	Revenue
Resident Commercial Mussel and Clam Fisherman's	11	\$30.00	\$328.50	30	\$30.00	\$885
Non-Resident Mussel and Clam Fisherman's	0	\$800.00	\$0.00	4	\$800.00	\$3,040
Permit to Sale Non-Game Fish	62	\$50.00	\$3,100.00	59	\$50.00	\$2,950
Total	73		\$3,428.50	93		\$6,875

This table provides detailed cost information by division for the mussel and clam fishery (shellfish) program and the non-game fish (finfish) program administered by the Department.

Inland Commercial Fisheries Costs										
Fishery Program	1999					1998				
	Inland Fisheries Division	Law Enforcement Division	Resource Protection Division	Administrative Divisions	Total Costs by Fishery	Inland Fisheries Division	Law Enforcement Division	Resource Protection Division	Administrative Divisions	Total Costs by Fishery
Freshwater Finfish	\$4,440	\$2,570,239	\$46,840	\$55,684	\$2,677,203	\$3,253	\$2,968,417	\$14,889	\$39,154	\$3,025,713
Freshwater Shellfish	\$788	\$499,376	\$8,310	\$9,879	\$518,353	\$1,874	\$578,904	\$8,580	\$22,563	\$611,921
Total Cost by Division	\$5,228	\$3,069,615	\$55,150	\$65,563	\$3,195,556	\$5,127	\$3,547,321	\$23,469	\$61,717	\$3,637,634

Appendix 7-B:

Coastal Commercial Fisheries

This table provides detailed license revenue information by type of license for the coastal commercial fishery programs administered by the Department. The revenue shown in the tables does not include the lease revenue and grant funds.

Coastal Commercial Fisheries License Sales and Revenue						
Type of License	1999			1998		
	No. of Licenses Sold	Fee	Revenue	No. of Licenses Sold	Fee	Revenue
General						
Resident Commercial Fishing Boat	959	15.00	14,385.00	1,339	15.00	20,085.00
Non-Resident Commercial Fishing Boat	27	60.00	1,620.00	23	60.00	1,380.00
Resident General Commercial Fisherman's	1,857	20.00	36,522.60	2,260	20.00	44,582.05
Non-Resident General Commercial Fisherman's	33	150.00	4,942.50	32	150.00	4,792.50
Transfer of Resident Commercial Fishing Boat License	8	5.00	40.00	9	5.00	45.00
Duplicate Resident Commercial Fishing Boat License Plates	6	5.00	30.00	11	5.00	55.00
Transfer of Non-Resident Commercial Fishing Boat	0	5.00	0.00	0	5.00	0.00
Duplicate Non-Resident Commercial Fishing Boat License Plates	0	5.00	0.00	0	5.00	0.00
Total General	2,890		57,540.10	3,674		70,939.55
Crab						
Commercial Crab Trap Tags				85,111	1.50	127,666.50
Resident Commercial Crab Fisherman's	287	500.00	143,500.00	0	0.00	0.00
Non-Resident Commercial Crab Fisherman's	1	2,000.00	2,000.00	0	0.00	0.00
Total Crab	288		145,500.00	85,111		127,666.50
Oysters						
Resident Commercial Oyster Boat	297	350.00	103,950.00	360	350.00	126,000.00
Non-Resident Commercial Oyster Boat	19	1,400.00	26,600.00	10	1,400.00	14,000.00
Resident Commercial Oyster Fisherman's	3	100.00	295.00	8	100.00	770.00
Non-Resident Commercial Oyster Fisherman's	0	250.00	0.00	0	250.00	0.00
Resident Commercial Oyster Boat Captain's	418	25.00	10,178.60	484	25.00	11,864.95
Non-Resident Commercial Oyster Boat Captain's	18	100.00	1,795.00	9	100.00	885.00
Duplicate Resident Commercial Oyster Boat License Plates	1	5.00	5.00	3	5.00	15.00
Transfer of Resident Commercial	8	5.00	40.00	6	5.00	30.00

Coastal Commercial Fisheries License Sales and Revenue						
Type of License	1999			1998		
	No. of Licenses Sold	Fee	Revenue	No. of Licenses Sold	Fee	Revenue
Oyster Boat License						
Transfer of Non-Resident Commercial Oyster Boat License	0	5.00	0.00	0	5.00	0.00
Duplicate Non-Resident Commercial Oyster Boat License Plates	0	5.00	0.00	1	5.00	5.00
Total Oysters	764		142,863.60	881		153,569.95
Shrimp						
Resident Commercial Gulf Shrimp Boat	1,174	275.00	322,850.00	1,163	275.00	319,825.00
Bait Shrimp Dealer's	342	115.00	39,330.00	354	115.00	40,710.00
Resident Commercial Bay Shrimp Boat	1,460	195.00	284,700.00	1,546	195.00	301,470.00
Resident Commercial Bait Shrimp Boat	1,401	195.00	273,195.00	1,497	195.00	291,915.00
Non-Resident Commercial Gulf Shrimp Boat	401	1,025.00	411,025.00	390	1,025.00	399,750.00
Non-Resident Commercial Bay Shrimp Boat	1	525.00	525.00	2	525.00	1,050.00
Non-Resident Commercial Bait Shrimp Boat	0	525.00	0.00	1	525.00	525.00
Resident Commercial Shrimp Boat Captain's	3,098	25.00	76,446.35	3,057	25.00	75,761.90
Non-Resident Commercial Shrimp Boat Captain's	371	100.00	36,959.95	323	100.00	32,250.00
Transfer of Resident Commercial Bay Shrimp Boat	79	195.00	15,405.00	105	195.00	20,475.00
Transfer of Resident Commercial Bait Shrimp Boat License	73	195.00	14,235.00	96	195.00	18,720.00
Transfer of Resident Commercial Gulf Shrimp Boat License	17	5.00	85.00	15	5.00	75.00
Duplicate Resident Commercial Gulf Shrimp Boat License Plates	3	5.00	15.00	6	5.00	30.00
Duplicate Resident Commercial Bay Shrimp Boat License	20	5.00	100.00	23	5.00	115.00
Duplicate Resident Commercial Bait Shrimp Boat License Plates	15	5.00	75.00	16	5.00	80.00
Transfer of Non-Resident Commercial Bay Shrimp Boat License	0	195.00	0.00	0	195.00	0.00
Transfer of Non-Resident Commercial Bait Shrimp Boat License	0	195.00	0.00	1	195.00	195.00
Transfer of Non-Resident Commercial Gulf Shrimp Boat	3	5.00	15.00	0	5.00	0.00
Duplicate Non-Resident Commercial Gulf Shrimp Boat License Plates	2	5.00	10.00	2	5.00	10.00
Duplicate Non-Resident Commercial Bay Shrimp Boat License Plates	0	5.00	0.00	0	5.00	0.00
Duplicate Non-Resident Commercial Bait Shrimp Boat License Plates	0	5.00	0.00	2	5.00	10.00

Coastal Commercial Fisheries License Sales and Revenue						
Type of License	1999			1998		
	No. of Licenses Sold	Fee	Revenue	No. of Licenses Sold	Fee	Revenue
Total Shrimp	8,460		1,474,971.30	8,599		1,502,966.90
Finfish						
Resident Commercial Finfish Fisherman's	786	75.00	58,950.00	768	75.00	57,600.00
Non-Resident Commercial Finfish Fisherman's	3	150.00	450.00	5	150.00	750.00
Saltwater Trotline	11,974		35,795.85	12,271	--	36,680.55
Total Finfish	789		95,195.85	773		95,030.55
Menhaden						
Class A Menhaden Boat License	21	3,500.00	73,500.00	24	3,500.00	84,000.00
Class B Menhaden Boat License	42	50.00	2,100.00	49	50.00	2,450.00
Total Menhaden	63		75,600.00	73		86,450.00
License Revenue Collected for Specific Fisheries						
License Revenue Collected for Specific Fisheries			1,991,670.85			2,036,623.45
Dealer and Business Licenses						
Retail Fish Dealer's	2,954	46.00	135,884.00	3,133	46.00	144,118.00
Bait Dealer's Individual	243	30.00	7,290.00	272	30.00	8,160.00
Wholesale Fish Dealer's	654	525.00	343,350.00	670	525.00	351,750.00
Wholesale Fish Dealer's Truck	65	325.00	21,125.00	73	325.00	23,725.00
Retail Fish Dealer's Truck	826	86.00	71,036.00	761	86.00	65,446.00
Resident Shell Buyer	1	100.00	100.00	4	100.00	390.00
Transfer of Wholesale Fish Dealer's	4	5.00	20.00	3	5.00	15.00
Finfish Import	106	75.00	7,950.00	111	75.00	8,325.00
Transfer of Finfish Import License	2	5.00	10.00	0	5.00	0.00
Transfer of Retail Fish Dealer's License	5	5.00	25.00	10	5.00	50.00
Transfer of Bait Shrimp Dealer's License	5	5.00	25.00	7	5.00	35.00
Transfer of Retail Fish Dealer's Truck License	51	5.00	255.00	38	5.00	190.00
Transfer of Wholesale Fish Dealer's	2	5.00	10.00	3	5.00	15.00
Non-Resident Shell Buyer's	1	1,500.00	1,500.00	3	1,500.00	4,350.00
Bait Dealer Business Building	2,142	30.00	64,260.00	2,180	30.00	65,400.00
Bait Dealer's Business Vehicle	125	30.00	3,750.00	100	30.00	3,000.00
Transfer of Bait Dealer's Business Building	5	5.00	25.00	6	5.00	30.00
Transfer of Bait Dealer's Business Vehicle	0	5.00	0.00	1	5.00	5.00
Total Dealer and Business Licenses	7,191		656,615.00	7,375		675,004.00
Grand Total	20,445		2,648,285.85	21,375		2,711,627.45

This table provides detailed cost information by fishery program and division for the coastal commercial fishery programs administered by the Department.

Coastal Commercial Fisheries Costs										
Fishery	1999					1998				
	Coastal Fisheries Division	Resource Protection Division	Law Enforcement Division	Administrative Divisions	Total Costs by Fishery	Coastal Fisheries Division	Resource Protection Division	Law Enforcement Division	Administrative Divisions	Total Costs by Fishery
Crab	\$181,246	\$51,202	\$189,525	\$60,869	\$482,842	\$159,371	\$21,063	\$215,304	\$55,390	\$451,128
Oysters	\$198,867	\$56,180	\$405,455	\$66,787	\$727,289	\$204,747	\$27,060	\$485,959	\$71,161	\$788,928
Oyster-Bed Leases	\$27,061	\$7,645	\$51,396	\$9,088	\$95,190	\$23,795	\$3,145	\$61,600	\$8,270	\$96,810
Shrimp	\$2,792,325	\$788,827	\$1,528,264	\$937,763	\$6,128,429	\$2,544,950	\$336,349	\$1,239,382	\$884,516	\$5,005,197
Plus buyback	\$81,250									
Finfish	\$496,539	\$140,271	\$1,070,707	\$166,756	\$1,874,274	\$427,755	\$56,533	\$1,216,023	\$148,670	\$1,848,981
Menhaden	\$13,216	\$3,733	\$7,966	\$4,438	\$29,353	\$13,281	\$1,755	\$8,171	\$4,616	\$27,823
Totals	\$3,790,504	\$1,047,858	\$3,253,313	\$1,245,701	\$9,337,376	\$3,373,899	\$445,905	\$3,226,439	\$1,172,624	\$8,218,867

Source: The State Auditor's Office developed estimates based on the Law Enforcement Division's timekeeping data and other divisions' staff estimates and applied them based on the number of licenses issued.

General Land Office's Leases of State-Owned Land Detailed Costs and Revenue for Fiscal Year 1998

1998			
Lease (Assignment) Type	Revenues	Expenditures	Contribution/(Deficit)
Coastal Easements	\$ 162,943	\$ 1,082,470	\$ (919,527)
Coastal Leases	410	74,588	(74,178)
Commercial Leases and Easements	945,853	264,035	681,818
Surface Leases - Uplands	557,271	225,113	332,158
Surface Leases - Coastal	49,550	82,553	(33,003)
Cabin Permits	197,624	294,658	(97,034)
Miscellaneous Easements	1,212,172	567,397	644,775
Subtotal	3,125,823	2,590,814	535,009
Mental Health and Mental Retardation ^a	3,329,774	193,971	3,135,803
Other State Agencies ^a	520,530	12,886	507,644
Total	\$ 6,976,127	\$ 2,797,671	\$ 4,178,456

^a The Office assists other agencies that have state-owned land with their leases. The Office's involvement in the leasing process varies, depending on the need of the agency. The Office does not usually receive any compensation for costs it incurs. The Office will sometimes receive reimbursement for some of its costs through a clause in the lease agreement or through a memorandum of understanding with the other agency. The expenditures are for the Office's costs associated with assisting the other agencies. However, the revenues are deposits to other agencies.

Note: The table shows total revenues and expenditures for each of the seven lease types reviewed, with the resulting contribution/deficit. In addition, system developmental costs of \$186,573 have been deducted from the expenditures because the grant revenue for the system was realized in a prior year.

Source: The State Auditor's Office developed estimates and applied them based on the division staff estimates.

Background Information on Parks and Wildlife Department Commercial Fishery Programs

Appendix 9-A: Information provided by the Comptroller of Public Accounts

Oyster Bed-Leases

The oyster industry in Texas today is an \$11 million-plus enterprise, supporting 350 to 500 oystermen and their families. By comparison, the Texas shrimping industry is valued at \$166 million and commercial finfishing at \$8 million.³

Every coastal state in the U.S. produces oysters, but not always in commercial quantities every year. Louisiana, the perennial top producer, harvested or “landed” 12.9 million pounds of oysters in 1998. That same year, Washington State was second with 7.2 million pounds. Texas ranked third with 3.4 million pounds. Maryland was fourth with 2.5 million pounds, and Florida fifth with 1.4 million. Connecticut, New Jersey, Alabama, and New York State rounded the top 10.⁴

The Department administers 43 leases covering 2,327 acres of submerged lands in Galveston Bay for the private, year-round production of oysters. Some 7,000 acres of public reefs in Galveston Bay are open to licensed oystermen during the normal November to April oyster season.⁵ In 1989, the Department instituted a moratorium on the issuance of new leases because of conservation concerns. The moratorium is still in effect today.⁶

The Department estimates that over 12,000 acres of Texas bay bottoms have been leased at one time or another. In 1907, almost 6,500 acres were leased, but that figured dropped to an all-time low of 11 acres in 1929.⁷

Galveston Bay accounts for 75 to 80 percent of Texas production and is the only bay in Texas where private oyster-bed leases exist today. Oysters grown in Matagorda Bay, San Antonio Bay, and South Bay near Brownsville supply the remaining production. Other Texas bays are inhospitable to oysters because their waters are too warm or too saline. Past attempts to establish leasing programs in Matagorda, Aransas, and Corpus Christi bays were unsuccessful.⁸

³ Parks and Wildlife Department, Coastal Fisheries Division, *Trends in Texas Commercial Fishery Lands, 1972-1997*, by Lance Robinson, Page Campbell, and Linda Butler (Austin, Texas, 1998), p. 145. This estimate is based on the total ex-vessel value of each resource in 1997. Also, interview with Region IV Director, Parks and Wildlife Department, (Seabrook, Texas, October 1999, Austin, Texas, June 1999 and October 2000.)

⁴ Oyster Landings report, 1994-1998, National Marine Fisheries Service, http://www.st.nmfs.gov/commercial/landings/annual_landings.html

⁵ Interview with Region IV Director, Parks and Wildlife Department.

⁶ Interview with Region IV Director, Parks and Wildlife Department. Also, Texas oyster fishery management plan, series Number 1, Parks and Wildlife Department, 1988, p. 1.

⁷ Hofstetter, R. P., *Trends in population levels of the American oyster, Crassostrea virginica Gmelin, on public reefs in Galveston Bay, Texas*, Technical series no. 24, Parks and Wildlife Department, 1977, pp. 74-79.

⁸ Interview with Region IV Director, Parks and Wildlife Department.

Health Certification

The Department of Health (TDH) as authorized by the Health and Safety Code, Chapter 436, continually tests and monitors bay waters for contaminants and microorganisms hazardous to human health. TDH designates all oyster reefs, both public and private, as either approved for harvest, conditionally approved, restricted, conditionally restricted, or prohibited. TDH also certifies the health of all oysters from harvest to consumption, with the authority to close down production at any time when the health of the oysters is questioned.⁹

Estuarine waters like those in Galveston Bay are sensitive to flood, drought, heat, hurricanes and runoff from cities upstream like Houston. In extreme conditions, particular microorganisms can flourish, affecting not only oyster food sources but also humans who ingest oysters. Runoff from Houston can bring particular pollutants. When pollutants or microorganisms are found in quantities high enough to endanger public health, TDH is authorized by statute to close all production of mollusks from the bay.

A shut-down of oyster production during a red tide event in 1998 precipitated action by the Legislature in 1999 to allow the oyster industry and the Department to oversee TDH actions to close production.¹⁰

Legislation passed by the 76th Texas Legislature (Senate Bill 1685 by Bernsen) created the Texas Oyster Council to advise the Board of Health on matters relating to oysters. It also created the Oyster Advisory Committee to advise the Department of Agriculture on promotion and advertisement of the Texas Oyster Industry.

Senate Bill 1685 also transferred responsibility from TDH to the Comptroller of Public Accounts for the collection of a fee of \$1 per barrel of oysters. (One barrel is about 300 pounds). This fee is designed to cover TDH's inspection costs and is assessed when oysters are off-loaded onto dealer docks.¹¹ Before TDH, the Department collected a 10-cent per bag fee, splitting the proceeds 50/50 with TDH. The Department's share was split further between the coastal fisheries and law enforcement divisions.¹²

The Development of Private Oyster-Bed Leases in Texas

Private leases originated as a conservation effort, then became a way to provide healthy oysters for year-round consumption.

At the end of the 19th century, the first Fish and Oyster Commissioner of Texas, I. P. Kibbe, recognized a general decline of naturally-occurring, publicly-owned oyster reefs. Mr. Kibbe and others thought the decline was due to overharvest. (Decades later, conservationists would come to call overharvesting a "tragedy of the

⁹ Texas Health and Safety Code, Section 436.101.

¹⁰ Texas Senate Bill 1685, 76th Legislature, Regular Session, 1997.

¹¹ Parks and Wildlife Code, Section 76.017.

¹² Interview with Region IV Director, Parks and Wildlife Department.

commons,” that is, that a shared use of a public resource, or “commons,” for private gain ultimately leads to the ruin of that resource.¹³⁾

To counteract the oyster decline, in 1895 Commissioner Kibbe, like many of his peers in other coastal states, adopted the practice of issuing leases of state-owned submerged lands to individuals for the private “farming” of oysters. The goal of this program was to build viable oyster reefs in areas where they did not naturally occur.¹⁴

Commissioner Kibbe’s efforts quickly paid off. The earliest lease on record at the Galveston County Courthouse, dated October 25, 1895, was issued to Leticia L. Eley for 15 acres near Smith Point in Galveston Bay. The lease was for a “Private Oyster Bed...for the planting of oysters therein.” Other than a description of metes and bounds, the Eley lease had no reference to payments to the state, terms and conditions of the lease, or even an expiration date. The same is true for leases in effect today.

The Biology of Oysters

The American, or Eastern oyster, *Crassostrea virginica*, is prevalent in estuarine waters from eastern Canada south to Texas bays in the Gulf of Mexico. Natural oyster reefs are most abundant in the Gulf, the U.S. South Atlantic, and Long Island Sound. Although more than 100 species of oysters exist worldwide, only the Eastern oyster from Atlantic and Gulf waters, and the Eastern, Pacific and Olympia oysters, produced on the West Coast, are commercially viable in the United States. No appreciable difference exists between the species.

Oysters spawn in the Gulf between March and November when both temperature and salinity levels are in moderate ranges. After adult eggs and sperm are released into the water, and the eggs are fertilized, the oyster larvae, called spat, go through several swimming stages. As they grow, the larvae finally become too heavy to float, and they sink to the bottom. Those that land on a clean, hard bottom called a “substrate” secrete a fluid that permanently cements them in place. Those that don’t, die. Spat reach harvestable size—3 inches in diameter—in 18 to 24 months.

Oysters are filter feeders, meaning that they *ingest* but do not *digest* everything in the water around them. As adults, oysters can pump five gallons of water an hour through their gills. If pollutants, contaminants or toxins are present in the water, oysters retain them just as they do biologic matter. If placed in clean water, oysters purge themselves of those same pollutants, contaminants or toxins.

Shrimp are more valuable as a food crop, more abundant, and easier to harvest. Most shrimpers depend on their harvest to provide enough money to make it through winter months. However, if the shrimping harvest is poor, they will turn to oyster harvesting as a second income in the off season.¹⁵

¹³ Hardin, Garrett, *The Tragedy of the Commons*, (1968). <http://dieoff.com/page95.htm>.

¹⁴ Hofstetter, R. P., *Trends in population levels of the American oyster, Crassostrea virginica Gmelin, on public reefs in Galveston Bay, Texas*, Technical series no. 24, Parks and Wildlife Department, 1977, p. 76.

¹⁵ Interview with Region IV Director, Parks and Wildlife Department.

Safe Haven

Remarkably, the oyster can purge itself of bacteria in 10 to 14 days if the water around the oyster is free of harmful substances. This process, called “deuration,” is the reason oyster-bed leases exist today.

Most of the natural oyster reefs are near the middle of Galveston Bay, which is also near the halfway point of the Houston Ship Channel. Oysters on these reefs are at some risk of pollution. They are also subjected to urban runoff from Houston and metropolitan areas. Rainfalls of 2 inches or more during a 24-hour period can result in bay areas being closed to harvest several times a year.¹⁶

About one-third of all the leases are in areas near the channel or heavy traffic areas of Dickinson Bay. Oysters transplanted from restricted areas of the public reefs, i.e. those areas determined by TDH to be off-limits for direct marketing,¹⁷ are allowed to deurate until they are free of contaminants and ready for market.

Private Leases Versus Public Reefs

The Department issues permits to leaseholders for the harvesting of oysters off restricted areas of public reefs and transplantation to private leases. The Department and leaseholders negotiate which days in the off-season the transplant harvest can occur.

An individual with a private lease enjoys several economic advantages over his brethren harvesting from public reefs.

- Leaseholders buy a \$100 annual permit for the right to harvest oysters off restricted areas of public reefs.
- Leaseholders pay nothing for the oysters themselves.
- Oysters placed on private leases are deemed by law to be private property.¹⁸
- Private leases receive Department law enforcement during routine patrols.
- Oysters on private reefs may be sold year-round, while oysters from the public reefs can be sold only during the regular season (November to April).
- Oyster-bed leases are generally located in cleaner and less-trafficked waters of Galveston Bay where suitable bottoms are found, and where the oysters are safer from pollution, toxins, and damage from passing ships. These cleaner waters produce oysters more marketable than are oysters from public reefs.
- Leases, once granted, are held indefinitely.

¹⁶ Interview with Region IV Director, Parks and Wildlife Department.

¹⁷ Texas Health and Safety Code, Section 436.002(7).

¹⁸ Parks and Wildlife Code, Section 76.035.

- All leases in effect today are without either term or restriction, listing only the effective date of the lease, the leaseholder's name, and the metes and bounds description of the lease.
- No lease in effect today specifies any conditions for perpetuation, renewal or termination of any lease, save nonpayment of the \$3 per acre annual fee.¹⁹
- According to Parks and Wildlife Code, Section 76.007, "(n)o person may own, lease, or control more than 100 acres of land covered by water under certificates of location." However, while no single lease in existence today exceeds 100 acres in size, control of the 43 leases can be traced to seven different families or individuals.
- The 1989 Department moratorium on issuing leases not only made current leases immediately valuable in and of themselves, but it also created a closed market, ensuring that no other individuals could obtain a lease except by purchasing an existing one. Private leases are frequently bought and sold in private transactions. The Department exercises no control or input on these transactions, nor does it receive any proceeds. The most recent sale prices known to the State have averaged well over \$1,000 per acre.
- The Department is neither contractually or statutorily able to monitor or halt the sale of leases, or even to be notified. Notices of sale filed with the county clerk's offices in Galveston and Chambers counties routinely list the sale price of the lease as "10 dollars and other consideration." As such, the true sales price in most instances is largely unknown to anyone other than the buyer and seller.
- Of the seven major leaseholders today, five are certified oyster dealers, meaning that they not only grow, but harvest, process and sell oysters. One former leaseholder is now solely a certified dealer. This is an indication that a vertical market exists for leaseholders.

Appendix 9-B: Information provided by the State Auditor's Office

Coastal and Inland Commercial Fisheries

Coastal Commercial Fisheries

The Coastal Fisheries Division (Coastal Fisheries) is responsible for making management recommendations regarding marine resources within the bays, estuaries, and the Gulf of Mexico (out to nine nautical miles). The estimated value of the fisheries within the 4 million acres of marine habitat exceeds \$2 billion per year. Coastal Fisheries was created in 1937 as part of the Game, Fish, and Oyster Commission to oversee the regulations of oysters and all coastal fisheries. Coastal Fisheries' responsibilities and activities are statutorily mandated in the Parks and Wildlife Code (Sections 61.001, 66.007, and 61.051 through 61.058).

Coastal Fisheries also manages commercial fishing in Texas coastal waters. This includes about 15,000 commercial fishermen; the commercial seafood industry, which

¹⁹ Parks and Wildlife Code, Section 76.017(d).

includes fish dealers and employs about 30,000 people; and about 10 million consumers of seafood products. Commercial fishermen have specific eligibility requirements for each type of license they must have to harvest specific types of finfish or shellfish. Wholesale fish, bait dealers, and fish guides are also licensed under specific qualifications.

Headquarters Staff and a management team located at coastal field sites administer Coastal Fisheries. The field staff members are stationed at ten field stations located from Port Arthur to Brownsville. Coastal Fisheries works with the General Land Office and the Department of Health regarding oyster lease management and the oyster fisheries.

The largest special account that supports Department operations is the Game, Fish and Water Safety Account (Fund 009), which provides almost half (\$80.4 million) of the Department's operating revenue. Amounts in the account come from hunting and fishing licenses; federal funds for sportfish and wildlife restoration; boat registration and titling fees; fines and penalties; and the sale of sand, shell, and gravel. Fund 009 may be used only for purposes related to the regulation and conservation of the State's fish and game and the enforcement of water safety laws.

Inland Commercial Fisheries

The Inland Fisheries Division (Inland Fisheries) is an outgrowth of the old Fish and Oyster Commission established in 1895. Inland Fisheries' responsibilities and activities are statutorily mandated in the Parks and Wildlife Code (Sections 61.001, 61.051 through 61.058, 61.052, and 66.007).

The majority of Inland Fisheries' resources and efforts focus around the recreational fishing industry. Inland Fisheries has a relatively small responsibility for commercial fisheries. Inland Fisheries is the permitting authority for exotic species permits; sale of non-game fish; permits to introduce fish, shellfish, or aquatic plants into public waters; and triploid grass carp permits.

Inland Fisheries is organized into three branches: Resource Management, Fish Hatcheries, and Outreach. Inland Fisheries is administered by divisional headquarters staff and staff in 3 regional offices, 15 districts, 5 fish hatcheries, 1 statewide research facility, and 1 visitor and outreach facility.

Background Information on General Land Office Lease Types

The Office currently administers over 8,300 leases and easements of state-owned lands, not including mineral or oil and gas leases. (See table below.) These leases and easements are for both upland and coastal lands.

With the passage of the federal Coastal Zone Management Act in 1972,²⁰ the Office quickly assumed management of the State's coast by enacting the Coastal Public Lands Management Act of 1973 and the Open Beaches Act in 1977.²¹ The State allows public access to all Texas beaches between the point of mean low tide on the seaward side of the beach, to the nearest line of vegetation or 200 feet from mean low tide, whichever is closer.²²

Coastal easements (CE) grant individuals, private groups—for instance, waterside condominium homeowners' associations—and public entities the right to place piers, docks, and boat ramps and lifts on state property. Coastal leases (CL) are issued to governments and public organizations for conservation easements, wildlife preserves, boat ramps, piers and docks. Commercial leases (LC) are similar, except they are generally for larger lands and are used for income-producing commercial purposes.

Examples of active commercial leases are for restaurants, piers, docks, marinas and signs on or over state lands.

Upon assuming management of the State's coastal properties, however, the Office discovered hundreds of residential structures—now known as personal cabins—on state coastal lands. Owners of these structures were allowed to seek and receive permits from the state to continue to occupy state coastal lands. Over time, permits were bought and sold, with the original structures gradually being adapted to housing for recreational fishermen.

Although originally personal property, the cabins were converted to state property with the enactment of the Coastal Management and Open Beaches acts. Since then, permittees have been granted the right to inhabit the cabins. Permittees are required to keep the structures in good repair, or they could be torn down. Office policy over the past several years has been not to repermit areas once the structure is permanently removed.

Active Office Leases and Easements as of November 1999

Number	Instrument Type
2,850	Coastal Easement (CE)
89	Coastal Lease (CL)
1	General Easement
221	Letters of Authorization (LA)
259	Coastal Commercial Lease (CL)
12	Uplands Commercial Lease (CL)
1,360	Coastal Miscellaneous Easement (ME)
700	Uplands Miscellaneous Easement (ME)
374	Cabin Permit (PC)
61	Cabin Permits On Hold-over (PC)
3	Special Document (SD)
168	Coastal Surface Lease (SL)
268	Uplands Surface Lease (SL)
1,981	Structure Registration
8,347	Total Instruments

Source: General Land Office

²⁰ 16 United States Code, Section 1451 et seq.

²¹ Vernon's Texas Code Annotated, Natural Resources Code, Chapters 33 and 61, respectively.

²² Vernon's Texas Code Annotated, Natural Resources Code, Section 61.014.

Now, many of the permits existing today are granted to “clubs” of recreational fishermen. Others are held by individuals and families who use the cabins as a second home. None of these cabins are connected to any municipal water, sewage or electrical systems. Several Office and local staffs interviewed for this report indicated that the condition of these cabins range from simple and poorly-maintained fishing shacks with outhouses to “Taj Mahals” with air conditioning and other amenities.²³

By law, these cabins are not allowed within 1,000 feet of either privately-owned facilities or wildlife refuges.²⁴ If damaged, for example, by a hurricane, the cabin owners are allowed to rebuild as long as the rebuilt cabin is no larger than the original. But if the cabin is destroyed, it cannot be rebuilt, and the permit is permanently cancelled.

Office staff interviewed for this report indicated that, in general, many of these cabins created environmental hazards, such as sewage discharge. Without a connection to a sewer system, cabins have either their own septic system, or compost or incinerate their waste. Chemical toilets were tested, but found to be more damaging to the environment than the raw sewage itself. Staff members were concerned that much of the raw sewage may in fact be released into bay waters without treatment.

A second major problem with several cabins identified by staff was the existence of houseboats docked or moored on nearby pilings. Houseboats are particularly problematic for the Office not only because of their mobility, but also because they are capable of damaging sensitive seagrasses and rookeries while also emitting raw sewage into coastal waters. Houseboats cannot be classified and permitted in a manner similar to the cabin permits and have no regulating authority.

Although permittees are required to keep the cabins in good repair, Office staff estimated that perhaps 10 percent of the existing cabins would be eligible for condemnation if the cabins were subject to local housing codes and regulations, which they are not.²⁵

While interviewed for this report, Office staff also indicated that many, if not most, of current cabin permits were passed down through generations, or privately bought and sold. The issuance of new permits is not competitive.

²³ Interviews with General Land Office Coastal Coordination Council permitting assistance coordinator in Corpus Christi, Texas, field office (since retired), November 2000; also, Willacy County Navigation District staff, November 2000.

²⁴ Vernon’s Texas Code Annotated, Natural Resources Code, Section 33.124.

²⁵ Interview with General Land Office Coastal Coordination Council permitting assistance coordinator, November 2000.