

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION

of

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No. 65/36

September 30, 1965

THE HONORABLE W. T. SHANNON, DIRECTOR OF THE
DEPARTMENT OF FISH AND GAME, has requested an opinion on the
following questions:

1. Does the amendment to former Section 820
of the Fish and Game Code in 1955, placing a 25-year
limit on the period of allotments of state water
bottoms for shellfish culture, apply to allotments
made prior to the effective date of the amendment, or
may earlier allotments be held until such time as they
are abandoned?

2. If two or more allotments having terminal
dates are consolidated, will the expiration date of
the consolidated area be determined by the earlier
date or the later date? If an allotment having a
terminal date is consolidated with an allotment made
prior to the 1955 amendment, will the consolidated
area be subject to the expiration date of the former
allotment, or will the consolidated area be subject
to no specified terminal or expiration date?

The conclusions are:

1. The 1955 amendment to former section 820 of the
Fish and Game Code (now § 6495)¹ placing a 25-year limit on
the period of allotments of state water bottoms for shellfish
culture applies to allotments made prior to the effective date
of the amendment. Such earlier allotments may not be held until
abandonment, but will terminate by operation of law on September
7, 1980, if not sooner abandoned or terminated for cause.

1. All section references are to the Fish and Game Code
unless otherwise specified.

cc: Oronite
Lambert

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2. Where allotments having different terminal dates are consolidated, the expiration date of the new allotment for the consolidated area will depend on the action of the Fish and Game Commission taken pursuant to section 131(f), title 14, California Administrative Code, irrespective of whether the consolidation includes an allotment made prior to September 7, 1955.

ANALYSIS

Former section 820 of the Fish and Game Code is derived from the Act of 1874, Stats. 1873-74, ch. 671, p. 940, which was adopted to permit and encourage the cultivation of oysters. The code section was enacted in 1933, Stats. 1933, ch. 73, p. 468, and provided in substance that the state water bottoms may be allotted to any citizen of California for the purpose of growing oysters "to be held by the petitioner until such time as it is abandoned." In 1955 section 820 was amended, Stats. 1955, ch. 1263, p. 2300, by the addition, inter alia, of the following sentence:

An allotment may be made for a period of not to exceed twenty-five (25) years and if, at the termination of the period of an allotment, the water bottom allotted is still subject to allotment the allottee shall have a prior right to the allotment of such bottom to him.

On recodification of the Fish and Game Code in 1957, this sentence was embodied in section 6495, Stats. 1957, ch. 456, p. 1410. Allotments may now be made for all shellfish. § 6490.

The 1955 amendment to former section 820 did not act retrospectively. It contains no express declaration that it should be so applied, and hence the 25-year period does not commence on the date of an earlier allotment. However, the section acts prospectively. For the reasons herein-after noted, it affects all shellfish allotments outstanding on the effective date of the 1955 amendment, namely, on September 7, 1955, from which date the 25-year period commences.

Oysters and shellfish are "fish", § 45, and as such are subject to the prerogative of the sovereign to protect and preserve them in such manner and upon such terms as the Legislature deems best for the common good. See In re Makings, 200 Cal. 474 (1927); People v. Stafford Packing Co., 193 Cal. 719 (1924); In re Marinovich, 48 Cal. App. 474 (1920). For example, an implied license extending over a long period of time to use lands for oyster cultivation may be revoked by the legislative body. Cf. Lowndes v. Huntington, 153 U.S. 1 (1893). Li

California and other jurisdictions it has been held that the cultivation of shellfish on public lands is a mere privilege, revocable at the pleasure of the state. Darbee & Inland Oyster & Land Co. v. Pacific Oyster Co., 150 Cal. 392 (1907); Phipps v. State, 22 Md. 380, 85 Am. Dec. 654 (1864); Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 Atl. 145 (1910). The power to terminate a license entirely includes the power to curtail the length of its term. Cf. Civ. Code § 3536. Thus in Darbee the Court said:

In Phipps v. State, 22 Md. 380, [5 [sic] Am. Dec. 654], the court was dealing with statutes like ours and it said: "It abundantly appears from the nature of the privilege in dispute, as well as from the terms in which it was conferred, that no transfer of the state's title to lands covered by navigable water was contemplated. Permission to use given areas . . . for a particular purpose [oyster cultivation] seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the state, but as a conditional license, revocable at the pleasure of the legislature." Again, in Hess v. Muir, 65 Md. 586, [5 Atl. 540, 6 Atl. 673], Alvey, C.J., said: "These statutes, the better to promote the growth and to increase the supply of oysters. . . provide that any of the citizens of the state may locate one lot . . . and plant the same with oysters, and thereupon he is given exclusive control thereof. This, however, is not a grant of an indefeasible right or estate in the lot thus authorized to be located and planted with oysters. It is simply a conditional or qualified license or franchise, revocable at the will and pleasure of the state. [Citing Phipps]. It is neither inheritable nor transferable, but is purely a personal privilege in the party locating the lot." 150 Cal. at 394-95.

It is a rule of long standing that pertinent statutory provisions are to be read into contracts. See 5B McK. Dig. § 154 (1961). In State Bonded Audit Bureau, Inc. v. Pomona Mut. Bldg. & Loan Assn., 37 Cal. App. 2d (Supp.) 765, 769 (1940) (quoting from Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1938)) it was said:

Not only are existing laws read into contracts. . . but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.

The same is equally true of a privilege conferred under state permit. This office has consistently ruled that a license from the state to carry on a lawful business, although unexpired, is subject to cancellation or modification in such manner as the Legislature deems meet and proper. 42 Ops. Cal. Atty. Gen. 99, 105 (1953); 38 Ops. Cal. Atty. Gen. 45, 49 (1951); 16 Ops. Cal. Atty. Gen. 28, 30 (1950); 12 Ops. Cal. Atty. Gen. 238, 240 (1948); cf. In re Carlson, 87 Cal. App. 584, 588 (1927); Anthony v. Veatch, 189 Ore. 462, 220 P.2d 493 (1950).

In the latter case the appellants had been licensed to fish with fixed appliances at a certain location. An intervening Oregon statute prohibited further use of the appliance. The fishermen claimed impairment of the obligation of a contract claiming that their payment of the imposed fees had the effect of making the license irrevocable. The court rejected their contentions, stating that the license to fish with a fixed appliance in a certain location was the granting of a special privilege conferred by the government, creates no vested rights, and is not a contract.

Thus a shellfish or oyster allotment is a mere privilege, the terms of which are subject to modification by the Legislature. The privilege is subject to cancellation if the Legislature should elect at any time to terminate or foreclose all shellfish cultivation, or a limitation may be placed on the duration of the license period. The 1955 amendment did not expressly or impliedly except pre-existing allotments from the limitation of the 25-year period. Therefore the amendment affects pre-existing shellfish allotments of state water bottoms, and such allotments will expire on September 7, 1980 unless abandoned or sooner terminated for cause.

The terminal dates of consolidated allotments will depend on the action of the Fish and Game Commission, taken pursuant to section 131(f), title 14, California Administrative Code, which reads as follows:

When several allotments are consolidated
the effective date of the new allotment
will be determined by the commission.

The terminal date of the consolidated allotment could not extend more than 25 years from and after the effective date of consolidation (§ 6495), irrespective of whether the new effective date is based on the date of the earlier or later allotment. Presumably, the Commission will give reasonable consideration to the terms of the application of the allottee or allottees for consolidation and all aspects of the matter. Cf., People v. Globe Grain & Mill. Co., 211 Cal. 121, 128 (1930).

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