

## PROPERTY RIGHTS IN FISH IN SEA RANCHING AND ENHANCEMENT– REAL OR DE FACTO

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It has been recognised for some time that, in most situations, appropriate investment by private enterprise in sea ranching and stock enhancement requires that they have adequate property rights in the released animals (Hanson 1974). This presentation considers a number of different ways in which property rights or de facto property rights may achieve this fundamental objective.

The English common law has, for the purpose of describing the rights of ownership of animals, divided animals into two classes, those the subject of absolute ownership (*domitae naturae*) and those the subject of a limited property right (*ferae naturae*). The principles underlying those concepts follow the Roman law concepts, as adopted in much of Europe.

*Domitae naturae* consists of a number of populations of animals (e.g. cattle, sheep, pigs, horses, dogs, cats, etc.). As a class *domitae naturae* are generally tame and capable of living about humans. They are populations of animals useful to humans, identifiable as a population and are populations over which humans effect a level of subjugation or control. The law gives effect to this community recognition, stamping on the community the concept that an animal of that class belongs to somebody.

The division *ferae naturae* encompasses all other animals, with a possible exception for those without the power of locomotion. This division has a number of subdivisions in the law, according to the circumstances under which they are possessed. The most important is *per industriam*, those the subject of industry (it includes those in captivity and those animals with an intention of returning as exhibited by their past habit); the second are those the subject of certain historical franchises granted by the Crown; the third are the young and impotent; and the fourth those about privately owned land.

Those principles were developed and adapted over many centuries in England, but more recently have undergone some further adaptation in the common law countries outside of England in a number of decisions related to animals that may be absolutely owned (*domitae naturae*). Based on those decisions, it will be asserted, that apart from those animals that have been recognised historically as *domitae naturae* a person may absolutely own an animal that is a member of a population of animals that has had a long association with humans, or are consistently exploited by a community in a recognised manner, other than by hunting. Whilst fish have long been regarded as *ferae naturae* it may now be possible that some populations in some jurisdictions may be recognised as *domitae naturae*.

Other possibilities for retention of property rights are the use of brands or marks, relying on the homing instinct of some populations and the status of alien or introduced animals. The advent of patented transgenic animals in some jurisdictions adds a further possibility to the ways of preserving property rights, albeit for a limited time, the life of the patent. Generally, patent laws grant the owner of the patent the exclusive right to use, sell, or dispose of a product. It may include a patented animal or an animal with a patented gene. Accordingly, obtaining a patent based on some novel aspect of a fish to be released may enable the patent holder to maintain property rights in that released fish.

Since at least *Magna Carta* (1215) fishing has been regarded as a common right of all the citizens, subject to any legislative restriction. However, the recognition of the overexploitation of fisheries has seen a progression of regulatory regimes designed to limit the exploitation of this natural resource. Initially, these rights were nothing more than an authority from the state to access a fishery. With time, in some jurisdictions, these rights themselves were recognised as property (area licenses and individual transferable quotas in particular). They may be traded in some cases, they may be the subject of trusts and dealings with them taxed, much like any other form of property.

In economic terms, these rights may have created a perceived property right in the underlying resource, an economic right in many respects akin to ownership, though in a collective manner. A further common consequence of this system is an increase in the involvement of the quota holders in the management of the resource and a realisation that there is little they can do to increase their catch. At this point enhancement is often considered and they find that they do not achieve property rights in the fish or molluscs released into the sea, but simply the exclusive right to recapture them by reason of their fishing right. Notwithstanding that, in practice and by way of contrast, the economic effect may, in many instances, be as significant and as effective as the legal principles applicable to the taking of *ferae naturae*.

## References

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