

**Monomoy National Wildlife Refuge**  
**Questions and Answers Related to the Refuge Boundary and Jurisdiction**

*Q: Under what authority does the Service claim jurisdiction in tidal and open waters within the refuge boundary? Doesn't the Colonial Ordinance assert that State jurisdiction applies?*

- The 1944 Declaration of Taking (DT) includes language that states the land was acquired "...together with all accretion and reliction and all and singular water and riparian rights and other rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, vested in the United States of America..."
- The Commonwealth of Massachusetts challenged this right via litigation under the 1953 Submerged Lands Act (43 USC §1301 *et seq*). Massachusetts claimed that all of waters of Nantucket Sound, which included the waters west of Monomoy within the DT, were under their jurisdiction. However, the Submerged Lands Act did not relinquish submerged lands already reserved or acquired by the Federal government, regardless of its acquisition through condemnation. The Supreme Court held that the submerged lands west of Monomoy Point were not Massachusetts' internal waters at the time of the formation of the Union. Therefore, the submerged lands within the DT were already acquired as Federal land, were excepted from the Submerged Lands Act, and were subject to Federal jurisdiction and control when the Commonwealth received the surrounding lands in 1953.
- The National Wildlife Refuge System Chief's Approval memo and map (1938), the Service's Development Plan for the proposed refuge (1941), and a biological assessment report (1929) include the biological justifications for acquiring the upland, tidal and open waters within these exterior limits, emphasizing the value of the submerged aquatic vegetation to migratory waterfowl. The 1938 map was initially used to develop the outline for the "Limits of Area to be Taken."
- The refuge's fixed western boundary and ambulatory (i.e., shifting) eastern boundary was endorsed by Congress on the official 1970 map establishing the Monomoy Wilderness Area.
- The fixed western boundary and ambulatory eastern boundary was also surveyed by the Service in 2002 and approved by the District Court in *Associates of Cape Cod v. Babbitt* ("Babbitt").
- All private and State's rights to lands and waters within the DT, including those covered by the Colonial Ordinance of 1641-1647, were eliminated as a result of the condemnation establishing the refuge. Federal law under the Supremacy Clause of the U.S. Constitution provides authority to the Federal government in maritime matters and has been recognized by the courts, including the U.S. Supreme Court and the Massachusetts District Court in *Babbitt*.

*Q: Why is the Service not regulating some uses and activities on the refuge and allowing them to continue, when other uses and activities will be regulated?*

- The United States has title to all lands and waters within the refuge boundary, and the Service has full authority to authorize or to deny activities within the refuge's boundaries, subject to the National Wildlife Refuge System Administration Act of 1966 and its amendments (16 USC §668dd *et seq.*), and the laws, policies, compliance requirements, and procedures which apply to any unit of the National Wildlife Refuge System.

- At this time, the Service has determined that there is no compelling Service interest necessitating further regulation of fishing in open waters lying above the submerged lands within the DT. Included fishing activities are: demersal long line fishing; mid-water trawl fishing, hook and line/rod and reel fishing; lobster, crab, and whelk pot fishing; and hand-harvest of scallops. These activities do not cause disturbance to the submerged lands and are already regulated by other Federal and State agencies (e.g., the National Marine Fisheries Service and the Massachusetts Division of Marine Fisheries).
- There are other activities occurring in the open waters or submerged lands within the DT that are a management concern because of their impact on Federal trust resources. These activities will be further regulated by the Service. Some will be prohibited; others will be allowed with restrictions. Examples of prohibited activities are kiteboarding, jet skiing, mussel harvesting, or any activity that causes a disturbance to the submerged bottom. Examples of activities allowed, but with restrictions, include scallop and softshell clam harvesting, where only hand harvest methods can be used.