

NWIFCA v Boughton Estates claim of fishing rights

Morecambe Bay

1. Morecambe Bay is a remarkably productive mussel growing area. In some years multiple settlements of juvenile mussel (spat or seed mussel) can be detected smothering the seabed, and growing rapidly. As mussels grow to fishable size (>45mm in length) they are fished mostly by hand. Under certain conditions, mussel seed (<45mm length) can become a valuable resource for mussel farming in other areas such as North Wales, Northern and Eastern Ireland. The seed is lifted by specialised dredge vessels, (under permit from the NWIFCA) transported and re-laid for on-growing elsewhere and forming a multi-million pound industry.
2. A landowner, Boughton Estates (part of Buccleuch Estates) owns intertidal land in Morecambe Bay within the NWIFCA District. Boughton also claim to have fishing rights over their land. The land is mostly part of the foreshore extending but may extend into deeper subtidal areas of North Morecambe Bay as shown in fig 1.
3. The main wild fisheries on the Boughton land and in the surrounding waters of Morecambe Bay are shell fisheries, mainly mussels, but also cockles, shrimp (nb: Morecambe Bay potted shrimp) and some small scale trawling for flat fish such as plaice and 'flukes' (dab). Mussels are mostly collected by hand raking (the authority does not generally permit dredging). Shrimp and other fish are caught using mostly tractor towed nets or trawls in deeper areas.
4. Boughton Estate has from time to time issued leases or other agreements to shellfish growers and merchants to operate on their land. They are keen to develop this further in the future. The main agreement known to be in place now is with a company called Seasalter Walney, to operate Morecambe Bay Oysters. Seasalter is or was an extension of a South East England oyster fishery company founded in 1883 based in Whitstable, Kent.
5. Morecambe Bay Oysters have since the 1980s operated a large oyster farm on Boughton Estate land in North Morecambe Bay. The farm grows pacific oysters (*Crassostrea gigas*) on semi-permanent trestles so that the oysters are raised above the seabed and are exposed at low tide. Seasalter also operate a large oyster hatchery on Walney island (not in the sea). They claim on their website to be 'Europe's largest oyster nursery and suppliers of the finest quality hatchery seed and part-grown pacific oyster'.
6. The Morecambe Bay Oyster trestles supporting bags of growing oysters must have free flowing water around them at high tide and also access for tractors and lifting equipment to husband and harvest the product. Mussels create a difficulty for the oyster farm because they accumulate large volumes of fine mud under them which can become a bank more than 1m in height. From time to time, abundant growth of mussels around and under the trestles inhibits oyster farming activities. In the past the NWIFCA and previously the Sea Fishery Committee (SFC) allowed the non-commercial (so it could not be sold) removal of the seed mussel under a time limited derogation from the mussel MLS.

Regulations in place

7. The whole of Morecambe Bay including the Boughton Estate land is covered by a suite of conservation designations: SAC (Special Area of Conservation, EU Habitats Directive and UK Habitats Regulations 2010) SPA (Special Protection Area, EU Birds Directive), Ramsar Site and SSSI (Site of Special Scientific Interest).
8. EU and UK fisheries legislation covers vessel licensing, technical fishing gear measures quotas for certain species and minimum landing sizes (MLS). NWIFCA and SFC byelaws

in place cover limits on vessel size, the use of some gear such as dredges, the placing of nets close to the shore, the MLS and a permit scheme for cockle and mussel fishing and a permit scheme for non-commercial fishing of shellfish such as crab and lobster.

9. From 1979 – 2009, a Fishery Regulating Order (FRO) enacted and operated under the 1967 Shellfish Act was in place over offshore skears in Morecambe Bay to the south of the Boughton Estate land. This FRO provided powers for the then SFC to manage so called 'ephemeral seed mussel' which regularly grows in large quantities in this area. Ephemeral seed mussel is identified in certain areas where it does not grow to size because it is not properly attached to its substrate. It is therefore washed away in stormy weather and would be lost to fishing if not taken while undersize. Under the 1978 FRO, the SFC authorised ephemeral seed mussel removal by dredge for on-growing in other areas. The FRO has now expired but the NWIFCA continues managing the seed mussel fishery in broadly the same way under byelaw.
10. There are now no known Fishery Orders in place in Morecambe Bay. This has recently been confirmed to NWIFCA by Defra. The Marine and Coastal Access Act 2009 makes provision for fishing rights in S158. This section appears to clarify that when environmental designations such as SAC, SPA, SSSI, Ramsar and MCZ are in place IFCA byelaws can override private fishing rights. If this understanding is correct then it may be that even if private fishery rights were confirmed, fishery byelaws would still apply over areas protected by environmental designations.

The matter in question

11. The land ownership by Boughton Estate is not in doubt but NWIFCA (and predecessor SFCs) understand that land ownership does not automatically include fishing rights. The evidence for fishing rights owned by Boughton Estate has always appeared to the IFCA and SFC to be weak. The implications of the claim to have fishing rights are further claims by Boughton Estate that:
 - I. NWIFCA (and remaining SFC byelaws) do not have application on their land;
 - II. Boughton land is not part of the public fishery and
 - III. Boughton have authority to manage fisheries on their land as they wish.
12. These claims have been raised by Boughton Estate from time to time over at least the last 20 years. They become significant when seed mussel accumulates around the oyster farm to such an extent that the operator must remove them in order for the farm to function.
13. The Boughton Estate claims have been consistently resisted by the NWIFCA and SFC stating that in the absence of definitive evidence of fishing rights, byelaws apply to Boughton land and will be enforced. Specifically, the NWIFCA / SFC position is that mussels on the sea bed around the mussel farm, as everywhere else, are part of the public fishery and mussels attached to oyster trestles (i.e. off the seafloor) are owned by the farm and can be removed without NWIFCA consent.
14. However, the NWIFCA and SFC have accommodated the needs of the oyster farm by allowing seed mussel to be removed under a limited derogation from the minimum landing size byelaw but not sold. Seed could be removed from around the trestles and deposited on another part of the shore.
15. In the last 2 years Boughton Estate and the oyster farm operator have taken steps to remove and sell mussel seed using their own contractor. This action made the fishery controversial to local fishermen holding mussel permits but not allowed by the operator to fish on Boughton Estate land. They complain that public fishing rights have been infringed and that removal of undersize mussel was illegal.
16. Alleged offences or removal of undersize mussel under IFCA byelaws have been detected but as yet no prosecutions have been taken so the question has not been tested in Court.

It is likely that if the matter is not resolved there will be prosecutions for taking undersize mussel in future.

Need to act now

17. Following further attempts by Boughton Estate to act on their claimed rights in recent years, the NWIFCA finds the uncertainty over the validity of fishing rights to be unsatisfactory and wishes to seek clarification of the position. The NWIFCA wishes to be fully confident of its regulatory duty on Boughton Estate land.
18. Defra have advised that there are no records of a fishery order or private fishery on this area. Boughton appear to be basing their claim on the work of an historian who has found some evidence that in past centuries Boughton gave consent for fishing on their land. We have that report although the Estate also claims to have further evidence not yet disclosed.
19. The most recent dispute was in December 2013 and as yet unresolved, when letters were received from solicitors acting for the Boughton Estate and mussel fishermen which challenged the NWIFCA powers to make and enforce byelaws covering Estate land.

Background papers

20. The NWIFCA holds papers and committee reports documenting this case since the 1990s including the report referred to above: 'Ownership of the Furness fisheries' Alan G. Crosby 1994. Mr Crosby is a historical research consultant and appears to have been commissioned to undertake the study by Boughton Estate.
21. Boughton Estate also may claim to have further evidence that they have not disclosed.

Questions

22. In order to settle this case and resolve the ongoing dispute with the Boughton Estate, the NWIFCA would like to investigate the following:
 - I. Does Boughton Estate have a legitimate claim to fishing rights on intertidal land in Morecambe Bay and if so how should the Estate prove its historic rights;
 - II. What is the legal basis of the oyster farm on Boughton Estate land and does it contravene the public right to fish in the area;
 - III. Depending on answers to the above, how should the NWIFCA deliver its statutory duties on Boughton Estate land in Morecambe Bay having regard to MACAA S158;
 - IV. Are there any areas of the current legal framework covering fishing rights which are unclear

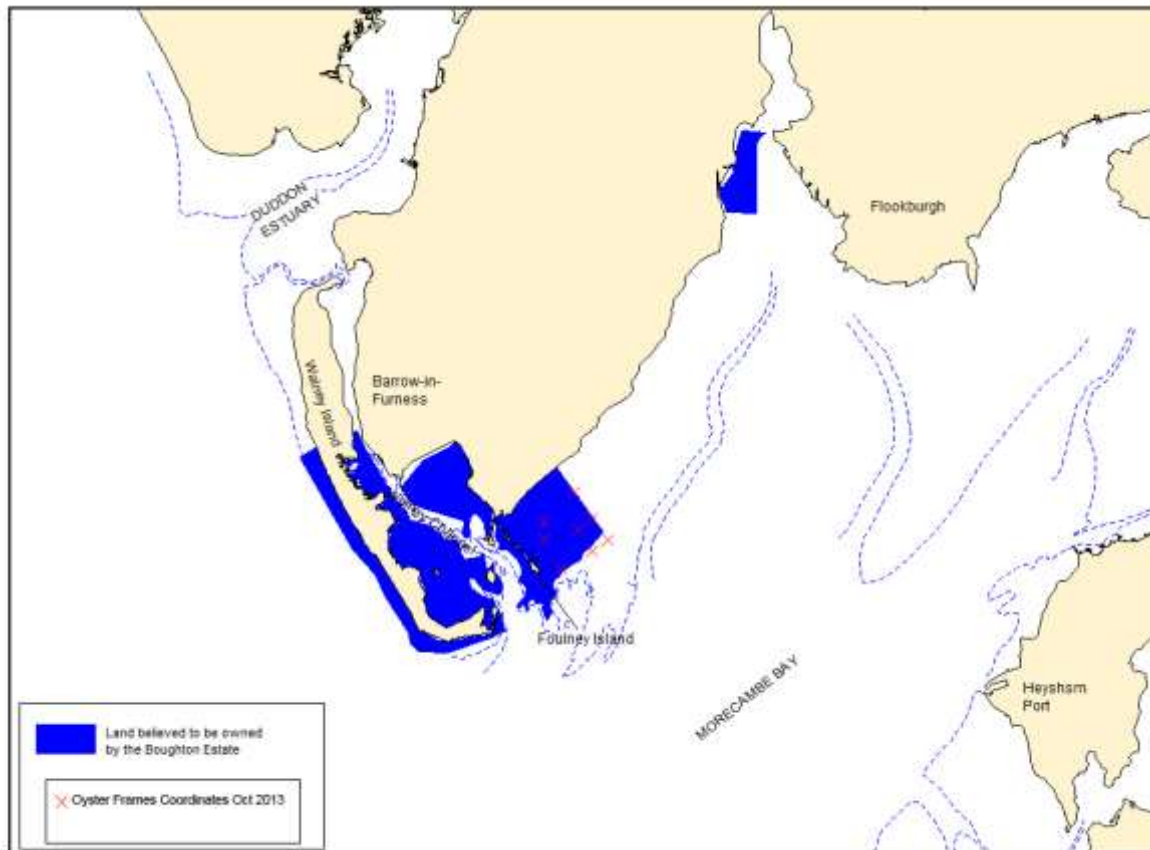


Fig 1 showing parts of Morecambe Bay believed to be owned by Boughton Estate (although ownership is unconfirmed) also showing the location of oyster farm trestles

NWIFCA
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