

ANDREW RADEL OYSTER CO.

MAY 21, 1926.—Committed to the Committee of the Whole House and ordered
to be printed

MR. UNDERHILL, from the Committee on Claims, submitted the
following

REPORT

[To accompany S. 2335]

The Committee on Claims, to whom was referred the bill (S. 2335) for the relief of Andrew Radel Oyster Co., having considered the same, report thereon with a recommendation that it do pass.

Attached herewith is Senate Report No. 332, which is made a part of this report.

[Senate Report No. 332, Sixty-ninth Congress, first session]

The Committee on Claims, to whom was referred the bill (S. 2335) for the relief of the Andrew Radel Oyster Co., having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment:

In line 6, strike out the word "the" and insert in lieu thereof the word "alleged."

The sole purpose of the bill is to confer jurisdiction upon the United States Court of Claims to hear and determine the claim of the Andrew Radel Oyster Co., as the lessee of certain lands, known as lots 1034 and 1038 in the books of the Conservation Commission of the State of New York, for compensation for alleged damage sustained by reason of the destruction of certain oyster beds located in Raritan Bay, about 2 miles southwesterly of Old Orchard Light, by a dredge of the United States War Department on June 19, 1923.

On that date the United States War Department dredge, called the *Raritan*, coming in a northwesterly direction, passed over the beds of the Andrew Radel Oyster Co. When Captain De Hart, who had charge of the beds for the Radel Oyster Co., observed what the dredge was doing he hailed the officer in charge of the dredge and advised him to the effect that he was dredging where oysters were planted. The reply was that he couldn't help it; that he was sent there to dig a channel, and continued with the work. The employee of the oyster company immediately got in touch with the Radel Co., and their representatives went to the War Department office in the city of New York, where the matter was reported to the assistant engineer. He was told of what had happened, and after scaling his map said that he did not know there were any oysters there. A messenger was immediately sent to stop the work, and it was stopped.

Subsequently the following letter was received by the Radel Oyster Co. from the district engineer:

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE, SECOND DISTRICT,
New York, N. Y., June 20, 1923.

The RADEL OYSTER CO.,
South Norwalk, Conn.

GENTLEMEN: It has just been brought to my attention that you own two oyster beds in Raritan Bay about 2 miles southwesterly of Old Orchard Light and that you have planted seed oysters on these beds.

You are hereby notified that a channel 30 feet in depth and 200 feet wide is to be dredged across your oyster beds, work on which was commenced on the 18th instant. The channel has been marked by white spars with green tops. Not knowing that you had planted oysters on your beds, until informed this morning, the Government dredge has passed over your beds but have now been ordered to discontinue dredging in that vicinity until further notice. A reasonable period will be allowed you to remove the oysters from the area covered by the authorized channel before any further dredging is performed over the area of the channel that passes across your oyster beds.

It is desired that you notify this office when the removal of the oysters has been completed.

Respectfully,

H. C. NEWCOMER,
Colonel, Corps of Engineers, District Engineer.

In compliance with this letter, and the orders, the oysters were removed and the department so advised.

Under date of June 20, 1923, a day after the dredging took place, the New York Conservation Commission received a letter from the district engineer to the effect that his office had just commenced dredging a 30-foot channel in Raritan Bay, New York and New Jersey. This letter is as follows:

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE, SECOND DISTRICT,
New York, N. Y., June 20, 1923.

STATE OF NEW YORK CONSERVATION COMMISSION,
1475 Broadway, New York City.

GENTLEMEN: 1. This office has just commenced dredging the 30-foot channel in Raritan Bay, N. Y. and N. J., from deep water northwest of Sandy Hook to Perth Amboy, N. J. This channel is laid out in a straight line from the fog bell at the westerly end of Sandy Hook to Segune Point, and thence follows the natural channel through Princess Bay, around Wards Point, to Perth Amboy, N. J.

2. In order that oyster growers may be notified of the proposed dredging operations and warned to remove the oysters from the area covered by the channel, it is requested that you forward to this office the names and addresses of such parties as have been granted areas on which to raise oysters within the borders of your State along the line of the authorized channel as described above.

Very respectfully,

H. C. NEWCOMER,
Colonel, Corps of Engineers, District Engineer.

It will be observed that this notification was written the day after the alleged damage occurred to the Radel Oyster Co. It appears that this letter was the first notice that the Conservation Commission had that any dredging was to be done. It further appears from the evidence before the committee that it was not the practice of the district engineer to notify parties interested when dredging was to take place, and that similar damage cases are on record.

An engineer of the conservation commission appearing before the committee testified that during the 13 years he had been with the commission this was the only time that the Government had requested

the names of lessees to notify them of contemplated improvements, and in this instance only after the alleged damage had been done.

A subcommittee of the Committee on Claims held an exhaustive hearing on the bill and it was fully convinced that the Radel Oyster Co. was entitled to a day in court, which opinion was concurred in by the full committee. It is therefore recommended that this company be permitted to bring suit in the Court of Claims to determine what, if any, damage was done, notwithstanding the report of the War Department, which is made a part of this report.

The following memorandum of facts, and a letter from the deputy commissioner of the Conservation Commission of New York, are also appended and made a part of report.

MEMORANDUM OF FACTS

Re Radel Oyster Co.

The Radel Oyster Co. hold under leases from the State of New York, through its conservation commission, two oyster lots known as Nos. 1034 and 1038. The lease for lot No. 1034 was recorded in the book of leases, page 1511. The lease for lot No. 1038 was recorded in the book of leases, page 1530. This book of leases is maintained by the conservation commission of the State of New York at its bureau of marine fisheries in the Times Building, at Forty-second Street and Broadway.

Without notice either to the State conservation commission, who would have notified us or the Radel Oyster Co., a dredger operated under the direction of the United States Army, under the command of Col. H. C. Newcomer, of the Second District United States Engineers, started and did actually dredge a channel through a large portion of the oyster beds indicated as above under the leases. They were warned immediately by Captain De Hart, in command for the Radel Oyster Co., who was notified by his watchman over the grounds, that seed oysters were planted on these grounds, and that 60,000 bushels had been planted on various dates between August 22, 1922, and April, 1923. Notwithstanding this notification, the men in charge of the dredging machine, which, by the way, was of a tremendous size and power, threatened to throw the man giving the warning into the water unless he immediately departed from the dredge.

Mr. Radel, the president of the company, was notified, and he communicated with me that evening, and the next morning we went to the office of the War Department, situated in the Army Building, 39 Whitehall Street, New York City, and after informing the responsible engineer in charge, he immediately commanded the work to stop. On the same day that office wrote a letter to the Radel Oyster Co., addressed to its office at South Norwalk, Conn., which I herewith set forth as follows:

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE, SECOND DISTRICT,
New York, N. Y., June 20, 1923.

THE RADEL OYSTER CO.,
South Norwalk, Conn.

GENTLEMEN: It has just been brought to my attention that you own two oyster beds in Raritan Bay about 2 miles southwesterly of Old Orchard Light and that you have planted seed oysters on these beds.

You are hereby notified that a channel 30 feet in depth and 200 feet wide is to be dredged across your oyster beds, work on which was commenced on the 18th instant. The channel has been marked by white spars with green tops. Not knowing that you had planted oysters on your beds, until informed this morning, the Government dredge has passed over your beds but has now been ordered to discontinue dredging in that vicinity until further notice. A reasonable period will be allowed you to remove the oysters from the area covered by the authorized channel before any further dredging is performed over the area of the channel that passes across your oyster beds.

It is desired that you notify this office when the removal of the oysters has been completed.

Respectfully,

H. C. NEWCOMER,
Colonel, Corps of Engineers, District Engineer.

The letter is an admission of the fact that the Radel Oyster Co. had received no notice of the contemplated action of the Army engineers. It is our understanding that others who had lots in the line of the channel had received notice.

In compliance with the directions in the letter of June 20, 1923, the Radel Oyster Co. proceeded to remove the oysters then remaining, damaged and undamaged, from the grounds, and after their removal the department was notified if it were satisfactory to have their dredge go on our lots 1034 and 1038, Raritan Bay, for the purpose of resuming dredging operations there.

We were in communication with our Captain DeHart at Princess Bay last evening, and he states that he has removed all the oysters he can from those grounds and that it is now all right for the United States dredger to resume work there.

We prefer that you advise the United States engineer, Mr. Mayhew, to this effect and we will not therefore either telephone or write him from this office.

As suggested by you we will arrange to have Mr. DeHart call upon you and go over the matter of quantity of oysters lost, but we may wait for this until Mr. Radel returns to South Norwalk about the middle of September.

Yours very truly,

The ANDREW RADEL OYSTER CO.,
By M. A. STONE.

Prior to that time, to wit, on July 7, 1923, the Radel Oyster Co., at our direction, had written to the Conservation Commission, Bureau of Marine Fisheries, Times Building, New York City, in which they informed them of what had occurred, and received thereto a reply on July 16, both of which letters are herewith set forth as follows:

JULY 7, 1923.

BUREAU OF MARINE FISHERIES,
Conservation Commission, New York City.
(Attention Mr. Rile P. Squires.)

GENTLEMEN: We desire to notify you that the United States Government dredger has commenced the work of digging a channel extending through our oyster lots No. 1034 and No. 1038, Raritan Bay. Although they have temporarily discontinued the dredging in order to give us an opportunity to remove the oysters they have not destroyed, this dredging will be resumed and we will be permanently denied the use of certain portions of those two lots. We are unable at this writing to state what the exact acreage is, but will know at a later date, and will probably require adjustment of the acreage mentioned in our deeds so that we will not be charged with the acreage we are unable to use in future on account of this proposed channel.

A large quantity of oysters which were planted on these two lots were destroyed by the dredger, but we are not in position at this writing to state the amount of loss we have sustained.

Yours very truly,

THE ANDREW RADEL OYSTER CO.

CONSERVATION COMMISSION,
New York, July 16, 1923.

The ANDREW RADEL OYSTER CO.,
South Norwalk, Conn.

GENTLEMEN: I beg to acknowledge receipt of yours of the 7th, relative to the Government dredging a channel through your oyster lots, 1038, Raritan Bay.

In reply I wish to state that I went to Albany and interviewed the counsel for the conservation commission, who advised me that there was no redress whatever from the Government for dredging a channel for navigation.

In regard to the commission making an adjustment of the acreage mentioned in your deeds, I would say that after the channel has been completed I will have

our surveyor come down to make a survey of the amount of ground that has been taken from your lots and we will adjust the same satisfactorily to you.

Trusting this will be satisfactory, I beg to remain,

Very truly yours,

EMMETT B. HAWKINS,
Supervisor, Bureau of Marine Fisheries.

On November 28, 1923, we wrote the conservation commission of the State of New York, setting forth the same facts as are herewith set forth, and in substantially the same language, a copy of which is herewith set forth as follows:

NOVEMBER 28, 1923.

CONSERVATION COMMISSION,
Albany, N. Y.

(Attention of Mr. Stagg.)

MY DEAR MR. STAGG: You will probably remember that on Wednesday, November 21, I called upon you concerning the matter of the Radel Oyster Co. That company, as you may know, leased from the State of New York two oyster lots known as Nos. 1034 and 1038, located in Raritan Bay.

On June 19, 1923, a dredger operated by the United States Army under the command of Col. H. C. Newcomer, the second district United States engineers, started and did actually dredge a channel through a large portion of these oyster beds. They were warned at the time by Captain DeHart in command for the Radel Oyster Co. that seed oysters were actually planted there and that 60,000 bushels had been planted at various times between August, 1922, and March and April, 1923. Notwithstanding this notification the men in charge of the dredging machine threatened to throw him into the water unless he immediately departed therefrom. Mr. Radel, the president of the company got in touch with me that afternoon on the telephone, and the next morning we went to the office of the War Department situated in the Army Building, 39 Whitehall Street, New York City, and after a talk with the responsible engineer in charge they immediately commanded the work to stop. On that same day they wrote a letter to the Radel Oyster Co. addressed to South Norwalk, Conn., which I set forth herewith.

"It has just been brought to my attention that you own two oyster beds in Raritan Bay about 2 miles southwesterly of Old Orchard Light and that you have planted seed oysters on these beds.

"You are hereby notified that a channel 30 feet in depth and 200 feet wide is to be dredged across your oyster beds, work on which was commenced on the 18th instant. The channel has been marked by white spars with green tops. Not knowing that you had planted oysters on your beds until informed this morning, the Government dredge has passed over your beds, but have now been ordered to discontinue dredging in that vicinity until further notice. A reasonable period will be allowed you to remove the oysters from the area covered by the authorized channel before any further dredging is performed over the area of the channel that passes across your oyster beds.

"It is desired that you notify this office when the removal of the oysters has been completed.

"Respectfully,

"H. C. NEWCOMER,
"Colonel, Corps of Engineers, District Engineer."

You will see from the body of the letter that they admit that they did not know that oysters had been planted there and that we have not received any notice.

It is my understanding that others who have oysters planted in the vicinity had received notice. In accordance with the directions in the letter of June 20, 1923, and the notice given by the War Department the Radel Oyster Co. proceeded to remove the oysters then remaining on the bed, and so notified them, as set forth in a letter addressed to the writer on August 23, 1923:

"This will confirm our talk with you by telephone this morning advising that Mr. Mayhew, of the United States Engineer office at New York City, telephoned to us at South Norwalk yesterday afternoon asking if it were satisfactory to have their dredge go on our lots 1034 and 1038, Raritan Bay, for the purpose of resuming dredging operations there.

"We were in communication with our Captain DeHart at Princess Bay last evening, and he states that he has removed all the oysters he can from those

grounds and that it is now all right for the United States dredger to resume work there.

"We prefer that you advise the United States engineer, Mr. Mayhew, to this effect, and we will not therefore either telephone or write him from this office.

"As suggested by you, we will arrange to have Mr. DeHart call upon you and go over the matter of quantity of oysters lost, but we may wait for this until Mr. Radel returns to South Norwalk about the middle of September.

"Yours very truly,

"THE ANDREW RADEL OYSTER CO.,
"By N. A. STONE."

Prior to that time, to wit, on July 7, 1923 the Radel Oyster Co. had written to your commission in a letter addressed to the Bureau of Marine Fisheries, Times Building, New York City, in which they notified them of the dredging and received thereto a reply on July 16, both of which letters I herewith set forth:

JULY 7, 1923.

BUREAU OF MARINE FISHERIES,
Conservation Commission, New York City.
(Attention Mr. Rile P. Squires.)

GENTLEMEN: We desire to notify you that the United States Government dredger has commenced the work of digging a channel extending through our oyster lots No. 1034 and No. 1038, Raritan Bay. Although they have temporarily discontinued the dredging in order to give us an opportunity to remove the oysters they have not destroyed, this dredging will be resumed and we will be permanently denied the use of certain portions of those two lots. We are unable at this writing to state what the exact acreage is, but will know at a later date, and will probably require adjustment of the acreage mentioned in our deeds, so that we will not be charged with the acreage we are unable to use in future on account of this proposed channel.

A large quantity of oysters which were planted on these two lots were destroyed by the dredger, but we are not in position at this writing to state the amount of loss we have sustained.

Yours very truly,

THE ANDREW RADEL OYSTER CO.

CONSERVATION COMMISSION,
New York, July 16, 1923.

The ANDREW RADEL OYSTER CO.,
South Norwalk, Conn.

GENTLEMEN: I beg to acknowledge receipt of yours of the 7th, relative to the Government dredging a channel through your oyster lot, 1038, Raritan Bay. In reply I wish to state that I went to Albany and interviewed the consul for the Conservation Commission, who advised me that there was no redress whatever from the Government for dredging a channel for navigation.

In regards to the commission making an adjustment of the acreage mentioned in your deeds, I would say that after the channel has been completed I will have your surveyor come down to make a survey of the amount of ground that has been taken from your lots and we will adjust the same satisfactorily to you.

Trusting this will be satisfactory, I beg to remain,

Very truly yours,

EMMETT B. HAWKINS,
Supervisor, Bureau of Marine Fisheries.

Permit us to say that you are entirely right in your statement set forth in your letter of July 16, 1923, that there is "no redress whatever from the Government for dredging a channel for navigation," that is to say legal redress; we feel, however, that the Federal Government is morally bound to grant redress and the only way that we know that this can be done is by an act of Congress. The Federal law provides for the introduction of a bill in Congress that may refer a claim to the Court of Claims under certain circumstances. This is section 816 of Barnes Federal Code (Judicial Code, section 151).

We would like to have your moral support when such a bill is introduced.

You will agree with me, I think, that the oyster business is at best a hazardous one and that oystermen that have been fortunate enough to secure a set after many years of failure ought not to have it destroyed seemingly in a ruthless manner and without notice.

I think that you will appreciate that the State will be harmed as well, because oystermen will feel and justly so, that lands rented by the State which may be invaded at any time without notice are not particularly valuable.

I say again that there is no question about our right of recovery, we have no such right, but we do think that we are entitled to redress from the United States Government for invading our land without notice and destroying our property.

It seems reasonable to assume that they had the same notice of our oyster beds as they had of others to whom they gave notice. If they would have done so we would have removed our oysters and would not have complained.

Will you give us your moral support?

In doing so you will have the support of the Court of Appeals of the State of New York, that court said in the case of Lewis Blue Point Oyster Co. against Briggs (198 N. Y. 287), speaking through Judge Vann, where a similar happening occurred and in which it was held that no legal right of recovery existed, "it (referring to the Lewis Blue Point Oyster Co.) ran the risk when it planted its oysters that the crop might be interfered with whenever Congress decided to dig a channel, or otherwise improve navigation in Great South Bay for the benefit of commerce. These laws may be severe but Congress is not apt to deal ungenerously with those who have good grounds for relief."

We believe we have good grounds.

Yours very truly,

DEICHES, GOLDWATER & FLYNN.

And to which we received a reply from the conservation commission, dated December 4, 1923, a copy of which is herewith set forth as follows:

STATE OF NEW YORK,
CONSERVATION COMMISSION,
Albany, December 4, 1923.

DEICHES, GOLDWATER & FLYNN,
Counsellors at Law, New York City.

GENTLEMEN: On behalf of the conservation commission I acknowledge receipt of your letter of November 28, relative to the claim of the Radel Oyster Co. against the United States.

When a bill is introduced in Congress for the relief of the Radel Oyster Co., the commission will be glad to indicate in writing its approval of the claim.

Yours truly,

C. T. STAGG,
Deputy Commissioner.

LAW

The leading and controlling case upon the question of the right of recovery is the Lewis Bluepoint Oyster Company *v* Briggs. This was an action commenced in the Supreme Court of the State of New York at Suffolk County in 1908, to enjoin a contractor under contract with the United States Government from dredging across lands under navigable waters in the Great South Bay, upon which the plaintiff had beds of oysters. The decision of Mr. Justice Jaycox will be found in 110 N. Y. Supp. 37. The injunction was denied on the ground that the Federal power under the commerce clause of the Federal Constitution to improve navigation is paramount to the rights of private individuals in land under water. It was held that the plaintiff's property rights were subordinate to the Federal power over navigation, and that the plaintiff's property could be destroyed without compensation, as such destruction was not a violation of the due process or just compensation clause of the Constitution.

The decision of the special term was affirmed by the Appellate Division, second department, in 129 App. Div. 574; 117 N. Y. S. 313.

The opinion was written by Mr. Justice Gaynor. At this point it is interesting to quote from the last paragraph of the opinion of Judge Gaynor, wherein he writes as follows:

"If the Government or the defendant should enter upon the plaintiff's oyster beds and destroy or take up the oysters without giving the plaintiff reasonable opportunity to take them up and remove them an entirely different question would be presented."

This language is interesting in view of the subsequent decisions and the comment by the Court of Appeals. Frankly, it would seem that the language of

the opinion in the Supreme Court of the United States is at variance with the opinion of the appellate division. The decision was again affirmed by the New York Court of Appeals in 1910, in 198 N. Y. 287, the case being reported again in 34 L. R. A. N. S. 1084.

In the last paragraph of the opinion of Justice Vann, he makes the following statement:

"We believe that the plaintiff has no right in the land under water that is not subject to the power of the United States to construct the improvement in question without making compensation to it. It ran the risk when it planted its oysters that the crop might be interfered with whenever Congress decided to dig a channel or otherwise improve navigation in Great South Bay for the benefit of commerce. This loss may be severe but Congress is not apt to deal ungenerously with those who have good grounds for relief."

In 1913 the case reached the Supreme Court of the United States, which again affirmed the original decision denying the injunction (229 U. S. 82). That opinion completely overrules all of the Federal cases that were favorable in any manner to the recovery, and is the final word upon this situation.

There is this to be taken into consideration as the difference between the position of the Radel Oyster Co. and that of the Lewis Bluepoint Oyster Co.:

The lessors of the Lewis Bluepoint Oyster Co. claimed to derive title through a grant of the British Crown, when New York was a British colony, the Great South Bay being included in a tract of lands described by metes and bounds in this grant from the British Crown, and which also conveyed as appurtenances all and every of the rights of "fishing, fowling, hunting, hawking," etc.

The Radel Co. were the lessees of the State, to whom they paid a stipulated rental of so much per acre.

Respectfully submitted.

MAURICE DEICHES,
Attorney for the Andrew Radel Oyster Co.

STATE OF NEW YORK, CONSERVATION COMMISSION,
Albany, February 24, 1926.

HON. RICE W. MEANS.

*Chairman Committee on Claims, United States Senate,
Washington, D. C.*

DEAR SIR: Upon investigation this commission believes that the Andrew Radell Oyster Co. ought to have an opportunity to present its claim to the United States Court of Claims for adjudication.

The Court of Appeals of the State of New York, in an opinion written by Judge Vann in a similar case, said

"It (referring to the planting company) ran the risk when it planted its oysters that the crop might be interfered with whenever Congress decided to dig a channel, or otherwise improve navigation in Great South Bay for the benefit of commerce. These laws may be severe but Congress is not apt to deal injuriously with those who have good grounds for relief."

We feel that this commission is interested in this matter in view of the fact that these oyster companies operate under the jurisdiction of this commission, occupying these lands and paying a license to the State of New York to have the full protection of its laws and its aid when necessary. We are further interested in the matter in view of the fact that the oyster business is one just at present receiving particular attention, and the propagation of oysters a very interesting subject of the commission.

We hope, therefore, that you will use your best endeavors to secure the passage of the bills mentioned above and that justice may be done to the Radell Oyster Co.

Yours very truly,

ALEXANDER MACDONALD,
Commissioner.

By FRANCIS X. DISNEY,
Deputy Commissioner.

WAR DEPARTMENT,
Washington, January 23, 1926.

Hon. RICE W. MEANS,
United States Senate.

MY DEAR SENATOR: Replying to your letter of the 12th instant, with which was transmitted a copy of S. 2335, Sixty-ninth Congress, first session, for the relief of the Andrew Radel Oyster Co., proposing to authorize the United States Court of Claims to hear and determine the claim of the company above named for compensation for damages alleged to have been sustained by reason of the destruction of certain oyster beds located in Raritan Bay, N. J., I am pleased to quote from a report prepared by the district engineer, second district, New York, as follows:

"A channel 30 feet deep and 400 feet wide known as the New York and New Jersey Channels was authorized by the river and harbor act approved September 22, 1922. A section of this channel as located extends in a straight line from deep water northwest off Sandy Hook, N. J., to a point off Seguine Point, Staten Island, N. Y., passing across several oyster beds located in lower New York and Raritan Bays westerly of Old Orchard Light.

"Dredging work was commenced on the Sandy Hook-Seguine Point reach of the New York and New Jersey Channels on June 18, 1923, with the United States Engineer Department seagoing suction dredge *Raritan* and on June 20 the United States Engineer Department dredge *Navesink* was placed on the work. The channel was laid out and marked by means of spar buoys from the vicinity of Chapel Hill range line to a point about 6,000 feet southeasterly of the new permanent navigation aid northerly of the entrance to the old Seguine Point Channel. The channel as buoyed passed across the oyster beds westerly of Old Orchard Light, but the captains of the dredges and the inspectors on the work were instructed verbally to carry the dredging only from deep water northwest of Sandy Hook to about opposite Old Orchard Light marked by mid-channel spar buoy "N. A." maintained by the Lighthouse Service. (See map herewith traced from U. S. Coast and Geodetic Survey No. 369.)

"At about 10 a. m., June 20, 1923, two days after dredging was commenced in Raritan Bay, a party of men who claimed they represented the Andrew Radel Oyster Co. (Inc.), called at this office and made verbal complaint, stating that a dredge working in Raritan Bay was injuring their oyster beds located about 2 miles southwest of Old Orchard Light. At that time this office had no maps showing the location of the oyster beds in lower New York and Raritan Bays and, therefore, could not tell whether the dredging work has been performed across any oyster beds or not. A letter was immediately prepared dated June 20, 1923, and forwarded to the Radel Oyster Co., in which the location of the channel to be dredged was described and stating that a reasonable time would be allowed them to remove the oysters from the area covered by the authorized channel. A copy of this letter was also forwarded to the first New York district, the operation of the dredges being under its direction, and orders were again given not to dredge westerly of a point opposite Old Orchard Shoal Light, it being assumed by this office that the dredge might have dredged the full length of the laid-out channel and across the oyster beds in question as stated in the letter to Radel Oyster Co. dated June 20, 1923, the locations of which, on account of the absence of oyster-bed maps in the files of this office were not definitely known.

"A letter was forwarded to the New York State Conservation Commission on June 20, 1923, in which the location of the channel was defined with the request that the names and addresses of parties granted oyster areas along the line of the channel be forwarded to this office. The letter from the conservation commission is herewith, dated June 21, 1923, which shows the names and addresses of the lessees of oyster beds crossed by the channel. It will be noted that the Andrew Radel Oyster Co. does not appear on the list. The maps which were sent under separate cover, mentioned in the letter, were originally dated 1917. This is crossed out and 1922 inserted in red; the name A. Radel is printed in the area covered by lots 1034 and 1038, which are given in the letter of the conservation commission as being leased to Clarence Dehart. Upon receipt of the information as to the names and addresses of lessees of oyster lots along the line of the channel, letters were sent to each one notifying them of the proposed dredging operations and that a reasonable time would be allowed them to remove the oysters from the area covered by the channel.

"No written acknowledgment was received from any of the notices which were sent out by this office. On August 23, 1923, the Andrew Radel Oyster Co. phoned this office that the removal of the oysters from their lots had been completed and the dredges were ordered to proceed with dredging in the channel across the oyster beds.

"When the representative of the Andrew Radel Oyster Co., on the morning of June 20, 1923, reported that dredging operations were injuring their oyster beds about 2 miles southwest of Old Orchard Light, it was considered that possibly the dredge *Raritan* has passed over the oyster beds in question. Written statements have been received from the inspector detailed from this office and from the master of the United States Engineer Department dredge *Raritan*, dated April 1, 1924, and April 2, 1924, respectively. Mr. Martin, the inspector from this office, states as follows:

"In reply to your verbal inquiry as to dredging over Radel Oyster Co.'s oyster grounds in Raritan Bay by the United States dredges *Raritan* and *Navesink* during the period from June 18, 1923, at which time dredging operations were commenced, to the time I was notified that the Radel Oyster Co. had removed oysters from area to be dredged, neither of the aforesaid dredges removed material from Radel Oyster Co.'s grounds."

"Charles R. Peterson, master of the dredge *Raritan*, states as follows:

"The area covered by the dredge *Raritan* in the Raritan Bay Channel on June 18, 19, and 20, 1923, extended from the deep water northwest of Sandy Hook to a range buoy placed approximately $2\frac{3}{4}$ miles west of the Chapel Hill Range.

"No dredging was done west of a point opposite Old Orchard Light, nor were any range buoys lighted west of that point."

From the information contained in the above letters, it is evident that the original verbal orders given before dredging was commenced, to dredge in the reach "from deep water northwest of Sandy Hook to opposite Old Orchard Light" and reiterated on June 20, 1923, after the representatives of the Radel Oyster Co. had made their complaint, were carried out and no dredging was performed across the oyster beds located about 2 miles to the westward until notice had been received from the Radel Oyster Co. that their oysters had been removed.

A practically identical case is cited by the Attorney General in a letter addressed to the Secretary of War under date of April 29, 1909, the case cited being that of Lewis Bluepoint Oyster Cultivation Co. v. Briggs. The Attorney General states as follows:

"* * * A suit was brought to restrain the defendant from dredging out a channel 200 feet wide across a tract of land under water in Great South Bay, within the State of New York, on which the plaintiff, as lessee of the owners, had beds of oysters which it brought from a distance and cast overboard there, in order that they might grow larger and improve and then be taken up for market. The defendant had a contract with the United States Government to do certain work in the improvement of navigation. The said bay is a navigable arm of the sea. The plaintiff claimed that it could not be deprived of its oysters by the defendant's dredging, and that the use of the land under water could not be impaired thereby, in the future without compensation being first made therefor, on the ground that the said oysters and said use were private property within the fifth amendment of the United States Constitution, forbidding the taking of private property without just compensation.

"Judgment was entered after trial at special term dismissing the complaint on the merits, and this judgment was affirmed by the appellate division upon the ground that—

"Public rights, like that of navigation in the navigable waters of the realm, were inalienable by the king, being vested in him not individually, but in the crown or sovereignty in trust for the people at large. The crown grant under which the plaintiff's lessors derive whatever title they have to Great South Bay is subject to this principle, if there were need to invoke it. * * * The public right of navigation always included the right of government to facilitate and improve navigation, by the erection of beacons, the removal of obstructions, the cutting and deepening of channels, etc., which latter right in this country is vested in the National Government by the provision of its Constitution for the regulation of commerce with foreign countries and among the States. * * * And the grantees from the crown in this case took subject to this measure of the public right of navigation. * * * whatever right the plaintiff and its lessors may have to deposit oysters, or hides for the tannery, or any other chattels, on the bottom of this bay, is subject to such public use, and therefore an obligation to remove such property and surrender possession of the land for such public use at any time."

"In my opinion, this is the correct rule and is amply sustained by the decisions in the United States Supreme Court, above cited. The court further pointed out that a reasonable opportunity should be given to the owner of the oyster beds to take them up and remove them. In the last paragraph of the opinion, it is said:

"If the Government or the defendant should enter upon the plaintiff's oyster beds and destroy or take up the oysters without giving the plaintiff reasonable opportunity to take them up and remove them, an entirely different question would be presented."

"Understanding, however, that your inquiry is directed to the right of the Government to dredge a channel in navigable waters for the purpose of carrying out an improvement authorized and directed by Congress, without making compensation to the owners of oyster beds placed upon the soil under the water originally owned and occupied by them, for the injury to or destruction of their property—reasonable opportunity having been given them to remove the same—I unhesitatingly affirm my opinion that such power is abundantly sustained by ample authority, and that the opinion of Attorney General Bonaparte, above referred to, must be limited in its application to operations in nonnavigable waters or the willful and unnecessary taking, injury to, or appropriation of property, without reasonable opportunity being given to the owner to remove the same."

"Conclusion: The channel being dredged was authorized by Congress and approved September 22, 1922, all lessees of oyster grounds over which the channel is laid out were notified that a reasonable time would be allowed for the removal of their oysters before dredging would be performed. No dredging was performed over the lots where the Andrew Radel Oyster Co. (Inc.), claim that they had planted oysters until they notified this office that all their oysters had been removed. Therefore, in view of the above facts and the decision cited in paragraph 8 above, the claim of the Andrew Radel Oyster Co. (Inc.), embodied in H. R. 8059, Sixty-eighth Congress, first session, dated March 19, 1924, is, in my opinion, unjust and should be denied."

Substantially the above report was made under date of April 18, 1924, to the chairman of the Committee on Claims, House of Representatives, on H. R. 8059, Sixty-eighth Congress, first session, which proposed to appropriate the sum of \$300,000, which was alleged to be the amount of the damages. While S. 2335 does not propose to appropriate any money, but to authorize the Court of Claims to hear and determine the claim, in view of the quoted opinions and decision, the department's view as to the propriety of the enactment of the proposed legislation is the same as in the previous report, namely, that the claim is wholly without merit, that the time and expense of a trial should be avoided on the ground that the claim could not be substantiated, and that the committee should not favorably report the bill.

Sincerely yours,

DWIGHT F. DAVIS, *Secretary of War.*

NEW YORK, June 21, 1923.

Col. H. C. NEWCOMER,
District Engineer Office, Room 616, Army Building,
39 Whitehall Street, New York.

DEAR SIR: In response to your letter of the 20th instant in reference to the granted shellfish lands within the State of New York and on the line joining Seguines Point and the northwesterly end of Sandy Hook there has been mailed to you under separate cover maps showing the beds which are located within this area.

The beds which are crossed by the above line, together with lessees names and addresses, are as follows:

Azel F. Merrill, Pier 32, East River, N. Y.	Lot 162
Clarence DeHart, 139 South Street, Mariners Harbor, Staten Island.	226
Azel F. Merrell.	228
Do.	494
J. and J. W. Elsworth Co., 95 South Street, New York City.	373
Seatang Oyster Co., Pier 32, East River, N. Y.	323
Alva W. Sharret, Broadalbin, Fulton County, N. Y.	656
Clarence DeHart, 139 South Street, Mariners Harbor, Staten Island.	1034
Do.	1038

Kindly accept our thanks for bringing this matter to our attention.

Respectfully yours,

CONSERVATION COMMISSION,
By ROBERT MICKNAS,
Engineer, Bureau Marine Fisheries.

