Oyster Rockefellers: How the Erroneous Use of Restoration Costs Created Oyster Millionaires and Why the Louisiana Supreme Court Should Reverse on Appeal

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I. INTRODUCTION

> These lawsuits are destroying the industry. . . . The people who are suing the state aren't your true oystermen. Maybe three or four of them are, but the majority are part-time people. They aren't the backbone of the industry. They're just opportunistic people who see a chance to get some money.
>
> David Cassanova, a St. Bernard Parish oyster farmer[1]

In December 2000, a Plaquemines Parish jury awarded a class of approximately 160 oyster farmers $21,345 per acre for oyster leases that were allegedly condemned by the state of Louisiana via the Caernarvon Freshwater Diversion Structure (Caernarvon), a coastal restoration project designed to rehabilitate Louisiana's eroding coastline.[2] The jury award, in addition to being the largest inverse condemnation award in the history of the United States,[3] "is also worth more than the total value of all [oysters] harvested in Louisiana since the state created its oyster leasing program in 1902."[4] While the multimillion dollar[5] award seemed outrageous to most, even more disturbing was the fact that the award was upheld on appeal by the Louisiana Fourth Circuit Court of Appeal.[6] This judgment not only shocked citizens and lawmakers in Louisiana, but it also had a ripple effect reaching as far as Washington D.C., where Congress is considering a $14 billion package aimed at restoring Louisiana's fragile and disappearing coastline.[7] Some have suggested that if the award is ultimately sustained, it will not only cause serious problems with Louisiana's budget, but it also could be the death knell for federal funding of coastal restoration.[8] In turn, this could condemn Louisiana's coastline to the Gulf of Mexico, altering the future of

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1. Jeffrey Meitrodt & Aaron Kuriloff, *Shell Games*, TIMES-PICAYUNE (New Orleans), May 4, 2003, at A1, *available at* 2003 WL 4007566 [hereinafter Meitrodt & Kuriloff, *Shell Games*].

2. *Id.*

3. Brief of Amici Curiae Coalition to Restore Coastal Louisiana & Environmental Defense at 5, Avenal v. State, Dep't of Natural Res., 858 So. 2d 697 (La. Ct. App. 2003) (No. 2003-C-3521) [hereinafter CRCL & ED Amici Brief].

4. Meitrodt & Kuriloff, *Shell Games*, *supra* note 1, at A18.

5. The jury awarded over $48 million to five class representatives; the trial court then extrapolated this award to the rest of the "similarly situated" oyster leaseholders in the class. When attorney fees are included, the total amount of the award exceeds $1 billion. *Id.*

6. Avenal v. State, Dep't of Natural Res., 858 So. 2d 697 (La. Ct. App. 2003).

7. Jeffrey Meitrodt & Aaron Kuriloff, *Murky Waters*, TIMES-PICAYUNE (New Orleans), May 25, 2003, at A1, *available at* 2003 WL 4011037 [hereinafter Meitrodt & Kuriloff, *Murky Waters*].

8. Jeffrey Meitrodt & Aaron Kuriloff, *Bill Aims to Hold Oyster Suits in Check*, TIMES-PICAYUNE (New Orleans), May 4, 2003, at A23, *available at* 2003 WL 4007566 [hereinafter Meitrodt & Kuriloff, *Bill Aims to Hold Oyster Suits in Check*].

southern Louisiana forever. Perhaps this is the true meaning of an "inverse condemnation" claim?[9]

There are numerous legal and policy reasons why the Louisiana Supreme Court should reverse and remand the Fourth Circuit's affirmation of the trial court's decision. This Comment addresses the plaintiffs' rights and liability issues before considering the inappropriate use of restoration costs in the calculation of the damages awarded. In addition, this Comment discusses the reasons why fair market value should be the standard used to determine such damages, assuming that the oyster farmers are in fact due any compensation at all. However, it is first necessary to understand the geographic, economic, social, and legal frameworks that shaped this litigation in order to appreciate the disposition of the case below.

II. A BRIEF OVERVIEW OF LOUISIANA'S WETLANDS, THE IMPACT OF THE MISSISSIPPI RIVER LEVEE SYSTEM ON THESE WETLANDS, AND THE RECENT EFFORTS TO RESTORE COASTAL LOUISIANA

A. Louisiana's Disappearing Wetlands

Coastal Louisiana is home to much of the nation's wetlands: overall, the region comprises thirty percent of all coastal wetlands found in the lower forty-eight states.[10] Throughout the history of human settlement in the area, Louisiana's wetlands provided coastal residents with enormous economic benefits. These benefits include fish and shellfish, fertile delta soil for agriculture, timber, oil and gas, navigable waterways and tourism.[11] Although southern Louisiana has transformed with the modern economy, becoming increasingly reliant on the oil and gas, petrochemical, and international shipping industries, there is no denying the economic impact that the wetlands provide, vis-à-vis the coastal fisheries.[12] Louisiana's commercial fishermen supply twenty-five to thirty-five percent of the United States' total catch of fish,[13] resulting

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9. The plaintiffs' theory of recovery is based on an inverse condemnation claim derived from La. Const. art. I, § 4 which provides a cause of action in cases where there has been a taking or damaging of property where just compensation has not been paid.

10. OFFICE OF COASTAL AND RESTORATION MGMT., LA. DEP'T OF NATURAL RES., LOUISIANA COASTAL FACTS (2003), *available at* http://www.savelawetlands.org/site/webfactsheet.pdf (last modified Mar. 10, 2004) [hereinafter LOUISIANA COASTAL FACTS].

11. COALITION TO RESTORE COASTAL LOUISIANA, NO TIME TO LOSE: FACING THE FUTURE OF LOUISIANA AND THE CRISIS OF COASTAL LAND LOSS 2 (2000), *available at* http://www.cred.org/no_time_to_lose.pdf (last visited Feb. 27, 2004) [hereinafter NO TIME TO LOSE].

12. *Id.* at 2-20 (discussing the evolution of Louisiana industry).

13. *Id.* at 20.

in over $2 billion annually in total economic impact (which does not include the $944 million attributable to recreational use of the fisheries); altogether an estimated 50,000 to 70,000 jobs statewide are tied to the health of the state's commercial fisheries.[14]

Tragically, however, Louisiana's wetlands are disappearing at an alarming rate. Since the 1930s, Louisiana has lost 1900 square miles of land; the current rate of land loss is estimated at between twenty-five and thirty-five square miles a year.[15] While coastal Louisiana makes up thirty percent of all coastal wetlands in the lower forty-eight states, it also accounts for ninety percent of coastal marsh loss in the lower forty-eight states.[16] Land loss is not the only detrimental effect of coastal erosion; it is accompanied by saltwater intrusion from the Gulf of Mexico that alters the nature of the wetland ecology.[17] Fisheries are especially vulnerable to coastal erosion and saltwater intrusion because the estuarine and freshwater habitats unique to the area serve as vital nursery areas and primary habitats of many species of fish and shellfish, including oysters.[18]

In addition to threatening the area's fisheries, coastal erosion threatens other economic bases of Louisiana as well. First, coastal deterioration will literally undermine much of the infrastructure supporting the economic base of southern Louisiana.[19] Second, as wetland marsh is replaced with open water, some of the transportation modes on which the region relies, such as the Intracoastal Waterway, will be permanently altered or destroyed.[20] Third, land areas will become increasingly susceptible to storm surges which could interrupt commercial activities in these areas.[21] Combined, these transportation disturbances and business interruptions provide little incentive for future businesses to locate to coastal Louisiana. Fourth, tourism will be affected as the marsh disappears; approximately 800,000 visitors

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14. LA. COASTAL WETLANDS CONSERVATION AND RESTORATION TASK FORCE & WETLANDS CONSERVATION AND RESTORATION AUTH., LA. DEP'T OF NATURAL RES., COAST 2050: TOWARD A SUSTAINABLE COASTAL LOUISIANA 56 (1998) [hereinafter COAST 2050].

15. NO TIME TO LOSE, *supra* note 11, at 2.

16. LOUISIANA COASTAL FACTS, *supra* note 10.

17. COAST 2050, *supra* note 14, at 47. Saltwater intrusion is the primary factor for loss of interior marsh in the Breton Sound Basin, the area which is the subject of this litigation. *Id.*

18. *Id.* at 68.

19. *Id.* at 53-54. The infrastructure includes six deep-draft ports and fifteen smaller ports handling more than 450 million tons of cargo annually; intracoastal waterways that protect 95 million tons of cargo shipments from open water; over 3,000 miles of other protected commercially navigable waterways; major rail and highway corridors, including hurricane evacuation routes; and approximately 16,000 miles of oil and gas pipelines. *Id.*

20. *Id.* at 54.

21. *Id.* at 55-56.

annually are drawn to the state's parks located in the coastal region.[22] Finally, the altered balance of salt- and freshwater resulting from saltwater intrusion impacts vital agricultural regions—from citrus groves in Plaquemines and St. Bernard Parishes to the rice fields in Acadiana, which rely on abundant supplies of freshwater.[23]

Briefly mentioned in the context of its benefit to local business, the protection that wetlands provide during the annual hurricane season cannot be understated given that over two million residents (around forty-six percent of Louisiana's population) live in the coastal zone and are threatened by every hurricane headed in Louisiana's direction.[24] Wetlands provide a natural buffer zone against the high winds and storm surges that accompany hurricanes.[25] As hurricanes make landfall and pass over wetlands, friction is created which reduces the wind speed of the storms.[26] The storm surge, the wall of water that is created along the leading edge of hurricanes, is also mitigated by the presence of wetlands; scientists estimate that every 2.7 miles of wetlands absorb one foot of storm surge.[27] This is especially important for coastal Louisiana given that much of the region—especially the New Orleans metropolitan area—lies below sea level, and also that the hurricane protection levees surrounding the population centers were intended to curb gradually rising water, not open water conditions resulting from wetlands loss.[28] A senior project manager for the United States Army Corps of Engineers (Corps) stated frankly that he:

> [W]ould much rather have 40 miles of wetlands around New Orleans than have a storm attack the levees directly. If people aren't interested in birds and shrimp and oysters, they better still care about protecting the wetlands, because the viability of the city is directly tied to the viability of those wetlands, no doubt about it.[29]

Such storm protection can also be put into dollar figures. Ecological economists surmise that each acre of wetlands provides between $208 and $904 worth of storm protection; at thirty-five square miles of

22. *Id.* at 57.
23. *Id.* at 52.
24. LOUISIANA COASTAL FACTS, *supra* note 10.
25. NO TIME TO LOSE, *supra* note 11, at 25.
26. *Id.*
27. *Id.*
28. *Id.* at 38-40.
29. Meitrodt & Kuriloff, *Murky Waters*, *supra* note 7, at A8.

wetlands lost each year, Louisiana loses over $4.5 million worth of natural storm protection annually.[30]

An understanding of *how* coastal erosion affects coastal Louisiana is only part of the complete picture. One must also have a proper understanding of the forces behind *why* coastal erosion afflicts the region.

B. The Mississippi River and Its Levee System

The history of the Mississippi River and its impact on the North American continent dates back to time immemorial, but it is the more recent and localized past that is relevant to the discourse of this Comment.[31] The Mississippi River has the third largest drainage basin of any river in the world, capturing runoff from more than 1.2 million square miles, thirty-one states, and two Canadian provinces.[32] Suspended in the current of this mighty river are enormous quantities of sediment: on a daily basis, the river passes over 800,000 tons of soil.[33] In turn, over the course of many millennia, these deposits of soil created the marshes and wetlands of coastal Louisiana.[34] Given the amount of sediment funneled into the Mississippi Delta and coastal Louisiana, one might ponder why there is any problem at all with coastal erosion, but the answer is simple: man's desire to control the Mississippi River for navigation and flood control through the construction of a massive levee system sparked a chain reaction of land loss and saltwater intrusion that has caused significant changes in the environment.[35] Although there are numerous reasons for wetland loss other than the levee system—examples include canal dredging and pipeline bulkheads associated with the oil and gas industry;[36] the introduction of destructive herbivores such as the nutria;[37] and natural processes such as wave erosion, subsidence,

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30. Joe F. Stevenson, *Louisiana's Oyster Lease Relocation Program: A Step Toward Common Ground*, 28 S.U. L. REV. 19, 21 (2000).

31. For a thorough discussion of the history of the Mississippi River see Oliver A. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies*, 58 TUL. L. REV. 3 (1983).

32. *Id.* at 17.

33. *Id.* (citing Gagliano & van Beek, *Mississippi River Sediment as a Resource*, *in* MODERN MISSISSIPPI DELTA – DEPOSITIONAL ENVIRONMENTS AND PROCESSES 103 (R. Saxena ed., 1976)).

34. COAST 2050, *supra* note 14, at 19-22.

35. *See* Houck, *supra* note 31, at 22.

36. Marc C. Hebert, *Coastal Restoration Under CWPPRA and Property Rights Issues*, 57 LA L. REV. 1165, 1168 (1997).

37. NO TIME TO LOSE, *supra* note 11, at 2.

land sinking, tidal invasion, and sea level rise[38]—it is generally accepted that the relatively recent construction of flood control levees has been the primary contributor to this problem.[39]

For Americans to settle along the great thoroughfare of commerce that is the Mississippi River, something had to be done about the Mississippi's spring floods. As early as the mid-1700s, there were levees along the Mississippi for thirty miles up- and downstream of New Orleans.[40] By 1828, there was "a continuous wall . . . along both sides of the river from above Baton Rouge to below New Orleans."[41] While the flooding became less frequent along the river, the fact that levees were being built all the way upstream meant that the flood stages increased in the downstream reaches of the river.[42] Gradually, the Corps strengthened and raised the levees, and it continues to do so to this day.[43]

"[T]he confinement of the Mississippi River [into] a single trough running ninety-five miles from New Orleans to the Gulf of Mexico" was not needed to protect population centers because there were no population centers in this area.[44] Rather, the driving forces behind these levees were commerce and navigation.[45] Regardless of the reasons for building the levees, they all have the same detrimental effect on the wetlands.

Prior to the construction of the levees for flood control and navigation, the Mississippi's spring floods deposited millions of tons of sediment carried by the river into the marshes and wetlands.[46] This depositing is part of the delta cycle, a process whereby a river or stream empties into an open water body (coastal bay or lake) and the river flow is able to escape the confines of the channel banks.[47] As the water leaves the channel, the river water loses velocity and there is a reduction in the stream's ability to transport sediment.[48] The sediment then settles and forms bars and shoals, which build up after a series of floods.[49] This

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38. Hebert, *supra* note 36, at 1169.

39. *See* NO TIME TO LOSE, *supra* note 11, at 3-5; COAST 2050, *supra* note 14, at 33-40.

40. Houck, *supra* note 31, at 18.

41. *Id.* As Houck notes, these levees, while continuous, were nothing compared to today's grand engineering achievements.

42. *Id.*

43. *Id.* at 19.

44. *Id.*

45. *Id.* Houck comments that "Federal politicians understood navigation. Leveed rivers floated ships." *Id.* He further notes that "[n]avigation was, and remains, a more obvious federal responsibility than local flood control." *Id.* at 21 n.70.

46. Stevenson, supra note 30, at 20.

47. COAST 2050, *supra* note 14, at 19.

48. *Id.*

49. *Id.* at 19-20.

"newly formed land becomes colonized by wetland vegetation," which then captures even more sediment, thereby accelerating the buildup of wetlands.[50]

The levees, however, interrupted this cycle and starve the wetlands of much needed sediments by constraining the lower Mississippi to a single channel expanding all the way to the Gulf of Mexico, bypassing coastal bays, and increasing the velocity of the water flow.[51] These three factors mean that sediments which once settled and built up the wetlands are now dumped into the depths off the outer continental shelf in the Gulf of Mexico and are lost to the land building and maintenance processes forever.[52] The resulting erosion process is also cyclic. Because existing wetlands are not replenished with sediment from river floods, they are faced only with the onslaught of saltwater from the Gulf of Mexico.[53] This saline environment is inhospitable to the wetland vegetation, which succumbs and is rendered useless to hold together the underlying landmass.[54] As the landmass erodes, more room is created for saltwater to move into the wetland areas.[55]

The reduction of the flow of freshwater and the landward movement of saltwater is also at the heart of the oyster litigation. Historically the Breton Sound Basin, where much of the plaintiffs' oyster leases are located, embodied a mixture of freshwater from the Mississippi River and saltwater from the Gulf of Mexico resulting in "brackish" water of intermediate salinity.[56] A wide area of the Breton Sound Basin, but not all of it, was suitable for oyster habitat.[57] "[T]he area closest to the land and thus closest to the source of freshwater had the lowest salinity and was not sufficiently saline for oysters, [while] the area farthest from land and thus closest to the Gulf of Mexico had the highest salinity and was too saline for oysters."[58] Over time, the construction of levees along the Mississippi River reduced the flow of freshwater into Breton Sound, thereby affecting the overall salinity regime, and thus the area suitable for oyster habitat.[59] Gradually, as the area of higher salinity moved landward, oyster beds began forming in areas that were previously too fresh to

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50. *Id.* at 22.
51. *Id.* at 38.
52. *Id.* at 25.
53. NO TIME TO LOSE, *supra* note 11, at 3-5.
54. *Id.*
55. *Id.*
56. Avenal v. State, Dep't of Natural Res., 858 So. 2d 697, 700-01 (La. Ct. App. 2003).
57. *Id.*
58. *Id.*
59. *Id.*

sustain them.[60] While the landward movement of oyster habitat benefited oystermen who were able to work closer to shore, there was no end in sight. Unless something was done to address the issues of coastal erosion, it remained possible that saltwater would wipe out the wetlands, and the oyster habitat, altogether.

C. Efforts to Restore Coastal Louisiana

Early in the twentieth century, the Conservation Commission of Louisiana realized the negative effects of the levees and recommended that freshwater diversions from the Mississippi River be built to stabilize the rising salinity of Breton Sound.[61] A 1914 report of the Commission reads, "This parish possesses some of the best oyster grounds in the state, but they have been seriously affected of late years by the influx of too much salt water."[62] By 1959, prompted by the requests of local groups (including several prominent oystermen) and after investigating the problem, the United States Fish and Wildlife Service (FWS) and the Department of Interior (Interior) concluded that introducing freshwater would be the most effective method of restoring the historic salinity regime in Breton Sound.[63] In 1965, Congress passed the federal Public Works—Rivers and Harbors Act authorizing "freshwater diversion structures to be built in and around Breton Sound Basin."[64]

After meeting with state government officials and holding public hearings in 1968 and 1969, the Corps proposed Caernarvon as a location for the diversion.[65] Louisiana entered into a formal agreement with the Corps in 1987, whereby the state would pay some of the construction costs and all of the maintenance and operations costs for the diversion structure, and the Corps would pay the remainder.[66] Construction began after Congress authorized funding in 1988 and was completed in 1991; the project came on line in late 1991.[67] Freshwater diversion projects like

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60. Douglas F. Britton, Note, Avenal v. United States*: Does the State of Louisiana Have a Property Interest in the Salinity of Its Waters?*, 2 OCEAN & COASTAL L.J. 154-55 (1996).

61. Jeffrey Meitrodt & Aaron Kuriloff, *Oyster Farmers Initially Backed Caernarvon Project; Fresh Water Seen as Saving Grace*, TIMES-PICAYUNE (New Orleans), May 4, 2003, at A21, *available at* 2003 WL 4007499 [hereinafter Meitrodt & Kuriloff, *Oyster Farmers Initially Backed Project*].

62. *Id.* Presumably, the parish referred to was either Plaquemines or St. Bernard, both of which border on Breton Sound.

63. Britton, *supra* note 60, at 155.

64. Avenal v. United States, 33 Fed. Cl. 778, 779 (Fed. Cl. 1995).

65. Avenal v. United States, 100 F.3d 933, 935 (Fed. Cir. 1996). Caernarvon is located about twenty miles downstream of New Orleans on the Mississippi River.

66. *Id.*

67. *Id.*

Caernarvon are designed "to mimic the spring floods to replenish the marshes with freshwater that would have been coming through if the levees weren't here in the way to block out the floods."[68] The idea is that the water being diverted from the Mississippi River into adjacent coastal basins will help restore the historic salinity regime to Breton Sound and will also improve conditions within the coastal marshes by providing sediments and nutrients for new land formation.[69]

Caernarvon has proven to be a success in terms of achieving the stated purposes of creating new marsh, pushing higher saline waters back towards the Gulf of Mexico, and providing for a larger area of oyster habitat in Breton Sound.[70] As of 1998, in sampled areas there was a net increase in marshland of 406 acres[71] which amounted to a six percent annual growth rate.[72] Current estimates suggest that by 2040, over 16,000 acres of coastal wetlands will be preserved as a result of Caernarvon.[73] In 2002, "[t]otal oyster landings in Plaquemines and St. Bernard Parishes reached 7.5 million pounds . . . the highest level since 1987, and the seventh best year since 1962."[74] While it is true that the restoration of Breton Sound's historic salinity configurations resulted in decreased salinity (and thus decreased oyster production) closest to the shore, there is no denying that overall oyster production has rebounded significantly from 1991 levels.[75] Members of the plaintiff class even agree on this point. Malcolm Assevedo, a plaintiff who saw decreased oyster production on 1000 acres of his oyster beds, commented that Caernarvon should be credited with saving the oyster industry: "With the little bit [Caernarvon is] damaging, it's doing so much good for the rest."[76] Furthermore, without diversion projects, the band of optimal salinity for oysters in Breton Sound would continue to move shoreward, eventually narrowing and finally becoming completely eliminated.[77]

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68. *All Things Considered: Profile* (National Public Radio broadcast, Sept. 9, 2002), *available at* 2002 WL 3497782 (quoting Jack Fredine, U.S. Army Corps of Engineers).

69. COAST 2050, *supra* note 14, at 2.

70. Avenal v. State, Dep't of Natural Res., 858 So. 2d 697, 701 (La. Ct. App. 2003).

71. New Orleans District, U.S. Army Corps of Eng'rs, Coastal Wetlands Planning, Protection, and Restoration Act Website, *Freshwater Diversion Brochure*, *available at* http://www.mvn.usace.army.mil/pao/bro/FreshwaterDiversion.pdf (last visited Feb. 17, 2004) [hereinafter *Freshwater Diversion Brochure*].

72. Meitrodt & Kuriloff, *Oyster Farmers Initially Backed Project*, *supra* note 61, at A21.

73. *Freshwater Diversion Brochure*, *supra* note 71, at 12.

74. Meitrodt & Kuriloff, *Oyster Farmers Initially Backed Project*, *supra* note 61, at A21.

75. Meitrodt & Kuriloff, *Shell Games*, *supra* note 1, at A19.

76. Meitrodt & Kuriloff, *Oyster Farmers Initially Backed Project*, *supra* note 61, at A21.

77. Brief of Amicus Curiae Louisiana Dep't of Wildlife & Fisheries at 1, Avenal v. State, Dep't of Natural Res., 858 So. 2d 697 (La. Ct. App. 2003) (No. 2003-C-3521) [hereinafter LDWF Amicus Brief].

III. THE LOUISIANA OYSTER LEASE PROGRAM

The Louisiana oyster leasing program originated in 1886 when state legislators began allowing citizens to cultivate private oyster beds on public lands.[78] Currently, the oyster lease program is governed by Title 56, Chapter 1, Part VII, Subpart D of the Louisiana Revised Statutes.[79] The program divides state water bottoms into two categories related to the production and harvest of oysters: public grounds used for oyster seeding and harvesting by all oyster fishermen[80] and private leases which are the subject of the oyster litigation.[81]

Oyster lessees may lease up to 2500 acres[82] of state water bottom for $2 an acre per year for an initial term of fifteen years.[83] Upon execution of the lease, the Secretary (Secretary) of the Department of Wildlife and Fisheries (DWF) can place in the lease such stipulations "as he deems necessary and proper to develop the industry."[84]

Once a lessee has an executed lease, he may begin to cultivate and harvest oysters. To create new oyster habitats, lessees build oyster reefs on their leased grounds by dropping cultch into the soft mud to provide a hard bottom for seed oysters to grow.[85] "Managing an oyster business is a bit like playing the stock market, requiring lessees to plant [seed] oysters [often from the aforementioned public oyster grounds] on a variety of sites, hoping that a combination of weather, tide, and salinity prove right at a few of those spots."[86] Luckily, Louisiana's wetlands provide optimum oyster habitat: the state has led the nation in oyster production for the

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78. Jeffrey Meitrodt & Aaron Kuriloff, *Oyster Harvests Healthier Than Ever Thanks to Lease Arrangements*, TIMES-PICAYUNE (New Orleans), May 11, 2003, at A12, *available at* 2003 WL 4008541 [hereinafter Meitrodt & Kuriloff, *Thanks to Lease Arrangement*].

79. LA. REV. STAT. ANN. § 56:421–451 (2003).

80. *Id.* § 56:434. In recent years, over fifty percent of all oysters harvested for commercial sale in Louisiana have come from these public grounds. *See* LDWF Amicus Brief, *supra* note 77, at 4.

81. LA. REV. STAT. ANN. § 56:423–432.1.

82. The amount of acreage was increased from 1000 acres in the aggregate to the current figure of 2500 acres in 2003. *Id.* § 56:423-432.1.

83. *Id.* § 56:428. Thus, a lessee with maximum acreage of 2500 acres pays $5000 a year to hold the lease. Currently, the average lessee holds approximately 260 acres, and therefore pays only $520 per year. *See* LDWF Amicus Brief, *supra* note 77, at 2.

84. LA. REV. STAT. ANN. § 56:425(C).

85. Meitrodt & Kuriloff, *Thanks to Lease Arrangement*, *supra* note 78, at A12. "Cultch" is an aggregate which is usually comprised of old oyster shells, but which can also include crushed limestone or other similar material. Avenal v. State, Dep't of Natural Res., 858 So. 2d 697, 701 (La. Ct. App. 2003).

86. Meitrodt & Kuriloff, *Thanks to Lease Arrangement*, *supra* note 78, at A12.

last fourteen years, and Louisiana oysters account for thirty percent of the domestic oyster market.[87]

Surprisingly, oyster leases can be profitable even if they never produce a single oyster, thanks to recent litigation and settlements with the oil and gas industry.[88] Oil and gas operations are ubiquitous throughout the coastal plain of Louisiana, and sometimes they cause damage to the water bottoms used by oyster lessees. Given that the lessees often have valid causes of action for damage to the beds under their leases,[89] "most oil companies would rather write a check than litigate" such claims.[90] On average, oil companies shell out an estimated $5 million a year to oyster farmers for the right to conduct operations on or near their leases; this amount is "equivalent to one-fifth of the entire Louisiana oyster crop."[91] "Though the law once required lessees to cultivate oysters on at least ten percent of their acreage, that requirement never was enforced and was dropped years ago"; "oyster lease speculators" continue to lease acreage with no intention of ever harvesting oysters.[92] At $2 a year per acre, some oyster leases play more like the lottery than the stock market.

IV. THE PLAINTIFFS HAVE NO VESTED PROPERTY RIGHT IN THE STATE'S WATER, WATER BOTTOMS, OR OYSTERS

The Louisiana Supreme Court has adopted a four-part analysis for inverse condemnation and expropriation cases in order to determine whether a claimant is entitled to compensation.[93] The threshold question in such cases is whether the challenged government action affects a person's legal right with respect to a legal object.[94] In other words, does the action actually affect a protected property interest? Second, if property is involved, it must be determined "whether the property, either a right or a thing, has been damaged, in a constitutional sense."[95] Third, if there is a taking or damaging, it must be decided whether such action was done for a public purpose under Article I, § 4 of the Louisiana

87. *Id.*

88. Jeffrey Meitrodt & Aaron Kuriloff, *Oil Industry Unintentionally Pumps Up Oyster Farms*, TIMES-PICAYUNE (New Orleans), May 4, 2003, at A23, *available at* 2003 WL 4007501 [hereinafter Meitrodt & Kuriloff, *Oil Industry Pumps Up Oil Farms*].

89. LA. REV. STAT. ANN. § 56:423(B)(1).

90. Meitrodt & Kuriloff, *Oil Industry Pumps Up Oil Farms*, *supra* note 88, at A23.

91. *Id.*

92. *Id.*

93. State, Dep't of Transp. & Dev. v. Chambers Inv. Co., 595 So. 2d 598, 603 (La. 1992); Constance v. State, Dep't of Transp. & Dev. Office of Highways, 626 So. 2d 1151 (La. 1993).

94. *Chambers*, 595 So. 2d at 603.

95. *Id.*

Constitution.[96] Finally, as added by *Constance*, the liability of a public body is "limited to those instances where there is a physical taking or damage to property or a special damage peculiar to the particular property and *not general damage sustained by other property similarly located*."[97] These four factors will guide the analysis of the inverse condemnation claim before the erroneous damage award is addressed.

A. The Public Trust Doctrine

Article IX, § 1 of the Louisiana Constitution sets out the public trust duty of the state of Louisiana with regards to natural resources. It reads as follows:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.[98]

The Louisiana Supreme Court has held that the public trust duty involves a balance between maintaining environmental values and promoting the public welfare.[99] Coastal restoration projects, like Caernarvon, demonstrate a narrow category of state action that respects both sides of the public trust balance—protecting, replenishing, and conserving the environment while also promoting the health, safety, and welfare of the people.[100] Restoring wetlands that have been lost to saltwater intrusion and erosion as a result of the levee system along the Mississippi River satisfies the first part of the balance regarding the protection of natural resources and the environment while the second part of the balance is satisfied by the substantial economic and safety interests at stake.[101]

Furthermore, whatever rights the plaintiffs acquired under their oyster leases are subordinate to the state's duty to manage public waters and water bottoms as a public trust for the benefit of Louisiana citizens.[102] The United States Supreme Court, in *Illinois Central Railroad Co. v. Illinois*, ruled that upon entering the Union, the citizens of each state "became themselves sovereign, and in that character hold the absolute

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96. *Id.*

97. *Constance*, 626 So. 2d at 1156 (emphasis added).

98. LA. CONST. art. IX, § 1.

99. Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984).

100. Brief of Amici Curiae Business Council of New Orleans and the River Region, Inc. & Jefferson Business Council at 2, Avenal v. State, Dep't of Natural Res., 858 So. 2d 697 (La. Ct. App. 2003) (No. 2003-C-3521) [hereinafter BCNO & JBC Amici Brief].

101. *Id.*

102. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 456 (1892).

right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the Constitution to the general government."[103] Nearly a century later, the Louisiana Supreme Court recognized that *Illinois Central* established that "the states cannot abdicate their trust over property in which the people as a whole are interested so as to leave it entirely under the use and control of private parties."[104] The dissent in *Avenal v. State, Department of Natural Resources* makes the axiomatic point that "the state cannot appropriate or inversely condemn that which it already owns."[105] So long as the waters and water bottoms are in the public trust, any state action to protect and enhance public trust values cannot impinge on private property rights.[106] This point is somewhat moot, however, given the limited rights actually granted by the oyster leases.

B. Rights Granted Under Plaintiffs' Oyster Leases

Contrary to the plaintiffs' assertion that the statutory scheme related to oyster leases places "an affirmative duty" on the lessees to cultivate oysters,[107] the rights conveyed to the oyster lessees are actually very narrow: "A lessee shall enjoy the exclusive use of the water bottoms leased and of all oysters and cultch grown or placed thereon, subject to the restrictions and regulations of this Subpart."[108] Read in context with the public trust doctrine laid out in Article IX, § 1 of the Louisiana Constitution, it is clear that oyster leases convey no ownership interest in the water bottoms nor in the waters of Breton Sound. Oyster leases merely grant the lessee the right to "use" water bottoms, to the exclusion

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103. *Id.*

104. Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 580, 589 (La. 1975); *see also Save Ourselves Inc.*, 452 So. 2d at 1152 (recognizing that the public trust was "continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources, commands protection, conservation, and replenishment of them insofar as possible and consistent with health, safety and welfare of the people, and mandates the legislature to enact laws to implement this policy"); LA. CIV. CODE ANN. art. 450, cmt. (b) (2000) (stating that navigable water bodies are "public things that belong to the state," and that such property is "dedicated to public use, and held as a public trust for public uses").

105. Avenal v. State, Dep't of Natural Res., 858 So. 2d 697, 740 (La. Ct. App. 2003) (Tobias, J., dissenting).

106. CRCL & ED Amici Brief, *supra* note 3, at 10.

107. Plaintiffs/Respondents Opposition Brief at 13, Avenal v. State, Dep't of Natural Res., 858 So. 2d 697 (La. Ct. App. 2003) (No. 2003-C-3521) [hereinafter Plaintiffs Opposition Brief]. Furthermore, if there was in fact such a duty, the legislature would not have dropped the provision requiring oyster lessees to cultivate at least ten percent of their acreage. *See* Meitrodt & Kuriloff, *Oil Industry Pumps up Oil Farms*, *supra* note 90, at A23.

108. LA. REV. STAT. ANN. § 56:423(A) (2003).

of others, to produce however many oysters that the lease yields.[109] As Justice Tobias observed in his *Avenal* dissent, oyster leases grant a lessee only "the uncertain hope that he or she will be able to raise a crop of oysters upon the water bottom."[110] There are no guarantees of any oysters, much less a commercially viable oyster harvest, being produced on a lessee's lease; to suggest that there is a duty to produce such oysters is contrary to the clear and limited language of the oyster leasing statutes. Nevertheless, the *Avenal* court's holding effectively granted a right to optimal oyster production from the water bottoms.

Another important component of the plaintiffs' claim is that their leases, although issued by the state and located over state water bottoms, were taken as a result of the freshwater flowing into the Breton Sound.[111] In other words, the plaintiffs claim that the altered salinity level over their oyster leases impinged on the property interests acquired under the leases. Again, Justice Tobias correctly interprets the law to observe that the limited grant of rights conveyed no entitlement to any specific set of conditions in the environment surrounding the lease areas, and that oyster leases convey no rights to the state owned water.[112] He states: "Because the granting of the plaintiffs' oyster leases did not include the lease of the state-owned *waters* covering the leased water bottoms, the plaintiffs had absolutely no constitutionally protected interest in the water itself."[113] From a policy standpoint, this must be right. In a lease of state owned property, the state simply cannot guarantee lessees the right to specified environmental conditions (i.e., salinity levels), especially when those environmental conditions are artificially created. How is it possible for Louisiana to be liable to third parties for attempting to restore Breton Sound, property that the state owns, to its original condition?

Furthermore, the Louisiana Supreme Court has already established that oyster lessees have no property right in the oyster beds themselves, because these too belong to the state.[114] In *Inabnet v. Exxon Corp.*, the court held that the plaintiff oyster lessees did not have the right to recover the cost of restoring their oyster beds from an oil and gas company that harmed oyster beds.[115] Instead, the court found that the owner of the water bottoms (Louisiana) is the only party with a right of action to

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109. CRCL & ED Amici Brief, *supra* note 3, at 8.

110. *Avenal*, 858 So. 2d at 740 (Tobias, J., dissenting).

111. *Id.* at 703.

112. *Id.* at 740.

113. *Id.*

114. Inabnet v. Exxon Corp., 642 So. 2d 1243, 1255 (La. 1994).

115. *Id.* It should be noted that this decision overruled part of a prior Fourth Circuit decision on this point.

recover restoration costs because the state is the real party in interest when water bottoms are damaged.[116] This point is especially relevant when oyster lessees sue the state for damages to the water bottoms that the state owns! The Fourth Circuit attempts to distinguish *Inabnet* on the grounds that it was a tort case against a corporation, while *Avenal* is an inverse condemnation case against the state.[117] However, this distinction has no bearing as far as the plaintiffs' property interests are concerned. *Inabnet* clearly held that oyster lessees have no property right in water bottoms, cultch, or oyster beds, and therefore cannot sue to restore water bottoms which they do not own.[118]

V. THE PLAINTIFFS' CLAIMS FAIL UNDER BOTH FEDERAL AND LOUISIANA TAKINGS JURISPRUDENCE

Assuming, *arguendo*, that the plaintiffs did have a recognizable protected property interest in the salinity of the water above their leases, they are still unable to prove that a taking occurred under either federal or Louisiana jurisprudence. This topic will be discussed briefly before proceeding to an analysis of the improper damage award in this case.

A. Federal Takings Analysis[119]

Any assumed taking would fall within the category of regulatory takings, as it is clear that Louisiana did not physically take or expropriate the plaintiffs' leases from them. The reasonableness of a claimant's investment expectations has long been a key factor in determining whether the government has effected a regulatory taking.[120] In *Penn Central Transportation Co. v. City of New York City*, the Supreme Court declared that "the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considera-

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116. *Id.*

117. *Avenal*, 858 So. 2d at 702 n.3.

118. Brief of Amicus Curiae La. Dep't of Transp. & Dev. at 5, Avenal v. State, Dep't of Natural Res., 858 So. 2d 697 (La. Ct. App. 2003) (No. 2003-C-3521) [hereinafter LDOTD Amicus Brief].

119. It should be noted that the plaintiffs filed a takings suit against the federal government almost identical to the inverse condemnation suit filed against the state due to the federal involvement of the U.S. Army Corps of Engineers. Both the Federal Claims Court and the Federal Circuit Court of Appeals rejected this claim, under two separate theories, and granted summary judgment in favor of the government. *See* Avenal v. United States, 100 F.3d 933, 934, 937 (Fed. Cir. 1996). It is conceded that there is some difference between federal and Louisiana takings law, but as will be discussed, the plaintiffs' claims fail under both of them. Nevertheless, an analysis of federal takings law is illuminating to the state claim.

120. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978).

tions."[121] Given the fact that the oyster farmers were major proponents of the Caernarvon project, specifically with regards to restoring the historic salinity levels, and were also aware of the plans to build the project, it cannot then be claimed that investments into their leases were reasonable when they not only knew about, but also lobbied for the changes that resulted.[122] A more recent Supreme Court regulatory takings case observed that to disregard the reasonableness of a claimant's investment expectations would contradict principles of fairness and justice which are central to federal takings jurisprudence.[123] In her opinion, Justice O'Conner observed that "if existing regulations do nothing to inform the [takings] analysis, then some property owners may reap windfalls and an important indicum of fairness is lost."[124] This is exactly the type of uninformed analysis that enabled oyster farmers to reap million dollar windfalls from the State. The Fourth Circuit mishandled the relevance of the investment-backed expectation analysis and deemed it irrelevant.

Another governing principle of federal takings law is the so-called "rule of necessity," which declares that it is not a taking when the government, faced with the choice of destroying certain property interests or allowing other property interests to be destroyed, chooses a course that will safeguard the most property and advance the overall public welfare.[125] The Supreme Court first laid out this principle in the 1920s in *Miller v. Schoene*:

> [W]e may accept . . . that the state was under the necessity of making a choice between the preservation of one class of property and that of the other . . . . When forced to such a choice, the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.[126]

Assuming that the oyster lessees had any protected property rights in the salinity of waters which were "destroyed" by Caernarvon, the rule of necessity dictates that there was no taking because, as discussed above, the freshwater diversion safeguards the most property and advances the overall public welfare.

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121. *Id.*
122. Meitrodt & Kuriloff, *Oyster Farmers Initially Backed Project*, *supra* note 61, at A21.
123. Palazzolo v. Rhode Island, 533 U.S. 606, 655 (2001) (Breyer, J., dissenting).
124. *Id.* at 635 (O'Connor, J., concurring).
125. CRCL & ED Amici Brief, *supra* note 3, at 17.
126. Miller v. Schoene, 276 U.S. 272, 279 (1928)

B. Louisiana Takings Analysis

The Fourth Circuit erred by holding that the mere fact that a loss has been incurred is sufficient to conclude that a taking has occurred;[127] this contravenes the Louisiana Supreme Court's jurisprudence on takings by glossing over the proper analysis established under *Chambers* and *Constance*. Using the four-factor test set out by these two cases, it is clear that the plaintiffs failed to establish the elements of an inverse condemnation claim. First, the legal rights of the lessees with respect to their oyster leases are governed solely by the leases themselves and the statutes from which they derive. As discussed above, La. R.S. 56:423 defines the rights of oyster lessees to include the right to harvest oysters on the leased water bottoms, the right to exclude others from using those water bottoms, and the right to maintain an action for damages *against third parties* arising out of the wrongful or negligent injury.[128] The third parties to which the statute refers are "any person, partnership, corporation, or other entity" that causes injury to the lease.[129] If the legislature intended that the state would be considered an "other entity" liable for wrongful injuries to oyster leases, it would have specified it in the language of the statute. The most reasonable reading of the statute is that "other entities" are other commercial ventures that are not partnerships or corporations. The takings claims against the state lack any basis because the rights of the lessees are defined by the lease, and the lease provides no basis of liability against the state for changes in salinity above or near the leases.

Second, the oyster lessees' property interests were not damaged in a constitutional sense. "Property [including intangible leasehold interests] is 'damaged' when the action . . . of the state, in the exercise of its power to acquire property for a public purpose, diminishes the value of the tangible property or the intangible property right."[130] The *Avenal* court said that "[w]hen property has been rendered permanently non-usable for its only purpose, that is a taking . . . . What is dispositive is that the State rendered the plaintiffs' oyster leases permanently useless for commercial oyster production."[131] This holding misunderstands the nature of the property rights in question. The plaintiffs' intangible property rights

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127. Avenal v. State, Dep't of Natural Res., 858 So. 2d 697, 705 (La. Ct. App. 2003).

128. LA. REV. STAT. ANN. § 56:423 (2003) (emphasis added); *see also* Pace v. Chevron, 579 So. 2d 494, 496 (La. Ct. App. 1991).

129. LA. REV. STAT. ANN. § 56:423.

130. Packard's W. Store, Inc. v. State, Dep't of Transp. & Dev., 618 So. 2d 1166, 1172 (La. Ct. App. 1993).

131. *Avenal*, 858 So. 2d at 705-06.

were not damaged—they still maintain the rights to exclude others from their leases and to harvest oysters from the leased water bottoms. The plaintiffs argue that the lack of oysters due to increased saline conditions mean that they cannot harvest oysters, but the right does not guarantee the presence of oysters, only the ability to harvest those that are there.[132] The plaintiffs also claim that the right to exclude others from their leases is worthless unless there are harvestable oysters present.[133] This argument fails because the presence or absence of oysters is not a good indication of the value of a lease; the ability to exclude oil and gas companies is inherently valuable to lessees because they can often settle with the companies for thousands of dollars.[134] To emphasize this point consider that in 1998, Ken Fox, a class representative and one of the largest oyster leaseholders in the state, was paid $411,000 by oil companies performing seismic tests on or near his leases.[135] This figure is four times more than the profits from his best year as an oysterman.[136] Third, because there was no taking or damaging of the plaintiffs property, it doesn't matter whether or not Caernarvon is intended for a public purpose.

Finally, the plaintiffs' claim fails with regards to the fourth factor set out in *Constance*, which distinguishes the liability of a public body in an inverse condemnation case from liability in expropriation cases.[137] Clearly, there is no physical damage or taking to the plaintiffs leases. Therefore, in order for the plaintiffs to prevail on an inverse condemnation claim, they must show "a special damage peculiar to the particular property and not general damage sustained by other property similarly located."[138] While the plaintiffs do allege a special damage by claiming that the change in the salinity of the water caused their losses, "the plaintiffs had absolutely no constitutionally protected property interest in the water itself."[139] Furthermore, the plaintiffs failed to show that the change in salinity was "peculiar to the particular property and not general damage sustained by other property similarly located."[140] Curiously, the Fourth Circuit did not even mention the *Constance* case,

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132. CRCL & ED Amici Brief, *supra* note 3.
133. *Avenal*, 858 So. 2d at 738-39.
134. Meitrodt & Kuriloff, *Oil Industry Pumps up Oil Farms*, *supra* note 90, at A23.
135. *Id.*
136. *Id.*
137. *See* Constance v. State, Dep't of Transp. & Dev. Office of Highways, 626 So. 2d 1151, 1156-58 & n.6 (La. 1993).
138. *Id.*
139. *Avenal*, 858 So. 2d at 738-39 (Tobias, J., dissenting).
140. *Constance*, 626 So. 2d at 1156.

even though it is binding Louisiana precedent for determining state liability in inverse condemnation claims.

The *Constance* takings analysis indicates that takings claims like the ones in *Avenal* are inappropriate for class action litigation because the general damage alleged in this case is in fact damage sustained by over 150 other leaseholders located in an area covering thousands of acres of water bottoms. Assuming *arguendo* that the plaintiff class was defined narrowly enough to cure this defect, as Judge Tobias points out, the change in salinity affected countless other classes of people, so the plaintiffs' claims should be rejected.[141] By definition, damage cannot be "peculiar to a particular property" when it is "general damage sustained by every other property similarly located"; it is an inherent oxymoron.[142] Although Caernarvon undeniably impacted at least some plaintiffs' oyster leases, "the negative effects of the . . . freshwater diversion were not peculiar to the plaintiffs' oyster leases" which is a requirement of an inverse condemnation case under Louisiana jurisprudence.[143]

Based on the nature of the plaintiffs' property interests in their oyster leases and the extent to which Louisiana appears free of liability for any damages sustained by the plaintiffs, the Louisiana Supreme Court should reverse and remand the decision for a proper and uniform application of Louisiana takings law. At the very least, however, the Supreme Court should remand for a recalculation of damages because the use of restoration costs in this case was clearly erroneous under Louisiana jurisprudence.

VI. THE ERRONEOUS USE OF RESTORATION COSTS IN CALCULATING DAMAGES TO THE PLAINTIFFS' OYSTER LEASES

The $21,345 per acre windfall that the jury awarded the plaintiffs in *Avenal* is premised upon the idea that the oyster farmers are entitled to replacement costs of their "taken" or "damaged" leases.[144] This figure represents the cost to cover "every inch of every acre of every lease" owned by the plaintiff class members in Breton Sound with six inches of

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141. *Avenal*, 858 So. 2d at 739 (Tobias, J., dissenting) (noting that "evidence reflects that the adverse impact of the freshwater diversion in the Breton Basin was not limited to the plaintiffs' oyster leases . . . commercial and recreational fishermen, commercial shrimpers, and coastal property owners, too, were adversely affected by the fresh water").

142. LDOTD Amicus Brief, *supra* note 118, at 6.

143. *Avenal*, 858 So. 2d at 739 (Tobias, J., dissenting).

144. Defendant's Application for Supervisory Writs, Writs of Certiorari and Review at 22-23, Avenal v. State, Dep't of Natural Res., 858 So. 2d 697 (La. Ct. App. 2003) (No. 2003-C-3521) [hereinafter Defendant's Writ Application].

cultch material suitable for oyster production.[145] The replacement cost basis for the award, and thus the award itself, is erroneous for many reasons and runs contrary to prior holdings of the Louisiana Supreme Court.

In *Avenal*, the Fourth Circuit began analyzing the damages award by stating "[W]e believe that the Louisiana constitutional imperative of 'full' compensation *favors* replacement cost, when that is greater than market value, as the measure of compensation to be applied."[146] This preference has no legal support because the Louisiana Supreme Court held in *Constance* that replacement cost is appropriate *only* as an alternative, when replacement is necessary to prevent the owner from going out of business on his remaining property.[147] The Louisiana Second Circuit Court of Appeal followed the Supreme Court on this point stating that, "[g]enerally, full compensation is measured by the market value of the property . . . an award of *replacement value is the exception*, not the rule."[148]

Further, in *Roman Catholic Church v. Louisiana Gas Services Co.*, the Louisiana Supreme Court delineated situations in which replacement costs are not to be used:

> If . . . the cost of restoring the property in its original condition is disproportionate to the value of the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm.[149]

This holding is particularly applicable to the replacement cost award in *Avenal*. First, in order to determine whether restoration costs are disproportionate to the value of the property, the value of the property must be assessed. Market value is "the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote, or contrary to law."[150] Market value has also been defined as "the price which would be agreed upon between the informed and willing buyers and sellers under usual and normal

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145. *Id.*

146. *Avenal*, 858 So. 2d at 702 (emphasis added).

147. Constance v. State, Dep't of Transp. & Dev. Office of Highways, 626 So. 2d 1151, 1157 (La. 1993).

148. La. Dep't of Transp. & Dev. v. Oswald, 665 So. 2d 668, 671 (La. Ct. App. 1995) (emphasis added).

149. Roman Catholic Church v. La. Gas Serv. Co., 618 So. 2d 874, 879-80 (La. 1993).

150. Exxon Pipeline Co. v. Hill, 788 So. 2d 1154, 1160 (La. 2001).

circumstances."[151] In depositions and transcripts in the *Avenal* case, a state economist estimated that the average value of a lease in Breton Sound is $200 an acre, no plaintiff testified to buying or selling a lease for more than $1000 an acre, and oyster industry leaders stated that $5000 an acre is the most a lease has ever fetched on the open market.[152]

Second, it must be determined what the "original condition" of the oyster leases was prior to Caernarvon coming on line. While the jury awarded damages to re-create oyster reefs on 100% of the plaintiffs' leased water bottoms, "much of those leased waterbottoms are covered in soft mud and can't support oysters"; a witness at the trial "estimated that [the percentage] of hard reef-waterbottoms prepared for oyster cultivation—covered less than forty percent of bottom on about 100 plaintiffs' leases in Breton Sound."[153] Oyster industry experts also agree that full cultch coverage on an oyster lease is all but unheard of.[154] Mike Voison, past president of the Louisiana Oyster Dealers and Growers Association "testified that 'very few' oyster leases in the state are one hundred percent productive."[155] According to Voison, average productivity is probably about fifty percent.[156] Given these original conditions and the market value of the leases, it is clear that the award of $21,345 an acre is *both* disproportionate to the value of the property and economically wasteful.

Roman Catholic Church allows for the use of restoration costs if "there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs."[157] With regards to this analysis, *Inabnet* is dispositive in two ways. First, the *Inabnet* court specifically rejected restoration costs in the context of damage to oyster leases.[158] This holding is even more significant considering that the damage in that case was actual, physical damage to the water bottoms caused by dredging and depositing spoil on oyster leases, while here the alleged damage is a change in the salinity of the water.[159] It simply does not make sense that a court could deny restoration costs to plaintiffs who experienced actual, physical

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151. *Oswald*, 665 So. 2d at 671.

152. Jeffrey Meitrodt & Aaron Kuriloff, *Affixing Value to Beds a Slippery Affair*, TIMES-PICAYUNE (New Orleans), May 4, 2003, at A19, *available at* 2003 WL 4007508.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Roman Catholic Church v. La. Gas Serv. Co., 618 So. 2d 874, 879-80 (La. 1993).

158. Inabnet v. Exxon Corp., 642 So. 2d 1243, 1255-56 (La. 1994).

159. *Id.*

damage, but then grant such damages when there was no physical damage.

Second, the *Inabnet* court recognized the distinct possibility that oyster lessees would simply pocket the restoration award because they have no real interest in restoring the water bottoms.[160] On this point the court noted that, "if the oyster lessee were allowed to recover damages for injury to the water bottoms, the lessee would not be obliged to restore the water bottoms and could use the money as he pleases, leaving the owner (the State) without even the opportunity to accomplish the restoration."[161] Indeed, if the water above the oyster leases is too fresh to support the cultivation of oysters, there is no reason why a lessee would restore the bottoms; "it is hopelessly illogical to require a lessor to pay a lessee the cost of restoring the lessor's own property and then allow the lessee to pocket the money, abandon the property, and leave the lessor with the damaged, unrestored property that it has already paid to restore."[162] Because the state, as lessor, is the only party with a right to restoration, the $21,345 an acre damage award is a textbook example of unjust enrichment.[163]

In addition to contravening Louisiana Supreme Court jurisprudence, the Fourth Circuit's decision in *Avenal* also runs contrary to its own holdings on damage awards in oyster cases. In *Tesvich v. 3-A's Towing*, the Fourth Circuit announced the proper measure of damages to oyster leases: "In Louisiana, damages awarded for negligent damage to oyster leases is the market value of the oysters which would have been harvested less the expense of producing those oysters for market."[164] The Fourth Circuit's *Avenal* holding suggests that the reason that it changed course on the type of damages to award was the availability of the "cultch currency matrix," a formula used to establish the cost to install cultch on oyster leases which was not available at the time *Tesvich* was decided.[165] However, in order to use the matrix in conjunction with a restoration cost standard, the court must know how much acreage of cultch each lease had, and how deep the cultch coverage was prior to Caernarvon coming

160. *Id.*

161. *Id.*

162. BCNO & JBC Amici Brief, *supra* note 100, at 9-10.

163. As the Fourth Circuit observes, it is true that the measure of just compensation in inverse condemnation cases can be broader than the measure of damages recoverable in tort under Louisiana law, but this "does not and cannot be read to create a property right where there is none." LDOTD Amicus Brief, *supra* note 118, at 5; *see also* Packard's W. Store, Inc., v. State, Dep't of Transp. & Dev., 618 So. 2d 1166, 1172 (La. Ct. App. 1993).

164. Tesvich v. 3-A's Towing, 547 So. 2d 1106, 1123 (La. Ct. App. 1989).

165. Avenal v. State, Dep't of Natural Res., 858 So. 2d 697, 701 (La. Ct. App. 2003).

on line. The plaintiffs failed to prove that their leases were covered in cultch.[166] "They did not prove the extent of any such coverage . . . [a]nd they did not prove damage to the oyster reefs themselves by operation of [Caernarvon]."[167] Based on this dearth of evidence, use of the matrix to estimate restoration costs was inappropriate.

It also bears mentioning that at the time the oyster was class certified, the trial court established that fair market value would be the measure of damages in this case.[168] In his Reasons for Judgment on Certification, Judge William A. Roe specifically asserted that "this class action will effectuate the constitutional protection of landowner compensation which is to make whole a party who has lost property for public purposes . . . . [*C*]*ompensation will be limited to an amount which will fairly compensate plaintiffs for the actual fair market value of property taken*."[169] Why the market value standard of damages was not put to the jury remains unclear.

The ramifications of the jury award in *Avenal* "shock the conscience."[170] Apart from the plaintiffs and their lawyers, most people would agree that $21,345 an acre in damages for a piece of property that rents for $2 an acre is excessive. Even Ken Fox, a class representative, said he "was shocked [the jury] came out with that figure . . . . I did not look to get that much money per acre. It is not justifiable."[171] Jurisprudentially, market value must be the proper measure of damages. In her dissent, Justice Love argues that a better estimation of the damages, if any, "should consider not only the rental price of the lease, but also the money, time and effort expended by the lessee in developing the lease, the availability of other comparable leases, and other relevant factors."[172] Justice Love goes on to say that the "loss of value cannot mean replacement cost or restoration cost."[173]

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166. BCNO & JBC Amici Brief, *supra* note 100, at 10.

167. *Id.*

168. Judge William A. Roe, 25th Judicial District Court, Parish of Plaquemines, State of Louisiana, Reasons for Judgment on Certification at 8, Avenal v. State, Dep't of Natural Res., (Apr. 18, 1996).

169. *Id.* In his 1990 judicial election campaign, Judge Roe is also quoted as saying "Nobody should get enriched because misfortune befalls them. Instead, they should get what's fair." Jeffrey Meitrodt & Aaron Kuriloff, *Sinking Chances*, TIMES-PICAYUNE (New Orleans), May 18, 2003, at A8, *available at* 2003 WL 4009887.

170. *Avenal*, 858 So. 2d at 708 (Love, J., concurring in part and dissenting in part).

171. Meitrodt & Kuriloff, *Shell Games*, *supra* note 1, at A1.

172. *Avenal*, 858 So. 2d at 708 (Love, J., concurring in part and dissenting in part).

173. *Id.*

VII. CONCLUSION

Louisiana is at a crossroads. It is difficult to conceive of the amount of time it took for natural processes to create the wetlands of coastal Louisiana, yet in the past few hundred years, humans have altered this landscape dramatically. Only in the past thirty years have scientists, engineers, lawmakers, and fishermen come to truly recognize the ever increasing risks of coastal erosion and begun to fix the problem. The time, effort, and research that have gone into the development of plans to curb the loss of Louisiana's coastal wetlands is truly remarkable, and the Caernarvon Diversion is an example of the engineering ingenuity that has already begun to turn the tide in just a few short years. There is simply no legal or public policy basis to despoil these restoration efforts by awarding oyster farmers millions of dollars for changes in the salinity levels over their oyster leases.