

We (Used To?) Make a Good Gumbo—The BP DEEPWATER HORIZON Disaster and the Heightened Threats to the Unique Cultural Communities of the Louisiana Gulf Coast

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Louisiana has long been known for music, food, and unique cultural traditions that add distinctive flavors to American culture. Many of Louisiana’s greatest contributions come from its once vast coastal wetlands. The estuary where the Mississippi River flows into the Gulf of Mexico is one of the most productive ecosystems in the world.¹ The Louisiana wetlands are rich with countless natural resources, from wildlife to forests.² The wetlands produce the delicious seafood that is

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1. See *What’s an Estuary?*, BARATARIA TERREBONNE NAT’L ESTUARY PROGRAM, <http://btnep.org/default.asp?id=1> (last visited Sept. 3, 2010); see also Marisa Katz, Comment, *Staying Afloat: How Federal Recognition as a Native American Tribe Will Save the Residents of Isle de Jean Charles, Louisiana*, 4 LOY. J. PUB. INT. L. 1, 1 (2003).

2. “Approximately 735 species of birds, finfish, shellfish, reptiles, amphibians, and mammals spend all or part of their life cycle in the estuary” located between the Mississippi and Atchafalaya Rivers and the Gulf of Mexico. *What’s an Estuary?*, *supra* note 1. In addition, the wetlands have been home to forests of cypress, water tupelo, mangrove, and oak trees. See THE GOVERNOR’S SCI. WORKING GRP. ON COASTAL WETLAND FOREST CONSERVATION & USE, CONSERVATION, PROTECTION AND UTILIZATION OF LOUISIANA’S COASTAL WETLAND FORESTS (2005), http://www.coastalforestswg.lsu.edu/SWG_FinalReport.pdf. Indeed, bayou and coastal

the hallmark of Louisiana's culinary contributions;³ the wetlands have served a vital function as a hurricane barrier for south Louisiana communities, including New Orleans;⁴ and they are home to a variety of ethnic communities that contribute to Louisiana's musical and cultural diversity.

The connection between culture and environment has long been recognized. With the passage of the National Environmental Policy Act (NEPA) in 1970, Congress expressed a national commitment to "encourage productive and enjoyable harmony between man and his environment."⁵ NEPA acknowledged that an environmental policy consistent with that commitment must protect cultural, as well as natural resources—the federal environmental policy should "assure for all Americans safe, healthful, productive, and esthetically and *culturally pleasing* surroundings [and] *preserve important historic, cultural, and natural aspects of our national heritage*, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."⁶

The Louisiana wetlands, and the cultures that have flourished in them, are a vital part of our national heritage.⁷ For that reason alone, their restoration and preservation should be a national environmental priority. When the vast natural resources of the wetlands are taken into account as well,⁸ wetland restoration from the damage caused by the BP disaster and continued wetland preservation become a necessity.

communities like Cheniere and Pointe au Chien were named for the oak groves (in French, cheniers means "place of oaks") that once flourished there. See *Gulf Coast Prairies and Marshes*, NATURE CONSERVANCY, <http://www.nature.org/wherework/northamerica/states/louisiana/preserves/art8688.html> (last visited Sept. 3, 2010).

3. Katz, *supra* note 1, at 1 (stating that as of 2003, the Louisiana Gulf coast was home to a \$1 billion per year commercial fish and seafood industry); see also Robert Viguerie, *Coastal Erosion: Crisis in Louisiana Wetlands*, 51 LA. B.J. 85, 85 (2003).

4. A mile of wetlands can absorb about a foot of hurricane storm surge. See Gina Schilmoeller, Comment, *Invoking the Fifth Amendment To Preserve and Restore the Nation's Wetlands in Coastal Louisiana*, 19 TUL. ENVTL. L.J. 317, 318, 322 (2006); see also Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post-Katrina and Rita Imperatives*, 51 LOY. L. REV. 861, 864-66 (2005).

5. 42 U.S.C. § 4321 (2006).

6. *Id.* § 4331(b)(2), (4) (emphasis added).

7. DAVID BATKER ET AL., *GAINING GROUND, WETLANDS, HURRICANES AND THE ECONOMY: THE VALUE OF RESTORING THE MISSISSIPPI RIVER DELTA* 13 (2010), http://www.earth.economics.org/FileLibrary/file/Reports/Louisiana/Earth_Economics_Report_on_the_Mississippi_River_Delta_compressed.pdf ("The history, music, literature, cuisine, Cajun and Creole culture, and folk songs and stories of the Mississippi River Delta form part of the heart and soul of the nation.").

8. *Id.* at 7 ("The Mississippi River Delta ecosystems provide at least \$12-47 billion in benefits to people every year. If this natural capitol were treated as an economic asset, the delta's minimum asset value would be \$30 billion to \$1.3 trillion.").

Long before the BP DEEPWATER HORIZON disaster⁹ and before Hurricanes Katrina, Rita, Gustav, and Ike, the Louisiana wetlands were in trouble. They have been slowly eroding¹⁰ and taking with them important contributions to the richness of Louisiana's, and indeed America's, culture. The coastal wetlands of Louisiana are home to a wide variety of racial and ethnic groups which have struggled to maintain cultural identities and livelihoods that are, in large part, inextricably intertwined with their close connection to their environment.¹¹ The Louisiana coastal fishing industry, for example, has been described as "a gumbo of Vietnamese, Cambodian, Laotian, African-American, Native American and Hispanic boat and dock owners, deckhands and other workers," mixed with "Caucasian ethnic groups, like the entrenched Cajun community, Croatians and others from the former Yugoslavia, along with the Islenos—originally from the Canary Islands."¹² The forces threatening these vulnerable communities have been at work for decades, and the threats are only escalated by the new dangers from the BP DEEPWATER HORIZON disaster sending massive amounts of oil gushing into the Gulf of Mexico and the wetlands.¹³

Once thought of as useless wastelands, Louisiana's wetlands have been more recently identified as "the source of seafood production,

9. The April 20, 2010 explosion on the British Petroleum drilling rig, the DEEPWATER HORIZON, which led to the deaths of eleven workers and serious injuries to seventeen others, and sent oil spewing into the Gulf of Mexico for eighty-six days, can hardly be described as something as simple and finite as an "oil spill." Given the magnitude of the harm caused by the original blowout, and exacerbated by a "cleanup" using hundreds of thousands of gallons of dispersants, this event will be referred to herein as "the BP DEEPWATER HORIZON disaster" or "the BP blowout."

10. The rate at which the wetlands are being lost might be better described as something other than slow. Estimates of loss vary from twenty-five to forty square miles lost per year, to a football field per half hour, to an acre per minute. See Katz, *supra* note 1, at 1; see also *Louisiana Coastal Area Restoration Study*, U.S. ARMY CORPS OF ENGINEERS, <http://www.mvn.usace.army.mil/environmental/lca.asp> (last visited Sept. 3, 2010); Kari Lydersen, *Gulf Waters Imperil Tribe's Way of Life in Louisiana Bayous*, WASH. POST, July 20, 2010, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/19/AR2009071901819.html>; *Louisiana's Wetlands Are Being Lost at the Rate of One Football Field Every Thirty-Eight Minutes*, SCI. DAILY (Jan. 4, 2008), <http://www.sciencedaily.com/releases/2008/01/080104112955.htm>. Those rates have continued to escalate.

11. See Jordan Flaherty, *Fears of Cultural Extinction on Louisiana's Gulf Coast*, S. STUD., <http://www.southernstudies.org/2010/fears-of-cultural-extinction-on-louisianas-gulf-coast.html> (last visited Sept. 13, 2010).

12. Susan Buchanan, *Gulf Oil Adds to Woes of Minority Fishermen*, LA. WKLY., May 17, 2010, <http://www.louisianaweekly.com/news/php?viewStory=2798>.

13. Most recent estimates place the amount of oil dumped into the Gulf as a result of the blowout at 4.9 million barrels, or over 205 million gallons. See Joel Achenbach & David A. Fahrenthold, *Oil Spill Dumped 4.9 Million Barrels into Gulf of Mexico, Latest Measure Shows*, WASH. POST, Aug. 3, 2010, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html>.

wildlife habitats, clean water, storm protection, and even tourist revenue.”¹⁴ Coastal erosion has been literally wiping out miles and miles of coastal wetlands each year.¹⁵ As a result, the vital functions performed by the wetlands¹⁶ are now at risk. The saddest part of this story is that, even before BP began spewing oil into the Gulf, this has been largely a man-made disaster.

For thousands of years, the Mississippi River delta has been a dynamic ecosystem. The river gathers sediment as it travels through the Midwest and heads toward the Gulf. Historically, that sediment was then washed down the Mississippi and deposited along the channel of the river and its distributaries, creating land that supported marsh and swamp vegetation.¹⁷ As this process inevitably lengthened the river’s path to the Gulf, the river would seek a new, shorter course. As the river abandoned a route, the marshes in that area would deteriorate and convert to open water, but any losses were offset by the new wetlands created in the new delta.¹⁸

Among the causes of the devastation of the wetlands are the extensive efforts to control and direct the mighty Mississippi River, which have prevented the natural depositing of sediment to build up the coastline and coastal wetlands.¹⁹ In addition, the oil and gas industry has cut up the wetlands with navigation channels that allow saltwater intrusion into the previously fresh water marshes and swamps.²⁰ As saltwater kills off trees and marsh grasses, their roots no longer hold the soil in place, making erosion occur more quickly.²¹ The BP disaster, as it adds toxic oil and dispersants into the wetlands, will likely speed up the pace at which this devastation occurs.²²

14. Ryan M. Seidemann & Catherine D. Susman, *Wetlands Conservation in Louisiana: Voluntary Incentives and Other Alternatives*, 17 J. ENVTL. L. & LITIG. 441, 444 (2002).

15. *Louisiana’s Wetlands Are Being Lost at the Rate of One Football Field Every Thirty-Eight Minutes*, *supra* note 10.

16. See ROBERT R. TWILLEY, PEW CTR. ON GLOBAL CLIMATE CHANGE, COASTAL WETLANDS & GLOBAL CLIMATE CHANGE: GULF COAST WETLAND SUSTAINABILITY IN A CHANGING CLIMATE 1-2 (2007).

17. Robert N. Jenkins, *From New Orleans’ Founding, Riches Outweighed Risks*, ST. PETERSBURG TIMES, Sept. 4, 2005, http://www.sptimes.com/2005/09/04/Worldandnation/From_New_Orleans_fou.shtml.

18. ENVTL. PROT. AGENCY, LA. WETLAND PROTECTION PANEL, EPA #230-02-87-026, SAVING LOUISIANA’S COASTAL WETLANDS: THE NEED FOR A LONG-TERM PLAN OF ACTION (1987).

19. Schilmoeller, *supra* note 4, at 322.

20. *Id.*

21. John Tibbetts, *Louisiana’s Wetlands: A Lesson in Nature Appreciation*, 114 ENVTL. HEALTH PERSP. A40, A42 (Jan. 2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1332684/>.

22. Ken Wells, *Collapsing Marsh Dwarfs BP Blowout as Ecological Disaster*, BLOOMBERG NEWS, Aug. 17, 2010, <http://www.bloomberg.com/news/2010-08-18/collapsing->

The story of wetland loss as a result of manipulating the Mississippi River is intertwined with the founding of the city of New Orleans. In the early 1700s, New Orleans was founded by the French in an area along the lower Mississippi River that would later lead it to be described by geographer Peirce Lewis as “an impossible but inevitable city.”²³ Its proximity to the Mississippi and the Gulf of Mexico, along with its modest elevation, all appeared to be a recipe for a prosperous settlement.²⁴ As early as 1722, the city of New Orleans began its reliance on artificial levees to control the Mississippi and prevent damage from its annual spring floods.²⁵ Thus began one of the slow but steady processes that have spurred the loss of the coastal wetlands.

When New Orleans was first founded, storms and flooding were treated as ordinary occurrences that were best dealt with by building on the highest elevations possible and constructing modest levees.²⁶ But as New Orleans flourished as a port and as a city, there was a push to make the river a more easily navigable shipping channel and to protect the city from frequent flood damage.²⁷ As a result, by the early 1900s, more and more of the river was managed with levees.²⁸ As the city prospered, marshy areas between the city and Lake Pontchartrain were drained or filled in to permit additional development.²⁹ The efforts to control the river gained force in the 1920s, and in the Flood Control Act of 1928, Congress called upon the Army Corps of Engineers (Corps) to develop a navigation and flood control plan.³⁰ Ironically, that same year, a scientist working for the State of Louisiana declared the State’s reclamation and flood control efforts a failure, because they were destroying valuable natural resources without producing the permanent benefits envisioned.³¹

As the Corps built more levees along the Mississippi, less sediment was distributed into the coastal wetlands.³² Now there was nothing to replace the ordinary erosion that occurred along the Gulf or the natural

louisiana-marsh-dwarfs-bp-oil-blowout-as-environmental-disaster.html; *see also* Oliver Houck, *Who Will Pay To Fix Louisiana?*, NATION, June 24, 2010, <http://www.thenation.com/article/36610/who-will-pay-fix-louisiana>.

23. Mark Davis, *Not By Accident: Building a Sustainable New Orleans*, AM. PROSPECT (Mar. 17, 2009), http://www.prospect.org/cs/articles?article=not_by_accident.

24. *Id.*

25. RICHARD CAMPANELLA, BIENVILLE’S DILEMMA: A HISTORICAL GEOGRAPHY OF NEW ORLEANS 22 (2008).

26. *See* Davis, *supra* note 23.

27. *Id.*

28. Jenkins, *supra* note 17.

29. CAMPANELLA, *supra* note 25, at 44-46.

30. *Id.* at 46-47.

31. Davis, *supra* note 23.

32. *See* Jenkins, *supra* note 17.

subsidence of soil in the wetlands.³³ Nonetheless, the nation's love affair with levees continues today. In the aftermath of Hurricane Katrina, the Corps' emphasis has continued to be on levees rather than wetland preservation and restoration.³⁴

The wetlands have also come under attack from the Gulf side. Since the 1920s, when oil companies began significant drilling in Louisiana's marshes and bayous, and by the late 1940s offshore drilling in the Gulf of Mexico had taken off.³⁵ As the oil industry developed, navigation and pipeline channels were dredged throughout the marshes and wetlands. "Between 1901, when drilling began in Louisiana, and the 1980s, the oil and gas industry laid tens of thousands of miles of pipelines and dredged 9,300 miles of canals in an industrial invasion of a wetland that once covered 3.2 million acres."³⁶ The canals brought salt water from the Gulf into the fresh water marshes and, as a result, began killing off trees and marsh grasses.³⁷ As the plant life died, their roots no longer served to hold in what land was in the wetlands.³⁸ These factors escalate the rates of land loss and intensify the impacts of major natural events like hurricanes.³⁹ In a vicious cycle, hurricanes hit harder because they do not slow down as they churn over the diminishing marshes and wetlands, resulting in stronger hurricane storm surges washing away more of the fragile wetlands.⁴⁰

As a result, Louisiana's coastal wetlands are more and more wet and less and less land. The communities most directly affected by the

33. That the artificial control of the river with levees is a significant contributor is evidenced by the Atchafalaya Basin further to the southwest. The Atchafalaya River becomes a tributary of the Mississippi north of many of these levees, so sediment is able to flow down the Atchafalaya into the basin. While just miles to the east the coast is losing wetlands at an almost unfathomable rate, the Atchafalaya Basin is actually building land. See, e.g., Joel K. Bourne Jr., *Gone with the Water*, NAT'L GEOGRAPHIC MAG., Oct. 2004, <http://ngm.nationalgeographic.com/ngm/0410/feature5/>.

34. See Michael Grunwald, *The Threatening Storm*, TIME MAG., Aug. 1, 2007, http://www.time.com/time/specials/2007/article/0,28804,1646611_1646683_1648904,00.html.

35. Oil was first discovered in Louisiana in a rice field near Jennings, Louisiana, in 1901. See *Louisiana Oil History: More than 100 Years in the Making*, HOUMA TODAY, Oct. 31, 2007, <http://www.houmatoday.com/article/20071031/NEWS0101/710310321>. The off-shore drilling industry took off in 1947 with the first rig in the Gulf that was out of sight of land. *Id.*; see also *History of the Offshore Oil and Gas Development in Louisiana*, BUREAU OF OCEAN ENERGY MGMT., REG. & ENFORCEMENT, http://www.gomr.mms.gov/homepg/regulate/environ/louisiana_coast.html (last visited Sept. 3, 2010).

36. Wells, *supra* note 22; see also Houck, *supra* note 22.

37. Flaherty, *supra* note 11.

38. *Id.*

39. See David A. Farenthold, *How Oil-Damaged Marsh Grasses Recovery Could Affect Gulf's Rebound*, WASH. POST, July 26, 2010, at A05, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072502620.html?hpid=topnews>.

40. See *id.*

wetland loss are those which have, sometimes for centuries, lived in the area because it offered a healthy livelihood. Now, their livelihoods and cultural identities are threatened. The nearly 300-year-old community of Islesnois in St. Bernard Parish are very much at risk from all of the forces mentioned above. The Slavs and the Vietnamese are, together with Cajuns and Native Americans, at the heart of a fishing community threatened by a changing coast, changing climate, and changing economic regime that favors the import of farmed foreign seafood over the indigenous fishery.⁴¹ In many ways these communities—and the stories they tell—are bellwethers of the trajectory of this region and its viability. The addition of millions of gallons of oil, and unknown quantities of dispersants, is likely to drive down that trajectory further and further.

The already occurring loss of the wetlands, and the vast array of channels cut through the marshes to the Gulf, will inevitably introduce oil and dispersants into the wetlands and marshes. The result can only be the death of more marsh grasses and other vegetation.⁴² As vegetation dies, rates of erosion increase. In addition, the loss of vegetation can lead to the loss of spawning grounds for various species of fish, shrimp, and crabs.⁴³ As the productivity of the estuarial ecosystem diminishes,⁴⁴ it not only reduces the national supply of local seafood, it decreases the ability to sustain the livelihoods of those who depend upon the wetlands for their very existence. Adding to the loss of wetlands, a toxic oil-dispersant hot sauce, which spread through the Gulf and into the wetlands, puts those cultural groups at risk of losing their distinct cultural practices and identities. These are losses that a check from BP can never repair.

41. David Their, *Gulf Fishermen Struggling Long Before BP Oil Spill*, AOLNEWS.COM, July 15, 2010, <http://www.aolnews.com/gulf-oil-spill/article/gulf-fishermen-struggling-long-before-n-spill/19555606>; *Shrimp Season Opens Today, But Crush of Imports Profoundly Altered Louisiana Industry*, TIMES-PICAYUNE (New Orleans), May 10, 2009, http://www.nola.com/news/index.ssf/2009/05/p102libbtop2_0511aaa01_2008_la.html.

42. Flaherty, *supra* note 11.

43. *Id.*

44. While the wetlands have shown some remarkable signs of resilience, see Seth Borenstein & Cain Burdeau, *Scientists Think Gulf Can Recover*, MSNBC.COM, Aug. 5, 2010, <http://www.msnbc.msn.com/id/38582049/ns/usnews-environment/>, they will not magically repair themselves overnight. Moreover, the BP blowout occurred during what for many species was “biological spring,” when the Gulf was teeming with new life. Jeff Goodell, *The Poisoning*, ROLLING STONE, July 21, 2010, <http://www.rollingstone.com/politics/news/17390/183349>. The true impact in such species may not be apparent until a few more springs have come and gone.

I. CULTURAL GROUPS OF THE LOUISIANA GULF COAST

A. *The Native Americans*

Several Native American tribes have called the Louisiana wetlands home for centuries. The tribes in the region include those currently members of the United Houma Nation,⁴⁵ the Biloxi-Chitimacha-Choctaw Federation,⁴⁶ the Atakapa-Ishak Nation,⁴⁷ and the Pointe au Chien Tribal Community.⁴⁸ These groups all share similar lifestyles and a similar relationship with their natural environment.⁴⁹ The Houmas were first encountered by French explorers in the late 1600s in what is now Louisiana, well north of the future site of New Orleans on the eastern shore of the Mississippi River opposite the Red River.⁵⁰ They were hunters and farmers, but by the early 1700s, these Native Americans moved south to escape conflicts with the Tunica tribe and colonial tensions between the British and the French in the area.⁵¹ The Houmas settled into the bayou marshlands in south and southeastern Louisiana.⁵² Some took up farming, but most survived as hunters, trappers, and fishermen.⁵³

The Native American groups that settled in the coastal regions weathered countless challenges. Some initially were forced into the wetlands by competing tribes or European settlers.⁵⁴ Once there, they adapted their ways of life to take advantage of the vast resources presented by the Louisiana coast. “The culture of the Atakapa-Ishak

45. See UNITED HOUMA NATION, <http://www.unitedhoumanation.org> (last visited Sept. 3, 2010) (“The United Houma Nation (UHN) is a state recognized tribe of approximately 17,000 tribal citizens residing within a six-parish (county) service area encompassing 4,570 square miles. The six parishes . . . are located along the southeastern coast of Louisiana. Within this area, distinct tribal communities are situated among the interwoven bayous and canals where Houmas traditionally earned a living.”).

46. See *Biloxi-Chitimacha Confederation of Muskogees*, BILOXI-CHITIMACHA-CHOCTAW OF LA., http://www.biloxi-chitimacha.com/the_confederation.htm (last visited Sept. 6, 2010).

47. See ATAKAPA-ISHAK NATION, <http://www.atakapa-ishak.com/> (last visited Sept. 3, 2010).

48. See POINTE-AU-CHEN INDIAN TRIBE, <http://pactribe.tripod.com/id2.html> (last visited Sept. 3, 2010).

49. Joseph H. Goodman, *Gulf Oil Spill Threatens Tribe's Livelihood in Louisiana*, MIAMI HERALD, June 1, 2010, <http://www.miamiherald.com/2010/05/31/v-fullstory/1657504/united-houmanation-faces-biggest.html>.

50. *History/Timeline*, UNITED HOUMA NATION (Aug. 12, 2008), <http://www.unitedhoumanation.org/node/13>.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

people is so tied to the water and fishing that their oral history says they came from the sea.”⁵⁵

Throughout their histories, however, each tribe has been subjected to prejudice and deprivation. Importantly, they were not permitted to attend public schools until the mid-1960s.⁵⁶ Thus, when the oil industry came knocking decades earlier, the Native Americans were told that the oil companies only wanted to drill on their land and pay them royalties when, in fact, the oil industry was taking their land with quit claim deeds.⁵⁷ While most Native American tribes in Louisiana have been recognized by the State of Louisiana, few have been given federal recognition.⁵⁸ Indeed, the Houmas’ application for federal recognition was opposed by parts of the oil and gas industry.⁵⁹

The Houmas, the Biloxi Chitimacha, and the Pointe au Chien have survived primarily as fishermen and shrimpers, and living off the waters and their natural resources has been traditional for generations.⁶⁰ Located in several parishes along the coast, with heavy concentrations in Terrebonne and LaFourche Parishes, these groups have seen their lands vanishing before their eyes due to coastal erosion.⁶¹ In addition, they endured the brunt of Hurricanes Rita, Gustav, and Ike.⁶² With each passing storm they have rebuilt, but the BP disaster may have even more enduring effects. Oil has affected revered fishing areas, and poses a risk to plants used in traditional medicines and basket weaving.⁶³ Brenda Dardar-Robichaux, principal chief of the United Houma Nation, described the BP DEEPWATER HORIZON disaster as “a dark day for our people. . . . We’re being hurt economically, environmentally and culturally. . . . It’s a total assault on who we are, our way of being.”⁶⁴

55. Sue Sturgis, *Tribes Unite To Fight BP: A Delegation of Indigenous Leaders from Ecuador Visited Louisiana To Share What They Learned in a Decades-Long Battle with Texaco*, YES! MAG., July 7, 2010, <http://yesmagazine.org/people-power/tribes-unite-to-fight-bp>.

56. See *History/Timeline*, *supra* note 50.

57. Kari Huus, *Long-Suffering Tribe Fears Oil May Strike Final Blow*, MSNBC FIELD NOTES, May 11, 2010, http://fieldnotes.msnbc.msn.com/_news/2010/05/11/4377136-long-suffering-tribe-fears-oil-may-strike-final-blow; *Native American Group Hit Hard by Oil Spill*, NAT’L PUB. RADIO, June 3, 2010, <http://www.npr.org/templates/story/story.php?storyId=127405886&sc+emaf;Flaherty>, *supra* note 11.

58. Patrick Oppmann, *Oil Spill Threatens Native American Land*, CNN.COM, June 1, 2010, <http://cnn.com/2010/US/06/01/oil.spill.native.americans/index.html>.

59. Huus, *supra* note 57.

60. See Goodman, *supra* note 49.

61. *Id.*

62. Huus, *supra* note 57.

63. Rob Capriccioso, *State Recognized Tribes Face Greater Oil Spill Risks*, INDIAN COUNTRY TODAY, June 4, 2010, <http://www.indiancountrytoday.com/national/95612344.html>; Goodman, *supra* note 49.

64. Capriccioso, *supra* note 63.

Theresa Dardar, a community leader of the Pointe au Chien tribe, similarly explained that if her community cannot “have our shrimp, fish, crabs and oysters . . . [i]t’s not just a way of life, it’s our food. . . . It’s the loss of our livelihood and culture.”⁶⁵

B. *The Islenos*

The Islenos, or Canary Islanders, came early to Louisiana, and have continued to maintain their unique cultural heritage. In 1766, to prevent New Orleans from falling into British hands in the French and Indian War, the French secretly ceded New Orleans and its other territories west of the Mississippi to Spain; the French territories to the East were ceded to the British.⁶⁶ From 1778-1783, Spain recruited residents of the Canary Islands to settle in Louisiana to supplement Spain’s colonial militia in the event of war with England, to spur agricultural production (particularly the sugar cane industry), and to make Louisiana more culturally Spanish.⁶⁷

Coming from mountainous areas in the Canary Islands,⁶⁸ the Islenos had to adapt to new challenges on the Louisiana coast. And adapt they did. Some Islenos settled in areas to the southeast of New Orleans, now southern St. Bernard Parish, and survived as trappers, fishermen, duck hunters, shrimpers, oystermen, crabbers, and alligator hunters.⁶⁹ Many early Isleno settlers initially worked sugar cane or indigo plantations, or farmed or raised cattle on their own lands. However, by the late 1700s most had their land grants bought out by sugar cane plantation owners and subsequently moved toward the fishing communities. When the American Civil War brought an end to the plantation culture, even more Islenos moved into the Bayou Terre aux Boeufs region.⁷⁰ Today, the Islenos live in a few small communities in lower St. Bernard Parish: Delacroix Island, Woods Lake, Reggio, Yscloskey, Shell Beach, and

65. Flaherty, *supra* note 11.

66. *St. Bernard Islenos, Louisiana’s Spanish Treasure*, LOS ISLENOS, <http://losislenos.org/history.html> (last visited Sept. 6, 2010).

67. *Id.*; Samuel G. Armistead, *The Islenos of St. Bernard Parish*, LA. VOICES, http://www.louisianavoices.org/Unit_5/edu_unit5ss_islenos_armiss.html (last visited Sept. 3, 2010); *see also* CAMPANELLA, *supra* note 25, at 24.

68. Aislinn Maestas, *Oil Spill Threatens the Way of Life for Louisiana’s ‘Islenos’ Community: How the BP Oil Spill Disaster Threatens Louisiana’s People and Their Traditions*, NAT’L WILDLIFE FED’N, June 23, 2010, <http://nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Wildlife/2010/06-23-10-Communities-at-Risk.aspx>.

69. *Id.*

70. Bob Marshall, *A Paradise Lost: Louisiana’s Islanders (pt. 2)*, TIMES-PICAYUNE (New Orleans), Aug. 2, 2010, at A1.

Hopedale.⁷¹ In those areas, there have long been strong connections between the land, the water, and Isleno culture.⁷²

This nearly 300-year-old community has struggled to maintain its Spanish cultural heritage in relative isolation. A lifelong resident of Delacroix Island recalled the community of his childhood, most of which was still there forty years ago, as follows:

[A] thriving community of more than 700 Spanish-speaking fishers and trappers who seldom felt the need to travel to New Orleans because the ridges and wetlands of their world provided all they needed. He remembers high, dry ground covered with forests of oak, maple and sycamore stretching from the banks of Bayou Terre aux Boeufs. He remembers wild fruit trees, citrus groves, rabbits and deer, ducks and geese, specks and reds and bass. He remembers how children spent half of each year at distant trapping cabins with the whole family, wedging in school between seasons for shrimp, muskrat, mink, crabs and ducks. He remembers thinking the world would always be like this.⁷³

Thinking the world would always be like this seems perfectly natural, considering the lifestyle of the Islenos on Delacroix Island, or in the other Islenos communities, had changed little from that of their ancestors who initially settled there.⁷⁴ While many of the younger generation have left the area and become more culturally assimilated, the older generations of Islenos have preserved their distinctive Louisiana-Spanish dialect, the Islenos tradition of *decimas*, or narrative poems, and their intimate connection with their environment.⁷⁵

Islenos have weathered all sorts of challenges. They too have seen the wetlands surrounding and protecting their communities disappear at alarming rates.⁷⁶ The dangers posed by the loss of wetlands were first underscored when Delacroix was devastated by Hurricane Betsy in 1965; nonetheless, most returned and rebuilt their lives.⁷⁷ The wetland losses were escalated by the Mississippi River Gulf Outlet (MRGO), a navigation channel completed by the Corps in 1968, which sliced right

71. Armistead, *supra* note 67.

72. Maestas, *supra* note 68.

73. Bob Marshall, *A Paradise Lost (pt. 1)*, TIMES-PICAYUNE (New Orleans), Aug. 1, 2010, at A1.

74. Bob Marshall, *A Paradise Lost (pt. 3)*, TIMES-PICAYUNE (New Orleans), Aug. 3, 2010, at A1.

75. *Louisiana's Spanish Treasure*, LOS ISLENOS, <http://losislenos.org/history.html> (last visited Aug. 17, 2010); Armistead, *supra* note 67.

76. John Burnett, *Louisiana 'Islenos' Torn Apart by Katrina*, NAT'L PUB. RADIO, Dec. 7, 2005, <http://www.npr.org/templates/story/story.php?storyId=5041976>.

77. Bob Marshall, *A Paradise Lost (pt. 4)*, TIMES-PICAYUNE (New Orleans), Aug. 4, 2010, at A1.

through lower St. Bernard Parish.⁷⁸ With this dramatic loss of wetlands, the presence of which would have served as a buffer against storms, the Isleno communities were almost completely wiped out by Hurricane Katrina.⁷⁹ After being scattered throughout the country, many of the Islenos returned to rebuild and restart.

For those whose lives and livelihoods depend on the rich natural resources of the coast, from fish, to shrimp, to ducks, it is crucial that productivity of the ecosystem be restored following a disaster such as the BP blowout.⁸⁰ The Isleno community has already changed dramatically. Few are full-time residents of Delacroix, choosing instead to commute to the area to fish commercially.⁸¹ The BP DEEPWATER HORIZON disaster has Delacroix natives anxious about their futures. They worry about the impact of oil on the crab population. As one native expressed, “If that oil messes up the crabs from laying their eggs, where are we gonna get crabs next year?”⁸² They also worry about whether they will be able to sell Louisiana crabs to other parts of the country.⁸³ For some, crabbing and living off the bounty of the wetlands is all they have ever known.⁸⁴

C. *The Cajuns*

The most well-known coastal Louisiana cultural group is the Acadians, or “Cajuns.” The Acadians were French settlers of Nova Scotia who were expelled in 1755 for refusing to sign loyalty oaths to the British Government.⁸⁵ Having been hunters, fishermen, and trappers in Nova Scotia, many settled in the marshlands of south Louisiana where they could pursue a similar lifestyle.⁸⁶ The Acadians mixed with other French immigrants, and various other immigrants who headed for the

78. The MRGO was deauthorized in 2008 and closed to shipping traffic in 2009. See MISSISSIPPI RIVER GULF OUTLET, http://www.mrgo.gov/MRGO_History.aspx (last visited Sept. 3, 2010). For an in-depth description of the MRGO and its role in escalating damage from Hurricane Katrina, see *In re Katrina Canal Breaches Consolidated Litigation*, 647 F. Supp. 3d 644 (E.D. La. 2009).

79. Burnett, *supra* note 76.

80. Maestas, *supra* note 68.

81. Marshall, *supra* note 77.

82. *Id.*

83. *Id.*

84. *Id.*

85. MIKE TIDWELL, BAYOU FAREWELL: THE RICH LIFE AND TRAGIC DEATH OF LOUISIANA’S CAJUN COAST 99 (2003).

86. Maida Owens, *Louisiana’s Traditional Cultures: An Overview*, FOLKLIFE IN LOUISIANA, http://www.louisianafolklife.org/LT/Maidas_essay/Main_introduction_onepage.html (last visited Sept. 3, 2010).

wetlands for the wealth of natural resources available.⁸⁷ Those who settled near the coast were isolated by the rugged terrain in which they lived.⁸⁸ For over two hundred years they have survived in the region, shrimping, crabbing, fishing, speaking a distinct version of French, singing French music—all a lifestyle intimately connected to the wealth of natural resources available from the coastal wetlands.⁸⁹ A critical part of the Cajun culture and identity is a sense “of independence and self-reliance that was established when their ancestors were forced to find ways to survive in an environment that many considered uninhabitable.”⁹⁰

In the early 1900s, when oil was discovered in south Louisiana, more and more of the bayou Acadians were forced to learn English.⁹¹ Many of today’s older Cajuns grew up with parents who spoke only French. They spoke French themselves at home, and were punished in school if they did not speak English.⁹² The Cajuns, like other groups in the region, developed a tenuous relationship with the oil and gas industry.⁹³ Many, particularly the younger generations, were attracted by the money-making opportunities presented by oil and gas industry.⁹⁴ Others resented the effects the oil and gas industry had upon the wetlands and the wetlands’ resources upon which they had depended for generations.⁹⁵

Over time, most Cajuns have become largely assimilated, but to this day, many continue to live a more traditional lifestyle, living off of hunting, trapping, fishing, shrimping, or jobs otherwise connected to the commercial seafood industry.⁹⁶ In addition, since the late 1980s, there has been a resurgence of interest in promoting and preserving traditional Cajun culture and language.⁹⁷ Even those who did not fish or shrimp for

87. *Id.*

88. *Id.*

89. *See, e.g.,* TIDWELL, *supra* note 85, at 98-101; Owens, *supra* note 86.

90. Mark Guarino, *BP Oil Spill Imperils Cajun Culture*, CHRISTIAN SCI. MONITOR, Aug. 6, 2010, <http://www.csmonitor.com/USA/Society/2010/0806/BP-oil-spill-imperils-cajun-culture>.

91. TIDWELL, *supra* note 85, at 101.

92. *Id.*

93. Debbie Elliott, *A Love-Hate History: Oil and Fishing in the Gulf*, NAT’L PUB. RADIO, July 22, 2010, <http://www.npr.org/templates/story/story.php?storyId=128463645>.

94. *See id.*

95. Guarino, *supra* note 90.

96. TIDWELL, *supra* note 85, at 98-101.

97. In 1968, the Louisiana Legislature created the Council for the Development of French in Louisiana (CODIFIL). The national and international interest in Cajun history and culture did not take significant root, however, until the 1980s. *See Louisiana’s French History*, CONSEIL POUR LE DÉVELOPPEMENT DU FRANÇAIS EN LOUISIANE, <http://www.codofil.org/english/la french history.html> (last visited Sept. 3, 2010). In its early years, CODIFIL’s success was limited, because it failed to connect with the very communities whose culture it was tasked to preserve. SHANE K. BERNARD, *THE CAJUNS AMERICANIZATION OF A PEOPLE* 125-30 (2003).

a living built fishing camps in the marshlands and pursued these traditional activities for recreation.⁹⁸ However, as coastal erosion has eliminated more and more wetlands and replaced them with open waters, the number of fishing camps has dwindled as well.⁹⁹

The BP DEEPWATER HORIZON disaster has had a devastating impact on those who have clung most closely to the traditional livelihoods. Most shrimpers and other commercial fishermen live from season to season, catch to catch. Even short-term closures of fishing and shrimping grounds, in the height of a season, have effects that extend throughout the year.¹⁰⁰ With the long-term vitality of the commercial seafood industry in serious question, the outlook for Cajun fishermen is bleak.

D. Croatian Oystermen

The early to mid-1800s saw a wave of Croatian immigrants arrive in Louisiana from the Dalmatian coast.¹⁰¹ Being experienced fishermen, most settled in Plaquemines Parish and were largely responsible for developing the Louisiana commercial oyster industry.¹⁰² Many who arrived were single men, or married men who left their families behind in Croatia. The married oystermen either made enough money to return to Croatia or ultimately brought their families to Louisiana.¹⁰³ Even today, some who call Croatia home return to Louisiana each year for several months of work as oystermen, making enough to support their families back home.¹⁰⁴ The Croatian communities in Plaquemines Parish are closely knit and supportive.¹⁰⁵ The Croatian oystermen are sometimes called “takos,” a nickname traced to a fisherman who answered “tako-

98. Evan Heimlich, *Acadians*, MULTICULTURAL AM., <http://www.everythingculture.com/multi/A-Br/Acadians.html> (last visited Sept. 6, 2010).

99. Rocky Kistner, *A Fisherman's Plea To Preserve the Louisiana Bayou*, NRDC SWITCHBOARD (June 27, 2010), http://switchboard.nrdc.org/blogs/rkistner/with_his_black_bird_dog.html.

100. The impact of oil and dispersants on seafood, both in the short term and the effects on future generations of fish, shrimp, crabs, etc. . . . has yet to be fully understood. See Suzanne Goldenberg, *BP Oil Spill: Obama's Administration's Scientists Admit Alarm over Chemicals*, GUARDIAN, Aug. 3, 2010, available at <http://www.guardian.co.uk/environment/2010/aug/03/gulf-oil-spill-chemicals-epa>.

101. Carolyn Ware, *Croations in Southeastern Louisiana: Overview*, FOLKLIFE IN LOUISIANA, http://www.louisianafolklife.org/LT/Articles_Essays/main_misc/croations_s_la.html (last visited Sept. 4, 2010).

102. *Id.*

103. *Id.*

104. Ana Campoy, *Disaster Hits Oystermen Near and Far*, WALL ST. J. ONLINE, May 4, 2010, <http://online.wsj.com/article/SB10001424052748703612804575222172901744584.html>.

105. See Ware, *supra* note 101.

tako,” Croatian for “so-so,” when asked how the sea had treated him.¹⁰⁶ In the early years, these oystermen often lived communally and established benevolent associations to make sure all in the community were cared for.¹⁰⁷

The Croatian oystermen popularized the practice of cultivating oysters by seeding them in beds with optimal growing conditions, which produced higher quality, meatier, more flavorful oysters.¹⁰⁸ The modern method for harvesting oysters, by using a dredge rather than handpicking with tongs, has been attributed to Croatian fishermen in 1905.¹⁰⁹ Over time, these immigrants branched out into other aspects of the commercial oyster distribution system and the New Orleans restaurant business.¹¹⁰ The Croatian did far better than “tako-tako.” Until the BP DEEPWATER HORIZON disaster, they had thrived through all the challenges presented by life in Louisiana’s coastal wetlands.

The BP DEEPWATER HORIZON disaster caused the closure of oyster beds throughout the coast of Louisiana.¹¹¹ Oysters, being stationery, cannot escape oil-laden waters. In their environments, a single oyster can filter as much as fifty gallons of water per day.¹¹² Here, too, the impact of steady exposure to water laden with oil and dispersants is a great unknown.¹¹³ Additionally, diminutions of oyster harvesting have chain reactions, and cause losses throughout the oyster distribution network.¹¹⁴ The Croatian community will bear the brunt of these losses.

E. Vietnamese Fishermen

With the fall of Saigon in 1975 began a wave of Vietnamese immigrants fleeing to the United States.¹¹⁵ For many, this was the second

106. Campoy, *supra* note 104.

107. *Id.*

108. See Forrest A. Deseran & Carl M. Riden, *Troubled Waters or Business as Usual? Ethnicity, Social Capital and Community in the Louisiana Oyster Fishery*, in COMMUNITIES OF WORK: RURAL RESTRUCTURING IN LOCAL AND GLOBAL CONTEXTS 131-33 (William W. Falk, Michael D. Schulman & Ann R. Tickmayer eds., 2003). The prior practice had been to simply collect oysters from wild reefs and then move on to a new reef when that stock had been depleted. *Id.*

109. Campoy, *supra* note 104.

110. Ware, *supra* note 101.

111. Campoy, *supra* note 104.

112. *Louisiana: Restoring Oyster Reefs*, NATURE CONSERVANCY, <http://www.nature.org/wherework/northamerica/states/louisiana/preserves/art31219.html> (last visited Oct. 15, 2010).

113. *Gulf Spill May Yield Less Seafood, Higher Prices*, MSNBC.COM, May 4, 2010, http://msnbc.msn.com/id/36915096/ns/business_us_business/.

114. *Id.*

115. Ylan Q. Mui, *A Refuge in Shrimping Turns Toward Ruin*, WASH. POST, June 27, 2010, at A1.

time they had uprooted their lives and started over in just a few short decades.¹¹⁶ When Vietnam was divided in 1954, and the North came under communist rule, Vietnamese Catholics fled south, settling in coastal communities outside Saigon.¹¹⁷ When they came to the United States, many settled in New Orleans East and in coastal regions along the Gulf of Mexico where they could take advantage of their skills as shrimpers and fishermen that they had developed in South Vietnam.¹¹⁸ “An estimated 20,000 Vietnamese fishermen and shrimpers live along the Gulf Coast—about half the total fishing community—and many more work at the seafood processing plants, wholesalers and po-boy shops found at every traffic light.”¹¹⁹ Vietnamese fishermen now account for one-third to one-half of Louisiana’s commercial fishing boats.¹²⁰

The Vietnamese have largely been an insular group, and their successes have caused some resentment among other groups.¹²¹ Those tensions, however, are slowly beginning to ease. In the aftermath of Hurricanes Katrina, Rita, Gustav, and Ike, the Vietnamese shared the same hardships as their neighbors, and have had to start over again.¹²² The BP DEEPWATER HORIZON disaster has hit Vietnamese fishermen hard.¹²³ Like all other Louisiana commercial fishermen, they lost income when waters were closed to fishing.¹²⁴ These problems have been exacerbated by language and cultural barriers that make navigating the BP claims process or obtaining cleanup work from BP a huge challenge.¹²⁵ In addition, many Vietnamese immigrants see accepting help, whether from BP or elsewhere, as a threat to their sense of self.¹²⁶

116. See *Spill Spreads Anxiety Among Vietnamese Fishermen*, USA TODAY, July 11, 2010, available at http://www.usatoday.com/news/nation/2010-07-11-gulf-vietnamese-fishermen_N.htm.

117. Kathy Kilbourne, *Vietnamese Folklife in New Orleans*, FOLKLIFE LOUISIANA, http://www.louisianafolklife.org/LT/Articles_Essays/creole_art_vietnamese.folk.html (last visited Aug. 17, 2010).

118. *Id.*

119. Mui, *supra* note 115.

120. Adam Thomson, *Gulf’s Vietnamese Fish for Handouts*, FIN. TIMES, Aug. 16, 2010, available at <http://www.ft.com/cms/s/0/f481b3a6-a94f-11df-a6f2-00144feabdc0.html>.

121. See TIDWELL, *supra* note 85, at 201-07, 293.

122. Mui, *supra* note 115.

123. Thomson, *supra* note 120.

124. *Id.*

125. Jessica Ravitz, *Vietnamese Fishermen in Gulf Fight To Not Get Lost in Translation*, CNN.COM, June 24, 2010, <http://www.cnn.com/2010/US/06/24/vietnamese.fishermen.gulf.coast/index.html>.

126. Thomson, *supra* note 120.

II. SAVING WHAT IS LEFT OF THE WETLANDS

For all these cultural groups, the ability to preserve their livelihoods and traditions is tied to the future of the coastal wetlands. Prior to the BP disaster, public awareness of the necessity of slowing the rate of wetland loss and restoring wetlands was finally beginning to take hold. In 1971, Louisiana began addressing coastal wetland loss by establishing the Louisiana Advisory Commission on Coastal and Marine Resources.¹²⁷ It was not until 1990, with the Coastal Wetlands Planning, Protection and Restoration Act (CWPPRA),¹²⁸ that there came a concerted effort to develop a coordinated state and federal approach to comprehensive strategies for protection and restoration of Louisiana's wetlands.

To date, however, the Act has led only to small-scale experiments that have produced modest results. For example, the Caernarvon Freshwater Diversion Project "diverts fresh water and its accompanying nutrients and sediments from the Mississippi River to coastal bays and marshes in Breton Sound," with the goal of restoring wetlands and enhancing habitats for fish and wildlife.¹²⁹ The results have included increases in freshwater and brackish water plant life, a net increase of over 400 acres of marshland, and an increase in fishery production.¹³⁰

In January 2010, the State of Louisiana committed \$77 million to a \$230 million package of CWPPRA projects including barrier island restoration, marsh restoration, and improvements to the eroding banks of the Gulf Intracoastal Waterway.¹³¹ Despite this progress, another possible restoration measure has been held up in a dispute with the Corps.¹³² Every year, the Corps dredges sixty million tons of sediment from the lower Mississippi River to keep the mouth of the river open for shipping traffic.¹³³ That sediment could build ten to sixteen square miles of

127. See La. R.S. 51:1363, Acts 1971, No. 35, § 1, *repealed by* Acts 1976, No. 582, § 3.

128. Coastal Wetlands Planning, Protection and Restoration Act, Pub. L. No. 101-646, 104 Stat. 4778 (1990) (current version at 16 U.S.C. §§ 3951-3956 (2006)) (also known as the Breaux Act).

129. U.S. ARMY CORPS OF ENG'RS, CAERNARVON FRESHWATER DIVERSION PROJECT (Mar. 11, 1998), <http://www.mvn.usace.army.mil/prj/caernarvon/caernarvon.htm>.

130. *Id.* The Caernarvon project has also had its detractors. Fishermen in the area claim that the project has actually destroyed some marshlands and devastated inshore shrimping. See Marshall, *supra* note 77.

131. Nikki Buskey, *State Injects More Money into Fixing Wetlands*, HOUMA TODAY, Jan. 22, 2010, <http://www.houmatoday.com/article/20100122/ARTICLES/100129739>.

132. Editorial, *New Orleans Area Mud-Wrestles the Corps*, TIMES-PICAYUNE (New Orleans), Nov. 29, 2009, at B4, *available at* http://www.nola.com/opinions.index.ssf/2009/11/new_orleans_area_mud-wrestles.html.

133. *Id.*

wetlands each year, but instead the Corps either suspends the sediment in the river where it then flows out into the Gulf or dumps it in deep water.¹³⁴

Another highly controversial project, started ostensibly as a means to protect the coast from oil released as a result of the BP blowout, is the State of Louisiana's sand berm project. The \$360 million project, pushed by Governor Jindal and funded by BP, initially proposed to create forty miles of sand berms, or artificial sea walls, from sand dredged from further out in the Gulf.¹³⁵ The berms are being constructed primarily as extensions of the long-diminishing Chandeleur Islands.¹³⁶ The project later was reduced to twenty-two miles of berms to allow for more natural tidal flushing of interior bays.¹³⁷ As an oil control measure, the berms have been only marginally helpful; they have contributed to the capture of only about 1000 barrels of oil.¹³⁸ Critics also have charged that the berm project may threaten fish and animal habitats,¹³⁹ and both the money and dredged sand used in the berm project would be better utilized as part of a more comprehensive coastal restoration project.¹⁴⁰

Undoubtedly any solution will be costly, and the funds thus far designated for coastal restoration fall far short of the projected needs. In 1998, Louisiana approved a plan, Coast 2050—Toward a Sustainable Coastal Louisiana, with projected costs of \$14 billion over thirty years.¹⁴¹ Expenditures to date, over twelve years in, do not even come close.¹⁴²

134. *Id.*

135. John Collins Rudolf, *Louisiana Builds Barriers Even as Oil Disperses*, N.Y. TIMES, Oct. 21, 2010, available at <http://www.nytimes.com/2010/10/22/us/22berms.html>; James C. McKinley & John Collins Rudolf, *Experts Express Doubts on Sand-Berm Proposal*, N.Y. TIMES, May 22, 2010, available at <http://www.nytimes.com/2010/05/22/us/22berms.html>.

136. McKinley & Rudolf, *supra* note 135. The Chandeleur Islands are nesting areas for a variety of birds, including brown pelicans.

137. Rudolf, *supra* note 135. This change also enables the project to come in closer to its \$360 million budget. *Id.*

138. *Id.*

139. *Id.* The dredging process has killed at least a half dozen sea turtles in the Gulf, and the Louisiana Department of Fish and Wildlife has suggested halting the project to assess impacts on fish and wildlife habitats. *Id.* EPA officials have urged the Army Corps of Engineers to reject or at least further study the State's request to extend the berm project to create 101 miles of berms, claiming "the berms pose problems for sea turtles, bird, seagrass beds, navigation, water quality and natural flow of sediment along the coast." Cain Burdea, *Louisiana Sand Berms Are Not Stopping Much Oil from Gulf of Mexico, EPA Says*, TIMES-PICAYUNE (New Orleans), Sept. 9, 2010, http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/09/Louisiana_sand_berms_are_not_s.html.

140. Rudolf, *supra* note 135; McKinley & Rudolf, *supra* note 135.

141. *See* COAST 2050—TOWARDS A SUSTAINABLE COASTAL LOUISIANA (1998), <http://www.coast2050.gov>.

142. Aaron Viles, *Five Years After Katrina, and Still No Coast Rescue Plan in Place*, GULF RESTORATION NETWORK (Aug. 28, 2010), <http://healthygulf.org/201008281486/blog/bps-oil->

Failure to make any significant inroads, combined with the new threats posed to the wetlands by oil in the Gulf, means that costs of wetland restoration will continue to escalate, while the chances of success continue to decline. The same can be said of the sustainability of those cultures which rely upon the wetlands for their livelihoods, traditions, and cultural practices.

III. CAN BP REPAIR CULTURAL LOSSES CAUSED BY THE SPILL?

Even if the cap on BP's liability can be lifted or otherwise avoided,¹⁴³ BP cannot repair all the damage it caused. Even if fishermen, oystermen, shrimpers, and others along the distribution chain are compensated for their lost income, how much money will repair a culture? And, if the litigation surrounding the *Exxon Valdez* oil spill litigation is any indicator, little or none of the compensation will come until years after the losses—years after Louisianans have been forced to transform their lifestyles and livelihoods.

The most relevant precedent from the *Exxon Valdez* litigation provides one marginally hopeful sign. In *In re Exxon Valdez*, a group of Native Alaskans brought a public nuisance claim based on the damage to their way of life.¹⁴⁴ The district court acknowledged the value of cultural and spiritual resources, and recognized a “right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings.”¹⁴⁵ Nonetheless, the district court rejected the Native Americans' public nuisance claim.¹⁴⁶ The United States Court of Appeals for the Ninth Circuit agreed, finding that the claims of Native Alaskans for cultural losses focused on their ability to engage in subsistence hunting and fishing, a privilege the Alaskan Constitution guaranteed to all Alaskans. Thus, the Native Alaskans were not considered to have suffered a “special injury.”¹⁴⁷

drilling-disaster-in-the-gulf-of-mexico/five-years-after-katrina-and-still-no-coast-rescue-plan-in-place.

143. The Oil Pollution Act of 1990, passed in response to the *Exxon Valdez* spill, sets general caps on liability for parties responsible for oil spills. See 33 U.S.C. §§ 2701-2762 (2006). For an offshore facility, liability is capped at seventy-five million dollars. See *id.* § 2704(a)(3), (b). Liability caps do not apply when the responsible part engages in gross negligence or certain other types of conduct, *Id.* § 2704(c).

144. *In re Exxon Valdez*, No. A89-0095-CV, 1994 WL 182856 (D. Alaska Mar. 23, 1994), *aff'd sub nom.* 104 F.3d 1196, 1198 (9th Cir. 1997).

145. *Id.* at *2.

146. *Id.* at *3.

147. *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196, 1198 (9th Cir. 1997).

While *In re Exxon Valdez* acknowledges that unique cultural losses may, in some cases, be compensable, the contours of such a claim are far from clear. For one thing, the district court suggested that the predisaster vitality of the cultural practice is an important consideration:

[O]ne's culture—a person's way of life—is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life. If (and we think this is not the case) the Native culture was in such distress that the *Exxon Valdez* oil spill sapped the will of the Native peoples to carry on their way of life, then a Native subsistence lifestyle was already lost before March 24, 1989. Development of the Prudhoe Bay oil fields, the construction of processing facilities, and the trans-Alaska pipeline on the North Slope of the Brooks Range were, in all probability, a much greater and certainly longer-lasting incursion into Native culture than the *Exxon Valdez* oil spill, yet the Inupiat have thrived. The court doubts that they are less committed nor less successful in preserving their Native culture than are the Native people of Prince William Sound, Kodiak, or the Cook Inlet area. The *Exxon Valdez* oil spill was a disaster of major proportions, but it did not deprive Alaska Natives of their culture.¹⁴⁸

But, how should those considerations be applied to cultural communities for whom the BP DEEPWATER HORIZON disaster is but the latest in a series of devastating blows? The diverse communities and cultures of the Louisiana Gulf Coast have been besieged by hurricanes and decades of wetland loss. If the devastation caused by the DEEPWATER HORIZON disaster pushes them over the edge, the fault may not lie with a lack of commitment to culture.

Any effort by BP to make things right in the aftermath of the DEEPWATER HORIZON disaster should take into account the very intimate nature of cultural loss—that “One's culture—a person's way of life—is deeply embedded in the mind and heart.”¹⁴⁹ In addition, BP must acknowledge its role in contributing to the already occurring wetland loss that enables the oil to have far more dramatic effects.

The future of the wetlands was far from bright before BP began spewing oil into the Gulf and failing to prevent that oil from flowing into the wetlands. The addition of the oil-dispersant cocktail makes for a toxic gumbo that could ruin the communities and cultures of the Louisiana Gulf Coast. The same engineering ambition and prowess that helped control the mighty Mississippi, and enabled BP to drill thousands of feet below the ocean's surface, must now be turned, and turned quickly,

148. *In re Exxon Valdez*, 1994 WL 182856, at *4.

149. *Id.*

to preserving what remains of the wetlands and beginning to restore the vast losses.