

SUPREME COURT OF LOUISIANA

DOCKET NO. 2003-C-3521

ALBERT J. AVENAL, JR., ET AL.

Plaintiffs-Respondents,

VS.

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES

Defendant-Petitioners.

ON APPLICATION FOR WRIT OF CERTIORARI AND/OR REVIEW TO THE
COURT OF APPEAL, FOURTH CIRCUIT, NO. 2001-CA-0843

BRIEF *AMICUS CURIAE* OF THE COALITION TO RESTORE
COASTAL LOUISIANA AND ENVIRONMENTAL DEFENSE IN SUPPORT
OF THE WRIT APPLICATION OF THE STATE OF LOUISIANA
AND THE DEPARTMENT OF NATURAL RESOURCES

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STATEMENT OF INTEREST

The Coalition to Restore Coastal Louisiana (“the Coalition”) is a Louisiana non-profit corporation dedicated to the stewardship of Louisiana’s vanishing coastline. The Coalition’s members include conservationists, businesses, local governments, landowners, civic and religious groups, commercial and recreational fishers, scientists and concerned individuals.

Environmental Defense is a national environmental organization dedicated to using science, economics and law to identify and urge implementation of solutions to complex environmental problems. Environmental Defense has been involved for 30 years in an effort to abate the loss of Delta wetlands and, with the Coalition, has supported State and federal restoration efforts. In recognition of this expertise, Environmental Defense is represented on the Louisiana Governor's Advisory Commission on Coastal Restoration and Conservation.

Your *amici* file this brief because the lower court rulings undermine significantly the still-incipient federal-state effort to protect and restore Louisiana’s coast. Louisiana’s coastal bays and estuaries are eroding at the catastrophic rate of 25 square miles per year. Unless arrested, this erosion may destroy Louisiana’s coastal ecosystem, exposing us to the risk of catastrophic hurricane damage, undermining the oil and gas industry’s extensive infrastructure, and destroying the coastal nursery grounds for commercial and recreational wildlife and fisheries activities. The principle strategy to control and hopefully reverse the process of coastal erosion is to recreate, to the extent possible, the former, natural pattern of water flow through Louisiana’s coast. The Caernarvon project, which diverts water from the Mississippi River into Breton Sound, is one of the first of many planned projects designed to accomplish this objective.

The large takings award in this case threatens to cripple the State financially and to undermine, over the long-term, the ability of the State to finance and develop additional freshwater diversion projects. The aberrational decision creates the prospect that each new step in the coastal restoration program will generate new litigation liabilities for the State. Not surprisingly, the takings award in this case has already caused delays in the development of other diversion projects and might ultimately cause the cancellation of some projects. As a result, the amici submit, the takings award in this case represents a frontal assault, not simply on the pockets on Louisiana’s taxpayers, but on the future economic and environmental viability of this State.

STATEMENT OF THE CASE

To avoid repetition, the amici highlight only those few facts necessary to explain how the rulings of the Court of Appeal, which would produce the largest inverse condemnation award in the history of the United States, would inflict a grave and extraordinarily expensive injustice on the taxpayers of Louisiana and undermine if not destroy the State's ability to deal with catastrophic erosion problems.

1. The \$48 million "takings" award in this case – which will exceed \$1 billion when extended to the entire class – is based on the theory that the State effected a taking by supporting the joint federal-state Caernarvon project on the Mississippi River. By helping to restore natural water flow and salinity levels in Breton Sound, the project apparently reduced the value of certain oyster grounds leased by the State.

2. The leases granted plaintiffs an exclusive right to harvest any planted and naturally occurring oysters plaintiffs could locate in designated areas of Breton Sound for a fifteen-year term. The State remained the owner of the water bottoms themselves; the leases conveyed no rights in the publicly owned waters above the leases; and they conveyed no ownership rights in the oysters. The lessees agreed to operate under "the laws of the state," and to pay \$2 per year per acre to the State.

3. The proposal to construct a diversion project in the area of Caernarvon was publicly discussed by public officials and others beginning in the 1950's. Congress authorized construction of the project in 1965, and the Army Corps of Engineers presented specific project plans in an environmental analysis published in 1968. All of these events pre-date the oldest of the fifteen-year leases allegedly taken as a result of the construction and operation of the project.

4. The primary purpose of the project – and other similar projects which might never get built unless the rulings below are reversed – is to arrest the catastrophic erosion of Louisiana's coast, which is destroying 25 square miles of property per year. In general, these projects are designed to reverse the effects of older Mississippi River channelization projects by re-establishing natural flow patterns.

5. Over many decades, the process of coastal erosion has gradually shifted the areas with the appropriate mix of salt and fresh water for oyster propagation in a landward direction. Prior to 1960, the process of coastal erosion and salt water intrusion had not proceeded to the point that the area at issue in this litigation was suitable for oysters. The first oyster operations were established in the area beginning in the 1960's, after the Caernarvon project was already on the drawing boards.

6. Because the traditional oyster reefs had been severely degraded by coastal erosion, the

oyster industry was one of the earliest and most vocal champions of the Caernarvon project. In fact, the project has been a success and has generally benefitted the oyster industry by helping to restore degraded oyster grounds. Oyster fishermen typically hold various leases in different locations, and many if not all of the plaintiffs have other leases in Breton Sound and elsewhere, in addition to the leases which are the subject of this litigation. While changes in salinity as a result of the project have apparently made some leases less valuable, plaintiffs have not shown that they suffered net economic loss as a result of the project. In fact, there is some evidence that certain oyster fishermen in Breton Sound have benefited from the taxpayers' investment in the Caernarvon project.

7. In 1990, before the Caernarvon project came on line, recognizing the fact that the project could reduce oyster production from certain leases, the State allowed lessees to move from the potential Caernarvon impact area to designated sites outside the projected impact zone. Some lessees participated in this "relay" program. Others, i.e. the plaintiff class in this litigation, did not.

8. The federal courts have rejected parallel claims under the federal Takings Clause against the United States based on the Caernarvon project brought by virtually all of the same plaintiffs in this case. The U.S. Court of Appeals for the Federal Circuit ruled that plaintiffs lacked the type of reasonable "investment-backed expectations" necessary to support a valid taking claim. As a result, the Court of Appeal's judgment in this case imposes 100% of the ostensible takings liability on Louisiana taxpayers, even though the federal government took the lead in developing the project.

9. The record indicates that the \$1 billion-plus compensation award in this case is at least 20 to as much as 200 times greater than the leases' market value. The extraordinary size of this award has led certain plaintiffs to acknowledge publicly that the awards they received are unjustifiable.

REASONS WHY THE WRIT SHOULD BE GRANTED

The decision whether to grant an application for a writ “rests within the sound discretion of this court.” Supreme Court Rule X, Section 1. This case cries out for review in this Court. First, this is a major litigation which has produced the largest inverse condemnation award in U.S. history. The case already has spawned additional litigation over oyster leases, and may spawn even more suits, potentially subjecting the State to billions of dollars more in liability. Second, each of the decisions of the Court of Appeal drew vigorous dissents, indicating, at a minimum, that the case involves important, hotly contested issues. Third, the litigation has enormous implications for the State’s ability to handle the greatest public policy challenge in Louisiana – how to deal with the catastrophic, ongoing erosion of Louisiana’s coast. Fourth, the case has been the subject of a great deal of public discussion and controversy. Fifth, referring to the specific criteria listed in Rule X, (1) the rulings of the Court of Appeal conflict with other decisions of the Court of Appeal and with decisions of this Court and of the U.S. Supreme Court, and (2) the Court of Appeal has erroneously applied the Constitution, the Code, and the statutes to the facts of this case, as we explain in detail below.

REASONS WHY THE RULINGS BELOW ARE LEGALLY ERRONEOUS

The balance of this brief attempts to assist the Court by outlining the five principle reasons why the Court of Appeal erred in finding a taking under Article I, Section 4 of the Louisiana Constitution.¹

I. Plaintiffs Lack a Private Property Right to the Maintenance of Artificial Salinity Levels in the Waters of Breton Sound.

The threshold inquiry in any inverse condemnation case is whether the challenged government action actually affects a protected property interest, that is, “a person’s legal right with respect to a thing or an object.” State of Louisiana v. Chambers Investment Co., 595 So.2d 598, 603 (La. 1992). Plaintiffs failed to cross this threshold hurdle, and for this reason alone the claims should have been rejected.

The case is based on the theory that, because the Caernarvon project altered the salinity levels in the waters above plaintiffs’ leases, thereby making the leases less productive, the State effectively “took” plaintiffs’ property rights under the leases. The premise of this claim is that the leases

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The amici recognize that a number of important legal objections also can be raised to the size of the compensation award in this case, assuming a taking had been made out. Because it is so clear there was no taking at all, it is unnecessary, in the amici’s view, for the Court to reach those complex issues.

themselves included an entitlement to the maintenance of specific salinity levels in State waters. But, in fact, the leases conveyed no such interest. Furthermore, when the State issued these leases, it reserved, explicitly as well as implicitly, certain public rights in the water and water bottoms, and these reserved rights also bar plaintiffs from asserting any private entitlement to a specific salinity level.

Narrow Grant of Rights. The rights conveyed by these leases are 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.” LSA-R.S. 56-423.

This grant is narrow, first, in physical terms. The leases conveyed no ownership interest in the water bottoms. Indeed, the Constitution expressly forbids the State from alienating the bottoms to private parties in circumstances such as this. See Louisiana Constitution, Article IX. Nor did the leases convey any property in the waters of Breton Sound, which remained in public ownership as well. See Louisiana Code, Article 450 (“Public things” include “the waters... of natural navigable water bodies”). Finally, the lessees acquired no property interest in the oysters themselves, even after they have been harvested, because they too are public property: See LSA -R.S. 56:3(A) (“The ownership of all oysters and other shellfish and parts thereof grown thereon, either naturally or cultivated, and all oysters in the shells after they are caught or taken therefrom, are and remain the property of the state.”). This is consistent with the general rule that fish and other wildlife within the State are public property. See State v. Monteleone, 131 So. 291, 292 (La. 1930).

The rights conveyed by these leases are also very narrow in a functional sense. The leases merely grant the lessee the right, to the exclusion of others, to “use” water bottoms to produce however many oysters hard work and/or luck may yield. They provide no guarantee of a commercially valuable harvest, or even that the area will produce any oysters at all. As stated by Judge Tobias in his dissent from the Court of Appeal’s October 15, 2003, decision, an oyster lease grants a lessee only “the uncertain hope that he or she will be able to raise a crop of oysters upon the water bottom.”

Given the narrow scope of the rights granted, plaintiffs failed to establish that the Caernarvon project, by altering the salinity of Breton Sound, impinged on a property interest plaintiffs acquired under their leases. The State’s limited grant conveyed no entitlement to any specific set of conditions in the environment surrounding the lease areas, and the leases conveyed no rights in the water itself. Again as stated by Judge Tobias, “[b]ecause 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.” (Emphasis in original). In sum, plaintiffs have

failed to show that the project affected any property interest belonging to them.

Broad Reservations of Public Rights. Even if the leases could be read as conveying private rights which might have been impinged upon by the Caernarvon project, the leases also reserved important public rights to the State. These reserved public rights supersede any conflicting claim of private right under the leases and, therefore, plaintiffs still cannot pass the hurdle of establishing a protected property interest to support their claims. These leases are, in effect, grants of privileges to exploit public resources, and the leases were made subject to various conditions which the State, as the grantor of the rights, was entitled to enforce. Cf. Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Commission, 715 So.2d 387, 392 (1998) (stating that a state fishing license only confers “a state-granted privilege subject to such limitations as the state may impose in the exercise of its police power.”). Plaintiffs’ leases are subject to at least three distinct reservations of public rights that prevent them from claiming any affect on a protected property interest.

First, whatever rights plaintiffs acquired under their leases are subordinate to the State’s right and responsibility to manage public waters and water bottoms as a public trust for the benefit of the citizens of Louisiana. In Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892), the seminal public trust precedent in America, the United States Supreme Court ruled that upon entering the union, the people of each state “became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.” In Gulf Oil Corp. State Mineral Board, 317 So.2d 580, 589 (1975), this 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.” The Court reiterated the principle in Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 453 So.2d 1152 (La. 1984), observing that a “public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by art. VI, S 1 of the 1921 Louisiana Constitution,” and 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.” See also La. Civ. Code Ann. Art 450 & comment (b) (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”).

The State possesses the authority under the public trust doctrine to “protect,” “conserve,” and “replenish” Breton Sound without running afoul of the Takings Clause. Insofar as State waters and water bottoms are impressed with the public trust, State action to protect and enhance public trust values cannot impinge on private property rights. As Judge Tobias accurately summarized the basic point, “the state cannot appropriate or inversely condemn that which it already owns.”

Thus, for example, in McQueen v. South Carolina Coastal Council, 580 S.E.2d 116, (S.C.), cert denied, 124 S.Ct. 466 (2003), the South Carolina Supreme Court recently rejected a taking claim based on a state agency’s denial of a permit to fill tidelands, stating that plaintiff’s “ownership rights [in tidelands] do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do.” See also Esplanade Props., Inc. v. City of Seattle, 307 F.3d 978 (9th Cir.2002), cert. denied, 123 S.Ct. 2574 (2003) (same). If the State can prohibit the exercise of private rights in public tidelands by prohibiting the filling of them, it can certainly protect and restore public trust waters without unconstitutionally impinging on private rights in tidelands, especially when the claimed private interests are as limited as in this case. In sum, in acting to restore Louisiana’s wetlands, and in the process altering the salinity regime in Breton Sound, the State was exercising its sovereign authority as trustee of public resources, and in that there was no taking.

Second, the leases contain a stipulation “that the lessee will operate both under the laws of this state and the rules and the regulations of the department.” See LSA 49:214.1 et seq. The Louisiana Coastal Wetlands Conservation and Restoration Act of 1989, by which the Louisiana legislature authorized the State to participate in the development of the Caernarvon project, represents a “law of this state.” Because the State was acting pursuant to the 1989 law, its actions fall within the scope of this lease condition. The claimants, when they entered the leases, agreed to live with operation of state laws, and that is all that is being required of them.

Third, the leases were implicitly granted subject to the limitation, which applies to all holders of private property interests under or adjacent to the navigable waters of the United States, that the private rights be subordinate to the federal navigation power. This case involves application of the navigation power because the waters at issue are navigable and the Caernarvon project was designed in part to serve navigational purposes. Section 204 of the federal legislation authorizing the Caernarvon project, Pub. L. No. 89-298, 79 Stat. 1073 (1965), specifically provides that “[t]he following works of improvement for the benefit of navigation and the control of destructive flood waters and other

purposes are hereby adopted and authorized." 79 Stat. at 1074. While the Caernavon project was designed to serve other purposes in addition to promoting navigation, the fact that one of the purposes of the project was to improve navigation is sufficient to bring the project within the scope of the navigation power. See Arizona v. California, 283 U.S. 423, 456 (1931).

Impingements on otherwise protected private property interests as a result of the exercise of the federal navigation power do not constitute "takings" because the navigation power represents a type of "background principle" of property law which limits the scope of private property rights. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992) (citing Scranton v. Wheeler, 179 U.S. 141 (1900), for the proposition that "the interests of 'riparian owner in the submerged lands ... bordering on a public navigable water' [are] held subject to Government's navigational servitude"). See also United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). In a case similar to this case, the U.S. Court of Claims rejected a taking claim by owners of oyster leases whose beds were destroyed by the Navy's construction of an operating base, on the ground that the Navy was acting, at least in part, to promote navigation, and an exercise of the federal navigation power trumps inconsistent private property interests. See Bailey v. United States, 62 Ct.Cl. 77, 94-96 (1926), cert. denied, 273 U.S. 751 (1927).

II. The Indemnity Clauses in the Plaintiffs' Leases Also Bar Them From Meeting the Requirement of a Protected Private Property Interest to Support Their Claims.

Virtually all of the plaintiffs also fail to meet the threshold requirement of a protected property interest for a separate reason – the vast majority of the leases contain "indemnity" provisions absolving the State of any financial liability based on coastal restoration activities.

One representative lease² states that "[t]his Lessee hereby agrees to hold and save the State of Louisiana, its agents or employees free and harmless from any claim for loss or damages to rights arising under this lease, from diversions of freshwater or sediment, depositing of dredged or other materials or any other actions, taken for the purpose of management, preservation, enhancement, creation or restoration of coastal wetlands, water bottoms or related resources." Another, more recent lease,³ states that "Lessee... agrees to indemnify and hold... the State of Louisiana... harmless from and for, all loss, damage, costs and/or expense in any way associated with this oyster lease and the oysters,

² Issued to Clarence Duplessis, dated July 30, 1990.

³ Issued to Kenneth A. Fox, dated April 22, 1996.

cultch, reefs and beds located therein, including any loss, sustained by the Lessee... arising out of, connected with, incident to, or directly or indirectly resulting from or related to diversion of freshwater sediment, deposit of dredged spoil or other material or any other action taken pursuant to coastal restoration projects undertaken by the State and/or the United States.”

These provisions limit the rights that claimants can claim under the leases. Because the lessees agreed to indemnify the State from losses attributable to coastal restoration projects, plaintiffs’ rights do not include any enforceable entitlement not to have their lease interests affected by such projects.

This conclusion is supported by various decisions. For example, in Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986), the Supreme Court rejected a taking claim on the ground that the plaintiff’s contract with the United States reserved to the government the right to modify its commitments; and therefore, according to the Court, the plaintiff’s alleged contract right “did not rise the level of ‘property’” Id. at 55. Also relevant are recent federal appeals court decisions dealing with whether the U.S. Bureau of Reclamation can be held liable based on curtailed water deliveries, where the water delivery contracts absolved the United States of liability in the event of shortages in water deliveries. In O’Neill v. United States, 50 F3d 677 (9th Cir.), cert. denied, 516 U.S. 1028 (1995), the federal appeals court ruled that, in view of contract terms absolving the United States of liability, the plaintiff could not claim a protected right to delivery of a certain quantity of water. See also Rio Grande Silvery Minnow v. John W. Keys, 333 F.3d 1109 (10th Cir. 2003) (same).

Nonetheless, the Court of Appeal rejected plaintiffs’ reliance on the indemnity clauses, for two reasons: (1) this Court’s decision in Jurisich v. Jenkins, 749 So2d 597 (La. 1999), ostensibly dictates the conclusion that these indemnity clauses are “legally invalid,” and (2) while the State was authorized by statute to insert indemnity language in leases issued after July 1, 1995, no leases introduced into the record post-dated July 1, 1995. Both lines of reasoning are incorrect and should be rejected.

Jurisich does not compel the conclusion that the types of indemnity provisions included in plaintiffs’ leases are legally invalid. Jurisich only addressed the validity of one type of lease condition, a so-called “navigation and oil field activity” clause. This clause made the lessee’s rights “subservient to navigation, maintenance of navigation, and all normal, usual and permissible mineral and oilfield activity, which has been sanctioned by the State of Louisiana through a prior existing lease, permit, or contract.” Id. at 598. While the State inserted other clauses in these leases at the same time, including

several indemnity clauses dealing with coastal restoration activities, the Court expressly did not address the validity of these other clauses. Indeed, following an application for rehearing the Court emphasized that “its discussion of the authority of the Secretary [of the Department of Wildlife & Fisheries] and its ultimate holding were restricted to the inclusion of the navigation and oil field activity clause.” *Id.* at 610. Thus, the Court reserved the issue of whether its holding could be extended to other types of indemnity clauses, including, in particular, clauses related to coastal restoration.

Furthermore, the Court’s reasoning in Jurisich strongly suggests that the Court’s holding should not be extended to coastal restoration clauses. In ruling that the Secretary lacked the authority to insert the contested clause in the leases, the Court focused on LSA -R.S., 56:425(C), which states that the Secretary “may make such stipulations in the leases made by him as he deems necessary and proper to develop the [oyster] industry.” The Court reasoned that the navigation and oil field clause did not fall within the scope of this provision because the exclusive purpose of the clause was to benefit the oil and gas industry at the direct expense of the oyster industry. By contrast, the coastal restoration clause is designed to facilitate coastal restoration, in substantial part for the purpose of protecting and developing the oyster industry. While this clause bars financial recoveries by certain oyster fisherman (which has no necessary impact on the health of the industry itself), the overarching purpose of the provision is to help develop the oyster industry. Thus this clause is distinguishable from the clause at issue in Jurisich, and the State has the authority to enforce this type of clause under La R.S. 56:425(C) because it is designed to develop, not harm, the oyster industry.

In addition, the Court in Jurisch considered and rejected the argument that the navigation and oil field clause could independently be justified as an exercise of the State’s authority under the public trust doctrine. The Court reasoned that the Constitution vests primary responsibility for implementing the public trust in the State legislature, and the navigation and oil field clause could not stand because it was contrary to state legislation. In addition, the Court concluded that the clause did not protect the public trust because it “overlook[ed] the importance of the oyster industry as a natural resource of the State,” and did not promote “environmental protection.” *Id.* at 605. By contrast, the state legislation in this case has properly relied upon the public trust doctrine as a legal basis for its coastal restoration efforts, and this clause implements the State’s public trust responsibilities by helping to restore trust resources. Thus, on this basis as well, the reasoning in Jurisich, far from invalidating the lease clauses in this case, supports their legal validity.

Finally, we understand that the Court of Appeal was simply wrong in stating that the record included no leases with indemnity clauses executed after July 1, 1995. The record apparently does include such leases, as well as other leases with similar clauses dating back to at least 1990. Thus, the Court was incorrect in thinking that the record contained no leases with the types of indemnity clauses upon which the State has relied in defending against these claims.

III. The Court of Appeal Erred in Concluding that the Plaintiffs' Lack of Reasonable-Investment Backed Expectations Was Irrelevant Under the Louisiana Constitution.

Assuming for the sake of argument that plaintiffs could claim that the project affected protected property interests under the leases, the judgment of the Court of Appeal should be reversed for another reason. As discussed, the U.S. Court of Appeals for the Federal Circuit concluded that plaintiffs lacked the kind of reasonable investment-backed expectations necessary to support a federal takings claims. The Court of Appeal should have accepted the federal court's resolution of that factual issue and it should have weighed the plaintiffs' lack of reasonable expectations as a factor in deciding whether plaintiffs suffered a taking under the Louisiana Constitution.

The parties do not dispute that the federal court in the earlier Avenal litigation actually concluded that the plaintiffs failed to establish they had reasonable expectations in the maintenance of artificial salinity levels in Breton Sound. See Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996). Nor is there any dispute that, applying the traditional rules of issue preclusion, the claimants are barred from attempting to re-litigate the expectations issue in this case. See 757 So.2d at 14 (Waltzer, J.). Nonetheless, the Court of Appeal believed that the federal court's resolution of the expectations issue had be disregarded in this second round of Avenal litigation for two reasons: (1) Louisiana law does not recognize the doctrine of issue preclusion, and (2) the expectations issue is irrelevant under the Louisiana Takings Clause, as opposed to the federal Takings Clause. On both points, the Court of Appeal reasoning was wrong.

First, the collateral estoppel issue in this case is not governed by Louisiana law, but by federal law. The collateral effect of a determination made in federal court, in a case based on federal law, on a subsequent state court litigation must be determined by federal law. See Reeder v. Succession of Palmer, 623 So.2d 1268 (La. 1993), cert. denied, 510 U.S. 1165 (1994). See also Semtek International Inc v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001) (“[W]e have long held that States cannot give [federal-court judgments in federal-question cases] whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes.”); Restatement (Second) of

Judgments §87 (1982).

In concluding that Louisiana, not federal, law governed, the Court of Appeal erred by relying on Louisiana decisions addressing, as a matter of Louisiana law, the effect of one Louisiana court's determination in a subsequent Louisiana judicial proceeding. See 757 So.2d at 5, citing e.g., Steptoe v. Lallie Keep Hospital, 634 So.2d 331, 335 (1994). Regardless of what the Louisiana rule is, that rule has no bearing in this case governed by federal law.

Second, the Court of Appeal was wrong to conclude that it could ignore the federal court's resolution of the expectations issue because expectations is irrelevant in Louisiana takings analysis. The Court believed that, absent bad faith, advance knowledge of a government action that effects a taking cannot defeat an inverse condemnation claim. But the Court confused expropriation cases in which the taking is uncontested (and the only disputed issue is the amount of compensation), with inverse condemnation cases in which the question is whether a taking had occurred at all. See, 757 So.2d at 14-15 (Waltzer, J.). It is correct, as discussed in the cases cited by the Court of Appeal, that absent bad faith, advance knowledge of a planned expropriation generally will not require a reduction in the size of a compensation award. Id. at 6-7, citing e.g., State v. Vermillion Development Co., 249 So. 2d 167 (1971). But these decisions do not address the issue of whether an owner's advance notice of a regulatory policy or other government action at the time he acquires a property interest is relevant in deciding whether the government action has effected a taking.

Under the federal Takings Clause, the reasonableness of a claimant's investment expectations has long been a central factor in determining whether a government action effected a taking. In Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 123 (1978), the Court declared that, "The economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." In the more recent case of Palazzolo v. Rhode Island, 533 U.S. 606 (2002), the Court addressed whether a lack of reasonable expectations, as evidenced by advance notice of a regulatory constraint at the time of purchase, can categorically bar a taking claim. The Court rejected this categorical rule, but it affirmed that investment expectations is a relevant factor in takings analysis. As stated by Justice O'Connor:

"Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the Penn Central analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings. Under these cases,

interference with investment-backed expectations is one of a number of factors that a court must examine. ...⁴
Id. at 633 (O'Connor, J., concurring). See also Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 535 U.S. 302, 315 n.10 (2002) (stating that “the extent to which the regulation interferes with reasonable investment-backed expectations” is a relevant factor in takings analysis).

The Court of Appeal’s ruling that Louisiana law, far from following federal law on this point, categorically bars consideration of the reasonableness of a claimant’s expectations has, so far as we know, no support in Louisiana law. It certainly is not supported by the “bad faith” cases relied upon by the Court of Appeal, for the reasons discussed above. It is also contradicted by Louisiana decisions referring to “investment expectations” in regulatory takings analysis generally, see, e.g., Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission, 715 So. 2d 387, 392 (1998), and with other decisions rejecting takings claims based on a claimant’s lack of reasonable investment expectations. See e.g., Sanchez v. Board of Zoning Adjustments of City of New Orleans, 488 So.2d 1277 (La. App. Ct.), writ denied, 491 So.2d 24 (La.), cert denied, 479 U.S. 963 (1986). To disregard the reasonableness of a claimant’s investment expectations would also contradict the principles of fairness and justice which are at the heart of takings jurisprudence. See Palazzolo, 533 U.S. at 635 (O'Connor, J.) (“if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost”). In sum, investment expectations are – and should be – a relevant factor in takings analysis under Louisiana law.

IV. The Development of the Caernarvon Project Did Not Effect a Taking Because There is a Public Necessity for State Officials to Address the Serious Threats to Life and Property Posed by the Rapid Erosion of the Louisiana Coast.

Yet another, independent reason the judgment of the Court of Appeal should be reversed is that it is not 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.

The Supreme Court articulated the governing principle in the classic case of Miller v. Schoene,

⁴While Justice O'Connor made this statement in the context of a Penn Central-type takings case, a lack of reasonable investment-backed expectations is likewise relevant in a case brought under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). See Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999). See also Tahoe-Sierra, 535 U.S. at 330 n. 24 (observing that Justice Kennedy concurred in the judgment in Lucas “on the basis of the regulation's impact on ‘reasonable, investment-backed expectations.’”). In any event, plaintiffs have not attempted to show that their leases were rendered literally “valueless,” as required to establish a Lucas claim, see Tahoe-Sierra, 525 U.S. at 330, and the evidence would contradict any such assertion.

276 U.S. 272 (1928), in which the Court rejected the claim that Virginia state officials effected a taking by authorizing the destruction of cedar trees which harbored pests threatening the state's apple crop. The Court said:

“On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. 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.”

276 U.S. at 279 (emphasis added).

In one of the first cases heard by the U.S. Supreme Court, Republica v. Sparhawk, 1 U.S. 357 (1788), the Court approved a congressional order to seize useful articles that might fall into the hands of the British during the American Revolution. The Court justified this alleged infringement on private property by referring to decisions from the English courts in which houses were razed to prevent the spread of fires without creating an obligation to pay financial compensation. The Court described a “memorable instance of folly” in which half of London burned in 1666 because the mayor refused to pull down wooden houses belonging to the Lawyers of the Temple “for fear he should be answerable for a trespass.” Id. at 363. The same kind of “folly” now threatens Louisiana's coastal restoration efforts based on the fear of takings awards.

In Lucas v. South Carolina Coastal Council, 505 U.S.1003 (1992), the Supreme Court recognized the rule of necessity as an established part of American takings law. The Court said that it does not constitute a taking for the government to impair or even destroy private property to prevent more serious damage to the property or lives of others. “What we have in mind,” the Court said, “is litigation absolving the State (or private parties) of liability for the destruction of real and personal property, in cases of actual necessity, to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others.” Id. at 1029, n. 16.

The rule of necessity supports rejection of plaintiffs' takings claims because the crisis threatening the Louisiana coast presents exactly the kind of stark choice the rule is designed to cover. The amici contend, of course, that plaintiffs lack the type of protected property interests necessary to support their claims.. But assuming that plaintiffs could claim that coastal restoration efforts impinged on their property interests, the State did not effect a taking of such property because it was justified in impairing, or even destroying plaintiffs' property under the rule of necessity. Numerous government

and private studies have documented the extraordinarily rapid rate of coastal erosion and how this erosion poses an imminent threat to Louisiana's economic, social, and ecological fabric. See, e.g., Coalition to Restore Coastal Louisiana (2000 Revision) (available at www.crcl.org); Coast 2050: Toward a Sustainable Coastal Erosion (1998) (available at www.lacoast.gov). Government action to address this kind of significant threat to life and property does not constitute a taking.

V. Plaintiffs Have Not Met the Test for a Taking Under the Louisiana Constitution.

Lastly, while the Court need not reach the issue, the judgment of the Court of Appeal also should be reversed because plaintiffs failed to establish the necessary elements of a taking claim under the Louisiana Constitution. This Court in Constance v. State, 626 So.2d 1151 (La. 1993), discussed the liability of a public body in an inverse condemnation case, stating:

“The liability of a public body in such case, however, had been limited to those instances where there is a physical taking or damage to or a special damage peculiar to the particular property and not general damage sustained by other property similarly located.”

Id. at 1156. As Judge Tobias explained in his cogent dissent from the October 15, 2003, decision, the plaintiffs failed to establish a taking under this test.

First, as Judge Tobias stated, “nothing in the record indicates that the DNR actually invaded or physically disturbed or damaged the water bottoms that were leased by the plaintiffs.” The Caernarvon project was not built on or adjacent to the leases themselves, and the change in salinity levels in the water above the leases was not an invasion of the lease areas, especially given that the State retained ownership of the water. Although it was alleged at the beginning of the lawsuit that the Caernarvon project deposited large amounts of sediment in the lease areas, “the scientific evidence in the record does not support this claim.”

Second, Judge Tobias correctly observed that the Caernarvon project did not “substantially interfere[] with the oyster lessees’ exclusive use of the leased water bottoms.” The project did not divest the lessees of the basic right they acquired under the leases, an exclusivity of use for oyster harvesting. Moreover, at least under some flow conditions, certain lessees continued to harvest substantial numbers of oysters after the project went on line, and many of the lessees continued to receive payments from oil and gas companies.

Finally, Judge Tobias accurately stated that “the evidence reflects that the adverse impact of the freshwater diversion in the Breton Sound was not limited to the plaintiffs’ oyster leases.” A variety of other commercial and recreational fishing interests, as well as coastal property owners, were affected by the changes in salinity levels. Moreover, the changes in salinity led to changes in the type of

vegetation in the bay, affecting fish and wildlife interests throughout the area. Thus, while the Caernarvon project certainly had some impact on at least some of these plaintiffs, “the negative effects of the... freshwater diversion were not peculiar to the plaintiffs’ oyster leases,” as required to make out a taking under Louisiana law.

CONCLUSION

For the foregoing reasons, the Court of Appeal plainly erred, on a number of different legal grounds, in affirming the finding of a taking in this case. Accordingly, this Court should grant the State’s application for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been served upon all counsel of record by first-class mail, postage prepaid on this 22nd day of December, 2003.

JOEL WALTZER (#19268)