SUPREME COURT OF LOUISIANA

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DOCKET NO. 2003- C- 3521

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ALBERT J. AVENAL, JR., ET AL.

Plaintiffs-Respondents,

VS.

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES

Defendant-Petitioners.

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ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH CIRCUIT, NO. 2001-CA-0843

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

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Respectfully submitted,
Joel Waltzer (BAR # 19268)
Robert Wiygul (BAR # 7348)
Waltzer & Associates
178 Main Street, Suite 103
Biloxi, Mississippi 39530
(228) 374-0700

Attorneys for *Amicus Curiae* Coalition to Restore Coastal Louisiana and Environmental Defense

OF COUNSEL:

John D. Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20002
(202) 662-9850

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## INTRODUCTION

Despite the multiplicity of issues in this case, the strenuous procedural wrangling, and the public controversy surrounding the trial court's extraordinary compensation award, amici Coalition to Restore Coastal Louisiana and Environmental Defense believe this case can and should be resolved in a simple and straightforward fashion. In your amicis' view, there are three basic points that require rejection of these takings claims.

First, the State's limited grant of permission to plaintiffs to exploit oysters growing on the public's water bottoms simply does not rise, in the circumstances of this case, to the level of a vested property right that they can legitimately wield as legal sword to thwart vital coastal restoration efforts and/or impose ruinous liabilities on the State. Second, all the plaintiffs voluntarily entered into these leases long after the federal government and the state had announced their plans to proceed with the Caernarvon project, thereby willingly accepting the risks and rewards of their chosen business venture; against this background, plaintiffs cannot claim they possessed "reasonable investment-backed expectations" sufficient to support successful takings claims, as the federal appeals court hearing plaintiffs' parallel suit against the United States resolved eight long years ago. Finally, and in any event, this case presented the State with the requirement to make a choice between sacrificing plaintiffs' claimed property interests in their oyster leases and sacrificing far more extensive and valuable private property interests as well public safety; under well established legal principles, the state can and should make the choice that safeguards the more valuable property as well as public safety, and in making that choice the state cannot be held liable for a taking.

Mindful that pictures are worth 1000 words, the amici have appended to this brief several maps, derived from a U.S. Geological Survey website, see www.nwrc.usgs.gov/special/landloss.htm, which depict the past and projected future erosion of the Louisiana coast if planned coastal restoration efforts were not to proceed, as might well happen if this award were upheld. The maps in the appendix depict the dramatic erosion in ten year increments; the short, dramatic animation on the USGS website depicts the changes as a continuous process.

## STATEMENT OF INTERESTS

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 scientists. The Coalition has been a leading voice in the State of Louisiana in terms of developing and promoting an effective, comprehensive coastal restoration program.

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.

## STATEMENT OF THE CASE

This statements of the case highlights only the 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 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 would exceed $1 billion once extended to the entire class – is based on the theory that the State effected a taking under the Louisiana Constitution 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 to the plaintiffs.

2. The leases granted plaintiffs the exclusive right to harvest planted oysters 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 bay bottoms themselves; the leases conveyed no rights in the publicly-owned waters above the leases; and they conveyed no ownership rights in the oysters themselves. The lessees agreed to operate under "the laws of the state," and to pay $2 per year per acre to the State.

3. Beginning in the 1950's, government officials publicly discussed the proposal to construct a diversion project at Caernarvon. In 1956, Congress authorized construction of the project, and in 1968 the Army Corps of Engineers published an environmental analysis with specific project plans. All of these events predate the oldest of the fifteen-year leases allegedly taken as a result of the construction and operation of the project. Therefore, plaintiffs knew about the plans to build this project when they voluntarily entered into the leases.

4. The primary purpose of the project – and other similar, proposed projects which may never be built unless this erroneous judgment is reversed – is to arrest the catastrophic erosion of Louisiana's coast, which is destroying 25 square miles of property per year. The projects are designed to reverse the effects of older Mississippi River channelization projects by reestablishing natural flow patterns.

5. Over many decades, the process of coastal erosion has gradually shifted the areas of the coast 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 oyster fisheries 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 benefited 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 due to the project have apparently made some leases less valuable, plaintiffs have not shown that they suffered any net economic loss as a result of the project. In fact, there is some evidence that certain oyster fishermen in Breton Sound have benefited significantly from the Caernarvon project, meaning that this takings award would convert the project into a double windfall for those plaintiffs.

7. In 1990, before the Caernarvon project came on line, recognizing that the project might reduce oyster production on certain leases, the State allowed lessees to move their leases 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 their takings claims. As a result, the judgment in this litigation would saddle Louisiana taxpayers with 100% of the ostensible takings liability, even though the federal government actually 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 times greater than the leases' market value, and may be as much as 200 times greater than the leases'

market value. The extraordinary size of this award has led certain forthright plaintiffs to acknowledge publicly that the awards they received, even from their self-interested standpoint, are "unjustifiable."

## ARGUMENT

### I. Plaintiffs' Claims Fail at the Threshold Because They Have Not Demonstrated That The Challenged Government Action Affected Any Vested Private Property Rights.

The threshold inquiry in this case, as 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 fail to cross this threshold hurdle, for two separate reasons: (1) the rights to use bay bottoms plaintiffs acquired did not include any vested right to any particular salinity levels surrounding the leases, and (2) in any event, the vast majority of the leases plaintiffs voluntarily entered into expressly informed plaintiffs that salinity levels might change and the State would not be responsible for any resulting economic loss. We discuss each of these grounds for rejecting these claims below.

#### A. Plaintiffs Lack a Private Property Right to Any Particular Artificial Salinity Levels.

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 necessary premise of this claim is that the leases themselves somehow conveyed an entitlement to the maintenance of specific salinity levels in State waters. But, in fact, the leases conveyed no such private entitlement. Furthermore, whatever rights plaintiffs might have acquired under the leases, those rights remained subordinate to longstanding public rights in the States' water and bay bottoms. Because modification of salinity levels as part of the effort to protect and restore Louisiana's coast was well within the scope of these reserved public rights, plaintiffs are barred for a second reason from claiming that he Caernarvon project impinged on any rights belonging to them.

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.

The leases are most remarkable for what they did not convey. The leases, by their terms, conveyed no ownership rights in the bay bottoms, and in fact 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 rights in the waters of Breton Sound, which remained, again, in public ownership. See Louisiana Code, Article 450 ("Public things" include "the waters... of natural navigable water bodies"). Finally, the lessees did not even acquire private property rights 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.").

All that these leases conveyed is the right to "use" a specific area of publicly owned bay bottom, and to the "oyster and cultch grown or placed" on the bay bottoms. Thus, these leases, which convey at most a kind of usufruct, merely grant the lessee an exclusive right, within a defined geographical area, to harvest as many oysters hard work and/or luck may yield. The leases say nothing about the state maintaining specific salinity levels in the vicinity of their leases. More generally, they contain 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." They grant nothing more, and in prosecuting these takings claims plaintiffs claim property rights the State never conveyed and plaintiffs never received.

Given the narrow scope of the rights conveyed, plaintiffs cannot 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 having conveyed private rights which might have been impinged upon by the Caernarvon project, these private rights were are remain subject to reserved public rights that supersede any conflicting claim of right under the leases. Therefore, for this independent reason 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. See 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."). In fact, 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 bay 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").

By virtue of the public trust doctrine, the State possesses the authority, and perhaps even an obligation, to "protect," "conserve," and "replenish" Breton Sound without running afoul of the Takings Clause. This authority could not be abdicated and the State did not so by entering into leases with plaintiffs, whatever the scope of rights the leases might otherwise be understood to convey. Insofar as State waters and bay 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."

Numerous courts have recognized that there can no taking of private property rights that are subject to a public trust when the government acts to protect public trust interests and values. 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 tidelands by prohibiting the filling of them, it can certainly act to protect and restore public trust waters without unconstitutionally impinging on private lease rights in tidelands, especially when the alleged lease rights are as limited as they are in this case. 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-RS 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. That is all that is being required of them. Again, whatever rights the leases might otherwise be read to convey, those right are subordinate to reserved public rights.

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 rights are 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), 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 (emphasis added). To be sure, the Caernavon project was designed to serve other purposes in addition to promoting navigation. But the fact that one of the purposes of the project is 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).

Just as government action to protect public trust interests cannot constitute a taking, so too exercises of the federal navigation power cannot constitute "takings." In the terminology of the landmark United States Supreme Court decision in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992), the navigation power represents a type of "background principle" of property law which limits the scope of private property rights and can defeat a taking claim at the threshold. In fact, the Court specifically cited 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) (same). . In accordance with these principles, in a case very 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. See Bailey v. United States, 62 Ct.Cl. 77, 94-96 (1926), cert. denied, 273 U.S. 751 (1927). The exercise of the federal navigation power, the court stated, trumps inconsistent private property interests. The ruling is directly applicable in this case.

B. The Indemnity Clauses in the Leases Bar Plaintiffs From Claiming Vested Rights.

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 lease[1] states that "This 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,[2] states that "Lessee... agrees to indemnify and hold... the State of Louisiana... harmless from and

[1] Issued to Clarence Duplessis, dated July 30, 1990.

[2] Issued to Kenneth A. Fox, dated April 22, 1996.

for, all loss, damage, costs and/or expense in any way associated with this oyster lease and the oysters, 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' enforceable rights under the contracts cannot include any vested entitlement not to have their lease interests affected by such projects.

This common sense reading of the scope of the rights conveyed by plaintiffs' leases is supported, for example, by federal appeals court decisions interpreting Bureau of Reclamation water contracts absolving the United States of liability for any damages due to curtailed water deliveries. The courts have ruled that this language bars the contract right holders from claiming any infringed of protected rights under the contracts when deliveries are in fact curtailed. Thus, 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.3d1109 (10th Cir. 2003) (same) (subsequently vacated as moot on other grounds).

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 addresses 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 exiting lease, permit, or contract." Id. at 598. While the State had included other clauses in the leases at issue in that case, 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 expressly reserved the issue of whether its holding could be extended to other types of indemnity clauses, including, in particular, clauses related to coastal restoration of the type presently at issue in this case.

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 which, in turn, is designed I to benefit, among other things, the oyster industry. While this clause bars financial recoveries by certain oyster fisherman, this prohibition has no necessary impact on the health of the industry as a whole. Given that an overarching purpose of the provision is to help promote the health of the oyster industry it falls comfortably within the scope of LA -R.S., 56:425(c). Contrary to the reasoning of the Court of Appeals, this clause is plainly distinguishable from the clause at issue in Jurisich, which provided no benefit to the oyster industry whatsoever.

In addition, the Court in Jurisch considered and rejected the argument that the navigation and oil field clause could be independently 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 legislature 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 promote environmental protection and otherwise protect 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 mistaken 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 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.

II. 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 relitigate 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 may be, 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 in reaching that conclusion 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 has 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.

In fact, under the federal Takings Clause, the reasonableness of a claimant's investment expectations is a central consideration 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 effort to expand upon the expectations rule, but it reaffirmed once more 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. ...

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) (confirming 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 contracted 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.Ct. App.), 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 be inconsistent with 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.

III. 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 Rapid Erosion of the Louisiana Coast.

A final, independent reason the judgment of the Court of Appeal should be reversed is that it is not a taking when the government, faced with the choice of destroying certain property interests or allowing other property interests to be destroyed, chooses a course that will safeguard the most property and advance the overall public welfare.

The Supreme Court articulated the governing principle in the classic case of Miller v. Schoene, 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 that the rule of necessity is 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 can claim that coastal restoration impinges 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 catastrophic threat to life and property cannot and does not constitute a taking.

## 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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Joel Waltzer (BAR # 19268)
Robert Wiygul (BAR # 7348)
Waltzer & Associates
178 Main Street, Suite 103
Biloxi, Mississippi 39530
(228) 374-0700

Attorneys for *Amicus Curiae* Coalition to Restore Coastal Louisiana and Environmental Defense

Of Counsel:

John D. Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20002
(202) 662-9850

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 13th day of March, 2004.

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