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LOUISIANA'S OYSTER LEASE RELOCATION PROGRAM:
A STEP TOWARD COMMON GROUND

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LAW CENTER

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I. INTRODUCTION

It is difficult to overestimate the importance of Louisiana's 18,000 square miles of coastal wetlands to the economic and environmental health of Louisiana.¹ Louisiana's coastal wetlands account for more than 25% of all wetlands found within the United States and about 40% of the nation's coastal wetland ecosystems, yet this important ecosystem is disappearing at an astonishing rate.² The loss of Louisiana's coastal wetlands is the highest in the United States, with an estimated loss of between 35 to 45 square miles every year and accounts for 80% of all coastal wetland loss for the lower 48 states.³ Over 80% of Louisiana's loss is occurring in Louisiana's Deltaic Plain, an area running from the Mississippi State line in the east to near the Atchafalaya River to the west.⁴ It has been estimated that, at the present rate of loss, about 1000 square miles or 640,000 acres of coastal wetlands will disappear by 2050.⁵

Most of Louisiana's loss of wetlands can be traced to the construction of flood control levees along the Mississippi River, which restrict the

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1. *No Time to Lose: Facing the Future of Louisiana and the Crisis of Coastal Land Loss*, (Coalition to Restore Coastal Louisiana), 1999, at 1.

2. *Id.*

3. J. A. Barras, P.E. Bourgeois, & L.R. Handley, *Land Loss in Coastal Louisiana*, 1956-90, (National Wetlands Research Center) Open File Report 94-01, Jan. 1994, at 2.

4. *Coast 2050: Toward a Sustainable Coastal Louisiana*, (Louisiana Coastal Wetlands Conservation and Restoration Task Force, Department of Natural Resources), 1998, at 19.

5. *No Time to Lose*, *supra* note 1, at 7.

river's flow.⁶ The levees interrupted the Mississippi River's natural flood cycle, that historically overflowed the river's banks and deposited rich sediments and nutrients into Louisiana's coastal wetlands.⁷ Before the construction of the levees, the Mississippi River would deposit an estimated 144 million tons of sediments each year into the coastal wetlands and marshes, replenishing the coastal wetlands.⁸ This annual flood cycle created a natural balance between natural erosion and subsidence causing the loss of wetlands and the creation of new wetlands.⁹ Today, because of the flood control levees, the vast majority of the Mississippi River's waters, along with the sediments and nutrients that they contain, are flushed out into the Gulf of Mexico and do not contribute to the restoration of Louisiana's coastal wetlands.¹⁰ If this condition is left unchecked Louisiana's coastal wetlands will continue to lead the United States in the loss of coastal wetlands and eventually the loss will result in economic and environmental disaster for Louisiana and the nation.

The direct economic benefits provided by Louisiana's coastal wetlands are illustrated by the fact that Louisiana's commercial fishermen provide between 25% to 35% of the United States' total catch of saltwater fish, with a value of approximately \$290,576,000.¹¹ About 95% of commercially valuable fish caught in the Gulf of Mexico depend on wetland habitats for a portion of their life cycle.¹² Therefore as wetlands disappear those species will also begin to disappear.¹³

In addition to the commercial fishing industry, Louisiana is a major source for other commercially valuable saltwater species, including shrimp, oysters and crabs, with a total value to Louisiana's economy in 1996 of about \$2,604,500,000.¹⁴ All of these species are directly dependant on wetlands for all or part of their life cycle, and will eventually decline in conjunction with wetland loss.¹⁵

Another major source of revenue to Louisiana comes from recreational saltwater fishermen, seeking speckled trout, redfish and other game

6. *Freshwater Diversion: Hope for Our Coast*, LA. CONSERVATIONIST, vol. 43, n. 2 Mar.-Apr. 1991, at 15.

7. *No Time to Lose*, *supra* note 1, at 2.

8. *Coastal Restoration Under CWPPRA*, LA. CONSERVATIONIST, vol. 43, n. 2 Mar.-Apr. 1991, at 1167.

9. *Coast 2050*, *supra* note 4, at 22.

10. *Freshwater Diversion: Hope for Our Coast*, *supra* note 6, at 15.

11. *No Time to Lose*, *supra* note 1, at 20.

12. Bowman, Bar and Carl, *Louisiana's Vanishing Coast*, LA. CONSERVATIONIST, vol. 46, n.1, 1994, at 5.

13. *Scientific Assessment of Coastal Wetland Loss, Restoration and Management in Louisiana*, J. COASTAL RES., Special Issue n. 20, May 1994, at 43-47.

14. *No Time to Lose*, *supra* note 1, at 23.

15. *Scientific Assessment of Coastal Wetland Loss, Restoration and Management in Louisiana*, J. COASTAL RES., Special Issue n. 20, May 1994, at 43-47.

fish species.¹⁶ In 1996 alone, recreational fishermen pumped approximately \$944,000,000 into Louisiana's economy.¹⁷ Again, the majority of the most sought after game species of saltwater fish in the Gulf of Mexico, including redfish and speckled trout, depend on Louisiana's coastal wetlands for a significant part of their life cycle.¹⁸ As Louisiana's wetlands disappear, its ability to support these valuable species will decline, forcing recreational fishermen to seek trophies in other waters.¹⁹

Indirect economic benefits provided by Louisiana's coastal wetlands are less apparent, but are just as important. Indirect economic benefits provided by wetlands include the protection of Louisiana's coast from the effects of storms and hurricanes by acting as a buffer zone, absorbing the force of the storm surge and wind.²⁰ It is estimated that every 2.7 miles of wetlands reduce the storm surge by one foot.²¹ The benefits provided by this protection should not be underestimated, since about 70% of Louisiana's population lives within the coastal zone, and is subject to the destructive force of hurricanes.²² In dollar value it is estimated that each acre of wetlands provides between \$208 and \$904 of storm protection from winds and storm surge.²³ This means that when Louisiana loses approximately 35 sq. miles of coastal wetlands each year, it also loses about \$4,659,200 of storm protection.

A. Restoration Efforts

To stabilize and restore Louisiana's coastal wetlands the United States Congress passed the Coastal Wetland Planning, Protection and Restoration Act of 1990 (CWPPRA) to provide funds for coastal restoration projects designed to stabilize and ultimately restore Louisiana's coast. CWPPRA created a Task Force to direct coastal restoration projects and established a list of high priority coastal restoration projects.²⁴ By doing so CWPPRA allows Louisiana and the various federal agencies involved in coastal restoration to coordinate their efforts to stop the loss of Louisiana's coastal wetlands and to share the cost of restoration projects. Already CWPPRA has allocated almost \$250 million toward coastal

16. *No Time to Lose*, *supra* note 1, at 23.

17. *Id.*

18. *Id.*

19. *Id.*

20. *No Time to Lose*, *supra* note 1, at 25.

21. *Id.*

22. *Id.* at 26.

23. Costanza, Farber and Maxwell, *Valuation and Management of Wetland Ecosystems*, *ECOLOGICAL ECON.*, vol. 1, at 335-361.

24. Hebert, *supra* note 8, at 1171.

restoration projects and will continue to allocate funds supporting projects in the future.²⁵

One of the major components of the coastal restoration plan is the construction of freshwater diversion projects, which divert a portion of the Mississippi River into coastal wetlands. The diversion of sediment rich river water is designed to mimic the natural flood cycle and allow the river's sediments and nutrients to be deposited in the coastal zone.²⁶ At the same time the flow of fresh water will help combat saltwater intrusion that kills many types of coastal vegetation.²⁷ The diversion of fresh water into areas that are presently salt water or brackish will cause a significant change in the salinity in that area, causing many of the saltwater species to move out of the area and into areas with higher salinity.²⁸ In general this process will not cause significant net loss of bio-diversity, because as saltwater species migrate out of the area, freshwater and brackish water species will replace them.

B. Restoration Impacts on Oysters

Oysters, which are not capable of moving in response to the changing level of salinity, will suffer some short term displacement, until the salinity stabilizes and the oyster population in the area is restored to its historic, pre-flood control status.²⁹ The displacement will occur because of the relatively narrow range of salinity in which oysters thrive. Oysters are most abundant in waters that have a salinity ranging from 10 to 30 parts per thousand.³⁰ For these conditions to exist there must usually be a source of fresh water flowing into the area, moderating the salinity level.³¹ In the past the fresh water was provided by Louisiana's many rivers and bayous flowing into the Gulf of Mexico.³² However, as levees were built to restrict flooding and canals were constructed to increase access to the Gulf of Mexico, the flow of fresh water began to de-

25. LOUISIANA COASTAL WETLANDS CONSERVATION AND RESTORATION TASK FORCE, *supra* note 4, at 2.

26. Hebert, *supra* note 8, at 1166.

27. *Id.* at 1169.

28. BOWMAN ET AL., *Louisiana's Vanishing Coast*, 46 LOUISIANA CONSERVATIONIST 5 (1994).

29. Hebert, *supra* note 8, at 1180.

30. *The Oyster Fishery of the Gulf of Mexico*, United States: A regional Management Plan, GULF STATES MARINE FISHERIES COMMISSION, No. 24, March 1991.

31. LOUISIANA COASTAL WETLANDS AND RESTORATION TASK FORCE, *supra* note 4, at 22.

32. *Id.* at 40.

cline and salinity levels began to increase.³³ As a consequence of the shifting salinity in coastal Louisiana, the oyster's range of habitation also began to shift and oyster beds began to form in areas that were too fresh in the past.³⁴ In addition, oyster beds at the Gulf edge of their range began to decline as the salinity increased.³⁵ The net result was a shifting inland of the most productive oyster beds.³⁶

Freshwater diversion projects will allow fresh water to again flow into some of Louisiana's coastal wetlands and recreate conditions similar to those that existed prior to the building of flood control structures.³⁷ As this takes place the range of habitation of Louisiana's oysters will begin to shift toward the Gulf of Mexico and some of the historic range will be re-established.³⁸

The effect of the influx of fresh water into coastal Louisiana will cause oyster beds in areas that experience lowered salinity to produce fewer commercially marketable oysters, but those oyster beds that have not been commercially productive in recent decades because of high salinity waters will become more productive as they become fresher and within the oyster's ideal salinity range.³⁹ The ultimate result of freshwater diversion projects on oyster production will be at least a partial restoration of historic oyster beds and an increase in overall oyster production.⁴⁰

C. Caernarvon Project

The Caernarvon freshwater diversion project is located on the Mississippi River in Plaquemines Parish, about 10 miles south of New Orleans. The project is designed to divert up to a maximum of 8,000 cubic feet per second of Mississippi River water into the Breton Sound area, where the sediment and nutrients will help restore the area's coastal wetlands.⁴¹

Since the Caernarvon freshwater diversion project began operation in 1991 the rate of wetland loss has been reversed and the area has gained

33. Douglas F. Britton, *Avenal v. United States: Does the State Of Louisiana Have a Property Interest in the Salinity of its Waters?*, 2 OCEAN & COASTAL L.J. 154 (1998).

34. *Id.* at 154.

35. *Id.*

36. *Id.*

37. *Freshwater Diversion: Hope for Our Coast*, *supra* note 6, at 15.

38. *Id.* at 15.

39. *Id.*

40. *Id.*

41. *Caernarvon Project Overview*, Louisiana Coastal Restoration Web Site (last modified March 11, 1998)

<<http://www.lacoast.gov/Programs/caernarvon/Index.htm>>

about 400 acres of new marshland.⁴² In the same period the productivity of public seed oyster grounds located in the area "has increased over three orders of magnitude," indicating that the influx of freshwater is a benefit to the oyster industry.⁴³

The influx of fresh water will inevitably cause a dislocation of saline tolerant species now found in the area, which will be forced to migrate to higher salinity waters and will be replaced by freshwater and brackish water species. This is not only expected, but is one of the goals of the project, to restore the area's coastal wetlands to its historic configuration.⁴⁴

II. FEDERAL LAWSUIT

The President of the Louisiana Oyster Dealers and Growers indicated support for freshwater diversion structures at a 1984 public hearing, but oyster fishermen that own leases in the affected area have voiced concerns about damage to productive oyster beds located near diversion projects.⁴⁵ A group of oyster fishermen that lease water bottoms in the Breton Sound Basin brought an action against the federal government in United States Court of Federal Claims and against the State of Louisiana in State Court.⁴⁶ The action brought against the federal government alleges that a taking of their lease occurred, in violation of the Fifth Amendment of the United States Constitution, because of a freshwater diversion project. "Specifically, the plaintiffs alleged that the Caernarvon project diluted the salinity level in the waters above their leased grounds (water bottoms) and caused silt deposits in the leased area."⁴⁷ These conditions were not favorable to oyster growth and the plaintiffs claim that the Federal Government, through the Caernarvon project, disabled their ability to cultivate oysters.⁴⁸ The Fifth Amendment prevents the federal government from taking private property for public use (eminent domain) without fair and just compensation.⁴⁹ The Fifth Amendment also prohibits federal actions that deny a property owner of all economically viable use of the property without fair and just compensation.⁵⁰

42. *Id.* at 2.

43. *Id.*

44. *Id.* at 1.

45. *Avenal v. United States*, 33 Fed.Cl. 778 (1995).

46. *Id.* at 782.

47. *Id.*

48. *Id.*

49. *Avenal v. United States*, 33 Fed. Cl. at 782.

50. *Constitution of the United States of America: Analysis and Interpretation*, Congressional Research Service, Library of Congress, 1987, at 1308.

However, to obtain protection from the Fifth Amendment the property owner must first demonstrate a legally recognizable interest in the property.⁵¹ In this case, the United States, as the defendant, argued that the plaintiffs did not have a legally recognizable property interest for purposes of the Fifth Amendment, because the "plaintiffs hold no property right in the maintenance of artificially high salt water in the area of their leases"⁵² Based on this contention the United States made a motion for summary judgment.

The court granted the government's motion for summary judgment, holding that the "lessees lacked a compensable property interest in the salinity of water for purposes of a Fifth Amendment taking claim."⁵³ The court commented that:

In this case the Federal Government created a benefit for plaintiffs, albeit an unintended one. Both parties admitted during argument that but for the Federal Government's levee construction, oyster growth in the area of the plaintiff's leases would not have occurred, because the area was too fresh to sustain such growth.⁵⁴

The construction of the Caernarvon Project was in response to the artificially high levels of salinity and sought to reverse this condition by diversion of fresh water from the Mississippi River into the coastal wetlands.

The court went on to state that the:

State acquired no property interest in the salinity level of the waters above plaintiffs' leased grounds. Plaintiffs therefore also hold no compensable expectancy in the salinity. Accordingly, in certain limited circumstances, the Federal Government can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment.⁵⁵

In short, the court held that the state does not own the salinity level of the water covering the water bottoms, therefore, no property interest in the salinity level of the water could be granted by the state to the lessee. The salinity of the water is incidental to the leased water bottom and can not become a property right.

51. *Id.* at 1308.

52. Avenal, *supra* note 44, at 786.

53. Avenal, *supra* note 44, at 790.

54. *Id.*

55. *Id.*

The plaintiffs then appealed the ruling to the United States Court of Appeals, Federal Circuit. The Appeals Court reversed part of the trial court's ruling and stated that the plaintiffs: "have valuable property rights created by the State and protected by the Constitution. These rights include the right to harvest oysters and the right to damages when the acts of another harm the oyster beds, including harm caused by deleterious changes in the waters in which the beds lie, for example by unlawful pollution."⁵⁶

With this declaration, the court recognizes that the plaintiff's right to cultivate and harvest oysters is a property right protected by the Fifth Amendment.⁵⁷ However, the court noted that the establishment of a legally cognizable property interest is not, by itself, sufficient to gain Fifth Amendment protection. Once it has been shown that a property interest exists, then the government action must be subjected to a "three-prong test" to determine if the Fifth Amendment is applicable.⁵⁸ The test examines the type of government action, the level of economic impact caused by the government's action and the level of government interference with the property owner's reasonable economic expectation from the property.⁵⁹ If it appears to the court that the government's action rises to a level that effectively denies the owner's reasonable economic expectation from the property, then the Fifth Amendment protection is appropriate.

In this case the court determined that the Caernarvon project did not result in a constitutional taking, because the plaintiffs knew or should have known of the federal and state efforts to address the loss of coastal wetlands, and took "advantage of the existing conditions for their own economic advantages."⁶⁰ The desired and anticipated results from the construction of the Caernarvon freshwater diversion project were publicized and a number of public meetings were held for the community to voice suggestions and objections.⁶¹ The plaintiffs, the court determined, were well aware that the water's salinity level would be altered when the project was completed when they leased the water bottoms for oyster cultivation.⁶²

The court noted that the plaintiffs, as entrepreneurs, are entitled to the right "to capitalize on the opportunities afforded by government action," but they do not have a "guarantee of non-interference by the gov-

56. *Avenal v. United States*, 100 F.3d 933, 937, 65 USLW 2352 (Fed. Cir., Nov. 12, 1996) (No. 95-5149).

57. *Id.* at 937.

58. *Id.*

59. *Id.*

60. *Avenal*, 100 F.3d 933, 937.

61. *Id.*

62. *Id.* at 938.

ernment" when they knew or should have known of government plans to divert fresh water into the area where their leases are located.⁶³ Therefore, the Court held that "in light of the history of events in this case, plaintiffs, as a matter of law, must be assumed to have known that their rights to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about" and affirmed the summary judgment.⁶⁴

III. STATE LAWSUIT

The plaintiff also brought an action in Louisiana State Court, naming the Louisiana Department of Natural Resources (DNR) as the defendant, based on Article 1, Section 4 of the Louisiana Constitution, which states that "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner..."⁶⁵ If the state's action is found to be in violation of Article 1, Section 4 the state is required to compensate the owner "to the full extent of his loss."⁶⁶

The State made a motion for summary judgment to the trial court. The state contended that the plaintiffs brought the same action against the Federal Government and had failed. Therefore, according to the State's motion, the plaintiffs should be collaterally estopped, or barred from re-litigating the same issue in an action against DNR.⁶⁷ The State argued that the issue had been decided in federal court and thus Louisiana should not be forced to re-visit an issue that had been settled.⁶⁸ The trial court denied the motion for summary judgment.⁶⁹

In Louisiana the denial of a motion for summary judgment is considered an interlocutory judgment, which is a decision that will not necessarily determine the final outcome of the action and the parties do not have the right to an automatic appeal of the judgment.⁷⁰ However, the Court of Appeals may, at its own discretion, review a trial court's decision concerning a motion for summary judgment.⁷¹ In this case the Court of Appeals of Louisiana, Fourth Circuit, exercised this right and reviewed the decision to deny the motion for summary judgment.

63. *Id.* at 937.

64. *Avenal*, 100 F.3d 933, 938.

65. LA CONST. art. I, § 4.

66. *Id.*

67. *Avenal v. Department of Natural Resources*, 99-0127 (La. App. 4 Cir. 3/3/99), 1999 WL 112500 (La. App. 4 Cir. 1999).

68. *Id.* at 112500.

69. *Id.*

70. *Id.* at 112503.

71. *Id.*

In the past Louisiana did not recognize the doctrine of collateral estoppel, regarding it as "alien to Louisiana law."⁷² However, in 1990 Louisiana adopted the doctrine of issue preclusion, or collateral estoppel, with the passage of La. R.S. 13:4231. La. R.S. 13:4231 revised Louisiana's *res judicata* doctrine by barring re-litigation of "any issue raised in a subsequent action brought by the defendant against the plaintiff.... provided that the issue had been actually litigated and essential to the judgment."⁷³ Therefore, if collateral estoppel is to be used under Louisiana law three elements must be present. The issue must have been raised in a prior action between the same plaintiff and defendant, the issue must have been actually litigated and the issue must have been resolved in the judgment.

In the federal action the plaintiffs named the United States as the defendant, while the plaintiffs named the State of Louisiana and the Department of Natural Resources as the defendant in the state action. Thus, under Louisiana law, collateral estoppel would not apply.

However, the Court of Appeals determined that it "must apply federal law to determine the effect of the judgment, rendered in the federal action, on the proceedings in state court."⁷⁴ In doing this the court was required to adopt the federal doctrine of collateral estoppel.

The federal doctrine of collateral estoppel requires three elements to be satisfied before an action is barred from re-litigation. First, the issue before the court must be identical to the prior action. Second, the issue must have actually been litigated in the prior action. Third, the resolution "of the issue in the prior action must have been a necessary part of the judgment in the earlier action."⁷⁵

According to the court, "collateral estoppel, unlike *res judicata*, does not require mutuality between the parties to the prior action and the parties in the subsequent action" for the issue to be barred from re-litigation.⁷⁶ The court held that, so long as "the facts and the legal standard used to assess the facts are the same" in the prior litigation and the current litigation, the use of the doctrine of collateral estoppel to bar re-litigation is appropriate.⁷⁷

The Court of Appeals held that the action brought against Louisiana, with the exception of the party named as the defendant, is "exactly the same" to the prior action brought against the United States. The court also held that the issue had been "actually litigated in the prior litigation and resolved in the federal court's granting of summary judgment in favor

72. Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La. 1978).

73. LA. REV. STAT. ANN. § 13:4231 (comment b) (West 2000).

74. Reeder v. Succession of Palmer, 623 So.2d 1268 (La.1993).

75. Recoveredge, L.P. v. Pentecost, 44 F.3d 1284, 1290 (5th Cir. 1995).

76. Avenal v. Louisiana, 99-0127, 757 So.2d 1, 7 (La. App. 4th Cir. 3/3/99).

77. *Id.* at 7.

of the defendant.”⁷⁸ Therefore, the court held that the first element required for the application of collateral estoppel, that the facts of the prior and current litigation are identical, was satisfied.

In addressing the second element for the use of the doctrine of collateral estoppel, that “the legal standard used to assess the facts are the same,” the court noted that the action brought against the United States relied on the Fifth Amendment’s protection against the taking of private property for public use without fair compensation to the private owner, while the action against Louisiana was based Article 1, Section 4, of the Louisiana Constitution.⁷⁹ Both the Fifth Amendment and Article 1, section 4 of the Louisiana Constitution guard against uncompensated taking of private property. The court noted that “the Louisiana Constitution guarantees fewer protections against public takings than the United States Constitution” and that Louisiana courts generally use “federal law in analyzing whether particular facts constitute a taking of property.”⁸⁰ Therefore, the legal standard used in both the prior action and the current action are the same, satisfying the second condition required to make the use of collateral estoppel appropriate.

Because the court found that collateral estoppel was appropriate to use in this action, it held that the “federal judgment precludes re-litigation of an issue which a federal court has already decided” and granted the State’s motion for summary judgment.⁸¹

At the time this article is being written the plaintiffs have been granted a re-hearing by the Court of Appeals, which was conducted on September 15, 1999. No written decision has been handed down at this time.

IV. OYSTER LEASE RELOCATION PROGRAM

Within the territorial boundaries of Louisiana, the water bottoms of natural navigable water bodies and territorial seas are owned by the State of Louisiana.⁸² However, the right to use the water bottoms may be leased by the state to private persons.⁸³ About 52% of the oysters taken from Louisiana’s waters are harvested from private oyster beds established on state water bottoms leased from the state.⁸⁴ In fact, in January

78. *Id.*

79. *Id.* at 6.

80. *Id.* at 5.

81. *Id.* at 8.

82. LA. CIV. CODE ANN. art. 450.

83. *Id.*

84. Clarence Meyers, Oyster Lease Survey Section Web Page (visited April 5, 1999) <<<http://oysterweb.dnr.state.la.us/oyster/oysterland.htm>>>.

of 1999, a total of 403,141 acres of state water bottoms were under lease by private individuals for oysters production.⁸⁵

To help protect these leaseholders from problems that may be caused by coastal restoration programs the state has passed La. R.S. 56:432.1, which created the Oyster Lease Relocation Program (OLRP). The OLRP is designed to "reduce and mitigate potential adverse impacts from the State's coastal restoration efforts which might be sustained by the tenants of oyster leases" and "to provide relief to those leases" adversely affected by the coastal restoration activities.⁸⁶ This legislation is in response to the likelihood that oyster leases near freshwater diversion projects will suffer damage, caused by increased turbidity and from a change in the salinity of the water due to the influx of fresh water into an area that has a high salinity. The OLRP is organized to pay the lessee of an affected oyster bed the cost of moving their operation.⁸⁷ While the cost per acre of water bottom leased for private oyster beds is relatively low, established at \$2.00 per acre of water bottom leased, the oyster producer must generally make improvements to the lease before an oyster bed can be established.⁸⁸ It is necessary in most areas of Louisiana's coastal wetlands to place a substrate of clam shells, so that the oysters will not sink into the mud and suffocate.⁸⁹ The cost and effort of these improvements can be substantial.

The OLRP statute states that the Louisiana Department of Natural Resources (DNR) "shall develop a program to reduce and offset the potential adverse impact of the coastal restoration efforts on oyster leases."⁹⁰ The Oyster Lease Relocation Program requires DNR to identify the areas likely to be negatively affected by coastal restoration projects and to notify the oyster leaseholders within these areas of possible impact to their leases.⁹¹ Once the areas that will be affected are identified the Department of Wildlife and Fisheries must "make a reasonable effort to provide notice to all oyster lessees that may potentially suffer damage from a coastal restoration project."⁹² The notification to the lessee must include a description of the coastal restoration project, including a map of the af-

85. *Id.*

86. LA. REV. STAT. ANN. § 56:432:1 (West 2000).

87. *Louisiana Oystermen Fear Effect of Diversion Project*, THE ADVOCATE, Dec. 8, 1998.

88. *The Oyster Fishery of the Gulf of Mexico*, *supra* note 30, at 14-2. (Louisiana cost-per-acre for an oyster lease is relatively expensive when compared to other states.).

89. *Id.*

90. LA. REV. STAT. ANN. § 56:432:1 (A) (West 2000).

91. LA. REV. STAT. ANN. § 56:432:1 (B) (West 2000).

92. LA. ADMIN. CODE tit. 43: I, § 852 (2000) (New regulations are being issued, but have not been promulgated at the time of this paper's publication).

affected area and a copy of the regulations concerning the OLRP.⁹³ Notification must also include a statement that informs the leaseholder that they have 30 days to respond to DNR if they desire to participate in the program and that the limited program funds will be distributed to participating leaseholders on a "first-come, first-served basis."⁹⁴ If multiple responses are received by DNR on the same day the availability of funds for each responding leaseholder will be determined by drawing of lots.⁹⁵

Each leaseholder notified by DNR has four options for each lease being affected by the coastal restoration project.

1. The leaseholder can keep the lease and run the risk of damage from the project.

2. The leaseholder can exchange the lease for another lease in an unaffected area.

3. The leaseholder can relocate his or her oyster bed to an area outside of the zone of impact.

4. The state may choose to purchase the lease, if it is more cost effective than relocating the lease.

A. *Retention of the Lease*

If the leaseholder chooses to retain the affected lease and take a chance that their lease or leases will not suffer any negative effects, then the lease will be amended to include a waiver of liability clause which stipulates that the lease is subject to any coastal restoration project and that the leaseholder accepts all risks of operating in affected areas. This clause states that the state of Louisiana is "free and harmless" of any damages caused from coastal restoration projects.⁹⁶ However, the leaseholder retains the right to choose one of the other OLRP options at a later time and DNR is obligated by the OLRP to "make every reasonable effort" to accommodate such requests.⁹⁷ However, if the funding is not available when the leaseholder makes the amended request, then the request will be denied.⁹⁸

B. *Exchange*

The leaseholder may choose to exchange the affected lease for leases outside of the affected area, so long as the new lease is acceptable

93. LA. ADMIN. CODE tit. 43: I, § 852.

94. *Id.*

95. *Id.*

96. LA. ADMIN. CODE tit. 43: I, § 856.

97. *Id.*

98. *Id.*

to both the lessee and the Department of Wildlife and Fisheries.⁹⁹ The exchange of the leases will be "in kind," meaning that the new water bottoms will be comparable to those being given back to the state and can not exceed the size of the original lease by more than 10%. The state is required to conduct an assessment of the current value of the lease and level of oyster productivity of the lease. The lease's value and productivity is established by determining the lease's type and volume of the substrate (foundation) of the oyster bed, known as the Cultch Currency Matrix.¹⁰⁰

The lease on the new area will be considered a continuance of the leaseholder's original lease, but the 15 year term of the lease will begin on the date of the exchange.¹⁰¹ Generally, an affected leaseholder can choose this option only when there is adequate funding for the exchange process, because DNR is responsible for the payment of the lessee's application fee and the cost of conducting the survey to establish the Cultch Currency Matrix.¹⁰² However, DNR retains the option, under special circumstances, to allow an exchange for specific leases even after funding for the OLRP has been exhausted.¹⁰³

C. *Relocation of the Oyster Lease*

The option to relocate the affected lease allows the leaseholder one year to move the marketable oysters and seed oysters from the affected oyster beds to an existing lease or to a new lease, outside of the probable impact area and have all or part of the cost of the relocation reimbursed by the state.¹⁰⁴ When a leaseholder chooses to relocate their lease, the State, in cooperation with the Oyster Task Force, will determine the level of reimbursement that will reasonably allow the leaseholder to relocate the oyster bed and any living seed oysters. The reimbursement is based on the Cultch Currency Matrix, or type of bottom located at the affected lease, so that comparable conditions can be created at the new lease and costs associated with the relocation of the affected lease.¹⁰⁵ Once the lessee receives notification of DNR's assessment of the lease's Cultch Currency Matrix and the reimbursement offer he or she has 30 days to accept the offer, or to request that the state purchase the lease. A leaseholder that accepts the reimbursement offer has 90 days to notify DNR of the date

99. LA. ADMIN. CODE tit. 43: I, § 854.

100. LA. ADMIN. CODE tit. 43: I, § 859.

101. LA. ADMIN. CODE tit. 43: I, § 854.

102. *Id.*

103. *Id.* It is unclear as to what would qualify as special circumstances.

104. LA. ADMIN. CODE tit. 43: I, § 855.

105. *Id.*

and location of the cultch's relocation and 12 months from the leaseholder's acceptance to carry out the relocation.¹⁰⁶

D. *Purchase*

A leaseholder that does not accept DNR's relocation reimbursement offer, can request that DNR purchase the lease, along with improvements made to the lease, rather than relocate the lease.¹⁰⁷ If the purchase price of the lease and improvements is less than the "reasonable and allowable compensation" for the relocation of the affected lease, then DNR may agree to buy the lease.¹⁰⁸ Once purchased the State will not allow the water bottoms to be leased in the future for oyster cultivation. Thus the purchase of leased water bottoms and improvements may only occur by the request of the leaseholder, but the determination of the cost effectiveness to buy the lease and the ultimate decision to buy the lease remains with the state. If the State chooses not to purchase the lease, then the leaseholder may have the lease relocated.¹⁰⁹

E. *Appeal Procedures*

The opportunity for administrative reconsideration of a decision by DNR concerning the relocation, exchange or purchase of an oyster lease is quite limited. Only two issues are subject to administrative appeal.

1. The substrate map prepared by DNR and the evaluation of the quantity of living oysters for relocation purposes may be appealed, if substantial technical information indicates that the determination or map is inaccurate.¹¹⁰

2. The determination of the "reasonable and allowable" expenses for the relocation of an oyster lease may be appealed, if there is evidence that the estimation is inconsistent with "specific provisions of R.S. 56:432.1."¹¹¹

All requests for an appeal must be made in written form and must be received within 30 days of DNR's offer. The request must include a "description of the specific basis for the request for reconsideration" and a "written report that includes specific technical information substantiating any alleged inaccuracies in the bottom substrate map or in the assessment of the quantity of living oysters on the affected lease."¹¹² Once a valid

106. *Id.*

107. *Id.*

108. LA. ADMIN. CODE tit. 43: I, § 855.

109. LA. ADMIN. CODE tit. 43: I, § 857.

110. LA. ADMIN. CODE tit. 43: I, § 858.

111. *Id.*

112. *Id.*

request for administrative reconsideration is received by DNR, the Department has 45 days to give the leaseholder written notice of its decision.¹¹³

A leaseholder who has exhausted all available administrative remedies, may seek judicial review of DNR's decision, under La. R.S. 49:964.

Any leaseholder that believes that he or she has suffered damage because of a coastal restoration project may seek relief for that damage through the OLRP, even if the lease is not within the area identified by DNR as likely to be affected by a coastal restoration project.¹¹⁴ No claim for damages can be made until the leaseholder has exhausted all remedies available under the OLRP.¹¹⁵ However, the prescriptive period determining when the leaseholder can bring legal action for recovery of damages will be suspended until all OLRP remedies have been exhausted.¹¹⁶

It is important to understand that available funds for the OLRP are limited and that all costs of exchange, relocation, or purchase of the leases will be considered a part of the cost of the coastal restoration project and shall be funded from that source.¹¹⁷ Therefore, all relief must come from funds available within a particular coastal restoration project.

For example, the Davis Pond Diversion project has approximately \$7.5 million available for the OLRP.¹¹⁸ The availability of funds is restricted to the amount specifically appropriated by the legislature for such purposes and when exhausted the relief available to leaseholders will be limited. All funding for the OLRP must be "specifically appropriated by the legislature for" this purpose and funds made available for the CWPPRA can not be used to fund the program.¹¹⁹

V. LIABILITY WAIVER CLAUSE

Generally, Louisiana and its political subdivisions do not have sovereign immunity against contract or tort liability, but the legislature may limit or define the extent of liability through legislation.¹²⁰ In 1995, the Louisiana Legislature approved La. R.S. 49:214.5, which grants the state and all political subdivisions immunity from tort and contract liability resulting from coastal restoration projects. La. R.S. 49:214.5 states that its effect is to be "remedial in nature and delineates legislative intent and

113. *Id.*

114. LA. REV. STAT. § 56:432:1 (C) (West Supp. 2000).

115. *Id.*

116. LA. REV. STAT. § 56:432:1 (C) (West Supp. 2000).

117. *Id.*

118. *Davis Pond Freshwater Diversion Structure*, (proposal by the US Army Corps of Engineers, New Orleans District, 1998).

119. LA. REV. STAT. § 56:432:1 (G) (West Supp. 2000).

120. LA. CONST. art. XII, §10.

shall be retroactive as it applies to any leases, permits, or licenses granted to any individual or other entity on state lands and water bottoms whose rights may be affected by coastal restoration projects."¹²¹ The statute also requires that all leases, permits and licenses granted or renewed by Louisiana and its political subdivisions after July 1, 1995 must include a waiver of liability clause for any damages due to coastal restoration projects.¹²² The liability waiver does not effect the lessee's ability to participate in the OLRP, nor does it bar the holder of an oyster lease from taking action to recover damages caused by a state action unrelated to coastal restoration. The plain reading of the statute indicates that the liability waiver contained in R.S. 49:214.5 (A) is, in itself, sufficient to limit the state's liability for damages resulting from coastal restoration activities, independent of the inclusion of specific language in leases. The lease clause requirement appears to have been included to provide notice to lessees and as an extra precaution to protect the state. As such, it is an example of redundancy common to legal writing.

On October 19, 1999, the Louisiana Supreme Court ruled in *Jurisich v. Jenkins*, a case involving oyster lease clauses.¹²³ While *Jurisich v. Jenkins* does not directly address the liability waiver established by R.S. 49:214.5, this case may have important implications on the ability of the state to include any type of liability waiver in oyster leases.¹²⁴ In *Jurisich v. Jenkins* the plaintiffs brought suit to stop the inclusion of what they termed as "onerous" clauses in their oyster leases. The action was brought when DWF chose to add new clauses to their existing leases upon renewal, thereby creating a new lease. The renewed lease included provisions, one of which made the oyster lease "subservient to navigation, maintenance of navigation and all normal, usual and permissible mineral and oil field activity, which has been sanctioned by the State of Louisiana through prior existing lease, permit or contract."¹²⁵ The plaintiff contended that "the secretary overstepped his legislative authority when he failed to renew the existing oyster lease without the inclusion of the navigation and oil field activity clause" and that the secretary exceeded his authority when he proposed the inclusion of the navi-

121. LA. REV. STAT. § 49:214.5 (application of restatement of § 2 of Acts 1995, No. 936 §1).

122. LA. REV. STAT. § 49:214.5 (B) (1999).

123. *Jurisich v. Jenkins*, 99-0076 (La. 10/19/99), 1999 WL 955374 (La.).

124. *Jurisich*, 1999 WL 955374, at *1. (per curiam). (On November 17, 1999, the Louisiana Supreme Court denied a request for rehearing and issued a per curiam reiterating that the "discussion of the authority of the Secretary and its ultimate holding were restricted to the inclusion of the navigation and oil field activity clause in the context of the Secretary's duty to develop the oyster industry..." The four remaining clauses were remanded to District Court for resolution.)

125. *Id.* at 7.

gation and oil field activity clause in the lease, which was neither necessary nor proper for the development of the oyster industry."¹²⁶

In regard to the plaintiff's first allegation, that the secretary exceeded his authority by failing to renew the oyster lease, the court found that laws regulating oyster leases "differ from the provisions which govern ordinary conventional leases" and that oyster leases are to be regulated by the provisions found in "Subpart D or Part VII of Chapter 1 of Title 56 of the Louisiana Revised Statutes."¹²⁷ The court also determined that, as stated in R.S. 56:428(A), "the owners of expiring oyster leases have first right of renewal of their oyster leases, provided the lease is capable of supporting oyster populations" and that the "renewals shall be executed by the secretary..."¹²⁸ If the oyster lease is not renewed by the secretary within "sixty days from the date of expiration of a lease" then "the lease is automatically renewed."¹²⁹ Furthermore, the "secretary has a mandatory duty to renew" the oyster lease, except when the "oyster beds initially leased are incapable of supporting oyster populations..."¹³⁰ Therefore, the court reasoned that the secretary had exceeded his legislative authority by failing to renew the plaintiff's oyster lease in accordance with R.S. 56:428 (A) and that the inclusion of new language into the oyster lease would "create a new contract and would effectively eliminate the oyster lessees' legislatively crafted first right of renewal."¹³¹

It should be noted that the secretary, while having a mandatory duty to renew an oyster lease, has the discretion to limit the term of the lease from one to fourteen years, if the oyster lease is "located within the impact area of a coastal restoration project."¹³² This gives the secretary more latitude in dealing with oyster leases located in a coastal restoration impact area.

In regard to the plaintiff's second allegation, that the "secretary exceeded his authority when he proposed the inclusion of the navigation and oil field activity clause in the lease, which was neither necessary nor proper for the development of the oyster industry," the Supreme Court held that the language to be included in the "lease renewal was prohibited because its inclusion did not develop the oyster industry," which is a necessary element for all language added to an oyster lease.¹³³

126. *Id.* at 4.

127. *Jurisich*, 1999 WL 955374, at *5.

128. *Id.*

129. *Id.*

130. *Jurisich*, 1999 WL 955374, at *6.

131. *Id.* at 6.

132. LA. REV. STAT. § 56:428.1 (West Supp. 2000).

133. *Id.* at 10. (An innovative and reasonable argument could be made that coastal restoration efforts will, in the long run, benefit the oyster industry as a whole by providing more habitat suitable for the propagation and culture of oysters. Viewed in that light the clauses could be seen to meet the court's requirement that changes to leases

The effect of the Supreme Court's decision to the navigation and oil field activity clause is three-fold.

1. The secretary of the DWF has a mandatory, non-discretionary duty to renew all existing oyster leases. The only reason that an oyster lease can be terminated by the secretary is if it is determined that the lease is no longer capable of supporting an oyster population.¹³⁴

2. The inclusion of a new clause into an oyster lease at time of renewal creates a "new contract and effectively eliminates the oyster lessees' legislatively crafted first right of renewal."¹³⁵

3. The secretary may make changes and add language to an oyster lease "as he deems necessary and proper to develop the oyster industry."¹³⁶ Thus, only when changes to an oyster lease will benefit the oyster industry will the DWF be allowed to include new language in an existing lease.

While *Jurisich v. Jenkins* applies only to the navigation and oil field activity clause, it may have wide and unanticipated effects on the oyster lease program, which will be discussed below.

When the OLRP is combined with La. R.S. 49:214.5's liability waiver, oyster leaseholders may be effectively barred from using litigation as a means of seeking compensation for damage to oyster beds from coastal restoration projects.¹³⁷ The liability waiver is prospective and retroactive, barring actions from an injury suffered after the promulgation of La. R.S. 49:214.5 and retroactively, barring actions resulting from injuries suffered prior to the passage of the liability waiver.¹³⁸

The retroactive application of R.S. 49:214.5 has not been examined by the courts and an in-depth examination of the constitutionality of retroactive laws is beyond the scope of this paper. However, the important implications of the retroactive application of the coastal restoration liability waiver warrants a short discussion.

The Louisiana Constitution, Art. 1 § 23 specifically prohibits *ex post facto* laws, or laws that impair an obligation created by contract.¹³⁹ Art. 6 of the Louisiana Civil Code states the general rule, that "in the ab-

"develop the industry." Of course, an individual lessee might draw little solace in the knowledge that his sacrifice would benefit the whole industry but numerous examples of such social decisions are all about us.)

134. *Id.* at 6.

135. *Id.* at 9.

136. *Id.* at 9.

137. LA. REV. STAT. § 49:214.5 (West Supp. 2000).

138. LA. REV. STAT. § 49:214.5 (West Supp. 2000). (The legislative intent can be found in R.S. 49:214.5's Application, which states that the effect is to be "remedial in nature and delineates legislative intent and shall be retroactive as it applies to any leases, permits, or licenses granted to any individual or other entity on state lands and water bottoms whose rights may be affected by coastal restoration.)

139. LA. CONST. art. 1, § 23.

sence of contrary legislative expression, substantive laws apply prospectively only, procedural and interpretive laws apply both prospectively and retroactively...¹⁴⁰ However, the comments to Article 6 state that a substantive law can be applied retroactively if the statute expressly or impliedly so provides and to the extent that such retroactive application is constitutionally permissible.¹⁴¹ The comments further discuss the concept of "remedial" legislation which is a vague concept generally meaning either a procedural law that affects a remedy rather than a right or an interpretative law that clarifies an error or ambiguity in a prior law. Substantive law, according to the comments to Article 6, is often termed remedial when it remedies an existing social problem, but in this authors opinion such an appellation does not free it from constitutional restrictions on retroactive applications of substantive law. The act creating R.S. 49:214.5 (Act 936 of 1995) states that its application is "intended to be remedial in nature and delineates legislative intent and shall be retroactive as it applies to any leases, permits or licenses granted to any individual or other entity on state lands and water bottoms whose rights may be affected by coastal restoration projects." The retroactive application of R.S. 49:214.5 will undoubtedly be challenged under the standards of Louisiana Constitutional Article 1 § 23 and Louisiana Civil Code Article 6. Prior case law is instructive and illuminating in this area.

The court in *Manuel v. Carolina Casualty* examined the retroactivity of a statute creating a new cause of action and attempted to clarify the general rule by stating that substantive changes to the law may be classified as remedial if they are designed to correct an inadvertent error made in some prior statute or to change a law which has been found to be undesirable in some respect.¹⁴² However, the Louisiana Supreme Court reviewed the retroactive application of a statute and its possible impact on contractual rights in *Rousselle v. Plaquemines Parish School Bd.* and ruled that even when a statute states that it is remedial in nature and it contains expressed intent to give substantive law retroactive effect, the law may not be applied retroactively if it "would impair contractual obligations or disturb vested rights."¹⁴³ In this case R.S. 49:214.5 clearly limits vested rights, granted by Art. 12 §10 of the Louisiana Constitution, which allows an injured party to hold the state liable for "liability in con-

140. LA. CIV. CODE ANN. art. 6 (West 2000).

141. LA. CIV. CODE ANN. art. 6 cmt. d (West 2000).

142. *Manuel v. Carolina Casualty*, 136 So.2d 275, 280 (La. App. 3rd Cir. 1961).

143. *Rousselle v. Plaquemines Parish School Bd.*, 93-1916 (La. 2/28/94), 633 So.2d 1235, 1244. See also, *American Waste and Pollution Co. v. State Department of Envtl. Equal.*, 597 So.2d 1125 (La. App. 1 Cir. 1992), *reh'g denied*, 604 So.2d 1309, 1318 (La. 1992); *Keith v U.S. Fidelity & Guaranty Co.*, 96-2075 (La. 5/9/97), 694 So.2d 180, 183.

tract or for injury to person or property."¹⁴⁴ If interpreted retroactively R.S. 49:214.5 would effectively bar litigation by all parties injured by state restoration activities, including those who were injured prior to promulgation of the statute. Based on current case law, it is doubtful that the courts will regard this infringement of vested rights as constitutional.¹⁴⁵ However, if the retroactive application of R.S. 214.5 withstands the court's scrutiny, and is found constitutional, the OLRP will be the only remedy available to oyster leaseholders for damages resulting from coastal restoration programs.

Even if the retroactive application of the coastal restoration liability waiver is found unconstitutional, R.S. 214.5 (A) should provide the state with a prospective liability shield for all causes of action resulting from post July 1995 damages, leaving a short gap in the state's liability shield. Lessees who have a cause of action and a lease dating before July of 1995 would not be restricted by the liability waiver and therefore, not barred from litigation, but must still first seek relief through the OLRP.¹⁴⁶ If a claimant is not successful in getting adequate relief for damages incurred before July, 1995 they may then take legal action against the state. The gap is temporary, and the numbers of claimants will shrink as pre-1995 causes of actions prescribe and / or, explicit liability waivers are included into oyster leases upon their renewal.

In light of the Louisiana Supreme Court's decision in *Jurisich v Jenkins*, discussed above, there is a third possibility, which could prove problematic for the state's coastal restoration efforts. The third possibility would arise if the coastal restoration liability waiver statute authorized by R.S. 214.5 (A) and the inclusion of the coastal restoration liability waiver clauses into oyster leases at renewal are barred by the *Jurisich v. Jenkins* court's interpretation of the oyster lease statute. The Supreme Court found that, in regard to navigation and oil field activity clause, the state can not insert language into an oyster lease without creating a "new contract and effectively eliminating the oyster lessee's legislatively crafted first right of renewal."¹⁴⁷ The Supreme Court further stated that secretary has a "mandatory duty to renew" an oyster lease, unless the lease is "incapable of supporting oyster populations."¹⁴⁸

While the Supreme Court clearly stated that their decision was "only made relative to the inclusion of the navigation and oil field activity clause" it is possible that this decision could be expanded to include the

144. LA. CONST. art. XII, §10.

145. *Manuel*, 136 So.2d 275 (3rd Cir. 1961); *Rodriguez v. Brown & Root, Inc.*, 410 So.2d 325 (La. App. 4th Cir. 1982).

146. LA REV. STAT. ANN. § 56:432:1 (C) (West Supp. 2000).

147. *Jurisich v. Jenkins*, 99-0076 (La. 10/19/99), 749 So.2d 597, 602.

148. *Id.* at 601.

coastal restoration liability waiver statute and lease clauses as well.¹⁴⁹ If this were to occur, R.S. 49:214.5 would be ineffective in barring litigation. However, considering the clear and unambiguous direction given to the DWF by the Louisiana Legislature to include specific liability waiver language by R.S. 214.5 (B), a court's interpretation of the validity of such clauses could be quite different from the "navigation clause". The *Jurisich v. Jenkins* court dealt with an administrative action, which, in their opinion, conflicted with a clear legislative mandate of the oyster lease provisions. The coastal restoration liability waiver statute required by R.S. 49:214.5 is a clear legislative statement that the *Jurisich* court found to be lacking in the navigation and oilfield activity clause, which was made subsequent to the oyster lease statute and appears to contradict it. When interpreting apparently contrary statutes the Louisiana Civil Code provides guidance in the proper interpretation. Article 8 of Louisiana's Civil Code allows a law to be repealed either wholly or partially and states that a "repeal may be expressed or implied."¹⁵⁰ An implied repeal occurs "when the new law contains provisions that are contrary to, or irreconcilable with, those of the former law."¹⁵¹ In this case the coastal restoration liability waiver statute, R.S. 49:214.5 specifically limits the state's liability for damage to oyster leases from coastal restoration projects and requires inclusion of language to that effect be placed in renewed and new oyster leases. This legislative directive was subsequent to the mandated renewal provisions found in the original oyster lease legislation.¹⁵² The more specific language of R.S. 214.5 is the latest legislative statement on the renewal of oyster leases.¹⁵³ Therefore, even in light of *Jurisich v. Jenkins*, it is likely that the coastal restoration liability waiver statute and clauses will be found permissible, at least when prospectively

149. *Id.* at 600.

150. LA. CIV. CODE ANN. art. 8 (West 2000).

151. *Id.* Note: In determining whether a statute implicitly repeals existing law, courts have taken a close look and will not find a prior law repealed if there is another reasonable construction. See *Thomas v. Highlands Insurance Co.*, 617 So.2d 877 (La. 1993); *Jordan v. Louisiana Gaming Control Bd.*, 98-1134 (La. 5/15/98), 712 So.2d 74.

152. "Liability waiver" statute, LA. REV. STAT. ANN. § 49:214.5 (Acts 1995, No. 936)(West Supp. 2000); "oyster lease renewal" statute LA. REV. STAT. ANN. § 56:428 (Acts 1981, No. 925)(West Supp. 2000).

153. *Giammanco v. Pizzolato*, 275 So. 2d 880, 883 (La. App. 4th Cir 1973) (stating the current rule that "the provisions of a subsequent special statute take precedence over and supersede those of an earlier general statute." In this case the general power of the police jury to remove officers of public office provided for in the Constitution and statutorily had been refined by a subsequent legislative directive which mandated a two-thirds vote. The latest and more specific statutory directive was found to supersede the latter).

applied, because they are the most current legislative directive on this matter.¹⁵⁴

VI. CONCLUSION

The OLRP has one principle goal, to "reduce and offset" negative effects of coastal restoration projects on the holders of oyster leases.¹⁵⁵ The first section of La. R.S. 56:432.1, which authorizes the OLRP, expressly states that the state "acknowledges potential conflicts between the Department of Wildlife and Fisheries oyster leasing program and Louisiana's coastal restoration program" and orders DNR to develop a program to resolve future conflicts.¹⁵⁶ While this effort by the Louisiana Legislature to resolve possible conflicts between oyster leaseholders and coastal restoration programs is quite broad, DNR's application of the statute is focused. The scope of DNR's application of the OLRP is restricted by limited funding, which is only sufficient to cover the costs of moving productive oyster beds and not to pay the value of the lease.¹⁵⁷ Because of the budget restrictions, it appears that DNR will seek to use the OLRP to help oyster leaseholders shift their productive oyster beds away from areas that are, or will be, affected by coastal restoration projects, rather than compensating damages sustained from coastal restoration projects. This approach allows the state to better estimate the scope of dislocation to be suffered by oyster leaseholders and to allocate funds from the coastal restoration project's budget to deal with the anticipated needs of affected oyster leases.

There are a number of open issues surrounding the state's coastal restoration efforts and oyster leaseholder's rights. However, some observations about the importance of the OLRP can be made.

From the state's perspective the OLRP's effectiveness is yet to be determined and dependent on future interpretation of the liability waiver. The coastal restoration liability waiver statute applied retroactively will leave the OLRP as the sole remedy available to oyster leaseholders to address damage caused by coastal restoration projects. The liability waiver applied prospectively means the OLRP will be the only method available to address damages sustained after July 1, 1995. Lastly, the liability waiver applied only to new leases means that the OLRP may be of limited effect. In this situation the holders of oyster leases, not con-

154. See *Inabnet v. Exxon Corp.*, 93-0681 (La. 9/6/94), 642 So.2d 1243; *Butler v. Baber*, 529 So. 2d 374 (La. 1988) (discussing an oyster leaseholder's right to bring an action for damage to an oyster lease unrelated to coastal restoration).

155. LA. REV. STAT. ANN. § 56:432.1 (A) (West Supp. 2000).

156. *Id.*

157. Mike Dunne, *Louisiana Oystermen Fear Effect of Diversion Projects*, THE ADVOCATE, Dec. 8, 1998.

taining the liability waiver, will not be barred from litigation against the state for damage to their oyster lease caused by coastal restoration projects and the OLRP may best serve as an extra-judicial method of resolving disputes between oyster lessees and the state, by offering an alternative to litigation.

From the oyster leaseholder's perspective the OLRP is a positive first step. The program offers an institutional, non-judicial, method of dealing with potential damage to oyster beds. For holders of leases issued after July, 1995 it will probably be the only method available. In any case, the OLRP provides an alternative to the expense of litigation. Most importantly, the OLRP provides a number of options, so that a leaseholder can choose which method of relief is best suited for their particular situation.

The affect that the *Avenal* cases will have on future litigation by an oyster lessee is unclear and whether *Jurisich v. Jenkins* will affect the state's liability shield provided by R.S. 214.5 is unknown. While the plaintiffs in *Avenal v. United States* were not successful in their efforts to be compensated for the damage to their oyster beds, the action may have important implications for future actions. The *Avenal v. United States* appeals court stated that "the decrease in salinity in the water covering the plaintiffs' leased grounds has restrained a valuable use of the lease rights," which was created by the state and protected by the Constitution.¹⁵⁸ The court further also stated that:

These rights include the right to harvest oysters and the right to damages when the acts of another harm the oyster beds, including harm caused by deleterious changes in the water in which the beds lie, for example, by unlawful pollution. We grant that the decrease in salinity in the water covering the plaintiffs' leased grounds has restrained a valuable use of the lease rights.¹⁵⁹

The court's decision establishes that acts affecting the composition of the water above an oyster lease, causing damage to the oyster bed, may be valid cause of action.

Regardless of future decisions, it is clear that the OLRP will impose more management requirements for oyster leaseholders. For example, the leaseholder must keep their address and phone number current and correct on all of their leases, so he or she can receive notice of a coastal restoration project affecting their lease as rapidly as possible. Once a notice is received, the leaseholder must respond as quickly as possible to participate in the program. The need for rapid response is necessary, because

158. *Avenal v. United States*, 100 F.3d 933,937 (Fed. Cir.1996).

159. *Id.*

the money allocated for the OLRP is limited and distributed on a first-come, first-served basis. If an oyster leaseholder does not respond in a timely manner, it is possible that he or she will be unable to participate in the OLRP, because all available funding has been allocated. Under these circumstances the DNR has the option to "make the exchange option available for specific affected leases, notwithstanding the unavailability of funds..."¹⁶⁰

The OLRP is not a cure for all of the problems that arise between holders of oyster leases and coastal restoration efforts. It neither provides all of the compensation desired by oyster bed lessees, nor protects the state from all possible liability resulting from coastal restoration. However, the OLRP does provide an extra-judicial means of resolving many of the disputes between oyster leaseholders and the state resulting for coastal restoration projects. The program also provides a method for oyster leaseholders to receive state assistance in relocating away from restoration projects after they have waived the right for compensation for damages caused by freshwater diversion projects.

160. LA. ADMIN. CODE tit. 43, §854.