Louisiana Coastal Law
LCL 77 October 2000

Louisiana Coastal Law is an advisory service of the Louisiana Sea Grant Program (National Oceanic and Atmospheric Administration, U.S. Department of Commerce.) Materials may be reproduced if credit is given. Distributed free upon written request.

Editors: Jim Wilkins & Erinn Neyrey
Managing Editor/Layout: Dustin Westphal

Sea Grant Legal Program
170 Law Center, LSU
Baton Rouge, LA 70803-1018
(225)388-5931 / FAX (225)388-5938
E-Mail: sglegal@lsu.edu
WWW: http://www.lsu.edu/guests/sglegal/

First and Second Extraordinary Sessions and Regular Session of the 2000 Louisiana Legislature

by Crissy Pellegrin

WILDLIFE AND FISHERIES

• First Extraordinary Session

Act No. 107
H.B. No. 232, Rep. Odinet, Dewitt, Frith, McMains and Sen. Hainkel and Dardenne

Coastal Restoration/Oyster Leases and Renewal of Oyster Leases Act 107 was passed during the 2000 First Extraordinary Session of the Louisiana Legislature. The Act's intent is "to amend and reenact R.S. 56:428.1 and 432.1(B)(3) and to enact R.S. 56:427.1 and 428.2, relative to oyster leases in coastal restoration impact areas."

R.S. 56:427.1

The enactment of R.S. 56:427.1 provides an expressed wavier of liability to Louisiana, its political subdivisions, agents and employees for all claims for loss or damage resulting from coastal restoration projects authorized by the Coastal Wetlands Conservation and Restoration Plan. This statute also requires that all state "agencies, boards or commissions" and all political subdivisions include a liability waiver for damages caused by coastal restoration projects in all new oyster leases and in all renewals or extensions of existing oyster leases.

R.S. 56:428.2

R.S. 56:428.2 gives discretionary authority to the Secretary of the Department of Wildlife and Fisheries in granting renewals or extensions of oyster leases affected by coastal restoration projects. The Secretary may grant an extension or renewal for an existing oyster lease on a year to year basis, for up to 15 years. However, to qualify for an extension or renewal the lessee must agree to certain conditions.

1. The leaseholder must stipulate that the leased area remains "capable of supporting oyster populations."

2. The leaseholder must agree that the oyster lease is "subservient to any coastal restoration project."

3. The leaseholder must assume all risk of operating an oyster lease within a coastal restoration impact zone.

4. The leaseholder must agree that all federal agencies are free of liability for damages caused by freshwater diversion projects.

If the coastal restoration project is canceled during the term of the lease, the renewal process is to be governed by R.S. 56:428(A) or R.S. 56:428.1. Areas within the impact area of a coastal restoration project, which are not currently leased, may be leased, along with "the first right of renewal," so long as the area remains capable of supporting oyster populations. However, when an oyster lease terminates and is not renewed or extended, all rights conveyed by the lease revert to Louisiana and may be subject to new oyster leases, if the area is capable of supporting oyster populations.

A holder of an oyster lease in a coastal restoration impact area, who receives an extension or renewal without compensation, retains the right to participate in the oyster relocation program, if otherwise eligible.

R.S. 56:428.1

The inclusion of significant new language into R.S. 56:428.1 is also authorized by Act 107. The most obvious change is to the structure of the statute, which is now divided into five sections. Sections A and B of revised R.S. 56:428.1 are restatements of the statute's original language

R.S. 56:428.1(C) requires that any lease renewed or extended must comply with the provisions found in R.S. 56:428.1. Specifically each lease renewed or extended must include a liability waiver for Louisiana, its political subdivisions, agents and employees for any damages caused by coastal restoration projects authorized by the Coastal

Also Inside:

Wetlands Conservation and Restoration Plan. The lease must also grant a liability wavier to federal agencies for any damage resulting from freshwater diversion projects.

R.S. 56:428.1(D) requires that all leased areas in a coastal restoration impact area revert to the state on the expiration or termination of the lease. After the area reverts to the state the area may be leased, but is not eligible for participation in the oyster relocation program. However, under R.S. 56:428.1(E) any lease within a coastal restoration impact area, which is granted an extension or renewal, is allowed to participated in the oyster relocation program, if otherwise eligible.

R.S. 56:432.1

The alterations made by Act 107 to R.S. 56:432.1 (Oyster Lease Relocation Program) are confined to section B, subsection 3. The majority of the alterations seek to increase the clarity of the statute and to eliminate possible ambiguity. However, Act 107 does insert new language into R.S. 56:432.1, which requires any extension or renewal of an oyster lease in areas adversely affected by costal restoration projects to comply with R.S. 56:427.1 (requiring the expressed waiver of liability) and expressly authorizes the renewal of existing leases under R.S. 56:428.1 or R.S. 56:428.2 (which give the Secretary discretion in renewal of leases and require liability waivers).

Act No. 130
H.B. No. 149, Rep. Odinet; SB No. 28, Sen. Hainkel

Revises the Commercial Fisherman's Sales Card or "trip ticket" and requires a commercial fisherman, when selling to a wholesale/retail dealer, to provide not only his name, license number, and species caught, but also the gear used, vessel used, primary location of fish catch and duration of the trip. In addition, the wholesale/retail dealer must provide the price per unit of all species purchased, and both the dealer and the commercial fisherman must attest to the veracity of this information. The act states that beginning January 1, 2001 the Department of Wildlife and Fisheries must be capable of receiving the information from the "trip ticket" by electronic means and provides that wholesale/retail dealers may submit their trip ticket information electronically at that time.

• Regular Session

H.C.R. No. 44; Jack Smith

Concurrent resolution to direct the Louisiana Commission on Law Enforcement and Administration of Criminal Justice to accredit the Department of Wildlife and Fisheries Basic Law Enforcement Training Academy as a P.O.S.T. (Peace Officer Standard Training) certified training academy.

• Second Extraordinary Session

Act No. 1
H.B. No. 12; Daniel

Amends and reenacts numerous changes to Title 56. Includes changes in fees for sporting licenses (see fee schedule below for detail); creates an infant combination lifetime hunting and fishing license available from birth to 5 years old. Changes fees for boat registration to depend upon the boat's length. Persons over 60 can use trails in Wildlife Management Areas (WMA) that are set aside for disabled persons. Persons from 18-60 must have special WMA permits to hunt on WMA land.

Wildlife and Fisheries Licenses and Fee Schedule

New licenses passed by the legislature in June are now available at vendors throughout the state and through LDWF's new electronic licensing system (see www.wlf.state.la.us). These include the Sportsman's Paradise license, the new Wildlife Management Area (WMA) permit, and the Senior Citizen's license. The Sportsman's Paradise license, which replaces the old universal license, includes basic fishing, saltwater fishing, basic hunting, big game, bow, muzzleloader, the state duck stamp, the Louisiana Wild Turkey stamp, WMA hunting and all recreational gear licenses. The cost of the all-inclusive license is $100 per year. The WMA hunting permit, which sells for $15 per year, is required for anyone hunting on WMAs. A basic hunting license is also required, except for those holding all-inclusive licenses such as lifetime licenses, Sportsman's Paradise licenses and senior hunting and fishing licenses. The senior license sells for $5 per year and is required for hunters and anglers who turned age 60 on or after June 1, 2000. The license includes all hunting and fishing privileges except for special fishing gear such as trawls, slat traps, crawfish traps, wire nets and others. Any United States citizen who is on active military duty and has been issued a Green Identification Card shall pay the resident's fee for hunting and fishing licenses. This license is valid only while the licensee is on active duty, and the licensee must carry his or her Green Identification Card at all times while hunting or fishing.

A new fee schedule for non-resident Louisiana recreational fishing and hunting licenses took effect June 27.

The new schedule for the new fees for non-resident licenses is as follows:

* Non-resident fishing season $ 60.00
* Non-resident saltwater fishing season 50.00
* Non-resident fishing three-day trip 30.00
* Non-resident saltwater three-day trip 40.00
* Non-resident hunting season 200.00
* Non-resident hunting five-day trip 100.00
* Non-resident charter-boat passenger three-day trip 5.00
* Non-resident bow-hunting 50.00
* Non-resident migratory bird three-day trip 75.00
* Non-resident muzzleloader 50.00
* Non-resident Louisiana duck

stamp 25.00
* Non-resident wild turkey stamp 20.50
* Non-resident big game season 225.00
* Non-resident big game five-day trip 110.00

The increases in resident and non-resident licenses and boat registration fees were necessary to offset a projected $9 million shortfall in the agency's $57 million budget for fiscal year 2001, which began July 1. Many of the fees had not been increased since 1987.

Act No. 19
H.B. No. 21; Representative Odinet and Senator Robichaux

Amends and reenacts R.S. 56:305(B)(2) and enacts R.S. 56:16. Sets a one-time fee of $45 for crab trap gear. The monies in the fund shall only be used by the DWF, Blue Crab Coalition, or other entities for the purpose of securing federally imposed tariffs, quotas, or both on imported crabmeat.

PUBLIC LANDS AND RESOURCES

• 2000 Regular Session

S.R. No. 6 and H.R. No. 11; Senator Romero and Representative Pierre

Resolutions to approve the Coastal Wetlands Conservation and Restoration Plan for the Fiscal Year 2000-2001, as adopted by the Wetlands Conservation and Restoration Authority.

OIL, GAS AND MINERALS

• First Extraordinary Session

Act No. 88
H.B. No. 119; Representatives Pierre, Jack Smith, Dewitt, McMains; Senators Hainkel and Dardenne

Amends and reenacts R.S. 30:21, increases the annual fees payable to the Office of Conservation by oil and gas operators. The fees will be in a form and schedule prescribed by the Office of Conservation and will be paid by operators of capable oil and gas wells based on a tiered system to establish parity on a dollar amount between the wells. Additionally, it adds an annual regulatory fee and an application fee, and adds that the funds shall be used by the Office of Conservation for the regulation of other industries under its jurisdiction, as well as for the regulation of the oil and gas industry.

Act No. 103
H.B. No. 197, Dewitt and McMains, Sen. Hainkel and Dardenne

Amends and reenacts R.S. 30:2484(10) to extend the time limit for the completion of the environmental baseline inventory to July 1, 2001 and to reduce the total amount disbursed from the oil spill contingency fund for such inventory from eight million dollars to five million five hundred and fifty thousand dollars. An environmental baseline inventory is an inventory that identifies the location and condition of natural resource. It is conducted by the oil spill coordinator in consultation with the state trustees in order to determine damages to natural resources in the event of an oil spill.

• Second Extraordinary Session

Act No. 8
H.B. No. 33; Daniel

Amends and reenacts R.S. 30:136.3, and enacts R.S. 30:136.1, R.S. 44:18, and R.S. 56:30.4 to increase revenues from mineral leases on state-owned land, including water bottoms by $10/acre to be placed in the DWF Conservation Fund and by $5/acre to be placed in the Oil and Gas Regulatory Fund. Changes legislation relative to exclusive and non-exclusive permits to conduct seismic, geophysical, and geological surveys on public lands. Sets aside a portion of the funds received by the DWF from survey activity on state lands for planting shells for oyster cultch and rehabilitating damaged areas.

ENVIRONMENTAL QUALITY

- **First Extraordinary Session**

Act No.93
H.B. No. 139; Rep. Triche, Dewitt, McMains, and Leblanc and Sen. Hainkel and Dardenne

Amends and reenacts R.S. 30:2075.2(A)(1) and enact R.S. 30:2075.2(A)(6). Modifies the law regarding security paid to DEQ by owners of privately owned sewage treatment facilities. Provides that the secretary of DEQ may waive or reduce the security required of permitees of privately owned sewage facilities if they are in substantial compliance with the Environmental Quality Act and the financial security is not necessary. Additionally, the secretary may issue, renew, modify, or transfer a permit without the required financial security if the applicant has made a reasonable, good faith effort to obtain financial security and is unable to do so, and the issuance, renewal, modification, or transfer of the permit is necessary to ensure sewage processing or to protect human health or the environment.

Act 146
S.B. 107; Sen. Schedler and Rep. Strain

Enacts Subpart J of Chapter 9 of Title 33 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 33:4049. Allows parishes to enter into cooperative endeavor economic agreements with certain statutorily created political subdivisions within the parish for the purpose of providing environmental services for the protection of public health and the environment through the control, monitoring and inspection of public and private sewerage and water systems and the provision and/or supervision of environmental services.

PORTS, HARBORS AND WATERWAYS

- **First Extraordinary Session**

Act No. 54
S.B. No. 49; McPherson and Ellington

Enacts R.S. 56:1855(E) and (H), and repeals R.S. 56:1853.

Allows waterworks districts to perform repair and maintenance on facilities located on any river or stream if those facilities existed before the river or stream was included into the Natural and Scenic River System, and allows the Water District No.3 of Rapides Parish to repair or replace the Big Creek Dam in Grant Parish.

Act No. 57
S.B. No. 59; Sen. Heitmeier, Hainkel and Dardenne and Rep. Dewitt, McMains and Pitre

Amends and reenacts R.S. 34:3474(A) and 34:3474(B)(1) and enacts R.S. 34:3474(B)(2)(h). Adds one voting member to the Millennium Port Authority selected by the Louisiana Landowners Association, to serve a term of four years.

Act No. 80
H.B. No. 24; Rep. Walsworth and Farrar and Sen. Ellington and McPherson

Amends and reenacts R.S. 56:1853 by deleting the prohibition of barricades, barriers, fences, or obstacles of any kind placed upon or across any river in the Natural and Scenic River System.

Act 147
H.B. No. 88; Rep. Pierre, Jack Smith, Dewitt and McMains and Sen. Hainkel and Dardenne

Amends and reenacts R.S. 49:214.30(G) and enacts R.S. 49:214.23(13), relative to coastal use permits. A definition of "residential coastal use" is added to the legislation. Residential coastal use shall mean any coastal use associated with the construction or modification of one single-family, duplex, or triplex residence or camp. It shall also include the construction or modification to any outbuilding, bulkhead, pier, or appurtenance, on a lot on which there exists a single-family, duplex, or triplex residence or camp or on a water body which is immediately adjacent to such a lot. This Act also allows for an increase in nonresident application fees up to one hundred dollars and an increase in excavation or filling application fees up to five thousand dollars, not to exceed ten cents per cubic yard of material.

• Second Extraordinary Session

Act No. 2
H.B. No. 2; LeBlanc

Purpose is to provide agency ancillary funds, specifically known as internal service funds, auxillary funds, or enterprise funds for certain state institutions, officials, and agencies. One such institution is the Sabine River Authority. The purpose of these funds is to protect groundwater supplies to the Chicot aquifer from depletion and increase the number of visitors to recreation sites.

MISCELLANEOUS

Act Nos. 18 (first extraordinary session) and 33 (regular session)
H.B. No. 36; Hammett and Dewitt; H.B. No. 140; Alario

Enacts R.S. 47:302(O) and 47:331(M) to declare certain sales tax exemptions inoperable. These previously legislated exemptions had included such items as feed and feed additives for agricultural animals, as well as bait used in the production or harvesting of crawfish. Therefore, as a result of these acts bait will now be a taxable item. However, agricultural feed, such as feed used on alligator farms will remain free from tax.

The Avenal Lawsuits

Louisiana's coastal wetlands provide essential habitat for countless species. This same ecosystem provides the rich bounty that makes the state the Nation's top seafood producer. Louisiana has been losing significant acres of this habitat every year, due in large part to the artificial containment of the Mississippi River. The containment has resulted in artificially high salinity levels near the mouth of the Mississippi River in the Breton Sound area. Over the years these manmade conditions provided ideal conditions for oysters and the state leased these water bottoms to private parties for oyster harvesting.

In 1991, after decades of planning and discussion, the Caernarvon Freshwater Diversion Project became operational. The project diverts freshwater into Breton Sound, replenishing the wetlands and restoring the natural salinity level of the water. The lower salinity levels and sediment flow resulting from the Caernarvon Project made several oyster leases unproductive. Oyster fishermen holding these leases brought separate suits against the United States and Louisiana, claiming that the Caernarvon Project resulted in a taking of their property, namely the ability to harvest oysters in Breton Sound, for which the oyster fishermen were entitled to compensation.

Federal Case

Both the United States and Louisiana's Constitutions provide that private property cannot be taken for governmental or public use unless the property owner is compensated, and it was on these grounds that the oyster fishermen sued. In April of 1994, Albert Avenal, Jr. and other oyster fishermen filed a class action lawsuit against the United States and the U.S. Army Corps of Engineers, the agency responsible for the design and constuction of the Caernarvon Project. The suit was filed in the U.S. Court of Federal Claims and was grounded on the Fifth Amendment's takings clause, which

proh±bits the government from taking private property without compensating the owner. The term taking includes both a physical and regulatory taking. Plaintiffs argue that while the Caernarvon Project did not physically deprive them of access to their leases, the fresh water and sediment flowing over their leases made harvesting oysters impossible, rendering the leases economically useless. The defendants, the U.S. government, argued that the oyster fishermen did not have a property interest in the salinity levels of the waters above their oyster leases. The court agreed with the government and granted summary judgement for the defendants in August 1995, Avenal v. United States, 33 Fed.Cl. 778 (Fed.Cl., 1995.) Summary judgement allows the court to avoid a trial when there are no material disputed facts and one party is entitled to judgement as a matter of law. In this case the court simply held that as a matter of law there can be no taking when there is no property interest to be taken.

Plaintiffs appealed the decision to the United States Court of Appeals. The Court of Appeals partly disagreed with the lower court's holding, determining that the oyster leases were themselves property and constituted the kind of property interest the Fifth Amendment was designed to protect, saying:

> "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" 100 F. 3d 933, 937

However, the Court of Appeals also held that merely establishing the existence of a property interest and a government taking thereof is not enough to trigger compensation. There must also be a reasonable expectation that is denied. Specifically, the court held the oyster fishermen knew of the government's plan to restore the waters of Breton Sound to its natural salinity level and the fishermen took advantage of artificially high salinity levels created by the government's levee program. The court decided that the oyster fishermen had no reasonable expectation that the salinity of water above their leases would continue to be maintained and as such they were not entitled to compensation, Avenal v. United States, 100 F. 3d 933, 65 USLW 2352 (Fed.Cir., Nov. 12, 1996.)

State Case

The plaintiffs also filed suit against the Louisiana Department of Natural Resources (DNR) in state court in 1994. The plaintiffs brought action based on Article 1, Section 4 of the Louisiana Constitution, which mirrors the Fifth Amendment and prohibits the government from taking private property without compensation. The State filed a motion for sumary judgement based on the doctrine of collateral estoppel, which prohibits litigating the same issue (determinative fact) twice. The State argued that the issue in this case was exactly the same issue that plaintiffs brought in Federal Court, and as such should not be allowed. The trial court denied the motion for summary judgement, determining that the oyster fishermen had stated a cause of action, Avenal v. Department of Natural Resources, 99-0127 (La. App. 4 Cir. 3/3/99), 1999 WL 112500 (La. App. 4 Cir. 1999). The State appealed that decision and the Louisiana Court of Appeals, Fourth Circuit, decided to review the denial of summary judgement.

In March of 1999 the appeals court applied federal law to determine that collateral estoppel did apply and the oyster fishermen's lawsuit should be barred. Under federal law a suit can be barred from litigation when three elements are met. The first requirement is that the issue must be identical to the issue litigated in a previous trial. Secondly, the issue must have actually been litigated, and third, the issue must have been essential to the outcome of the case, Avenal v. Department of Natural Resources, 99-0127 (La. App. 4 Cir. 3/3/99), 1999 WL 112506 (La. App. 4 Cir. 1999). However, on rehearing a year later, the court determined that this state law claim required the application of Louisiana state law. This changed things considerably since Louisiana state law does not recognize the doctrine of collateral estoppel. The court held that the legal standards involved in the state case were sufficiently different than those in the federal case and warranted a trial. The court went on to recognize that under Louisiana law the requirements for a constitutional taking have been met under the facts of this case, namely that property was taken or damaged by the state or its political subdivisions, for which the plaintiffs were entitled to compensation. Inverse condemnation is a possible remedy available any time there has been a taking or damaging of property without compensation. The court determined that this cause of action was available to the oyster fishermen as a remedy, Avenal v. Department of Natural Resources, 99-0127 (La.App. 4 Cir. 3/3/99), 757 So.2d 1 (La.App. 4 Cir. Mar 03, 1999) (NO. 99-C-0127), on rehearing (Mar 15, 2000). The case was remanded to the trial court to proceed and the State appealed to the Louisiana Supreme Court in a last chance effort to be granted summary judgement. The LA Supreme Court denied writs in June of this year and the case is finally set to be heard, Avenal v. Department of Natural Resources, 2000-1077 (La. 6/23/00) 2000 WL 960723.

After five years of dispute the oyster fishermen in Breton Sound find themselves in the same situation as when they began this lawsuit. Although the federal courts have closed the door, they are still seeking remedy in the state courts. The state has exhausted its opportunities to have this case thrown out and must now litigate the issues it has been attempting to avoid. After such a long and drawn out struggle it is only now that the trial is getting underway. The case began on October 16th in Plaquemines Parish District Court.

St. Martin v. Mobil Exploration and Phillips Petroleum Company

"St. Martin v. Mobil Exploration & Phillips Petroleum Company" (2000 U.S. App. Lexis 20202), Decided August 16, 2000

Oil companies found liable for damages to marshland caused by their use and failure to maintain canal spoil banks.

The following article reviews the St. Martin v. Mobil Exploration & Phillip Petroleum Company lawsuit (St. Martin Case) decided August 16, 2000 by the United States Court of Appeals for the Fourth Circuit. The suit involves land, situated in the Mandalay Marsh of Terrebonne Parish, LA, purchased by St. Martin (plaintiff) in 1992. St. Martin purchased a 7,000-acre tract for $245 per acre from Southdown Sugars, Incorporated. In 1995, a suit was filed by St. Martin against the oil companies (Mobil Exploration & Producing U.S. Inc. and its predecessor Phillips Petroleum Company) who own an overlapping mineral lease and canal servitudes across the plaintiff's property. The plaintiff sought restoration and money damages based on the allegation that the use of and failure to maintain the canals by the oil companies has caused erosion and other damage to the freshwater flotant marsh ecosystem on their property. The plaintiff alleges that gaps in the oil company's spoil banks allow water flow into approximately a 357-acre area of their marsh land causing erosion of the flotant marsh and leaving open ponds.

The trial court held that the oil companies had an implied obligation arising from the servitude agreements to maintain the spoil banks and that they had breached that duty. The court determined that forty acres had been damaged. Damages were set at $10,000 per acre for restoration cost, which was then adjusted, with 40% of the damage attributed to natural causes. Defendants appealed liability and damages. The Plaintiff appealed the limitation of the award to the equivalent of 24 acres of damaged marsh.

On appeal the defendant oil companies contended that the plaintiff failed to show adequate causation linking defendants to the deterioration. Specifically, defendants argued that the district court erred in allowing Dr. Robert Chabreck, plaintiffs' expert, to testify. Dr. Chabreck is a specialist in ecology of the region and is not a specialist in hydrology. Defendants argued that he did not meet the Daubert factors, which establish standards for qualification of expert witnesses. Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993). The appellate court held that Dr. Chabreck expertise in "marshland ecology and in the erosion of vegetative mats in particular, along with his personal observations" made him qualified to testify as an expert. The appellate court also held that the district court findings that Dr. Chabreck's report was reliable and relevant were adequately supported.

Additionally, the defendants offered several alternative explanations for the erosion of the plaintiff's flotant marsh. The appellate court upheld the finding that the use of and failure to maintain the canals contributed to the deterioration of the marsh. The appellate court evaluated the evidence examined by the trial court to determine causation and held that since the district court allowed evidence from both sides and weighed all of the evidence, its ruling on causation would be upheld.

On the matter of liability, the defendants argued that they could not be held liable under Louisiana law and that the canal servitude agreement did not imply an obligation to construct or maintain the spoil banks. The appellate court first opined that, because of a continuing obligation under the servitude agreements, the claim had not prescribed. Secondly, the court found that there was "an ongoing and cumulatively increasing deterioration of plaintiff's property adjoining the canals due to defendants' continuing conduct in their failure to maintain the canal banks." The contract creating the canal servitude agreement provided for a continuing duty to maintain and a continuing right of enforcement and compensation.

Defendants also argued that the damages for restoration costs were excessive as being above fair market value and purchase price of about $245 per acre. Damages in excess of property value can be awarded, under the Roman Catholic Church test, only when there is "a reason personal to the owner for restoring the original condition or there is a reason to believe that plaintiff will, in fact, make the repairs." Roman Catholic Church v. Louisiana Gas Serv. Co., 618 So.2d 874 (La. 1993). The district court reasoned that, because the St. Martins had shown a genuine interest in the marsh through their Mandalay Wildlife Refuge efforts, this case fell within the Roman Catholic Church exception and allowed damages greater than market value (i.e. restoration costs) to be awarded. Defendants argued that a commercial motive was also involved in the plaintiffs' decision to buy the land. The court held that although there may have been a commercial reason, that economic reason does not foreclose greater than market value damages when there is also a significant personal interest.

Also on the matter of damages, the plaintiff argued that the award was improperly limited to the equivalent of 24 acres when 357 acres were damaged by the use and maintenance of the canals. The appellate court agreed with the district court and held that St. Martin was not allowed pre-purchase damages. It also agreed that natural causes contributed to the deterioration, so the limitation was not clear error.

The district court had

ordered the plaintiff to revise the proposed restoration plan because it found the plan excessive in scope and in cost. The district court reduced the per acre amount awarded the plaintiff and reduced the number of acres for which damages were awarded, finding that only 40 acres had been damaged during the ownership of St. Martin. The district court also found natural causes responsible for 40% of the damage to the marsh and accordingly reduced the award to $240,000. The award reflects $10,000 per acre for 24 acres (60% of 40 acres damaged). The appellate court affirmed the award of damages in that amount.

Dissent: Judge Rhesa Hawkins Barksdale disagreed with the majority of the court and stated her reasons as follows:

The district court abused its discretion by allowing Dr. Chabreck to give expert testimony that the spoil bank gaps could allow enough barge waves to enter the marsh and provide sufficient force to erode the vegetative mat. The district court must, when considering an expert's testimony, "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). Here, Dr. Chabreck's testimony was neither relevant nor reliable. Testimony on whether there was sufficient force from the barge waves to erode the vegetative mat should be made by a hydrologist, even according to Dr. Chabreck's own testimony. He was not qualified by education or by skill, knowledge, experience or training. He did not meet any of Daubert's factors. Therefore, the district court abused its discretion in allowing his testimony.

The servitude agreement did not impose any duty to maintain the spoil banks. The agreement did not mention or require the construction or maintenance of a bank system for the canals. Also, the St. Martins' predecessor in interest did not complain about the spoil banks maintenance. The servitude agreement imposed only a duty to maintain the canals themselves, not their banks. The spoil banks were not part of the canals. To maintain a canal is simply to keep it navigable. The duty to maintain the banks was not in the plain language of the agreement nor was this duty reflected in the conduct of the parties.

SWANCC v. United States Army Corps of Engineers

In Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers (Corps), 191 F.3d 845 (7th Cir. 1999), the federal appeals court upheld the Corps' use of the "migratory bird rule" to require SWANCC to obtain a permit under section 404 of the Clean Water Act, 33 U.S.C.S. 1344, to fill in an area designated as migratory bird habitat. The Supreme Court will consider this term whether this decision can stand in light of its interpretation of the Commerce Clause in United States v. Lopez, 514 U.S. 549, (1995). This will undoubtedly be a watershed decision with the potential to significantly alter the Corps jurisdiction to regulate wetlands under its "migratory bird rule."

Solid Waste Agency of Northern Cook County (SWANCC) is a corporation of 23 municipalities that purchased a 533 acre site, with plans to utilize 410 acres as a balefill, (a landfill where garbage is baled before it is dumped). This land included 17.6 acres of "semi-aquatic" land which would need to be filled before it could serve as a balefill. The Corps originally surveyed the land and determined that SWANCC would not need a 404 permit because the site did not include "wetlands" as defined by the Clean Water Act. After a state agency, the Illinois Nature Preserves Commission, apprised the Corps of the number of migratory birds species seen in the area, the Corps asserted its authority under the migratory bird rule and required SWANCC to apply for a permit. After finding that there were in fact over 100 species of migratory birds observed in the area, the Corps denied SWANCC's permit, and SWANCC filed suit.

Section 404 of the Clean Water Act, 33 U.S.C.A. 1344(a) prohibits the discharge of fill material into "navigable waters" of the United States without a permit from the U.S. Army Corps of Engineers. The federal government has limited powers established by the U.S. Constitution which prevents it from regulating in many areas that are left to the states to regulate under their general police powers. One area of control specifically reserved to the federal government is the regulation of interstate commerce of which navigable waters are considered an integral part. The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C.A. 1362(7). While the act itself goes no further to provide for a definition of "waters of the United States," the Corps and the Environmental Protection Agency define it in their regulations, specifically 33 C.F.R. 328.3(a)(3), as including, "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce." The so-called "migratory bird rule" the court notes, "has long been understood by the EPA and the Corps to include all waters, including those otherwise unrelated to interstate commerce, 'which are or would be used as habitat by birds protected by Migratory Bird Treaties' or 'which are or would be used as habitat by other migratory birds which cross state lines.'" 33 C.F.R. 328.3(a)(3).

SWANCC first alleged that Congress did not have authority to regulate migratory birds under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, and thus did not have the power to delegate that

responsibility to the Corps. Specifically SWANCC argued that the Congress' regulation of migratory birds is unconstitutional according to United States v. Lopez, 514 U.S. 549, (1995). Lopez dealt with a federal statute that purported to use Congress' power to regulate interstate commerce to make it a federal crime for a person to possess a firearm in a school zone. The Supreme Court ruled the federal statute unconstitutional because criminalizing guns in school zones was not a, "regulation of an act that substantially affects 'interstate commerce.'" The court in SWANCC distinguished Lopez by pointing to various impacts migratory birds have on commerce which in the aggregate "substantially affects interstate commerce," as required by Lopez. These affects include the $1.3 billion spent by Americans to hunt migratory birds, as well as the millions of Americans who travel across state lines to observe migratory birds.

SWANCC also argued that the authority to regulate habitat for migratory birds under the Commerce Clause is contrary to the Fourth Circuit's decision in United States v. Wilson, 133 F.3d 251 (4th Cir. 1997). Wilson challenged 33 C.F.R. S 328(a)(3)'s definition of "waters of the United States" as including all waters "the use, degradation or destruction of which *could* affect interstate or foreign commerce."

The Wilson court found fault with the regulation's use of the word "could," noting, "to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase 'waters of the United States' beyond its definitional limit," Wilson at 257. The SWANCC court found this inapplicable because it accepted the Corps finding that filling the 17.6 acres would have an impact on migratory birds that in fact resided there, and thereby would affect interstate commerce. The SWANCC court therefore did not need to consider whether the Corps would have jurisdiction over possible habitats of migratory birds that could affect interstate commerce.

The United States Supreme Court granted a writ of certiorari on May 22, 2000.

Announcements

LCL Email Update Service

LSU Sea Grant Legal Program has begun a bi-monthly email update service that contains short articles and summaries of recent coastal news and legislation, case law and review of informational websites. To view recent issues go to: http://its2ocs.lsu.edu/guests/sglegal/public_html/lcl.html. If you are interested in being added to our Update Service email list please email Erinn Neyrey at eneyrey@lsu.edu.

"Louisiana's Oyster Lease Relocation Program: A Step Toward Common Ground" written by Joe Stevenson will be published in the Southern University Law Review. Look for the article in the Fall 2000 issue.

Oceans Act of 2000, S.2327

The Oceans Act was approved Congress on July 25, 2000 and signed into law by President Clinton on August 8th. The National Ocean Commission, which will perform a comprehensive review of US ocean and coastal activities, is established by this legislation. This national commission will provide the forum for representatives from state and local government, industry, academia and public interest groups to evaluate current issues and policies and report to the President and Congress with recommendations for the future. Over a three year fiscal year period beginning in 2001 a total of $6,000,000 has been appropriated to support Commission operations. The last ocean study of this magnitude was the Stratton Commission, convened by Congress in 1966.

Non-Profit
Org.
U.S. Postage
PAID
Permit No. 733
Baton Rouge