

January 2013

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Recommended Citation

Catherine M. Janasie, *Oyster Mortality Due To Freshwater Diversions In The Deepwater Horizon Response Effort: Are Takings Claims Viable?*, 19 *Ocean & Coastal L.J.* (2013).

Available at: <http://digitalcommons.maineraw.maine.edu/oclj/vol19/iss1/3>

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OYSTER MORTALITY DUE TO FRESHWATER DIVERSIONS IN THE DEEPWATER HORIZON RESPONSE EFFORT: ARE TAKINGS CLAIMS VIABLE?

*Catherine M. Janasie**

Many private parties sustained damage after the Deepwater Horizon incident on April 20, 2010 (the Spill). Since the Spill, many of these parties have attempted to recover their losses, and the news recently has been filled with stories detailing the settlement of some of these claims.¹ After the Spill, British Petroleum (BP) set up the Gulf Coast Claims Facility, which paid over \$6 billion before it was replaced with a court-supervised claims process in June 2012.² The U.S. District Court in Louisiana recently approved a settlement in the Spill's multi-district litigation.³ While there is a \$2.3 billion cap on the claims that BP will pay to seafood vessel owners, seafood boat crews and captains, commercial fishermen, and oyster leaseholders, other claims are not

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1. See, e.g., *Judge OKs Settlement in BP Class-Action Suit*, CNN (Dec. 22, 2012, 1:50 PM), <http://www.cnn.com/2012/12/22/us/bp-spill-settlement/index.html?iref=allsearch> [hereinafter *Judge OKs Settlement*]; Tom Fowler, *Transocean Is Set to Pay \$1.4 Billion in Gulf Spill*, WALL ST. J. (Jan. 3, 2013, 3:54 PM), <http://online.wsj.com/news/articles/SB10001424127887324374004578219533349270970>.

2. Michael Kunzelman, *BP Oil Spill Payments Exceed \$1B Mark*, ASSOCIATED PRESS (Jan. 10, 2013, 11:22 AM), <http://www.bigstory.ap.org/article/bp-oil-spill-settlement-payments-exceed-1b-mark-0>.

3. See *id.*

capped.⁴ Through this settlement, BP estimates that it will pay out more than \$7.8 billion of the \$20 billion trust to resolve all the claims.⁵

The U.S. government has also settled some of its civil and criminal cases from the Spill.⁶ In November 2012, BP settled with the U.S. Department of Justice to plead guilty to criminal charges and pay \$4.5 billion in fines, one of largest criminal fines ever imposed by the U.S. government against a corporation.⁷ In addition, BP faces additional Clean Water Act claims that were not included in the settlement with the Department of Justice.⁸ Transocean Ltd., who owned the rig that exploded, recently settled with the U.S. Department of Justice to pay \$1.4 billion to cover all federal civil and criminal charges against the company.⁹

Among those parties who sustained damage as a result of the Spill are oystermen who raise and harvest oysters in the Gulf of Mexico (Gulf).¹⁰ Oysters are in a unique position in the Gulf. In addition to being an economic commodity, oysters are a keystone species and provide ecosystem services such as filtering water.¹¹ Unfortunately, the Spill occurred when oysters were spawning, so the oyster population was likely very damaged by the Spill.¹² However, much of the oyster mortality is being attributed to the decision to flush freshwater into the Gulf as part of the response effort, and not due to oil from the Spill.¹³

The State of Louisiana decided to use its freshwater diversion system in an attempt to keep oil out of the state's coastal marshes and wetlands.¹⁴ Louisiana and the U.S. Army Corps of Engineers began to

4. *Judge OKs Settlement*, *supra* note 1.

5. *Id.*

6. Clifford Krause & John Schwartz, *BP Will Plead Guilty and Pay Over \$4 Billion*, N.Y. TIMES (Nov. 15, 2012), <http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html?pagewanted=all>.

7. *Id.*

8. *Id.*

9. Fowler, *supra* note 1.

10. MIKE FREEMAN, STEPHEN GIDIÈRE & MARY SAMUELS, *THE OIL SPILL'S IMPACT ON GULF COAST OYSTERS 1* (2010), available at http://www.eli.org/pdf/na_40-11/40.11097.pdf.

11. *Id.*

12. *Id.* at 1-2.

13. *Id.* at 1. Throughout my research, I encountered "freshwater" spelled in two ways: "freshwater" and "fresh water." Except when I am quoting or referencing sources, I will use the "freshwater" spelling.

14. Nicole Santa Cruz & P.J. Huffstutter, *Effort to Keep Oil Spill at Bay Tips Ecological Balance*, L.A. TIMES (Aug. 3, 2010), <http://articles.latimes.com/2010/aug/03/nation/la-na-freshwater-20100803>.

flush unprecedented amounts of freshwater into Louisiana's coastal waters beginning ten days after the Spill.¹⁵ Most parties concur that the freshwater diversions lowered the salinity level in Louisiana's coastal marshes, and that the lower salinity levels led to massive amounts of oyster mortality in these areas.¹⁶ However, disagreement exists as to the effectiveness of the freshwater diversions.¹⁷ In addition, although most parties acknowledge that the freshwater diversions attributed to a drop of salinity that led to oyster mortality, some parties are claiming that the freshwater diversions were only one of several factors that caused salinity levels to drop in Louisiana's coastal waters.¹⁸

Ironically, these diversion systems were planned and completed by the state of Louisiana and the federal government partly at the request of the oyster industry.¹⁹ The freshwater diversion systems were built as part of an effort to protect and preserve Louisiana's coastline and remain part of Louisiana's coastal restoration plan.²⁰ Louisiana continues to use freshwater diversions to prevent further coastal erosion and salt water intrusion, as well as "to maintain and enhance the existing ecological framework" of Louisiana's coastal areas.²¹

This article will look at possible recovery available against Louisiana and the federal government for oyster harvesters and distributors for damage done to their leased oyster beds by the freshwater diversions after the Spill. As stated above, oyster leaseholders had the option to join the \$2.3 billion settlement for the seafood industry in the multi-district litigation.²² Similarly, oyster leaseholders could have submitted claims to the Gulf Coast Claims Facility.²³ However, this article will

15. *Id.*

16. *Id.*

17. *Id.*

18. Jeffrey Ball, *Fresh Water Aimed at Oil Kills Oysters*, WALL ST. J. (July 21, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748704720004575377503611992306.html>.

19. Chris Kirkham, *Louisiana Oyster Industry Struggles to Cope with Oil Spill, Coastal Restoration Efforts*, TIMES-PICAYUNE (Oct. 31, 2010, 9:00 AM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/10/louisiana_oyster_industry_stru.html.

20. COASTAL PROTECTION & RESTORATION AUTHORITY OF LOUISIANA, PROJECTS, <http://www.coastal.la.gov/index.cfm?md=pagebuilder&tmp=home&nid=78&pnid=0&pid=97&catid=0&elid=0> (last visited Sept. 15, 2013) [hereinafter PROJECTS].

21. COASTAL PROTECTION & RESTORATION AUTHORITY OF LOUISIANA, PROJECT SUMMARY FOR THE DAVIS POND FRESHWATER DIVERSION, http://sonris-www.dnr.state.la.us/sundown/cart_prod/cart_ocpr_project_summary?pattask_proj_id=a2b200bf7eb32e94e040007f01005d75&popen_in_attask=N&phide_merged_fields=N (last visited Sept. 15, 2013) [hereinafter PROJECT SUMMARY DAVIS POND DIVERSION].

22. *See supra* notes 6-9 and accompanying text.

23. *See id.*

look at the ability of oyster leaseholders in Louisiana to bring takings claims under the U.S. and Louisiana constitutions.²⁴

Part I will discuss the history of oysters and freshwater diversions in Louisiana. Part II of this article will discuss the Deepwater Horizon disaster and the freshwater diversions, including how the diversions impacted oysters. Part III will briefly discuss the other forms of recovery available to the oystermen.²⁵ Part IV will discuss the recovery under state and federal law for takings claims. Part V will analyze whether these takings claims could be successful.

I. HISTORY OF OYSTERS AND FRESHWATER DIVERSIONS IN LOUISIANA

Oysters play an integral role in the Gulf ecosystem.²⁶ As a keystone species, oysters have “a shaping, disproportionate influence on [their] habitat and community.”²⁷ In addition, oysters work to purify the water in their habitat, as they can filter at least a gallon of water in an hour,²⁸ and between twenty-five to fifty gallons in a day.²⁹ Further, oyster reefs serve as habitat and nursery grounds for other species in the ecosystem.³⁰ Oyster reefs also keep down coastal erosion because the reefs form ridges on the sea bottom, which minimize tidal impacts and waves.³¹ Finally, oysters serve as a food source for other species in the ecosystem, including birds.³²

In addition to their vital importance to the Gulf’s ecosystem, oysters are also an extremely vital economic commodity.³³ NOAA reported that in 2008, Gulf fishermen harvested over one billion pounds of shellfish and finfish that yielded \$659 million in revenue.³⁴ The Gulf is the

24. Additional claims may be available to oyster leaseholders under state or federal law, but these claims are beyond the scope of this paper. Further, this paper will not address the recovery available under the Gulf Coast Claims Facility, pursuant to the terms of the Oil Pollution Act.

25. In this article, the term “oystermen” refers to men and women who make their living producing and harvesting oysters in the Gulf.

26. NAT’L COMM’N ON BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER, THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 178 (2011) [hereinafter DEEP WATER REPORT].

27. *Id.*

28. *Id.*

29. Freeman, Gidiere & Samuels, *supra* note 10, at 1.

30. *Id.*

31. *Id.*

32. *Id.*

33. DEEP WATER REPORT, *supra* note 26, at 186-7.

34. *Id.* at 187.

leading producer of the nation's oysters, with NOAA reporting that Louisiana itself accounts for sixty-seven percent of the country's oyster production.³⁵ All in all, oysters produce around \$131 million in annual revenue for the Gulf Coast region.³⁶ In addition to loss of revenue due to physical harm and the seafood harvesting closures that occurred after the Spill, many in the region are concerned with the lack of consumer confidence in Gulf seafood after the Spill.³⁷ Because of lower salinity levels and oil from the Spill, oyster production from January to June 2010 was down fifty-seven percent compared to averages from 2007 to 2009, and the dockside value loss for the same time period was forty-four percent.³⁸

A. Oyster Leases in Louisiana

Under Louisiana law, oyster leases are recognizable property rights, so that oyster leases have legal attributes similar to other real property and are protectable against injuries by third parties.³⁹ Under Louisiana law, "[a] lessee shall enjoy the exclusive use of the water bottoms leased and of all oysters and cultch grown or placed thereon."⁴⁰ However, the statute goes on to state that an oyster lessee's

exclusive use of water bottoms is subordinate to the rights or responsibilities of the state, any political subdivision of the state, the United States, or any agency or agent thereof, to take any action in furtherance of coastal protection, conservation, or restoration. For purposes of this Subpart, 'coastal protection, conservation, or restoration' means any project, plan, act, or activity for the protection, conservation, restoration, enhancement, creation, preservation, nourishment, maintenance, or management of the coast, coastal resources, coastal wetlands, and barrier shorelines or islands, including but not limited to projects authorized under any comprehensive coastal protection master plan or annual coastal protection plan issued pursuant to

35. *Id.*

36. Freeman, Gidiere & Samuels, *supra* note 10, at 1.

37. DEEP WATER REPORT, *supra* note 26, at 185.

38. Natalia Real, *Louisiana Oyster Industry Struggling the Most*, FISH INFO & SERVICE CO. (Oct. 1, 2010, 3:30 PM), <http://fis.com/fis/worldnews/worldnews.asp?l=e&country=0&special=&monthyear=&day=&id=38392&ndb=1&df=0>.

39. *Avenal v. United States*, 100 F.3d 933, 936 (Fed. Cir. 1996).

40. LA. REV. STAT. ANN. § 56:423(A) (2006).

Part II of Chapter 2 of Title 49 of the Louisiana Revised Statutes of 1950.⁴¹

The statute allows an oyster lessee to make a claim for damage or injury done to the oyster beds or grounds of the lease, but states once again that the lessee may not bring an action “against the state, any political subdivision of the state, the United States, or any agency, agent, contractor, or employee thereof for any claim arising from any project, plan, act, or activity in relation to coastal protection, conservation, or restoration, except as provided in R.S. 56:427.1.”⁴²

The State of Louisiana and any of its political subdivisions, along with the United States, may not be held liable for coastal restoration actions, including any claims arising from freshwater diversions “for the purpose of coastal protection, conservation, or restoration.”⁴³ In addition, Louisiana law requires all oyster leases to contain “hold-harmless” language to this effect.⁴⁴

In addition to private oyster leases, Louisiana law also establishes public oyster seed grounds for the oyster industry’s use and benefit.⁴⁵ A person may take mature oysters, seed oysters, or cultch from the public seed grounds for their own use or benefit.⁴⁶ However, to do so, the person must obtain a permit from the state.⁴⁷

B. History of Louisiana’s Diversion System and the Oyster Industry

Ironically, the diversion system that many believe caused oyster mortality after the Spill was built in part because of requests by the oyster industry.⁴⁸ Historically, Louisiana’s coastal waters provided an ideal habitat and salinity for oysters, since the freshwater from the Mississippi River and other smaller streams mixed with the Gulf’s saltwater.⁴⁹ However, the U.S. Army Corps of Engineers (the Corps) expanded the levee system of the Mississippi after the flood of 1927 in

41. *Id.*

42. LA. REV. STAT. ANN. § 56:423(B) (2006).

43. LA. REV. STAT. ANN. § 56:427.1(A) (2006).

44. LA. REV. STAT. ANN. § 56:427.1(B) (2006).

45. LA. REV. STAT. ANN. § 56:434 (2006).

46. *Id.*

47. *Id.*

48. *See Avenal v. Louisiana*, 886 So.2d 1085, 1088 (La. 2004).

49. *Id.*

an effort to prevent future major floods of the Mississippi River.⁵⁰ However, by controlling the flooding of the Mississippi River with the levee system, freshwater no longer reached these coastal areas, which raised the salinity level in these waters.⁵¹ The increased salinity had two effects: (1) areas landward that had previously had salinity levels that were too low for oyster cultivation now could support oyster growth; and (2) areas from the coast that had previously been ideal for oyster cultivation were now too saline to support oyster growth.⁵² In addition, the Mississippi River levee system led to coastal erosion and the loss of wetlands along Louisiana's coast.⁵³

In the 1950s, the federal and state governments began to address these effects and plan a diversion system to reintroduce the Mississippi River's freshwater back into the effected coastal waters.⁵⁴ At the request of local groups, which included the oyster industry, the U.S. Fish and Wildlife Service (the FWS) began an investigation into the effects of the Mississippi levee system.⁵⁵ In 1959, the FWS issued a memorandum to the Corps that stated that natural and man-made events had raised the salinity in these coastal waters, which had an adverse effect on the fish and wildlife of the area, including oysters.⁵⁶ In the 1959 memorandum, the FWS concluded that "[i]ntroduction of fresh water to reestablish natural patterns of salinity . . . would provide the most effective method of restoring fish and wildlife production."⁵⁷ In addition, the 1959 memorandum also recognized that the increased salinity had made some waters that had previously been too fresh suitable for oyster growth.⁵⁸ Finally, the 1959 memorandum identified four locations for diversion sites, including in the areas that had previously been too fresh for oyster cultivation.⁵⁹

Through the 1960s, 1970s, and 1980s, the Corps continued to work with the Louisiana state government on planning the freshwater

50. *Id.* For a discussion of the history of the Mississippi River levee system and flood control in the area, see KAREN M. O'NEILL, RIVERS BY DESIGN: STATE POWER AND THE ORIGINS OF U.S. FLOOD CONTROL (2006).

51. *Avenal*, 886 So.2d at 1088.

52. *Id.* at 1088-89.

53. *See id.* at 1089.

54. *Id.* at 1088.

55. *Id.* at 1088-89.

56. *Id.*

57. *Id.* at 1089.

58. *Id.*

59. *Id.*

diversion system.⁶⁰ In the 1970s, coastal erosion and increased salinity levels continued in these areas, which continued to move the areas for oyster growth further landward, while making previously vital oyster grounds unusable, including Louisiana's public seed grounds.⁶¹ The Corps prepared an Environmental Impact Statement in 1984, proposing the construction of three diversion structures to control salinity and recognizing that "the zone where conditions will become too fresh for oyster cultivation as a result of the diversion coincides with an area that was historically (prior to 1960) too fresh and not favorable for oyster cultivation."⁶² Finally, in the 1980s and 1990s, the planned diversions were constructed and became operational.⁶³

The freshwater diversion system continues to be part of Louisiana's coastal restoration plan.⁶⁴ Louisiana uses the freshwater diversion system to slow the intrusion of saltwater and aid marsh growth in coastal Louisiana in an effort "to maintain and enhance the existing ecological framework" of Louisiana's coastal areas by providing freshwater, sediment, and nutrients.⁶⁵

Louisiana has anticipated continued tension between its use of freshwater diversions and its effect on the oyster industry.⁶⁶ As discussed above, in response to the operation of the freshwater diversion system, the Louisiana Department of Wildlife and Fisheries (LDWF) inserted a clause into its oyster lease form that indemnifies and holds harmless Louisiana for all claims related to the state's coastal restoration actions.⁶⁷ Further, because Louisiana plans to continue using freshwater diversions in its coastal restoration plans, Governor Jindal formed the Oyster Advisory Committee, in part to address the oyster damage due to the Spill and the freshwater diversions, and in part to address the potential future conflicts between the oyster industry and freshwater diversions initiated for coastal restoration purposes.⁶⁸

60. *Id.* at 1089-90.

61. *Id.* at 1089.

62. *Id.* at 1090.

63. *Id.* at 1090-92.

64. PROJECTS, *supra* note 20.

65. PROJECT SUMMARY DAVIS POND DIVERSION, *supra* note 21.

66. *Avenal*, 886 So.2d at 1090.

67. *Id.*

68. Kirkham, *supra* note 19.

II. THE OIL SPILL AND THE FRESHWATER DIVERSIONS

On April 20, 2010 an explosion on the drilling rig the Deepwater Horizon, which was operating in the Gulf of Mexico (the Gulf) for BP, caused one of history's greatest oil spills.⁶⁹ After eighty-six days of oil gushing into the Gulf, BP finally claimed that it had capped the Macondo well in July 2010.⁷⁰ In September, five months after the Spill, pressure tests determined that the pumping of cement into the well's base formed a final seal, and the federal government declared that the Macondo well was dead.⁷¹

All in all, scientists for the government have estimated that around five million barrels of oil gushed into the Gulf from the Macondo well.⁷² The oil reached the shores of Louisiana first, and tar balls and oil mousse made it to the shores of Mississippi, Alabama, and Florida by June.⁷³ The Gulf is the home of an extremely rich and productive ecosystem, and the Spill threatened to damage these resources.⁷⁴ In the aftermath of the Spill, the media inundated the American public with images of oil-slicked waterways and oil-covered wildlife; however, very little coverage was given to another negative consequence of the Spill response – freshwater diversions from the Mississippi River into the bays of Louisiana.⁷⁵

A. The Freshwater Diversions

In an attempt to keep oil from the Spill from reaching the coast of Louisiana, Louisiana and the U.S. Army Corps of Engineers began to flush freshwater into Barataria Bay and Breton Sound.⁷⁶ The freshwater diversions began ten days after the explosion on the Deepwater Horizon

69. Campbell Robertson, *U.S. Puts Oil Spill Total at Nearly 5 Million Barrels*, N.Y. TIMES (Aug. 2, 2010), <http://www.nytimes.com/2010/08/03/us/03flow.html>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. See DEEP WATER REPORT, *supra* note 26, at 174.

75. See, e.g., *100 Days of the BP Spill: A Timeline*, TIME, <http://content.time.com/time/interactive/0,31813,2006455,00.html> (last visited Oct. 12, 2013) (an interactive timeline containing multiple images of the oil spill but no mention of damage from freshwater diversions); *Huff Post: Gulf Oil Spill*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/bp-oil-spill/> (last visited Oct. 12, 2013) (A collection of stories covering the spill including many images of oil in the marshes but containing no stories on the damage done by the freshwater diversions).

76. Santa Cruz & Huffstutter, *supra* note 14.

rig, on April 30, 2010.⁷⁷ According to a coastal scientist in Louisiana, these diversions were a preferred response measure because they were a low-cost solution that would not require any funds from either BP or the federal government.⁷⁸ The diversions were accomplished by releasing large quantities of river water through gates along the Mississippi River levees and man-made channels into Louisiana's coastal marshes.⁷⁹ The freshwater was released through this system in larger quantities than had been released by the system in the past.⁸⁰

Louisiana opened the Davis Pond and Caernarvon diversions, the state's largest two diversions, on April 30, 2010.⁸¹ On May 4, 2010 Louisiana opened the Ostrica Locks to flush additional freshwater into Breton Sound.⁸² On May 7, 2010, the Louisiana Office of Coastal Protection and Restoration (OCPR) announced that six diversions with a combined flow of 18,900 cubic feet along the lower Mississippi had been opened in order to keep oil from getting to Louisiana's wetlands and estuaries.⁸³ On May 10, 2010, OCPR announced that the Davis Pond diversion had been opened to full capacity.⁸⁴ On May 12, 2010, OCPR announced that a seventh diversion had been opened, and the total combined flow of these diversions was 29,550 cubic feet per second.⁸⁵ The following are the seven diversions that were opened:

77. *Id.*

78. *Id.* The solution was low-cost because a freshwater diversion system already existed in Louisiana, which will be discussed in Part III.

79. Jeffrey Ball, *supra* note 18.

80. Santa Cruz & Huffstutter, *supra* note 14.

81. *See* Press Release, State of Louisiana, Office of Coastal Protection and Restoration Officials Open Additional Freshwater Diversions to Help Protect Coastal Wetlands from Oil Spill (May 7, 2010), *available at* <http://emergency.louisiana.gov/Releases/05072010-cpra.html> [hereinafter Press Release, Additional Freshwater Diversions]. "The Office of Coastal Protection and Restoration is the implementation office for the Louisiana Coastal Protection and Restoration Authority." *Id.*

82. *Id.*

83. *See id.*

84. *See* Press Release, State of Louisiana, Office of Coastal Protection and Restoration Officials Open Davis Pond Diversion to Full Capacity to Help Curb Oil Penetration into Coastal Marshes (May 10, 2010), *available at* <http://emergency.louisiana.gov/Releases/05102010-ocpr.html> [hereinafter Press Release, Davis Pond Diversion].

85. *See* Press Release, State of Louisiana, State Opens Additional Freshwater Diversion Canal at Bayou Lamoque in Plaquemines Parish (May 12, 2010), *available at* <http://emergency.louisiana.gov/Releases/05122010-Lamoque.html> [hereinafter Press Release, Plaquemines Parish].

- (1) Davis Pond Diversion: St. Charles Parish;
- (2) Violet Siphon: St. Bernard Parish;
- (3) Caernarvon Diversion: St. Bernard Parish;
- (4) Whites Ditch Siphon: Plaquemines Parish;
- (5) Naomi Siphon: Plaquemines Parish;
- (6) West Pointe A la Hache Siphon: Plaquemines Parish; and
- (7) Bayou Lamoque Diversion: Plaquemines Parish.⁸⁶

The diversions, which are located on both the east and west sides of the Mississippi River, diverted water into the northern Barataria Basin⁸⁷ and the adjacent wetlands to Breton Sound and Black Bay.⁸⁸

Through these press releases, OCPR made it clear that it thought opening these diversions was necessary to protect Louisiana's coastal resources. OCPR Assistant Director Jerome Zeringue stated, "[w]e have opened every diversion structure we control on the state and parish level to try to limit the oil approaching our coasts."⁸⁹ Robert Barham, Secretary of the LDWF, stated that "[t]he potential effects of this oil spill could last for decades, so we are using every means at our disposal to try to lessen the devastation the oil could inflict on our wetlands."⁹⁰ Garret Graves, Chairman of the Louisiana Coastal Protection and Restoration Authority, stated:

Oil has made its way west of the Mississippi River and we are using every tool we have available to try and protect our coastal resources. We have been using diversions, siphons and locks on both the east and west side for more than 10 days to try and push the oil away from our coastal wetlands. The Barataria Basin is a maze of marshy islands, grass beds, bayous, ponds and lakes. It will be nearly impossible for us to clean the oil out of these areas for years if it gets in there.⁹¹

86. *Id.* In addition to these seven diversions, Louisiana also flushed freshwater through Ostrica Locks.

87. *See* Press Release, Davis Pond Diversion, *supra* note 84.

88. *See* Press Release, Plaquemines Parish, *supra* note 85. Four of the diversions are in Plaquemines Parish, three are located in St. Bernard Parish, and one is located in St. Charles Parish. *Id.*

89. Press Release, Additional Freshwater Diversions, *supra* note 81.

90. Press Release, Plaquemines Parish, *supra* note 85.

91. *Id.*

In addition, the OCPR stated that they would “continue to closely monitor coastal conditions and will assess any potential damage to wetlands as impacts are reported.”⁹²

B. The Effect on Oysters

Parties are in disagreement as to the effectiveness of the freshwater flushing. The National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling stated in its report to President Obama (the Presidential Report) that many parties believe that the diversions were “a futile attempt to keep oil from entering the estuarine areas.”⁹³ However, other sources state that most accounts claim that the diversions were successful in allowing only a minimal amount of oil into Louisiana’s estuaries.⁹⁴ Despite the disagreement concerning the diversions’ effectiveness, the freshwater diversions appear to be another response effort that could result in its own environmental damage.⁹⁵

Many scientists believe that the diversions are the cause of massive oyster mortality in Louisiana’s marshes, because the flushing of freshwater into these areas reduced the salinity of the water in the marshes.⁹⁶ Seawater usually has a salinity of about “[thirty-five] parts salt per thousand parts water.”⁹⁷ However, many of the most productive waters for oysters in Louisiana have a salinity of about fifteen parts salt per thousand parts water.⁹⁸ In fact, oysters usually require a salinity level between five to fifteen parts per thousand.⁹⁹ Although oysters can survive a fluctuation in salinity, they cannot do so for an extended period of time.¹⁰⁰ When salinity levels drop below five parts per thousand, the salt level is too low for the survival of larvae and adult oysters and for young oysters to attach to the oysters beds.¹⁰¹ After the diversions were started, Earl Melancon, a biologist at Nicholls State University located in Thibodaux, Louisiana, has said that the salinity levels in some areas of

92. Press Release, Additional Freshwater Diversions, *supra* note 86.

93. DEEP WATER REPORT, *supra* note 27, at 178.

94. Ball, *supra* note 18.

95. *Id.* Other response efforts that could have adverse environmental impacts include the use of dispersants and the building of sand berms off the Louisiana coast, which some believe could actually increase coastal erosion. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See Santa Cruz & Huffstutter, *supra* note 14.

100. *Id.*

101. *Id.*

Barataria Bay were below five parts per thousand, a salinity level that oysters would have difficulty surviving.¹⁰²

Once the freshwater diversions had begun, scientists and oystermen observed large numbers of empty, flapping oyster shells in Louisiana's oyster grounds, which meant that the oysters inside were dead.¹⁰³ Further, these parties have observed large amounts of oyster mortality in parts of Louisiana where oil from the Spill never reached, leading many to believe that the deaths were caused by the freshwater diversions.¹⁰⁴ Patrick Banks, who oversees the oyster fishery in Louisiana as a biologist for LDWF, said LDWF conducted tests in an extremely productive part of Barataria Bay and found that around sixty percent of the oysters in the area had died.¹⁰⁵ Banks also described an oyster die-off as looking "like a fish kill" with oyster meat floating on the water's surface in such large quantities "that the predators that normally would eat up the oyster meat just couldn't keep up."¹⁰⁶ Melancon also found dead oysters in Barataria Bay, and stated that dead oysters had also been found in Breton Sound.¹⁰⁷

Melancon has claimed that he is "fairly confident" that the freshwater diversions caused the oyster deaths that he observed.¹⁰⁸ The Presidential Report stated that "[o]yster mortality observed in the highly productive areas of Barataria Bay and Breton Sound . . . appear to be due, in large part, to the flood of fresh water introduced through river diversions"¹⁰⁹ A Louisiana Coastal Protection and Restoration Authority spokesman has claimed that it is "obvious" that the diversions resulted in a reduced salinity level in some of the state's oyster beds; however, the spokesman also claimed that the diversions were just one of the factors that could have contributed to the lower salinity levels, as other factors such as rain and the river's natural flow could also have been contributors.¹¹⁰ After the diversions, a BP spokesman refused to comment on whether they would pay for oyster deaths caused by the freshwater diversions.¹¹¹

102. Ball, *supra* note 18.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Santa Cruz & Huffstutter, *supra* note 14.

108. *Id.*

109. DEEP WATER REPORT, *supra* note 26, at 178.

110. Ball, *supra* note 18.

111. *Id.*

John W. Tunnell, Jr. prepared an expert report on the expected recovery of the seafood industry in the Gulf.¹¹² In his opinion, Tunnell discusses oysters in the Gulf and the impact of the Spill on oysters.¹¹³ Tunnell states that “[t]oo much freshwater will kill oysters, although they can tolerate some freshwater flooding from time to time.”¹¹⁴ However, Tunnell also states that oyster reefs can quickly recolonize due to the large number of eggs and larvae produced by a single spawn.¹¹⁵ In conclusion, Tunnell claims that oyster harvesting in 2011 in the northern Gulf will follow the trends of recent years.¹¹⁶ Further, Tunnell states that unless there are “large scale flooding events in 2011,” oyster reefs that were damaged by freshwater diversions “should be recolonized by young oysters in 2011 . . . but they will not likely be of harvestable size until late 2012 or 2013.”¹¹⁷

III. ALTERNATIVE RECOVERY OPTIONS

Those who suffered damage due to the Spill faced several choices in how they would like to recover their losses. Many claims for damages have been processed by the Gulf Coast Claims Facility (GCCF), which paid out over \$6 billion on more than 220,000 claims following the Spill before being replaced by a court-supervised claims process in June 2012.¹¹⁸ The GCCF was set up pursuant to the Oil Pollution Act of 1990 (OPA).¹¹⁹ Under OPA, a responsible party who discharges oil from a vessel or facility is liable for the removal costs and damages that result from the discharge.¹²⁰ The responsible party is liable for, among other costs, damages in connection with real or personal property, lost revenue

112. JOHN W. TUNNELL, JR., AN EXPERT OPINION OF WHEN THE GULF OF MEXICO WILL RETURN TO PRE-SPILL HARVEST STATUS FOLLOWING THE BP DEEPWATER HOIZON MC 252 OIL SPILL (2011), *available at* http://media.nola.com/2010_gulf_oil_spill/other/Tunnell-GCCF-Final-Report.pdf.

113. *Id.* at 29.

114. *Id.* at 30.

115. *Id.* at 30-31. In addition, Tunnell points out that although oysters can be “tolerant of light to medium oiling,” without detailed oiling maps, it is difficult to determine the exact amount of oiling that oysters received in specific areas. *Id.*

116. *Id.* at 32.

117. *Id.* at 32-33. Tunnell states that oyster reefs that were heavily oiled might “not recover for 6-8, even 10 years.” *Id.*

118. Kunzleman, *supra* note 2.

119. *See* GULF COAST CLAIMS FACILITY, PROTOCOL FOR EMERGENCY ADVANCE PAYMENTS (2010), *available at* http://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-emergency-advance-payments.pdf.

120. 33 U.S.C.A. § 2702(a) (2006).

and profits, and hindered earning capacity.¹²¹ Under OPA, all claims for costs or damages must first be presented to the responsible party.¹²² After presenting a claim to the responsible party, if the claimant disagrees with the responsible party's denial of the claim or determination of the amount owed, the claimant may present a claim to the Oil Spill Liability Trust Fund, administered by the National Pollution Funds Center.¹²³ This action is also available if the responsible party has failed to act within ninety days after the claimant presented the claim.¹²⁴

After the Spill, the U.S. Coast Guard designated BP as a responsible party under OPA.¹²⁵ BP, as required by OPA, set up a procedure for paying and settling claims for damages and costs incurred because of the Spill.¹²⁶ However, the White House announced on June 16, 2010 that BP would replace the claims process with the GCCF and establish a \$20 billion escrow fund to pay for claims under OPA.¹²⁷ The GCCF reviewed individuals' and businesses' claims for damages and costs incurred due to the Spill.¹²⁸ Under the GCCF, an individual or business could make a claim for Emergency Advance Payments, Quick Payment Final Payments, Full Review Final Payments, or Interim Payments.¹²⁹

Oystermen who sustained damage due to the freshwater diversions after the Spill could make a Final Claim to the GCCF because the Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology (Final Rules), specifically mentioned damage caused by the freshwater diversions.¹³⁰ The Final

121. 33 U.S.C.A. § 2702(b) (2006).

122. 33 U.S.C.A. § 2713(a) (2006).

123. See U.S. COAST GUARD, NAT'L POLLUTION FUNDS CTR., THE OIL SPILL LIABILITY TRUST FUND (OSLTF), http://www.uscg.mil/npfc/About_NPFC/osltf.asp (last visited Oct. 12, 2013).

124. *Id.*

125. U.S. GOV'T ACCOUNTABILITY OFFICE, DEEPWATER HORIZON OIL SPILL: PRELIMINARY ASSESSMENT OF FEDERAL FINANCIAL RISKS AND COST REIMBURSEMENT AND NOTIFICATION POLICIES AND PROCEDURES, REP. GAO-11-90R, 1 (2010), available at <http://www.gao.gov/products/GAO-11-90R>.

126. *Id.*

127. *See id.*

128. *Id.*

129. See Brian J. Donovan, *Third Lawsuit Alleges Gross Negligence and Fraud by BP Oil Spill Fund Administrator*, DAILY KOS (July 19, 2013, 6:13 AM), <http://www.dailykos.com/story/2013/07/19/1224910/-Third-Lawsuit-Alleges-Gross-Negligence-and-Fraud-by-BP-Oil-Spill-Fund-Administrator>.

130. GULF COAST CLAIMS FACILITY, FINAL RULES GOVERNING PAYMENT OPTIONS, ELIGIBILITY AND SUBSTANTIATION CRITERIA, AND FINAL PAYMENT METHODOLOGY 5 (Feb. 18, 2011), available at <http://eng2viet.files.wordpress.com/2011/02/gccf-final-rules.pdf> [hereinafter FINAL RULES].

Rules stated that claimants who had losses due to the freshwater diversions were entitled to a Final Payment “equal to four times the actual documented losses in 2010.”¹³¹ However, oystermen who sustained this type of damage may have felt that they would be inadequately compensated by the GCCF; many oystermen were confused by the GCCF process and were unsure of how to calculate their losses.¹³² Further, though the Final Rules mention damage caused by freshwater diversions, the claimants who sustained this type of damage may not have been able to adequately document their claim to the GCCF.¹³³ Claimants who had inadequate documentation had the option of receiving a “Quick Payment,” which required no additional documentation, as long as they had previously received an Interim Payment or an Emergency Advance Payment.¹³⁴

To receive most payments under the GCCF, claimants had to sign a waiver.¹³⁵ To receive a Quick Payment Final Claim, claimants had to release and waive any future claims against BP and any other potentially responsible party in connection to the Spill “or to submit any claim for payment to the National Pollution Funds Center, the Coast Guard office responsible for evaluating and approving Oil Pollution Act claims, or in court.”¹³⁶ Similarly, to receive a Final Payment from the GCCF, the claimant had “to sign a release precluding the claimant from seeking further compensation from the GCCF, the Coast Guard, or in court from either BP or any other defendant company allegedly responsible for the Oil Spill.”¹³⁷ Since Interim Payments only covered documented past

131. *Id.*

132. Nikki Buskey, *Oysterman Say Oil-Spill Claims Process Unclear*, HOUMATODAY (Nov. 7, 2010, 6:01 AM), <http://www.houmatoday.com/article/20101107/ARTICLES/101109419/0/SEARCH>.

133. Because the oystermen “are located in *the immediate vicinity of the Gulf shore . . .* the submission of adequate financial information and data contrasting wages and income before and after the Oil Spill will usually be deemed sufficient to document a claim.” FINAL RULES, *supra* note 130, at 7 (emphasis in original). In the same paragraph however, the Final Rules also state that most of the claims received by the GCCF “*are pervasively lacking documentation contrasting pre- and post-Oil Spill wages and income and complete 2010 financial documentation.*” *Id.* (emphasis in original). Therefore, oystermen may not have been able to substantiate their economic losses in a manner sufficient to be able to collect under the GCCF.

134. *Id.* at 8. Quick Payments were in the amount of \$5,000 for individuals and \$25,000 for businesses. *Id.*

135. *See id.* at 2, 8.

136. *See id.* at 1-2, 8.

137. *Id.* at 2.

damages, a claimant was not required to sign a release and thus retained all of his or her litigation rights.¹³⁸

Under the Final Rules, it does not appear that oystermen had to choose between either making a claim to the GCCF or pursuing a takings claim in court.¹³⁹ Although to collect most claims under the GCCF claimants had to give up a lot of their future litigation rights by signing a broad release, the releases did not cover claims against the state or federal government.¹⁴⁰ The Final Rules only mentioned a release that would preclude claimants from seeking additional “compensation from the GCCF, the Coast Guard, or in court from either BP or any other defendant companies allegedly responsible for the Oil Spill.”¹⁴¹ Because the State of Louisiana and the United States are not mentioned among the parties released, oystermen who collected under the GCCF could still pursue a takings claim against the United States and Louisiana.¹⁴²

If an oysterman either disagreed with the GCCF’s denial of his or her claim or the GCCF’s determination of the amount payable to the claimant, or if the GCCF failed to act within ninety days after the oysterman presented the claim, then the claimant could submit the claim to the National Pollution Funds Center (NPFC).¹⁴³ Unlike the GCCF, the NPFC will not pay any amount for future or speculative damages, and the NPFC requires a claimant to release “all rights to recover the amount paid on that claim from responsible parties and from any person under any other law consistent with provisions of OPA.”¹⁴⁴ However, a claimant does not have to release his or her rights to any claim for damages or removal costs that are not included in the NPFC’s payment to the claimant.¹⁴⁵ Further, a claimant must bring a claim for damages

138. *Id.*

139. *See id.*

140. *See id.*

141. *Id.*

142. *See id.*

143. *Id.* at 9. Claims to the NPFC must be made in writing, for a “sum certain” for damages and the cost of oil removal. U.S. COAST GUARD, NAT’L POLLUTION FUNDS CTR., DEEPWATER HORIZON CLAIMANT FAQs, http://www.uscg.mil/npfc/claims/DWH_faqs.asp (last modified Sept. 12, 2013). Because the NPFC will only pay documented claims, a claimant should include the documentation and information on which the claimant relied in determining his or her “sum certain,” as well as all information proving that the costs and damages were the result of the Spill. *Id.* Like the GCCF, the NPFC will most likely deny any claim that is undocumented or submitted without supporting information. *See Id.*

144. FINAL RULES, *supra* note 130, at 9.

145. *Id.*

within three years after the injury and the connection to the Spill are “reasonably discoverable with the exercise of due care.”¹⁴⁶

Similarly, the oystermen could bring a claim for damages against BP in court.¹⁴⁷ For example, the oystermen could join the multidistrict litigation pending in the U.S. District Court for the Eastern District of Louisiana.¹⁴⁸ The U.S. District Court for the Eastern District of Louisiana has approved a settlement for spill-related claims in the above multidistrict litigation.¹⁴⁹ The court set a deadline of January 22, 2013 for claimants to join the settlement for seafood claims.¹⁵⁰ Recently the U.S. District Court judge overseeing the litigation denied a motion to extend the deadline to join the seafood settlement.¹⁵¹ Although the rest of the settlement does not have a cap, the seafood claims, which cover seafood vessel owners, seafood boat crews and captains, commercial fishermen and oyster leaseholders, are capped at \$2.3 billion.¹⁵² Overall, the settlement process in this litigation has led to BP paying more than \$1 billion for claims, and BP estimates that the amount will reach around \$7.8 billion once the process is complete.¹⁵³

IV. TAKINGS CLAIMS

Both the Federal Court of Claims and the Louisiana Supreme Court have decided cases that addressed oyster mortality due to the freshwater diversion systems in Louisiana.¹⁵⁴ A background of takings law and

146. *Id.* A claimant must bring a claim for damage to natural resources within three years after the natural resource damage assessment is completed under federal regulations. *Id.* A claimant must bring a claim for removal costs within six years of the completion of the claimant’s removal actions. *Id.*

147. *Id.* The NPFC procedures discussed in this paragraph do not apply to claims for physical injury. Further, like claims to the NPFC, a court might not determine that the claimant is entitled to more damages than the GCCF offers, and if the claimant is unable to document a claim to the GCCF, it is unlikely that the claimant will be able to establish a claim in court.

148. *See generally* *In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d 891 (E.D. La. 2012).

149. *Id.* at 964; *see also* Kunzelman, *supra* note 2.

150. Kunzelman, *supra* note 2.

151. Richard Thompson, *Federal Judge Rejects Motion to Extend Deadline for BP Oil Spill Seafood Settlement*, TIMES-PICAYUNE (Jan. 24, 2013, 3:24 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/01/federal_judge_rejects_motion_t.html.

152. *Judge OKs Settlement*, *supra* note 1.

153. Kunzelman, *supra* note 2.

154. *See, e.g., Avenal v. United States*, 33 Fed. Cl. 778 (1995); *see also, e.g., Avenal v. Louisiana*, 886 So. 2d 1085 (La. 2004).

federal and state cases that addressed oyster mortality due to freshwater diversions are discussed in turn below.

A. Takings Generally

The Fifth Amendment of the U.S. Constitution states that “[n]o person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁵⁵ The first part of the Fifth Amendment is known as the Due Process Clause.¹⁵⁶ The second part constrains the government’s use of its power of eminent domain and is known as the Takings Clause.¹⁵⁷

Eminent domain is an inherent government power to take privately owned property for a public use without the owner’s consent, subject to constitutional and statutory limitations.¹⁵⁸ Because it is an inherent power, the power of eminent domain does not need to be granted to the government by statutes or the Constitution; therefore, the U.S. Constitution does not grant to the federal government the power of eminent domain.¹⁵⁹ Rather, the Fifth Amendment of the U.S. Constitution provides protection to property owners by stating that the government can only take privately owned property without the property owner’s consent if: (1) the government is taking the property for a public purpose, and (2) the government pays just compensation to the property owner.¹⁶⁰ Therefore, the only time that a taking will be considered unconstitutional is if the taking is not for a public use, even if compensation is provided, or if the compensation provided is not adequate.¹⁶¹

The purpose of this takings clause in the Fifth Amendment is to keep the government from placing an unfair burden on private property

155. U.S. CONST. amend. V.

156. *See* E. Enters. v. Apfel, 524 U.S. 498, 556-57 (1998) (Breyer, J., dissenting) (“We need not face these difficulties, however, for there is no need to torture the Takings Clause to fit this case. The question involved -- the potential unfairness of retroactive liability -- finds a natural home in the Due Process Clause, a Fifth Amendment neighbor.”).

157. *Id.*

158. *See* Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 244-45, 252 (1897).

159. *See id.*

160. U.S. CONST. amend. V.

161. *See, e.g.,* Kelo v. City of New London, 545 U.S. 469, 477 (2005); *see also, e.g.,* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 318-319 (1987) (discussing the just compensation clause).

owners when the public should be bearing the burden.¹⁶² There are two types of takings.¹⁶³ The first category is physical takings, which is where the government either obtains title to the property, known as condemnation, or physically invades private property without providing just compensation to the owner, known as inverse condemnation.¹⁶⁴ However, the Fifth Amendment does not simply protect property owners from the government invading, occupying, or removing property.¹⁶⁵ Rather, it also protects against government regulatory action that diminishes the usefulness of private property, which is known as a regulatory taking.¹⁶⁶ A regulatory taking occurs when the government burdens private property with a regulation to such an extent that the regulation has the same effect on the property as if the government had physically taken the property.¹⁶⁷ Put simply, if the regulation goes "too far," it will constitute a taking.¹⁶⁸

Although a regulation can amount to a taking, states and local governments have broad legislative power to regulate land use through the police power, which allows a state to enact regulations to protect the health, safety, and general welfare of the community.¹⁶⁹ In addition to the police power, the government may also act to protect the state's interest in submerged and public trust lands.¹⁷⁰

By exercising these powers, the government may create conflicts with property owners who might challenge the regulation.¹⁷¹ Under the police power, a court will presume that a land use regulation is valid and will only declare a regulation to be unconstitutional if it is clearly arbitrary and unreasonable, with no substantial relation to the public health, safety, or welfare of the community.¹⁷² Further, as stated above, if a land use regulation "goes too far," a court may consider it to be a regulatory taking.¹⁷³

162. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

163. *Abraham Bell & Gideon Parchomovsky, Givings*, 111 *YALE L.J.* 547, 558 (2001).

164. *See id.*

165. *See id.*

166. 26 *AM. JUR.* 2D *Eminent Domain* § 11 (2013).

167. *See id.*

168. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

169. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

170. *See e.g. Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892).

171. *See* 26 *AM. JUR.*, *supra* note 163, at § 11.

172. *Vill. of Euclid*, 272 U.S. at 395.

173. *Mahon*, 260 U.S. at 415.

Courts have been unwilling to set hard and fast rules regarding whether a property restriction by the government constitutes a taking.¹⁷⁴ However, the U.S. Supreme Court has created certain categories of cases that are considered per se takings.¹⁷⁵ First, if the government physically invades a person's property on a permanent basis, the government has taken the property and must provide just compensation to the property owner.¹⁷⁶ Second, if the government action keeps the owner from using his or her property in any economically beneficial way, the government has taken the property with what is known as a "total regulatory taking."¹⁷⁷

Outside of these two per se regulatory takings, the U.S. Supreme Court has also developed an analysis for land-use exactions, which involve situations when the government seeks to impose a condition on the property owner in exchange for authorizing a land use that it has restricted otherwise.¹⁷⁸ The Court laid out the test for whether an exaction amounts to a taking in *Nollan v. California Coastal Commission*¹⁷⁹ and *Dolan v. City of Tigard*.¹⁸⁰ In *Nollan*, the Court created what is known as the "essential nexus" test, which requires a condition in the permit to serve "the same governmental purpose as the development ban."¹⁸¹ In *Dolan*, the Court added to the "essential nexus" test by requiring a "rough proportionality" between the proposed development's impact and the condition.¹⁸² The lower courts have split on whether the *Nollan* and *Dolan* tests should be applied to situations outside of the facts of those cases, such as cases where the exaction does not involve dedications of real property or in cases when a permit is never issued, but the Supreme Court ruled during its 2013 term that *Nollan* and *Dolan* could be applied to these situations.¹⁸³

If a government action limits the use of property and does not fall within one of the above categories, a court will apply the three-part test

174. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

175. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

176. *See id.*

177. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026, 1030 (1992).

178. *See St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So.3d 1220, 1223 (2011) (defining "exaction"), *rev'd*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2603 (2013); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 390-91 (1994).

179. 483 U.S. 825 (1987).

180. 512 U.S. 374 (1994).

181. *Nollan*, 483 U.S. at 837.

182. *Dolan*, 512 U.S. at 390-91.

183. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2603 (2013).

established by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*,¹⁸⁴ known as the “*Penn Central Test*.”¹⁸⁵ Under the *Penn Central Test*, a court will analyze “the character of the governmental action.”¹⁸⁶ For example, a court might look at whether the government has physically invaded the property or otherwise impacted the property.¹⁸⁷ A court will also examine “the economic impact on the claimant.”¹⁸⁸ Importantly, a court will analyze “the extent to which the governmental action had interfered with distinct investment-backed expectations.”¹⁸⁹ However, the *Penn Central Test* is not a set formula and the Court intended for the test to be used by courts as guidance in their analysis of whether there is a taking due to a government’s restriction on the use of property.¹⁹⁰

B. Federal Claims

As discussed in Part I.A above, oyster leases are recognized property rights in Louisiana that are protectable from injury or damage done by third parties.¹⁹¹ Pursuant to the U.S. Constitution, state-created property rights are protected from uncompensated takings by the state or federal government.¹⁹² In *Avenal v. United States*,¹⁹³ the U.S. Court of Appeals for the Federal Circuit determined whether damage done to oyster beds due to freshwater diversions, which were initiated to combat coastal erosion and changed salinity levels at the Caernarvon diversion project, constituted a taking by the government.¹⁹⁴

The court first established that the intent of the government in its development of the Caernarvon project was not to occupy or use the plaintiffs’ oyster lease beds for government purposes but, rather, to limit the plaintiffs’ use of the oyster beds.¹⁹⁵ Further, the court concluded that

184. 438 U.S. 104 (1978).

185. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Taking Jurisprudence*, 14 YALE L.J. 203, 243-51 (2004).

186. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

187. See, e.g., *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So.3d 1220, 1226-27 (2011).

188. *Penn Cent.*, 438 U.S. at 124.

189. *Id.*

190. See *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326-27 (2002).

191. See *Avenal v. United States*, 100 F.3d 933, 936 (Fed. Cir. 1996).

192. *Id.*

193. *Id.*

194. *Id.* at 935-36.

195. *Id.* at 937.

the limits imposed by the government substantially reduced the plaintiffs' property values.¹⁹⁶

In the case, the court examined the oystermen's claims using the *Penn Central* test.¹⁹⁷ In determining that there was no taking by the government, the court concluded that the plaintiffs did not have "reasonable investment-backed expectations" that their property interests in their oyster lease beds would be protected from the state and federal governments' planned diversions of freshwater.¹⁹⁸ An issue for the court in determining that the plaintiffs did not have investment-backed expectations was that the plaintiffs had not established how long they had held their oyster leases.¹⁹⁹ This led the court to assume that none of the plaintiffs held leases prior to 1976, which the court calculated by subtracting fifteen years, which is the term of oyster leases in Louisiana, from 1991, the date when the government began operating the freshwater diversions at the Caernarvon project.²⁰⁰ Because the state and federal governments had been planning the freshwater diversion projects since the 1950s and 1960s, the court ruled that the plaintiffs could not have reasonable investment-backed expectations to be protected from the state and federal governments' planned freshwater diversions, because the diversions were planned prior to when the plaintiffs were assumed to have entered their leases.²⁰¹ The court stated that the "plaintiffs as a matter of law must be assumed to have known that their rights to use bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about."²⁰²

Another factor in the court's decision was the fact that plaintiffs' oyster leases were in an area that was previously unsuitable for oyster cultivation.²⁰³ The court stated that the plaintiffs were entitled to take advantage of the changing salinity levels caused, at least partly, by government actions in building the Mississippi levee system, for their economic benefit by obtaining leases in these areas.²⁰⁴ However, the

196. *Id.* at 937 (quoting *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994) ("There can be no doubt from the record that the limit on plaintiff's use . . . had the effect of substantially reducing the value of plaintiff's property, well beyond the level of 'mere diminution.'").

197. *See id.*

198. *Id.*

199. *Id.* at 936-37.

200. *Id.* at 936.

201. *Id.* at 937-38.

202. *Id.* at 938.

203. *See id.* at 937.

204. *Id.*

court further elaborated that the plaintiffs could not be surprised that the government would again tamper with the area's salinity levels.²⁰⁵

Finally, the court acknowledged that the plaintiffs possessed valuable state-created property rights that were entitled to constitutional protection, such as protection from unlawful pollution.²⁰⁶ Interestingly, in dictum, the court also claimed that the hold-harmless clauses in some of the plaintiffs' oyster leases did not change the fact that the state and federal governments' actions had restrained the plaintiffs' use of their property.²⁰⁷ However, as discussed above, the court ruled that this restraint did not amount to an unconstitutional taking.²⁰⁸

C. Louisiana Claims

Since the Louisiana Constitution distinguishes between property that is "taken" and property that is "damaged," what is considered a taking under the Louisiana Constitution is narrower than what is considered a taking under the U.S. Constitution.²⁰⁹ Under the Louisiana Constitution

[e]very person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power. . . . Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation.²¹⁰

Moreover, a claimant must bring a takings claim within three years under the statutory law of Louisiana, but a claimant must bring a damages claim within two years under Article I, Section 4 of the Louisiana Constitution.²¹¹

In *Avenal v. State*, the Supreme Court of Louisiana ruled on the plaintiffs' claims under the Louisiana Constitution.²¹² The court applied a three-part test to analyze "whether a claimant is entitled to eminent domain compensation."²¹³ Under the three-part test, a court shall: "(1) determine if a recognized species of property right has been affected; (2)

205. *Id.*

206. *Id.*

207. *Id.* at 937-38.

208. *Id.*

209. *Avenal v. State*, 886 So.2d 1085, 1113-14 (La. 2004) (Weimer, J., concurring).

210. LA. CONST. art. I, §4.

211. *Avenal*, 886 So.2d at 1113-14 (Weimer, J., concurring).

212. *Id.* at 1088.

213. *Id.* at 1104 (citing *State v. Chambers Inv. Co.*, 595 So.2d 598, 602-03 (La. 1992)).

if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for a public purpose under Article I, § 4.”²¹⁴

However, the Supreme Court of Louisiana determined the three-part test was not necessary because the plaintiffs’ claims were time-barred.²¹⁵ As takings and damages claims have different prescription periods under Article I, Section 4, the court stated that it was necessary to determine whether the plaintiffs’ claims were takings or damages claims.²¹⁶ The plaintiffs’ claims were for damages, which are subject to a two-year prescription period, because the property suffered a diminution in property value due to government action.²¹⁷ In Louisiana, the prescription period for damages claims starts “to run after the completion and acceptance of the public works.”²¹⁸ As a result, the court ruled that the prescription period began to run when the Caernarvon project became operational in 1991, which effectively time-barred the plaintiffs’ claims.²¹⁹

Regardless of the prescription period, the Supreme Court of Louisiana also ruled that the plaintiffs were not entitled to compensation for a majority of their claims because the leases contained hold-harmless clauses that released Louisiana from damage caused by coastal diversion projects.²²⁰ This rationale differed from the federal court’s dictum that the hold-harmless clauses did not change that the government had restrained the plaintiffs’ use of the property.²²¹ In holding that the hold-

214. *Id.*

215. *Id.* at 1104-05.

216. *Id.* at 1104.

217. *Id.* at 1105-06. Under Louisiana law, “property is ‘taken’ when the public authority acquires the right of ownership or one of its recognized dismemberments.” *Id.* at 1106 (quoting *Columbia Gulf Transmission Co. v. Hoyt*, 215 So.2d 114, 120 (La. 1968)).

218. *Id.* (quoting LA. REV. STAT. ANN. § 9:5624 (2012)).

219. *Id.* at 1109.

220. *Id.* at 1098. The Court discussed how the Louisiana Department of Natural Resources objected to the issuance of new oyster leases in areas of Louisiana that would be affected by coastal restoration projects. *Id.* at 1096. But due to a compromise with the Louisiana Coastal Restoration Policy Committee, oyster leases were allowed to be issued with a hold-harmless and indemnity clause that favored Louisiana. *Id.* In that case, prior to this requirement, Louisiana had issued twelve oyster leases that did not contain the hold-harmless and indemnity language. *Id.* at 1102. The court ruled, however, that the claims by the leaseholders whose leases did not contain the hold-harmless language were still time-barred. *Id.* at 1109-10.

221. *Avenal v. United States*, 100 F.3d 933, 938-39 (Fed. Cir. 1996).

harmless clauses were valid, the court stated the clauses were necessary to the oyster industry's development.²²² Moreover, the court reasoned the clauses were allowed under the public trust doctrine, which required the state to protect Louisiana's coastline.²²³ The public trust doctrine, furthermore, required Louisiana to go forward with its coastal restoration projects, including the planned freshwater diversions and "the redistribution of existing productive oyster beds to other areas . . . in [pursuit] of this goal."²²⁴

V. RECOVERY UNDER TAKINGS CLAIMS

In order to succeed in a takings claim, the oystermen who suffered damage due to freshwater diversions after the Spill will have to distinguish their cases from the *Avenal* decisions in state and federal court. As will be discussed below, the facts surrounding these freshwater diversions are distinguishable from the *Avenal* decisions. However, even though the facts are distinguishable, the oystermen will still have to overcome some obstacles to succeed on a takings claim.

First, the oystermen may be able to distinguish their claims from the facts underlying the *Avenal* decisions and make a better case that they had reasonable investment-backed expectations. The court considered deliberate diversions in the *Avenal* decisions, whereas the freshwater diversions after the Spill were not the planned, as the freshwater diversions began only ten days after the Spill and were not part of the general coastal restoration plans of Louisiana.²²⁵ Further, the freshwater

222. *Avenal*, 886 So.2d at 1100. The court gave several reasons why the hold-harmless clauses were necessary to the oyster industry's development, including: (1) the clauses allowed oyster lessees to risk that their leased grounds would be productive in the face of the planned freshwater diversions; (2) the clauses allowed the coastal restoration projects to continue without the danger of lawsuits; (3) the coastal restoration projects helped the public seed-grounds' productivity; and (4) the coastal restoration projects reestablished the productive areas for oyster growth that existed prior to the Mississippi River levee system. *Id.*

223. *Id.* at 1101.

224. *Id.* at 1102. The court also distinguished the facts of this case from the facts of a prior case of the Supreme Court of Louisiana that prohibited the LDWF from conditioning the renewal of existing oyster leases upon the inclusion of a "navigation and oil field activity clause" to the lease because the clause was neither "necessary and proper" to the development of the oyster industry, nor mandated by the public trust doctrine. *Id.* at 1098-1103 (citing *Jurisch v. Jenkins*, 749 So.2d 597, 605-06 (La. 1999)).

225. See *supra* text accompanying notes 78-81.

diversion systems were put on full blast after the Spill, which had never happened before in the history of the systems.²²⁶

In addition, the oystermen had been raising and cultivating oysters for many years in these areas, even though the coastal restoration freshwater diversions had been operational since the early 1990s.²²⁷ Moreover, if the oystermen who sustained damage are able to show how long they have held their oyster leases, they will be able to distinguish the facts of their situation from the facts in the *Avenal* decisions. However, even if the facts are distinguishable from the facts in the *Avenal* decisions, there are still roadblocks to the oystermen's recovery under takings claims.

A. State Claims

Although the freshwater diversions were not deliberate diversions, like those in the *Avenal* decisions, the hold-harmless clauses that barred most of the claims in the *Avenal* state decision may still apply. The hold-harmless clauses that are included in oyster leases under Louisiana law hold harmless state and federal actors from actions taken "in furtherance of coastal protection, conservation, or restoration," which include acts to protect the state's coastline, wetlands, and coastal resources.²²⁸ The Louisiana OCPR's press releases announcing the opening of the freshwater diversion systems after the Spill stated the diversions were used to protect the state's coastal resources.²²⁹ In addition, the LDWF stated that the diversions were an effort to keep oil from damaging Louisiana's wetlands.²³⁰ Thus, there is evidence that Louisiana and the Corps acted within the terms of the hold-harmless clause currently found in all Louisiana oyster leases.

Moreover, even though state statutory law provides that the hold-harmless clause covers state and federal actions taken pursuant to "any comprehensive coastal protection master plan or annual coastal protection plan," the state statutes also indicate the actions covered by the hold-harmless clause are not limited to actions taken under these plans.²³¹ Therefore, the fact that these diversions were not taken

226. See Mark Schleifstein, *BP Says It's Not Responsible for Paying to Reseed Oyster Beds*, TIMES-PICAYUNE (Apr. 16, 2011, 12:00 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/04/bp_says_its_not_responsible_fo.html; Kirkham, *supra* note 19.

227. See *supra* text accompanying note 63.

228. LA. REV. STAT. ANN. § 56423(A) (2006).

229. See, e.g., Press Release, Additional Freshwater Diversions, *supra* note 81.

230. See *supra* text accompanying notes 89-91.

231. LA. REV. STAT. ANN. §§ 56:423(A), 56:427.1.

according to any coastal restoration plan does not mean that they fall outside of the scope of the hold-harmless clauses found in Louisiana oyster leases.

Further, even if the oystermen are able to distinguish their cases from the *Avenal* state decision, to the extent that the state court finds that the hold-harmless clauses do not apply, the oystermen's claims may still be time-barred. The *Avenal* state decision remains good law in Louisiana and the case clearly holds that claims for damage done to oyster beds due to freshwater diversions have a two-year prescription period.²³² Further, the *Avenal* state decision provided that the prescription period began "to run after the completion and acceptance of the public works," which the court determined was 1991.²³³ Under the court's reasoning in the *Avenal* state decision, the oystermen's claims for damage done by the freshwater diversions after the Spill may have been time-barred in 1993, seventeen years before the oystermen sustained damage by the Spill.

In order to overcome the prescription clock of the *Avenal* state decision, the oystermen would have to argue that the freshwater diversions were so outside the scope of the freshwater diversion system's use under Louisiana's coastal restoration plan, and that the prescription period should not have begun to run until the oystermen sustained damage after the Spill. Unfortunately, even if the court was persuaded to reset the clock for the oystermen's damages claims, their claims are most likely still time-barred. The prescription period for damages claims in Louisiana is two years, and the damage the oystermen sustained from the freshwater diversions occurred in 2010, more than two years ago.²³⁴ Thus, the prescription period serves as a giant roadblock for oystermen's claims in Louisiana state courts.

B. Federal Claims

At first glance, the oystermen may have an easier case to make in federal court. In the *Avenal* federal decision, the Court of Federal Claims stated in dictum that the hold-harmless clauses in the oyster leases did not change the fact that the state and federal governments had restrained the plaintiffs' use of their property.²³⁵ Although the court only stated this in dictum, it is still evidence that a federal court would not consider the hold-harmless clauses to be a bar to the oystermen's takings claims.

232. *Avenal v. State*, 886 So.2d 1085, 1110 (La. 2004).

233. *Id.* at 1105.

234. *See supra* text accompanying note 210.

235. *See Avenal v. United States*, 100 F.3d 933, 937-38 (Fed. Cir. 1996).

In addition, the oystermen's claims may not be time-barred in federal court. Under the Tucker Act, claimants should file takings claims against the government in the Court of Federal Claims.²³⁶ The statute of limitations for these claims is six years and, in a recent decision, *Northwest Louisiana Fish & Game Preserve Commission v. United States*, the United States Court of Appeals for the Federal Circuit stated that a takings claim begins to accrue when the claimant actually suffers damage.²³⁷ In that case, the court reasoned a takings claim accrues when the events that allegedly set the government's liability have occurred and the claimant knew or should have known of the existence of the events.²³⁸ Thus, a takings claim does not accrue while there is the threat of future harm, and the possibility that there may be a future taking does not support a present takings claim.²³⁹

The facts in *Northwest Louisiana Fish* are similar to the facts supporting the oystermen's potential claims in response to the freshwater diversions after the Spill. In *Northwest Louisiana Fish*, the Court of Appeals for the Federal Circuit ruled that the claimant's takings claim did not accrue when the Corps took action that threatened harm in the future, but accrued only when the harm to the claimant actually occurred.²⁴⁰ Like the claimant in *Northwest Louisiana Fish*, the oystermen could similarly argue that though the diversion systems became operational in the early 1990s, the diversion systems at that moment only threatened future harm to the oystermen. Thus, the oystermen could argue their takings claims did not accrue until they actually sustained harm, which was when their oysters sustained damage due to the freshwater diversions after the Spill.

Similarly, another recent decision of the Court of Federal Claims would support the oystermen's argument that their claims are not time-barred. In *George Family Trust v. United States*, the court held that the claimant's takings claim had not accrued because the flooding of the claimant's property was not foreseeable until the Corps "unpredictably changed" the flooding patterns, "thereby impacting what previously had been a viable agricultural enterprise despite historical flooding."²⁴¹ Unlike *George Family Trust*, the oystermen could argue that their takings claims did not accrue when the Corps began operating their

236. See 28 U.S.C. § 1491 (2006).

237. *Nw. La. Fish & Game Preserve Comm'n v. United States*, 446 F.3d 1285, 1291 (Fed. Cir. 2006).

238. *Id.*

239. *Id.* at 1291-92.

240. *Id.* at 1291.

241. *George Family Trust v. United States*, 91 Fed. Cl. 177, 201 (Fed. Cl. 2009).

diversion systems. Instead, the oystermen could contend that they had been viably raising oysters while the Corps had been operating these diversion systems since the early 1990s, and that their claims began to accrue only when the government changed their usual freshwater diversion patterns after the Spill and operated the diversion systems at full capacity, which damaged their property. Under these previous cases, the oystermen would have until sometime in 2016 to file their federal claims, depending on when they actually sustained damage from the freshwater diversions after the Spill.²⁴²

The U.S. Supreme Court has also decided cases after the federal *Avenal* decision that could aid the oystermen's claims. Although not directly on point, the oystermen could state that by analogy, their case is similar to when the government takes property by temporarily flooding land. The Court recently decided *Arkansas Game & Fish Commission v. United States*, a temporary takings case that involved the flooding of a wildlife management area by the Corps where the Court held that flooding should not be treated differently than other takings claims.²⁴³ The case involved release rates that were temporary deviations from the regular operation plan of the dam.²⁴⁴ These deviations caused flooding that led to damage to the timber in the wildlife management area, while the normal release rates had not caused similar damage in the past.²⁴⁵ Despite the fact that in *Arkansas Game & Fish Commission* the temporary deviations flooded land,²⁴⁶ while the freshwater diversions after the Spill damaged submerged oysters,²⁴⁷ the facts of the two cases are very similar. Like in *Arkansas Game & Fish Commission*, the normal freshwater diversions rates of the coastal restoration plan allowed the oystermen to successfully raise oysters; however, when the deviations from the usual diversion rates occurred during the Spill, their property sustained damage.²⁴⁸

In ruling that temporary flooding could be a taking, the Court overturned the decision of the U.S. Court of Appeals for the Federal Circuit, which ruled that the temporary deviations from the dam's operating plan that had flooded the claimant's property could not amount to a taking, because in order to establish a takings claim for intermittent flooding, a claimant must show that the flooding is "inevitably

242. *Id.* at 190.

243. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012).

244. *Id.* at 516.

245. *Id.*

246. *Id.*

247. FREEMAN, GIDIÈRE & SAMUELS, *supra* note 10.

248. Kirkham, *supra* note 19.

recurring.”²⁴⁹ The Court disagreed with this analysis, stating that flooding should not be treated differently than other types of takings.²⁵⁰ Rather, the Court reiterated that such claims should be decided on a case-by-case basis and remanded the case to be decided using the *Penn Central* Test.²⁵¹

The Court specified some factors that the lower court could take into account in deciding whether a taking had occurred, such as “the degree to which the invasion is intended or is the foreseeable result of authorized government action . . . the character of the land at issue and the owner’s ‘reasonable investment-backed expectations . . . as well as the severity of the interference.’”²⁵² Particularly, the Court pointed out that though the damaged area was in a floodplain and had experienced past flooding, the area “had not been exposed to flooding comparable to the 1990’s accumulations in any other time span prior to or after the construction of the Dam.”²⁵³

Although *Arkansas Game & Fish Commission* involves flooding and damage on land, while the oystermen here sustained damage to oysterbeds on submerged land, the oystermen have a comparable situation because the diversions after the Spill were abnormal and not part of the overall coastal restoration plan of Louisiana.²⁵⁴ However, it is not clear how persuasive a court will find *Arkansas Game & Fish Commission* since the Court did not do a takings analysis in the decision and only ruled that a taking could have occurred.²⁵⁵ In deciding whether to bring a similar claim as *Arkansas Game & Fish Commission*, the oystermen may want to follow how the lower federal court evaluates the Commission’s temporary takings claim. If the decision turns out favorably and the court finds that a temporary taking occurred, the oystermen may want to make a similar temporary takings argument in their claims.

The oystermen could also potentially use *Arkansas Game & Fish Commission* to combat some of the reasoning of the federal *Avenal* decision that discussed the foreseeability of the oystermen’s claims.²⁵⁶ The court in the federal *Avenal* decision stated that since the plaintiffs were taking advantage of an area that was previously unsuitable for

249. *Ark. Game & Fish Comm’n*, 133 S. Ct. at 523.

250. *Id.* at 522.

251. *Id.*; see also *Penn Cen. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978).

252. *Ark. Game & Fish Comm’n*, 133 S. Ct. at 522 (citation omitted).

253. *Id.*

254. Kirkham, *supra* note 19.

255. *Ark. Game & Fish Comm’n*, 133 S. Ct. at 522.

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

oyster cultivation, they could not expect that the government would not tamper with salinity levels in the future.²⁵⁷ The oystermen here could argue that the freshwater diversions after the Spill were not foreseeable, as they were much greater than any previous diversions in the history of the diversion system.²⁵⁸ As stated above, the Court pointed out in *Arkansas Game & Fish Commission* that though the damaged area was in a floodplain and had experienced past flooding, the area “had not been exposed to flooding comparable to the 1990’s accumulations in any other time span prior to or after the construction of the Dam.”²⁵⁹ The oystermen could claim that a gradual change in salinity brought on by an incremental change in the amount of freshwater being released from the diversion projects would be foreseeable; this type of change could be planned for and the oystermen could take the appropriate steps to move their leases. On the other hand, the sudden, large changes in the amount of freshwater released after the Spill that had an immediate effect on salinity and oyster health were not foreseeable.²⁶⁰ Thus, the claimant could argue, foreseeability should not serve as a bar to their claims.²⁶¹

Another U.S. Supreme Court case decided after the federal *Avenal* decision may also be of use to the oystermen. In *Palazzolo v. Rhode Island*, the Court considered the takings claim of a property owner who obtained title to the property in question after the government had passed a regulation restricting the use of the property.²⁶² In 1978, the Rhode Island Coastal Resources Management Council (Council) passed regulations that designated salt marshes as protected wetlands, greatly restricting the amount of development that could occur on the property.²⁶³ In 1978, the corporation who held the property lost its corporate charter and the title to the property passed to Palazzolo, the corporation’s sole shareholder, who subsequently made several applications to the Council to develop the property.²⁶⁴ The Council rejected these applications, believing that the development would violate the salt marsh regulations, which prompted Palazzolo to file a takings claim.²⁶⁵ The Rhode Island Supreme Court held that since the salt marsh regulations existed before Palazzolo obtained title to the property, he

257. *Id.*

258. Kirkham, *supra* note 19.

259. *Ark. Game & Fish Comm’n*, 133 S. Ct. at 522.

260. Kirkham, *supra* note 19.

261. *See Avenal*, 100 F.3d at 937; *Ark. Game & Fish Comm’n*, 133 S. Ct. at 522.

262. *Palazzolo v. Rhode Island*, 533 U.S. 606, 613-14 (2001).

263. *Id.* at 614.

264. *Id.* at 614-15.

265. *Id.* at 615.

could not have a reasonable investment-backed expectation to develop his property under the *Penn Central* Test.²⁶⁶

The U.S. Supreme Court disagreed with the reasoning of the Rhode Island court and held that the fact that Palazzolo obtained title to the property after the Council enacted the salt marsh regulations could not serve as a bar to his takings claim.²⁶⁷ The Court reasoned that governments should not be able to put an expiration date on takings claims by barring claims by property owners who obtained title to property after a regulation was enacted, and doing so, the Court stated, would absolve the government from the obligation of defending its actions, “no matter how extreme or unreasonable.”²⁶⁸ In doing so, the Court rejected the lower court’s ruling stating that “[a] purchaser or a successive title holder like the petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.”²⁶⁹ The Court remanded the case to be determined under the *Penn Central* factors.²⁷⁰

The oystermen here could use *Palazzolo* to combat the reasoning of the federal *Avenal* decision where the court determined that the oystermen could not have reasonable investment-backed expectations, because they could not establish that they held their oyster leases prior to when the government began planning the freshwater diversion projects, and therefore, could not expect protection from the projects’ planned freshwater diversions. The oystermen could argue that under *Palazzolo*, this fact should not serve as an outright ban on their claims, but rather, should only be one factor weighed in the *Penn Central* analysis.

Even if a court finds both *Arkansas Game & Fish Commission* and *Palazzolo* to be persuasive and the oystermen here have been able to distinguish their claims from the previous federal *Avenal* decision, the oystermen will still have to contend with the fact that the federal *Avenal* decision remains good law. Recently, the Court of Federal Claims decided a case in which the claimant brought a takings claim based on the Corps’ discharge of polluted freshwater from a lake into a river in Florida.²⁷¹ In that case, the Court of Federal Claims cited the federal *Avenal* decision in finding that the claimants did not have a right to bring a takings claim based on the discharge of freshwater into the river, which

266. *Id.* at 616.

267. *Id.* at 632.

268. *Id.* at 627.

269. *Id.* at 626.

270. *Id.* at 630.

271. *Mildenberger v. United States*, 91 Fed. Cl. 217, 227 (2010).

altered the river's salinity level.²⁷² Even though, in *Avenal*, the Federal Circuit Court of Appeals held that the plaintiffs did not have reasonable investment-backed expectations and that not all takings claims based on changed salinity levels would fail, the oystermen could face a similar interpretation of the *Avenal* decision by the Court of Federal Claims in its review of the oystermen's claims.

Finally, oystermen should consider how a federal court might examine the oystermen's claims under the *Penn Central* Test. As stated above, the oystermen here have a stronger case that these diversions were unforeseeable than the *Avenal* plaintiffs did, since the diversions after the Spill were not part of the normal operation of the diversion systems. Further, the oystermen could use *Palazzolo* to argue that the fact that they obtained their leases after the diversion systems were being planned or operated should not serve as a bar to their claims. Moreover, if an oysterman could show that his or her lease dated back to before the planning of the diversion, which the *Avenal* plaintiffs were unable to do, he or she would have an even stronger case that he or she had a reasonable investment-backed expectation.

How a court might weigh the facts of the oystermen's claims under the *Penn Central* Test is uncertain, however, as there is no set formula for examining takings cases. Because of this, it is often hard to predict how a court will decide a takings claim. In addition to the foreseeability and investment-backed expectations arguments discussed above, the court may be swayed by the circumstances surrounding the Spill. In light of the fact that the Spill is an emotional event, one cannot underestimate how the facts of the Spill and the ecological damage that the Spill caused might sway a court, and any potential claimants should consider this factor in deciding whether to bring a takings claim. On the other hand, the government stated that the freshwater diversions after the Spill were taken to protect the coastal resources of Louisiana.²⁷³ Given the chaos that occurred after the Spill, a court may find that the government's actions here were properly within the government's police power and duty under the public trust doctrine, and that the actions did not go "too far." In deciding whether to bring a takings claim, a potential claimant should not fail to consider the unpredictability of how a court may view a takings claim.

272. *Id.* at 245.

273. See PROJECT SUMMARY DAVIS POND DIVERSION, *supra* note 21.

VI. CONCLUSION

In conclusion, outside of the BP settlement process, the oystermen who suffered damage from the freshwater diversions initiated after the Spill may be able to bring takings claims in state and federal court, though a state claim is likely to be time-barred. The previous *Avenal* decisions will be a high hurdle for these claimants to overcome, and each claimant will have to determine whether he or she is willing to expend the time and resources, both financial and emotional, that a court case will entail.

The oystermen will have to distinguish the facts of their case to overcome the prior state decision's holding that the *Avenal* plaintiffs' claims were both time-barred and barred by the hold-harmless clauses in Louisiana oyster leases. Even if the oystermen are able to successfully argue that the diversions were outside the state's coastal restoration plan, the claims are most likely still time-barred. Claims for damages in Louisiana have a two-year prescription period, and the damage to oysters by the freshwater diversions occurred more than two years ago.

Although a federal claim may not be time-barred or barred by the hold-harmless clause, the oystermen would still have barriers to overcome in federal court. Any potential claimants will have to argue that their case is distinguishable from the previous federal *Avenal* decision, and the Federal Claims Court recently cited the federal *Avenal* decision for the proposition that a claimant could not establish a takings claim based on changed salinity levels.²⁷⁴ Though the oystermen may be able to distinguish their cases from the facts of the *Avenal* decisions and more recent U.S. Supreme Court decisions may help aid their arguments, whether they will be able to overcome the precedent of these decisions is not certain. Nor is one able to easily predict how a court would weigh the facts of this case under the *Penn Central* Test.

In determining whether to bring takings claims, each oysterman will have to determine whether the chance that they will be able to distinguish their case from the *Avenal* decisions is worth the time, money, and emotional resources that litigation entails. Oystermen should not underestimate the time and resources that the claimants in the Exxon Valdez litigation had to invest in their own court cases, and even the *Avenal* decisions took many years to be decided. The oystermen should consider whether they are willing to be invested in litigation for this lengthy period of time and whether they are willing to risk that a court

274. See *Mildenberger*, 91 Fed. Cl. at 245.

will not view their claims more favorably than the courts in the *Avenal* decisions.