

NO. 99-30067

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MICHAEL X. ST. MARTIN AND
VIRGINIA RAYNE ST. MARTIN,**

Plaintiffs – Appellees - Cross-Appellants,

VERSUS

**MOBIL EXPLORATION & PRODUCING U.S. INC.
AND PHILLIPS PETROLEUM COMPANY,**

Defendants – Appellants - Cross-Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

**BRIEF FOR MICHAEL X. ST. MARTIN
AND VIRGINIA RAYNE ST. MARTIN**

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CERTIFICATE OF INTERESTED PERSONS

MICHAEL X. ST. MARTIN;
VIRGINIA RAYNE ST. MARTIN,
Plaintiffs – Appellees - Cross-Appellants,

v.

No. 99-30067

MOBIL EXPLORATION & PRODUCING U.S. INC.;;
PHILLIPS PETROLEUM COMPANY,
Defendants – Appellants - Cross-Appellees.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Michael X. St. Martin, plaintiff;
2. Virginia Rayne St. Martin, plaintiff;
3. A.J. Gray, III, counsel for plaintiffs;
4. The Gray Law Firm, counsel for plaintiffs;
5. Nathan A. Levy, Jr., counsel for plaintiffs;
6. Lee A. Archer, counsel for plaintiffs;
7. Mobil Exploration & Producing U.S., Inc., defendant;
8. Mobil Corporation, the parent company and publicly held company that owns 10% or more of the stock of Mobil Exploration & Producing U.S., Inc., defendant;

9. John Burr Scofield, counsel for Mobil Exploration & Producing U.S., Inc.;
10. John R. Pohorelsky, counsel for Mobil Exploration & Producing U.S., Inc.;
11. Scofield, Gerard, Veron, Singletary & Pohorelsky, counsel for Mobil Exploration & Producing U.S., Inc.;
12. Phillips Petroleum Company, defendant;
13. Vanguard Fiduciary Trust Company, a publicly held company owning 10% or more of the stock of Phillips Petroleum Company, defendant;
14. David N. Schnell, Jr., counsel for Phillips Petroleum Company;
15. Robert T. Lorio, counsel for Phillips Petroleum Company;
16. Milling Benson Woodward, L.L.P., counsel for Phillips Petroleum Company.

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REQUEST FOR ORAL ARGUMENT

This case, in which defendant oil companies were found liable for destruction of productive wetlands caused by their failure to maintain deteriorating oil and gas exploration canals on plaintiffs' property, involves issues of crucial import to the environment and the public.

Louisiana's wetlands, described by the United States Environmental Protection Agency as "national treasures" comparable to rainforests, provide innumerable benefits, including food and habitat for fish and wildlife; flood protection; shoreline erosion control; natural products for human use; water quality improvement; pollution control; and opportunities for employment, recreation, education, and research for millions of people.

Yet, our wetlands are disappearing at an extremely alarming rate. In a mere ten years, from 1970 to 1980, twenty-five percent of Louisiana's valuable and productive wetlands simply vanished, and the losses are continuing to progress geometrically. At the current rate, in approximately the next 30 to 50 years, there will be no St. Bernard Parish in Louisiana. Plaquemines Parish will be completely gone in 34 years. The demise of Terrebonne Parish will not be far behind.

What is the cause of this devastation of Louisiana's precious wetlands? A large majority of scientists (notably, those who are not employed by oil and gas

companies) have concluded that deteriorating man-made canals, the vast majority of which are attributable to the oil and gas industry, are responsible for almost 90% of the loss of Louisiana's wetlands.

Despite the indisputable evidence of the damage to Louisiana's wetlands caused by deteriorating canals, the oil and gas industry, sponsor of a canal system through the coastal region even larger than that of the Corps of Engineers, has adamantly denied any role in the problem, and has refused to work on a solution. This, despite the fact that oil and gas companies have extracted billions of dollars per year in minerals from these lands.

In the instant case, hundreds of acres of pristine wetlands on the St. Martins' property have been lost, essentially eroded away, due to the defendants' obstinate refusal to maintain and repair their 7,000 feet of canals and levees. Plaintiffs, avid conservationists who played a major role in establishing the nearby Mandalay National Wildlife Refuge, repeatedly requested that defendants repair their canals to prevent the continuing damage and restore the wetlands to at least a productive state, as required by two canal servitude agreements in plaintiffs' favor, as well as numerous provisions of Louisiana law. Only after these companies breached their initial promises to make the repairs and denied all responsibility for restoring the wetlands did plaintiffs file this suit, requesting that the Court order these

companies to uphold their legal and moral obligations to repair and remedy the damages their deteriorating canals have caused and continue to cause.¹

The District Court properly held defendants liable for refusing to maintain their canals and retaining levees on plaintiffs' wetlands property. The Court correctly held that the two canal servitude agreements obligated defendants to maintain their canals and to repair damage to the plaintiffs property caused by the disintegrating canals. Although the Court found no need to consider further theories of liability, numerous other grounds exist to impose liability under Louisiana law, including the Mineral Code, the Civil Code articles on vicinage, lessees, negligence and strict liability, and the Public Trust Doctrine.

The Court's basic findings upholding liability and causation, awarding damages for prior property loss, and ordering defendants to maintain and repair their canals to prevent future property losses, were clearly correct. In their cross-appeal, plaintiffs contest the Court's decision that defendants were liable for damage to only 24 of the 357 damaged acres, which was based on its findings that defendants were not liable for damages they caused prior to 1992, the date of

¹ Contrary to defendants' accusations that the St. Martins are seeking only money, the St. Martins, who are avid conservationists, stated from the very beginning that they would be satisfied with a judgment ordering defendants to repair and maintain the canals and return the wetlands to a productive state, without an award of damages in plaintiffs' favor. The St. Martins have donated hundreds of thousands of dollars in money, equipment, services and time to the Mandalay Wildlife Refuge and other wetlands conservation efforts. Defendants' resort to attacks on the St. Martins' character demonstrates the weakness of defendants' position.

plaintiffs' purchase of the property, and that defendants were only 60% at fault for causing the damage.

Plaintiffs respectfully suggest that oral argument in this case, which involves issues of critical import to the environment and the public, as well as potential application of emerging theories of law such as the Public Trust Doctrine, would be helpful to the Court.

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STATEMENT OF JURISDICTION

This suit was originally brought in state court then removed to federal district court based on diversity of citizenship pursuant to Sections 1332 and 1441, Title 28, United States Code. The Jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code, as an appeal from a final judgment of the United States District Court for the Eastern District of Louisiana that disposed of all parties' claims.

The District Court's Judgment was dated January 6, 1999. Defendants-Appellants filed their Notices of Appeal on January 15, 1999. Plaintiffs-Appellees-Cross Appellants filed a timely Notice of Appeal on January 22, 1999, in accord with Rule 4(a) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW
(Cross-Appellees)

1. Whether the District Court erred in its factual determination that defendants' disintegrating canal system caused only 60% of the damage to plaintiffs' wetlands property?

2. Whether the District Court erred in its legal determination that defendants were not responsible for the damage they caused to plaintiffs' wetlands property prior to 1992, the date plaintiffs purchased the property?

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**MICHAEL X. ST. MARTIN AND
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VERSUS

**MOBIL EXPLORATION & PRODUCING U.S. INC.
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**BRIEF FOR MICHAEL X. ST. MARTIN
AND VIRGINIA RAYNE ST. MARTIN**

MAY IT PLEASE THE COURT:

Plaintiffs-Appellees-Cross-Appellants Michael X. St. Martin and Virginia Rayne St. Martin respectfully submit, through undersigned counsel, their Original Brief in the above captioned appeal, in conformity with the Federal Rules of Appellate Procedure and the Local Rules of this Honorable Court.

STATEMENT OF THE CASE

Nature of the Case

Michael St. Martin and his wife, Virginia own approximately 2,400 acres in the Mandalay marsh in Terrebonne Parish, Louisiana, where they have their home. Avid wetlands conservationists, the St. Martins have been instrumental in

establishing and maintaining the nearby Mandalay National Wildlife Refuge. The St. Martins brought the instant suit as a result of damage to hundreds of acres of wetlands on their property caused by disintegrating oil exploration canals under the control and custody of defendant Mobil Exploration & Producing U.S., Inc. (hereinafter “Mobil”) and its successor, defendant Phillips Petroleum Company (hereinafter “Phillips”), mineral lessees conducting oil exploration and production on the property.

The St. Martins’ concern with preserving these wetlands is well-founded. Louisiana’s wetlands, described by the United States Environmental Protection Agency as “national treasures” comparable to rainforests, provide innumerable benefits, including food and habitat for fish and wildlife; flood protection; shoreline erosion control; natural products for human use; water quality improvement; pollution control; and opportunities for employment, recreation, education, and research for millions of people.² Our wetlands are homes to endangered or threatened species, such as the bald eagle, the brown pelican, and the migratory arctic peregrine falcon. Exhibit 38, p.12 and Table 1; Exhibit 40,

² Environmental Protection Agency, *Values and Functions of Wetlands*, published at www.epa.gov/owow/wetlands; United States Fish and Wildlife Service and Environmental Protection Agency, *Southeast Wetlands, Status and Trends, mid 1970’s to mid 1980’s*, www.nwi.fws.gov/sewet.

p.2. They are also the breeding grounds that ensure survival of Louisiana's seafood industry, which provides jobs and food for millions of people.

Unfortunately, our invaluable wetlands are disappearing at an alarming rate. From 1970-1980 alone, Louisiana lost 518,000 acres of wetlands, 28% of its total.³ As of 1983, the rate of loss was fifty square miles per year, triple the rate of loss for 1970. The losses continue to increase geometrically. Houck, *Land Loss in Coastal Louisiana: Causes, Consequences and Remedies*, 58 Tul. L. Rev. 3,6,11 (October, 1983). At the current rate, in approximately 30 years, there will be no St. Bernard Parish in Louisiana. VI.Tr.160-161. Plaquemines Parish will be completely gone in 34 years. The demise of Terrebonne Parish will not be far behind. 58 Tul. L. Rev. 3,6,11.

What is the cause of this geometric increase in the loss of Louisiana's precious wetlands? According to the evidence at trial and the vast majority of experts (notably, those who are not affiliated with oil companies) the losses are due, in major part, to the 10,000 mile web of deteriorating oil and gas exploration canals crossing Louisiana's coastal plains. These canals, which are rarely filled, expand in size geometrically as the years pass. These canals, with their eroding levees, permit water inundation and saltwater intrusion into the marshes, and are also the cause of vast amounts of subsidence.

Noted environmental law professor Oliver Houck, in an extraordinarily well-documented article that is worth reading, observes that man-made canals, the vast majority of which are attributable to the oil and gas industry, are responsible for almost 90% of the loss of Louisiana's wetlands, and the oil and gas industry is "a dominant, if not the predominant, factor in coastal land loss." Houck, *supra*, 58 Tul. L. Rev. 69-70. Interestingly, despite indisputable evidence of the damage to our wetlands caused by oil and gas canals, "[t]he oil and gas industry, sponsor of a canal system of its own through the coastal region even larger than that of the Corps of Engineers, has yet to acknowledge a role in the problem at all." 58 Tul. L. Rev. 5-6. This, despite the fact that the industry has extracted minerals worth billions of dollars per year in Louisiana.

In the instant case, hundreds of acres of pristine wetlands on the St. Martins' property have been lost, eroded away, due to the defendants' obstinate refusal to maintain and repair their 7,000 feet of canals. Despite repeated requests and promises, defendants refused to perform repairs to abate the geometrically increasing erosion and damage to the plaintiffs' property, or to remedy the damage they have caused. Despite the tens of millions of dollars in minerals they have taken from this very land, these companies adamantly refuse to acknowledge any part in the environmental havoc they are wreaking.

³ *Southeast Wetlands*, *supra* n. 2, www.nwi.fws.gov/sewet/introd.html.

The oil and gas industry's denial of any role in coastal land loss is reminiscent of the tobacco industry's completely insupportable position denying the link between cancer and cigarettes. It is time that the oil and gas industry accepted responsibility for the effects of its activities upon Louisiana's "living coast." 58 Tul. L. Rev. at p. 6. "To the extent that we are killing it prematurely we should, all who have had a hand in it, begin to make amends." *Id.* The lower Court's decision in the instant case is a laudable step towards that goal.

Proceedings and Disposition Below

After a bench trial, on August 13, 1998, the District Court entered a partial judgment finding defendants liable for damage to plaintiffs' property. IV.R.934. In its Partial Findings and Conclusions, the Court found that defendants had breached two canal servitude agreements, which contractually obligated defendants to maintain their canals and imposed liability for damages "occasioned to Grantor's lands as a result of the construction, use and maintenance" of the canals and their containing levees."⁴ IV.R.917. The Court found that defendants' obligations under the servitude agreements were continuing in nature, and that defendants must maintain and repair the canals to prevent future damage to plaintiffs' land.

Regarding causation, the Court found that the defendants' improperly maintained canal system caused 60% of the damage to plaintiffs' wetlands, and that the remaining 40% had been caused by natural forces. IV.R.928. The Court upheld its prior ruling on summary judgment that plaintiffs were only entitled to relief for damages to the property from 1992 forward, and requested additional briefing on the extent of damages between 1992 and the present. IV.R.932.

On January 6, 1999, the Court rendered a final judgment in favor of plaintiffs, awarding plaintiffs \$240,000.00 in damages. IV.R.866. The Court incorporated its prior Partial Findings and Conclusions, and reiterated that defendants breached their servitude agreements, which "unquestionably provide" that defendants have a continuing obligation to maintain the canals and their containing levees, and impose liability for damages occasioned as a result of the construction, use and maintenance of the canals. IV.R.862.

Addressing damages, the Court found that the total of the damaged property was 357 acres, and the damage subsequent to 1992 was to 40 acres. IV.R.863. Applying its prior findings that defendants had caused 60% of the damages, the Court found that damage to 24 of those acres (60%) was attributable to defendants. The court determined that an appropriate award of damages to restore

⁴ Having found that the servitude agreements expressly governed the duties and obligations between the parties, the District Court found it unnecessary to address plaintiffs' other theories of

the wetlands was \$10,000.00 per acre, and thus awarded plaintiffs \$240,000.00 in damages. The Court further ordered that defendants maintain their canals and repair the existing breaks or cuts to prevent future damage. Finally, the Court ordered that it would retain jurisdiction to enforce the judgment and address additional post-trial claims by the plaintiffs should the defendants fail to maintain and repair their canal system. IV.R.864.

From the aforementioned rulings, defendants appealed, and plaintiffs cross appealed. Plaintiffs, in their cross appeal, support the Court's judgment finding defendants liable for damage to the wetlands and enforcing their continuing duty to maintain and repair their canal system to prevent future damage. Plaintiffs contest the District Court's decision as to the percentages of fault, and contend that defendants should be held liable for 100% of the damages to the wetlands. Plaintiffs further contest the District Court's failure to order defendants to restore the entire 357 acres of damaged land to a productive wetlands state.

STATEMENT OF FACTS

Mandalay is a beautiful marsh, home to abundant wildlife, including bald eagles, pelicans, ducks, waterfowl, deer and wildflowers. V.Tr.15. In the winter time, the area supports tens of thousands of migratory water-fowl. V.Tr.22-23. The beauty of the marsh and its abundant wildlife were moving considerations for the

liability. IV.R.916.

St. Martins' purchase of their property and their decision to reside nearby. V.Tr.15.

In 1985, the St. Martins purchased the tract upon which they built their family home. V.Tr.46. In 1992, the St. Martins purchased 7,000 acres of the surrounding lands, including the 2,400 acre tract at issue in this case. V.Tr.16. They assisted the Nature Conservancy, a non-profit conservation organization, in establishing the Mandalay National Wildlife Refuge, on approximately 4,600 acres of this pristine wilderness. V.Tr.17, 18, 22.

Because the Nature Conservancy initially did not have the funds to purchase the property, the St. Martins purchased it for them, with the understanding that the Nature Conservancy would later obtain the 4,600 acres. V.Tr.18. The St. Martins assisted the Nature Conservancy in fund raising efforts, V.Tr.19 and donated \$140,000.00 to enable them to obtain funding. V.Tr.18. As a result of these efforts, the Mandalay National Wildlife Refuge was established by the U. S. Fish and Wildlife Service.

The St. Martins' contribution to the Mandalay Refuge has been continuing and substantial. They have hosted many meetings with the Nature Conservancy, the U.S. Fish and Wildlife Service, and members of Congress, in order to aid in the planning and development of the refuge. V.Tr.22. The St. Martins permit the

refuge personnel to use their property as a landing base for their operations, and to use the St. Martins' barns, fuels and dock facilities. *Id.*

Every year the St. Martins, at their expense, unload, transport and install multiple 18-wheeler loads of Christmas trees to assist the Refuge in combating marsh erosion. V.Tr.19-20. Because the U.S. Fish and Wildlife Department lacks sufficient funding to maintain the refuge, the St. Martins have agreed to do physical work on the property that requires draglines and equipment, and to pay other upkeep items on the property. V.Tr.23. As evidenced by their tireless dedication to the Mandalay Wildlife Refuge, the preservation of the pristine marsh and swamp in this area is of paramount importance to the St. Martins. V.Tr.22.

The St. Martins are surface owners of the 2,400 acre tract at issue. V.Tr.21.⁵ At the heart of this field, called the Sunrise Field, is an area north of the Intracoastal waterway that contains the Superior/Mobil canal system. That area, which is circled on Joint Exhibit 2, is the subject of the instant litigation.

⁵ In 1954, the property subject to this litigation was owned by Southdown Sugars, Inc. Pretrial Stipulation and Order, ¶7 #9. At least two mineral leases granted by Southdown to Mobil's predecessor Superior still affect portions of the property. *Id.*, ¶7 #12. When Southdown granted the mineral leases, it owned both the surface and the minerals. *Id.*, ¶7 #13. Later, several mineral conveyances had the effect of separating the surface ownership from the minerals. *Id.*, ¶7 #15, 20. The mineral servitudes created in favor of Southdown are still in existence today. *Id.*, ¶7 #32. Effective December 1, 1995, Mobil conveyed to Phillips all of its right, title and interest in and to the St. Martin Property including the mineral leases, wells, equipment and facilities and all contracts and agreements including the canal servitudes, for the stated consideration of \$27,524,000.00.

Originally, the oilfield activities within the Sunrise Field were conducted entirely from land. V.Tr.33. After Superior/Mobil took over the area, the operation was changed to a “water” operation, whereby canals were dredged to well locations. V.Tr.118. It was more convenient, but not ecologically sound, for Superior/Mobil to use a water operation. V.Tr.118.

Superior/Mobil constructed canals and levees on the St. Martin property. They allowed numerous breaks or cuts in the levees or spoil banks to develop and enlarge which continue to cause erosion and destruction of the marsh. After St. Martin purchased the property, he wrote letters to Mobil asking them to maintain the canal system, to plug unneeded canals, and to otherwise restore the property. Mobil did take steps to remedy the more obvious problems, such as the removal of pilings and drums, but even that work was never completed.

After repeated demands, Mobil installed several plugs in the canal levees. However, these “temporary patches” lasted only six to nine months. St. Martin attempted to fix the erosion problem at his expense by bringing in equipment to plug the breaks. However, St. Martin did not have the proper equipment nor expertise to properly repair the damage, and could not work in the dangerous area of defendants’ pipelines.

After a year, Mobil, both verbally and in writing, agreed to install an earthen dam to plug the unused northern canal system. For example, by letter dated May 10, 1993, Mobil stated:

[that it had] commenced plans to plug the subject canal. Please note this project may require a special permit, and therefore, ask for your patience in this case, as it may require 90 days to obtain a permit.

Despite Mobil's promise, Mobil never applied for the permit and never plugged the canal. Trial Exhibit 85. St. Martin's final demand before filing the captioned suit was by letter dated October 18, 1995:

Demand is made for the property to be restored. All canals and the marsh are to be stabilized. Canals not necessary for your operation are to be filled. The marsh elevation is to be restored and the marsh grass replanted.

Mobil denied responsibility, and the instant suit, wherein the St. Martins sought to compel Mobil to honor its responsibilities and commitments, proceeded to trial.

SUMMARY OF ARGUMENT

As the District Court correctly found, defendants' refusal to repair their canal system and ameliorate the continuing damage to plaintiffs' wetlands property was in violation of two canal servitude agreements, which unequivocally provide that defendants owe a continuing obligation to maintain their canal system, and impose liability for damages to the land as a result of the construction,

use and maintenance of the canals. The Court further correctly refused to uphold defendants' affirmative defenses of waiver, estoppel and prescription, as defendants failed to establish the legal and factual requisites to support these defenses.

Although the Court did not reach plaintiffs' remaining theories of liability, defendants' obligations to remedy and abate the damage they continue to cause are also required under many other provisions of Louisiana law and jurisprudence. First, strict liability is warranted based upon La. Civil Code article 2317, which imposes liability "for the damage occasioned by ... the things which we have in our custody." Louisiana and French authorities hold that canals are indeed "things" within the purview of article 2317 and its predecessors. In the instant case, the breaches in defendants' canals and levees, as well as the widening of the canals, are canal defects, and those defects have caused damage for which defendants are strictly liable.

Second, under Supreme Court decisions including *Inabnet v. Exxon Corp.*, 93-0681 (La. 9/6/94), 642 So.2d 1243, liability without negligence on the part of holders of interests in the same land may be premised upon application of Civil Code Article 2315, with reference to all analogous codal and statutory provisions. In the instant case factors which support liability include: defendants' violations of Civil Code articles 667-669; defendants' violation of their obligations under the

Mineral Code, lease laws and servitude articles; defendants' breach and/or unreasonable use of the leases and the canal servitudes; Mobil's breach of its oral and written agreements to repair and dam the canals; and the availability of far less damaging means for defendants' operations. Consideration of the foregoing factors indisputably supports the Court's imposition of liability.

Finally, liability is warranted under the Public Trust Doctrine. Pursuant to this developing doctrine, natural resources such as wetlands, even those on private property, "are considered too important to society to be owned by one person," and, as such, have gradually evolved into the corpus of the public trust. Spyridon and LeBlanc, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 Tul. Envtl. L.J. 287-289, 303 (Summer, 1993). Defendants, who have damaged and destroyed vast acres of wetlands, are liable to plaintiffs as well as the public, to prevent further damage to these valuable natural resources and to restore them to a productive state. As such, the Court properly held defendants liable.

The Court was further correct in finding causation. The fact that defendants' defective canals were a cause of the damage to plaintiffs' property was overwhelmingly established at trial. However, the Court clearly erred in determining that defendants caused only 60% of the damage. Plaintiffs' experts, corroborated by defendants' experts, established that the sole cause of damage to

this particular property was defendants' defective canals, and not natural forces. For example, nearby control areas that were not affected by the defective canals suffered *no damage at all*. Accordingly, plaintiffs request that this Court modify the District Court's determination on the percentages of fault, and find defendants 100% at fault.

Next, the Court was correct in determining the amount of restoration damages in the amount of \$10,000 per acre. Plaintiffs' experts established without contradiction that this amount was required to minimally restore the wetlands to a productive state under a plan developed and used by the Army Corps of Engineers in the LaBranche Wetlands Restoration Project. V.Tr.122. In that project, 254 acres were restored to productive wetlands at a cost of \$9,799.21 per acre, a figure very close to the Court's award in the instant case.

Defendants contend that the award is excessive. However, defendants presented no evidence at trial on the costs for restoration of the property. Indeed, they have presented no solutions at all to the problems they have created. Rather, defendants rely solely on their legal argument that plaintiffs are entitled only to an award of damages equivalent to the decrease in the market value of the property.

Indeed, in some cases, Louisiana courts have found that a proper measure of damages to immovable property is diminution of market value. However, in this case that measure is inapplicable, for three main reasons. First, the property at

issue has significant value in excess of its appraised value not only to the plaintiffs, but to all of the citizens of this state, mandating restoration pursuant to *Roman Catholic Church v. Louisiana Gas Service Co.*, 618 So.2d 874 (La. 1993). Second, this case involves a mineral lessee, and restoration of damaged land is required under the Mineral Code and lease laws. Finally, this case involves wetlands, which are invaluable natural resources subject to the Public Trust doctrine, mandating restoration. As such, the Court's award of restoration damages was correct.

The Court, however, erred in refusing to order defendants to restore all 357 acres they damaged. The Court's decision was based on its conclusion that under Louisiana law, plaintiffs were not entitled to recover monetary damages for harm to the property that occurred prior to 1992, the date they purchased the property. The Court found that 40 acres were damaged since 1992, and therefore excluded liability for damage to the remaining 317 acres. However, whether or not plaintiffs are entitled to monetary damages, defendants still owe an obligation under numerous provisions of law and jurisprudence to restore the damaged land.

It should be noted that the St. Martins, who have proven their tireless dedication to maintaining and restoring these wetlands, are not seeking a windfall. Plaintiffs brought the instant suit only to obtain the Court's assistance in forcing defendants to uphold their legal and moral duties to prevent further damage and

repair the damage caused by their improperly maintained canals. In the event that this Court decides it is appropriate to order defendants to restore all 357 acres of land and completely eliminate the award of monetary damages, plaintiffs will concur.

ARGUMENT

I. STANDARDS OF REVIEW

Defendants have omitted discussion of the applicable standards of review in this case. First, the District Court's factual determinations and conclusions regarding liability, causation and damages are subject to the "clearly erroneous" standard. Fed. R. Civ. P. 52(a) requires deference to all factual determinations, even those based on "physical or documentary evidence or inferences from other facts." *Anderson v City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504 (1985); *Pullman-Standard v Swint*, 456 U.S. 273, 287, 102 S.Ct. 1789 (1982).

Under the "clearly erroneous" standard, the reviewing court must not substitute its judgment for that of the lower court: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson, supra*, 470 U.S. at 573-74. Furthermore, a trial court's choice between two permissible views of the evidence cannot be clear error. S. Childress, M. Davis, *Federal Standards of Review*, Sec. 2.05, at 2-34 (2d.Ed.1992), citing *Amadeo v. Zant*, 486 U.S. 214, 225-26 (1988). Finally, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference

to the trial court's findings..." *Anderson*, 470 U.S., at 574, citing *Wainwright v Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985).

Second, the district court's conclusions of law on the issue of pre-acquisition damages, and its interpretation of the unambiguous servitude agreements, are reviewed *de novo*. *Johnson v. Gambrinus Co./Spoetzl Brewery*, 109 F.3d 1040, 1044 (5th Cir.1997) (trial court's conclusions of law are reviewed *de novo*); *Clardy Mfg. Co. v. Marine Midland Business Loans Inc.*, 88 F.3d 347,352 (5th Cir.1996), *cert. denied*, ---U.S.---, 117 S.Ct. 740 (1997) (whether a contract is ambiguous, as well as the interpretation of an unambiguous contract, are questions of law reviewed *de novo*.)

Likewise, under Louisiana law, the interpretation of an unambiguous contract is an issue of law for the court. *Rutgers, State Univ. v. Martin Woodlands Gas Co.*, 974 F.2d 659,661 (5th Cir.1992). "When the words of the contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. C.C. art. 2046. This court has stated that when the contract is not ambiguous, it has no authority to reach beyond the four corners of the document. *Huggs, Inc. v. LPC Energy, Inc.*, 889 F.2d 649, 653 (5th Cir.1989).

II. THE DISTRICT COURT DID NOT ERR IN HOLDING DEFENDANTS LIABLE.

C. THE DISTRICT COURT'S IMPOSITION OF LIABILITY WAS WARRANTED UNDER THE CANAL SERVITUDE AGREEMENTS.

3. The Court correctly held defendants liable for breach of the canal servitudes.

In the case of servitudes transmitted by title, La. C.C. article 697 provides that: “The use and extent of such servitudes are regulated by the title by which they are created...” Moreover, one with a servitude is bound to use that servitude “in such manner as not unreasonably to injure the right of the owner of the servient estate,” and if the owner of the easement or servitude uses it in a negligent, unauthorized or unreasonable manner, the owner of the servient estate may maintain an action for damages. La. C.C. articles 743-745; *Duet v. Louisiana Power and Light Company*, 169 F.Supp. 184,186 (E.D.La.1958).

As the District Court held, the servitude agreements in this case “unquestionably provide” that defendants have a continuing obligation to maintain their canals. In addition, both servitudes impose liability for property damage upon the grantee and its successors (defendants): “Grantee further agrees to pay Grantor for any damages occasioned to Grantor’s land as a result of the construction, use and maintenance of the canal. ... This agreement shall extend to

and be binding upon the respective successors and assigns of the parties hereto.”
Joint Exhibits 6 and 7 at 3.

Defendants’ canals have far exceeded the extent permitted by the title. The servitudes permit two canals 65 feet in width, and provide that written permission must be obtained prior to any enlargement of the canals. Charles Camp testified without contradiction that, due to erosion, the canals are now 115-120 feet wide. VI.Tr.18-19. Moreover, the canals have extended far beyond their location on the plats, into the large ponds that have damaged the servient estate. Finally, there are other distinct Mobil canals on the property that never were authorized under the servitudes. V.Tr.32.

Defendants violated the express terms of the servitude agreements, and in addition used the servitudes in a negligent, unauthorized and unreasonable manner. As such, the Court was correct in holding that defendants must maintain and repair their canal system and remedy the damages occasioned as a result of the construction, use and maintenance of the canals.

4. The District Court correctly determined that plaintiffs’ claims for breach of the servitude agreements were not waived and had not prescribed.

c. Defendants did not establish their affirmative defense of waiver or estoppel.

Defendants argue that the fact that the prior landowner did not file suit against Mobil or its predecessors, somehow operates to estop the current landowners from bringing an action to abate and repair the exponentially increasing damage to the land caused by defendants' continuing dereliction of their duties.

Defendants misconstrue the law. In Louisiana, estoppel is "a doctrine of last resort... no statutory material and no body of jurisprudence justifies its use." *Howard Trucking Co., Inc. v. Stassi*, 485 So.2d 915,918 (La.1986), *cert. denied*, 479 U.S. 948, 107 S.Ct. 432 (1986). Furthermore, "[e]quitable considerations and estoppel cannot be permitted to prevail when in conflict with the positive written law." *Howard Trucking Co., Inc. v. Stassi, supra*.

The Louisiana Supreme Court defines equitable estoppel as "the effect of the voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied upon such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct." *John Bailey Contractor v. State, Dept. of Transp. & Dev.*, 439 So.2d 1055,1059 (La.1983). The three elements required are: (1) representation by conduct or word; (2) justifiable reliance thereon; and (3) change of position to one's detriment because of the reliance. *Id.* In the instant case, defendants omitted to plead or prove

any of the foregoing elements of estoppel in their defense, much less where the case involves a prior landowner.⁶

The canal servitudes, which are continuing and still binding on the parties, expressly call for the lessee and its successors and assigns to maintain the canals and repair the continuing damage caused by the canals. Both the fault and the damage in this case are continuing in nature, and defendants' proposal that a landowner loses the right to save his property from continuing destruction due to inaction of his predecessors is insupportable.

d. Defendants did not establish their affirmative defense of prescription.

Defendants argue that the Court erred in failing to find that all of plaintiffs' claims are prescribed. To the contrary, as the Court properly recognized, the servitude agreements in this case are still in force, and impose continuing obligations upon the defendants that have not prescribed and may be enforced. IV.R.945-6.

Moreover, this case presents a classic example of a continuing tort, for which prescription does not begin to run until the conduct causing the damage is abated.

See *South Central Bell Telephone Co. v. Texaco, Inc.* 418 So.2d 531, 533

⁶ Numerous decisions regarding property damage wherein there were transfers of property have been decided in favor of the current landowners or lessees, despite the action or inaction of prior owners. See, e.g., *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La.1991).

(La.1982), in which the Louisiana Supreme Court held that prescription would not begin to run on an action for damages caused by continuously leaking gasoline tanks until the tanks were repaired. See also, *Estate of Patout v. City of New Iberia*, 97-1097 (La.App. 3 Cir. 3/6/98), 708 So.2d 526, citing Prosser and Keaton on the Law of Torts, sec. 13, at 83 (5th ed.1984) (trespass by failure to remove a structure or debris from another's land is a continuing tort.) Defendants' continually leaking canals and their failure to remove the unnecessary canals, which are causing continuous damage to plaintiffs' land, constitute a classic continuing tort, thus prescription has not begun to run on plaintiffs' claims.

Moreover, defendants' oral and written acknowledgments of their duty to repair the canals, as well as their attempts to do so (Joe Flores, Trial Exhibit 85) interrupted prescription. In *Watermeier v. Continental Oil Co.*, 818 F. Supp. 929 (E.D. La.1993), the Court noted that under Louisiana law, for purposes of the interruption of prescription, a tacit acknowledgment occurs when the debtor performs acts of reparation or indemnity, or lulls the creditor into believing that he will not contest liability. As such, prescription was interrupted.

Furthermore, Louisiana's ten year contractual prescriptive period applies to Mobil's breach of its oral and written agreements to repair the canals and remedy the damage. Plaintiffs' claims for those breaches of contract were timely filed.

Finally, an action to enforce the express duty established by law compelling mineral lessees to restore the land they have damaged cannot begin to prescribe until the termination of the lessee's activities. Assuming defendants' argument as true, once an oil company's canals fell into disrepair, all tort actions by any landowner, present or future, to prevent the continuing damage, would be forever barred one year after the canal began to leak, in complete contravention of the law mandating that the property be restored. Such a conclusion is simply insupportable.

In sum, the District Court's decision that defendants failed to prove their affirmative defenses of waiver, estoppel and prescription was clearly correct.

D. ADDITIONAL GROUNDS SUPPORT THE DISTRICT COURT'S IMPOSITION OF LIABILITY.

In addition to their obligations under the servitude agreements, defendants are obliged under numerous provisions of Louisiana law to maintain and repair their canals and remedy the damage caused by their operations to Louisiana's irreplaceable wetlands. The Louisiana Supreme Court has authorized a holistic approach in determining cases of this nature, and has advised the courts to consider not only the agreements between the parties, but also all analogous codal and statutory provisions. *Inabnet v. Exxon Corp.*, 93-0681 (La. 9/6/94), 642 So.2d

1243; *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475, (La. 1991); *Butler v. Baber*, 529 So.2d 374 (La. 1988). Those provisions are discussed *infra*.

1. Defendants are strictly liable under Article 2317.

In the instant case, strict liability is warranted based upon Civil Code article 2317, which imposes liability, without regard to ownership or relationship of neighborhood, "for the damage occasioned by . . . the things which we have in our custody."⁷ In order to recover under Article 2317, plaintiff must prove the thing which caused the damage was in the care or custody of defendants, the existence of a defect or vice of the thing, and the damage was caused by this defect or vice. *Loescher v. Parr*, 324 So.2d 441 (La. 1975).

Louisiana and French authorities hold that canals are indeed "things" within the purview of article 2317 and its predecessors. Article 1384(1) of the Code Napoleon, the source article for La. C.C. article 2317, is considered applicable in case of damage by canals. F. Laurent, XX Principes de Droit Civil Francais, sec. 605 (1878); *quoted* in C. Gobert, *Toward a More Reasonable Standard for Recovery of Damage to Wetland Resources by Canals*, 1 Tul. Envtl. L.J. 19 (Spring, 1988).

French courts resort to Article 1384 in a variety of closely analogous

⁷ Acts 1996, 1st Ex. Sess., No. 1 amended C.C. arts. 660, 667, 2321, and 2322 and enacted 2317.1, adding certain negligence elements to strict liability claims. Those amendments, which did not become effective until April of 1996, are not retroactive and are not applicable to the instant suit. *Coulter v. Texaco, Inc.*, 117 F.3d 909 (5th Cir.1997); *Collins v. Whitaker*, 29,324

contexts, as where obstruction and diversion of flowing waters from their natural bed causes displacement of soil, 1 Tul. Envtl. L.J. at 23, n.50, and where accumulation of surface waters and clay in a tunnel causes subsidence. *Id.*, n.51. French courts have also applied article 1386 (which is analogous to C. C. art. 2322) where the lateral walls of a canal collapse, damaging neighboring property. *Id.*, n.52. Louisiana courts have found that a canal “is certainly a ‘thing’” within the meaning of Article 2317, recognizing a cause of action in one to whom canal construction or maintenance poses an unreasonable risk of harm. *Canty v. Terrebonne Parish Police Jury*, 397 So. 2d 1370,1375 (La. App. 1st Cir.), writ denied, 401 So. 2d 988 (La.1981).

In the instant case, Mobil’s eroding canals with their leaking levees, which far exceed the extent of the canal servitudes, are “things” that are clearly defective within the meaning of La. C.C. article 2317. As such, Mobil must be held strictly liable to repair the damage caused by the defects.

2. Defendants are liable under Article 2315.

In *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475, (La. 1991) the Louisiana Supreme Court permitted recovery under Article 2315 for damages including costs for restoration by a surface landowner who was neither a party to

(La. App. 2 Cir. 4/2/97), 691 So.2d 820; *Moore v. Delta Waste System, Inc.*, 96-1984 (La. App. 4 Cir. 3/12/97), 690 So.2d 1108.

the mineral lease nor the owner of the mineral rights, based upon the mineral lessee's implied obligations under the mineral code; a lease provision requiring the lessee to pay for damages to the land, and articles 667 and 2315 of the Civil Code.

Later, the Supreme Court in *Inabnet v. Exxon Corp.*, 93-0681 (La. 9/6/94), 642 So.2d 1243, permitted recovery by an oyster lessee against a mineral lessee on the same property for damages caused by the mineral lessee's canals. The Court found that actions for liability without fault pursuant to article 2315, by analogy to articles 667-669, the Mineral Code and any other pertinent laws, may be maintained by any persons with concurring interests in the same property.

As such, in the instant case, factors which must be considered by the Court in imposing liability under article 2315 include: defendants' violations of Civil Code articles 667-669; defendants' obligations and plaintiffs' rights under the Mineral Code, Louisiana lease laws and servitude articles; defendants' breach and/or unreasonable use of the leases and the canal servitudes; Mobil's breach of its oral and written agreement to repair and dam the canals; and the availability of far less damaging means for its operations. These factors are discussed in the following sections.

3. Defendants are liable under Articles 667-669.

As the Supreme Court noted in *Inabnet*, while the owner of immovable property (or a person deriving his rights from the owner) generally has the right to

use the property as he or she pleases, the owner's right may be limited if the use causes damage to neighbors (and others). The corresponding rights and obligations of neighboring proprietors are principally governed by Articles 667-669. *Inabnet*, 642 So.2d at 1250.

Article 667 is clear: “Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.” Article 669, which regulates nuisances, by its very terms, permits recovery by “those in the same or neighboring houses.” *Salter v B.W.S. Corp*, 290 So.2d 821,826 (La. 1974). Article 669, properly translated, applies to “different inconveniences,” not only to “smoke or nauseous smell.” *Yiannopolous*, *supra*, sec. 58; See, e.g., *Bruning v New Orleans Canal and Banking Co.*, 12 La. Ann. 541 542-43 (1857) (canal resulting in flooding of dry land); *Shneidau v Louisiana Highway Commission*, 206 La. 754, 20 So.2d 14 (1944) (canal built “with no protection against the sloughing of the banks).

In *Butler v. Baber*, 529 So.2d 374 (La.1988), the Louisiana Supreme Court permitted an oyster lessee to recover against a mineral lessee pursuant to articles 667-669, for damages caused to the wetlands by canal construction. *Accord*, *Salter*, *supra*, 297 So.2d at 826; *Stone*, *Tort Doctrine in Louisiana*, *The*

Obligations of Neighborhood, 40 Tul. L. Rev. 701, 704 (1966); Yiannopolous, 4 Louisiana Civil Law Treatise, Sec. 10 (1987).

In the instant case, defendants have deprived plaintiffs of the liberty of enjoying their property. The damage occasioned, including the loss of land, is certainly more than an inconvenience. The poorly maintained leaking canals, which, as discussed *infra*, far exceed the permitted scope of the canal servitudes, most definitely constitute a trespass and a nuisance. As such, articles 667-669 provide grounds for defendants' liability.

4. Defendants are liable under the Mineral Code.

The Supreme Court in *Inabnet* stated that all analogous laws and rules should be considered when determining the rights of parties with different legal interests in the same piece of property. Moreover, the Louisiana courts and legislature have clarified that, even without a lease, mineral lessees may be held liable to others deriving rights from the mineral lessor based on violations of express and implied duties under the Mineral Code. La. R.S. 31:10 & comment; 31:11 and comment; *Inabnet, supra, Butler, supra, Magnolia Coal, supra*. Accordingly, the Mineral Code is applicable to this case.

Under the Mineral Code, the owner of a mineral servitude is bound to perform the contract in good faith; to develop and operate the property leased as a reasonably prudent operator; and to use only so much of the land as is reasonably

necessary to conduct his operations. He is obligated, insofar as practicable, to restore the surface to its original condition. La. R.S. 31:122. Furthermore, under the Code, the owner of land burdened by a mineral right and the owner of a mineral right must exercise their respective rights with reasonable regard for those of the others. La. R.S. 31:11 and Comment.

A mineral lessee has the same obligation "... to maintain and restore the premises in the condition he found them subject to his rightful use, and where he has damaged the property it is his duty to appropriately remedy the condition brought on by his use of the lease." *Smith v. Schuster*, 66 So.2d 430 (La. App. 2d Cir. 1953). *Accord*, *Edwards v. Jeems Bayou Production Co.*, 507 So.2d 11 (La. App. 2 Cir., 1987); *Broussard v. Waterbury*, 346 So.2d 1342 (La. App. 3d Cir. 1977), *writ denied*, 350 So.2d 674 (La. 1977); La. C.C. Art. 2719, 2720. See also Comment following La. R.S. 31:122. The lessee's duties remain the same whether or not the ownership of the minerals has been separated from the ownership of the land. *Pennington v. Colonial Pipeline Co.*, 260 F. Supp. 643 (E.D. La., Nov 18, 1966). *Accord*, La. R.S. 31:11 and Comment; *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La. 1991).

Louisiana courts also recognize an implied obligation of a mineral lessee to restore the surface of the lease premises as near as is practical to original condition. Comments to Mineral Code Article 122 state that this implied

obligation has a foundation in La. Civ. Code Art. 2719 and 2720, which require a lessee to return the leased property in the same condition. Restoration is also properly considered a specification of the prudent administrator standard. Martin, *Implied Covenants in Oil and Gas Leases, Past, Present & Future*, 33 Washburn L.J. 639, 669 (Summer 1994).

In the instant case, it is abundantly clear that defendants have violated their express and implied obligations under the Mineral Code. Defendants have interfered with the surface owner's reasonable enjoyment of the property, by destroying it. Defendants have extended their operations, including its canals, far beyond what is reasonably necessary, to the point where hundreds of acres of pristine marshland have been eroded away. And, by refusing to maintain the canals and restore the damage, Defendants have breached their duty to remedy adverse conditions brought about by their use. As such, defendants are liable under the Mineral Code.

5. Defendants are liable under the Mineral Lease.

In *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475 (La. 1991), the Supreme Court held that a landowner's right to recover damages because of failure to properly plug and abandon an oil well and to properly clean up the well site was a property right arising out of the original mineral lease and attached to the property. *As in the instant case, the plaintiff was not a party to the lease,*

because the ownership of the minerals had been severed from the surface ownership prior to its purchase. Nevertheless, the Court permitted recovery under the damages provision in the lease, noting that “Magnolia's right to recover damages is a property right arising out of the original lease and attached to the property.” *Magnolia Coal*, 576 So.2d 475, citing *Andrepoint v. Acadia Drilling Co.*, 255 La. 347, 231 So.2d 347 (1969). *Accord*, *Washburn v A. F. Gilmore Co.*, 116 Cal App 370, 2 P.2d 506 (1931.) Moreover, under analogous lease laws, including Civil Code article 2720, mineral lessees are liable to restore the property to the same state in which it was received.

As such, pursuant to express and implied obligations under the Mineral Code, the lease laws, the Mineral Lease, and the Canal Servitudes, defendants must remedy the damage to the land to which the lease and the servitudes apply.

6. Defendants are liable for breach of promise.

Mobil agreed, orally and in writing, to repair the breaks in the levees, and to erect an earthen and stone dam at the midpoint of the unused canal system. Exhibit 15; Exhibit 85. Mobil's promised repairs to the breaks (at least the few that it attempted) did not hold. Despite Mobil's oral and written promises and representations, Mobil never applied for the necessary permit and never plugged the unused canal. Exhibit 85. The only barrier there at the present time is a chain

barrier erected by I.P. V.Tr.25. Even assuming that Mobil had no duty to repair the levees and construct the dam, Mobil assumed that duty by virtue of its written and oral promises. Mobil and its successor should be made to honor those promises.

7. Defendants are liable for failure to use less damaging means.

According to the Supreme Court in *Inabnet*, this Court should also specifically consider whether defendants could have used less damaging alternative means to conduct their operations. In the instant case, defendants clearly could have conducted their operations via less damaging means, had they bothered to repair their canals. Moreover, uncontradicted evidence demonstrates that defendants could have used land rather than water access to conduct their operations. V.Tr.33-34,117-18; VI.Tr.14; VIII.Tr.37. Had they done so, the entire marsh now would be pristine.” V.Tr.117-18.

Defendants put on no evidence contradicting plaintiffs’ evidence regarding less damaging alternative means. This is certainly a major factor, of the many detailed above, supporting the imposition of liability.

8. Defendants are liable under the Public Trust Doctrine

Finally, liability is warranted pursuant to the Public Trust Doctrine. Pursuant to this developing doctrine, certain natural resources, even those on private property, “are considered too important to society to be owned by one

person,” and, as such, have gradually evolved into the corpus of the public trust. Spyridon, LeBlanc, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 Tul. Envtl. L.J. 287-289,303 (Summer, 1993). When the public's rights to these resources are alienated by destruction, damage, or interference, the Public Trust Doctrine and the courts construing it have recognized a cause of action against the tortfeasor. *Id.* at 291-292.

The degree of federal and state regulation, management, or control over natural resources “is a clear expression of the public's overriding, if not proprietary, interest in those resources regardless of its fee simple ownership.” 6 Tul. Envtl. L.J. at 303-304. The movement “from insatiable consumption to protection and restoration of natural resources began in 1969 with the enactment of the National Environmental Policy Act (NEPA) and has been gaining momentum ever since with the subsequent enactment of numerous environmental statutes...” including the Coastal Zone Management Act. 6 Tul. Envtl. L.J. at 300-302.

Louisiana, too, has enacted sweeping laws requiring protection of the environment and our natural resources. See., e.g. Article IX, Section 1 of the Louisiana Constitution of 1974; the Louisiana Water Control Law, La. R.S.

30:2072 and Louisiana's Environmental Quality Act, La. R.S. 30:2003; 6 Tul. Envtl. L.J. at 302-303.

Wetlands are clearly included. The federal government has asserted an overriding public interest in wetlands, such that a private owner of wetlands cannot develop his land without first obtaining a permit under the Clean Water Act. 33 U.S.C. S 1344; 6 Tul. Envtl. L.J. at 303-304; J. Jackson & W. Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act*, Pub. Land. Rev. (1986).

The Louisiana Water Control Law defines the waters of the state so broadly that they include regulation of water solely contained within the confines of private lands. La. R.S. 30:2073. Louisiana's Department of Environmental Quality (DEQ) regulations go even further by defining surface water as, *inter alia*, “wetlands, swamps and marshes...public or private...” La. Admin. Code Tit. 33, pt. IX sec. 107 (1988).

CERCLA, OPA and other federal statutes reach privately held natural resources. The same rationale affords “a basis upon which to assert a cause of action for the recovery of damages to natural resources on private property.” 6 Tul. Envtl. L.J. 304. Accord, Wilkins, *The Public Trust Doctrine in Louisiana*, 52 La. L. Rev. 861 (March 1992). Furthermore, “a strong legislative preference for

restoration provides the courts with the necessary guidance to fashion an appropriate remedy for natural resource damages.” *Id.*, emphasis added.

Louisiana’s wetlands, “national treasures” on a par with rainforests, are entitled to Constitutional protection under the Public Trust Doctrine, whether or not they are located on private property. Under this doctrine, discussed in further detail in Section VI, *infra*, defendants are liable for restoration of the natural resources they have damaged.

III. THE DISTRICT COURT DID NOT ERR IN DETERMINING CAUSATION.

The deleterious effects of the oil and gas industry’s vast web of oil and gas canals and pipelines upon the coastal marshes of Louisiana is well documented and beyond dispute. Houck, *supra*, 58 Tul. L.Rev. 1 (1983) (and citations therein); Turner, Costanza and Scaife, *Canals and Wetland Erosion Rates in Coastal Louisiana, Proceedings of the Conference on Coastal Erosion and Wetland Modification in Louisiana* (1982); *Ryan v Southern Natural Gas Co.*, 1987 WL 19044 (E.D.La.1987), *amended* 1987 WL 25610 (E.D.La.1987), 1988 WL 32241 (E.D. La.1988) *reversed on other grounds*, 879 F.2d 162 (5th Cir.1989).

In the instant case, the continuing damage to the St. Martin property caused by defendants' canals was also established beyond dispute.⁸ First, St. Martin noted that as of the date of trial, the marsh in the area at issue, formerly a healthy pyophene marsh, retains only a few areas that have not been severely injured. V.Tr.24. He has personally observed that the Superior-Mobil canals are causing the problem. V.Tr.24. There are multiple breaks in the levee system of those canals. At the northwestern end, the levees have completely eroded, causing substantial marsh loss. V.Tr.25,29. There is an extensive break at the end of the Number 10 well slip. There is also a substantial breach slightly north of the IP well, which has caused serious damage to the marsh there. V.Tr. 29. There are extensive 15' wide breaks at point "A" on the map. Two other canals that St. Martin pointed out on the map, which he believed to have been dredged by Mobil, have eroded so badly that one cannot even tell where the canals were. V.Tr.27.

On the recent aerial photographs one can clearly see the big cut in the number 10 well location. St. Martin noted that water rushes in and out all the time. V.Tr.37. One can also see the break that was twice repaired and failed. V.Tr.37. The ponds in the area show the significant breaks in the levee. V.Tr.37.

⁸ Defendants complain that the Court erred in relying "solely" on the testimony of Dr. Chabreck in determining causation. To the contrary, plaintiffs, in their Post Trial Brief, submitted 18 full pages detailing the documentary evidence and the expert testimony of not only Dr. Chabreck, but also St. Martin, Charles Camp, Dr. James Coleman, Dr. Stephen Murray, and Dr.

The ponds are near the breaks. In the areas where the levees are intact, there are no ponds. V.Tr.37.

Compared to 1992, there is approximately twice as much water, which has been invaded by water hyacinths, a non-native pest plant that chokes the marsh. V.Tr.42. The photographs are deceptive in that the green that would appear to be marsh is actually open water choked with water hyacinths. V.Tr.42. And, the breaks have become much worse, they are deeper and wider. They find water 2 to 3 feet deep near the breaks. V.Tr.42. There is no 2-3 foot water anywhere at Mandalay, except near the breaks. V.Tr.42.

St. Martin visited the property during the trial, and noted that there are still open gaps. A gap two feet deep flows out of the marsh and under the production facility now operated by Phillips. VIII.Tr.66. In back of the IP well there is a cut 20 feet wide and five feet deep that has been there for years, with water continually flowing out of the area into the location canal. VIII.Tr.67. He personally saw two large floats of marsh, 20 feet by 20 feet, flow out of the area, full of fourchettes and marsh grasses. VIII.Tr.67. Two openings in Minors canal were dug by Mobil and are marked by Mobil and Superior signs and pilings, and contain flow lines that run into the facility. VIII.Tr.67. There is a large cut dug by

Mendelssohn, which overwhelmingly establish causation. The Court specifically mentioned all of these witnesses in its Findings and Conclusions.

Mobil as a place to lay a flow line, 25 feet wide and 5 feet deep, which “has devastated the marsh in here. I saw it with my own eyes yesterday.” VIII.Tr.67.

Dr. Robert Chabreck, a professional wetland scientist, a professional wildlife biologist, and a professor at LSU (V.Tr.107-8), unequivocally confirmed St. Martin’s observations regarding the severe damage caused by the canals. Examining the aerial photographs of this location over the years, Dr. Chabreck traced the evolution of the damage. V.Tr.116.

The photographs from 1951 to 1963, before the canals were dredged, show that the Mandalay marsh was a “well-vegetated, healthy, freshwater marsh.” V.Tr.117, with very few openings present in the marsh surface. Id. Subsequent mineral development, and the placement of the Superior/Mobil canals, is seen on the 1973 photograph. Prior to the canal excavation this was a healthy marsh. V.Tr.133. The area was hydrologically isolated from the forces of the Intracoastal waterway. V.Tr.118. However, openings were left or arose in the levees surrounding the Superior/Mobil canals, which linked the water forces of the Intracoastal Canal to the marsh, causing the erosion that formed the large open ponds on the property that are visible on the more recent aerial photographs. V.Tr.118, 133.

As Chabreck explained, barge induced waves from the many large barges traveling daily on the Intracoastal canal enter the breaks in Mobil’s canals,

exerting hydrologic forces on the vegetative mat in the marsh that have eroded the mats and destroyed the marsh. V.Tr.110, 119-120. The barges push vast amounts of water that surges up into the canals, through the openings and out into the marshes. As the barges pass, the water flushes out, pumping out the floating vegetative mat and the soil. V.Tr.118-120, 134.

Chabreck noted that the process is continuing - it is “like a wave tank at a water park in the Intracoastal waterway.” V.Tr.133. One can actually watch the marsh float out through the canals. V.Tr.134. Chabreck took photographs in October of 1997. As he sat there he observed the marsh being destroyed: “They had two or three big, or large floating mats of marsh, bigger than that table. I have pictures of them here (indicating), that actually came by as I was -- as I was sitting there.” V.Tr.134. See Photos, Exhibit Chabreck 1 (A-E).

Chabreck noted that the conclusion that the breaks are causing the damage is bolstered by the presence of two naturally occurring “control areas,” healthy freshwater marsh areas that are completely surrounded by undamaged levees that are not hydrologically linked to the Intracoastal Waterway. Those areas can be seen on the aerial photographs. V.Tr.121-122. He is positive that the reason this area suffered no damage is because there are no breaches in the levees. V.Tr.143.

Regarding other factors which might play a role in land loss, Chabreck agreed that those are potential causes for land loss in a marsh. V.Tr.149-151.

However, in the instant case, he concluded, based on his personal observations and observation of the control areas, that the damage was caused by the canals. V.Tr.151.

Interestingly enough, defendants' experts bolstered Chabreck's conclusions. Defendants' expert Dr. Stephen Murray tested the water currents in the pond to the left of the gap at the letter "A," in September and October, 1997. VII.Tr.63. Even though his tests occurred during a very unusual drought when water levels were very low, he admitted that "indeed, there are large currents in these gaps produced by barge waves." VII.Tr.65, 78. Murray noted that the currents can reach 60 centimeters per second, which is a more than a knot. VII.Tr.66.

Counsel for plaintiffs showed Dr. Murray a sample of the water from the cut where Murray put his meter. VII.Tr.77. Murray confirmed that the sample had organic debris in it. VII.Tr.77. He admitted that he saw all the organic material going in and out of the cuts. VII.Tr.77. He also admitted that the water could easily move organic matter... "those organic matters would certainly move." VII.Tr.81. "It doesn't take much to move them." VII.Tr.81.

Defendants' expert Dr. Mendelssohn also recognized that canals were a factor in the losses on the St. Martin property. VII.Tr.104,115. He agreed that there is erosion in the cuts along the spoil banks, "where the velocity of the water can be very high, as Dr. Murray showed." VII.Tr.116. Furthermore,

Mendelssohn's name is on plaintiff's Exhibit 36, a map entitled "Louisiana Coastal Land Loss Study." VII.Tr.117-118. In Mendelssohn's own words, the Map, in this specific area, **"shows the estimate of land loss was the function of altered hydrology caused by oil and gas activity.** VII.Tr.113.

Chabreck noted that the erosion and deterioration of the marsh will continue until something is done with these canals and their cuts. V.Tr.138-139. The damage is getting worse as time passes. V.Tr.140. The amount of erosion is proportional to the amount of surface area on the ponds, and that is increasing daily. The erosion is exponential. V.Tr.140.

IV. THE DISTRICT COURT ERRED IN DETERMINING THE PERCENTAGES OF FAULT.

Plaintiffs submit that the Court's decision that natural factors were responsible for 40% of the damage to this specific property was clear error, and should be modified.

Inconsistent with the vast weight of authority, and even the testimony of their own experts at trial admitting that canals were a factor in the instant case (VI.Tr.159, 175; VII.Tr.4-5; VII.Tr.104) defendants claim that all of damage to this

marsh was caused by other factors, including hurricanes, nutria eat-outs, temperature fluctuations, flooding, saltwater intrusions, and herbicide sprays.

In support of these theories, defendants presented at trial the testimony of layman Ronald King (a Mobil production foreman); Dr. James Coleman (a biologist who admitted that some of his studies were funded by Mobil,⁹) Steven Murray and Dr. Mendelssohn. The testimony of these witnesses was rife with inconsistencies and outright contradictions, including contradictions by their own depositions, studies and publications. Moreover, because the testimony of the experts was based largely upon studies and observations that were conducted during highly unusual conditions, including the April 1997 flood (the worst flood in the area since 1977) and October of 1997 (the worst drought in years) many of their conclusions deserve no weight and should be disregarded. Finally, the testimony of plaintiffs' witnesses and experts clearly refutes the testimony of defendants' experts. Defendant's main expert, Dr. James Coleman, a Geologist, admitted that canal dredging is a big problem. There is "a wide range of dredging problems." VI.Tr.159, 175.¹⁰ Coleman opined that there are always multiple causes for coastal loss. VI.Tr.156. He opined that natural processes such as hurricanes, nutria eat outs, floods and

⁹ Coleman runs geologic seminars for Amoco and Mobil. They also provide him aircraft with which he has "flown the coast following every hurricane." VI.Tr.169.

¹⁰ Dr. Mendelssohn also admitted that canals were a factor in the losses on the St. Martin property. VII.Tr.104.

subsidence cause approximately 71% of the total coastal loss and human impacts 29%. VI.Tr.169-174. However, his opinion is directly contrary to the vast weight of authority.¹¹

Coleman never even set foot on this property. VI.Tr.153; VII.Tr.29. Nevertheless, he stated that the main causes for damage on this particular property were: hurricanes, nutria eat-outs, temperature fluctuations, flooding, saltwater intrusions, and herbicide sprays.

Dr. Mendelssohn, who visited the site only once in September of 97, VII.Tr.103, was also asked to evaluate causes for wetland loss in general and specifically to Mandalay. VII.Tr.103. Contrary to his own published works, he testified that the most likely causes were flooding and saltwater intrusion. He testified in his deposition a few days before trial that he did not think hurricanes were a factor in the losses to the St. Martin property. VII.Tr.104. However, a few days later at trial he changed his mind. VII.Tr.107. He also changed his mind about the effects of nutria. VII.Tr.121. His opinion on numerous issues changed drastically over the course of a few days, from deposition time to trial. VII.Tr. 121.

¹¹ He later contradicted himself and stated it is impossible to allocate a percentage of damage to any one factor. VII.Tr.5.

The evidence discussed *infra* demonstrates that the foregoing factors were not, as defendants would have it, the cause of the damage to the St. Martin's property.¹²

HURRICANES

Defendants' expert Dr. Coleman, who never even visited the St. Martin property, testified that he thought hurricanes were the major factor that caused the damage to St. Martin's property. VII.Tr.6. He discussed various hurricanes that have hit the Louisiana coast, and opined that hurricanes may cause marsh damage, VI.Tr.195; however, he never connected the hurricanes to the St. Martin property. Interestingly, Mobil's other expert Dr. Mendelssohn, opined in his deposition that it was highly unlikely that a hurricane caused any problems on this property.¹³ VI.Tr.118.

Dr. Chabreck, who has studied major hurricanes along the coast and has published the results in his book "Coastal Marshes," VIII.Tr.10, unequivocally concluded that the impact of hurricanes, which declines as one moves inland, did not affect the St. Martin property, which is 30-35 miles inland from the shore. VIII.Tr.11.

¹² Due to space limitations, plaintiffs cannot include herein the lengthy analysis of the evidence contained in their Post Trial Brief. Plaintiffs respectfully request that this Court review Plaintiffs' Post Trial Brief, particularly pages 32-48, at III.R. 681-697.

Chabreck, unlike defendants' experts, has walked this property five times and studied it in detail. He has seen no hurricane damage on this property. VIII.Tr.12. In fact, in over 40 years of study he has seen no damage to the marshes north of the Intracoastal in this area. VIII.Tr.12. Most of the damage is to the south and closer to the Gulf. VIII.Tr.43. Hurricanes can cause open water ponds but that is further to the south where the impact is stronger. V.Tr.176, 192. He excluded hurricanes as a cause due to location. V.Tr.192.

Chabreck further noted that his conclusions were affirmed by the existence of the "test" or control areas on the property. If the marsh loss in the area had been caused by hurricanes, it would have damaged the whole area, the pristine areas as well. V.Tr.143.¹⁴

NUTRIA

Defendants' sole factual support for their contention that Nutria damaged the property came from Mobil employee Ronald King, who is far from an expert. King testified that he recalled that in 1965-1966, when he was poaching game on the subject property (VI.Tr.86-88, 95-98) that there were many nutria. VI.Tr.86. However, he admitted that he only saw a few nutria on a recent visit. VI.Tr.100.

¹³ Mere days after his deposition, he changed his opinion at trial, with the excuse that his about-face was due to listening to layman Ronald King's testimony.

¹⁴ Even defendant's expert Mendelssohn testified that the test areas show no sign of hurricane damage. VII.Tr.123.

Defendants' experts Coleman and Mendelssohn, admitted that they based their conclusions that nutria had an impact on this property not from personal observation, but just from reading literature about nutria. VII.Tr.4; VII.Tr.121.¹⁵

From recent extensive personal observations, St. Martin noted that he has seen some nutria in the area, but they are not a problem because of the extensive alligator population, which feeds on nutria. V.Tr.44. His observations were confirmed by Dr. Chabreck, one of the world's top 5 nutria experts, who has been heavily involved in nutria studies all along the Louisiana coast for over 40 years. VIII.Tr.7; V.Tr.193. Chabreck noted that the 60's were the peak of the nutria population. VIII.Tr.38. However, the nutria population crashed because they ran out of food. VIII.Tr.39. Today there remains less than 1/10th of the former nutria population in 1965. VIII.Tr.39.

Chabreck specifically excluded nutria or herbivory as a cause of the damage to this property. V.Tr.192. Chabreck noted that nutria can cause some damage in freshwater marshes. But based on the control areas, he unequivocally stated that did not happen here. V.Tr.192-3. In his expert opinion, rendered after studying the subject property, rather than just reading general literature, Chabreck concluded: "I don't feel that nutria have had a serious impact on this marsh." V.Tr.196.

¹⁵ Once again, Mendelssohn's opinion at trial varied remarkably from his deposition testimony a few days earlier. VII.Tr. 121.

HERBICIDES

Defendants' only factual support for their belated allegation¹⁶ that herbicide spraying caused land loss in this area came from Mobil employee Ronald King. Contrary to his deposition testimony, King testified that the Corps of Engineers sprayed herbicides in 1975-1980 to try to eliminate water hyacinths in the waterways of Terrebonne parish, and that the spray killed other plants as well. VI.Tr.102-104. King was not certain of the location of any of the canals in question from his memory. VI.Tr.145. King could not specifically identify any other plants that died. VI.Tr.111. He also noted that the sprayed plants came back every year. VI.Tr.145. Defendants' expert testimony on this issue consisted of a proffer from Mendelssohn stating that herbicides can kill vegetation. VII.Tr.111-113.

Contrary to defendants' vague assertions, St. Martin, from personal experience, testified that from the 1950's onward he tried to get the Corps to spray for water hyacinths. VIII.Tr.64. On every occasion the Corps informed him that they could not spray private property. VIII.Tr.65. Over the past 35-40 years, during which he has controlled over 8,000 or more acres of freshwater marsh, he has never seen the Corps on any of his properties spraying water hyacinths. VIII.Tr.65. "They have never, ever gone in here and sprayed a lily." VIII.Tr.74.

¹⁶ The effects of herbicide sprays were not listed as an issue in the Pre-Trial Order. VI.Tr.106-7.

Moreover, Dr. Chabreck worked for the Corps in developing the program for the herbicidal spray. VIII.Tr.4. He prepared the environmental impact statement on the Aquatic Weed Control Program. VIII.Tr.4. The Corps then and now uses the herbicide 2-4-D. VIII.Tr.21. It is a safe and very selective herbicide that affects only broadleaf plants such as water hyacinths. VIII.Tr.5. Narrowleaf plants such as grasses and sedges, including the dominant plants in the marshes, are not affected by this herbicide. VIII.Tr.5. The herbicide would have no effect on the dominant plant species in the marshes. VIII.Tr.5.

Finally, water hyacinths only float in open water in damaged marsh areas. VI.Tr.110. Any spraying came after the ponds were open and the erosion took place. VIII.Tr.31. Chabreck concluded that the herbicide had no effect on the opening of the ponds. VIII.Tr.29.

FLOODING

Using photographs taken during the peak of a “100 year flood” when the flood stage on the Mississippi River and the Atchafalaya “was at an all time high,” Mobil Exhibit 63; V.Tr.174,187; VIII.Tr.6, defendants attempted to establish that long term flooding in the area caused the land loss.

However, the condition of water overtopping the levees of the Intracoastal is exceedingly rare. As St. Martin noted from personal observation, there are very few, insignificant breaks in the Intracoastal levee in the area. Vol. 1 at p. 69. “At

an ordinary tide condition, you won't have that water going into the Intracoastal or coming from the Intracoastal into the marsh.” Vol. 1 at p. 72. Chabreck concurred: It would take a very special flood to top the levee on the Intracoastal waterway. V.Tr.187.

Chabreck specifically ruled flooding out as a cause of the damage to this marsh. V.Tr.167. Overflow by flooding of the Intracoastal would not cause this damage, because the damage is caused when the water discharges and exports organic matter. V.Tr.169-170,173. In a flood situation, a thin panel of water might overtop the levees, letting water come in, but that would not, as canals do, cause the discharge of organic matter. V.Tr.169-170,173. The water from such a flood would flow out through the Mobil cuts and aggravate the situation. VI.Tr.6. Chabreck noted that if the land had been protected by levees like the test areas it would not be affected at all by seasonal flooding. VIII.Tr.50.

SALINITY

Defendants sought to prove that flooding over the Intracoastal levees, in conjunction with the alleged salinity of the water in the Intracoastal canal, damaged the property. Again, the photographs defendants submitted to prove flooding, (Mobil Exhibit 63) were taken during the peak of a “100 year flood.” V.Tr.174, 187, VIII.Tr.6. Flooding over the tops of the Intracoastal levees is a very rare occurrence.

Furthermore, the only possible means of saltwater intrusion would be from the Houma navigation canal, miles away to the East. Coleman and Chabreck agreed that the flow of water in the Houma navigation Canal is generally from west to east, away from the St. Martin property. VII.Tr.34; V.Tr.188. According to a chart prepared by one of Mobil's scientists, the salinity at Mandalay reserve never runs more than 4 parts per million. V.Tr.73-74.

Dr. Coleman, with all his charts, never demonstrated what the salinity would be in the St. Martin area, only at the Houma Navigation Canal, eight to ten miles away. VI.Tr.190; VII.Tr.34. Mendelssohn tested in September of 1997 and did not find any salinity. VII.Tr.82, 116. Murray found .4 parts per thousand salinity, during October of 1997, a period that by his own admission was one of the worst droughts on record for the area, during which time the salinity would be much higher than normal. VII.Tr.88. Mendelssohn stated that a salinity of less than .5 parts per thousand is freshwater. VII.Tr. 114. As such, at a time when salinity would be at an all time peak, the water on the property was not salt water.

At any rate, the fact remains that flooding and salinity never occur at the same time. During a flood, there would be no salt water, because the water comes from the Mississippi then through the Atchafalaya then east of the Intracoastal waterway to this area, and that has no salt. VI.Tr.5. Dr. Murray, defendant's expert, agreed. He noted that the Intracoastal normally moves from west to east at

a quarter to a half a knot.. VII.Tr.73. During flood times the high level of water would keep the saline water out. VII.Tr.73.

Accordingly, absent the impossible condition of a saltwater flood overtopping the Intracoastal waterway, the only way that saline water could enter the St. Martin property is through the breaches in the Mobil canals. Coleman, Murray and Mendelssohn even admitted that the saline water, if any, would enter via the canals. VII.Tr.52; VII.Tr.76; VII.Tr.118. Indeed, the test areas, which are protected by levees, show no sign of saltwater intrusion damage. VII.Tr.123; VIII.Tr.56.

As such, defendants' entire argument regarding salinity is a red herring. Without the breaks in Mobil's levees, salt water could not get in the marsh. For that, defendants are responsible.

V. THE DISTRICT COURT CORRECTLY DETERMINED THE AMOUNT OF RESTORATION DAMAGES PER ACRE.

Defendants challenge the Court's award of \$10,000 per acre in damages to permit restoration of the wetlands to a productive state. However, defendants presented no evidence at trial regarding the damages, restoration and/or other available remedies in this matter. Defendants caused this problem, yet once again they present no solutions.

On the other hand, plaintiffs submitted voluminous evidence on this issue. Dr. Chabreck and Charles Camp presented specific testimony regarding the extent of the damages, as well as the means and costs to reasonably restore the property. Dr. Chabreck recommended a remediation plan that has been recently developed and used by the Army Corps of Engineers in the LaBranche Wetlands Restoration Project. V.Tr.122. There, the Corps raised the elevation and restored the marsh into a healthy wetlands. In that project, 254 acres were restored at a cost of \$2,489,000, or \$9,799.21 per acre (Plaintiffs' Exhibits 40-41) a figure very close to the Court's award of \$10,000 per acre in the instant case.

For the instant property, Chabreck and Camp personally visited the site and determined the acreage and cost figures involved in the plan. V.Tr.124-5; Plaintiffs' Exhibit 30. Chabreck testified that the elevation should be raised with fill dredged from the intracoastal waterway, and native vegetation should be planted, at a cost of approximately \$10,000 per acre. V.Tr.127-9. The native plants would quickly begin to grow again. V.Tr.131. In a few years, the land would be returned to productive and healthy wetlands. Without these measures, it is unlikely that the wetlands will ever return to a productive state. Simply plugging the breaches is not enough—that would make a very poor quality, unhealthy marsh, a spawning ground for water hyacinths and nutria. V.Tr.205; VIII.Tr.15-16.

Under those conditions, it could require as long as 100 years before the marsh might heal. V.Tr.204.

Chabreck stressed that the plan set forth the minimum effort required to return this property to a healthy and productive state and ensure no future damage. V.Tr.132. Such efforts will not, as defendants claim, create solid ground, or restore the property to its pristine state as a floating marsh. VII.Tr.8-9. Such a complete restoration would cost 20 times the funds for plaintiffs' plan (V.Tr.132) and would be financially and physically impracticable. Plaintiffs' plan simply calls for a minimal restoration to productive and functioning wetlands.

Plaintiffs would note, finally, that defendant Mobil alone has generated no less than 28 million dollars in income from this specific property. Plaintiffs' Exhibit 28. The Court's award of \$240,000 represents *less than one percent* of the revenue Mobil has received. Had Mobil practiced environmentally sound exploration techniques in the first instance, or at least kept its canals in repair, the costs to Mobil would have been far less. As such, the Court's award of \$10,000 per acre for restoration is both justified and reasonable, and should be sustained.

VI. THE COURT CORRECTLY AWARDED DAMAGES FOR RESTORATION RATHER THAN THE DIFFERENCE IN MARKET VALUE.

Defendants claim that the Court erred in awarding damages in excess of the difference in market value of the property, pursuant to *Roman Catholic Church v.*

Louisiana Gas Service Co., 618 So.2d 874 (La. 1993). That decision does not support their contention. The Supreme Court in *Roman Catholic Church*, as well as *Inabnet, supra*, and the Fourth Circuit in *Sercovich v. Chevron U.S.A., Inc.*, 626 So.2d 434 (La. App. 4 Cir. 1993), *reversed and remanded on other grounds*, 93-2927 (La. 10/28/94), 644 So.2d 379; recognize that to fully compensate an owner, courts should not be limited to a simple diminution in market value of a small part of the property, but should consider the value of the property as a whole, the nature of the owner's use of the property, the reasons for wanting the land restored to its former condition, and the aesthetic or other intangible value placed on the property or its repair by the owner.

The District Court in this case specifically found as a matter of fact that the St. Martins had demonstrated their dedication to the Mandalay area, as evidenced by their actions in helping to establish the Mandalay Wildlife Refuge. The Court had “no doubt” that the area is of personal importance to them. V.R.958.

The St. Martins’ personal reasons for repair and restoration are indeed compelling. The property strategically connects St. Martin’s personal residence to the national wildlife refuge. After the purchase, St. Martin expended considerable effort in attempting to restore the marshes and improving them. St. Martin’s Christmas Tree project and tree planting activities have been ongoing for years.

Several large cypress plantings have been made, up to five hundred (500) or more trees at a time. St. Martin has encouraged the wildlife habitat in numerous ways.

The St. Martins have worked tirelessly towards the preservation of the marshes, and live in the immediate area.¹⁷ The St. Martins are not holding this property for investment or resale, it is both their home and their cause. V.Tr.44. As St. Martin stated at trial: “ My house isn't for sale. The land surrounding my house is not for sale, nor is any part of this swamp and marsh for sale, at any price.” V.Tr. 44. “We bought this property, we intend to keep it forever.” V.Tr.93.

Indeed, the St. Martins, as well as the public, have ample personal reasons for restoring the productive condition of the invaluable wetlands property at issue. As discussed *supra*, Louisiana’s wetlands provide innumerable resources, livelihood, food and recreation for vast numbers of our residents. The property is a treasured natural resource. Accordingly, restoration was the proper remedy in this case.

VII. THE COURT ERRED IN FAILING TO ORDER DEFENDANTS TO RESTORE THE ENTIRE DAMAGED 357 ACRES.

¹⁷ Apart from the St. Martins’ ongoing conservation efforts, defendants’ derelictions have caused plaintiffs additional personal concerns. The existence of the defective canal system creates a huge potential liability. Poachers use the eroded canals to illegally access the St. Martins’ property. V.Tr.82. They come in mud boats, through the breaches in the levees, and steal decoys, boats, pirogues, hunting gear, “you name it.” *Id.* St. Martin is quite concerned that a trespasser could be hurt in one of the canals and that the St. Martin family would find itself in litigation over a situation which they did not create and which they have been struggling to correct.

Based on its determination that plaintiffs were not entitled to monetary damages for property damaged prior to their acquisition in 1992, the District Court found defendants liable to restore only the 40 acres damaged from 1992 to the date of trial. This decision was error: whether or not plaintiffs are entitled to monetary damages, defendants have the legal and moral obligation to restore all the damaged acres to a productive state. Three bases, discussed in detail *infra*, support this conclusion.

1. First, even assuming that the right to receive damages may inure to the present owner from date of purchase, the right of restoration runs with and is owed to the land. The canal servitudes in this case, which provide for ingress and egress via the construction of canals, are predial servitudes. See La. C.C. articles 697, 699; *Walker v. Simmons*, 155 So.2d 234 (La.App. 3rd Cir.1963). Predial servitudes run with the land. *Palomeque v. Prudhomme*, 95-0725 (La. 11/27/95), 664 So.2d 88 (predial servitudes run with the land and are transferred regardless of their mention in the deed).¹⁸ Moreover, the servitudes expressly state that they apply to the successors of the grantor and grantee, and that “The rights hereby granted shall exist until the expiration of whichever of the above identified leases last

¹⁸ Accordingly, because the rights are transferred with the land, the Court erred in determining that plaintiffs were not entitled to recover pre-acquisition damages. However, even if this Court does not reverse the decision regarding pre-acquisition damages, the land, to which the obligation runs regardless of ownership, legally still must be restored.

expires.” Joint Exhibits 6 and 7 at p. 3. As such, as the lower Court recognized, the servitudes are still in force, St. Martin, the present surface owner, stands in the shoes of the grantor, and is entitled to enforce the terms of the servitude, which call for repair of the damaged land.

2. Second, this case involves a mineral lease, and restoration of land damaged by mineral exploration is required under the Louisiana Mineral Code and Louisiana jurisprudence. A mineral lessee has the obligation "... to maintain and restore the premises in the condition he found them subject to his rightful use, and where he has damaged the property it is his duty to appropriately remedy the condition brought on by his use of the lease." *Smith v. Schuster*, 66 So.2d 430 (La. App. 2d Cir. 1953). *Accord*, *Edwards v. Jeems Bayou Production Co.*, 507 So.2d 11 (La. App. 2 Cir., 1987); *Broussard v. Waterbury*, 346 So.2d 1342 (La. App. 3d Cir. 1977), *writ denied*, 350 So.2d 674 (La. 1977); La. C.C. Art. 2719, 2720. See also Comment following La. R.S. 31:122.

In addition to article 122 of the Mineral Code, Louisiana courts recognize the implied obligation of a mineral lessee to restore the surface of the lease premises as near as practicable to the original condition. Comments to Mineral Code Article 122 state that this obligation has a foundation in La. Civ. Code Art. 2719 and 2720, which require a lessee to return the leased property in the same

condition. Restoration is also properly considered a specification of the prudent administrator standard. *Id.*¹⁹

It is not the agreement of the parties that imposes the obligations, but rather the operation of law. Merrill, *Covenants Implied in Oil and Gas Leases* sec. 7, at 27 (1964 Supp.) The lessee's duties remain the same whether or not the ownership of the minerals has been separated from the ownership of the land. *Pennington v. Colonial Pipeline Co.*, 260 F. Supp. 643,649 (E.D. La.1966), *affirmed* 387 F.2d 903 (5th Cir.1968); Mineral Code, La. R.S. 31:11 and comment. Further, even where there is no lease or an oil and gas lease is silent on the issue of which party has the responsibility to restore the land, such a duty will be imposed on the lessee. *Broussard, supra*, 346 So 2d 1342 (even absent written lease, defendant operated as mineral lessee and was statutorily obligated to restore the premises to their original condition); *Bonds v Sanchez-O'Brien Oil & Gas Co.* 289 Ark 582, 715 SW2d 444, 62 ALR4th 1147 (1986) (operator of oil and gas lease had implied duty to restore the surface of the land as nearly as practicable to condition it was in prior to commencement of operations); *Edwards v Jeems Bayou Production Co.*, 507 So 2d 11 (La App 2d Cir. 1987) (lessee required by statute to restore leased premises as nearly as possible to original condition.)

¹⁹ “Wise stewardship of resources should be the operative concern in defining the prudent operator rather than making the quick buck.” Patrick H. Martin, *Implied Covenants in Oil and*

3. Third, this case involves wetlands, which are invaluable natural resources, the injury of which calls for restoration under the Public Trust Doctrine. In this case, a private landowner/trustee seeks to enforce his own and the public's interest and national and local policies regarding the protection of the environment and invaluable and irreplaceable natural resources. In such a case, an award of damages including only the diminution of property values, rather than restoration, would render similar enforcement attempts futile, would violate national and local policy, and certainly would provide no deterrent value to prevent further damage to the resources involved.

“When property damage claims include injury to natural resources, traditional property damage concepts become grossly inadequate to carry out the state and national policies of protecting and restoring natural resources.” Spyridon and LeBlanc, *supra*, 6 Tul. Envtl. L.J. 311-312 (Summer, 1993). “The tort model of damage liability is... inappropriate for environmentally significant public resources”. Stewart, *Evaluating the Present Natural Resource Damages Regime: The Lawyer's Perspective*, in *Natural Resource Damages: A Legal, Economic and Policy Analysis* 171, n.33.

Accordingly, the Courts have borrowed from analogous environmental statutes such as CERCLA and OPA to fashion new remedies awarding restoration

Gas Leases, Past, Present & Future, 33 Washburn L.J. 639, 669 (Summer 1994).

of wetlands natural resources. In *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 671 (1st Cir.1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1350 (1981), the Commonwealth of Puerto Rico sought to recover approximately \$13 million in damages for the restoration of forty-two acres of a mangrove forest contaminated by an oil spill. The mangrove forest had a commercial market value of approximately \$200,000 but, like many wetlands, was found to serve many noncommercial ecological functions. Puerto Rico sought full restoration and recovery of the total value of the damages caused to the environment and/or natural resources.

The Court held that a strict application of the traditional property damage (diminution in value) rule would effectively deny any right to recover meaningful damages. 628 F.2d at 675. In fashioning a new measure of damage for injury to natural resources, the court held that "the appropriate primary standard for determining damages ... is the cost reasonably to be incurred ... to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible without grossly disproportionate expenditures." 628 F.2d at 675.

Following the rationale of the First Circuit and the strong preferences expressed by Congress in subsequent legislation such as CERCLA and OPA, a plaintiff "should not be precluded from recovering restoration costs for damages to

privately held natural resources even if they exceed the fair market value of the property....” 6 Tul. Env'tl. L.J. at 315. It is time to begin attempting new strategies of restoration, including “the enforcement of the public's legally protected interest in damaged natural resources regardless of whether they are publicly or privately held.” 6 Tul. Env'tl. L.J. at 316.

Considering the strong policy expressed in the Constitution and laws of this state favoring the environment and requiring reclamation of land damaged by mineral exploration, as well as the foregoing law and caselaw imposing an implied duty upon the mineral lessee (and its successors and assigns) to restore the land to the condition in which the original lessee found it, this Court should order defendants to expend a minute fraction of the massive profits they have gained to restore all 357 acres of the land they have destroyed.

CONCLUSION

Plaintiffs are not seeking a windfall; they simply want destruction of these invaluable wetlands to be abated and the property restored. The lower Court's decision, which was correct in major part, was of great assistance to plaintiffs' efforts. However, plaintiffs respectfully submit that Mobil and Phillips should be ordered to restore all 357 acres of damaged property in accordance with Dr. Chabreck's plan, or, in the alternative, ordered to pay damages to St. Martin of

\$3,570,000, or \$10,000 per acre, plus interest and all costs in this court and the lower Court. As they did below, the St. Martins specifically agree that any damage award may be conditioned upon the sum awarded actually being spent to restore the property.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that plaintiffs' Original Brief and Record Excerpts were served upon this Court and all parties of record by depositing copies of same in the United States Mails, first class postage prepaid, properly addressed to: John B. Scofield and John R. Pohorelsky, 1114 Ryan Street, Lake Charles, LA 70601; David N. Schnell, Jr. and Robert T. Lorio, 909 Poydras Street,

Suite 2300, New Orleans, LA 70112-1010; and the Clerk of this Honorable Court,
on this, the _____ day of June, 1999.

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

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