

# Land-Loss Litigation and *Roman Catholic Church*<sup>1</sup>

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Long gone are the days when the marsh was considered valueless swampland.<sup>2</sup> In *St. Martin v. Mobil Exploration & Producing U.S. Inc.*,<sup>3</sup> the Fifth Circuit made a judicial finding that “[t]he marsh itself is of significant public value; it is part of a rapidly diminishing number of marshes that have been identified by national conservation efforts as key environmental and ecological resources.”<sup>4</sup>

Individual families, coastal communities, and the public as a whole have lost tremendous benefits from what were in fact *invaluable* wetlands. But since 2016, if not before, Louisianans have begun seeking restoration of their wetlands under the right-of-way agreements executed in Louisiana and under article 2315 of the Louisiana Civil Code.<sup>5</sup>

An important issue at any land-loss trial is the value of the wetlands. Under *Roman Catholic Church v. Louisiana Gas Serv. Co.*,<sup>6</sup> the test of whether restoration damages sounding in tort are feasible requires a comparison of the cost of restoration with the value of the land.<sup>7</sup> In *Roman Catholic Church*, the Louisiana Supreme Court reinforced the rule that “no mechanical rule can be applied with exactitude in the assessment of property damage under Article 2315 and that every case must rest on its own facts and circumstances.”<sup>8</sup> In *Rose v. Tennessee Gas Transmission Company*,<sup>9</sup> the court held that the “principles of *Roman Catholic Church* only apply if the evidence shows that the cost of restoring the property would be disproportionate to its value or economically wasteful.”<sup>10</sup>

In this article, I will suggest the importance of ecosystems valuation and developing evidence that qualifies for the “reason personal” exception to the fair market cap under *Roman Catholic Church*.

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<sup>1</sup> Forthcoming in the January 2022 edition of Louisiana Association for Justice monthly magazine.

<sup>2</sup> See *A Coastal Users Guide to the Louisiana Coastal Resources Program* (discussing the Louisiana Coastal Zone and its vital public interest because it is one of the world’s richest ecological and economic estuarine regions).

<sup>3</sup> 224 F.3d 402 (5th Cir. 2000).

<sup>4</sup> *Id.* at 410-11.

<sup>5</sup> See, e.g., *Vintage Assets, Inc. v. Tennessee Gas Pipeline Company, L.L.C.*, 2017 WL 3601215 (E.D. La. 08/22/2017) (where the plaintiffs asserted that, since 1953, their family lost 49.17 acres of marsh wetlands because the pipeline companies did not fulfill the terms of the governing right-of-way agreements).

<sup>6</sup> 618 So. 2d 874 (La. 1993) (leading case concerning non-wetlands in Louisiana).

<sup>7</sup> *Id.* at 879.

<sup>8</sup> 618 So. 2d 874, 877 (La. 1993) (citations omitted).

<sup>9</sup> 2009 WL 4891910, at \*7 (E.D. La. 12/8/09).

<sup>10</sup> *Id.*

Ecosystem service markets is a valuation methodology that has gained “tremendous traction” in science, economics, and law since its inception in the ‘70s and ‘80s.<sup>11</sup> Wetland markets have provided “a principle source of empirical information on how these markets have actually operated and evolved, thus providing the grist for data-based studies in environmental law, policy, economics, and science.”<sup>12</sup> An ecosystem services methodology allows an economist to capture the market and non-market benefits from the property in a rigorous way.

Since 2008, the ecosystem service framework has been inserted into environmental law.<sup>13</sup> Courts are also embracing the ecosystem services framework. In *Avenal v. State*,<sup>14</sup> the Louisiana Supreme Court upheld a fresh water diversion project against a regulatory taking claim by considering the ecosystem services of the project as a barrier against storms for coastal cities.<sup>15</sup> In *Palazzolo v. Rhode Island*,<sup>16</sup> after the United States Supreme Court remanded the case back to the trial court,<sup>17</sup> the trial court held that a development that would degrade the ability of a marsh to filter and clean runoff was a public nuisance.<sup>18</sup>

Even if *Roman Catholic Church* is triggered in a land-loss case because the cost of restoration is higher than the ecosystems valuation of the marsh, the next question will be whether either of the two exceptions to *Roman Catholic Church* apply. When the cost of restoration is disproportionate to the value of the property, full restoration is nevertheless appropriate if “there is a reason personal to the owner” for restoring the property to its original condition or if there is a reason to believe that the property owner will make the repairs.<sup>19</sup>

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<sup>11</sup> See gen. J.B. Ruhl, *In Defense of Ecosystem Services*, 32 PACE ENVTL. L. REV. 306, 307-08 (2015).

<sup>12</sup> Michael Jenkins et al., *Markets for Biodiversity Services: Potential Roles and Challenges*, 46 Env’t 32, 32-42 (2006); J. B. Ruhl & R. Juge Gregg, *Integrating Ecosystem Services into Environmental Law: A Case Study of Wetland Mitigation Banking*, 20 STAN. ENVTL. L. J. 365, 365-92 (2001); Todd BenDor, Nichlas Brozoric, & Vorkki George Pallathucheril, *The Social Impacts of Wetland Mitigation Policies in the United States*, 4 J. PLAN. LITERATURE 341, 341-57 (2008); Martin W. Doyle & Andrew J. Yates, *Stream Ecosystem Service Markets Under No Net Loss Regulation*, 69 ECOLOGICAL ECON. 820, 820-27 (2010); Douglas J. Spieles, Meagan Coneybear, & Jonathan Horn, *Community Structure and Quality After 10 Years in Two Central Ohio Mitigation Bank Wetlands*, 38 ENVTL. MGMT. 837, 837-52 (2006).

<sup>13</sup> The U.S. Army Corps of Engineers and the Environmental Protection Agency issued a joint regulation declaring that compensatory mitigation decisions would take compensating losses to ecosystem services into account under 33 C.F.R. 332.3(d)(1); Congress added a provision to the 2008 Farm Bill directing the U.S. Department of Agriculture to “facilitate the participation of farmers, ranchers, and forest landowners in emerging environmental service markets” under 16 U.S.C. §3845(a); and The Forest Service issued new land planning regulations for national forests requiring plans to identify and evaluate ecosystem service benefits people obtain from national forests under 36 C.F.R. § 219.6(b)(7).

<sup>14</sup> 886 So. 2d 1085 (La. 2004).

<sup>15</sup> *Id.* at 1101.

<sup>16</sup> *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974 (R.I. Super. Ct. July 5, 2005).

<sup>17</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>18</sup> 2005 WL 1645974, at \*5.

<sup>19</sup> *Roman Catholic Church*, 618 So. 2d at 879-80. The second exception to the *Roman Catholic Church* rule is beyond the scope of this article.

*Roman Catholic Church* and its progeny teach that the personal-reason analysis is a flexible inquiry to be made after considering the intended function of the property.<sup>20</sup> In *McEwen v. MCR, LLC*,<sup>21</sup> the Montana Supreme Court affirmed a jury award of damages for a tort claim in excess of the value of the property because of the McEwen family's personal reasons for seeking restoration of the aquifer beneath their pond.<sup>22</sup> Prominent among these personal reasons was the testimony of the McEwens that their commitment to maintaining the original condition of the ranch was so they could pass it on intact to their children for ranching, which represented the family's way of life.<sup>23</sup> The Montana Court acknowledged the kinship between the outcome in *McEwen* and *Roman Catholic Church*, where the Louisiana Supreme Court acknowledged the church's commitment to provide housing to low-income families as a valid personal reason to support restoration damages.<sup>24</sup>

The property at issue in *Vintage Assets* is located in Breton Sound, which lies directly within the typical hurricane trajectory for Louisiana-bound storms.<sup>25</sup> Hurricane Katrina gave the plaintiffs a personal reason to value the ability of the wetlands to lessen the property damage from hurricanes and tropical storms.<sup>26</sup>

This type of personal reason for repairing a family's damaged property to enable it to function according to the family's stated purpose has been accepted by other juries and courts. In *Sunburst School District No. 2 v. Texaco, Inc.*, the Montana Supreme Court affirmed the jury's award of restoration damages in excess of the property's market value for the school district, in part because "a strict cap could deny a meaningful remedy for injuries to the environment and sensitive ecological properties in particular."<sup>27</sup>

Another valid personal reason for restoration damages is the use of a property for recreational hunting and fishing.<sup>28</sup> In *Massie v. Cenac Towing Co., Inc.*,<sup>29</sup> the defendant argued that the plaintiff should not be entitled to restoration damages because he lacked a personal reason for restoring the property.<sup>30</sup> The Louisiana Third Circuit Court of Appeal disagreed, noting that

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<sup>20</sup> *Id.* at 877, 879.

<sup>21</sup> 368 Mont. 38, 291 P.3d 1253 (Mont. 2012) (awarding damages sounding in contract and in tort).

<sup>22</sup> *Id.* at 1263.

<sup>23</sup> *Id.* at 1262.

<sup>24</sup> *Id.* at 1264.

<sup>25</sup> Kenneth R. Knapp et al., *The International Best Track Archive for Climate Stewardship (IBTrACS): Unifying tropical cyclone best track data*, BULLETIN OF THE AMERICAN METEOROLOGICAL SOCIETY, 91, 363-76 (2010).

<sup>26</sup> Plaintiffs' Memorandum in Opposition to Defendants' Partial Motion for Summary Judgment on Plaintiffs' Tort Claims, *Vintage Assets, Inc. v. Tennessee Gas Pipeline Company, L.L.C.*, 2:16-cv-00713, (E.D. La. 6/20/17), Document 137 at 8-9.

<sup>27</sup> 165 P.3d 1079, 1088 (Mont. 2007) (recognizing that certain landowners might place high values on properties that the market might not reflect).

<sup>28</sup> Plaintiffs' Memorandum at 10-11.

<sup>29</sup> *Massie v. Cenac Towing Co., Inc.*, 2000-1596 (La. App. 3 Cir. 4/25/01), 796 So.2d 14, 18 (justifying the large damage award because the defendant had trespassed on the plaintiff's property on multiple occasions).

<sup>30</sup> *Id.* at 18.

the plaintiff used the property for deer hunting and entertainment.<sup>31</sup> Using the property for the recreation of hunting, fishing, and the rituals of coming of age in Southern Louisiana have thus been legally affirmed as valid personal reasons for seeking restoration damages.

The Vintage Assets' family also valued the services provided by the wetlands as an ecosystem even when they did not receive financial remuneration for them.<sup>32</sup> This personal reason of repairing a family's damaged property to allow it to function according to the purpose the family desires it to fulfill has been accepted by other juries and courts. The D.C. Circuit Court in *Ohio v. United States DOI* held that even persons lacking any interest in personally enjoying a resource could "attach some value to it because he or she may wish to have the resource available for others to enjoy."<sup>33</sup>

The law is no green eye-shade accountant, attentive only to the calculus of the benefits gained through the cold logic of the market, but rightly takes into account the wide range of ways that individuals, families, and communities can and should be allowed to enjoy the protection and bounty of their wetlands.

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<sup>31</sup> *Id.*

<sup>32</sup> Plaintiffs' Memorandum at 11-13.

<sup>33</sup> 880 F.2d 432, 475-76 n. 73 (D.C. Cir. 1989).