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AVENAL v. UNITED STATES: DOES THE STATE OF LOUISIANA HAVE A PROPERTY INTEREST IN THE SALINITY OF ITS WATERS?

*Douglas F. Britton**

I. INTRODUCTION

The United States Court of Federal Claims recently found that certain leaseholders of oyster beds in Louisiana hold no compensable property interest in the salinity of the waters above their leased acreage.¹ The deciding issue, one of first impression, was whether the leaseholders derived from the state a vested interest in an artificially high level of salinity, caused by a federal flood control project,² such that a subsequent project³ reestablishing a low level of salinity, would amount to a compensable taking under the Fifth Amendment.⁴ By deciding the state did not acquire a property interest in the salinity condition before leasing the oyster beds, the court was able to dismiss the takings claim upon

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

2. The case was before the court upon motion for summary judgment by the defendant government. Although the defendant argued that past projects by both the state and federal government were involved, the court adopted the plaintiffs' contention that the artificial salinity level was primarily the result of federal levee projects in the region of the plaintiffs' leaseholds, thereby giving the plaintiffs the "benefit of 'all applicable presumptions, inferences, and intendments.'" *Id.* at 786, n.10 (quoting *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985)).

3. On October 27, 1965, Congress enacted the Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073 (1965), authorizing certain fresh water diversion projects in the Lower Mississippi River Basin, including (under section 204) the freshwater diversion project that allegedly resulted in a taking of the plaintiffs' property. *Avenal v. United States*, 33 Fed. Cl. at 779.

4. *Id.* at 787.

summary judgment, thus avoiding the need for a complete takings analysis.⁵

This Note analyzes the wisdom of the court's approach in *Avenal v. United States*, and, while approving of the noncompensability of any private property interest in the artificially created salinity level, argues that the court did not completely address the nature of the property interest in question. This Note will then argue that the noncompensability of the plaintiffs' interest would have been better explained under the navigation servitude, which will be briefly described and then be shown to apply to the factual circumstances of the case. Finally, it will be argued that the holding of *Avenal v. United States* is inconsistent with the public trust doctrine in Louisiana, and that an alternative holding under the navigation servitude would have prevented this inconsistency and would have allowed recognition of the state's continuing public trust interest in its coastal waters.

II. AVENAL V. UNITED STATES

A. Facts

Section 204 of the Flood Control Act of 1965⁶ authorized the federal government to construct fresh water diversion structures in the Breton Sound Basin of Louisiana, where the plaintiffs hold leaseholds for oyster farming.⁷ Historically, the location of the plaintiffs' leases had been unfavorable for oyster growth.⁸ However, by the early 1960s, primarily as a result of a federal flood control project,⁹ the natural salinity

5. The court stated, "for a takings claim to succeed under the Fifth Amendment, under either a physical invasion or regulatory takings theory, a claimant must first establish a compensable property interest." *Id.* at 784-785 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1030, 112 S.Ct. 2886, 2899-2900 (1992)).

6. Pub. L. No. 89-298, 79 Stat. 1073, 1076 (1965) (modifying and expanding the Flood Control Act of 1928, Pub. L. No. 70-391, 45 Stat. 534 (1928)).

7. Specifically, section 204 adopted and authorized H.R. Doc. No. 308, 88th Cong., 2d Sess. (1965), giving the location and description of the fresh water diversion structures. *Avenal v. United States*, 33 Fed. Cl. at 779.

8. The optimal salinity level for oyster growth ranges from 5 parts per thousand to 15 parts per thousand, and, for various reasons, oysters cannot survive in salinity levels beyond this range. Historically, the salinity of the waters existing over the plaintiffs' leaseholds fell below this range. *Id.*

9. *Id.* at 780.

conditions of the Breton Sound Basin were unexpectedly altered. This change in salinity fostered new oyster growth in the landward region of the basin which had previously been too fresh to sustain oyster growth.¹⁰ Beginning in the 1970s, many persons in the oyster industry, including the plaintiffs, recognized the change in the salinity conditions and entered into water-bottom lease agreements with the Louisiana Wildlife and Fisheries Commission.¹¹

While the alteration of salinity patterns had the beneficial effect of creating new oyster grounds in the landward end of the Breton Sound Basin, the change also had the detrimental effect of creating unacceptably high levels of salinity within the seaward end of the basin, where extensive areas of traditionally productive oyster grounds were rendered unusable.¹² In 1959, prompted by the requests of local groups and after investigation, the Fish and Wildlife Service of the Department of Interior concluded that introducing fresh water would be the most effective method of restoring fish and wildlife production in the seaward end of the basin.¹³

After a considerable length of time,¹⁴ a single fresh water diversion structure at Caernarvon, Louisiana was constructed in February 1991.¹⁵

10. *Id.*

11. The leases covered a maximum of 1,000 acres and had a term of fifteen years. *Id.* at 781. In 1976, the Louisiana Wildlife and Fisheries Commission changed the general provisions of the lease agreements to include the following language: "This lease is also subject to Commission policies not stipulated by regulations . . ." *Id.* n.6 (citing Def's Proposed Findings of Fact No. 73, filed Feb. 7, 1995). Between 1988 and 1990 the leases were further modified to include a hold-harmless clause that prevented leaseholders from seeking damages from the state for losses arising from fresh water diversion projects. According to the defendant, leases issued before 1988 were not amended to include a hold-harmless clause. *Id.*

12. *Id.* at 781.

13. The conclusions of the investigation and a description of the recommended fresh water diversion projects were part of a 1959 memorandum from the United States Department of the Interior, Fish and Wildlife Service to the U.S. Army Corps of Engineers. *Id.* at 779. The memorandum was incorporated into H.R. Doc. No. 308, 88th Cong., 2d Sess. (1965), which Congress approved in the Flood Control Act of 1965, Pub. L. No. 89-298, § 204, 79 Stat. 1073, 1074 (1965).

14. Considerable time was spent in allowing for interactions between local and state agencies, and in allowing for various public hearings to provide additional input. *Avenal v. United States*, 33 Fed. Cl. at 780-781.

15. *Id.* at 782. The Army Corps of Engineers issued a final report in 1982 that sanctioned a single fresh water diversion structure at Caernarvon, even though the Flood Control Act of 1965 had originally authorized a plan for two diversion structures. *Id.*

On April 26, 1994, numerous owners of water-bottom leases filed a takings claim in the United States Court of Federal Claims¹⁶ alleging that the Caernarvon diversion structure diminished the salinity level of the waters above the plaintiffs' leaseholds, thereby preventing the cultivation of their oyster beds.¹⁷ The government moved for summary judgment, asserting that the plaintiffs held no compensable property interest in the artificially created salinity level of the waters above their leaseholds.¹⁸

B. *The Court's Analysis*

1. *The Takings Claim on Summary Judgment*

After noting that the parties did not dispute the essential facts of the case the court proceeded to evaluate the validity of the plaintiffs' takings claim.¹⁹ The court invoked *Lucas v. South Carolina Coastal Council*²⁰ for the proposition that a successful physical or regulatory takings claim depends on the existence of a compensable property interest.²¹

at 781. Congress authorized funds for the Caernarvon diversion structure under the Fiscal Year 1987 Energy and Water Development and Appropriations Act, Pub. L. No. 99-591, 100 Stat. 3341, 3341-195 (1986). *Avenal v. United States*, 33 Fed. Cl. at 782.

16. *Id.* The court noted that:

Plaintiffs also filed a motion for class certification . . . seeking to certify as a class hundreds of oyster lessees of water bottoms in the vicinity of the Breton Sound Basin whose leases had been impaired by the activity of the Federal Government through the Caernarvon project. There are 130 named plaintiffs in the action

Id. at 783. However, the court deferred decision on the motion. *Id.*

17. *Id.* at 782; U.S. CONST. amend. V. The plaintiffs' claim for a physical taking was unique because it was founded upon alleged physical damage to the salinity level of the waters above their submerged leasehold, which is distinguishable from other takings claims which have been based upon alleged physical damage to the submerged land itself. *See, e.g., Lewis Blue Point Cultivation Co. v. Briggs*, 229 U.S. 82 (1913).

18. *Avenal v. United States*, 33 Fed. Cl. at 783.

19. The court noted that: "[A]lthough '[t]he fact-intensive nature of just compensation jurisprudence to date . . . argues against precipitous grants of summary judgment . . . , [t]here [are] cases in which the United States as a moving party is entitled to judgment as a matter of law, and where it is quite clear what the truth is'" *Id.* at 784 (quoting *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed. Cir. 1983)).

20. 505 U.S. 1003, 1027-1030 (1992).

21. *Avenal v. United States*, 33 Fed. Cl. at 784.

The court then emphasized that not all economic interests are actual or compensable property rights. Under *United States v. Willow River Power Co.*²² and *Penn Central Transportation Co. v. City of New York*,²³ only those interests that have the “law back of them” are compensable property rights.²⁴ For an example of such noncompensable interests, the court looked again to *Willow River Power Co.*, which found that a dominant public right to navigation precluded a riparian land owner from acquiring a compensable property interest in the high-water level of a navigable river.²⁵

After noting *Willow River Power Co.*'s restriction of property rights affected by the navigation servitude, the court proceeded to set forth the necessary elements of its analysis under *Lucas v. South Carolina Coastal Council*.²⁶ The court found that it must first evaluate the plaintiffs' “bundle of rights” at the time they acquired their leases, and that second it must examine “existing rules or understandings that stem from an independent source such as state law” to define the range of interests that qualify for protection as ‘property’ under the Fifth (and Fourteenth) Amendments.²⁷ Although the court purported to apply both prongs of this test to determine the validity of the plaintiffs' interest, only the first element was directly addressed.

The court began by deciding that the plaintiffs' right to income under their leases is a valid property interest as defined by state law.²⁸ The court then moved to the second prong of the test to determine whether

22. 324 U.S. 499, 502 (1945).

23. 438 U.S. 104, 124-125 (1978).

24. *Avenal v. United States*, 33 Fed. Cl. at 785 (citing *United States v. Willow River Power Co.*, 324 U.S. at 502).

25. *Avenal v. United States*, 33 Fed. Cl. at 785 (citing *United States v. Willow River Power Co.*, 324 U.S. at 511). The court also cited *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. at 87-88, which found that an owner of submerged lands holds title subject to a dominant public right of navigation, and rejected the claimant's takings claim under the navigation servitude. See discussion of “navigation servitude” *infra* part III.

26. *Avenal v. United States*, 33 Fed. Cl. at 785.

27. *Id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027, 1030).

28. *Id.* at 786 (citing *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. at 87 (owner or lessee of submerged lands has property right to uses of such lands that do not obstruct navigation); referencing also *767 Third Avenue Associates v. United States*, 48 F.3d 1575, 1578 n.2 (Fed. Cir. 1995) (individual's right to income under lease constitutes property under the Fifth Amendment)).

the plaintiffs' leasehold property interest was noncompensable due to "the nature of the *res* that is being leased."²⁹

The court answered this query by first addressing the plaintiffs' expectancy interests, under state law, in the continued artificial salinity condition of the waters directly above their leaseholds.³⁰ Relying on the plaintiffs' admission that the terms of the lease do not address any leasehold interest in the quality of water above the oyster beds, the court concluded, without reference to precedent, that "based on state law, plaintiffs hold no compensable expectancy in the salinity of the waters above their leased acreage."³¹

Notwithstanding this conclusion, the court continued by focusing on whether the plaintiffs could have received *from the state* a vested interest in the salinity condition.³² Thus, the court had neatly disposed of the second prong of its analysis, concerning the use of state law to define protected property interests, and focused instead on whether the *state* acquired a vested interest in the salinity condition.³³ This presented the court with a question of first impression: "[W]hether the plaintiffs have a vested right, derived from the state, in an unintended benefit resulting from a federal government project, such that a cessation of that benefit, due to the consequences of a separate federal project, warrants compensation under the Fifth Amendment."³⁴ The court then sought to determine whether the leaseholders could have derived from the state an interest resulting from an unintended benefit, thereby concentrating the weight of its analysis on the first prong of its test, concerning what rights could have been acquired by the plaintiffs.³⁵ By defining the contested interest in terms of benefit, or by its pecuniary effect, the court obscured

29. *Avenal v. United States*, 33 Fed. Cl. at 787.

30. *Id.*

31. *Id.* The court made no attempt to evaluate "the nature of the *res*" before reaching this conclusion, nor did the court provide any authority to support its construction of the lease. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* The court's characterization of the salinity condition as an unintended benefit is appropriate considering the consequences which it has for the plaintiffs' oyster beds, but it may be argued that relative to the inquiry of the *state's* interest, the condition was part of a greater physical change in salinity patterns which may be better described as a harm, resulting in deleterious economic and ecological consequences for the entire seaward region of the Breton Sound Basin.

35. *Id.* at 787-790.

the physical nature of the salinity condition which was at the heart of the plaintiffs' claim.³⁶

2. *Noncompensable Interests in Unintended Benefits*

To decide the "bundle of rights" question the court began by discussing whether analogous property interests can be derived from federal programs. Although the court noted the noncompensable nature of the cessation of benefits derived from government entitlement programs,³⁷ it acknowledged that the analogy is imperfect.³⁸ Undaunted, the court offered the relative benefits doctrine as another "loosely analogous" principle, by which the government is not required to compensate for damages to private property when the action "confers great benefits when measured in the whole."³⁹ The court recognized that this analogy is also imperfect, stating that "the doctrine is inapplicable" due to factual considerations in *Avenal*.⁴⁰

Finally, acknowledging that "the case law is of marginal assistance," the court turned to the factual circumstances of the case to determine the "nature of the federal government-conferred benefit."⁴¹ The court reasoned that compensation was not required because the benefit conferred had historically been considered problematic and artificial, and because the federal government had taken steps to remedy the problem

36. The plaintiffs maintained that the Caernarvon diversion structure resulted in a physical taking of their water-bottom leases. *Id.* at 785.

37. *Id.* at 788. See *Bowen v. Gilliard*, 483 U.S. 587, 604-605 (1987) ("Congress is not, by virtue of having instituted a social welfare program, bound to continue it . . ."); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) ("[T]he analogy drawn . . . between social welfare and 'property' . . . cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.") (citation omitted); *Allred v. United States*, 33 Fed. Cl. 349, 356 (1995) ("[R]ecipients of government benefits generally do not have a substantive property right to have these benefits continue.") (citation omitted).

38. The court recognized that the property interests of the plaintiffs, unlike the interests of entitlement recipients, are ultimately founded upon a leasehold interest created by the state. *Avenal v. United States*, 33 Fed. Cl. at 788-789.

39. *Id.* at 789. (quoting *United States v. Sponenbarger*, 308 U.S. 256, 266-267 (1939)).

40. *Id.* The court noted that the application of the relative benefits doctrine requires extensive factual determinations, and that the facts necessary for the doctrine are contested and not ripe for adjudication.

41. *Id.*

soon after it developed.⁴² Thus, the court used a factual inquiry, based on the historical perceptions of the salinity condition, to decide that the state acquired no property interest which it could subsequently convey in the salinity level of the waters above the plaintiffs' leaseholds.⁴³

III. THE NAVIGATION SERVITUDE

A. A Brief Survey

The navigation servitude is derived from the Commerce Clause of the United States Constitution,⁴⁴ and is a manifestation of the principle that "the determination of whether a taking has occurred must take into consideration the important public interest" in the nation's navigable waters.⁴⁵ If Congress, in a proper exercise of the navigation power,⁴⁶ burdens expectation interests in private property, compensation may not be constitutionally required where the burdened expectations were held subject to the dominant public right to navigation⁴⁷ as protected under the navigation servitude.⁴⁸ This principle gives rise to the "rule of no compensation," under which Congress may "destroy or impair with impunity certain private rights and values in water courses,"⁴⁹ according to the theory that the owner never had a compensable private property right to begin with.⁵⁰

42. *Id.* at 790.

43. *Id.*

44. See U.S. CONST., art. I, § 8, cl. 3.

45. *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 71-72 (1913); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. at 87-88. A complete survey of the navigation servitude is beyond the scope of this Note; for a comprehensive treatment, see, e.g., Eva H. Morreale, *Federal Powers in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963).

46. The origin of the navigation power demands that *one* purpose of the government act must be to protect or improve navigation. Morreale, *supra* note 45, at 11.

47. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. at 87.

48. Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Takings Issue*, 67 N.C. L. REV. 627, 666 (1989).

49. Morreale, *supra* note 45, at 19-20.

50. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. at 681.

Historically, the courts have given Congress substantial scope to exercise its navigation power.⁵¹ While the proper exercise of the navigation power demands that *one* purpose of the government act must be to protect or improve navigation, other interests may also be served.⁵² As the Supreme Court has stated: “[T]hat purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power.”⁵³

In *United States v. Appalachian Electric Power Co.*,⁵⁴ *Oklahoma v. Atkinson*,⁵⁵ and *United States v. Grand River Dam Authority*,⁵⁶ the Supreme Court upheld flood control and water development projects as constitutionally valid exercises of the navigation power in the interest of navigation. In this context, the Supreme Court has stated that there is no “constitutional necessity” for viewing each project “in isolation from a comprehensive plan covering the entire basin of a particular river.”⁵⁷

Considerable deference has been allowed to Congress in the judicial review of the exercise of the navigation power.⁵⁸ In *United States v. Twin City Power Co.*, the Court held:

It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or the protection of navigation The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate.⁵⁹

Thus, the Court plays essentially no role in the determination of what projects serve the interests of navigation, and it has limited itself to accepting the perfunctory declarations made by Congress with regard to navigation.⁶⁰

51. Morreale, *supra* note 45, at 11.

52. *Id.*

53. *Arizona v. California*, 283 U.S. 423, 456 (1931).

54. 311 U.S. 377 (1940).

55. 313 U.S. 508 (1941).

56. 363 U.S. 228 (1960).

57. *Oklahoma v. Atkinson*, 313 U.S. at 525.

58. Morreale, *supra* note 45, at 12-14.

59. *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956) (citations omitted).

60. Morreale, *supra* note 45, at 17.

B. Applying the Navigation Servitude to Avenal v. United States

The court in *Avenal* rejected the plaintiffs' takings claim without completely addressing the nature of the property interest under state law,⁶¹ and found that the state never acquired a property interest in the salinity of the waters above the plaintiffs' leaseholds.⁶²

Alternatively, the court could have recognized the important state interest which exists in the physical nature of its waters and yet could have defeated the plaintiffs' takings claim, for the particular government action at issue, under the navigation servitude. Moreover, under the navigation servitude, the court could have rejected the takings claim without *any* examination of state interest in the salinity condition, thereby eliminating any risk of conflict with Louisiana's public trust doctrine. As it stands, the court's decision may have undesirable implications for state interests in navigable waters, primarily because it disregards the public trust interests which should exist in the physical condition of salinity as an important characteristic of coastal waters.⁶³

As a project authorized by the Flood Control Act of 1965,⁶⁴ the Caernarvon diversion project is a constitutionally valid exercise of the navigation power because the Act expressly declared that projects

61. The court did make reference to *A-B Cattle Company v. United States*, 621 F.2d 1099 (Ct. Cl. 1980), which held that under Colorado law a riparian landowner did not have a property right to silty water, to support the proposition that "[s]alinity may be construed as a benefit outside the property, like fish in the sea, and therefore compensation is not warranted." *Avenal v. United States*, 33 Fed. Cl. at 790. However, the rationale of *A-B Cattle Company v. United States* was premised upon the finding of the Colorado Supreme Court that, under Colorado state law, there could be no property interest in silty water. Because the court in *Avenal v. United States* did not determine that there can be no property interest in salinity under Louisiana state law, the reliance upon *A-B Cattle Company v. United States* can only be described as erroneous. Furthermore, the court's recognition of salinity as a physical characteristic of water is incongruous with its ultimate reliance upon a factual inquiry concerning the salinity condition as an unintended economic benefit.

62. *Avenal v. United States*, 33 Fed. Cl. at 790.

63. "The court holds that the state acquired no property interest in the salinity level of the waters above the plaintiffs' leased grounds. Plaintiffs therefore also hold no compensable expectancy in the salinity." *Id.* Conflict with the public trust doctrine is discussed *infra* Part IV.

64. Pub. L. No. 89-298, 79 Stat. 1073 (1965).

completed under the Act benefitted navigation;⁶⁵ such a Congressional finding⁶⁶ is essentially treated by the courts as non-reviewable.⁶⁷ Furthermore, as a means of effectuating the objectives of a prior flood control project, and as a component of an overall flood control project for the entire Lower Mississippi River Basin, the constitutional validity of the Caernarvon diversion structure as a proper exercise of the navigation power would be supported under *United States v. Appalachian Power Co.*, *Oklahoma v. Atkinson*, and *United States v. Grand River Dam Authority*.⁶⁸

Therefore, the plaintiffs' private property interest is burdened by a proper exercise of the navigation power and their takings claim would be defeated under the no compensation rule of the navigation servitude.⁶⁹ This analysis would be harmonious with the court's utilization of *Willow River Power Co.*, which was decided under the navigation servitude, as an example of when a property interest is noncompensable for purposes of the Fifth Amendment.

65. Section 204 provides that "[t]he following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized." *Id.* § 204, 79 Stat. at 1074.

66. The court noted that "[t]he Caernarvon project was designed not only to abate salt water intrusion, but also to abate marine tidal invasion." *Avenal v. United States*, 33 Fed. Cl. at 782.

67. *Morreale*, *supra* note 45, at 19; *but see* *United States v. Twin City Power Co.*, 350 U.S. at 224 (when considering Congressional determination that the purpose of a project is to benefit navigation, "[c]ourts should respect that decision until and unless it is shown to 'involve an impossibility,' as Mr. Justice Holmes expressed it"). Thus, the possibility remains that there would be an insufficient nexus between the diversion structure and the declared purpose relating to navigation.

68. *See supra* notes 54-57 and accompanying text.

69. *Finnell*, *supra* note 48, at 666.

IV. AVOIDING CONFLICT WITH THE PUBLIC TRUST DOCTRINE

The essential defect with the court's rationale is that its analysis of the state's interest conflicts with public trust jurisprudence,⁷⁰ and with the state constitution and civil code of Louisiana. *Illinois Central Railroad Co. v. Illinois*,⁷¹ generally regarded as the seminal case for public trust jurisprudence in America,⁷² found that upon entering the union, the people of each state "became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government."⁷³ The Supreme Court of Louisiana adopted this language in *Gulf Oil Corp. v. State Mineral Board*,⁷⁴ thereby giving clear recognition of the public trust doctrine in Louisiana.

The Louisiana Supreme Court revisited the public trust doctrine in *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,⁷⁵ where the court noted that a "public trust for the protection, conservation and replenishment of all natural resources of the state was recognized by

70. While this Note argues that the rationale of *Avenal v. United States* is inconsistent with public trust jurisprudence, it does not purport to explain the public trust doctrine, for which a considerable body of literature has developed. For a more complete treatment of the public trust doctrine in Louisiana, see James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861 (1992); Robert E. Tarcza, Comment, *The Public Trust Doctrine as a Basis for Environmental Litigation in Louisiana*, 27 LOY. L. REV. 469 (1981); Nelea A. Absher, Note, *Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 59 TUL. L. REV. 1557 (1985). For a general treatment of the public trust doctrine, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter *The Public Trust Doctrine in Natural Resource Law*]; Joseph L. Sax, *Liberating The Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Bernard S. Cohen, *The Constitution, The Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388; Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980).

71. 146 U.S. 387 (1892).

72. Sax, *The Public Trust Doctrine in Natural Resources Law*, *supra* note 70, at 489.

73. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 456 (quoting Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)).

74. 317 So.2d 576, *modified on rehearing*, 317 So.2d 580, 589 (1975).

75. 452 So.2d 1152 (La. 1984).

art. VI, § 1 of the 1921 Louisiana Constitution,⁷⁶ and that the public trust was “continued by the 1974 Louisiana Constitution, which specifically lists air and water as natural resources.”⁷⁷ In addition to these constitutional provisions, the Louisiana Civil Code provides that the waters of natural navigable water bodies are public things that belong to the state,⁷⁸ and that such property is “dedicated to public use, and held as a public trust, for public uses.”⁷⁹ In Louisiana, therefore, the public ownership of navigable waters has been firmly established within the public trust doctrine.⁸⁰

Avenal v. United States is inconsistent with Louisiana’s public trust doctrine because it indicates that some portion of the state’s established interest in its waters may be discontinued when a change in the physical condition of public trust property can be characterized as an unintended economic benefit resulting from a federal project. More specifically, conflict arises because the navigable waters of the state were vested as public property in the state of Louisiana when it achieved statehood in 1812,⁸¹ and this interest, either in part or in whole, is held subject only to “the rights since surrendered by the Constitution to the general government.”⁸² Accordingly, the state of Louisiana should not be divested of any portion of its interest in these waters absent an overriding constitutional mechanism such as the navigation servitude.⁸³ Furthermore, presence of the state’s continuing public trust interest in its waters undermines the court’s factual determination that the state acquired no interest in the altered salinity condition.

76. *Id.* at 1154 (citing LA. CONST. art. VI, § 1 (1921)).

77. *Id.* (citing LA. CONST. art. IX, § 1: “The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”).

78. LA. CIV. CODE ANN. art. 450 (West 1980). A portion of this article provides that: “Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.”

79. LA. CIV. CODE ANN. art. 450, comment (b) (West 1980) (citing *City of New Orleans v. Carrollton Land Co.*, 60 So. 695, 696 (La. 1913)).

80. Wilkins & Wascom, *supra* note 70, at 868.

81. *Id.*

82. See *supra* note 73 and accompanying text.

83. Morreale, *supra* note 45, at 19.

V. CONCLUSION

The *Avenal* court improperly characterized the plaintiffs' alleged property interest as an unintended benefit, pecuniary in its manifestation, which allowed the court to essentially disregard the physical nature of the altered salinity condition at issue. This misperception guided the court's analysis, and ultimately directed the court to rest its holding upon a factual inquiry. The resulting analysis determined that the state had no interest in the altered salinity condition and thus conflicts with Louisiana's public trust doctrine, which has established that the waters of the state are held in trust for the public. A more prudential outcome could have been reached if the court had based its holding upon the navigation servitude, under which the court could have avoided any potential conflicts with the state's public trust interest in its coastal waters.⁸⁴ Though the court properly dismissed the plaintiffs' takings claim, it did so on the basis of an incomplete factual inquiry which disregarded the state's continuing public trust interest in the physical characteristics of its coastal waters.

84. The navigation servitude is limited in its operation to those interests affected by the specific exercise of the navigation power at issue, e.g., the Caernarvon freshwater diversion structure, and thus would not otherwise conflict with the state's public trust interest in its coastal waters. Finnell, *supra* note 48, at 666.