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Land-loss litigation and *Roman Catholic Church*

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Long gone are the days when the marsh was considered valueless swampland.[1] In *St. Martin v. Mobil Exploration & Producing U.S. Inc.*,[2] the U.S. 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."[3]

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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 right-of-way agreements executed in Louisiana and under Article 2315 of the Louisiana Civil Code.[4]

An important issue at any land-loss trial is the value of the wetlands. Under *Roman Catholic Church v. Louisiana Gas Serv. Co.*,[5] 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.[6] 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."[7]

In *Rose v. Tennessee Gas Transmission Company*,[8] 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."[9]

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

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.[10] 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."[11] An ecosystem service methodology allows an economist to capture market and non-market benefits from property in a rigorous way.

Since 2008, the ecosystem service framework has been inserted into environmental law.[12] Courts are also embracing the ecosystem service framework. In *Avenal v. State*,[13] the Louisiana Supreme Court upheld a freshwater diversion project against a regulatory-taking claim by considering the ecosystem services of the project as a barrier against storms for coastal cities.[14]

In *Palazzolo v. Rhode Island*,[15] after the United States Supreme Court remanded the case back to the trial court,[16] the trial court held that a development that would degrade the ability of a marsh to filter and clean runoff was a public nuisance.[17]

Even if *Roman Catholic Church* is triggered in a land-loss case because the cost of restoration is higher than the ecosystem 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.[18]

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.[19] In *McEwen v. MCR, LLC*,[20] 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.[21] 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.[22]

The Montana court acknowledged the kinship between the outcome in *McEwen* and *Roman Catholic Church*, in which the Louisiana Supreme Court recognized the church's commitment to provide housing to low-income families as a valid personal reason to support restoration damages.[23]

The property at issue in *Vintage Assets* is located in Breton Sound, which lies directly within a typical hurricane trajectory for Louisiana-bound storms.[24] Hurricane Katrina gave the plaintiffs a personal reason to value the ability of the wetlands to lessen property damage from hurricanes and tropical storms.[25]

Other juries and courts have accepted this type of personal reason — to enable property to function according to a family's stated purpose — for repairing damaged property. 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."[26]

Another valid personal reason for restoration damages is the use of a property for recreational hunting and fishing.[27] In *Massie v. Cenac Towing Co., Inc*.,[28] the defendant argued that the plaintiff should not be entitled to restoration damages because he lacked a personal reason for restoring the property.[29] The Louisiana Third Circuit Court of Appeal disagreed, noting that the plaintiff used the property for deer hunting and entertainment.[30] Thus, courts have legally affirmed using property for hunting, fishing, and the rituals of coming of age in South Louisiana 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.[31]

The D.C. Circuit Court in *Ohio v. United States DOI* held that even a person 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."[32]

The law is no green eyeshade accountant, attentive only to the calculus of the benefits gained through the cold logic of the market. It rightly considers the wide range of ways that individuals, families, and communities can and should be allowed to enjoy the protection and bounty of their wetlands.

Endnotes

1. *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).
2. 224 F.3d 402 (5th Cir. 2000).
3. *Id*. at 410-11.
4. *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).
5. 618 So. 2d 874 (La. 1993) (leading case concerning non-wetlands in Louisiana).
6. *Id.* at 879.
7. 618 So. 2d 874, 877 (La. 1993) (citations omitted).
8. 2009 WL 4891910, at *7 (E.D. La. 12/8/09).
9. *Id.*
10. *See* gen. Ruhl, J.B. "In Defense of Ecosystem Services." 32 *Pace Environmental Law Review*, 306, 307-08 (2015).
11. Jenkins, Michael, et al. "Markets for Biodiversity Services: Potential Roles and Challenges." 46 *Environment* 32, 32-42 (2006); Ruhl, J.B. and R. Juge Gregg. "Integrating Ecosystem Services into Environmental Law: A Case Study of Wetland Mitigation Banking," 20 *Stanford Environmental Law Journal* 365, 365-92 (2001); BenDor, Todd, Nicholas Brozoric, and Vorkki George Pallathucheril. "The Social Impacts of Wetland Mitigation Policies in the United States." 4 *Journal of Planning Literature* 341, 341-57 (2008); Doyle, Martin W. and Andrew J. Yates. "Stream Ecosystem Service Markets Under No Net Loss Regulation." 69 E*cological Economics* 820, 820-27 (2010); Spieles, Douglas J., Meagan Coneybear, and Jonathan Horn. "Community Structure and Quality After 10 Years in Two Central Ohio Mitigation Bank Wetlands." 38 *Environmental Managemen*t 837, 837-52 (2006)).
12. 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). 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).

13. 886 So. 2d 1085 (La. 2004).
14. *Id*. at 1101.
15. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974 (R.I. Super. Ct. July 5, 2005).
16. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
17. 2005 WL 1645974, at *5.
18. *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.
19. *Id*. at 877, 879.
20. 368 Mont. 38, 291 P.3d 1253 (Mont. 2012) (awarding damages sounding in contract and in tort).
21. *Id*. at 1263.
22. *Id*. at 1262.
23. *Id*. at 1264.
24. Knapp, Kenneth R., 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).
25. 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.
26. 165 P.3d 1079, 1088 (Mont. 2007) (recognizing that certain landowners might place high values on properties that the market might not reflect).
27. Plaintiffs' memorandum at 10-11.
28. *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).
29. *Id.* at 18.
30. *Id.*
31. Plaintiffs' memorandum at 11-13.
32. 880 F.2d 432, 475-76 n. 73 (D.C. Cir. 1989).

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