

Blanco v. Burton: Louisiana's Struggle for Cooperative Federalism in Offshore Energy Development

I. INTRODUCTION: HURRICANE KATRINA EXPOSES LOUISIANA'S FRAGILE COASTLINE

The day after Hurricane Katrina struck the coast of Louisiana, biologist Tommy Michot and geographer Chris Wells of the United States Geological Survey conducted a flight to photograph and assess the damage to Louisiana's coastland.¹ Michot and Wells took aerial photographs of countless destroyed human structures, including almost all of the homes and camps on Grand Isle.² The town of Venice, located just west of the Delta National Wildlife Refuge, was completely flooded, leaving lumber and dead vegetation washed up against the levee.³ The most dramatic impacts of Katrina were seen along the Chandeleur Islands, which served as an important habitat for wildlife and were the first line of hurricane defense for Louisiana's coastline. The land mass of those islands had been reduced by an astonishing fifty percent.⁴

Scientists with the U.S. Geological Survey believe about 100 square miles of marshland were destroyed and became open water as a result of Hurricanes Katrina and Rita.⁵ Since the early 1990s, the state has spent roughly a half billion dollars building rock barriers, planting marsh grasses, and diverting freshwater into low-lying areas damaged by salt water. Katrina and Rita erased all of that progress in an instant.⁶

Traditionally, the populace was averse to "environmental extremists."⁷ In fact, Governor Blanco was the self-proclaimed "oil

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1. National Wetlands Research Center, U.S. Geological Survey: National Wetlands Research Center, Hurricane Katrina Photographs August 30, 2005, <http://www.nwrc.usgs.gov/hurricane/post-hurricane-katrina-photos.htm>.

2. Grand Isle is a barrier island located at the mouth of Barataria Bay where it meets the Gulf of Mexico.

3. National Wetlands Research Center, *supra* note 1.

4. *Id.*

5. Cain Burdeau, *Hurricanes Take Bite Out of La. Wetlands*, WASH. POST, Nov. 10, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/10/AR2005111000138_pf.html. Hurricane Rita made landfall on Louisiana's western coast on September 24, 2005.

6. *Id.*

7. See, e.g., Frank Ashby, Jr., *A Friend of the Environment*, TIMES PICAYUNE (New Orleans), Dec. 25, 1991, at B10.

and gas governor.”⁸ However, Hurricanes Katrina and Rita significantly shifted the paradigm of Louisiana politics. Katrina particularly demonstrated to the citizens of Louisiana just how dangerous the loss of a coastal buffer can be. Suddenly, protecting the environment was a central part of the conversation and an important factor in the region’s long-term survival.

Thus, in light of Katrina’s destruction, it was not surprising that Governor Blanco sued the United States Department of the Interior in *Blanco v. Burton* for their failure to cooperate with Louisiana in protecting its coastline in the months that followed.⁹ The *Blanco* lawsuit was precipitated by the federal government’s decision to proceed with an oil and gas lease sale¹⁰ in the Gulf of Mexico within weeks of the two devastating hurricanes. The Department of the Interior dismissed Louisiana’s environmental concerns associated with the lease sale, illustrating the friction between federal and state governments in balancing offshore energy development with environmental regulations.

The erosion of Louisiana’s coastline and wetlands is a multifaceted problem. The causes of erosion include, but are not limited to, the destruction from hurricanes, a levee system that interrupts the natural flooding process, wave erosion, and the natural sinking of marshland. Another significant factor having an impact on the State’s coastline and wetlands is the expanding oil and gas industry. While the State has reaped economic benefit from offshore oil and gas production, it has also incurred tremendous infrastructure and environmental costs to make offshore production possible. Scott Angelle, Secretary of the Louisiana Department of Natural Resources, testified before Congress in June of 2006 that Louisiana has

tens of billions of dollars of requirements to repair, rebuild, and maintain the infrastructure needs of roads, ports, flood protection, environmental damage from old practices of the

8. Stephanie Grace, Editorial, *An ‘Oil and Gas Governor’ Draws the Line*, TIMES PICAYUNE (New Orleans), May 11, 2006, at B7.

9. *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046, at *1 (E.D. La. Aug. 14, 2006).

10. A “lease sale” is an auction system whereby the Department of the Interior puts specified areas up for lease in federally controlled waters. The Mineral Management Service gives a notice of leasing with an identification of tracts and the potential lessees can evaluate what they think the lease is worth. Oil and gas companies bid on the tracts, seeking to obtain a right to drill in that desired tract. Leasing the tract also involves the right of shared royalties of any discovered oil and gas in that tract. The royalty is based on a percentage determined by federal law. *See* 43 U.S.C. §§ 1334(a)(3)–(4), 1337(a)(1), 1344 (2000).

past, onshore disposal of offshore production wastes, and other infrastructure, including restoring protective coastal wetlands that are being lost at a rate of more than 24 square miles per year.¹¹

Approximately 200 acres of wetlands are lost per year due to human activities associated with the oil and gas industry.¹² Inland and coastal dredging, the building of channels for navigation, oil and gas exploration, land reclamation projects, as well as the construction of ports, are all contributing factors to this loss.¹³

Some of the contributing factors of coastal erosion are not easily manageable by legislation or through the court system. Mother Nature controls the hurricane season, and a dramatic overhaul of the present levee system in the state is not financially feasible. However, one area where legislation can and has made a difference is offshore energy development. A balance is needed for Louisiana to continue to provide for the nation's energy needs while protecting its coastal environment. This balance can only be achieved through true cooperation between the federal and state agencies involved in oil and gas production.

Part II of this Note provides a historical context for a proper understanding of *Blanco v. Burton*. There has been an ongoing dispute between the federal government and coastal states over who has control of oil and gas production in the offshore area. This conflict concerns who will control drilling rights, who will benefit from them, and who will receive oil and gas royalties to finance environmental protections. Part III presents the facts and arguments of the case, including the findings of the court that the Department of the Interior failed to cooperate with Louisiana in the lease sale process and had disregarded environmental regulations. Part IV offers solutions for this multi-faceted environmental crisis by stressing the importance of cooperative federalism¹⁴ between federal and state governments. The judiciary is encouraged to

11. *Hearing on Domestic Energy Production through Offshore Exploration and Equitable Treatment of State Holdings Act of 2006*, 109th Cong. 1 (2006) (statement of Scott A. Angelle, Sec'y of the La. Dept. of Natural Res.), available at <http://dnr.louisiana.gov/sec/execdiv/pubinfo/newsr/2006/0614sec-angelle-testimony.pdf> [hereinafter Angelle].

12. Donald F. Boesch et al., *Scientific Assessment of Coastal Wetlands Loss, Restoration and Management in Louisiana*, 20 J. COASTAL RES. (SPECIAL ISSUE) 61 (1994).

13. *Id.*

14. Cooperative federalism is the “[d]istribution of power between the federal government and the states in which each recognizes the powers of the other while jointly engaging in certain governmental functions.” BLACK’S LAW DICTIONARY 644 (8th ed. 2004).

make a more effective use of the preliminary injunction to postpone lease sales once it is determined an agency has failed to follow environmental regulations. Finally, Congress is encouraged to enact further legislation requiring a sharing of offshore royalties with coastal states to finance environmental projects.

II. LOUISIANA AND THE TIDELANDS CONTROVERSY: A HISTORICAL PERSPECTIVE

The conflict between the federal government and coastal state governments over offshore energy development is often referred to as the Tidelands Oil Controversy.¹⁵ The friction occurs because both the federal government and the coastal states have a vested interest in offshore energy development. The federal interest includes an ever-increasing demand for a domestic supply of energy, preserving jobs in the oil industry, generating federal revenues, and reducing the trade deficit.¹⁶ Likewise, offshore energy development provides economic benefits to the coastal states, although they bear the brunt of adverse environmental impacts associated with such development.¹⁷

The Tidelands Oil Controversy particularly involves the states' share of money from federally controlled offshore oil and gas royalties. If Louisiana (or any coastal state, for that matter) is to finance a meaningful environmental program to protect its coastlines, it must share the revenues generated by offshore drilling and production.¹⁸ These royalties are the appropriate source of funds for addressing environmental needs since offshore oil and gas production and its related activities have significantly contributed to the destruction of the State's coastline. Because Louisiana's offshore drilling and production have provided oil and gas for the rest of the nation and billions of dollars to the federal treasury, the federal government has an obligation to mitigate the environmental impact to the state resulting from offshore energy development.

The United States Supreme Court confronted several related issues connected with the Tidelands Oil Controversy from the 1940s through the 1960s. The holdings from several of these cases

15. For a thorough analysis of the Tidelands Controversy prior to 1953, see ERNEST R. BARTLEY, *THE TIDELANDS OIL CONTROVERSY: A LEGAL AND HISTORICAL ANALYSIS* (Univ. of Tex. Press 1953).

16. Edward A. Fitzgerald, *The Seaweed Rebellion: Florida's Experience with Offshore Energy Development*, 18 J. LAND USE & ENVTL. L. 1, 2 (2002).

17. *Id.*

18. Angelle, *supra* note 11, at 8.

have directly impacted Louisiana and laid the groundwork for the confrontation arising in *Blanco v. Burton*.

A. California I: The Federal Government Claims Dominion over Offshore Lands

In October 1945, President Harry Truman issued a proclamation that declared U.S. jurisdiction over “the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas.”¹⁹ Executive Order 9633 said the proclamation did not affect the federal-state controversy as it related “to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit.”²⁰ The Truman Proclamation defined the controversy strictly as a domestic conflict between the federal and state governments, and not as an issue of defining national boundaries for international purposes.²¹

Federal or state ownership of the offshore area was particularly relevant when it pertained to oil and gas leases granted to oil companies. The owner of the sea bed in which the drilling took place would be the recipient of the subsequent oil and gas royalties. Between 1933 and 1937, the Department of the Interior received a number of mineral lease applications from oil companies seeking to drill offshore for oil and gas.²² The Department rejected all of these applications on the basis that states owned the submerged lands.²³ However, in 1937, Secretary of the Interior Harold Ickes reversed this policy, announcing that the federal government would begin granting oil leases covering offshore lands.²⁴

Since coastal states were also granting mineral lease applications from oil companies seeking to drill offshore, the Department of the Interior sought to assert its ownership of offshore lands through a series of legal complaints filed against the coastal states. Secretary Ickes persuaded President Truman to order Attorney General Tom Clark to file a complaint against California seeking a declaration that the United States owned the submerged lands and mineral deposits off the California coast. Prior to this

19. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945).

20. Exec. Order No. 9633, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

21. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209, 214 (1988).

22. Austin W. Lewis, *A Capsule History and the Present Status of the Tidelands Controversy*, 3 NAT. RESOURCES LAW. 620, 620 (1970).

23. *Id.*

24. *Id.*

case, the U.S. Supreme Court issued more than thirty decisions, consistently holding that coastal states owned submerged lands under their navigable waters.²⁵ However, in this landmark case of 1947, known as *California I*, the Court rejected as dicta its prior decisions and created the legal concept of “paramount rights” in deciding against California, emphasizing national defense concerns and national supremacy as grounds for its ruling.²⁶ An important aspect of these paramount rights was dominion over the energy resources located therein.²⁷ The Court rejected California’s argument that the Equal Footing Clause²⁸ granted the State the same historical rights possessed by the original states over their offshore lands. The Court held that the original states never held title to offshore lands beyond the low water mark.²⁹

In his dissent, Justice Frankfurter was in agreement with the “paramount rights” analysis but said that mineral leasing by the states was not an impediment to the federal government’s claiming the marginal sea as a part of the national domain. He believed that claim was a political act that should be undertaken by Congress and not a judicial act for the Supreme Court.³⁰

B. Louisiana I: *The State Loses its Claim to the Tidelands*

With precedent set in *California I*, the federal government in 1948 filed complaints against Texas and Louisiana. The complaints alleged that the United States was “the owner in fee simple of, or possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico” off the Texas and Louisiana coasts out to the edge of the continental shelf.³¹ The complaint against Louisiana is commonly referred to as *Louisiana I*.³²

As one of its defenses in the case, Louisiana traced its title to the submerged lands through various treaties, cases, and the Equal Footing Clause contained in the national resolution admitting

25. See, e.g., *The Abbey Dodge v. United States*, 223 U.S. 166 (1912); *Louisiana v. Mississippi*, 202 U.S. 1 (1906); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

26. *United States v. California (California I)*, 332 U.S. 19 (1947).

27. *Id.* at 29–41.

28. See U.S. CONST. art. IV, § 3.

29. 332 U.S. at 36.

30. *Id.* at 43–46 (Frankfurter, J., dissenting).

31. BARTLEY, *supra* note 15, at 196 (quoting *United States v. Louisiana (Louisiana I)*, 339 U.S. 699, 701 (1950)).

32. *Louisiana I*, 339 U.S. 699.

Louisiana into the Union.³³ The Court rejected the equal footing argument and stated that its holding in *California I* applied.³⁴ The Court then awarded the title to the submerged lands with its mineral resources to the federal government.³⁵ The Supreme Court held that Louisiana had no title to the submerged lands beyond the low water mark along the Gulf of Mexico or where the sea met the inland waters.³⁶ Unfortunately, *Louisiana I* did little to define the coastal boundaries of Louisiana and left open the issue of who controlled leases in the Outer Continental Shelf.³⁷ As one Louisiana attorney observed:

The *Louisiana I* case . . . created tremendous confusion regarding the issuance of leases. Louisiana's administrative body and the Department of the Interior were both issuing leases on and around Louisiana's coast, because the paramount rights decision had not delineated Louisiana's coast, but stated that the federal government now owned everything off of it.³⁸

Louisiana continued to issue leases based upon the Coast Guard Line,³⁹ which included the barrier islands over which Louisiana had exercised jurisdiction, vast tracts of marsh, and submerged land that contained huge reserves of oil and gas.

Congress entered into a period of intense legislative activity on the part of those wishing to return the submerged lands to the status they had held prior to *California I* and *Louisiana I*. Beginning in January 1948, many such measures were introduced during several Congressional sessions.⁴⁰ In each case, President Truman vetoed the attempt to return the coastal property rights of

33. BARTLEY, *supra* note 15, at 200.

34. *Louisiana I*, 339 U.S. at 704-05.

35. *Id.* at 705-06.

36. *Id.* at 704-05.

37. Governor John McKeithen asked Paul M. Hebert, Dean of the Louisiana State University Law Center, to assemble a team of attorneys to represent Louisiana in litigation to establish the state's coastline. See Oliver P. Stockwell, *The Boundaries of the State of Louisiana*, 42 LA. L. REV. 1043 (1982).

38. Amos J. Cormier III, *The Story of the Greatest Wealth Transfer in U.S. History* 15 (Feb. 27, 2007) (unpublished manuscript, on file with author).

39. The Coast Guard Line was established by an 1895 Act of Congress and is generally located at the perimeter of the outmost barrier islands off of Louisiana's coast. The issue is discussed in some detail in *United States v. Louisiana (Louisiana IV)*, 394 U.S. 1 (1969).

40. See, e.g., H.R. 4484, 82d Cong. (1951); S. 940, 82d Cong. (1951); H.R. 180, 81st Cong. (1950); H.R. 8137, 81st Cong. (1950); S. 155, 81st Cong. (1949); S. 1545, 81st Cong. (1949).

ownership to the states.⁴¹ President Dwight Eisenhower's election in 1952, coupled with the election of a Republican Congress, resulted in the enactment of the Submerged Lands Act (SLA) of 1953.⁴² The SLA relinquished all federal claims to offshore lands within the historic boundaries of coastal states.⁴³ Under the SLA, the Gulf States could assert a claim to submerged land within three marine leagues of their coastlines.⁴⁴ Soon after the SLA became law, Congress enacted the Outer Continental Shelf Lands Act (OCSLA).⁴⁵ As stated in OCSLA, it is a policy of our nation that the Outer Continental Shelf (OCS) "is a vital national resource reserve held by the Federal Government for the public, which should be made available for . . . orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."⁴⁶

C. Louisiana II: *The State Loses Billions in Future Royalties*

In the 1950s, there was a rapid development of technology in the oil and gas industries that allowed for offshore energy development in ever deeper waters. As a result, it became essential to establish specific federal-state boundaries.⁴⁷ In 1956, both Louisiana and the federal government attempted to lease tracts in the same area, located between three miles and three marine leagues from shore. Defining boundaries would determine whether federal or state governments would receive oil and gas royalties in a given coastal area.

The suit against Louisiana, joined by the other Gulf States, became known as *Louisiana II*.⁴⁸ The Court established a two-part test to determine if the Gulf States could claim submerged land three marine leagues from their coastlines.⁴⁹ First, the state boundaries had to have been defined as exceeding three miles from their coastline on the day the state was admitted into the Union. Second, Congress had to explicitly approve of those boundaries.⁵⁰

41. BARTLEY, *supra* note 15, at 215.

42. 43 U.S.C. §§ 1301–1315 (2000).

43. § 1311.

44. §§ 1302, 1312.

45. §§ 1331–1356.

46. § 1332(3). The outer continental shelf is essentially the area of the continental shelf beyond the territory of the coastal states, which for Louisiana is beyond three miles from the coast land. *See* §§ 1312–1313 (defining and describing the seaward boundaries of the coastal states).

47. Fitzgerald, *supra* note 21, at 220.

48. *United States v. Louisiana (Louisiana II)*, 363 U.S. 1 (1960).

49. *Id.* at 27, 33–36.

50. *Id.*

The case established the boundaries of Texas and Florida at three marine leagues (approximately 10.3 geographical miles) off of their respective coastlines, while limiting the boundaries of Louisiana, Mississippi, and Alabama to only three geographical miles.⁵¹ Louisiana claimed that the Act of Congress admitting the state to the Union in 1812 described the new state's boundaries as including all islands within three leagues of the coast and should be read to mean that Congress set the state's seaward boundary at three leagues from its coast.⁵² The Court, however, agreed with the federal government's argument that the Act was meant to include only the islands themselves lying within three leagues of the coast and not all waters within that distance as well.⁵³ The result for Louisiana was financially devastating, considering the vast oil and gas reserves that were contained between the three mile mark and the three league mark. Justice Black's dissent criticized the majority for not establishing the coastlines from which the three-mile or three-league boundary would be measured.⁵⁴ Black's dissent proved to be important because the Court would wrestle with the standard for measurement in subsequent decisions.

D. Louisiana V: The State Loses its Coastline Boundary Claim

The Supreme Court belatedly dealt with the issue raised in Justice Black's *Louisiana II* dissent. In *Louisiana III*⁵⁵ and *Louisiana IV*,⁵⁶ the Supreme Court attempted to set the parameters in defining the coastline of Texas. In *Louisiana V*,⁵⁷ Louisiana claimed that the Coast Guard Inland Water Line established the boundary of its inland waters, as prescribed by an 1895 statute. Louisiana also claimed that a number of historic bays (in particular, East Bay) were inland waters.⁵⁸ The Court decided that the Coast Guard Inland Water Line was never intended to establish a territorial boundary and denied Louisiana's claim.⁵⁹ Justice Black's dissent in *Louisiana V* criticizes the majority for applying standards for establishing California's coastal boundary to Louisiana.⁶⁰ Black recognized Louisiana's unique geography that

51. *Id.* at 65, 79, 82, 100–01.

52. *Id.* at 66.

53. *Id.*

54. *Id.* at 85–101 (Black, J., dissenting).

55. *United States v. Louisiana (Louisiana III)*, 389 U.S. 155 (1967).

56. *United States v. Louisiana (Louisiana IV)*, 394 U.S. 1 (1969).

57. *United States v. Louisiana (Louisiana V)*, 394 U.S. 11 (1969).

58. *Id.* at 74.

59. *Id.* at 27–35.

60. *Id.* at 79 (Black, J., dissenting).

includes numerous coastal islands arranged in a jagged, uneven fashion.⁶¹ Justice Black said:

Nor can I find any justification for applying the Convention standard applied in the second California case to Louisiana, a State that was not a party to the West Coast litigation but urges us to adopt a different standard, one especially convenient for application to Louisiana's own unusual coast, and one never even considered in the West Coast litigation. Under these circumstances I must dissent. I would hold that "inland waters" should be measured in Louisiana, and in any other State with similar coastal characteristics, by the standard urged by Louisiana—the Coast Guard line established years ago, under the authority of an 1895 Act of Congress, to mark off the boundaries of the States' "inland waters." Such a holding would put an end to a useless, unnecessary litigation, over an issue that can well be characterized as *de minimis* so far as the practical effect to the United States is concerned.⁶²

The end result of this decision was yet another loss of land and revenue for Louisiana. The State's coast is jagged with numerous islands, and the Court's holding put many submerged oil and gas reserves beyond Louisiana's boundaries and control.

E. Louisiana's Struggle for Cooperative Federalism in the Tidelands Oil Controversy

By 1970, Louisiana had suffered a string of defeats through these Supreme Court holdings, resulting in negative financial and environmental consequences for the state. Unfortunately, the Supreme Court's *modus operandi* in analyzing who has control over OCS activities was to determine if it was *either* the federal government *or* the state governments. The Court never sought a solution by basing its decisions on cooperative federalism that distributes power between the federal and state governments. The complexity of OCS activities, which involve both federal and coastal state interests, require shared control by *both* the federal government *and* the state governments.

Congressional enactment of environmental legislation in the 1970s and 1980s brought new challenges for federal and state cooperation in offshore energy development. The energy needs of the nation were growing while the environment of the coastal

61. *Id.* at 83–84.

62. *Id.* at 79–80.

states was deteriorating. The tension between Louisiana and the federal government reached a new zenith in 2005 when the Department of the Interior announced it was proceeding with a lease sale in the Gulf of Mexico only weeks after two destructive hurricanes devastated Louisiana's coast.⁶³ Governor Blanco saw the lease sale as an affront to Louisiana because it ignored pertinent environmental regulations and dismissed environmental concerns she had submitted. Louisiana's lawsuit against the Department of the Interior in *Blanco v. Burton* can be seen as both an apex and a turning point in this long-standing controversy between Louisiana and the federal government.

III. *BLANCO V. BURTON*: LOUISIANA FILES SUIT AGAINST THE DEPARTMENT OF THE INTERIOR

Less than three months after Katrina, and less than two months after Rita, the U.S. Mineral Management Service (MMS) published a notice of its intent to prepare an environmental impact statement⁶⁴ for proposed Lease Sale 200 in the Outer Continental Shelf (OCS).⁶⁵ What followed was a heated exchange between Governor Blanco and the Department of the Interior that eventually led both parties to federal district court.

A. The War of Words Leading to the Lawsuit

On May 30, 2006, Governor Blanco objected to MMS's use of an outdated environmental assessment from 2002 and submitted comments and recommendations to MMS.⁶⁶ The Governor said the timing of the proposed lease sale was inappropriate and strongly recommended postponing the lease sale until MMS could provide a meaningful environmental assessment of OCS activities in light of the damage to Louisiana's coast after the 2005 hurricane season.

63. See *infra* note 65.

64. NEPA requires federal agencies to prepare an environmental impact statement (EIS) for lease sales. An EIS must address: (1) the environmental impact of the proposed action, (2) environmental effects of the proposed action, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible commitments of resources which would be involved in the proposed action. 42 U.S.C. § 4332(2)(C) (2000). See also 40 C.F.R. § 1502.16 (2008).

65. 70 Fed. Reg. 70,633 (Nov. 22, 2005).

66. The OCSLA requires the Secretary of the Interior to accept a Governor's recommendations prior to a lease sale if those recommendations provide for a reasonable balance between the nation's interests and the state's interests. See 43 U.S.C. § 1345(c) (2000).

When MMS announced it was proceeding with the proposed lease sale, the “oil and gas governor” drew the proverbial line in the sand.⁶⁷ On June 14, 2006, Blanco made the following statement to the press addressing her concerns:

The failure of the Federal Government to take action to protect the precious coastal resources of Louisiana continues to endanger the lives of our people, the future of our economy and the stability of our nation’s oil supply. I cannot and will not stand by idly while we continue to lose an entire football field of coastal wetlands every 38 minutes. The government’s inaction has forced me today to declare Lease Sale 200 . . . inconsistent with Louisiana’s coastal zone management program.⁶⁸

On the same day, the State submitted comments to MMS, criticizing the agency for failing to fully address the devastation of Hurricanes Rita and Katrina in its assessments.⁶⁹ The Regional Director of MMS responded to the State’s comments, taking the position that Lease Sale 200 is consistent with the policies of the Louisiana Coastal Recovery Program but that MMS personnel would be willing to meet with relevant state personnel to discuss Louisiana’s concerns.⁷⁰ Notably, and sadly, the meeting between the parties never took place.⁷¹

In a letter dated July 11, 2006, MMS explicitly rejected Louisiana’s recommendation to postpone the lease sale, offering the following reasons for its decision: (1) uncertainty in the MMS lease sale process would cause companies to invest elsewhere, (2) delay of the sale might have significant impact on the State of Texas, (3) delay would impact the delivery of new natural gas supplies, and (4) potentially hundreds of millions of dollars could be lost by the U.S. Treasury as a result of a delay.⁷² As such, MMS determined Governor Blanco’s recommendations did not provide a reasonable balance between national and state interests, which would be required to implement her recommendations.

67. Stephanie Grace, Editorial, *An ‘Oil and Gas Governor’ Draws the Line*, TIMES PICAYUNE (New Orleans), May 11, 2006, at B7.

68. Governor Blanco’s Statement Regarding Her Letter to U.S. Mineral Management Service, June 14, 2006, <http://www.blancogovernor.com/index.cfm?md=newsroom&tmp=detail&articleID=1960>.

69. Blanco v. Burton, No. Civ.A. 06-3813, 2006 WL 2366046, at *5 (E.D. La. Aug. 14, 2006).

70. *Id.*

71. *Id.*

72. *Id.*

B. Frustrated Governor Sues the Federal Government

On July 20, 2006, Blanco and the State of Louisiana filed a complaint in the U.S. District Court for the Eastern District of Louisiana for declaratory and injunctive relief against MMS to stop the lease sale.⁷³ One of the State's claims came under the National Environmental Policy Act (NEPA),⁷⁴ which requires the preparation of an environmental impact statement (EIS) for major federal actions significantly affecting the quality of the human environment, such as a lease sale under the OCSLA.⁷⁵ The 1978 amendments to the OCSLA expressly determined that offshore lease sales were major federal actions that require an EIS.⁷⁶ The Governor alleged that MMS's decision to proceed with Lease Sale 200 was arbitrary and capricious because it failed to assess the existing environmental baseline and failed to adequately analyze the direct, indirect, and cumulative impacts of the proposed lease sale.⁷⁷ The plaintiffs further alleged that MMS was relying on an EIS from previous multi-sale leases that was outdated because it did not account for the environmental impact of Hurricanes Katrina and Rita.⁷⁸

Besides the coastal damage from the hurricanes, the outdated assessment of MMS failed to consider the destruction to oil and gas platforms and pipelines. In a release dated January 19, 2006, MMS estimated that 3,050 of the Gulf of Mexico's 4,000 oil and gas platforms, and 22,000 of the 33,000 miles of Gulf pipelines were in the direct path of either Hurricanes Katrina or Rita.⁷⁹ In May 2006, MMS estimated that 113 platforms were destroyed and that 457 pipelines had been damaged.⁸⁰ However, while the plaintiffs recognized that MMS recorded these statistics, the agency failed to analyze these statistics and consider their potential impact on future OCS activities.

Louisiana also claimed that MMS acted arbitrarily and capriciously by failing to accept the Governor's recommendation

73. *Id.* at *1. The complete list of defendants in the complaint is Rejane "Johnnie" Burton, Direct of MMS, Dirk Kempthorne, Secretary of the Interior, and American Petroleum Institute as intervenor.

74. 42 U.S.C. §§ 4321–4375 (2000).

75. § 4332(2)(C).

76. *See* 43 U.S.C. §§ 1346, 1351 (2000).

77. *Blanco*, 2006 WL 2366046, at *7.

78. *Id.*

79. Press Release, U.S. Mineral Management Service, Impact Assessment of Offshore Facilities from Hurricanes Katrina and Rita (Jan. 19, 2006), <http://www.mms.gov/ooc/press/2006/press0119.htm>.

80. *Id.*

that the lease sale be postponed.⁸¹ The language of the OCSLA states that such recommendations are to be given considerable deference and must be accepted if they provide a reasonable balance between national and state interests.⁸² The State requested that the court enjoin the defendants from opening any bids or awarding any leases connected with Lease Sale 200 until a final ruling was issued by the court on the merits of the complaint.⁸³

The American Petroleum Institute (API) represented the oil and gas industry and intervened as a defendant, opposing the issuance of a preliminary injunction. A memorandum filed by API maintained the State had not demonstrated any imminent threat of injury, an essential element for the granting of a preliminary injunction.⁸⁴ The API quoted the Fifth Circuit, a court recognizing that a lease sale “does not involve a single undertaking or a project which becomes a *fait accompli* the day the decision to proceed is made.”⁸⁵ Rather, a lease sale involves “separable operations over a period of months and years, and restrictions in those leases give the agency the ability to constantly control and adjust future action.”⁸⁶ The API argued that even if the State could show that the cited statutes were violated at this stage, the violations would not threaten the State with imminent irreparable harm.⁸⁷ Additionally, the API reminded the court that the first purpose given by Congress in adopting the 1978 amendments to the OCSLA was to

establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.⁸⁸

81. *Blanco*, 2006 WL 2366046, at *7.

82. 43 U.S.C. § 1345(c) (2000).

83. *Blanco*, 2006 WL 2366046, at *6.

84. *See Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986).

85. *Sierra Club v. Morton*, 510 F.2d 813, 828 (5th Cir. 1975). *See also* Memorandum of the Am. Petroleum Inst. in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at *5, *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046 (E.D. La. Aug. 4, 2006) [hereinafter API Memorandum].

86. *Sierra Club*, 510 F.2d at 828. OCSLA segments the process of developing oil and gas leases into four phases: preparation of a leasing plan, leasing, exploration, and development and production. *See* § 1344(a)(3).

87. API Memorandum, *supra* note 85, at *5.

88. § 1802(1). *See* API Memorandum, *supra* note 85, at *13.

The defendants argued that greater harm would come to the nation by delaying the lease sale as compared with little, if any harm to Louisiana by proceeding with the lease sale.⁸⁹

In a reply memorandum, the State expressed its concern regarding the defendants' assertion that the lease sale stage was not very important and that any significant impacts could be addressed at later stages of the leasing process.⁹⁰ Through the OCSLA, Congress had indicated that expeditious and orderly development of the nation's oil and gas resources should be "subject to environmental safeguards, and with due consideration to affected States."⁹¹ The plaintiffs reminded the court that in the 1978 amendments to the OCSLA, Congress explicitly made offshore leases contingent upon environmental acceptability.⁹² Louisiana disagreed with the federal government's claim that irreparable harm cannot occur at the lease sale stage because this reasoning undermines the purpose of NEPA.⁹³ NEPA requires that agencies evaluate not only the direct effects of a proposed action but also the cumulative and indirect effects that are reasonably foreseeable.⁹⁴ Louisiana maintained that MMS did not comply with NEPA before proceeding with the lease sale.⁹⁵ Louisiana recounted a similar situation where a federal district court in Massachusetts addressed the issue of MMS's failure to follow federal regulations for lease sales.⁹⁶ The Massachusetts court enjoined the Secretary of the Interior from conducting a lease sale off the coast of New England in 1983.⁹⁷ That court determined that "future access cannot effectively remedy violations of statutes and regulations that impose duties upon the Secretary specifically with respect to the decision to conduct [the] Lease Sale Correction of those violations, if it is to have any meaning at all, must precede the sale."⁹⁸ Louisiana saw the situation in *Blanco v. Burton* as similar to the case considered in Massachusetts and petitioned the

89. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at *26-30, *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046 (E.D. La. Aug. 3, 2006).

90. Plaintiffs' Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at *2, *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046 (E.D. La. Aug. 8, 2006) [hereinafter Plaintiffs' Reply].

91. H. REP. NO. 95-1474, at 80 (1978) (Conf. Rep.).

92. See § 1338.

93. Plaintiffs' Reply, *supra* note 90, at *7-8.

94. 40 C.F.R. § 1508.8(b) (2008).

95. Plaintiffs' Reply, *supra* note 90, at *7.

96. *Id.* at *8-9.

97. *Conservation Law Found. v. Watt*, 560 F. Supp. 561 (D. Mass. 1983).

98. *Id.* at 581.

court to stop Lease Sale 200 until MMS complied with the requirements of OCSLA and NEPA.

C. The Court's Decision

Judge Kurt Engelhardt, the presiding judge, issued his order on August 14, 2006, a mere forty-eight hours before Lease Sale 200 was scheduled to take place. His decision gave a warning to the federal government that it had failed to comply with environmental legislation requiring the Department of the Interior to act as a partner to the coastal states in the OCS leasing process.⁹⁹ The court's decision indicated a strong likelihood of success on the merits in favor of the State.¹⁰⁰ Judge Engelhardt noted that the State's claims fell under three Acts of Congress: the NEPA,¹⁰¹ the Coastal Zone Management Act (CZMA),¹⁰² and the OCSLA.¹⁰³

Regarding the NEPA claim, the court noted that in the environmental assessment, MMS provided discussion of the damage caused by the 2005 hurricanes to OCS facilities: the overall impact of the hurricanes to the wetlands, the effects of the hurricanes on water quality, the destruction caused to refineries, and the impact on oil production caused by the storms.¹⁰⁴ However, "with little or no analysis as to why, MMS concludes virtually every discussion of changes caused by the hurricanes with a generalized statement that its prior conclusions as to the impacts of OCS activities in connection with Lease Sale 200 remain unchanged."¹⁰⁵ Judge Engelhardt agreed with the State's argument that direct, indirect, and cumulative impacts of the proposed lease activity are likely to be significantly different and that MMS's Environmental Assessment provided no real analysis to support its prior conclusions that the 2002 multi-sale Environmental Assessment was still valid for Lease Sale 200.¹⁰⁶ Thus, the plaintiffs were likely to prevail on their NEPA claim.¹⁰⁷

Regarding the CZMA claim, the court recognized that this legislation was passed to promote the development of coastal zone management programs by the states and to encourage interaction

99. See *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046, at *7-14 (E.D. La. Aug. 14, 2006).

100. *Id.*

101. 42 U.S.C. §§ 4321-4375 (2000).

102. 16 U.S.C. §§ 1451-1466 (2000).

103. 43 U.S.C. §§ 1331-1356 (2000).

104. *Blanco*, 2006 WL 2366046, at *9.

105. *Id.*

106. *Id.* at *9-11.

107. *Id.* at *11.

and cooperation between federal and state agencies involved in programs affecting the coastal zone.¹⁰⁸ A federal agency carrying out any activity affecting a state's coast must provide a "consistency determination" (CD) to the relevant state agency to determine if the federal agency's action is consistent with state coastal programs.¹⁰⁹ MMS's treatment of the Coastal Use Guidelines from the Louisiana Coastal Restoration Program was "so inadequate as to suggest that proceeding with Lease Sale 200 was a *fait accompli* even before the CD was compiled."¹¹⁰ MMS had failed to demonstrate, as it was required to do, that the direct, indirect, and cumulative impacts of the agency's decision were consistent with Louisiana's Coastal Use Guidelines.¹¹¹ The court concluded that MMS's "cavalier approach" concerning these critical issues was inadequate and indicated the plaintiff's "substantial likelihood of success on the merits" with the CZMA claim.¹¹²

As for the OCSLA claim, Judge Engelhardt noted that "[t]he Act imposes a specific duty to balance oil and gas production and environmental health."¹¹³ The Act requires that the Secretary of the Interior, in preparing a five-year leasing plan, select the timing and location of leasing so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.¹¹⁴ Under OCSLA, the Secretary is required to accept a governor's recommendations regarding the proposed lease sale if he determines that "they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State."¹¹⁵ Judge Engelhardt concluded that Louisiana had made a *prima facie* case that MMS had made an offhanded dismissal of Governor Blanco's recommendations. MMS failed to give serious consideration or a reasoned determination to accept or

108. See 16 U.S.C. § 1452 (2000).

109. 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.34(a)(1) (2008).

110. *Blanco*, 2006 WL 2366046, at *11.

111. Louisiana has initiated a series of programs to offset the catastrophic loss of coastal wetlands. The Louisiana State and Local Coastal Resources Management Act was passed in 1978 to regulate the developmental activities that affect wetland loss. The resulting Louisiana Coastal Resources Program became a federally approved coastal zone management program in 1980. This program has delineated the state's Coastal Use Guidelines. See Dept. of Natural Res., Coastal Restoration Division, <http://dnr.louisiana.gov/crm/coastres/coastres.asp> (last visited June 30, 2008).

112. *Blanco*, 2006 WL 2366046, at *13.

113. *Id.*

114. *Id.* at *13–14.

115. 43 U.S.C. § 1345(c) (2000).

reject these recommendations and made a forced effort to meet a preexisting scheduled lease sale date.¹¹⁶

While the State was clearly favored in each of these claims, the court denied Louisiana's request for a preliminary injunction to stop the proposed lease sale.¹¹⁷ The court found that the plaintiffs had not made a sufficient showing of an immediate irreparable harm by the opening of the lease sale.¹¹⁸ Even if Louisiana had shown some harm, the harm would be very minimal before the date of the trial.¹¹⁹ Any injunctive relief provided by the court following the trial on the merits would be as effective as preliminary injunctive relief.¹²⁰

D. The Parties Negotiate a Settlement Agreement

A pre-trial conference was set for November 3, 2006, and the trial date was set for November 13, 2006.¹²¹ After encouragement from Judge Engelhardt, a settlement agreement was reached between the parties, and the case was dismissed on October 24, 2006.¹²² Under the agreement, MMS agreed not to conduct any future lease sales in the Central or Western Gulf of Mexico without issuing an updated EIS that would consider the cumulative impact of past lease sales, including Lease Sale 200.¹²³ The defendants agreed that the CD submitted to Louisiana for the next OCS oil and gas lease sale in the Gulf of Mexico will not simply replicate another CD completed for a prior lease sale.¹²⁴ The defendants further agreed that the environmental assessment would include a detailed analysis of the direct, indirect, and cumulative impacts of the proposed lease sale and its related activities, including identifying onshore support services and infrastructure that the applicant intends to utilize, as well as any onshore services that have been affected by Hurricanes Katrina or Rita.¹²⁵ Additionally, the defendants agreed that any response to recommendations made by the Governor of Louisiana regarding future lease sales would be

116. *Blanco*, 2006 WL 2366046, at *14.

117. *Id.* at *1.

118. *Id.* at *19.

119. *Id.* at *20.

120. *Id.*

121. *Id.* at *21.

122. 71 Fed. Reg. 66,343 (Nov. 14, 2006).

123. Settlement Agreement at 3, *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046 (E.D. La. Oct. 24, 2006).

124. *Id.*

125. *Id.* at 4.

made directly by the Office of the Secretary of the Department of the Interior.¹²⁶

In exchange for these commitments by the necessary federal agencies, Louisiana agreed to dismiss the pending lawsuit. The court, however, would retain jurisdiction to insure compliance with the terms of the settlement agreement.¹²⁷ The dismissal order provided that the case would be dismissed with prejudice if Louisiana did not file a motion to enforce the agreement within sixty days after the defendants notify the plaintiffs that they have satisfied their obligations under the agreement.¹²⁸ As a result of the agreement, MMS also canceled Lease Sale 201, scheduled for March 2007.¹²⁹

IV. SOLUTIONS FOR THE FUTURE

Recognizing the need for action to balance offshore energy development with responsible environmental protections, both the judicial and legislative branches of government can be part of the solution. Federal courts are encouraged to use the preliminary injunction *before* a lease sale takes place if it finds agencies are ignoring environmental regulations. This will act as a strong incentive for the Department of the Interior to honor environmental legislation throughout the lease sale process. In addition, Congress is encouraged to pass additional legislation that mandates a sharing of oil and gas royalties with the coastal states to finance desperately needed coastal restoration. Without revenue sharing, the costs of coastal restoration will not be possible for the states.

A. Effective Use of Preliminary Injunctions in Future Lease Sales

Judge Engelhardt should be commended for his assessment of the environmental claims in *Blanco v. Burton*. He chastised the U.S. government for failing to act as a partner with Louisiana in the OCS leasing process and affirmed the state's contention that at least three environmental acts of Congress had been ignored.¹³⁰ It is crucial for federal courts to enforce the coastal states' demands that the Department of the Interior honor local and national environmental legislation in OCS activities.

126. *Id.* at 4–5.

127. *Id.* at 5.

128. *Id.* at 6–7.

129. 70 Fed. Reg. 66,344 (Nov. 14, 2006).

130. *Blanco v. Burton*, No. Civ.A. 06-3813, 2006 WL 2366046, at *7 (E.D. La. Aug. 14, 2006).

The court erred, however, in its denial of Louisiana's request for a preliminary injunction. The most important factor supporting the issuance of preliminary injunctive relief is a finding that the plaintiffs would suffer irreparable harm before trial without such relief. Plaintiffs have the burden of demonstrating this harm.¹³¹ The U.S. government in *Blanco* attempted to demonstrate that a lease sale presents no imminent environmental harm to coastal states because there are further steps to be taken before oil exploration begins. That fact, in the view of the Department of the Interior, shows the lease sale alone cannot hurt the environment. This argument, however, ignores the fact that the NEPA is not designed to prevent all possible harm to the environment, but rather is designed to influence the decision-making process. Its aim is to force government agencies to take notice of environmental considerations and to seriously consider them. When a decision involving NEPA obligations is made without the informed environmental consideration that the NEPA requires, the harm has already occurred.¹³² Some courts have concluded that when MMS ignores the intent of Congress through the NEPA, this merits an injunction in the appropriate case.¹³³

While a NEPA violation should not automatically result in an injunction, the analysis for determining irreparable harm should err on the side of environmental protection. Government agencies should not simply be able to point to additional steps between the opening of a lease sale and environmental harm in order to stop a preliminary injunction. Once MMS has made the initial commitment to open a lease sale for drilling, it becomes economically unwise and politically difficult to reverse that action. It is better for federal courts to require MMS to follow the NEPA and its requirement of an updated EIS *before* a lease sale will be allowed to commence. Hopefully, federal courts will use this effective method of enforcement of environmental regulations in the future.

Judge Engelhardt's explicit encouragement of the parties to arrive at a settlement agreement was an effective tool in fostering

131. *Id.* at *15.

132. *Alaska v. Andrus*, 508 F.2d 465, 485 (D.C. Cir. 1978); *Jones v. Dist. of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512-13 (D.C. Cir. 1974).

133. See *California v. Watt*, 520 F. Supp. 1359, 1371 (C.D. Cal. 1981) (stating that "leasing sets in motion the entire chain of events which culminates in oil and gas development"); WILLIAM ROGERS, JR., ENVIRONMENTAL LAW § 9.7 (1994) ("[NEPA's] purpose is to require consideration of environmental factors before project momentum becomes irresistible, before options are closed, and before agency commitments are set in concrete.").

cooperative federalism through the settlement agreement process itself. The fact that all of the parties reached an agreement without going to trial is a sign that cooperative federalism is possible.

Besides judicial enforcement of environmental regulations, Congress can be part of the solution by enacting further legislation that results in a sharing of oil and gas royalties so that coastal states can finance coastal restoration projects.

B. Federal Legislation Mandating Shared Royalties with Coastal States

Congress has passed legislation that fostered cooperative federalism with respect to the OCS on more than one occasion. The SLA and OCSLA in 1953 envisioned cooperative development by the federal government and coastal states regarding the large oil and gas deposits beneath the marginal sea. At that time, the concerns for the environment we take for granted today were not a priority of the federal and state legislatures. "Conservation" simply meant that oil and gas production should not waste any of the resources being sought. The motivation of Congress in 1953 was based on the military's desire for a petroleum reserve and not on preserving the fragile ecological balance of the coastal area.¹³⁴ However, both the SLA and OCSLA recognized the need for federal and state governments to work with each other, not in spite of each other, as offshore energy development progressed.

Fortunately, when Congress passed the Gulf of Mexico Energy Security Act¹³⁵ in 2006, they furthered the goal of cooperation between federal and state governments. While Governor Blanco confronted the Department of the Interior in court over environmental regulations, United States Senator Mary Landrieu of Louisiana challenged Congress over the issue of shared royalties from oil and gas production in the Gulf of Mexico.

Senator Landrieu co-sponsored the bill with United States Senator Pete Domenici of Arizona, but they were met with opposition from some legislators and the White House. Congressional leaders of coastal states with a moratorium on oil and gas production off their coasts (such as California, Maine, and Florida) were concerned that the proposed legislation would open the door to ending that moratorium. Since the bill mandated a sharing of royalties with the coastal states, the Bush

134. Alan V. Hager, *The Tidelands Oil Controversy: The Prize and the Responsibility*, 10 NAT. RESOURCES & ENV'T (SUMMER ISSUE) 44, 51 (1995).

135. Pub. L. No. 109-432, H.R. 6111, 109th Cong. (2006).

Administration was concerned that the bill would channel too much money from the Federal Treasury and escalate an already skyrocketing federal budget deficit.¹³⁶ However, those fears were put to rest and Senator Landrieu was able to work out a series of compromises among diverse groups, eventually securing the passage of the bill.¹³⁷

The Gulf of Mexico Energy Security Act allows offshore oil and gas leasing in the 181 and 181 South areas of the Gulf of Mexico (approximately 2.5 million acres) within one year of its enactment. It also allows the expansion of oil and gas leasing into the Eastern Planning, Central Planning, and Western Planning area (an additional 5.8 million acres) at some future date, as soon as practicable.¹³⁸ Revenue sharing is required on new areas of production in the 181 Area from FY 2007 through 2016 as follows: (1) 50% of the revenues from this project will be deposited into the Federal Treasury; (2) 37.5% of the revenues will be deposited with the Gulf producing states (Texas, Louisiana, Mississippi and Alabama); (3) 12.5% of the revenues will be deposited in the Federal Land and Water Conservation Fund.¹³⁹ Revenue sharing required on new leases after the date of enactment in existing planning areas from FY 2016 through 2055 will be distributed under the same percentages as listed above.¹⁴⁰

The Coastal Protection and Restoration Authority of Louisiana (CPRA)¹⁴¹ estimates that Louisiana's share of the revenues generated by this Act will be approximately \$20 million annually between 2007 and 2016, for a total of \$200 million during that ten-

136. See Letter from Samuel W. Bodman, U.S. Sec'y of Energy, to The Honorable Joe Barton, Chairman of House, Senate Conference on H.R. 6 at 4 (July 15, 2005), available at http://www.taxpayer.net/energy/pdf/adminletterto_barton.pdf.

137. See, e.g., *Sen. Landrieu Brings Fight for Offshore Revenue Sharing to Financial Leaders*, U.S. FED. NEWS, Nov. 27, 2006, available at 2006 WLNR 20750725.

138. H.R. 6111 at § 3(a)–(b).

139. *Id.* at § 5(b)(1). The Federal Land and Water Conservation Fund finances the acquisition of green spaces across the country as established in 1965 by 16 U.S.C. §§ 4601–4608.

140. *Id.* at § 5(b)(2).

141. Because of the devastation of Hurricanes Katrina and Rita, in December 2005, the Louisiana Legislature restructured the State's Wetland Conservation and Restoration Authority to form the Coastal Protection and Restoration Authority (CPRA). Act 8 of the State's First Extraordinary Session of 2005 expanded the membership, duties, and responsibilities of the CPRA and charged the new Authority to develop and implement a comprehensive coastal protection plan, including both a master plan and annual plans.

year period.¹⁴² After 2016, the revenue share increases dramatically because the oil producing states of the Gulf Coast begin sharing in the lease revenues of a significantly larger area of the Gulf of Mexico. The CPRA estimates that Louisiana's share after 2016 will be approximately \$600 million annually, for a total of \$12 billion during the 20-year period between 2017 and 2036.¹⁴³

In a press release immediately following Senate passage of the Bill, Senator Landrieu celebrated the landmark legislation:

Today the Senate confirmed its strong support for Louisiana and the entire Gulf Coast by passing the Domenici-Landrieu fair-share bill, which after nearly 60 years provides for Louisiana a significant share of oil and gas revenues produced off our shores In August, 71 Senators agreed to the bill because they recognized that a dedicated stream of revenue is necessary for Louisiana to protect itself from future storms. Katrina and Rita showed us what devastation can ensue if our communities remain vulnerable.¹⁴⁴

In addition to the positive actions of Congress, Louisiana fulfilled its obligation to use newly acquired royalty revenue for environmental purposes. In 2006, the State passed a constitutional amendment that specifically directs royalty funds for restoring Louisiana's wetlands and for hurricane protection.¹⁴⁵ The amendment makes responsible use of royalty revenue and states: "There shall be established in the state treasury the Coastal Protection and Restoration Fund to provide a dedicated, recurring source of revenues for the development and implementation of a program to protect and restore Louisiana's coastal area."¹⁴⁶

Congressional passage of the Gulf of Mexico Energy Security Act was significant because the legislative branch of government chose to share royalties from offshore production when the judicial branch had not required it to do so. Congress answered its call to

142. Coastal Protection and Restoration Authority of Louisiana, Federal Funding Sources, <http://lacpra.org/index.cfm?md=pagebuilder&tmp=home&pid=11> (last visited July 5, 2008).

143. *Id.* Revenue projections for fiscal years beyond 2016 remain somewhat speculative. Variables such as the price of oil, the amount of oil and gas reserves available, and subsequent congressional legislation must be taken into account, making such projections uncertain.

144. Press Release, U.S. Senator Mary Landrieu, U.S. Senate Passes Domenici-Landrieu "Fair Share" Plan in Early Morning 79-to-9 Vote (Dec. 9, 2006), *available at* <http://landrieu.senate.gov/~landrieu/releases/06/2006C09513.html>.

145. LA. CONST. art. VII, § 10.2(A) (amended 2006).

146. *Id.*

protect the environmental concerns of the coastal states while ensuring future offshore energy development for the needs of the nation. The Act has limitations in that significant sharing of royalties does not occur for a number of years and only a small area of the Gulf is affected. However, Congress has hopefully set the stage for true cooperation in future offshore energy development. Since a sharing of royalties is critical for continued financing of coastal restoration, it is the hope of Louisiana that Congress will pass additional legislation using this same model for other areas of the Gulf of Mexico.

V. CONCLUSION

The devastation of Hurricanes Katrina and Rita exposed and accelerated the crisis of coastal erosion in Louisiana. Damaged wetlands and fewer barrier islands off Louisiana's coast enabled the storms to maintain a greater ferocity as they progressed further inland. This was a significant factor that caused approximately 1,464 deaths from Hurricane Katrina alone.¹⁴⁷ Environmental issues literally became matters of life and death for the state. The oil and gas industry, which had brought significant financial benefit to Louisiana, was also one of the culprits contributing to coastal erosion. When the Department of the Interior announced a lease sale in the Gulf of Mexico only weeks after so many deaths in Louisiana, the State perceived a federal agency that lacked sensitivity to Louisiana's plight and ignored federal environmental regulations. *Blanco v. Burton* highlights a confrontation between Louisiana and the federal government that has taken place over many decades. Fortunately for all parties concerned, the settlement agreement between Louisiana and the federal defendants showed a willingness of both sides to find a solution. This was a refreshing change from the federalism feuds that took place throughout the Tidelands Oil Controversy.

The energy and environmental needs of our nation are great, requiring cooperation between all levels of government involved in offshore energy development. While *Blanco v. Burton* demonstrated the willingness of the court to enforce environmental legislation, federal courts are encouraged to make greater use of the preliminary injunction as a tool to enforce environmental regulations. The enactment of the Gulf of Mexico Energy Security Act was a positive legislative development because it demonstrated

147. La. Dept. of Health & Hospitals, Hurricane Katrina Deceased Reports as of Aug. 2, 2006, www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248 (last visited July 5, 2008).

that the federal government would be willing to surrender some control over offshore royalties for the sake of the energy needs of our nation and the environmental needs of our coast. Congress is encouraged to expand this legislation to other areas of the Gulf of Mexico.

These positive results were precipitated by a devastating hurricane. In that sense, a new hope for Louisiana's coastline has emerged from the destructive horror that was Katrina.

*Patrick B. Sanders**

* I am grateful to Professor Patrick H. Martin for his patient guidance and to Amos J. Cormier III for inspiring me to pursue this important topic for Louisiana. This Note is dedicated to my father, Robert L. Sanders, who dedicated 35 years of his life to oil and gas production for our nation, while always making environmental protection a priority in his work.