SUPREME COURT OF THE

STATE OF LOUISIANA

DOCKET NO: 19 C 160

STEVE CROOKS AND ERA LEA CROOKS

VERSUS

THE STATE OF LOUISIANA, DEPARTMENT OF NATURAL RESOURCES

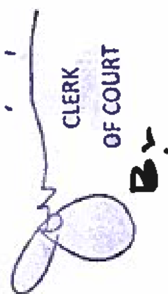
A CIVIL ACTION

APPLICATION FOR WRIT OF CERTIORARI

ON BEHALF OF
THE STATE OF LOUISIANA, DEPARTMENT OF NATURAL RESOURCES, THROUGH
THE LOUISIANA DEPARTMENT OF JUSTICE

THIRD CIRCUIT COURT OF APPEAL
DOCKET NUMBER 17-750-CA
THE HONORABLE JOHN D. SAUNDERS, MARC T. AMY, AND D. KENT SAVOIE, PRESIDING

NINTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 224,262
HONORABLE JAMES HUGH BODDIE, JR., PRESIDING


SUPREME COURT OF LOUISIANA 2019 JAN 28 PM 3 33 CLERK OF COURT

Respectfully submitted,

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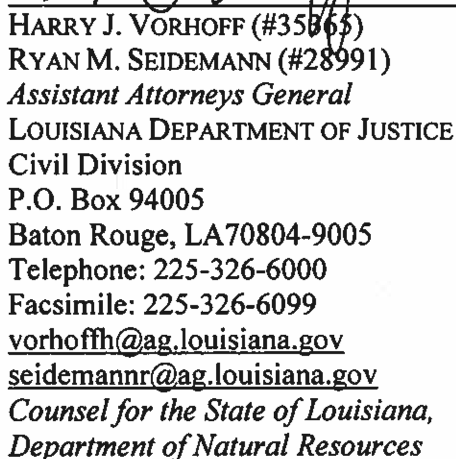
BY: 
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SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. ______________________

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Steve Crooks and Era Lea Crooks

VS.

State of Louisiana, Department of Natural Resources

Applicant: State of Louisiana, Department of Natural Resources

Have there been any other filings in this Court in this matter? ☐ Yes ☑ No

Are you seeking a Stay Order? No

Priority Treatment? No

If so you MUST complete & attach a Priority Form

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TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: N/A Docket No. N/A

Judge/Commissioner/Hearing Officer: N/A Ruling Date: N/A

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Rapides Parish, Nineth Judicial District Court Docket Number: 224,262

Judge and Section: Hon. James Hugh Boddie, Jr., ad hoc, Division G Date of Ruling/Judgment: May 15, 2017

APPELLATE COURT INFORMATION

Circuit: Third Docket No. 17-750-CA Action: Affirmed in part; vacated in part; and rendered

Applicant in Appellate Court: State of Louisiana, Department of Natural Resources Filing Date: Sept. 28, 2017

Ruling Date: Dec. 28, 2018 Panel of Judges: Hon. John D. Saunders, Marc T. Amy, and D. Kent Savoie En Banc: ☐

REHEARING INFORMATION

Applicant: N/A Date Filed: N/A Action on Rehearing: N/A

Ruling Date: N/A Panel of Judges: N/A En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date: ______________, ☐ Trial in Progress, ☑ Post Trial

Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No

If so, explain briefly: N/A

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

January 28, 2019
DATE

SIGNATURE

SUPREME COURT OF THE
STATE OF LOUISIANA

STEVE CROOKS AND ERA LEA CROOKS

VERSUS

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RULE X(1)(a). STATEMENT OF WRIT-GRANT CONSIDERATIONS

1. CONFLICTING DECISIONS: THE THIRD CIRCUIT COURT OF APPEAL FAILED TO APPLY LOUISIANA SUPREME COURT JURISPRUDENCE AND SIGNIFICANTLY NARROWED HOW LAKES ARE DEFINED IN LOUISIANA.

The Third Circuit Court of Appeal's December 28, 2018, judgment reverses Catahoula Lake's centuries-old designation as a state-owned lake and quite literally wipes Catahoula Lake off the map for the first time in recorded history. As Judge Amy recognized in his dissenting opinion, the Third Circuit's judgment privatizes nearly 42 square miles (or about 27,000 acres) of lake bed.[1] Moreover, the judgment violates this Court's holdings in *State v. Placid Oil Co.*, 300 So.2d 154 (La. 1974), and *Sapp v. Frazier*, 51 La.Ann. 1718 (La. 1899), which provide for the classification of waterbodies similar to Catahoula Lake.

In upholding the district court's judgment, the Third Circuit rejected this Court's multifactor test established in *State v. Placid Oil Co.*, 300 So.2d 154 (La. 1974), for determining whether a waterbody is a lake or a river under Louisiana law.[2] As this Court stated in *Placid Oil*, "a judgment *must* be based upon a consideration of pertinent characteristics. Among these are the size, especially its width as compared to the streams that enter it; its depth; its banks; its channel; its current, especially as compared to that of streams that enter it; and its historical designation in official documents, especially on official maps" (emphasis added).[3] Because the Third Circuit failed to conduct the proper *Placid Oil* analysis, it erred as a matter of law when it erroneously upheld the district court's conclusion that, in 1812, the area known as Catahoula Lake constituted the banks of Little River.

Each of the *Placid Oil* factors weigh heavily in favor of Catahoula Lake's centuries-old classification as a lake: (1) it is the largest natural freshwater lake in Louisiana, covering more than 42 square miles; (2) it is significantly wider and shallower than the streams that enter and leave it; (3) it does not have an appreciable flow; (4) it is inundated by backwater and not caused by overflow of natural levees by the streams that enter the lake; and (5) it has been *universally* depicted, described, and considered a lake dating back to before Louisiana was admitted to the Union in 1812.[4] When the United

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[1] *See Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 2 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (Amy, J., *dissenting*) (recognizing "[p]rior to this lawsuit, the record indicates that the area known as Catahoula Lake was treated as if it were a lake, and thus, as State-owned land.").

[2] *Id.* at 23.

[3] *State v. Placid Oil Co.*, 300 So.2d 154, 175 (La. 1974).

[4] Importantly, even the Plaintiffs' deed recognize that Catahoula Lake is a lake when they refer to the title extending to the ordinary high water mark—not a moniker used for anything other than lakes and the sea. R. Exhibits from 1.28.15 & 1.29.15, State's Exhibit 138 *in globo*. The deeds state, "SELLER makes no warranty as to exact acreage conveyed, **or as to the exact location of the 'mean high water mark' of Catahoula Lake**, either as same existed in 1812 or as it presently exists" (emphasis added). *See generally*, *Placid Oil*, 300 So.2d at 172 ("As to lakes, the State has never ceded, and still holds, the land below the ordinary high-water mark.")

States government traversed Louisiana at the time of statehood, its surveyors recorded a massive inland freshwater lake—"Ocatahoola Lake." Indeed, during the nineteenth century, no less than 11 separate United States government surveyors classified Catahoula Lake as a lake and these classifications were accepted by the United States Surveyor General. This designation of Catahoula Lake as a lake has been maintained by governments, courts, surveyors, and scientists for more than 200 years. The Louisiana Court of Appeal for the Third Circuit and the Ninth Judicial District Court failed to follow to these classifications, the experiences of contemporaneous people on the ground, and most importantly, the controlling law and, consequently, upended this classification of 200 plus years of ownership, title stability, and equity in Rapides and LaSalle Parishes.

In direct contravention of *Placid Oil*, the lower courts singularly focused on the fluctuations of the water level in Catahoula Lake. Under natural conditions, parts of Catahoula Lake are seasonally dry, but the Lake is covered in water for the remaining majority of the year. In scientific terminology, this is known as an intermittent or seasonal lake. As the name implies, they are treated by scientists as a type of lake.[5] In *Sapp v. Frazier*, 51 La.Ann. 1718 (La. 1899), this Court established that such seasonal fluctuations are irrelevant to lake designations. The lower courts' conclusion that a waterbody cannot be a lake because parts of it are seasonally dry directly contradicts this Court's holding in *Sapp*. In *Sapp*, this Court found that Lake Bistineau was and remains a state-owned lake in spite of such intermittent dry periods.[6] As with Catahoula Lake, "[t]he bed of [Lake Bistineau], or a large part of it, becomes measurably dry, and remains so, more or less, for four or five months in the year."[7] The lower courts should have, therefore, come to the same conclusion that this Court came to in *Sapp* when it upheld the prevailing notion that "[t]he bed of the lake has never been looked upon as private property.... All were thought to have an equal right upon the lake bed or bottom when its waters were down, as they had upon the lake

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(*citing* La. C.C. art. 455; *State v. Aucoin*, 20 So.2d 136 (La. 1944); *State v. Bozeman*, 101 So. 4 (La. 1924); *State v. Capdeville*, 83 So. 421 (La. 1919); *Milne v. Girodeau*, 12 La. 324 (La. 1838)).

[5] The Glossary of Geology, which was cited by the Plaintiffs' own expert at trial, defines a lake as:

> Any inland body of standing water occupying a depression in the Earth's surface, generally of appreciable size (larger than a pond) and too deep to permit vegetation (excluding subaqueous vegetation) to take root completely across the expanse of the water; the water may be fresh or saline. **The term includes an expanded part of a river, a reservoir behind a dam, or a lake basin intermittently or formerly covered by water.**

State's Exhibit 161; *see also* R. 3790, line 26-28 (emphasis added).

[6] *See also Bruning v. New Orleans*, 115 So. 733, 737 (La. 1927) (*citing Sapp* for the principle that a waterbody can be uncovered for whole seasons at a time and still be state-owned up to the ordinary high water mark); *see also State v. Aucoin*, 20 So.2d 136, 150 (La. 1944) (*citing Sapp* for the principle that an owner of land abutting on a navigable lake could not claim as dereliction the land which was dried up in the summer.").

[7] *Sapp*, 51 La.Ann. at 1724.

itself when the waters were up."[8] It is essential that this Court grant the State's writ application to reverse the Third Circuit's judgment and find Catahoula Lake is a lake under *Placid Oil* and *Sapp*.

2. IMPORTANT ISSUE OF PUBLIC POLICY: CATAHOULA LAKE IS A VITAL PUBLIC AND ENVIRONMENTAL RESOURCE AND ITS JUDICIAL PRIVATIZATION WILL HAVE DISASTROUS REPERCUSSIONS FOR CATAHOULA LAKE AS WELL AS MANY OTHER LOUISIANA LAKES AND PUBLIC WORKS PROJECTS.

In addition to wiping Catahoula Lake off the map, the effect of the Third Circuit's privatization of such a vast public resource to Louisiana taxpayers is astounding: an approximately $43 *million* damages award. While this sum is sizable in its own right, the liability to the public fisc is much greater because Third Circuit's judgment eliminates prescription and allows parties-plaintiff to file suit directly against the State for damages or takings by the United States in instances where the State has indemnified the United States for public works projects. The Third Circuit's elimination of these bedrock protections for the State and society generally is in contravention of statutory law and this Court's jurisprudence.

In addition to the Third Circuit's judgment creating substantial State liability for untold past, present, and future public works projects, it also has a ruinous effect on Louisiana's brand as a "Sportsman's Paradise." Catahoula Lake has served for generations as a premier location for duck hunting, fishing, and habitat conservation. The Third Circuit's judgment eliminates the public's right of access and use of Catahoula Lake and the State's ability to conserve critical wildlife habitat. The Third Circuit's judgment also threatens the as-yet unquestioned public ownership of other similar waterbodies, such as Lake Bistineau, Cross Lake, Ferry Lake, Caddo Lake, Saline Lake, and Black Lake, thus raising doubt as to their future public access and management. Because of the sheer scale and importance of the Third Circuit's judgment across all corners of Louisiana, this Court should grant the State's writ and reverse the Third Circuit's reclassification and privatization of Catahoula Lake.

3. ERRONEOUS INTERPRETATION OR APPLICATION OF CONSTITUTION OR LAWS: THE THIRD CIRCUIT FAILED TO APPLY THE PROPER LIBERATIVE PRESCRIPTIVE PERIOD FOR AN INVERSE CONDEMNATION CLAIM.

Prescriptive periods exist for a reason: in civil matters, they ensure stability and continuity. Especially in matters of title disputes, if prescription could not run, then the ownership of land could never be definitive and clouds of liability could loom in perpetuity—foreign notions to Western law.[9] The Third Circuit's decision below eviscerates the certainty and finality of title by merging inconsistent tort and takings concepts and thus ensuring that ownership is never definitive and inverse condemnation claims

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[8] *Id.* at 1720.

[9] Indeed, as this Court has observed, "[t]he purpose of the limitations of action is to 'insure that claims are asserted within a reasonable time,...[and] to insure that notice of claims are given to adverse parties in order to prevent fraudulent and stale claims from springing up at great distances of time and surprising the other party.'" *Taranto v. La. Citizens Prop. Ins. Corp.*, 2010-0105 (La. 03/15/11), 62 So. 3d 721, 272 (internal citations omitted).

may forever loom over government actions. The Third Circuit's application of the continuing tort doctrine to an appropriation claim renders meaningless the statutes providing prescriptive periods for inverse condemnation claims. The Third Circuit's analysis precludes any application of liberative prescription, not only in this case, but for any inverse condemnation claim. Taken to its logical end, the Third Circuit's judgment here turns all public works projects into significant liabilities and potential takings claims. With this judgment, the Third Circuit has jurisprudentially rewritten Louisiana's liberative prescription laws. Based on the Third Circuit's judgment, an inverse condemnation claim may never prescribe no matter how long ago the public work was constructed.

Curiously, although the Third Circuit recognized the correct prescriptive period, it failed to apply it to this matter.[10] The Third Circuit here found the State liable for damages associated with an alleged inverse condemnation done by the United States, not the State. The alleged inverse condemnation was of a flowage servitude below the ordinary high water mark and above the ordinary low water mark of Catahoula Lake. The Third Circuit acknowledged in its majority opinion that when the United States inversely condemns private property (as it found here), under 28 U.S.C. § 2501, claims for compensation prescribe six years after the property owner knew or should have known of the condemnation.[11] Despite acknowledging the applicable six-year prescriptive period for inverse condemnations by the United States,[12] the Third Circuit inexplicably failed to apply it or explain why this period was not controlling.

Adopting the same labored and erroneous reasoning as it did in *Cooper v. Department of Public Works*,[13] the Third Circuit instead applied the one year prescriptive period for torts, but it concluded that the prescriptive period had not commenced when this case was filed in 2006 because of the United States Fish and Wildlife Services' continued management of the water levels on Catahoula Lake.[14] The Third Circuit's conclusion is based on the erroneous application of the continuing tort doctrine, which forestalls the running of liberative prescription until the tortious activity ceases.[15] The Third Circuit's novel and erroneous conclusion that prescription for an inverse condemnation will begin to run only when the United States no longer utilizes the taken property has support in neither law nor logic. Further, despite differently

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[10] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 7 (La.App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.
[11] *Id.*, at 7 (*citing* 28 U.S.C. § 2501).
[12] *Id.*
[13] 2003-1074 (La.App. 3 Cir. 3/3/04), 870 So.2d 315, *writ dismissed*, 2004-1431 (La. 9/24/04), 882 So.2d 1146 (not timely filed). *Cf.*, *Anderson v. Red River Waterway Comm'n.*, 231 F.3d 211, 215 (5th Cir. 2000); *Barasich v. Columbia Transmission*, 467 F.Supp.2d 676, 693 (E.D. La. 2006) (the Third Circuit's reasoning in *Cooper v. La. Dep't. of Public Works* on this issue, finding "the results a stretch and its reasoning forced."). *See also In re Katrina Canal Breaches Litig.*, 2008 U.S. Dist. LEXIS 51712, fn. 1 (E.D. La. 2008), 2008 WL 2704540.
[14] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 29 (La.App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.
[15] *Id.*

applicable prescriptive periods, the Third Circuit's conclusion makes no distinction between takings by the United States or the State, thus judicially eliminating the respective prescriptive periods enacted by the Congress and the Louisiana Legislature.[16] The Third Circuit's errors of law have enormous implications for the State, even if they are limited only to that circuit. This Court should grant the writ to ensure prescriptive periods are given proper effect by the courts of this State.

4. CONFLICTING DECISIONS: THE THIRD AND FOURTH CIRCUITS ARE NOW SPLIT REGARDING WHETHER THE STATE OR UNITED STATES IS THE APPROPRIATING AUTHORITY IN CERTAIN TYPES OF COOPERATIVELY ENDEAVORED PUBLIC WORKS PROJECTS.

The Third Circuit has created a split among the circuits and has injected mass confusion into public works law that must be resolved. The Third and Fourth Circuit Courts of Appeal now diverge with respect to whether the United States or the State is the alleged appropriating authority when the State and United States enter into certain types of intergovernmental agreements for the construction of public works. This Court must now exercise its supervisory jurisdiction to resolve this circuit split. As is common with federal public works projects, in 1962, the State agreed to acquire all the land necessary to construct the various navigation, flood control, and habitat conservation structures in and around Catahoula Lake and to indemnify the United States for any damages resulting from the construction or maintenance of the project.

The Third Circuit upheld the district court's conclusion that the United States is the party that appropriated the property at issue in this case.[17] The State concurs that, *arguendo,* if there was an inverse condemnation, the United States is the proper alleged appropriator. Presumably, the longer, six-year federal prescriptive period for takings should have applied to this project. However, again, the confusion created by the courts below complicates this analysis. If the United States accomplished the appropriation here, then it is a necessary party and its six-year prescriptive period applies (even if the State was acting as its agent).

Supporting in his dissent the conclusion that the State was the proper alleged appropriating authority in this case, Judge Amy cited the Fourth Circuit Court of Appeal's conclusion in *Succession of Rovira v. Bd. Of Comm'rs of Port of New Orleans*, 418 So.2d 1382 (La.App. 4 Cir.), *writ denied*, 423 So.2d 1147 (La. 1982). In *Rovira*, under very similar facts as this case, the Fourth Circuit concluded that the State and not the United States was the appropriator.[18] The circuit split identified by Judge Amy has far-reaching implications for many federal-state partnerships in Louisiana. Due to the ubiquitous nature

[16] The relevant prescriptive periods are delineated in 28 U.S.C. § 2501, La. R.S. 13:5111, and La. R.S. 9:5624.
[17] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 29 (La.App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.
[18] *Succession of Rovira v. Bd. Of Comm'rs of Port of New Orleans*, 418 So.2d 1382 (La.App. 4 Cir.), *writ denied*, 423 So.2d 1147 (La. 1982).

of these types of intergovernmental agreements, this Court must grant certiorari to resolve this circuit split by clarifying and unifying the law in Louisiana.

5. CONFLICTING DECISIONS: THE THIRD CIRCUIT BROKE WITH THIS COURT AND THE UNITED STATES SUPREME COURT WHEN IT FAILED TO CONSIDER THE PURPORTED PROPERTY OWNERS' INVESTMENT-BACKED EXPECTATIONS.

The Third Circuit's decision conflicts with those of the United States Supreme Court and this Court that require the consideration of the purported property owners' reasonable investment-backed expectations. The Third Circuit found that "[t]he damages claimed by the Plaintiffs were not only sustained prior to their purchase, rather the wrongful conduct and subsequent damages have continued to occur during the Plaintiffs' ownership of the property at issue."[19] This finding resulted in an approximately $43 million judgment against the State as compensation for the United States to operate a dam that mimics the natural fluctuations of Catahoula Lake. This finding fails to consider how such a manipulation of water levels interferes with the purported landowners' reasonable investment-backed expectations below the Lake's ordinary high water mark, which is a critical consideration to the takings inquiry.[20]

Additionally, the Third Circuit found that the subsequent purchaser doctrine did not apply in this case because it erroneously determined that the Plaintiffs' inverse condemnation claims can be considered continuing torts until the filing of the claims, at which point they convert into inverse condemnation claims.[21] The subsequent purchaser doctrine is an outgrowth of the consideration of reasonable investment-backed expectations. The Third Circuit's analysis precludes any application of the subsequent purchaser doctrine, not only in this case, but for any inverse condemnation claim and substantially erodes this Court's sound jurisprudence in the matter of *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So.3d 246.

As the United States Supreme Court stated in *Palazzolo v. Rhode Island*, "[i]t is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser."[22] This Court similarly stated in *Eagle Pipe* that under Louisiana law, "the personal right for compensation or damages remains with the person who was the owner of the property at the time the land was taken or damaged."[23] The holding here effectively turns

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[19] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 33 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.

[20] *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Ark. Game & Fish Comm'n. v. U.S.*, 568 U.S. 23, 39 (2012).

[21] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 32-33 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.

[22] 533 U.S. 606, 614 (2001) (*citing Danforth v. United States*, 308 U.S. 271, 284 (1939); *see also U.S. v. Dow*, 357 U.S. 17, 22 (1958); *Kindred v. Union Pacific R. Co.*, 225 U.S. 582, 597 (1912); *Roberts v. Northern Pacific R. Co.*, 158 U.S. 1, 10 (1895).

[23] 2010-2267 (La. 10/25/11), 79 So.3d 246, 267, fn.54.

Palazzolo and *Eagle Pipe* on their heads in some situations and undermines their utility in others. As with the prescription arguments, *Palazzolo* and *Eagle Pipe* provide stability under the law. Now, for example, buyers and sellers of previously damaged property can avail themselves of duplicative legacy oil and gas claims in direct contravention of this Court's ruling in *Eagle Pipe*. Because, as the district court here concluded, "only one title introduced at trial unequivocally predated 1973[,]"[24] the inverse condemnation claims of all the other parties-plaintiff should have been dismissed, and the class should have been limited to only those who purchased their property prior to 1973. These significant departures from United States and Louisiana Supreme Court jurisprudence cannot stand, and the record facts clearly support a reversal in this matter.

6. CONFLICTING DECISIONS: THE THIRD CIRCUIT STANDS ALONE IN ALLOWING PLAINTIFFS TO SUE THE STATE DIRECTLY FOR A PURPORTED FEDERAL INVERSE CONDEMNATION.

The Third Circuit erred in 2004 when, in *Cooper v. La. Dep't. of Public Works*, 03-1074 (La.App. 3 Cir. 3/3/04), 870 So.2d 315, it broke with this Court's holdings that establish that there is no cause of action against the State for federal inverse condemnation claims.[25] In this case, the Third Circuit again refused to apply direct precedent of this Court when it determined that these Plaintiffs have an action directly against the State for an alleged inverse condemnation by the United States and further doubled-down on its outlier opinion in *Cooper*. The Third Circuit found that the Plaintiffs have a cause of action directly against the State because of its agreement with the United States to acquire the property necessary for the United States to construct the public works at issue and to indemnify the United States from any damages due to its construction or operation.

The Third Circuit's conclusion is anomalous in both state and federal jurisprudence. As this Court found in *Cooper v. Bogalusa*, 198 So. 510, 512 (La. 1940), an agreement between the City of Bogalusa and the United States, which was nearly identical to the Act of Assurances in this case, did not give the alleged property owners a cause of action against the City for damage caused by the United States' dredging and improvement of the Pearl River. The Fourth Circuit Court of Appeal similarly held that alleged property owners had no cause of action against the State for damages caused by the United States' construction of the Mississippi River-Gulf Outlet, even though the State agreed to furnish all lands necessary for its construction and hold harmless the United States against any and all claims that might result therefrom. *Vuljan v. Board of Comm'rs*, 170 So.2d 910, 913 (La.App. 4 Cir. 1965); *see also Soileau v. Yates Drilling Co.*, 183 So.2d 62, 64-65 (La.App. Ct. 1966) (holding that indemnity clause does not

[24] District Court's Written Reasons for Judgment, R. 2612.
[25] *Cf.*, *Cooper v. Bogalusa*, 198 So. 510, 512 (La. 1940) (among others).

confer a cause of action in favor of third parties) and *Haeuser v. Bd. of Comm'rs of the Port of New Orleans*, 170 So.2d 728, 729 (La.App. Ct. 1965) ("Plaintiffs have no direct action against Defendant for such recovery, since Defendant, or the State, if liable, is answerable only to the United States in a proper proceeding.").

The United States Fifth Circuit Court of Appeals has likewise found that the United States' potential right to seek indemnification from the Red River Waterway Commission does not confer power upon plaintiffs to file suit against the Red River Waterway Commission. *Anderson v. Red River Waterway Comm'n.*, 231 F.3d 211, 215 (5th Cir. 2000). Likewise, the United States Eastern District of Louisiana has repeatedly refused to follow the Third Circuit's reasoning in *Cooper v. La. Dep't. of Public Works* on this issue, finding "the results a stretch and its reasoning forced." *Barasich v. Columbia* Transmission, 467 F.Supp.2d 676, 693 (E.D. La. 2006); *see also In re Katrina Canal Breaches Litig.*, 2008 U.S. Dist. LEXIS 51712, fn. 1 (E.D. La. 2008), 2008 WL 2704540. Simply, the Third Circuit here has retrenched on an untenable legal position with enormous fiscal implications that is unsupportable and cannot stand. This Court must grant certiorari and provide a course correction back to its own jurisprudence arising from *Cooper v. Bogalusa*.

7. SIGNIFICANT UNRESOLVED ISSUES OF LAW: THE STATE, LIKE ANY OTHER LOUISIANA PERSON, CAN ACQUIRE PROPERTY THROUGH ACQUISITIVE PRESCRIPTION.

As this and other courts have noted in the past, stability of title is crucial to the orderly functioning of property law.[26] It is for this reason, among others, that the principles of acquisitive prescription exist. Even if Catahoula Lake is reclassified as a river, the State has exercised open, continuous, unequivocal, and peaceable possession of the current lake bed between at least 1973 and 2003 and has thus acquired the Lake through acquisitive prescription. Indeed, as Judge Amy concluded in his dissenting opinion, if the lower courts are correct in their classification of Catahoula Lake as a river, then the State has more than satisfied the requirements to acquisitively prescribe ownership of Catahoula Lake.[27] *Citing* La. Const. art. 1, § 4(B) and *Jefferson v. Bonnabel Properties, Inc.*, 620 So.2d 1168, 1170-71 (La. 1993), the Third Circuit erroneously held that "acquisitive prescription is implicitly prohibited by the State because it is a taking without just compensation."[28] Contrary to the Third Circuit's supposition, this Court's decision in

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[26] *See e.g., Bfp v. Resolution Trust Corp.*, 511 U.S. 531, 544, fn.8 (1994) (classifying "the security and stability of title to land" as an "essential sovereign interest"). *Citing American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911). *See also Torrey v. Simon-Torrey, Inc.*, 307 So.2d 569, 575 (La. 1974) (Tate, J., dissenting) (observing "the special sanctity of immovable property in our system of values and the general necessity for stability of title to land.").

[27] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (Amy, J., *dissenting*).

[28] *Id.* at 20.

Bonnabel Properties does not address whether the State can acquire fee title via acquisitive prescription. In *Bonnabel Properties*, this Court specifically limited its evaluation to whether a *political subdivision* of the State can acquire fee title via acquisitive prescription. This Court's conclusion that political subdivisions cannot acquire fee title via acquisitive prescription is based on the explicit grant under La. Const. art. 6, § 24 of authority to political subdivisions to acquire servitudes via acquisitive prescription, thus leading the Court to the conclusion that acquisitive prescription of fee title was intentionally excluded. There exists no analogous exclusion as to the State, thus making *Bonnabel Properties* inapposite to this matter.

In Judge Amy's comprehensive analysis of this question in his dissenting opinion, he noted that this Court cited with approval in *Todd v. State, Dep't. of Natural Resources*, 456 So.2d 1340, 1352 (La. 1983), the notion that the State may derive title or ownership by prescription.[29] Although the Third Circuit erred repeatedly on other aspects of its decision in this matter, should this Court be inclined to agree with those errors, this case represents an opportunity for this Court to erase all doubt regarding whether the State can acquire property by thirty-year acquisitive prescription. The State's ability to acquire property through acquisitive prescription is of great import beyond the ownership of Catahoula Lake. As Justice Marcus warned in his dissenting opinion in *Bonnabel Properties*, "if public bodies were prohibited from acquiring property by prescription, defects in titles to property acquired by purchase or donation could never be cured. Clearly, the framers of the constitution did not intend to preclude the state from ever curing defects in its titles." 620 So.2d at 1172. Indeed, as Yiannopoulos recognized, "[o]f all the civil law institutions, prescription is the most necessary for social order."[30] Because the State may acquire property through any means not prohibited by law and because the State is not excepted from the acquisitive prescription laws, this Court must grant certiorari and find that the State may avail itself of property acquisitions though acquisitive prescription.

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[29] *Id.* at 10 (Amy, J., *dissenting*).

[30] A.N. Yiannopoulos, Civil Law Property Coursebook, 9th ed., 296 (Claitor's 2009).

STATEMENT OF THE CASE

Catahoula Lake is the largest natural freshwater lake in Louisiana, and it has been recognized as a lake since before statehood in 1812. Eleven United States General Land Office surveyors and countless nineteenth century officials and eyewitnesses documented a vast lake spanning the border between Rapides and LaSalle Parishes in Louisiana. The legal effect of this recognition is that the State of Louisiana owns Catahoula Lake to its ordinary high water mark, its citizens have access rights to the lake for recreation, and its agencies have access to the lake for wildlife habitat management. In 1973, when the United States placed water control structures on Catahoula Lake, its classification as a lake did not change—only the exact timing of the fluctuations in the water level. For the first time in more than 200 years, in 2016, Judge Boddie, sitting *ad hoc* in the Ninth Judicial District Court, used an incomplete legal analysis to remove from the public domain 42 square miles of land that was known to Louisiana's early European inhabitants as Ocatahoola Lake. This conversion of an ancient public lake to private property in the face of overwhelming evidence to the contrary is an absurd result that cannot stand.

This case arises from the United States' construction of a congressionally-authorized navigation and wildlife conservation project nearly a half a century ago that is composed of several water control structures. These structures were completed in 1972, at which time the United States Fish and Wildlife Service started managing the water levels on Catahoula Lake. Active management of the Lake's water levels became necessary in order to avoid a catastrophic loss of productive waterfowl habitat as a result of concurrent public works being implemented to improve navigation on the Black and Ouachita Rivers. Rather than significantly altering any natural state, the water levels have been managed since 1972 to mimic the Lake's natural fluctuations but maximize the Lake's productivity as a premier migratory waterfowl habitat. The Plaintiffs are landowners adjacent to Catahoula Lake. As the district court found, the Plaintiffs or their ancestors-in-title knew or should have known by 1973 that the water levels of Catahoula Lake were being manipulated.[31] The Plaintiffs assert that these actions by the United States amount to an uncompensated "taking" of servitudes of drain over their properties and that, pursuant to an agreement between the United States and the State, the State must pay for the alleged taking.

While the district court certified the Plaintiffs as one class, a subclass of Plaintiffs (referred to by the district court and herein as the "Lake Plaintiffs") assert an inverse condemnation of property between

[31] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (*citing* District Court's Written Reasons for Judgment, R. 2605).

the ordinary low and ordinary high water marks of Catahoula Lake.[32] The parties stipulated that Catahoula Lake was navigable in 1812, so it is undisputed that Catahoula Lake is a state-owned waterbody pursuant to La. C.C. art. 450. The Lake Plaintiffs' inverse condemnation claims are contingent upon a threshold determination that Catahoula Lake is not a lake under Louisiana law but rather is a river with the land between the ordinary low and ordinary high water marks constituting river bank susceptible of private ownership. Further distinguishing themselves as a subclass of Plaintiffs, the Lake Plaintiffs assert that the State must reimburse them for alleged improper mineral royalty payments corresponding to the State's historic and ongoing mineral leasing of Catahoula Lake up to the ordinary high water mark. The State provided dispositive evidence supporting its assertion that Catahoula Lake was in 1812 and continues to be classified as a "lake" under Louisiana law; however, the district court applied the wrong law when evaluating whether Catahoula Lake is a lake or a river and created a new definition for lakes that violates existing law.

The district court held that: (1) Catahoula Lake is a river; (2) through its construction and operation of the water control structures in and around Catahoula Lake, the United States took a flowage servitude from the Plaintiffs without compensation; (3) the Plaintiffs can sue the State directly for the alleged taking by the United States; (4) even though the United States' management of the water levels was known or should have been known no later than 1973, the inverse condemnation claims do not prescribe under the continuing tort doctrine because the water levels continue to be managed; (5) even though the United States' management of the water levels was known or should have been known no later than 1973, the Plaintiffs who purchased their properties after 1973 have a right of action under the continuing tort doctrine because the water levels continue to be managed; and (6) additional attorney's fees should be awarded pursuant to La. R.S. 13:5111. The Third Circuit Court of Appeal affirmed all of the findings of the district court except for the award of attorney's fees. The attorney's fees, awarded under La. R.S. 13:5111, were vacated by the Third Circuit.

ASSIGNMENT OF ERRORS

The Third Circuit misapplied, and in some cases failed to apply or follow, the existing Louisiana Supreme Court and United States Supreme Court jurisprudence applicable to the Plaintiffs' inverse condemnation claims and the facts of this case.

1. The lower courts erred in determining that Catahoula Lake is not a lake.

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[32] The remaining Plaintiffs fall within the subclass referred to by the district court as the "Swamp Plaintiffs." The Swamp Plaintiffs are owners of "overflow lands" located on the southwestern side of Catahoula Lake but outside of the Lake.

a. Refusing to recognize this Court's conclusions in *Sapp v. Frazier*, 51 La. Ann. 1718 (La. 1899), the lower courts erred in finding that a lake cannot be seasonally dry and still qualify as a lake under Louisiana law.

b. By refusing to apply this Court's multifactor test from *State v. Placid Oil Co.*, 300 So.2d 154 (La. 1974), *cert. denied* 419 U.S. 1110 (1975), the lower courts' analysis of whether Catahoula Lake is a lake or a river is defective and their conclusions are invalid.

2. The lower courts erred in finding that the Plaintiffs' inverse condemnation claims have not prescribed, and indeed cannot prescribe, because the United States continues to exercise the flowage servitude it allegedly appropriated in or around 1973.

3. The lower courts erred in failing to find that the Plaintiffs' inverse condemnation claims have prescribed under either or both La. R.S. 13:5111 or 28 U.S.C. § 2501.

4. The lower courts violated this Court's ruling in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So.3d 246, by finding that the subsequent purchaser doctrine does not apply to the Plaintiffs who purchased their properties after 1973 because the United States continues to exercise the flowage servitude it appropriated in or around 1973.

5. The lower courts erred finding a taking had occurred even without first considering whether the alleged property owners' reasonable investment-backed expectations were impinged upon, as required under *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001), and *Ark. Game & Fish Comm'n. v. U.S.*, 568 U.S. 23, 39 (2012).

6. The lower courts violated this Court's ruling in *Cooper v. Bogalusa*, 198 So. 510, 512 (La. 1940), by finding that the Plaintiffs have a cause of action against the State for a purported inverse condemnation by the United States under the guise of an alleged *stipulation pour autrui*.

7. The Third Circuit erred in finding that the State did not, and indeed cannot, acquire ownership of the Lake through acquisitive prescription and further erred in not addressing or recognizing that the United States did not acquired a flowage servitude up to the ordinary high water mark on the Lake through acquisitive prescription.

SUMMARY OF THE ARGUMENT

In this case, the district court sent up a red flag from the outset when it noted that "*jurisprudence constante* is not inviolate, and is a secondary source of law."[33] That court then proceeded on a significant departure from several centuries of Louisiana history, tradition, and jurisprudence when it failed to follow the established law in its decision. The Third Circuit continued this unsupported reasoning. The Third Circuit Court of Appeal committed multiple legal errors that warrant reversal of its judgment in whole or in part. The Third Circuit failed to consider crucial and controlling statutory law as well as precedent from this Court and the United States Supreme Court in its decision, and it improperly interpreted the statutes and jurisprudence that it did consider.

This Court has mandated the application of a multifactor test when courts are asked to determine whether a body of water is a lake or a river.[34] The lower courts did not apply the multifactor test when

[33] Written Reasons for Judgment at 4 (R. 2563).
[34] *State v. Placid Oil Co.*, 300 So.2d 154 (La. 1974), *cert. denied* 419 U.S. 1110 (1975).

analyzing the nature of Catahoula Lake.[35] Rather than employing this consistent and time-tested jurisprudential analysis, the district court eschewed the *Placid Oil* analysis in favor of a patchwork of jurisprudence from two far flung states that does not even support its conclusion.[36] The lower courts improperly concluded that *Placid Oil* was not relevant because parts of Catahoula Lake dry up for several weeks or months each year.[37] This inquiry is but a portion of one of the mandatory *Placid Oil* factors, and the courts below erred in not applying the remaining factors. In other words, the lower courts found that Catahoula Lake was precluded from the *Placid Oil* consideration of lake versus river because it is seasonally dry.[38] This approach defies this Court's authority and precedent.

The lower courts failed to recognize this Court's repeated classification of waterbodies that dry for several months of the year as lakes under Louisiana law. In *Sapp v. Frazier*, this Court recognized that Lake Bistineau, which naturally dries for several months of the year in a similar manner as Catahoula Lake, is a lake and held that the land below the ordinary high water mark was public and was thus insusceptible of private ownership.[39] Over the twentieth century, this Court has cited *Sapp* for the principle that the annual drying of a lake does not sanction private ownership below the ordinary high water mark. The lower courts decided to break from this line of jurisprudence and based a finding that Catahoula Lake is a river on the singular fact that it is seasonally dry. Had the lower courts properly applied the *Placid Oil* factors and considered the legal classification of the similarly situated Lake Bistineau, they would have determined that Catahoula Lake is a lake under Louisiana law, comporting with its unwavering treatment as a lake by the State, the United States, adjacent property owners, and the public for over 200 years.[40] The courts below erred.

Even if this Court finds that no error was committed in the determination that Catahoula Lake is a river, the lower courts erred in finding that the Plaintiffs' claims have not prescribed. Pursuant to well-

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[35] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 23 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.

[36] Written Reasons for Judgment, R. 2594 (*citing Nottolini v. LaSalle National Bank*, 335 Ill.App.3d 1015, 270 Ill.Dec. 421, 782 N.E.2d 980 (2003), which evaluated whether a man-made quarry which subsequently floods can be considered a lake, and *Block v. Franzen*, 163 Neb. 270, 277, 79 N.W.2d 446, 450 (1956), which found that a pond that occasionally dried up was a "permanent body").

[37] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 23 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.

[38] *Id.*

[39] 51 La. Ann. 1718, 1726 (La. 1899).

[40] Importantly, even the Plaintiffs' deed recognize that Catahoula Lake is a lake when they refer to the title extending to the ordinary high water mark—not a moniker used for anything other than lakes and the sea. R. Exhibits from 1.28.15 & 1.29.15, State's Exhibit 138 *in globo* (The deeds state, "SELLER makes no warranty as to exact acreage conveyed, **or as to the exact location of the 'mean high water mark' of Catahoula Lake,** either as same existed in 1812 or as it presently exists" (emphasis added).). *See generally*, *Placid Oil*, 300 So.2d at 172 ("As to lakes, the State has never ceded, and still holds, the land below the ordinary high-water mark.") (*citing* La. C.C. art. 455; *State v. Aucoin*, 20 So.2d 136 (La. 1944); *State v. Bozeman*, 101 So. 4 (La. 1924); *State v. Capdeville*, 83 So. 421 (La. 1919); *Milne v. Girodeau*, 12 La. 324 (La. 1838)).

settled state and federal jurisprudence, prescription of the Plaintiffs' takings claims began to run in 1973 when they became aware of the manipulation of water levels on their alleged properties.[41] The lower courts relied heavily on the Third Circuit's erroneous opinion in *Cooper v. Dept. of Public Works*.[42] The *Cooper* opinion, a two-to-one decision for which a writ of certiorari by this Court was not timely sought, is an outlier in state and federal jurisprudence because it incorrectly applied the continuing tort doctrine to an inverse condemnation claim. Longstanding jurisprudence declares that takings claims sound in property law, not in tort. Moreover, even under a tort analysis, there is no continuing tort here because the operative act was the construction of public works and implementation of a water management plan. The operative acts took place no later than 1973. Because 1973 is the date of the alleged taking in this case, any tort prescribed in 1974,[43] any claim of a damaging by the State prescribed in 1975,[44] any claim of a State taking prescribed in 1977,[45] and any claim of a federal taking prescribed in 1979.[46] In other words, there is no statutory basis under federal or state law for a viable takings or tort claim to have post-dated 1979. Astoundingly, suit in this matter was filed in 2006—27 full years after any prescriptive period had run in this matter. Moreover, and contrary to the Third Circuit's analysis, it is of no consequence that the appropriated property is a natural servitude of drain. The inability to lose a natural servitude due to nonuse does not prevent the creation of a superseding conventional drainage servitude, whether it is created by obligation, acquisitive prescription, or appropriation. The courts below erred.

Relying on *Cooper* and its application of continuing tort doctrine, the Third Circuit also failed to sustain the State's no right of action exception against the Plaintiffs who purchased their properties after 1973, which is the year that the district court found that the manipulation of water levels on the Lake became apparent. Applying a general tort doctrine to an appropriation claim, the Third Circuit abolishes the well-settled jurisprudence prohibiting subsequent purchasers from asserting takings claims because the taking allegedly continues anew each day until the inverse condemnation claim is filed.[47] The Third Circuit erred, and this Court must not allow this judicial rewriting of property law to stand.

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[41] *See Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (citing District Court's Written Reasons for Judgment, R. 2605).
[42] 03-1074 (La.App. 3 Cir. 3/3/04), 870 So.2d 315, *writ dismissed*, 2004-1431 (La. 9/24/04), 882 So.2d 1146 (not timely filed).
[43] La. C.C. art. 3492.
[44] La. R.S. 9:5624; *see Lyman v. Sunset*, 500 So.2d 390, 393 (La. 1987) (holding that damages to private property by a public work for a public purpose cannot be a continuing tort because the two-year prescriptive period under La. R.S. 9:5624 begins to "run from the first occurrence of damage after completion of the public work.").
[45] La. R.S. 13:5111.
[46] 28 U.S.C. § 2501.
[47] *Cf.*, *U.S. v. Dow*, 357 U.S. 17, 22 (1958); *Kindred v. Union Pacific R. Co.*, 225 U.S. 582, 597 (1912); *Roberts v. Northern Pacific R. Co.*, 158 U.S. 1, 10 (1895); *Palazzolo v. Rhode Island* 533 U.S. 606, 614 (2001);

More broadly, none of the Plaintiffs demonstrated a loss of any reasonable investment-backed expectations through the alleged taking of their servitude of drain. Yes, the water level on the Lake is managed by the United States Fish and Wildlife Service, but it managed to mimic nature while maximizing the wildlife and fish productivity and ecology of the Lake. The water levels are also kept at or below the Lake's historical ordinary high water mark. The impact of the Lake's management of water levels on the purported landowners does not evidence any degradation of their reasonable investment-backed expectations, let alone comport with the approximately $43 million in awarded damages. Had the lower courts considered the purported landowners' reasonable investment-backed expectations, as directed by the United Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001), and *Ark. Game & Fish Comm'n. v. U.S.*, 568 U.S. 23, 39 (2012), they would have determined no such interests were degraded and no inverse condemnation occurred.

Furthermore, none of the Plaintiffs have a right of action against the State for an alleged inverse condemnation by the United States. The lower courts found that the 1962 Act of Assurances between the United States and the State constituted a *stipulation pour autrui*, giving the Plaintiffs a right of action against the State even though they found that it was the United States that did the alleged taking. The lower courts again relied heavily on the Third Circuit's erroneous opinion in *Cooper*, which is also an outlier in state and federal jurisprudence on the issue of whether a cause of action may be brought against the State for an inverse condemnation by the United States. The overwhelming state and federal jurisprudence on this issue denies a cause of action against the State for an alleged taking by the United States.[48] The Third Circuit misguidedly opted to double-down on *Cooper* rather than to right the jurisprudential ship and denied the State's exception of no cause of action. The Third Circuit erred.

Lastly, the State has acquisitively prescribed ownership of Catahoula Lake up to the ordinary high water mark and the United States has acquisitively prescribed flowage servitudes over the Plaintiffs' properties. As Judge Amy recognized in his dissenting opinion, the State has exercised open, continuous, public, unequivocal, and uninterrupted possession of Catahoula Lake with the intent to own for well over the 30 years needed to acquire ownership.[49] The Third Circuit erroneously concluded that the

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Danforth v. United States, 308 U.S. 271, 284 (1939); *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So.3d 246.

[48] *Cooper v. City of Bogalusa*, 198 So. 510 (La. 1940); *Vuljan v. Board of Com'rs of Port of New Orleans*, 170 So.2d 910 (La.App. 4 Cir. 1965); *Anderson v. Red River Waterway Comm'n*, 231 F. 3d 211, 215 (5th Cir. 2000); *In re Katrina Canal Breaches Consol. Litig.*, 05-4182 (E.D. La. 2008), 2008 U.S. Dist. LEXIS 51712, * FN 1; *see also Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 693 (E.D. La 2006).

[49] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 3 (La.App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (Amy, J., *dissenting*).

constitutional prohibition from taking property without compensation under La. Const. art. 1, § 4 prevents the State from availing itself of acquisitive prescription. There is no language in that article that prohibits the State's acquisition of ownership by acquisitive prescription. The right to property afforded under La. Const. art. 1, § 4 certainly is "subject to reasonable statutory restrictions." As with liberative prescription for uncompensated taking or damaging of private property under La. R.S. 13:5111 and La. R.S. 9:5624 respectively, the State's ability to avail itself of acquisitive prescription under La. C.C. art. 3486 is another such restriction on ownership of property. If Catahoula Lake is not a lake under the *Placid Oil* analysis, then the State gained ownership of Catahoula Lake and the requisite surface rights over the Swamp Plaintiffs' properties by way of acquisitive prescription by open, continuous, public, unequivocal, and uninterrupted possession for 33 years at the time of the filing of this suit in 2006.[50] Thus, the Third Circuit's judgment must be reversed.

Moreover, through its construction of public works and management of water levels on Catahoula Lake since 1973, the United States has openly, continuously, publicly, unequivocally, and uninterruptedly possessed with the intent to own a flowage servitude over the Plaintiffs' property, thereby acquisitively prescribing ownership thereof and eliminating the right to a takings claim. Pursuant to the State's and the United States' acquisitive prescription of the rights allegedly taken from the Plaintiffs, their claims should be dismissed and Third Circuit's judgment reversed.

The courts below erred. They erred not just once, but they erred on at least six different cornerstone concepts of Louisiana law. These errors are not just simple errors of law—any one individually and certainly all of them collectively have enormous implications for the public fisc and public ownership of this and other land. The judgment cannot and should not stand.

ARGUMENT

The legal errors committed by the lowers courts mandate reversal of their decisions. Accordingly, the State asks the Court to dismiss the Plaintiffs' inverse condemnation claims and declare the State the owner of Catahoula Lake up to the ordinary high water mark.

I. UNDER LOUISIANA LAW, A LAKE CAN BE SEASONALLY DRY AND STILL QUALIFY AS A LAKE.

The lower courts' analysis fails to adhere to the substantial Louisiana jurisprudence stating that a waterbody can annually dry for weeks to months and remain a lake under the law. The district court's factual conclusions do not validate its definition of a lake derived from an erroneous legal analysis based

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[50] These elements of possession were set forth by this Court in the matter of *Chevron U.S.A., Inc. v. Landry*, 558 So. 2d 242, 243-244 (La. 1990).

on non-controlling, out-of-state jurisprudence, one of which involved the factually inapposite situation of a man-made quarry and another that concluded a pond could occasionally dry up and still be considered a permanent body of water.[51] The Third Circuit committed clear legal error—directly contrary to this Court's precedent—in upholding the district court's findings that "no such jurisprudence exists holding that a temporary body of water can legally be classified as a lake"[52] and "in order to meet the definition of a 'lake' the body of water must be reasonably permanent."[53] The lower courts pinned much of their opinion that Catahoula Lake is not a lake on the fact that, under natural conditions, the Lake seasonally drains for as much as ten weeks to six months each year.[54] Seizing upon this singular idea,[55] the district court erroneously parted with this Court's direction and adopted the Plaintiffs' characterization of the lake as "temporary" despite its own conclusion that the lake is and has been full for the vast majority of the year, every year, since time immemorial.[56]

This Court addressed the issue of temporary subsidence of a lake's waters in *Sapp v. Frazier*.[57] The similarities between this case and *Sapp* are striking and cannot be overstated. In *Sapp*, the bed of Lake Bistineau, as is the case here with Catahoula Lake, was naturally covered with water six to seven months each year, and for the remaining months, in parts of each summer and fall, parts of the lake bed would dry as its water drained into the Red River.[58] Notably, during the dry season, there remained a low water channel meandering through the bed of Lake Bistineau and the lake bed supported high weeds and cattle grazing.[59] The Court found that the seasonal subsidence of the lake's waters did not permit private possession or ownership and that the lake remained a public thing up to the ordinary high water mark, regardless of whether it was dry or fully inundated.[60] *Sapp*, the controlling jurisprudence on the specific legal question at issue in this matter, stands for the proposition that a lake remains a lake even under circumstances where the lake bed naturally would have been seasonally dry.

This *Sapp* rule has received positive treatment in subsequent Louisiana Supreme Court opinions, demonstrating a consistent inclusion of lakes that are seasonally dry in the legal definition of lakes.[61] Citing *Sapp*, this Court noted in *Bruning v. New Orleans* that the law recognized as public property "land

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[51] Written Reasons for Judgment, R. 2594 (*citing Nottolini v. LaSalle National Bank*, 335 Ill.App.3d 1015, 270 Ill.Dec. 421, 782 N.E.2d 980 (2003), and *Block v. Franzen*, 163 Neb. 270, 277, 79 N.W.2d 446, 450 (1956).

[52] R. 2595. *Cf.*, *Sapp v. Frazier*, 51 La. Ann. 1718 (La. 1899).

[53] R. 2598. *Cf.*, *Sapp v. Frazier*, 51 La. Ann. 1718 (La. 1899).

[54] R. 2585.

[55] R. 2579.

[56] R. 2586.

[57] 51 La. Ann. 1718 (La. 1899).

[58] *Id. at* 1719.

[59] *Id.*

[60] *Id.* at 1725.

[61] *See Bruning v. New Orleans*, 115 So.733, 737 (La. 1927); *State v. Aucoin*, 20 So.2d 136, 150 (La. 1944).

actually covered by the waters of the sea; **nor does it make a difference that such land be uncovered even for whole seasons at a time**, if in fact it be subject to periodical inundation by the regular rise or flow of the water at the appropriate season."[62] Discussing why the adjacent landowner in *Sapp* did not acquire the land which was left dry by the temporary subsidence on Lake Bistineau, this Court reasoned in *State v. Aucoin* that:

> the subsidence was not permanent subsidence but only an annual occurrence which lasted only 5 or 6 months in the year. The decision is cited in 112 A.L.R. 1124 as authority for the statement "that **an owner of land abutting on a navigable lake could not claim as dereliction the land which was dried up in the summer**."[63]

Staggeringly, in straining to reach its decision in this case, the Third Circuit even reverses its own previous conclusions about Catahoula Lake. In *Sanders v. State*, a landowner adjacent to Catahoula Lake "asked that a boundary be established between his land and the land owned by the State, as owner of the bed of Catahoula Lake and/or Little River."[64] The landowner also "sought an award of damages against the State" for artificially flooding his property.[65] The claims and facts in *Sanders* are virtually identical to this case with one exception: "[n]o one dispute[d] the trial court's finding that Catahoula Lake is a lake."[66] While Catahoula Lake's classification was not disputed, the Third Circuit still evaluated the seasonal draining of the Lake and determined that "[i]t makes no difference how we classify Catahoula Lake[, whether 'intermittent' or 'ephemeral']. It is still a lake, and the proper determination of the State's ownership is the ordinary high water mark."[67]

Failing to recognize the relevance of the above-cited cases, the lower courts instead relied on the Third Circuit's opinion in *Schoeffler v. Drake Hunting Club*, 05-499 (La.App. 3 Cir. 1/4/06), 919 So.2d 822, 827, for the proposition that "a temporary body of water that is seasonally inundated at high river stages cannot be a real lake."[68] The error in relying on *Schoeffler* is that that case was not one of a distinction between lakes and rivers.[69] Further distinguishing *Schoeffler* is that that case revolves around the swamp and overflow lands in the Atchafalaya Basin,[70] a wholly different watershed system to that of the Black River watershed and Catahoula Lake.[71]

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[62] *Bruning*, 115 So. at 737 (emphasis added).
[63] *State v. Aucoin*, 20 So.2d 136, 150 (La. 1944) (emphasis added).
[64] *Sanders v. State*, 07-821 (La.App. 3 Cir. 12/19/07), 973 So.2d 879, 879.
[65] *Id.* at 879-80.
[66] *Id.* at 882.
[67] *Id.*
[68] Written Reasons for Judgment, R. 2597-98.
[69] *Schoeffler*, 919 So.2d at 843.
[70] *Id.* at 828.
[71] *See e.g.*, *Meche v. Richard*, 2007 U.S. Dist. LEXIS 17196, pp. 23-25 (W.D. La. 2007) (noting the unique nature of the Atchafalaya Basin).

Unlike the weeks-long "lakes" created in the ever-evolving Atchafalaya Basin every year when the Atchafalaya River overflows its banks, Catahoula Lake's natural state is to be inundated for a majority (often the vast majority) of every year.[72] As the Third Circuit stated clearly in *Sanders v. State*, Catahoula Lake is not swamp or overflow lands because "[t]he situation at Catahoula Lake is not a temporary or extraordinary situation. It has been occurring for hundreds of years.... Everyone agreed that these bodies of water stay within their natural beds. Catahoula Lake always reaches a certain normal high level during several months of the year.... None of the tributaries, including Black River, overflow their natural beds."[73] Moreover, the parties and the lower courts have recognized the geographic distinction between the properties of the Lake Plaintiffs and those of the Swamp Plaintiffs on the basis that the former claim ownership of land between the ordinary low and high water marks of Catahoula Lake while the latter claim ownership of "overflow lands" lying outside Catahoula Lake.[74]

As demonstrated above, the lower courts clearly erred in finding that Catahoula Lake is *per se* not a lake because it is dry for several weeks or several months each year. Indeed, the controlling Louisiana jurisprudence holds to the contrary. Because of their erroneous conclusion that a lake is not a lake if the bed seasonally dries, the lower courts did not apply the multifactor test established by this Court in *Placid Oil* for determining whether a body of water is a lake or a river.[75] Based upon the review of the facts through the proper lens, this Court must adhere to this century-plus of jurisprudence by reversing the courts' judgments and find that Catahoula Lake is a lake.

II. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE MULTI-FACTOR TEST ESTABLISHED BY THIS COURT IN *STATE V. PLACID OIL*, FOR DETERMINING WHETHER A WATERBODY IS A RIVER OR A LAKE.

Had the lower courts applied the multi-factor test established in *Placid Oil*, they would have determined that Catahoula Lake is indeed a lake. In that controlling case, this Court stated that:

> In our opinion, the jurisprudence, as well as the expert testimony, supports a multi-factor test for classifying a water body as a lake or a stream. A judgment must be based upon a consideration of pertinent characteristics. Among these are the size, especially its width as compared to the streams that enter it; its depth; its banks; its channel; its current, especially as compared to that of streams that entered it; *and its historical designation in official documents, especially on official maps.*[76]

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[72] *See* Written Reasons for Judgment, R. 2579 (stating the "lake bed could have remained dry for a period of about 10 weeks each year" and that over a 25-year period the longest annual period was six months).
[73] *Sanders v. State*, 07-821 (La.App. 3 Cir. 12/19/07), 973 So.2d 879, 883.
[74] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 3 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.
[75] Written Reasons for Judgment, R. 2569 (*referring to State v. Placid Oil Co.*, 300 So.2d 154 (La. 1974), *cert. denied* 419 U.S. 1110 (1975)).
[76] 300 So. 2d 154, 175 (La. 1974) (emphasis added).

In *Placid Oil,* summarizing the relevant considerations concerning the designation of Grand Lake-Six Mile Lake, the Court noted that the "[l]ake is a wide, irregularly shaped body of water of great size, relatively shallow in depth, with a current substantially slower than that of the inflowing river.... Historically it has always been designated as a lake."[77] The *Placid Oil* Court further noted, contrary to the lower courts' finding in this case, that "vast expanses of water, such as Calcasieu Lake, [should be designated] as a lake notwithstanding a river empties into it and flows through it into the sea."[78]

The record in this matter is replete with references to the historical designation of the water body at issue as "Catahoula Lake," dating back more than 200 years. Indeed, the district court in its own Written Reasons for Judgment references the recorded observations and descriptions from the early 1800s of a Catahoula Lake that was distinct waterbody from Little River from the early 1800s.[79] The district court admitted into evidence an incontrovertibly significant amount of documentation of the historical designation of the disputed water body as Catahoula Lake. Among the documents offered and admitted for consideration in the river versus lake analysis undertaken by the district court were:

- 141 maps and documents identifying Catahoula Lake as a lake (R. Exhibits from January 28 and January 29, 2015, D-37 in globo);
- Explorer William Dunbar's 1804 map designating Catahoula Lake as a lake (R. Exhibits from January 21, 2015, J-1 and J-2);
- Dunbar's 1817 references in his writings referring to Catahoula Lake as a lake (R. Exhibits from February 11, 2015, D-153);
- Explorer William Darby's references to Catahoula Lake as a lake, both on his renowned map and in his writings, repeatedly referencing "Ocatahoola Lake." (R. Exhibits from January 20, 2015, P-1003);[80]
- Darby's 1834 Gazetteer which discusses the lake at Catahoula Lake (R. Exhibits from January 27, 2015, FW-152);
- The 1895 report of the Secretary of War which officially refers to Catahoula Lake (R. Exhibits from January 27, 2015, FW-166);

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[77] *Id.*

[78] On this point, the *Placid Oil* Court quotes *State v. Erwin*, 138 So. 84 (La. 1931), and notes that, though overruled on other grounds, the *Erwin* Court correctly analyzed and found that Calcasieu Lake should be considered a lake. *Cf.* R. 2591.

[79] R. 2570, 2573, 2574.

[80] Importantly, Darby separately refers to the river flowing into this lake as "Ocatahoola River." This is Darby distinguishing Little River from Catahoula Lake.

- GLO survey map designations of Catahoula Lake on those official maps. (R. Exhibits from January 21, 2015, P-1006).

In addition to Catahoula Lake's irrefutable historic designation as a lake, the remaining *Placid Oil* factors weigh heavily in favor of its classification as a lake: (1) it is the largest natural freshwater lake in Louisiana, covering more than 42 square miles;[81] (2) it is three miles wide as compared to the several hundred feet wide multiple streams that enter and leave it;[82] (3) it is shallower than the streams that enter and leave it;[83] (4) it does not have an appreciable flow; (5) it is inundated by backwater and not caused by overflow of natural levees by the streams that enter the lake;[84] and (6) its shape is irregular.[85] Indeed, in *Sanders*, the Third Circuit properly applied *Placid Oil* to Catahoula Lake and found that it "is exactly the situation" of a lake.[86]

Certainly, the additional six *Placid Oil* factors—unrefuted in the record—heavily favor the classification of Catahoula Lake as a lake. However, perhaps more astounding than the lower courts' disregard for this unrefuted evidence is their refusal to adhere to the classification of Catahoula Lake as a lake in the introduced (and unanimous) GLO plats. These plats have stood the test of time and are to be accepted in evidence as the official federal record of government land available in the United States for sale at the time of the survey (excepting sovereign lands such as lakes).[87] They are not infallible, but the agreement of 11 official surveys weighs heavily in favor of classifying Catahoula Lake as a lake. Indeed, to do otherwise mandates a showing of gross error in all 11 surveys. The Plaintiffs here have not even attempted to show gross error and their challenge to the GLO must be considered an impermissible collateral attack.[88] The far-reaching ripple effects for both public and private title of a collateral attack on such a series of official documents is unfathomable and should not be countenanced.

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[81] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 8 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.
[82] R. 413.
[83] R. 359.
[84] *Sanders v. State*, 07-821 (La.App. 3 Cir. 12/19/07), 973 So.2d 879, 883.
[85] R. 846, 860-62, 1092.
[86] *Sanders*, 973 So.2d at 883.
[87] *Department of Natural Resources v. Todd County Hearings Unit*, 356 N.W.2d 703, 707 (Minn.App. 1984) ("The meander lines were drawn for the purpose of determining the quantity of land which was to be paid for by purchasers of the government-owned lands. The lakes themselves were excluded from the acreage purchased, and the law was settled that 'meandered lakes belong to the state in its sovereign capacity in trust for the public.'") (internal citations omitted).
[88] *See e.g.*, *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935) ("...whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding."); *Russell v. Maxwell Land Grant Co.*, 158 U.S. 253, 256 (1895) ("A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any collateral attack in the courts.").

The lower courts applied legally erroneous standards and definitions for the classification of lakes, and as a result, failed to properly apply and evaluate the *Placid Oil* factors. This Court should grant the State's writ, reverse the district court's judgment, and, viewing the facts as found by the district court through the lens of applicable law and jurisprudence, find that Catahoula Lake is a lake. Alternatively, this Court should grant the State's writ, vacate the judgment below, correctly apply the undisputed facts that are in the record, and hold Catahoula Lake is a lake pursuant to *Sapp* and *Placid Oil.*

III. THE PLAINTIFFS' TAKINGS CLAIMS HAVE PRESCRIBED.

This case was dead on arrival when it was filed in 2006. The Plaintiffs' claims for an uncompensated taking by the United States must be brought within six years of the alleged date of taking.[89] As the lower courts acknowledged, "the complaining property owners or their ancestors in title were aware or should have been aware of the increased inundation of their lands no later than 1973."[90] Contrary to law, the Third Circuit here upheld the district court's finding that "the United States' alteration of the natural drainage in and around Catahoula Basin creating increased inundation of plaintiffs' lands exceeded its lawful rights as owner of a servient estate."[91] Assuming *arguendo* the validity of this finding, the lower courts still committed legal error in their determination that the Plaintiffs' takings claims have not prescribed.

In denying the State's exceptions of liberative prescription, the lower courts adopted the Third Circuit's reasoning in *Cooper v. Louisiana Department of Public Works*.[92] The underlying facts of *Cooper* are similar to this case; it too was an action for increased flooding of lands caused by the Jonesville Lock and Dam, constructed pursuant to the 1960 River and Harbor Act as part of the Ouachita-Black River Navigation Project.[93] However, and with all due respect to the Third Circuit, its reasoning in *Cooper* is unconvincing and is recognized by other courts as an aberration of inverse condemnation jurisprudence.[94]

[89] 28 U.S.C. § 2501. Alternatively, the State submitted to the district court and asserts herein that if the Court determines that the State is the entity that allegedly "took" the servitudes of drain, the prescriptive period is three years from the date of the alleged taking under La. R.S. 13:5111. *See* R. 809-832.

[90] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (*citing* District Court's Written Reasons for Judgment, R. 2605).

[91] Written Reasons for Judgment, R. 2617; *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 29 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.

[92] Written Reasons for Judgment, R. 2604. However, the *Cooper* court did not evaluate prescription under 28 U.S.C. § 2501, perhaps because as the Court noted, "[it] cannot supply the objection of prescription; a party must plead it." 870 So.2d at 324.

[93] *Cooper*, 870 So.2d at 319.

[94] *See e.g., Anderson v. Red River Waterway Comm'n.*, 231 F.3d 211, 215 (5th Cir. 2000); *Barasich v. Columbia Transmission*, 467 F.Supp.2d 676, 693 (E.D. La. 2006); *In re Katrina Canal Breaches Litig.*, 2008 U.S. Dist. LEXIS 51712, fn. 1 (E.D. La. 2008), 2008 WL 2704540.

In *Cooper*, the Third Circuit erroneously found: (1) that tort doctrine can be applied to an appropriation claim, and (2) that increased water levels resulting from the project is a continuing tort.

Cooper was not the Third Circuit's first evaluation of takings claims by flooding resulting from the Ouachita-Black River Navigation Project. In *Hawthorne v. Louisiana Dep't of Public Works,*[95] property owners asserted damages resulting from their property being taken by the flooding resulting from the construction of the Jonesville Lock and Dam.[96] The Third Circuit correctly found in *Hawthorne* that "[t]he taking of property, by flooding or otherwise, without proper exercise of eminent domain, is not a tort but is considered an appropriation."[97] The Third Circuit drew directly from its previous decision in *Boothe v. Dept. of Public Works*, wherein the it "dealt with an almost identical claim arising out of the construction of the Jonesville Lock and Dam and resulting increase in the mean sea level of Rawson Creek."[98] The Third Circuit in *Hawthorne* followed its reasoning in *Boothe* and "[found] that prescription on plaintiffs' claims began to run, at the latest, at the end of the summer of 1972, at which time it was stipulated that the plaintiffs were fully aware of the permanent inundation of their properties resulting from the operation of the Jonesville Lock and Dam."[99] The Third Circuit thereby established a clear line of jurisprudence denying the application of tort doctrine to inverse condemnation claims specifically arising from the Ouachita-Black River Navigation Project, from which the Third Circuit abruptly and erroneously broke in *Cooper* and perpetuated in this case.

The critical error in *Cooper* is that "the continuous action that the Plaintiffs' complain of is the tortious conduct—the constant interference with their servitudes of drainage, causing the permanent flooding of their lands."[100] The Third Circuit in *Cooper* and in this case failed to recognize the distinction that this Court made in *Avenal v. State*, when it held that "property is 'taken' when the public authority acquires the right of ownership or one of its recognized dismemberments. Property is considered 'damaged' when the action of the public authority results in the diminution of the value of the property."[101] Under that controlling jurisprudence, any taking that occurred here occurred in 1973 when, as the district

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[95] 540 So.2d 1261 (La.App. 3 Cir. 1989).
[96] *Hawthorne*, 540 So.2d at 1262.
[97] *Id.* (*citing Bernard v. State*, 127 So.2d 774 (La.App. 3 Cir. 1961); *Boothe v. Dept. of Public Works*, 370 So.2d 1282 (La.App. 3 Cir. 1979), *writ denied*, 374 So.2d 661 (La. 1979); *see also Dept. of Highways v. Mouledous*, 199 So.2d 185 (La.App. 3 Cir. 1967), *writ denied*, 199 So.2d 927 (La. 1967).
[98] *Hawthorne*, 540 So.2d at 1262; *see also Boothe v. Dept. of Public Works*, 370 So.2d 1282 (La.App. 3 Cir. 1979), *writ denied*, 374 So.2d 661 (La. 1979).
[99] *Hawthorne*, 540 So.2d at 1264. That the public nature of such massive federal works are the starting point for prescription periods is nothing new. *See e.g.*, *Labruzzo v. State*, 14-262 (La.App. 5 Cir. 11/25/14), 165 So.3d 166, *writs denied*, 2014-2702 (La. 3/27/15), 162 So.3d 385 (dealing with the publicly visible post-Katrina pump construction on the 17th Street Canal).
[100] *Cooper*, 870 So.2d at 323.
[101] 03-3521 (La. 10/19/04), 886 So.2d 1085, 1105 (*citing Columbia Gulf Transmission Co. v. Hoyt*, 215 So.2d 114 (La. 1968) (internal quotations omitted)).

court held, the landowners around Catahoula Lake were aware of any alterations in water levels. Furthermore, if the federal government took the servitudes of drain, it owns those servitudes and thus cannot commit the tortious act of trespass.

The Third Circuit's opinion in *Cooper* relies heavily on *Estate of Patout v. City of New Iberia*,[102] which dealt with claims for "damages due to trespassing resulting from the operation of a municipal landfill adjacent to [the plaintiffs'] property."[103] In that case, the City did not intend to take the adjacent landowner's property and had agreed to implement certain corrective measures.[104] Moreover, in evaluating whether there was a taking, the Court found that La. R.S. 9:5624 did not apply because "there was absolutely no legitimate or necessary reason to cross over onto the plaintiffs' property."[105] By contrast, the increased water levels on Catahoula Lake are the necessary and intended result of a congressionally-authorized navigation project. For these reasons, this Court must repudiate the Third Circuit's decisions in *Cooper* and in this case and hold that an appropriation of property is not a tort. With this jurisprudential course correction, the Plaintiffs' claims prescribed long before the filing of this action.

Furthermore, *arguendo*, if tort doctrine can apply to an appropriation claim, the one-year prescriptive period began to run in 1973, once the operative act of constructing the public works was completed and the Plaintiffs were aware of increased water levels.[106] The continuing tort doctrine forestalls prescription when "the tortfeasor perpetuates the injury through overt, persistent, and ongoing acts."[107] This Court, the Third Circuit, and other courts of appeal have subsequently rejected arguments that the failure to remove something that was wrongfully deposited on the landowner's property constitutes a continuing tort.[108] In *Hogg v. Chevron USA, Inc.*, this Court explained that "the breach of a duty to right an initial wrong simply cannot be a continuing wrong that suspends the running of prescription, as that is the purpose of every lawsuit and the obligation of every tortfeasor."[109] Either the completion of the public works or the implementation of the water management plan, both of which occurred more than 30 years prior to 2006, represents the act from which the liberative prescription of the Plaintiffs' tort claims begins. The lower courts erred by not dismissing this case as prescribed.

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[102] 97-1097 (La.App. 3 Cir. 3/6/98), 708 So.2d 526, *writ granted*, 98-961 (La. 7/2/98), 721 So.2d 897, *affirmed by*, 98-961 (La. 7/7/99), 738 So.2d 544.
[103] 708 So.2d at 527.
[104] *Id.*
[105] *Id.* at 530.
[106] *Hogg v. Chevron USA, Inc.*, 2009-2632 (La. 7/6/10), 45 So.3d 991, 1005.
[107] *Id.* at 1003.
[108] *Id.* at 1005; *LeJeune Brothers, Inc. v. Goodrich Petroleum, Co., L.L.C.*, 06-1557 (La.App. 3 Cir. 11/28/07), 981 So.2d 23, *writ denied*, 08-0298 (La. 4/4/08), 978 So.2d 327; *Mouton v. State of Louisiana*, 525 So.2d 1136 (La.App. 1 Cir. 1988), *writ denied*, 526 So.2d 1112 (La. 1988).
[109] 2009-2632 (La. 7/6/10), 45 So.3d 991, 1007 (*citing Crump v. Sabine River Auth.* 737 So.2d 720, 729 (La. 1999); *see also Young v. United States*, 727 F.3d 444, 448-49 (5th Cir. 2013).

The district court erroneously concluded (and the Third Circuit perpetuated) that the date of the taking was the filing of the present lawsuit.[110] It is textbook law that "[l]iberative prescription begins to run as soon as the action accrues...."[111] It is well settled that "the correct standard for determining the accrual date of such a takings claim is when all events which fix the government's alleged liability have occurred, and the harmed party knows or should have known of their existence."[112] For cases involving flooding caused by government-constructed dams, the prescriptive period begins to run when the situation stabilizes "such that the 'consequences of the inundation have so manifested themselves that a final account may be struck."[113] Because the Plaintiffs became aware in 1973 of the increased inundation that they allege is an inverse condemnation,[114] prescription of those claims began to run in 1973. Pursuant to 28 U.S.C. § 2501, or alternatively La. R.S. 13:5111, La. R.S. 9:5624, or La. C.C. art. 3492, the Plaintiffs' takings claims have long ago prescribed, and this Court must grant certiorari and dismiss this matter.

IV. THE PLAINTIFFS HAVE NO CAUSE OF ACTION AGAINST THE STATE FOR AN ALLEGED INVERSE CONDEMNATION BY THE UNITED STATES.

The Third Circuit found that the Plaintiffs have a cause of action directly against the State because, pursuant to the Act of Assurances, the State agreed to acquire any servitudes and lands necessary for the construction, operation, and maintenance of the project and "hold and save the United States free from damages due to construction and maintenance of the project."[115] The Third Circuit upheld the district court's erroneous conclusion that "the pertinent language of the Act gives rise to a *stipulation pour autrui* in favor of the plaintiff class members herein."[116] When a contracting party stipulates a benefit for a third person, "[t]he stipulation gives the third party beneficiary the right to demand performance from the promisor."[117] This situation is called a *stipulation pour autrui*.

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[110] Written Reasons for Judgment, R. 2621-22.
[111] A.N. Yiannopoulos, CIVIL LAW PROPERTY COURSEBOOK, 9th ed., 305 (Claitor's 2009) (citing 2(1) Planiol, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 358-361 (La. Law Inst. 1959)).
[112] *St. Bernard Par. v. United States*, 88 Fed. Cl. 528, 551-52 (2009) (*quoting Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1290 (Fed. Cir. 2006) (internal quotations omitted); *Mildenberger v. U.S.*, 91 Fed.Cl. 217, 233 (2010). If this Court finds that it was the State that is the government entity that did the alleged "taking," this Court stated in *Faulk v. Union Pac. R.R. Co.*, 2014-1598 (La. 6/30/15), 172 So.3d 1034, 1044, that "[t]he constitutional command of Article I, Section 4 [of the Louisiana Constitution], is self-executing, such that the cause of action arises whenever a state commits a taking without justly compensating the victim." *See also Roy v. Belt*, 2003-1022 (La.App. 3 Cir. 2/18/04), 868 So.2d 209, 215.
[113] *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (*quoting United States v. Dickinson*, 331 U.S. 745, 747 (1947)).
[114] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853.
[115] Written Reasons for Judgment, R. 2599-2600; Release from Damages and Additional Act of Assurances, p. 48 of oversized envelope of exhibits dated January 20, 2015, Part 1, P#D65.
[116] Written Reasons for Judgment, R. 2611 (*citing* 870 So.2d 315).
[117] La. C.C. arts. 1978, 1981.

With the exception of the Third Circuit's opinion in *Cooper v. Dept. of Public Works*, state and federal courts have consistently found that "Acts of Assurances," like the one at issue in the present case, are not *stipulations pour autrui* and do not allow actions directly against the State for alleged inverse condemnations by the United States.[118] For example, in *Anderson v. Red River Waterway Comm'n*, 231 F. 3d 211 (5th Cir. 2000), property owners alleged that the Red River Waterway Commission ("RRWC") had not acquired "the relevant property rights" from them prior to the construction of a series of locks and dams that raised water levels in the Red River Basin. As is the case here, despite the "acts of assurance" given by the State entity, it was the U.S. Army Corps of Engineers alone that had and exercised the power to raise the water levels at issue.[119] As the United States Fifth Circuit Court of Appeals clearly articulated, "the Corps of Engineers' potential right to seek indemnification from the RRWC does not confer power upon the plaintiffs to file suit against the RRWC."[120] Applying the *Anderson* conclusion to this case, the United States' right to seek indemnification from the State does not confer power upon the Plaintiffs to file suit against the State.

The Louisiana Fourth Circuit Court of Appeal came to the same conclusion in the matter of *Vuljan v. Board of Com'rs of Port of New Orleans*, 170 So.2d 910 (La.App. 4 Cir. 1965) as did the Fifth Circuit in *Anderson*. In *Vuljan*, in an agreement with the U.S. Army Corps of Engineers, the State entity agreed "to furnish all lands, servitudes, and rights-of-way incident to the construction, maintenance and operation of the project, and to indemnify and hold harmless the United States against any and all claims that might result from the construction of the channel."[121] The State entity brought an exception of no cause of action, arguing in part that it was only liable to the United States in indemnity if any damage had been sustained by the plaintiff. The trial court granted the exception, and the Fourth Circuit affirmed, noting that, "if the public improvement is a federal project, the State cannot be sued directly merely because the State contributed to the cost of the project. The test, therefore, is whether or not the project is State or Federal."[122]

The Fourth Circuit in *Vuljan* was following the precedent set by this Court in *Cooper v. City of Bogalusa*, 198 So. 510 (1940). In that case, this Court "held that the property owner did not have a right of action to bring suit directly against the city, the local indemnifying authority, for damages caused by the dredging and improvement of the Pearl River," which was, "solely under the control of the United

[118] *See* R. 1151-52 for the State's assertion of this exception at the trial court.
[119] *Anderson v. Red River Waterway Comm'n*, 231 F.3d 211, 215 (5th Cir. 2000).
[120] *Id.*
[121] 170 So.2d at 911.
[122] *Id.* at 912.

States Government."[123] Indeed, this Court "held that the assurance to save the United States harmless was in the nature of an agreement of indemnification and, as such...did not create a cause of action in Plaintiff, a third person, to sue Defendant for damages to his property resulting from the construction of the project."[124]

Repudiating the Third Circuit's opinion in *Cooper v. Louisiana Department of Public Works*, the United States Eastern District has repeatedly asserted that "simply because the federal government is able to seek indemnity from [a state entity] based on an act of assurance does not necessarily, without more, allow a third party to sue based upon that assurance."[125] Refusing to find that an act of assurances constituted a *stipulation pour autrui*, the Eastern District of Louisiana repeatedly "found *Cooper's* reasoning 'forced', and instead followed the majority of Louisiana courts in finding that these acts of assurances do not create a third party cause of action."[126]

Just as in the above-cited cases, under the Act of Assurances, the State only bound itself to repay the United States if proper party-plaintiffs successfully pursue suit against the United States. As demonstrated above, *Cooper v. Dept. of Public Works* is an outlier and runs counter to the well-settled jurisprudence that such acts of assurances between the State and United States do not give private claimants a right of action against the State. Accordingly, the Plaintiffs do not have a right of action against the State for the alleged taking asserted in their petition, the lower courts erred when they held otherwise, and the Plaintiffs' claims should be dismissed.

V. THE PLAINTIFFS DO NOT HAVE ANY REASONABLE INVESTMENT-BACKED EXPECTATIONS IN THE ALLEGED FLOWAGE SERVITUDE THAT WAS TAKEN BY THE UNITED STATES.

It is undisputed that the United States constructed, maintains, and operates the public works at issue in this case and that those works are what allegedly took the Plaintiffs' servitudes of drain.[127] The United States, however, exercises this servitude at or below the Lake's ordinary high water mark and subject to an operations manual devised to mimic the natural fluctuations of the Lake.[128] The Third Circuit

[123] *Id.* at 913.
[124] *Id.*
[125] *In re Katrina Canal Breaches Consol. Litig.*, 05-4182 (E.D. La. 2008), 2008 U.S. Dist. LEXIS 51712, * 11.
[126] *Id.* at FN 1; *see also Barasich v. Columbia Gulf Transmission Co.*, 467 F.Supp. 2d 676, 693 (E.D. La 2006).
[127] R. 2554.
[128] As an alternative to its merits argument that Catahoula Lake is a sovereign lake, at the Third Circuit, the State pleaded that the Plaintiffs have no right of action because their alleged property below the ordinary high water mark is burdened by a federal navigation servitude because Catahoula Lake is a navigable waterbody. The Third Circuit did not consider the merits of this exception because it determined that there was insufficient evidence in the record of the federal high water mark. *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 18 (La.App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853. While the State disagrees with the Third Circuit's finding of insufficient evidence on this question, the Third Circuit necessarily should have considered the extent of the property interest and reasonable investment-backed expectations of the alleged property owners. Failing to consider these elements of an inverse condemnation claim render the analysis incomplete and insufficient.

failed to consider how such a manipulation of water levels interferes with the purported landowners' reasonable investment-backed expectations, which is critical to the takings inquiry.[129]

Moreover, under long-standing United States Supreme Court jurisprudence, a right of action arising from an alleged uncompensated taking by the United States only inures to those persons owning a parcel at the time that it was taken.[130] As the United States Supreme Court stated in *Palazzolo v. Rhode Island*, "[i]t is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser."[131] This Court similarly stated in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, that under Louisiana law "the personal right for compensation or damages remains with the person who was the owner of the property at the time the land was taken or damaged."[132] The subsequent purchasers are precluded from seeking compensation for takings prior to their purchases because that taking was or should have been reflected in the purchase price, thereby eliminating any reasonable investment-backed expectations. Because, as the district court concluded, "only one title introduced at trial unequivocally predated 1973[,]"[133] the inverse condemnation claims of all the other parties-plaintiff should have been dismissed, and the class should have been limited to only those who purchased their property prior to 1973.

The lower courts, however, denied the State's exception of no right of action based on the misguided application of the continuing tort doctrine,[134] which is improper in an appropriation case. The lower courts found that the subsequent purchaser doctrine "did not apply because this case involves a continuing tort."[135] There is not, however, a separate tort claim against the State in this matter—the only claim is for a taking, nothing more. As the Third Circuit correctly summarized, "[i]n the present case we are dealing with inverse condemnation claims. An action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land *already* taken or damaged against a governmental [entity]."[136] As discussed more fully in the section above concerning liberative prescription, the Third Circuit's conclusions impermissibly blend tort and property law regimes, creating a novel theory that an inverse condemnation claim can be considered a continuing tort until an action is filed. Such a

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[129] *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Ark. Game & Fish Comm'n. v. U.S.*, 568 U.S. 23, 39 (2012).
[130] *U.S. v. Dow*, 357 U.S. 17, 22 (1958); *Kindred v. Union Pacific R. Co.*, 225 U.S. 582, 597 (1912); *Roberts v. Northern Pacific R. Co.*, 158 U.S. 1, 10 (1895).
[131] 533 U.S. 606, 614 (2001) (*citing Danforth v. United States*, 308 U.S. 271, 284 (1939)).
[132] 2010-2267 (La. 10/25/11), 79 So.3d 246.
[133] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (citing District Court's Written Reasons for Judgment, R. 2612).
[134] *Id.* at 32.
[135] *Id.*
[136] *Id.* at 23 (internal citation omitted) (emphasis added).

theory exists nowhere in the law and undermines the well-developed body of inverse condemnation jurisprudence and must be repudiated by this Court.

VI. THE STATE'S OPEN, CONTINUOUS, PUBLIC, UNEQUIVOCAL, AND UNINTERRUPTED POSSESSION OF THE SUBJECT PROPERTY WITH THE INTENT TO POSSESS AS OWNER MEANS THAT THE PLAINTIFFS HAVE LOST THEIR CLAIMS THROUGH ACQUISITIVE PRESCRIPTION.

As an alternative to its merits argument that Catahoula Lake is a sovereign lake, at the Third Circuit, the State pleaded the exception of prescription by 30 years adverse possession under La. C.C. art. 3486.[137] As Judge Amy found in his dissenting opinion, "the State has proven the elements of thirty-year acquisitive prescription concerning the area known as Catahoula Lake."[138] There is no doubt that the State has corporeally possessed Catahoula Lake and surrounding lands since the early 1970s when State-owned navigable waters were artificially managed up to 36 feet above Mean Sea Level.[139] As the district court found, "the complaining property owners or their ancestors in title were aware or should have been aware of the increased inundation of their lands no later than 1973."[140] Further, as is evidenced by the State's own public records,[141] it has, since at least the mid-nineteenth century, believed that it owned Catahoula Lake and it has acted accordingly, granting mineral leases and exercising the jurisdiction of the Department of Wildlife and Fisheries over the Lake. Accordingly, by the presence of water on the disputed property for more than 30 years, combined with the State's intent to own the disputed property, this Court should dismiss all of the Plaintiffs' claims in this matter as acquisitively prescribed.

The Third Circuit erroneously concluded that the constitutional prohibition from taking property without compensation under La. Const. art. 1, § 4 prevents the State from availing itself of acquisitive prescription. By its own language, the right to property afforded under La. Const. art. I, § 4, however, is "subject to reasonable statutory restrictions." La. Const. art. 1, § 4(A). As with liberative prescription for uncompensated taking or damaging of private property under La. R.S. 13:5111 and La. R.S. 9:5624

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[137] "Ownership and other real rights in immovables may be acquired by the prescription of thirty years without the need of just title or possession in good faith."

[138] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 3 (La.App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (Amy, J., *dissenting*). It is important to note here that the State, by making its acquisitive prescription argument, does not concede the classification of Catahoula Lake as a lake. The State disagrees with the district court's decision on the lake versus river issue. However, the alternative argument that the State owns Catahoula Lake by acquisitive prescription is presented here as a simple mechanism for this Court to dispose of this matter without addressing the factual findings of the court below.

[139] Written Reasons for Judgment, R. 2599.

[140] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (citing District Court's Written Reasons for Judgment, R. 2605).

[141] *See e.g.*, General Land Office map dated 1853 and entered into the record on January 21, 2015 (located in the exhibits folder from that day and identified as "Exhibit P-1006").

respectively, the State's ability to avail itself of acquisitive prescription under La. C.C. art. 3486 is another such restriction on ownership of property.

As Judge Amy correctly concluded in his dissenting opinion, "legislation and custom favor the State being able to acquire property by acquisitive prescription."[142] In his comprehensive analysis of the question in his dissenting opinion, Judge Amy recognized this Court's approval in *Todd v. State, Dep't. of Natural Resources*,[143] of the notion that the State may derive title or ownership by prescription.[144] Because the State may acquire property through any means not prohibited by law and because the State is not excepted from the acquisitive prescription laws, this Court should find that the State may avail itself of acquiring property though acquisitive prescription. As recognized by Judge Amy, the State proved it has acquired ownership of Catahoula Lake.[145]

Irrespective of whether this Court is inclined to find in favor of the State's full ownership of the bed and bottoms of Catahoula Lake via acquisitive prescription, there is ample evidence that the federal government has, since 1973, converted the natural servitude of drain of all the Plaintiffs' alleged properties to a conventional servitude in its favor by way of acquisitive prescription. The Third Circuit has previously opined that "the natural servitude of drainage...may be altered, modified, or suppressed by prescription"[146] and that "[p]rescription commences to run from the day structures, ditches, or works cause changes in the natural flow of the waters."[147] As found by the district court in this case, changes in the natural flow of the waters due to the public works at issue were known or should have been known beginning in 1973.[148] Accordingly, assuming *arguendo* that the United States' actions caused the taking of the Plaintiffs' servitudes of drain, the United States began in 1973 to acquisitively prescribe conventional servitudes against the flooded area through its manipulation of water levels on the Lake. No compensation is due for acquisition of ownership via acquisitive prescription; such an acquisition is merely a transfer of ownership.

The State primarily maintains that acquisitive prescription against any private party was unnecessary because the property at issue here are the sovereign bottoms of Catahoula Lake. However, the State maintains that, in the alternative, should Catahoula Lake not be a lake, it has successfully

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[142] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 11 (La. App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (Amy, J., *dissenting*).
[143] 456 So.2d 1340, 1352 (La. 1983).
[144] *Crooks v. State of Louisiana, Department of Natural Resources*, 17-750, p. 10 (La.App. 3 Cir. 12/28/18), 2018 La. App. LEXIS 2665, 2018 WL 6816853 (Amy, J., *dissenting*).
[145] *Id.* at 3 (Amy, J., *dissenting*).
[146] *Johnson v. Wills*, 220 So.2d 134, 135 (La.App. 3 Cir. 1969).
[147] *Id.*
[148] R. 2599.

acquisitively prescribed full ownership over the flooded area through the intent to own such property and the exercise of corporeal possession on the property for more than 30 years. The State additionally maintains that, should its first position that Catahoula Lake is a lake be rejected by this Court, the United States has certainly acquisitively prescribed a conventional servitude over the flooded area for which no compensation is due to the former owners.

For these reasons, and based on the State's publicly recorded possession, or alternatively the United States' open and continuous exercise of a conventional servitude of drain, this Court should reverse the Third Circuit's judgment with regard to the ownership of Catahoula Lake below the ordinary high water mark, as well as ownership of a conventional servitude over all the Plaintiffs' alleged property, and render judgment in favor of the State. At a minimum, the Court should remand this matter to the district court for a full vetting of the State's, or the United States' (with the state asserting on its behalf as its indemnitor should the Court not uphold the State's exception of no right of action) acquisitive prescription claim and any defenses that the Plaintiffs may have thereto.

CONCLUSION AND RELIEF REQUESTED

The State asks the Court, in the pursuit of rendering a judgment that is just, legal, and proper, to grant its writ application for certiorari and review. The Third Circuit Court of Appeal committed multiple legal errors that warrant reversal of its judgment. The Third Circuit failed to consider – indeed flatly refused to apply – crucial and controlling precedent from this Court and the United States Supreme Court in its decision and improperly interpreted the jurisprudence that it did consider. This Court should grant the writ, reverse the Third Circuit judgment, and: (1) hold that the State owns Catahoula Lake below the ordinary high water mark of 36 feet above Mean Sea Level either because it is a navigable lake or because the State has acquisitively prescribed ownership; (2) dismiss the Plaintiffs' inverse condemnation claims because they prescribed under federal law six years after the United States started manipulating water levels on the Lake in 1973; (3) dismiss the Lake Plaintiffs' inverse condemnation claims because under *Sapp* and *Placid Oil*, Catahoula Lake is a lake under Louisiana law and is owned by the State up to the ordinary high water mark; (4) dismiss the Plaintiffs' inverse condemnation claims because they don't have a cause of action against the State; (5) dismiss the inverse condemnation claims of the Plaintiffs who purchased their land after 1973 because, under the subsequent purchaser doctrine, they do not have a right of action; and (6) dismiss the Plaintiffs' inverse condemnation claims because the United States acquisitively prescribed a flowage servitude over their property.

Respectfully submitted:

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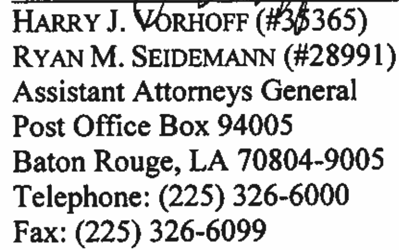
By: 

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VERIFICATION OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary public, personally appeared

HARRY J. VORHOFF

who, after being duly sworn, did state that he is an attorney for the Defendant/Applicant, State of Louisiana, Department of Natural Resources, that the allegations of the Application and Brief in Support of Application for Writ of Review are true to the best of his knowledge, information, and belief, and that a copy of the brief was served upon the following via U.S. Mail, properly addressed, this 28th day of January, 2019.

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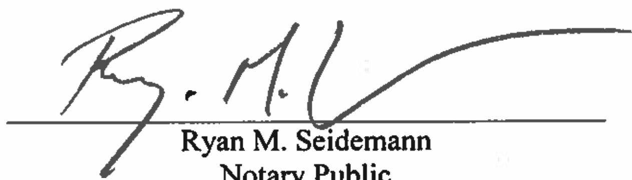

Ryan M. Seidemann
Notary Public
La. Bar No. 28991
My commission ends at death.

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