

COASTAL PETROLEUM'S FIGHT TO DRILL OFF FLORIDA'S GULF COAST

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I. INTRODUCTION

Robert Joffee, director of the Mason-Dixon Florida Poll, said Floridians are clearly overwhelmingly against offshore drilling. "Just go to a busy shopping center and ask about offshore drilling If you get anyone in favor of it, call me Most people who reside in the state attach a great deal of importance to recreational use of the shoreline."¹

In 1944, Florida Governor Spessard L. Holland and members of his cabinet signed a renewable oil lease agreement which covered 3.6 million acres of state submerged lands,² an area covering

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1. Chris Poynter, *Drilling for Dollars*, TALL. DEM., Oct. 13, 1996, at 8A.

2. See *Drilling Lease between Arnold Oil Explorations, Inc. and the Trustees of the Internal Improvement Fund of the State of Florida 13* (Dec. 27, 1944) (on file with the Office of the Att'y General Office, Tallahassee, Fla.) [hereinafter 1944 Drilling Lease]; see

sovereign lands under water from Appalachicola to Naples and extending 10.36 miles into the Gulf of Mexico.³ Coastal Petroleum Oil Company (Coastal) bought out the company that originally held the leases, Arnold Explorations, Inc. (Arnold)⁴ and drilled for oil on its leases for many years without ever producing any commercial quantity of oil.⁵ In 1990, the Florida Legislature banned all oil drilling off the coasts of Florida.⁶ Although Coastal had been inactive in its drilling for twenty-eight years by that time, this legislative action galvanized the company to pursue a long battle in the courtrooms of Florida, seeking recompense from Florida taxpayers for its alleged monetary loss caused by the ban.⁷

Coastal's fight to drill off Florida's Gulf Coast raises issues that are becoming more common as the government takes an increasingly active role in protecting this country's natural resources. Coastal's fight illustrates the tension between preserving the government's ability to change its policies to adapt to the changing needs of the environment and values of community versus protecting the property rights of individuals. Coastal's case is complicated by the reality that no one knows how much oil, if any, exists underneath the state waters of Florida's Gulf Coast. In a sense, the State is playing a game of russian roulette with Coastal. Fifty years of dry wells would suggest that no oil exists on Coastal's lease, so why not let the company continue to sink dry wells? Why continue a costly and lengthy legal battle to keep oil drilling off Florida's beaches if the drilling is almost certain to produce no oil? Why restrict Coastal's right to drill and risk a court order requiring the State of Florida to pay for the value of the leases? Floridians' strong attachment to their pristine beaches, the dependence of Florida's

also Florida is Sued Over Confiscation of Oil Leases, PLATT'S OILGRAM NEWS, July 24, 1990, at 4 [hereinafter *Florida is Sued*].

3. See 1944 Drilling Lease, *supra* note 2, at 2.

4. See Poynter, *supra* note 1, at 8A.

5. See *id.*

6. See Act effective Aug. 1, 1990, ch. 90-72, 1990 Fla. Laws 187 (codified at FLA. STAT. § 377.242(1)(a) (1995)).

7. See Poynter, *supra* note 1, at 8A ("It only sprang to life because they saw the potential for money," said David Guest, an attorney for the Sierra Club Legal Defense Fund in Tallahassee, which is suing to keep Coastal from drilling. "As soon as the state said no drilling, Coastal jumps and sues for a bajillion dollars."").

lucrative tourism economy on an unmarred scenic view and clean water and beaches, the damage to the marine ecosystem caused by oil drilling, and the remote possibility oil would be found make the gamble that Coastal will continue to come up dry a risk Florida's government may be unwilling to take.

This Comment examines the legal issues surrounding oil drilling off Florida's Gulf Coast. Part II considers whether oil exists at all in the Gulf, and if so, what damages could occur in the event of a spill. Part III discusses the actions that the State of Florida has taken regarding offshore oil drilling and the dynamics of Coastal as a company. With this background, Part IV studies the litigation between Coastal and the State of Florida that has occurred in the last six years. The litigation has taken two distinct paths: a suit by Coastal alleging that Florida's 1990 ban on offshore oil drilling unlawfully took Coastal's property rights without due process of law and a suit by Coastal attempting to force the Florida Department of Environmental Protection (DEP) and Florida's Board of Trustees of the Internal Improvement Trust Fund (Trustees) to issue a permit to drill off of St. George Island without requiring large sums of money for an accident security deposit.⁸ Part V shifts the focus to five potential legal theories that may be pursued by Coastal in its attempt to protect its alleged drilling rights: (1) the Submerged Lands Act argument; (2) the public trust doctrine; (3) the vested rights argument; (4) the Fifth Amendment takings argument; and (5) the substantive due process argument. Part V explores these arguments and evaluates the potential success and failure both sides may have.

II. THE POTENTIAL FOR OIL AND THE EFFECT OF A SPILL

No one has ever found oil beneath Florida's territorial waters in the Gulf of Mexico.⁹ Coastal has drilled for twenty-five years.¹⁰ It has sunk twenty-two wells.¹¹ All have come up dry.¹² However,

8. See Poynter, *supra* note 1, at 8A; David Abramson, *Coastal Petroleum to Appeal Court Decision on Development of Offshore Florida Leases*, OIL DAILY, Aug. 8, 1996, at 2.

9. See Poynter, *supra* note 1, at 8A.

10. See *id.*

11. See *id.*

the potential for oil may exist. In 1975, the State hired two experts to estimate how much oil might lie beneath Florida's Gulf Coast.¹³ According to those experts, the land which Coastal leased from the State could contain more than sixty million barrels of oil.¹⁴ Denis Dean, the Assistant Attorney General handling the Coastal litigation, de-emphasized the significance of this estimate, stating that it was based on the oil activity in federal, not state, waters in the vicinity and was simply a guess.¹⁵ He also reported that both experts indicate they would not stand by those figures today.¹⁶ Further, Dean stated that no company approached the State of Florida between 1976 and 1990 to request a lease to drill in those waters. This lack of interest led Dean to ask, "If there was this big demand, where was everybody?"¹⁷ Nevertheless, a spokesperson for Coastal has argued that since vast oil resources have been found off the coasts of Texas, Alabama, and Louisiana for years, logically oil could also be found off Florida's Gulf Coast, as "oil doesn't recognize a state line."¹⁸

Recent technological innovations could have an impact on the possibility of finding oil.¹⁹ New construction for the platforms on oil rigs may enable drilling at significantly lower depths.²⁰ Computers may be able to find oil resources that were not otherwise detectable.²¹ One journalist reports that these innovations have created an offshore rush by Florida energy companies to "aggressively purs[ue] oil and gas exploration in the Gulf."²² Despite these innovations, a truism in the oil drilling

12. *See id.*

13. *See* Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Oct. 24, 1996) [hereinafter Dean Interview].

14. *See* Eric Schmuckler, *If You Can't Drill, Sue*, FORBES, Sept. 17, 1990, at 14.

15. *See* Dean Interview, *supra* note 13.

16. *See id.*

17. *Id.*; Gady Epstein, *Oil Company Returns to Court*, TAMPA TRIB., May 7, 1996, at Metro 6.

18. Poynter, *supra* note 1, at 8A.

19. *See Deep in Gulf is High-Tech Oil Rush*, ST. PETE. TIMES, May 2, 1996, at 1A.

20. *See id.*

21. *See id.*

22. *Id.*

business holds that no one can ever know for sure if oil exists on a site before drilling has begun.²³

In addition to the uncertainty about the presence of oil is the question of how much potential damage a spill could cause. The amount of damage caused by a potential spill depends upon two unknowns: (1) the quantity of oil that might be discovered; and (2) the water temperature and weather conditions at the time of a spill.²⁴ According to DEP biologist Ernest Barnett, an oil spill at the Coastal site off St. George Island could result in the spillage of as much as a million barrels, or 42 million gallons of oil. He projected:

Uncontained and with certain wind conditions, the oil would travel 29 miles within 24 hours It would seep onto the beaches of St. George Island, Cape St. George Island, Dog Island and St. Vincent Island At least 50 percent of beach within 29 miles of the drill site would be damaged [Five] percent of the oyster reefs—23.21-million square feet—would be damaged, as well as 46.86-million square feet of marshes and 6.4 million square feet of sea grasses Those were conservative estimates²⁵

Moreover, Florida's warm waters might actually facilitate damage caused by an oil spill. Scientists report that cold-water oil spills, like that of the Exxon Valdez, are not nearly as damaging as those which take place in warmer waters, thus making Florida, with its marshlands and sandy beaches, many times more vulnerable than Prince William Sound in Alaska.²⁶ In the Exxon Valdez oil spill, 10 million gallons of oil were dumped in Prince William Sound.²⁷ Exxon had to spend \$3 billion to clean up the oil and settle lawsuits, and two years ago it paid another \$5 billion in a jury award to harmed fisherman and property owners.²⁸

In November 1992, Coastal commissioned a study by Continental Shelf Associates of Jupiter, Florida to assess potential damage

23. See Dean Interview, *supra* note 13.

24. See *Reckless Assault on Florida's Coast*, TAMPA TRIB., May 26, 1995, at Nation 14 [hereinafter *Reckless Assault*].

25. Diane Rado, *State Takes New Tact Against Oil Driller*, ST. PETE. TIMES, May 24, 1995, at 1B.

26. See *Reckless Assault*, *supra* note 24, at Nation 14.

27. See *id.*

28. See *id.*

that could result from a spill off the Florida Gulf Coast.²⁹ Ten pages of the study detail the parade of horrors that would attend an oil spill from the proposed drilling site off St. George Island.³⁰ Despite this finding of Coastal's own study, Coastal attorney Robert Angerer took issue with DEP's prediction, arguing, "The largest oil spill in United States history was 77,000 barrels off the coast of Santa Barbara, California. There's no way Florida would ever see anything close to that, let alone a million barrels."³¹

III. ACTIONS THE STATE OF FLORIDA HAS TAKEN REGARDING OFFSHORE OIL DRILLING PRE-1990

In the early 1940s, when the country was at war, the State of Florida was anxious for investors to fund exploration for domestic oil, pay taxes, make lease payments, and bring industry to this state.³² Lawmakers passed the Florida Oil Discovery Award Bill in June 1941, guaranteeing \$50,000 to the first company to strike oil.³³ Subsequently, the State entered into an option contract with Arnold, allowing the company, as lessee, full rights to conduct geological and geophysical surveys and investigations of an area of submerged lands.³⁴ In 1944, Arnold entered into two perpetual leases with the State for oil, gas, and mineral rights to 3.6 million acres of state submerged lands in the Gulf, an area about the size of Massachusetts.³⁵ The leases covered an area 425 miles long, beginning at Appalachicola and ending south of Naples, and beginning at the beach and reaching 10.36 miles into the Gulf.³⁶

29. See CONTINENTAL SHELF ASSOC., INC., ENVIRONMENTAL CONDITIONS AND ASSESSMENT OF POTENTIAL IMPACTS BOB SIKES CUT SITE A (1992) [hereinafter ENVIRONMENTAL CONDITIONS Report]; Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Sept. 13, 1996) [hereinafter Dean Interview].

30. See ENVIRONMENTAL CONDITIONS report, *supra* note 29.

31. Phil Willon, *Oil Spill Bonding Demanded*, TAMPA TRIB., June 28, 1995, at Metro 1.

32. Act effective June 4, 1941, ch. 20667, 1941 Fla. Laws 1677 (reflecting the attitude of Florida legislators in the 1940s).

33. See FLA. STAT. § 253.49 (1941) (repealed 1947); see also Poynter, *supra* note 1, at 8A.

34. See Gas and Minerals and Option to Lease Exploration Contract for Oil between the Trustees and Arnold Oil Explorations, Inc. 1 (Oct. 4, 1941) (on file with the Office of the Att'y General) [hereinafter 1941 Drilling Lease].

35. See 1944 Drilling Lease, *supra* note 2.

36. See *id.*; see also Poynter, *supra* note 1, at 8A.

The leases also included the submerged lands under Tampa Bay, Lake Okeechobee, Charlotte Harbor, the Suwannee River, nine central Florida lakes and part of the St. Johns River.³⁷ Under the terms of the leases, Arnold paid \$500 per drilling block for the purpose of drilling for oil, gas, and sulphur.³⁸ Arnold also agreed to drill at least one test well on each drilling block every five years until a sufficient number of wells had been drilled according to a formula in the lease.³⁹ If Arnold did not comply with the well drilling requirement, the right to renew the lease was to become unenforceable.⁴⁰ If Arnold struck oil, the State would receive one-eighth in royalties.⁴¹ The drilling leases were to be periodically renewed. The 1944 agreement provided that Arnold would pay a total annual rental of approximately \$22,566.40 for all the leases.⁴² In 1946, that rent was raised to \$27,048.00.⁴³ In the mid-1940s, Coastal purchased the leases and took over all rights and responsibilities from Arnold.⁴⁴ By 1976, the annual lease rent was fixed around \$60,000, and this rent remained in effect until 1992, when Coastal and the State agreed the payments should stop pending resolution of their litigation.⁴⁵

In 1968, the Trustees and the United States Army Corps of Engineers became embroiled with Coastal over rights to Lake Okee-

37. See Phil Willon, *Oil Drilling Restrictions Spark Battle*, TAMPA TRIB., Aug. 13, 1995, at Metro 1. Dean admits that the state "gave away the farm" in granting those leases in the 1940s. Poynter, *supra* note 1, at 9A.

38. See 1944 Drilling Lease, *supra* note 2, at 2.

39. See *id.* at 4.

40. See *id.*

41. See *id.* at 5.

42. See *id.* at 7.

43. See Drilling Lease between Arnold Oil Explorations, Inc. and the Trustees of the Internal Improvement Fund of the State of Florida 1 (Mar. 27, 1946) (on file with the Office of the Att'y General Office, Tallahassee, Fla.).

44. See Drilling Lease between Arnold Oil Explorations, Inc. and the Trustees of the Internal Improvement Fund of the State of Florida 2-3 (Feb. 27, 1947) (on file with the Office of the Att'y General Office, Tallahassee, Fla.).

45. See Memorandum of Settlement, *Coastal Petroleum Co. v. Secretary of the Army*, No. 68-951-Civ.-CA & 69-699-Civ.-CA (consolidated) 6 (S.D. Fla. Jan. 6, 1976) (on file with the Office of the Att'y General, Tallahassee, Fla.) [hereinafter Settlement Agreement]; Poynter, *supra* note 1, at 8A; Dean Interview, *supra* note 13.

chobee.⁴⁶ The lawsuits were resolved in a Settlement Agreement in 1976 in which Coastal agreed not to explore or drill on Lake Okeechobee due to its environmental value.⁴⁷ In addition, Coastal's 10.36 miles of submerged land along the 435 mile stretch of coastline was divided into three parallel zones.⁴⁸ The near shore zone extends from the water's edge to 4.36 miles into the Gulf.⁴⁹ Here, Coastal retains only a royalty interest.⁵⁰ If the State drilled in the zone or allowed someone else to drill, Coastal would be entitled to a 6.25% royalty on any oil discovered.⁵¹ From mile 4.36 to mile 7.36, Coastal returned all rights to the state.⁵² Coastal possesses no lease, no royalty rights or any other kind of right to this area.⁵³ In the outer three miles, from mile 7.36 to mile 10.36, Coastal retains full exploitation rights.⁵⁴

Coastal agreed that its rights to explore for oil, gas, and minerals would terminate completely in 2016, forty years from the signing of the Agreement. Coastal divested itself of any right to intervene in any land use decisions except in the outer three-mile strip and agreed to secure permits from all appropriate state environmental protection agencies.⁵⁵ In recognition of Coastal's reduced rights, Coastal's annual rental on leases 224-A and 224-B was decreased from \$49,614.40 to \$39,261.00.⁵⁶ Coastal returned

46. See Letter from Lawton Chiles, Gov. of Fla., to Bob Graham, U.S. Sen.-Fla. 2 (Aug. 27, 1996) (on file with author) (providing a time line and history of Coastal).

47. See Settlement Agreement, *supra* note 45.

48. See *id.* at 6.

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.* at 5; see also Dean Interview, *supra* note 29.

53. See Dean Interview, *supra* note 29.

54. See *id.*

55. See Settlement Agreement, *supra* note 45, at 4.

56. See *id.* at 6. Lease 224-A covers the full 10.36 mile span from St. George Island to Pasco County, north of Tampa. Lease 224-B picks up from that point and extends to the end of 425 mile span, to a point south of Naples in Collier county. Lease 248 covers only Lake Okeechobee. See Letter from Carliane D. Johnson, Governmental Analyst, OPB Environmental Policy Unit, to Leigh Braslow (Nov. 6, 1996) (on file with author) (displaying Lease Nos. 224-A, 224-B, and 248 on a State of Florida map). The lease payment on lease 248 remained at \$19,985.92. See Settlement Agreement, *supra* note 45, at 6.

to the State 1.2 million acres of offshore land and retained 2.4 million acres with either a royalty interest or with full rights.⁵⁷

In 1988, the Florida Legislature passed a law that requires an entity drilling for oil to provide a deposit, bond, or surety which satisfies statutory safety and environmental performance provisions.⁵⁸ In the alternative, the applicant may chose to pay an annual fee to the Minerals Trust Fund, at a rate of \$4,000 per year per well for the first year and \$1,500 per well for each subsequent year.⁵⁹ In addition, regardless of the number of permits a lessee possesses or has applied for, the lessee will be required to contribute no more than \$30,000 per year to the fund.⁶⁰

Apparently dissatisfied with the coverage afforded by that statute, in 1997, the Florida Legislature passed a new law that empowers the government to require greater assurances from an applicant seeking to drill.⁶¹ The amount of surety will now be based on the projected clean-up amount and natural resources damages resulting from a potential spill, and the Administrative Commission (essentially the Governor and cabinet) are the permitting authority to set the bond.⁶² This recent development is a victory for opponents of offshore oil drilling, but no one can be sure to what degree until the Commission acts and a court reviews this new legislation.⁶³

57. See *Florida is Sued*, *supra* note 2, at 4.

58. See FLA. STAT. § 377.2425(1)(a) (1995).

59. See *id.* § 377.2425(1)(b). These rates have been adjusted to reflect inflation. See *id.* § 377.2425(1)(b)(4) (allowing for a cost of inflation adjustment). They now stand at approximately \$4,802 and \$1,801. See Telephone Interview with Bruce M. Deterding, DEP Analyst, Tallahassee, Fla. (Oct. 24, 1996) [hereinafter Deterding Interview].

60. See FLA. STAT. § 377.2425(1)(b)(3) (1995).

61. Act effective May 7, 1997, ch. 97-49, 1997 Fla. Laws 286 (to be codified at FLA. STAT. § 377.242(1)(a) (1995)). Deterding opines that the new law will give DEP greater leverage in requiring a surety that is commensurate with the potential damage a driller could cause. See Deterding Interview, *supra* note 59.

62. See Act effective May 7, 1997, ch. 97-49, 1997 Fla. Laws 286 (to be codified at FLA. STAT. § 377.242(1)(a) (1995)).

63. See Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (June 16, 1997) [hereinafter Dean Interview].

In 1990, Florida passed a sweeping ban on offshore oil drilling.⁶⁴ The ban prohibited any structures designed to drill oil in Florida's state waters in the Gulf of Mexico.⁶⁵ The legislation provided an exception for Coastal, the only company grandfathered in under this statute.⁶⁶

IV. COASTAL PETROLEUM THE COMPANY

While Coastal calls itself an oil drilling company, its only assets are the drilling leases.⁶⁷ Coastal owns no boats or drilling equipment.⁶⁸ From 1941 to 1990, Coastal paid \$2.3 million in lease rentals.⁶⁹ During the fifty-five years of the company's existence and after \$10 million dollars in legal fees,⁷⁰ all of Coastal's exploratory wells have come up dry.⁷¹ Coastal has operated at a loss since 1953 and had a deficit of around \$22.8 million in 1996.⁷² In 1994, Coastal reported to the United States Securities and Exchange Commission (SEC) that "its primary source of income for decades, issuing new stock, was no longer a good option. Few investors would be interested in a company on such shaky ground."⁷³ In March of 1995, Coastal filed a statement with the SEC stating that if no sales were made or if the litigation in Florida was not resolved soon in Coastal's favor, the company would likely

64. See Act effective Aug. 1, 1990, ch. 90-72, 1990 Fla. Laws 187 (codified at FLA. STAT. § 377.242(1)(a) (1995)).

65. See FLA. STAT. § 377.242(1)(a)(1)-(4) (1995).

66. See *id.* § 377.242(1)(b) (stating that the ban does not apply to permitting or construction of structures intended for the drilling or for the production of oil pursuant to an oil lease); see also Letter from Carliane D. Johnson, Governmental Analyst, OPB Environmental Policy Unit, to Leigh Braslow (Nov. 6, 1996) (on file with author).

67. See David Olinger, *State Says Company is Drilling for Dollars*, ST. PETE. TIMES, Aug. 20, 1996, at 1B.

68. See *id.*

69. See Tom Stewart-Gordon, *Company Set to Abandon its Efforts to Drill Offshore Florida*, OIL DAILY, Aug. 6, 1990, at 7.

70. See Gady Epstein, *Investors Gamble on Fla. Oil*, TAMPA TRIB., Aug. 25, 1996, at Nation 1.

71. See Phil Willon, *Lykes Keeps Oil Company in Business*, TAMPA TRIB., Dec. 7, 1995, at Metro 1.

72. See Poynter, *supra* note 1, at 8A.

73. Phil Willon, *Lykes Fuels Coastal Bid to Drill Offshore Oil Rig*, TAMPA TRIB., July 24, 1995, at Metro 1.

“have insufficient funds to continue operations after 1995.”⁷⁴ However, recently Coastal has begun to win its battles in Florida courtrooms.

In 1992, the Lykes Company of Florida invested a large amount of money in Coastal.⁷⁵ Commenting on the investment, Florida Attorney General, Bob Butterworth stated, “Lykes sees dollars Coastal is not a drilling company. Coastal is a lottery,”⁷⁶ implying that Lykes involved itself with Coastal because it foresees a potentially large settlement from the State for the return of Coastal’s leases. However, Lykes may have a bona fide interest in oil drilling because Lykes required at least half of the invested money to be used for aggressive oil and gas exploration.⁷⁷

Coastal Caribbean Oils & Minerals owns 67.5% of Coastal.⁷⁸ The Lykes family owns 7.8 million shares, about 23% of Coastal.⁷⁹ Philadelphia investor Leon Gross owns 3.2 million shares, about 10% of the company.⁸⁰ According to SEC records, the company has about \$6 million in cash, which was raised earlier this year when the company released 6.7 million shares of stock for sale at \$1 each.⁸¹ Because the company makes no money from oil, Coastal’s financial health depends upon its 14,000 investors who have purchased 33 million shares.⁸²

V. LITIGATION BETWEEN COASTAL PETROLEUM AND THE STATE OF FLORIDA IN THE 1990S

A. *The Near Shore Royalty Rights and the 1990 Drilling Ban*

74. Willon, *supra* note 37, at Metro 1.

75. *See id.*

76. Willon, *supra* note 71, at Metro 1.

77. *See Lykes Bros. Co. Pushes Oil-Well Drilling*, LAKELAND LEDGER PUBLISHING CORP., July 25, 1995, at 3B.

78. *See Barry Meier, A Florida Company Does Little But Sue, But It has Prospects*, WALL ST. J., Aug. 26, 1986.

79. *See Poynter, supra* note 1, at 8A.

80. *See Epstein, supra* note 70, at Nation 1.

81. *See Poynter, supra* note 1, at 8A.

82. *See id.* One enthusiastic investor who owns 4% of the company remarked that maintaining the existence of the company was “almost like a religion with me.” Meier, *supra* note 78; *see also Epstein, supra* note 70, at Nation 1.

After the signing of a Settlement Agreement in 1976, fourteen years passed in which no company, including Coastal, drilled for oil.⁸³ In 1990, when Florida banned offshore oil drilling, with the exception for Coastal's lease in the seven to ten mile strip, Coastal commenced litigation claiming that the ban constituted a taking of Coastal's royalty interest of 6.25% in profits in the near shore area of the leases.⁸⁴ The State agreed to suspend Coastal's yearly rental of approximately \$60,000 for all three leases until the lawsuits were resolved.⁸⁵

Estus Whitfield, director of the governor's environmental office in 1990, stated, "It has never been my understanding that an oil and gas lease guarantees the right to drill," thereby implying that no taking could exist where profits were so uncertain.⁸⁶ Coastal has rejected that contention as "hard to accept" because Coastal's leases require the company to regularly drill a specified number of holes.⁸⁷

In a circuit court decision, Judge Padovano held that the Settlement Agreement, which established the amount of the royalty decision, "was silent as to whether the Trustees have a duty to cooperate with prospective lessees or whether the State may simply prohibit leasing, permitting, and drilling in the royalty areas."⁸⁸ Although Coastal claimed the royalty area had oil prospects at the time of the Settlement Agreement, Judge Padovano ruled to the contrary, noting that twenty-one of twenty-two wells drilled had come up dry;⁸⁹ Coastal spent \$16 million on the leases before 1968

83. See Poynter, *supra* note 1, at 8A.

84. See *id.* As explained above, the ban had an exception for entities who had a valid oil lease in effect before the 1990 act. See FLA. STAT. § 377.242(1)(b)(1995). Coastal was the only company with such a lease. However, in the Settlement Agreement, Coastal surrendered its lease rights to the near shore area and maintained only a royalty interest. Because the exception in the ban was for the leases in the near shore area, not royalty interests, where Coastal possessed the right to royalties if the oil was discovered, Coastal's interest went from a potential 6% to zero. See Settlement Agreement, *supra* note 45, at 6.

85. See Willon, *supra* note 73, at Metro 1.

86. Stewart-Gordon, *supra* note 69.

87. *Id.*

88. Coastal Petroleum Co. v. Chiles, No. 90-3195 (Fla. 4th Cir. Ct. 1996) (on file with the Office of the Att'y General, Tallahassee, Fla.).

89. See *id.* Coastal struck oil on one occasion in 1954. The oil was found inland at 40 Mile Bend in South Florida. See Willon, *supra* note 73, at Metro 1.

with no oil ever produced; and from 1976 to the filing of the suit at bar no third party had requested a grant of any leases from the State in Coastal's royalty area.⁹⁰

The court found that the lease did not contain an implied condition that the State lease the near shore area because Coastal had not bargained for this right.⁹¹ The court also determined that the State was not bound to act as a "reasonably prudent landowner" because it also had environmental policies to further.⁹² Additionally, the court held that Coastal had given away land-use decisionmaking authority in the Settlement Agreement when it agreed that "Coastal shall have no right to intervene in any land use decisions within the areas leased other than as to the outermost three miles."⁹³ Judge Padovano held that the ban was passed to prevent ecological harm pursuant to the public trust doctrine,⁹⁴ in light of the Legislature's assertion that "future oil and gas drilling on sovereign lands in the near shore waters of the State would be detrimental and contrary to the public interest."⁹⁵ Significantly, Florida's constitutional codification of the public trust doctrine, which had long existed in state case law, occurred in 1970, six years before the Settlement Agreement.⁹⁶ Coastal has an appeal currently pending before the First District Court of Appeal,⁹⁷ where oral arguments were held on February 25, 1997.⁹⁸

B. The Battle Over a Permit to Drill Off of St. George Island

1. The Department of Environmental Protection

Aside from the dispute involving Coastal's rights in the near shore zone, Coastal is also involved in another dispute. This second

90. See *Coastal Petroleum Co. v. Chiles*, No. 90-3195 (Fla. 4th Cir. Ct. 1996) (on file with the Office of the Att'y General, Tallahassee, Fla.).

91. See *id.* at 6.

92. *Id.* at 9.

93. *Id.*

94. See *id.*

95. *Id.* at 15.

96. See discussion *infra* Part VI.B.

97. See Poynter, *supra* note 1, at 9A.

98. The author attended these oral arguments. At the time of this writing, a decision has not been rendered.

dispute takes place in the outer three-mile zone off St. George Island. Coastal has chosen this site to commence new exploratory drilling operations.⁹⁹ Florida has made two attempts to require Coastal to post a bond that would cover clean-up costs in case of an oil spill.¹⁰⁰ The first attempt sought a \$515 million insurance bond to cover clean-up costs as well as potential harm to Florida's \$31 billion tourism industry.¹⁰¹

DEP may require certain conditions precedent before issuing a drilling permit to Coastal. Section 377.2425, *Florida Statutes*, states that prior "to granting a permit . . . the department shall require the applicant or operator to provide surety that these operations will be conducted in a safe and environmentally compatible manner."¹⁰² An applicant can choose to provide a bond that satisfies environmental provisions of the statute or pay into the Minerals Trust Fund at a rate of \$4,000 per well for the first year and \$1,500 per well for each subsequent year.¹⁰³ A surety guarantees that a company has the money to clean up a spill if it occurs, so Florida taxpayers will not have to pay the bill.

In 1995, DEP told Coastal it would not be granted a permit to drill off St. George Island unless Coastal posted a \$515 million security, an amount based upon estimated clean-up costs in the event of a spill.¹⁰⁴ Coastal was unsuccessful in its endeavor to raise that amount, and DEP denied the permit.¹⁰⁵ The First District Court of Appeal held that DEP had exceeded its statutory authority when it required the \$515 million security, stating, "Nothing in section 377.2425 suggests that the department can require additional security when an applicant has paid into the fund."¹⁰⁶ Coastal had already elected to join the Minerals Trust Fund with the annual payment of \$4,000 specified in that

99. See Jim Ash, *Bill Will Require Oil Drillers to Post Bond*, FLA. TODAY, May 29, 1997, at 5B.

100. See *Reckless Assault*, *supra* note 24, at Nation 14.

101. See *id.*

102. FLA. STAT. § 377.2425 (1995).

103. See *id.* § 377.2425(1) (b).

104. See *Coastal Petroleum Co. v. Department of Env'tl. Protection*, 649 So. 2d 930 (Fla. 1st DCA 1995).

105. See *id.*

106. *Id.*

section.¹⁰⁷ The Florida Supreme Court denied certiorari on the matter.¹⁰⁸

107. *See id.* at 931.

108. *See* Department of Env'tl. Protection v. Coastal Petroleum Co., 660 So. 2d 712 (Fla. 1995).

2. Governor Chiles and the Cabinet and the Trustees

When the First District Court of Appeal rejected DEP's attempt to require the \$515 million bond, Governor Chiles and the Trustees tried to require a \$1.9 billion bond under the authority of section 253.571, *Florida Statutes*, which empowers the Trustees to require proof of financial responsibility of a developer prior to mining on public trust land.¹⁰⁹ Coastal claimed that the bond was an unconstitutional retroactive application of a statute to a preexisting lease.¹¹⁰ Because the lease was executed in the 1940s and the Florida Legislature did not enact the statute until 1969, the First District Court of Appeal agreed.¹¹¹

The court said that in the 1976 Settlement Agreement, Coastal agreed to satisfy the requirements of all environmental permitting agencies. Because the Trustees are not a "permitting agency," they could not impose a bond under this banner.¹¹² The Settlement Agreement also had a clause that waived the State's right to assert drilling requirements not specified in chapter 20680, 1941 Laws of Florida.¹¹³ That clause would exclude the authority conferred by section 253.571.¹¹⁴ In addition, the court stated that since the State had other remedies at its disposal, intrusion upon this contract was not warranted.¹¹⁵ The State's remedies were that Coastal could and did contribute to the Minerals Trust Fund and that Coastal's contract requires Coastal to assume responsibility for all damage it causes.¹¹⁶ The court did not address the adequacy of a \$4,000 (or \$1,500 for subsequent years) contribution per well nor the fact that Coastal may well be judgment-proof, since a judgment against Coastal may prove worthless if Coastal has no assets with which to pay. The Florida Supreme Court again refused certiorari.¹¹⁷

109. See FLA. STAT. § 253.571 (1995); *Coastal Petroleum Co. v. Chiles*, 672 So. 2d 571, 572 (Fla. 1st DCA 1996).

110. See *Coastal Petroleum*, 672 So. 2d at 572.

111. See *id.* at 573.

112. *Id.* at 573-72 (citing Settlement Agreement, *supra* note 45, at 6).

113. See *id.* at 573 (citing Settlement Agreement, *supra* note 45, at 5).

114. See *id.* at 573-74.

115. See *id.* at 573.

116. See *id.*

117. See *Chiles v. Coastal Petroleum Co.*, 678 So. 2d 1287 (Fla. 1996).

3. Must DEP Now Issue the Permit?

After losing its bid to require Coastal to post the \$515 million bond, DEP had no other alternative but to issue the permit for the site off the coast of St. George Island. Before DEP issues a permit, the *Florida Administrative Code* requires that Coastal publish for the public's benefit DEP's "notice of intent" to issue the permit.¹¹⁸ This notice gives interested parties and environmental groups an opportunity to initiate an administrative hearing before the Division of Administrative Hearings (DOAH).¹¹⁹

Coastal asked the First District Court of Appeal to order DEP to issue the final permit immediately because the public was noticed and had already had an opportunity to intervene concerning the issuance of this permit.¹²⁰ The State argued that not all people having an interest in the *denial* of the permit were in the group of people having an interest in the *granting* of the permit.¹²¹ The State further contended that without a second hearing, certain interested members of the public would be denied their opportunity to speak about the permit, through no fault of their own.¹²² Coastal objected, arguing this was a stalling tactic, as these hearings could take two years to conclude.¹²³ In February of 1997, the First District Court of Appeal granted environmental groups the opportunity to protest Coastal's oil drilling plans at DOAH.¹²⁴

118. FLA. ADMIN. CODE ANN. r. 62-103.150 (1996); see also *Court Orders Florida to Explain its Policy*, OIL DAILY, Sept. 16, 1996; Dean Interview, *supra* note 13.

119. See FLA. ADMIN. CODE ANN. r. 62-103.150 (1996).

120. See *Coastal Petroleum Co. v. Department of Env'tl. Regulation*, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); see also Dean Interview, *supra* note 63.

121. See *Coastal Petroleum Co. v. Department of Env'tl. Regulation*, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); see also Dean Interview, *supra* note 63.

122. See *Coastal Petroleum Co. v. Department of Env'tl. Regulation*, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); see also Dean Interview, *supra* note 63.

123. See *Across the Nation Florida: Enviro's Challenge Coastal's Oil Drilling Plans*, AM. POL. NETWORK GREENWIRE, Sept. 6, 1996, at 16.

124. See *Coastal Petroleum Co. v. Department of Env'tl. Regulation*, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); see also Chris Poynter, *Court Rules that Public Can Fight Coastal Drilling Plan*, TALL. DEM., Feb. 12, 1997, at B1.

In the administrative hearing, DEP must defend its decision before an administrative officer. The administrative officer will make a recommendation and will forward it to DEP, which may accept or reject it. Coastal may then appeal the DEP order to the First District Court of Appeal.¹²⁵ With the passage of the new law giving the Administrative Commission authority to impose a bond on Coastal's activity,¹²⁶ DEP has asked DOAH to relinquish jurisdiction of the citizen hearing, which is scheduled for September 1997.¹²⁷ DOAH is considering that motion currently.¹²⁸

4. *Administrative Challenges by Interested Environmental Groups*

Sierra Club and the Florida Audubon Society filed a petition with DOAH on August 20, 1996, requesting a formal administrative hearing on the permit.¹²⁹ Their petition contends that section 377.241, *Florida Statutes*, requires that the permit be denied because:

the ocean environment is extremely sensitive to potential adverse effects of oil drilling; Coastal has had the lease for almost fifty years without producing any oil gas or minerals; Coastal ceased bona fide exploratory activities over 20 years ago; and there is only an extremely remote possibility of finding oil or gas in commercially recoverable quantities.¹³⁰

The permitting agency is required to take into account the nature of the area surrounding the site of the proposed drilling; the character of the mineral ownership interest of the applicant, including the length of time the applicant has held such rights without performing any exploratory operations; and the likelihood of the

125. See *DEP Still Obligated to Issue Oil-Drilling Permit But Coastal Petroleum Must Give Public Notice*, FRANKLIN CHRON., Feb. 21, 1997, at A1. "There are three additional permits [Coastal] must have before any drilling can take place, and these permit applications are also subject to notice provisions, and possible challenge." *Id.*

126. See notes 61-63 and accompanying text.

127. See Dean Interview, *supra* note 63.

128. See *id.*

129. See Christine Younger, *Florida Environmentalists Challenge Coastal Petroleum Oil Drilling Permit*, WEST'S LEGAL NEWS, Sept. 5, 1996, at 9237.

130. *Id.* (citing a petition filed with DEP on August 30, 1996 by the Florida Wildlife Federation, Florida Chapter of the Sierra Club, and the Florida Audubon Society asserting the sensitive nature of the St. George Island beach).

presence of oil, gas or minerals in large enough quantities to be commercially recoverable before issuing a permit.¹³¹ This statutory requirement may present a formidable obstacle for Coastal, considering that it possessed its drilling rights for over fifty years, has sunk approximately twenty wells, has produced no oil, and wants to drill off a pristine coastline.¹³²

At the time of this writing, Coastal and the Attorney General are awaiting an opinion from the First District Court of Appeal as to whether Judge Padovano¹³³ correctly ruled that the ban on offshore oil drilling was not a taking of Coastal's royalty interest in the near shore area. The court heard oral argument on this question on February 25, 1997.¹³⁴ That same day, Coastal filed an application for twenty-two new drilling permits in the outer three-mile zone.¹³⁵ Now that the First District Court of Appeal has rejected Coastal's attempt to force DEP's issuance of the drilling permit without first publishing notice to the public and allowing an opportunity for an administrative hearing,¹³⁶ the Sierra Club and Florida Wildlife Federation's administrative petition to commence a hearing will go forward, unless DOAH accedes to DEP's motion to relinquish jurisdiction.¹³⁷

If the environmental groups' administrative challenges fail, Coastal can begin drilling barring two events. DEP could refuse to issue a permit. A question exists as to whether DEP could still refuse to issue the permit once Coastal has satisfied all statutory and administrative requirements. In other words, does Coastal have a legally protected right to a drilling permit?¹³⁸ Additionally,

131. See FLA. STAT. § 377.241 (1995).

132. See discussion *supra* Part III.

133. Since deciding this case at the trial level, Judge Padovano was appointed to the First District Court of Appeal of Florida, the same court in which the appeal is being heard.

134. The author personally attended these oral arguments.

135. See Telephone Interview with Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Feb. 28, 1997) [hereinafter Dean Interview].

136. See *Coastal Petroleum Co. v. Department of Env'tl. Regulation*, No. 96-3226 (Fla. 1st DCA Feb. 10, 1997) (petition review of non-final order from August 1996); Poynter, *supra* note 1, at 8A.

137. See discussion *supra* Part V.B.3.

138. However, Dean has stated that DEP affirmatively intends to issue the permit once Coastal satisfies the requirements for the administrative hearing. See Interview with

the Governor and the Trustees could revoke the leases under the State's public trust doctrine in Article X of Florida's Constitution.¹³⁹ If this happens, Coastal would likely file suit seeking payment from Florida taxpayers for the value, albeit speculative, of the leases. Thus, the question becomes: Does the public trust doctrine exempt the State from paying for the value of the property interest it has taken?¹⁴⁰

VI. LEGAL ANALYSIS

With the background of the Coastal litigation laid, this Comment turns its focus to evaluating the potential legal arguments of Coastal and the State of Florida. The coming section will analyze the likelihood of Coastal and the State's success based on a variety of legal theories, including the Submerged Lands Act of 1953, public trust doctrine, vested rights, takings, and substantive due process. The Submerged Lands Act and public trust doctrine arguments pertain to both of Coastal's fights: protection of all its near shore royalty rights and obtaining a permit to drill off St. George Island. The vested rights, takings, and substantive due process arguments are targeted specifically at the St. George permitting controversy.

A. *Submerged Lands Act of 1953*

In 1845, the Supreme Court stated that title to submerged lands in navigable waters belongs to the states.¹⁴¹ It was generally presumed that these lands included offshore submerged lands. In 1897, California became the first state to successfully drill for oil

Denis Dean, Ass't Att'y General, Tallahassee, Fla. (Jan. 27, 1997) [hereinafter Dean Interview].

139. See FLA. CONST. art. X; Dean Interview, *supra* note 138; see also discussion *infra* Part VI.B (providing a comprehensive analysis of the public trust doctrine).

140. The third outcome could be that the Administrative Commission could set a bond so high that Coastal would not be able to raise adequate funds to pay. In that case, Coastal would not be entitled to a permit due to its failure to post the requisite bond. However, since section 377.242, *Florida Statutes* was just passed, its impact on Coastal remains speculative. See discussion *supra* Part III (describing the new law).

141. See *Pollard v. Hagan*, 44 U.S. 212, 230 (1845).

offshore.¹⁴² It was not until 1937 that the United States Department of the Interior “suddenly changed its position concerning the states’ title to the territorial sea.”¹⁴³ In 1947, the Supreme Court affirmed the Department’s change in policy in a California case when it held California had no ownership rights in the three-mile territorial sea.¹⁴⁴ Although the case applied only to California, the language in the opinion was sufficiently broad to upset presumed rights of all coastal states in the three-mile territorial sea.¹⁴⁵

In 1953, Congress resolved the dispute by passing the Submerged Lands Act which confirmed title to land beneath navigable waters, including ocean waters, to the states within their respective boundaries.¹⁴⁶ The United States tried to challenge the effect of the Act in 1960¹⁴⁷ and 1975.¹⁴⁸ The United States Supreme Court confirmed that the Act granted Florida three marine leagues seaward from its coastline into the Gulf of Mexico.¹⁴⁹ In 1976, the Supreme Court issued a consent decree again confirming that Florida is entitled to all lands, minerals, and other natural resources extending from the coastline to three marine leagues into the Gulf of Mexico and three miles into the Atlantic.¹⁵⁰

Coastal’s entire lease could be void if, due to the Supreme Court’s decision in 1947, California had no ownership rights in the three mile territorial sea. Florida similarly was without authority to lease the submerged lands in 1941.¹⁵¹ What is significant is that, arguably, Florida did not receive congressional authorization to make the 1941 agreement until 1953. Thus, arguably, Coastal

142. See Donna R. Christie, *Making Waves: Florida’s Experience with Extended Territorial Sea Jurisdiction*, 1 TERRITORIAL SEA J. 81, 87 (1990).

143. *Id.*

144. See *United States v. California*, 332 U.S. 19, 22 (1947).

145. See Christie, *supra* note 142, at 87-88.

146. See 43 U.S.C. §§ 1301-1315 (1986 & Supp. 1997).

147. See *United States v. Louisiana*, 363 U.S. 1 (1960).

148. See *United States v. Louisiana*, 420 U.S. 515 (1975).

149. See *United States v. Florida*, 363 U.S. 121, 127 (1960). A marine league is three nautical or geographical miles. A nautical or geographical mile is 6,080 feet. A land mile is 5,280 feet. See BLACK’S LAW DICTIONARY 667, 685 (6th ed. 1991).

150. See *United States v. Florida*, 425 U.S. 791, 791-92 (1976).

151. See *United States v. California*, 332 U.S. 19, 22 (1947).

would have received nothing because the state as grantor did not in fact own the property at the time of the conveyance. If Coastal did not receive any rights in the 1940s, it has no case today.

Coastal may have an estoppel-by-deed argument to defeat this contention. In the *Coastal Petroleum Co. v. American Cyanamid Co.*,¹⁵² the Florida Supreme Court found that the Trustees were not estopped from claiming legal title to sovereignty lands encompassed within previously conveyed deeds.¹⁵³ The Florida Supreme Court allowed the State to repudiate the deed because the deed “does not show that the Trustees *intended* to convey *sovereignty* lands” along with the *swamp and overflowed* lands that the State did clearly intend to convey.¹⁵⁴ The State survived the estoppel-by-deed argument in *Cyanamid* because its intent to convey sovereignty lands along with the swamp and overflowed lands was unclear. The State would have patent difficulty making the same argument in a case against Coastal because Coastal’s leases clearly demonstrate the Trustees’ intent to convey rights in the subject sovereignty lands.¹⁵⁵ Thus, Coastal would have an excellent estoppel-by-deed argument because Coastal can show reliance and the State’s clear intent to lease the interest at issue.

B. Public Trust Doctrine

An analysis of the State of Florida’s conveyance to Coastal of these leases under the public trust doctrine must begin with consideration of the leading case on the public trust doctrine, *Illinois Central Railroad Co. v. Illinois*.¹⁵⁶ Illinois granted a railroad title to virtually all of the submerged land in Chicago harbor.¹⁵⁷ The grant was a fee in perpetuity, just as Coastal’s leases were in perpetuity prior to the Settlement Agreement.¹⁵⁸ In *Illinois Central*, the United States Supreme Court said that the conveyance of a mere 1,000 acres of submerged land was a “gross perversion of the trust over

152. 492 So. 2d 339 (Fla. 1986).

153. *See id.* at 343.

154. *Id.* (emphasis added).

155. *See* 1941 Drilling Lease, *supra* note 34.

156. 146 U.S. 387 (1892).

157. *See id.* at 450-51.

158. *See id.* at 448.

the property.”¹⁵⁹ By contrast, Coastal’s leases embraced 3.6 million acres of submerged lands.¹⁶⁰ The court stated that while the State may grant parcels of land, “the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake” is not permitted.¹⁶¹ Likewise if a state purports to make a grant that is offensive to the public trust doctrine, the grant is always revocable, if not void, at any time in the future.¹⁶² This is because the state “can no more abdicate its trust over property . . . like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of peace.”¹⁶³ The Supreme Court said that the people’s interest in public trust lands could not be dependent upon the choices of past legislatures:

The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands . . . was inoperative.¹⁶⁴

The Florida Supreme Court considers it an “uncontroverted legal proposition” that “Florida received title to all lands beneath navigable waters, up to the ordinary high water mark, as an incident of sovereignty, when it became a state in 1845.”¹⁶⁵ All navigable waters and submerged lands under navigable waters are held by the sovereign for the benefit of the people.¹⁶⁶ This principle was codified in Florida’s Constitution: “The title to lands under navigable waters . . . is held by the state, by virtue of its sovereignty, in trust for all the people . . . Private use of portions of

159. *Id.* at 455.

160. See note 2 and accompanying text.

161. *Illinois Central*, 146 U.S. at 452-53.

162. See *id.* at 455.

163. *Id.* at 453.

164. *Id.* at 460.

165. *Coastal Petroleum v. American Cyanamid Co.*, 492 So. 2d 339, 342 (Fla. 1986).

166. See *Merrill-Stevens Co. v. Durkee*, 57 So. 428, 431 (Fla. 1912).

such lands may be authorized by law, but only when not contrary to the public interest.”¹⁶⁷

While further analysis would be required to establish the legal navigability of the inland waterways conveyed in Coastal’s leases, the 425-mile strip reaching 10.36 miles out into the Gulf of Mexico is unquestionably sovereign submerged land held in the public trust.¹⁶⁸ From time immemorial, the Gulf has been used for all traditional public trust uses: commerce, navigation, and fishing.¹⁶⁹ An analysis of Coastal’s leases under *Illinois Central* suggests that Florida’s conveyance of drilling rights violated the public trust doctrine at its inception. A challenge could be mounted against the 1944 lease on the grounds that 3.6 million acres is not a parcel of land under any reasonable definition. A grant that is offensive to the public trust doctrine is always revocable, if not void.¹⁷⁰ However, revocation is not barred simply because the lease has been in existence for fifty years since “[a]ny grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time.”¹⁷¹ When the Florida Legislature passed the ban against offshore drilling in 1990, it was giving expression to the tenet that “[e]very legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.”¹⁷² In *Coastal Petroleum Co. v. Secretary of the Army*,¹⁷³ Judge Atkins specifically held that application of the public trust doctrine limited Coastal’s leases.¹⁷⁴

The Supreme Court seemingly retreated from *Illinois Central* in 1926 when it decided *Appleby v. City of New York*,¹⁷⁵ holding that New York effectively conveyed the *jus publicum* as well as the *jus*

167. FLA. CONST. art. X, § 11.

168. See *Illinois Central*, 146 U.S. at 455.

169. See *White v. Hughes*, 190 So. 446, 448 (Fla. 1939).

170. See *Illinois Central*, 146 U.S. at 455.

171. *Id.*

172. *Id.* at 460.

173. No. 68-951-Civ.-CA & 69-699-Civ.-CA (consolidated) (S.D. Fla. Jan. 6, 1976).

174. See *id.*

175. 271 U.S. 364 (1926).

*privatum*¹⁷⁶ in several blocks of land under navigable water.¹⁷⁷ *Appleby* did not overrule *Illinois Central* but merely distinguished it.¹⁷⁸ The difference between these two cases lies in the courts' differing perceptions of what the state legislature has determined to be in the public interest and by the fact that *Appleby*, unlike *Illinois Central*, concerned a small conveyance of property.¹⁷⁹

Illinois Central seems to establish that Florida's Legislature would have the authority to revoke Coastal's leases under the state's public trust doctrine.¹⁸⁰ The question remains whether compensation would nevertheless be due to Coastal. One court has ruled that in Florida the revocation of a permit does not constitute a taking of property requiring compensation because a permit to perform activities on public land is always subject to the public trust doctrine.¹⁸¹ A permit does not create a vested right until the permit holder detrimentally relies on the permit.¹⁸² By contrast, the holder of a lease acquires rights that vest at the time of conveyance.¹⁸³ It is not known whether this distinction between a permit and a lease would cause a court to reach a different conclusion as to whether no compensation is due when a taking occurs pursuant to the public trust doctrine.

The public trust argument thus far has relied on the notion that Coastal's leases were void at their inception because the doctrine

176. Originally, in English law, *jus privatum* meant that the sovereign held title over lands, while *jus publicum* vested dominion over the lands in the crown as a trust for the benefit of the public. See DONNA R. CHRISTIE, COASTAL AND OCEAN MANAGEMENT LAW 19 (1994).

177. See *Appleby*, 271 U.S. at 399.

178. See *id.* at 395.

179. See *id.* at 393-94.

180. See notes 170-172 and accompanying text.

181. See *Marine One, Inc. v. Manatee County*, 898 F.2d 1490, 1492 (11th Cir. 1990) ("Although no Florida cases have been cited where a permit to perform activities on public land was revoked, it is clear from other Florida cases that revocation of such a permit would not constitute a taking of property. In *Graham v. Edwards*, the court stated that a permit to erect structures on sovereign submerged lands does not exempt the permit-holder from exercise of the state's proprietary powers over those lands. Those proprietary powers are founded on the 'public trust doctrine,' long a part of Florida jurisprudence" (citations omitted)).

182. See *Franklin County v. Leisure Properties, Ltd.*, 430 So. 2d 475, 479 (Fla. 1st DCA 1993); see also discussion *infra* Part VI.C.1.

183. See discussion *infra* Part VI.C.1.

prohibits a state from leasing such a large amount of sovereign land. Another argument is that the proposed use, offshore oil drilling, may violate of the public trust doctrine. In 1941, the Florida Legislature believed that attracting drillers and discovering oil would benefit the public.¹⁸⁴ However, the United States Supreme Court said in *Illinois Central* that each legislature has the authority to reexamine what uses of public lands are in the public's best interest and may repeal acts by previous legislatures if deemed necessary.¹⁸⁵ This proposition raises the question of which uses of the submerged lands off Florida's Gulf Coast fall within Florida's public trust doctrine.

As a part of the common law, the public trust doctrine has historically evolved to meet changing needs. In its original form in England, the doctrine only applied to navigable waters that were affected by the tides.¹⁸⁶ This application made sense with respect to an island country. American courts modified the doctrine to include its many navigable waterways that are not tidally influenced.¹⁸⁷ Similarly, in its traditional form, the public trust uses were primarily commerce, navigation, and fishing.¹⁸⁸ Courts in recent decades, however, are beginning to recognize preservation of the shrinking natural environment for recreation and ecological preservation as a legitimate expression of the public trust doctrine.¹⁸⁹ The California Supreme Court, for instance, has said:

There is growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds

184. See FLA. STAT. § 253.49 (1941) (repealed 1947).

185. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 460-62 (1892).

186. The public trust doctrine provides that the State, as trustee for the people, bears the responsibility of preserving and protecting submerged lands for the public to use for fishing, commerce, navigation, and more recently, recreational and ecological purposes. See BLACK'S LAW DICTIONARY 859 (6th ed. 1991).

187. See CHRISTIE, *supra* note 176, at 19-20.

188. See *id.*

189. See *id.*

and marine life, and which favorably affect the scenery and climate of the area.¹⁹⁰

Thus, two viable arguments could be made that Coastal's leases violate the public trust doctrine. The first is that the 3.6 million acre lease violated *Illinois Central's* prohibition on massive grants of public trust land; the second is that preservation of the Gulf by a ban on offshore oil drilling is an integral part of public trust doctrine that has evolved in Florida. If these arguments were to succeed, then Coastal's leases could possibly be void. Consequently, Coastal might not be entitled to any right to drill off Florida's coast or receive damages for not being able to drill.

C. Vested Rights

1. Florida Law

To successfully pursue a takings claim, Coastal must possess a development expectation recognized by state law that is reasonable enough to find a vested right interest.¹⁹¹ By virtue of the leases, does Coastal also have a vested right to a drilling permit? As stated in *Town of Largo v. Imperial Homes Corporation*,¹⁹² "[O]ne party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon" ¹⁹³ Coastal may make the equitable estoppel argument necessary to establish a vested right to a permit if: "(1) relying in good faith (2) upon some act or omission of the government (3) it has made such a substantial change in position or incurred such extensive obligations and expense that it would be highly inequitable and unjust to destroy the rights it has acquired."¹⁹⁴

190. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (stating that the public trust doctrine encompasses preserving land in its natural state); see also *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1087 (Idaho 1983) (stating that the public trust doctrine includes "varied public recreational uses in navigable waters").

191. See John J. Delaney & Emily J. Vaia, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 28, 29 (1996).

192. 309 So. 2d 571 (Fla. 2d DCA 1975).

193. *Id.* at 573.

194. *Id.* at 572-73.

A court would first have to determine whether Coastal acquired a vested interest. The vast majority of cases involve a developer asserting vested rights in a development permit for private property.¹⁹⁵ In this case, Coastal would argue that it has a vested right in a permit to develop on public, submerged land. *Marine One, Inc. v. Manatee County*¹⁹⁶ held that a landowner or developer has no property right in possession of a building permit on public land.¹⁹⁷ Furthermore, the *Marine One* court found that a county's revocation of a construction permit for a marina built on sovereign submerged lands was not a taking because the permittee did not have a property right in that permit.¹⁹⁸ Activities performed on public land are "mere licenses whose revocation cannot rise to the level of a Fifth Amendment taking."¹⁹⁹ *Marine One* has been cited with approval on several occasions.²⁰⁰ In the event that a court did not find *Marine One* controlling, Coastal would have to prove that it had a vested right to a permit under the elements of equitable estoppel outlined above.

Several indications suggest that Coastal should have reasonably expected a change in the regulations on oil drilling in Florida. DEP and Governor Chiles tried to condition drilling on the obtaining of clean-up bonds ranging from \$515 million to \$1.9 billion, respectively.²⁰¹ DEP introduced legislation in the 1997 legislative session that would give the Trustees greater leverage in requiring sureties commensurate with the potential damage an oil driller could cause.²⁰² The Sierra Club and the Florida Audubon Society filed a petition requesting a formal administrative hearing on the permit,

195. See, e.g., *Equity Resources, Inc. v. County of Leon*, 643 So. 2d 1112 (Fla. 1st DCA 1994); *Franklin County v. Leisure Properties, Ltd.*, 430 So. 2d 475, 479 (Fla. 1st DCA 1993).

196. 898 F.2d 1490 (11th Cir. 1990).

197. See *id.* at 1492-93.

198. See *id.*

199. *Id.* (emphasis added).

200. See *Corn v. City of Lauderdale Lakes*, 771 F. Supp. 1557, 1568 (S.D. Fla. 1991); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1486-87 (N.D. Fla. 1992); *Decarion v. Monroe County*, 853 F. Supp. 1415, 1418 (S.D. Fla. 1994).

201. See note 109 and accompanying text.

202. This legislation ultimately passed and went into effect in May of 1997. See notes 61-63 and accompanying text.

the granting of which, they contend, could lead to the ruin of Florida's sensitive ecosystem.²⁰³ The red flags of political resistance to Coastal's venture are evident, as Coastal's president, Phil Ware, himself acknowledged in a 1996 interview with the *Tallahassee Democrat*.²⁰⁴ Yet, according to *A.H. Sakolsky v. City of Coral Gables*,²⁰⁵ these signs of resistance will not necessarily result in a finding of bad faith reliance by Coastal. The Florida Supreme Court rejected the "red flags doctrine" and stated that even where a petitioner has good reason to believe that the "official mind might change because 'strenuous objection was present and made known, [and because a] suit was threatened and the political issue made apparent,'" a petitioner can still rely in good faith that its intended action will be permitted.²⁰⁶ The court did not believe that developers should be subject to the instabilities of a municipal body merely because its membership is subject to change.²⁰⁷

In making a vested rights determination, a court will next consider whether the government made any representations that would authorize Coastal's particular course of activity or development. As an initial matter, the law in this area is concerned with protecting private property owners from overstepping by governmental entities: "A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds."²⁰⁸ For example, while the mere purchase of land may not create a right to rely on existing zoning, a developer may legitimately rely on a rezoning when the municipality knew that the developer's purchase of the land was contingent solely upon obtaining that rezoning.²⁰⁹ Coastal will benefit from the language in the *Imperial Homes* decision which

203. See notes 129-132 and accompanying text.

204. Ware conceded, "Not everyone is real in favor of Coastal drilling." Poynter, *supra* note 1, at 9A.

205. 151 So. 2d 433, 435 (Fla. 1963).

206. *Id.* at 435.

207. See *id.*

208. *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

209. See *id.*

stated that there is no requirement that the private property owner have obtained a building permit in reliance on existing zoning to evoke equitable estoppel.²¹⁰

Coastal will likely argue that the “official act” on which it relied was the signing of the leases. Coastal would assert that this act implied that as long as Coastal followed the permitting procedures, drilling for oil could commence. Behind this argument are two competing policy considerations: (1) preserving the autonomy of governmental entities to regulate land use for the benefit of the general public; and (2) protecting a private property owner’s equitable interests. The *Imperial Homes* court discussed the tension between these two important goals:

[N]othing in this opinion should be construed as any impediment to the efforts of municipalities and other local governmental entities which exercise zoning authority from reducing the density provisions in their zoning regulations in an orderly and comprehensive manner, provided this is accomplished *in the interest of the public health, safety and welfare and in a way as not to mislead innocent parties who in good faith rely to their detriment upon the acts of their governing bodies.*²¹¹

Coastal has a strong equity argument in that the State, as grantor of the lease, not only had notice of Coastal’s intent to drill but was the key enabler of drilling activity. In *Sakolsky*, the mayor of Coral Gables suggested a site for the developer to construct a luxury apartment building.²¹² The developer obtained a permit, but the city commission later rescinded it in response to public opposition.²¹³ In that case, the developer had a permit in hand at the time of suit,²¹⁴ unlike Coastal, which does not have a permit for the St. George site. However, language in *Imperial Homes* indicates that a private property owner need not have obtained a building permit before equitable estoppel can apply.²¹⁵ Thus, the *Sakolsky* court’s decision to preclude the city commission from rescinding

210. *See id.*

211. *Id.* at 574 (emphasis added).

212. *See Sakolsky v. City of Coral Gables*, 151 So. 2d 433, 433-34 (Fla. 1963).

213. *See id.* at 434.

214. *See id.*

215. *See Imperial Homes*, 309 So. 2d at 573.

the permit on equitable estoppel grounds and its emphasis on the mayor's role in enabling construction suggest that Coastal might successfully wield this estoppel argument.

Ultimately, a court will have to decide whether the State's environmental interests can be safeguarded by a less unilateral method than denial of a permit to drill.²¹⁶ If Coastal can show that it will conduct its drilling activity in a sufficiently careful manner, a court may find that such a resolution appropriately balances the strong equitable interests of Coastal and the responsibilities of the State as guardian of Florida's natural resources.

One Florida case implies that a permit can lapse due to a developer's inaction. In *Hollywood Beach Hotel*, the Fourth District found that after receiving permission but electing not to proceed or initiate construction, the developer relinquished and forfeited its vested right in the building permit.²¹⁷ The Florida Supreme Court rejected this holding but only because "it fails to take into account the unique facts which dominate the instant case."²¹⁸ The unique facts created an adverse political climate and delays attributable to the city commissioners.²¹⁹ In Coastal's case, "from 1976 to 1990, the company was dormant except for lawsuits. But when the state moved in 1990 to ban offshore oil drilling altogether, Coastal came alive."²²⁰ In that time frame, Coastal chose not to drill, not because of political opposition, but because it could not find an oil company interested in investing in the venture so unlikely to be profitable.²²¹ If Coastal had a right to a permit, it arguably may have lapsed under *Hollywood Beach Hotel* because Coastal's business reality, not political opposition, caused the leases to lay idle.

The final factor in a court's vested rights determination involves whether Coastal, in reliance on the leases, made substantial investments or incurred extensive obligations in preparation for oil drilling. Every year since it obtained its leases, Coastal made payments

216. *See id.*

217. *See City of Hollywood v. Hollywood Beach Hotel*, 283 So. 2d 867, 870 (Fla. 4th DCA 1973), *aff'd in part, rev'd in part*, 329 So. 2d 10 (Fla. 1976).

218. *See City of Hollywood v. Hollywood Beach Hotel*, 329 So. 2d 10, 16 (Fla. 1976).

219. *See id.*

220. Poynter, *supra* note 1, at 8A.

221. *See id.*

to the State which began around \$20,000 in 1941 and reached approximately \$60,000 in the 1990s.²²² The State can argue that Coastal's right to drill vests on a yearly basis after it makes its annual payment. Coastal paid every year and enjoyed anew the freedom to exercise its rights under the leases.²²³ As a result, the State may argue that the money should not be viewed as a cumulative expenditure but as an annual expenditure for which Coastal reaped a contemporaneous benefit—a right to drill which no one else possessed.

Other than the lease payments and its legal bills, Coastal has spent no appreciable amount of money in exploration or preparation for drilling in reliance upon its right to drill; Coastal owns no drilling equipment or boats.²²⁴ Further, Coastal agreed in the 1976 Settlement Agreement that it would secure permits from all appropriate State environmental protection agencies prior to commencing any drilling or mining.²²⁵ Thus, long before Coastal sought to drill at the St. George site, Coastal knew that a permit must be obtained.

In *Equity Resources v. County of Leon*,²²⁶ the First District Court of Appeal held that where “a substantial and not de minimis portion of the overall expenditures benefited future phases of the planned project,” the developer could not be denied a permit when the local government was fully aware of the scope of the development and consistently granted permits to continue the development.²²⁷ Under *Equity Resources*, Coastal could argue that the yearly expenditures were benefiting future phases of its oil drilling project. Furthermore, the court in *Equity Resources* specifically rejected a requirement for “large scale developments that would naturally contemplate and require a number of years to

222. See Settlement Agreement, *supra* note 45, at 6; Poynter, *supra* note 1, at 8A; Dean Interview, *supra* note 13.

223. When Coastal's freedom to exercise its rights became encumbered by litigation in 1992, the State permitted Coastal to halt payments. See Dean Interview, *supra* note 13.

224. See Olinger, *supra* note 67, at 1B.

225. Settlement Agreement, *supra* note 45, at 6.

226. 643 So. 2d 1112 (Fla. 1st DCA 1994).

227. *Id.* at 1119.

complete” be developed within a “reasonable time.”²²⁸ Thus, the fact that Coastal may have taken fifty years to exercise its drilling rights at St. George may not be problematic. On the other hand, *Equity Resources* also noted that no evidence indicated that the project was ever abated or abandoned by the developer.²²⁹ In contrast, Coastal chose not to drill for twenty-eight years before the 1990 drilling ban and only became active when the ban was passed affecting the first three miles off Florida’s Gulf Coast.²³⁰

The existence of a “public peril” may be a special exception to the principle of vested rights that could allow the revocation of a vested right under certain circumstances. The Florida Supreme Court stated in dicta that a change in zoning may effectively revoke a building permit “if a municipality can show that some new peril to the health, safety, morals or general welfare of the municipality has arisen between the granting of the building permit and the subsequent change of zoning.”²³¹ However, the court stated that it had “never had the occasion to decide if the exception . . . should be established.”²³² A subsequent Third District Court of Appeal opinion relied on this exception, enunciated in *Hollywood Beach Hotel*.²³³ Therefore, an argument could be made that a peril has arisen since 1941 when Coastal’s leases were granted. That peril is a progressive attrition of Florida’s coastal environment caused by industry and Florida’s burgeoning human population.²³⁴ As noted by the Florida Supreme Court, “environmental degradation threatens not merely aesthetic concerns vital to the state’s economy but also to the health, welfare, and safety of substantial numbers of Floridians.”²³⁵ Allowing offshore oil drilling in Florida’s Gulf Coast could have the potential to push the State’s coastal environmental well-being into a state of peril.

228. *Id.*

229. *See id.*

230. *See Poynter, supra* note 1, at 8A.

231. *City of Hollywood v. Hollywood Beach Hotel Co.*, 329 So. 2d 10, 16 (Fla. 1976).

232. *Id.*

233. *See Dade County v. Rosell Constr. Corp.*, 297 So. 2d 46, 48 (Fla. 3d DCA 1974).

234. *See Department of Community Affairs v. Moorman*, 664 So. 2d 930 (Fla. 1995).

235. *Id.* at 932.

The elements of equitable estoppel necessary to show a vested right in Florida require Coastal to demonstrate its good faith reliance upon some act or omission of the government that leads Coastal to incur extensive expense such that it would be highly inequitable to destroy the rights Coastal has acquired. Due to the *Sakolsky* decision, Coastal should easily satisfy the good faith reliance prong. Even though Coastal may not have expended exorbitant sums of money, the yearly lease payments and legal bills would probably satisfy a court as to the "substantial change in position" factor. The real fight would center around whether it would be highly inequitable to destroy these rights: Should the State be held hostage to a overwhelmingly unpopular lease agreement that was signed over fifty years ago that could have a catastrophic effect on Florida's environment and tourist economy? Or should Coastal's rights and change of position be protected? The success of the vested rights argument as applied to Coastal rests upon a court's stance concerning these seminal questions.

2. Federal Law

Though having only persuasive value, a line of federal cases dealing with oil drilling in the outer continental shelf deserves mention in the discussion of Coastal's rights. Federal case law establishes that, like Florida law, vested rights are based upon notions of equitable estoppel.²³⁶ Under federal law, oil and gas leases issued by the Department of Interior traditionally have not been considered to vest a right to a permit.²³⁷ However, the Secretary of Interior does not have the discretion to refuse to issue a permit once a company holding a drilling lease fulfills all applicable statutory conditions and when the statute contains language requiring issuance of a permit upon satisfaction of statutory conditions.²³⁸

In *Union Oil Company of California v. Morton*,²³⁹ an oil company sued the Secretary of the Interior for denial of permission to construct a drilling platform in federal waters under a federal oil and gas lease.²⁴⁰ The Secretary had approved the application to install a drilling platform in 1968. In January 1969, before the platform was installed, a very serious oil blowout occurred off the coast of Santa Barbara.²⁴¹ As a result, approval of the platform was withdrawn and Union Oil sued.²⁴²

236. See *Southwestern Petroleum Corp. v. Udall*, 361 F. 2d 650, 654 (10th Cir. 1966) (finding that rights vested under "existing legislation may [not] be superseded or modified by later legislation"); *Wyoming v. United States*, 255 U.S. 489, 501 (1921) ("When all statutory requirements have been met to obtain a mineral patent from the federal government, but the patent has not yet been issued, the complying party then has a vested right referred to as 'equitable title.' Such a vested right removes from the United States the power to deprive the holder of the right to the fee title . . .").

237. See Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENVTL. L. REV. 1, 13 (1987).

238. See *id.*

239. 512 F.2d 743 (9th Cir. 1975).

240. See *id.* at 746.

241. With regard to the severity of the spill, one court reported:

On January 28, 1969, a Union Oil well on outer continental shelf lands in the Santa Barbara Channel blew out, creating an oil slick of about fifty square miles which caused severe property and environmental damage . . . [and caused] the collapse of the insurance market covering damages caused by offshore oil spills.

Pauley Petroleum Inc. v. United States, 591 F.2d 1308, 1311 (Cl. Ct. 1979).

242. See *Union Oil*, 512 F.2d at 746.

In a written statement, the Secretary detailed his reasons for withdrawing the permit. The Secretary explained that possible oil pollution would have adverse environmental consequences, and the proposed platform would increase interference with recreational and commercial fishing and would be aesthetically undesirable.²⁴³ The Ninth Circuit rejected these considerations as interests that should have been considered before the lease was granted.²⁴⁴ Nevertheless, the court stated that Union Oil was subject to reasonable restraints on its lease rights when such restraints are based upon sound environmental and/or conservation grounds.²⁴⁵

Three years later, another oil company sued the United States for denial of a permit to install an oil platform.²⁴⁶ The Court of Claims agreed that the United States had breached its lease agreement.²⁴⁷ The court said the Secretary of the Interior "cannot breach vested contractual rights under the guise of protecting the Channel environment."²⁴⁸ The court considered it critical that the environmental concerns proffered by the Secretary were "known and undoubtedly considered" when the lease was signed.²⁴⁹

This line of cases is instructive in considering Coastal Petroleum's legal position. In *Union Oil*, an oil and gas lease had been signed, and the oil company was protesting the denial of permission to construct a drilling platform,²⁵⁰ just as Coastal has been fighting the State's resistance to issue a permit to drill. According to the Ninth Circuit, as long as no newly-discovered risk associated with offshore oil drilling has developed, Coastal's lease created a right to drill that cannot be canceled simply because oil drilling has become unpopular.²⁵¹ Perhaps this approach by

243. See *id.* at 748-49.

244. See *id.* at 751.

245. See *id.* at 750-52.

246. See *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl. 1978).

247. See *id.* at 813.

248. *Id.* at 814.

249. *Id.* at 816.

250. See *id.* at 746.

251. See *Union Oil*, 512 F.2d at 751.

federal courts will sway Florida courts to be more sympathetic toward Coastal's position.

D. Fifth Amendment Takings

The government may regulate the use of property, but if a regulation goes "too far," the government must compensate the landowner for the taking²⁵² or must rescind the regulation.²⁵³ A regulation that has a *de minimis* effect on the value of property is not compensable.²⁵⁴ In deciding how far is too far in a regulatory taking, courts use an ad-hoc, fact-specific approach, looking at: (1) the economic impact of the regulation; (2) the character of the government action; and (3) the extent to which the action interferes with reasonable investment-backed expectations.²⁵⁵

The first prong examines the economic impact of the regulation and contains two subparts. The United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*²⁵⁶ held that a legitimate exercise of the police power, whether or not it is required to prevent a nuisance, will not be deemed a taking absent a complete diminution in fair market value.²⁵⁷ Accordingly, the first subpart of the first prong requires a court to examine whether a denial of a Coastal's permit to drill is a legitimate exercise of police power. In *Graham v. Estuary Properties, Inc.*,²⁵⁸ the Florida Supreme Court stated that "protection of environmentally sensitive areas and pollution prevention are legitimate concerns within police powers."²⁵⁹ However, the Second District Court of Appeal

252. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

253. *See id.*

254. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622, 625 (Fla. 1990).

255. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

256. 505 U.S. 1003 (1992).

257. *See id.* at 1031; *see also* Richard J. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard*, 8 J. LAND USE & ENVTL. L. 431, 477-78 (1993).

258. 399 So. 2d 1374 (Fla. 1981).

259. *Id.* at 1381. *Estuary Properties* may be distinguishable, however, from Coastal's facts because in *Estuary Properties* the regulation at issue did not render the developer's property worthless. *See id.* at 1381-82. In Coastal's case, this factual conclusion would rest upon whether Coastal's property is deemed to encompass only the St. George site or all 3.6 million acres. *See infra* notes 263-265 and accompanying text.

of Florida noted that as statutory and regulatory limitations affecting private property owners increase in frequency over this century, the need to compensate for socially reasonable restrictions that substantially impact private rights has also increased.²⁶⁰ One commentator has stated that the range of police power actions that would prevent a just compensation claim for a total diminution of value has narrowed, declaring that a “valid general concern will not necessarily justify a specific confiscatory action and specific factual and scientific evidence will be required.”²⁶¹ Thus, although *Estuary Properties* suggests that the State’s purpose in denying a permit would be a legitimate exercise of its police powers, the State would still have to demonstrate sufficient scientific evidence to justify its denial.

Assuming that the State succeeded in proving that its denial of Coastal’s drilling permit is a valid exercise of the police power, a court would turn to the portion of the takings analysis in which lies the crux of the entire takings question in Coastal’s case. The second subpart of the first prong requires a court to analyze whether denial of a permit would result in a complete diminution in fair market value of Coastal’s property rights.²⁶² In examining this issue, a court must decide if Coastal’s threatened property interest encompasses only the St. George site or all of the submerged land on which Coastal has lease rights.²⁶³

The Supreme Court said in *Penn Central*:

“Takings” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.²⁶⁴

Using this language from *Penn Central*, the State can argue that Coastal has not been deprived of all economic use of its property

260. See *Conner v. Reed Bros.*, 567 So. 2d 515, 519 n.7 (Fla. 2d DCA 1990).

261. Grosso, *supra* note 257, at 482.

262. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

263. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978).

264. *Id.*

because Coastal's property interest includes its entire leasehold, totaling 2.4 million acres of submerged land.²⁶⁵ Given this property interest, the State may assert that a permit denial at the St. George site affects a minuscule portion of Coastal's property interest. Coastal will likely counter that its property interest is much narrower, including only its leasehold interest at the St. George site. Thus, Coastal would assert that a denial of a permit to drill at St. George denies all economic use of its rights at St. George.

The heart of the takings analysis as applied to Coastal turns on a court's interpretation of the extent of Coastal's property interest. From Coastal's vantage point, a permit denial would be a total deprivation of economic use under *Lucas* and require compensation. Instead, a court might follow the interpretation of a recent Florida appellate decision that shows that "courts will take a practical, realistic view of the property as a whole for takings analysis."²⁶⁶ Such an approach would lead to a broader

265. See Settlement Agreement, *supra* note 45. The 2.4 million acres of submerged land constitute Coastal's net leased holdings off Florida's coast after the Settlement Agreement in 1976. See *id.*

266. Grosso, *supra* note 257, at 484. In *Department of Environmental Regulation v. Schlinder*, 604 So. 2d 565 (Fla. 2d DCA 1992), the court did not find a prohibition on filling 1.85 acres of wetlands a taking when the landowner also owned 1.65 acres of uplands which were immediately adjacent. See *id.* at 567-68.

Additionally, in *Reahard v. Lee County*, 968 F.2d 1311 (11th Cir. 1992), the court held if a substantial state interest is advanced, such as protection of wetlands, an owner is not entitled to compensation unless the landowner is deprived of all or virtually all economically viable use of the property; a showing of "substantial reduction in value" is not be sufficient to warrant compensation. In that case, a county land use plan allowed only one residence to be built on thirty-eight acre of wetlands. *Id.* at 1136. Both of these cases illustrate courts looking at the whole of the property interest affected rather than focusing on the fraction of land directly restricted.

A federal circuit court's consideration of whether a regulation constituted a taking illustrates the same approach:

[A]re there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short, has the government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?

Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994).

interpretation of Coastal's property interest and support the State's argument that Coastal's interest encompasses its entire leasehold.

The second prong of the takings analysis requires a court to analyze the character of the government action.²⁶⁷ Generally, the "more compelling the purpose of the governmental regulation, the further the regulation can go before it will be a taking."²⁶⁸ Specific factors considered by the Florida Supreme Court include: (1) whether the regulation confers a public benefit or prevents a public harm; (2) whether the regulation promotes the health, safety, welfare, or morals of the public; and (3) whether the regulation is arbitrarily and capriciously applied.²⁶⁹

In *Estuary Properties*, the Florida Supreme Court elaborated on whether the *Estuary* regulation conferred a public benefit or prevented a public harm. The court found that the regulation prevented a public harm because it prohibited the destruction of a mangrove forest necessary to avoid unreasonable pollution of the waters.²⁷⁰ In Coastal's case, the State could argue that denial of a drilling permit was necessary to avoid unreasonable pollution of the waters, thereby causing unreasonable harm to the public,²⁷¹ although a requisite evidentiary showing would be necessary to support this point. Second, the court in *Estuary Properties* also found that the regulation promoted the health, safety, welfare, or morals of the public because it protected the community from pollution which would adversely affect the local economy.²⁷² The State in the Coastal controversy could also argue that a clean natural environment is conducive to the health and safety of the public and critical to preserving Florida's tourism industry. Additionally, the Florida Supreme Court held that because the

267. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

268. See *Keystone Bituminous Coal Ass'n v. DeBenidictis*, 480 U.S. 470, 488 (1987); see also *Grosso*, *supra* note 257, at 479;

269. See *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1381 (Fla. 1981); see also *Grosso*, *supra* note 257, at 479.

270. See *Estuary Properties*, 399 So. 2d at 1381.

271. The court in *Estuary Properties* discussed the conceptual difficulty in drawing a line between prevention of a public harm and creation of a public benefit. Yet the court maintained that "it does not necessarily follow that the public is safe from harm when a benefit is created." *Id.* at 1382.

272. See *id.* at 1381.

proposed development would cause pollution affecting the county's economy, the regulation preventing that public harm was not arbitrary.²⁷³ Again, the State can make a similar pollution argument to satisfy the arbitrariness inquiry.

The third prong of the takings analysis requires a court to determine whether the regulation interferes with Coastal's distinct investment-backed expectations in its leasehold.²⁷⁴ To accomplish this task, a court must consider Coastal's expenditures of money in reliance on its leases.²⁷⁵ Then, a court must determine whether Coastal's expectation was reasonable and not subjective given the circumstances²⁷⁶ and whether the expectation was reasonable at the time Coastal formed its expectation.²⁷⁷

As to the first subpart, Coastal has spent no appreciable amount of money in exploration or preparation for drilling in reliance upon its right to drill other than the lease payments and its legal bills.²⁷⁸ As discussed earlier, Coastal owns no drilling equipment or boats.²⁷⁹ Next, a court must consider the subjectiveness of Coastal's drilling expectations.²⁸⁰ Unlike the landowner in *Estuary Properties* who had "only its own subjective expectation that the land could be developed in the manner it now proposes,"²⁸¹ Coastal did not enter into these leases with knowledge of a drilling restraint. The State and Coastal intended the leases to facilitate oil drilling in the Gulf.²⁸² Lastly, a court must determine the reasonability of Coastal's expectation at the time of the formation of that expectation.²⁸³ All parties to Coastal's perpetual lease appear to have had the expectation that the lease would lead to offshore oil drilling.²⁸⁴ Coastal paid annual rent to

273. *See id.*

274. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

275. *See id.* at 124; *Estuary Properties*, 399 So. 2d at 1381.

276. *See Estuary Properties*, 399 So. 2d at 1383.

277. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984).

278. *See Olinger*, *supra* note 67, at 1B.

279. *See id.*

280. *See Estuary Properties*, 399 So. 2d at 1383.

281. *See id.* at 1382.

282. *See discussion supra* Part III (describing the history of Coastal's leasehold).

283. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

284. *See discussion supra* Part III.

preserve its right to drill oil.²⁸⁵ Further, Coastal entered into the perpetual lease decades before the oil drilling ban.²⁸⁶

If DEP refuses to issue the drilling permit, Coastal could argue that denying the permit renders its lease rights worthless. Coastal's investment-backed expectation is further supported by the existence of a statutory right under section 377.242 (1) (b), *Florida Statutes*, which exempts Coastal's lease from the general ban on offshore oil drilling.²⁸⁷ Thus, the viability of Coastal's argument would center upon whether Coastal's property is deemed to encompass just the St. George site or all 2.4 million acres of its leasehold.²⁸⁸

While a court will find a *per se* taking and will require the state to compensate when a landowner has been denied all economically viable use,²⁸⁹ there is an exception to this rule when the use sought to be prohibited was forbidden at the time the owner took title.²⁹⁰ For example, under the nuisance exception, the State could argue that any oil drilling by Coastal would be a public nuisance. The Supreme Court said in *Lucas*, "We assuredly would permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title."²⁹¹ Thus, if a use constitutes a common law nuisance or offends some other background principle of law, a regulation can prohibit it without compensation being due.²⁹²

The Florida Supreme Court stated that a "public nuisance violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally."²⁹³ However, the Court cautioned that it "is not possible to define comprehensively 'nuisance' as each case must turn upon its facts and be

285. See note 87 and accompanying text.

286. See discussion *supra* Part III.

287. See FLA. STAT. § 377.242(1)(b) (1995); *Estuary Properties*, 399 So. 2d at 1383.

288. See note 263 and accompanying text.

289. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

290. See *id.* at 1027.

291. *Id.* at 1028-29.

292. See *id.*

293. *Orlando Sports Stadium v. State*, 262 So. 2d 881, 884 (Fla. 1972).

judicially determined.”²⁹⁴ Given the definition above, the State could argue that vast environmental damage potentially caused by oil drilling off Florida’s sensitive coast constitutes a nuisance. However, Coastal’s plan to drill for oil probably would not go so far as to violate public rights, subvert public order, decency, or morals. Arguably though, oil drilling could cause inconvenience or damage to the public generally so that a particularly environmentally-conscience court might consider an application of the nuisance doctrine to Coastal’s case.

The idea behind nuisance is that a property owner was never authorized to use his property in a manner which was proscribed at common law. Thus, because the owner took title with this inherent limitation, denial of the proposed use fails to deprive the landowner of a right previously obtained. Additionally, if a particular use has long been engaged in by similarly-situated owners, a presumption exists that the use was not prohibited at common law.²⁹⁵ Coastal’s use of its leases for oil drilling has long been enabled and authorized by Florida. Second, nuisance has its roots in equitable principles.²⁹⁶ Coastal could argue the inequity of allowing the State, through the permitting process, to now prevent drilling denies Coastal the sole right for which the State executed the leases. Further, Coastal could contend that nothing in the State’s conduct prior to the 1990 oil ban reflected the conviction that oil drilling violated the State’s understanding of its nuisance power. For these reasons, the State would probably be unsuccessful in asserting the nuisance exception enunciated in *Lucas*.

E. Substantive Due Process

If Coastal succeeds in convincing a court that it has a vested right to a drilling permit, Coastal could allege that denial of such a permit violates its substantive due process rights, which protect an individual’s right to be free from an abuse of governmental

294. *Id.*

295. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

296. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1182 (Fed. Cir. 1994).

power,²⁹⁷ including arbitrary or irrational zoning standards.²⁹⁸ To satisfy this standard, Coastal must show that the State “abused its power by acting arbitrarily and capriciously, which means that the action does not bear a substantial relation to the public health, safety, morals, or general welfare.”²⁹⁹

The State can show that denial of a permit bears a substantial relation to the public’s general welfare. In *Estuary Properties*, the Florida Supreme Court said that pollution prevention and the protection of environmentally-sensitive areas are legitimate concerns within a state’s police powers.³⁰⁰ Thus, the State could maintain that denial of a permit to drill is consistent with their legitimate concerns.³⁰¹

The State would also have to show that the denial of the permit was not arbitrary, capricious, oppressive or discriminatory.³⁰² The Florida Supreme Court has explained that “a law is not necessarily discriminatory—hence invalid—because it lacks universality of operation over the state. The test to be applied is whether the exclusion of certain territories, people or property is predicated upon a fair, property and reasonable classification premise.”³⁰³ It is true that no company but Coastal would suffer from a policy of drilling permit denials; but no other company is similarly situated to Coastal in enjoying an oil lease off Florida’s Gulf Coast. Second, a denial of a permit to drill at St. George might not be considered oppressive since Coastal has millions of other acres for which it may seek a permit to drill.³⁰⁴ Third, Coastal would not be oppressed as a result of a permit denial if, as many contend, no

297. See *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 n.13 (11th Cir. 1989).

298. See *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981).

299. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1374 (11th Cir. 1993).

300. See *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1381 (Fla. 1981).

301. In *Department of Community Affairs v. Moorman*, 644 So.2d 930 (Fla. 1990), the Florida Supreme Court said that a regulation which regulated the height of fences in order to protect a threatened population of deer had a rational relationship with state environmental policy. See *id.* at 933.

302. See *Village of North Palm Beach v. Mason*, 167 So. 2d 721, 727 (Fla. 1964).

303. *Id.*

304. See 1944 Drilling Lease, *supra* note 2, at 13; see also discussion *supra* Part I (describing the size of Coastal’s leasehold).

commercially useful quantities of oil lie beneath Florida's Gulf Coast.³⁰⁵ However, the State will have to convince a court that denial of the permit is necessary to achieve its environmental protection goals. If there are alternative means to reasonably ensure the ecological well-being of the Gulf Coast, then denial of the permit may be a case of regulatory overkill and a violation of Coastal's substantive due process rights.³⁰⁶

VII. CONCLUSION

As the public trust doctrine evolves, it has come to include the responsibility of the State to manage public trust lands in a way that guarantees preservation of and the public's recreational access to diminishing natural resources. Under *Illinois Central*, Coastal's leases appear to violate the public trust doctrine due to the leases' indiscriminate size. Thus, *Illinois Central* seems to authorize the Florida Legislature's revocation of those leases today for a violation over fifty years ago.³⁰⁷ While takings are compensable under the Fifth Amendment, courts have yet to fully address whether the same principles would apply when the revocation is effected under the public trust doctrine. As a matter of basic fairness, it is difficult to explain why Coastal should not be entitled to some compensation if its contract is revoked pursuant to this doctrine.

The *Marine One* decision suggests that in Florida a property owner does not have a vested right to a building permit on public land.³⁰⁸ However, under Florida's equitable estoppel test, it would appear that Coastal has in good faith detrimentally relied upon the government's issuance of the leases and thus has a vested right to a drilling permit. The troubling part of this equity argument, which is based upon notions of fairness is that Coastal may end up the party who unfairly benefits. The State did not wait until Coastal had the drilling bit poised over a gold mine to intervene. Coastal

305. See discussion *supra* Part II.

306. See *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981) (stating that individuals have a right to be free from arbitrary or irrational zoning standards if other options are available).

307. See discussion *supra* Part VI.B.

308. See discussion *supra* Part VI.C.1.

was a dormant oil company.³⁰⁹ No company had petitioned the State or Coastal to drill in Florida's Gulf Coast for decades because of the prevalent belief that there is no oil in Florida's Gulf Coast. In a sense, Coastal is holding the State hostage to a moribund contract in which Coastal had no evident interest for twenty-eight years. Coastal's leases are not prospective for oil; they are prospective for a legal settlement. To allow Coastal to prevail in this matter by utilizing notions of equity would be a cruel irony on Florida's citizens.

The State may succeed using the takings argument depending upon the denominator a court employs when measuring how much of Coastal's property has been taken compared to the whole of its rights.³¹⁰ Otherwise, prohibiting Coastal from drilling off St. George Island, or anywhere in the outer three mile zone, will completely deprive Coastal of its investment backed expectations. Even in a takings suit, however, the State might ultimately prevail on the damages question because the value of the leases is highly speculative, and most Florida juries would not be sympathetic to Coastal's business venture.

The substantive due process argument will also be a difficult challenge for the State to defend against.³¹¹ A court may be persuaded that denial of a permit is not arbitrary and discriminatory, even though it only affects Coastal because there are no similarly-situated property owners. A court may be persuaded that denial of a permit is not oppressive depending again upon the denominator a court employs when measuring how much of Coastal's property has been taken. If only a small part of Coastal rights are deemed frustrated by denial of a permit, such a denial may not rise to the level of oppression. Finally, denial of a permit would not be oppressive if a court was persuaded no oil existed at the drill site.

As a native of Florida's gulf coast beaches, this author considers protection of the coastal environment to be of paramount importance. For better or for worse, a court of law often becomes a venue far removed from the people and places whose interests are

309. See discussion *supra* Part VI.C.1.

310. See discussion *supra* Part VI.D.

311. See discussion *supra* Part VI.E.

there litigated, and the reality of what is at stake becomes a mere abstract.

On balance, Coastal probably has the stronger case. The State of Florida signed a contract it never should have signed. Now, the State should probably pay whatever a jury determines is the contract's worth. In a law review article such as this, there is little room in which to moralize. So, perhaps, it will be enough to say generally that, notwithstanding superior legal arguments, entrepreneurs such as this company who are content to put their financial gain ahead of the long term well being of Florida's rare and exquisite natural resources should be considered *personas non grata* in this state.