STOP THE BEACH RENOURISHMENT STOPS PRIVATE BEACHOWNERS' RIGHT TO EXCLUDE THE PUBLIC

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Within their respective boundaries, the states own the navigable waters and soils under them for the common use of the public.[1] When the lands abutting navigable waters are privately owned, public access to and use of state-owned waters and submerged lands may become difficult or impossible. As more and more riparian landowners[2] have exercised their right to exclude the public from their private waterfront properties, state and local governments have implemented various measures to enhance public access to and use of government-owned tidelands, streambeds, and lake shores.[3] Although not necessarily titled as such, many of these measures result, without payment of compensation, in an easement allowing public access to and use of private waterfront property.

Section I begins with a description of the rights of riparian property owners and the right of the public to use government-owned shores and tidelands, followed by a general overview of various state legislative and judicial responses designed to address the conflicts that arise when these competing interests collide. The authors then focus on the legislative and judicial developments in two geographically and culturally distinct jurisdictions. Section II discusses the laws of Florida. Section III is a discussion of the U.S. Supreme Court's recent decision in *Stop the Beach*

1. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842); *see* discussion *infra* Part I.B.

2. Although in its general use "riparian" may refer to land abutting any body of water, in its more technical use "riparian" refers to land abutting a river or stream and "littoral" refers to land abutting an ocean, sea or lake. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So.2d 934, 936 (Fla. 1987). In this article, we use the term "riparian" in its general sense to refer to land abutting any body of water.

3. For example, Hawaii's statutory access to beaches and shores below the "upper reaches of the wash of the waves," HAW. REV. STAT. §§ 115-4, 115-5 (2010), supplements that state's Na Ala Hele program, which utilizes ancient, pre-western contact trails that lie principally along the shorelines, *Id.* § 264-1.

Renourishment, Inc. v. Florida Department of Environmental Protection.[4] Section IV provides an analysis of the laws of Montana, which strongly protect the public's right to recreate on all waters located within its boundaries, and the effect of those laws on private property rights. Section V addresses the creative public access laws of Hawaii and Texas. In Section VI, the authors conclude with an assessment of the impact of the *Stop the Beach Renourishment* case on state efforts to provide access to government-owned waters, tidelands, and shores.

I. INTRODUCTION

A. Property Rights and the Right to Exclude

Throughout its history, the United States has fostered and encouraged private ownership of real property.[5] With some notable exceptions,[6] private property interests (including the rights of riparian property owners) are created and defined by state law.[7] Although the U.S. Constitution does not create property interests, it protects them.[8] For example, the Fifth Amendment of the U.S. Constitution prohibits the taking of private property for public use without payment of just compensation.[9]

Property is "the sum of all the rights and powers incident to ownership."[10] The "bundle of rights" commonly associated with the ownership of real property includes the right of the owner to transfer the

4. Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 177 L. Ed. 2d 184 (2010).

5. Richard Norejko, *From Metes and Bounds to Grids or a Cliff Notes History of Land Ownership in the United States*, FAIR & EQUITABLE, Jan. 2009, at 3, *available at* http://www.iaao.org/uploads/Norejko.pdf. Approximately sixty percent of lands located within the United States are privately owned; federal, tribal, state, and local governments own the remaining forty percent. ECON. RESEARCH SERV., U.S. DEP'T AGRIC., MAJOR USES OF LAND IN THE UNITED STATES 35 (2002), *available at* http://www.ers.usda.gov/publications/EIB14/eib14j.pdf.

6. For example, property interests in copyrights and patents are defined and created by federal law. HARRY G. HENN, HENN ON COPYRIGHT LAW 2–3 (1991).

7. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. 2d at 192.

8. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

9. The Fifth Amendment applies to the states through the Fourteenth Amendment. Chicago B & O R. Co. v. City of Chicago, 106 U.S. 226, 239 (1898). Most state constitutions also prohibit the taking of private property without just compensation. *E.g.*, FLA. CONST. art X, § 6; MONT. CONST. art. 2, § 29.

10. Nashville, C. & S. L. Ry. v. Wallace, 288 U.S. 249, 268 (1933).

property, to possess and use the property, and to exclude others from the property.[11] This article focuses in particular upon the right to exclude.

The U.S. Supreme Court has characterized the right to exclude as one of the most "essential sticks"[12] and "treasured strands"[13] of property ownership, and a "fundamental element" that "the Government cannot take without compensation."[14] Courts have steadfastly protected the right of property owners to exclude others from their land, without inquiring into whether the exercise of this right serves a rational, beneficial, or public purpose, and without engaging in a balancing of the interests of the property owner vis-a-vis the interests of those being excluded.[15]

In a series of cases before the U.S. Supreme Court, private property owners enjoyed success in defending their "right to exclude" against uncompensated government imposition of "easements of passage" that allowed public access across private property to facilitate the public's use of government-owned waters, beaches, and waterfronts.[16] In *Kaiser Aetna v. United States*,[17] the Supreme Court ruled that the government's attempt to create a public right of access across a private pond through the imposition of a navigational servitude was a taking of private property that required compensation under the Fifth Amendment of the U.S. Constitution. In *Nollan v. California Coastal Commission*, the Supreme Court noted that a taking would occur if "individuals are given a permanent and continuous

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11. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (describing property rights as "the right to possess, use, and dispose of [a thing]" (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945))). This list of rights is not exclusive. Generally, rights associated with the ownership of property are a matter of state law. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. 2d at 192. For example, in Florida riparian owners also have the right of access to water, the right to an unobstructed view of the water, and the right to receive accretions. *Id.* The seminal riparian rights decision in Florida is *Hayes v. Bowman*, 91 So.2d 795 (Fla. 1957), which describes the principal three riparian rights as access to the navigable channel, wharfage and piers. Obviously, there is no private right of wharfage along the Gulf of Mexico or Atlantic Ocean in the manner common to interior riparian parcels.

12. *Kaiser*, 444 U.S. at 176.

13. *Loretto*, 458 U.S. at 435.

14. *Kaiser*, 444 U.S. at 179–80.

15. The right to exclude is enforced through the tort of trespass, for which a remedy lies as long as the entrance onto the land of another was intentional. For example, intentionally setting a foot upon land owned by another gives rise to a trespass action, even if the trespasser mistakenly believes that he is on his own property. RESTATEMENT (SECOND) OF TORTS § 164 (1964).

16. Dolan v. City of Tigard, 512 U.S. 374, 393 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987); *Kaiser*, 444 U.S. at 179–80.

17. *Kaiser*, 444 U.S. at 180.

right to pass to and fro, so that the real property may continuously be traversed."[18]

In view of these precedents, states must carefully consider and protect the right of riparian property owners to exclude others when designing measures intended to provide public access to and use of government-owned tidelands and shores.

B. Sovereign Ownership of Lands Submerged Under Navigable Waters

Under English common law, the crown owned the shores abutting and soils underlying all "navigable waters" located within its jurisdiction.[19] In England, there were few, if any, navigable rivers that extended above the reach of the tide, and thus English common law recognized as "navigable waters" only those waters affected by the ebb and flow of the tide.[20] The crown's title (*jus privatum*) to the navigable waters and their shores and soils was subject to the use of the public (*jus publicum*):

> Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit . . . . That the people have a public interest, a *jus publicum*, of passage and repassage

18. *Nollan*, 483 U.S. at 832. The Court characterized a government-imposed easement as a "permanent physical occupation" in violation of the rule set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). *Id.* However, imposition of an easement across private property may be allowed in the context of an exaction if certain conditions are met. *Id.* at 853. *But see Dolan*, 512 U.S. at 391 (noting that an imposition of an easement across private property may be allowed in the context of an exaction if certain conditions are met).

19. Shively v. Bowlby, 152 U.S. 1, 10–12 (1892). In this case, the U.S. Supreme Court was called upon to determine ownership of land in Astoria, Oregon, located below the high water mark of the mouth of the Columbia River. *Id.* at 1. The Court undertook a thorough analysis of the laws governing the ownership of shores and tidelands, including the English common law and the laws of the thirteen original states. *Id.* at 11–58.

20. Genesee Chief, 53 U.S. (12 How.) 443, 454–55 (1851).

> with their goods by water, and must not be obstructed by nuisances.[21]

The crown's title to the shores abutting navigable waters commenced at the ordinary high water mark.[22] A grant from the sovereign of land bounded by the ocean or other navigable tidal waters did not convey any title to soils below the high water mark, unless a contrary intent was clearly indicated by the language of the grant or long usage under it.[23] With regard to soils lying under rivers that were not navigable (including all rivers not affected by the ebb and flow of the tide), the riparian property owner held title to the middle of the streambed.[24]

At the conclusion of the American Revolution, the people of the thirteen original states "became themselves sovereign" and acquired the rights previously held by the crown of England, including "the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."[25] Unlike England, many rivers within the original thirteen colonies were navigable far above the reach of the tide. Recognizing the importance of retaining ownership of the streambeds underlying these rivers to protect the free flow of commerce and transportation, most of the original thirteen states expanded the meaning of "navigable waters" for purposes of title[26] to include those waters beyond the reach of the tide, if those waters were actually

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21. *Shively*, 152 U.S. at 10–12.

22. Attorney-General v. Chambers, (1859) 45 Eng. Rep. 1, 29; 4 De G. M & G. 206 (citations omitted). In determining the ordinary high water mark, the Court concluded that the highest spring tides and lowest neap tides should not be considered. *Id.* at 29.

23. *Shively*, 152 U.S. at 13.

24. *Id.* at 31.

25. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842). An exception applies to submerged lands that had previously been granted by the crown or another prior sovereign to private parties. *But see* S.F. City & County v. Le Roy, 138 U.S. 656, 671 (1891) (noting that an exception applies to submerged lands that had previously been granted by the crown or another prior sovereign to private parties). Additionally, the original thirteen states obtained a navigational servitude over tidally influenced waters, which was subject to a superior navigational servitude in favor of the federal government. *See generally* United States v. Appalachian Electric Power Co., 311 U.S. 377, 423 ("The State and [private riparian landowners] alike . . . hold the navigable waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce.").

26. The meaning of "navigable waters" for purposes other than title may vary. For example, "navigable waters" is much more broadly defined for purposes of whether the United States has jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251–1387. Rapanos v. United States, 547 U.S. 715, 730–31 (2006).

navigable.[27] However, some of the original thirteen states adhered to the English common law, limiting state ownership to the shores and soils of only those navigable waters affected by the ebb and flow of the tide.[28]Under the equal footing doctrine, states admitted to the Union after the original thirteen also acquired ownership of the lands underlying the waters located within their boundaries that were navigable at the time of statehood.[29] In determining what waters are navigable for purposes of state ownership under the equal footing doctrine, the courts apply the federal common law test for navigability, enunciated by the U.S. Supreme Court as follows:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be

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27. *See, e.g.*, McManus v. Carmichael, 3 Iowa 1, 55–57 (1856) (noting that the private owner was driven back from the middle of the stream); Brown v. Chadbourne, 31 Me. 9, 21 (1849) (noting that the test for public servitude was whether a stream was capable of being used for the purposes of commerce or for the floating vessels, boats, rafts, or logs); Moore v. Sanborne, 2 Mich. 519, 519–20 (1853) (noting that rivers were subject to the servitude of public interest if they had the capacity for valuable floatage); Carson v. Blazer, 2 Binn. 475, 484–85 (Penn. 1810) (noting that the "flux and reflux" of the tides does not determine navigability, and soil under a navigable river belongs to the state). For purposes of admiralty jurisdiction, federal law also adheres to the "navigable in fact" test, which is satisfied if the waters "are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball, 77 U.S. 557, 557 (1871).

28. Van Ruymbeke v. Patapsco Indus. Park, 276 A.2d 61, 65 (Md. 1971); Brosnan v. Gage, 133 N.E. 622, 624 (Mass. 1921); Cobb v. Davenport, 32 N.J.L. 369, 380–81 (Sup. Ct. 1867). Although the shores and submerged lands of navigable waters not affected by the tide are owned by the riparian owners, the public reserves certain rights over such waters, including the right to use the waters for navigation and fishing. For example, in *Brosnan v. Gage*, 133 N.E. at 624, the Massachusetts Supreme Court noted that although the riparian owned the soils of a river beyond the reach of the tide, such ownership was subject to "an easement or right of passage up and down the stream in boats or other craft for purposes of business, convenience or pleasure."

29. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845).

> a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.[30]

In order to satisfy the navigability test for purposes of the equal footing doctrine, it is not necessary that a particular river was actually being used for commerce at the time of statehood. An absence of actual use, especially in sparsely settled areas, can be overcome upon presentation of sufficient evidence of the river's "susceptibility to use as a highway of commerce" at the time of statehood.[31]

With regard to nonnavigable streams and rivers, the states have generally followed the English common law, recognizing that title of the riparian landowner extends to the middle of the channel of the river.[32] States have taken a more divergent approach to ownership of the soils underlying non-navigable lakes. Although several jurisdictions have adopted the principle that the riparian owner takes to the center of the bed of a non-navigable lake,[33] other jurisdictions have limited private ownership to a point at or near the water's edge.[34]

C. Boundaries Between Riparian Lands and State-Owned Submerged Lands

1. General Principles

When privately owned property abuts navigable waters, the determination of the boundary between them is important, because it

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30. United States v. Utah, 283 U.S. 64, 76 (1931) (citing United States v. Holt State Bank, 270 U.S. 49, 56 (1962)).

31. *Id.* at 82.

32. *See, e.g.*, Bullock v. Wilson, 2 Port. 436, 448 (Ala. 1835) (noting that "the owner of land bounded by a fresh water river, owned the land to the centre of the channel of the river, as by common right"); Foss v. Johnstone, 110 P. 294, 298 (Cal. 1910) (stating that where a land owner borders nonnavigable waters they "take[] to the middle of the . . . stream"); Arnold v. Munby, 6 N.J.L. 1, 10–13 (Sup. Ct. 1821) (noting that a "grant of land, bounded upon a freshwater stream or river" extends to the center of that river); Wyckoff v. Mayfield, 280 P. 340, 341 (Or. 1929) ("It is the settled law of this state that a line running to the bank of a stream, or to the stream which is nonnavigable, extends to the center or thread of the stream.").

33. Warren v. Chambers, 25 Ark. 120, 122 (1867); Smith v. City of Rochester, 92 N.Y. 463 (1883); Lembeck v. Nye, 24 N.E. 686, 689 (Ohio 1890).

34. *See* Fuller v. Shedd, 44 N.E. 286, 286 (Ill. 1896) (noting that a landowners' rights ended at the lake's meandered shoreline as depicted upon the government survey); State v. Gilmanton, 9 N.H. 461, 463 (1838) ("[I]n relation to grants bounding on ponds, lakes, or other large bodies of standing fresh water . . . the grant extends only to the water's edge."); *see also infra* notes 87–89 and accompanying text.

demarcates the line between state-owned lands that the public is generally entitled to use and private lands over which the landowner is entitled to exercise his right to exclude the public. For example, if a member of the public is strolling down the state-owned "wet sands" of a beach and steps across the boundary line onto adjacent privately-owned "dry sands," she may be subject to a civil or criminal trespass claim.

The rules governing water boundaries are complex for several reasons. The laws establishing the boundaries between navigable waters and adjacent riparian lands vary from state to state, and on occasion federal law applies.[35] Furthermore, the rules may vary within each jurisdiction as between different types of water bodies, such as tidelands, marshes, rivers, and lakes. Differing rules often apply to navigable versus non-navigable waters and natural versus artificial water bodies. And yet, another set of rules may apply to "swamp and overflowed" lands granted by the federal government to the various states.[36]

Unlike land boundaries, water boundaries are usually ambulatory. The waters of rivers are constantly changing their course, ocean shores are reshaped by the flux of the tides, and lakefronts change with variations in water levels. A "gradual and imperceptible" change caused by the deposit or removal of soil is referred to as an "accretion" or a "reliction."[37] As a general rule, the riparian landowner is entitled to accretions and relictions, resulting in a boundary that moves with the water.[38] A sudden or perceptible

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35. *See, e.g.*, Hughes v. Washington, 389 U.S. 290, 291 (1967) (applying federal law, instead of state law, to determine who owned artificially-created accretions along the Pacific coast).

36. *See* Act of March 2, 1849, ch. 87, 9 Stat. 352 (aiding the state of Louisiana in draining the swamp lands therein); Swamp Land Act of 1850, 43 U.S.C. § 982 (2006) (enabling most states to construct necessary levees and drains and to reclaim certain swamplands). For a discussion of swamp and overflowed lands, see BRUCE S. FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS 17–22 (Roy Minnick ed., 2002) and Sidney F. Ansbacher & Joe Knetsch, *Negotiating the Maze: Tracing Historical Title Claims in Spanish Land Grants and Swamp and Overflowed Lands Act*, 17 J. LAND USE & ENVTL. LAW 351 (2002).

37. An accretion results in the gradual addition of sand, sediment or other deposits to waterfront property, whereas relictions result in the gradual exposure of formerly submerged lands as a result of the gradual recession of water. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 177 L. Ed. 2d 184, 192–93 (2010). Both "accretion" and "reliction" are subsequently referred to as accretions in this article.

38. *Hughes*, 389 U.S. at 293–94 ("Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines."). The common law rule of accretion has been codified in many states. *E.g.*, Mont. Code Ann. § 70-18-201 (2009). While the Florida Supreme Court held in *Martin v. Busch*, 112 So. 274, 287–88 (Fla. 1972), that Florida took title to relictions as Lake Okeechobee was drained to attempt to facilitate development of the Everglades, that court later stated, in *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs.*, 512 So.2d 934, 939–40 (Fla. 1987), that *Martin* addressed a dispute over whose survey was

change, such as the creation of a new channel in a river as the result of a flood or the destruction of a beach as a result of a hurricane, is referred to as an "avulsion." Unlike accretions, an avulsion generally does not result in an adjustment of the boundary to the water's edge; instead, the boundary remains the same as before the avulsion.[39] Several jurisdictions also distinguish between, and apply different rules to, accretions and avulsions that arise naturally versus those caused artificially.[40]

Perhaps one of the greatest challenges relating to water boundaries is in translating the legal boundary (such as the "high water mark") into an actual physical location, especially when the boundary is constantly changing.[41] Furthermore, the precise boundary is seldom visible to or ascertainable by members of the public who are using adjacent, state-owned lands.

2. Application of State Law

Under English common law, the high water mark established the boundary between sovereign soils underlying navigable waters and the adjacent riparian property.[42] The original thirteen states succeeded to the rights of the crown in the submerged lands of navigable waters below the high water mark, and under the equal footing doctrine, subsequent states acquired similar rights.[43] However, the development of the parameters of the exact rights of riparian property owners became a matter of state law,[44] with some important limitations. First, the title of states in the soils of

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accurate, and that any discussion of reliction was nonbinding dicta. While the Florida Supreme Court in *Stop the Beach Renourishment* did not even cite *Martin*, Justice Scalia's opinion for the United States Supreme Court held *Martin* was binding Florida authority. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. 2d at 207.

39. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. 2d at 193; Missouri v. Nebraska, 196 U.S. 23, 35 (1904).

40. *See, e.g.*, *Sand Key*, 512 So.2d at 937, 941 (noting that naturally formed accretions vest in the owner, but holding that artificially formed accretions will only vest if they result from work done by a third party).

41. *See* 1 AARON V. SHALOWITZ, *Chapter 6: The Tidal Boundary Problem*, *in* SHORE AND SEA Boundaries 89–90 (1962), *available at* http://www.nauticalcharts.noaa.gov/hsd/docs/CSE_library_shalowitz_v1p1ch6.pdf (discussing the technical aspects of determining the location of tideland boundaries).

42. Attorney-General v. Chambers, (1859) 45 Eng. Rep. 1, 23; 4 De G. M & G. 206. For all non-navigable rivers, the riparian owners held title to the middle of the stream, also referred to as the *filum aquae*. Shively v. Bowlby, 152 U.S. 1, 31 (1892).

43. *See supra* Part I.B.

44. In *Shively*, 152 U.S. at 57–58, the Court noted that "[t]he title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States."

navigable waters is subject to the right to regulate interstate commerce granted to the federal government under the U.S. Constitution,[45] which includes the power to keep all interstate navigable waters "open and free from any obstruction to their navigation, interposed by the States or otherwise [and] to remove such obstructions when they exist."[46] This has become known as the federal navigational servitude,[47] and any state grant of property below the high water mark is subject to this servitude.

As a second limitation, states were required to recognize property rights created by a prior sovereign. For example, if the English sovereign had previously conveyed submerged soils of navigable waters below the high water mark to a private party, the state did not acquire ownership of those previously ceded soils.[48]

Subject to these limitations, it is the prerogative of each individual state to determine the extent of the property rights granted to riparian property owners below the high water mark, including the establishment of the boundary between riparian property and state-owned, submerged lands.[49] All lawyers facing riparian property legal issues should take heed of the following warning:

> [T]here is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of

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45. U.S. CONST. art. I, § 8, cl. 3; Gilman v. Philadelphia, 70 U.S. 713, 724–25 (1866) ("Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.").

46. *Gilman*, 70 U.S. at 725; *see also* Scranton v. Wheeler, 179 U.S. 141, 163 (1900) ("[W]hether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters.").

47. United States v. Rands, 389 U.S. 121, 123 (1967) ("This power to regulate navigation confers upon the United States a 'dominant servitude,' which extends to the entire stream and the stream bed below ordinary high-water mark." (citation omitted)).

48. *See Shively*, 152 U.S. at 58 ("Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States."); S.F. City & County v. Le Roy, 138 U.S. 656, 671 (1891) (explaining that grants by the federal government of territorial lands have generally been construed to convey title to the high water mark).

49. St. Louis v. Rutz, 138 U.S. 226, 242 (1891) ("The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi river [sic], extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law . . . .").

> justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.[50]

It is beyond the scope of this article to summarize the laws adopted by each state affecting riparian ownership. Not only do the laws vary among jurisdictions, but within a single jurisdiction, different laws may apply to different water bodies or for different purposes. Furthermore, each jurisdiction has developed its own "bundle of rights" incidental to riparian ownership, such as the right to access the water, the right to build wharfs and other structures, and the right to a view. Although not a comprehensive review, the following comments briefly discuss the prevailing choices made by states in defining riparian rights.

3. Boundaries on Ocean Coasts

On ocean coasts, the states acquired ownership of the tidelands (the lands covered and uncovered by the daily ebb and flow of the tide).[51] Ownership of the submerged lands lying three miles seaward of the coast was ceded by the federal government to the states under the 1953 Submerged Lands Act.[52]

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50. *Shively*, 152 U.S. at 26.

51. Hardin v. Jordan, 140 U.S. 371, 381–82 (1891) ("This right of the States to regulate and control the shores of tide-waters, and the land under them, is the same as that which is exercised by the Crown in England.").

52. In 1947, the Supreme Court issued a decree that the United States was "possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things" underlying the sea to the extent of three nautical miles measured from the low-water mark on the coast or from the outer limit of internal waters, and that the coastal states had "no title thereto or property interest therein." United States v. California, 332 U.S. 804, 805 (1947). Subsequently, Congress enacted the Submerged Lands Act of 1953, Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301–1315 (2006)), ceding to the coastal states all the property rights of the United States in submerged lands within three miles of the baseline (and up to three marine leagues in the Gulf of Mexico if a state established a historic title to such broader area). 67 Stat. at 30 (codified at 43 U.S.C. §§ 1301, 1312). The Submerged Lands Act gave the states "the right and power to manage, administer, lease, develop, and use" the submerged land and natural resources of the ceded area. *Id.* § 6, 67 Stat. at 32 (codified at 43 U.S.C. § 1311(a)). The United States retained, however, "powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." *Id.* § 6, 67 Stat. at 32. (codified at 43 U.S.C. § 1314(a)).

Derived from English common law,[53] the boundary between state-owned tidelands and adjacent upland riparian property is generally the high water mark.[54] In 1935, the U.S. Supreme Court addressed at length the appropriate definition of the "high water mark" for boundary purposes, concluding that it is determined by "the average height of all the high waters at that place" over a period of 18.6 years, and not solely by reference to the highest spring tides or the lowest neap tides.[55] Subsequent to that decision, most states have adopted a substantially similar definition of the high water mark in establishing the boundary separating riparian properties from tidelands.[56]

To encourage private construction of wharfs and other improvements, several states, primarily in the northeast, have granted ownership of tidelands to the low water mark.[57] In these jurisdictions, riparian ownership of the lands lying between the low and high water marks may be subject to certain uses by the public, such as navigation and fishing.[58]

4. Boundaries on Navigable Rivers

Under English common law, the boundary between navigable rivers and adjacent riparian lands is the high water mark.[59] Whereas only a handful of states have departed from the high water mark as the boundary of tidelands, there has been much greater disparity amongst the states in deciding the appropriate boundary between riparian lands and navigable rivers.

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53. Attorney-General v. Chambers, (1859) 45 Eng. Rep. 1, 23; 4 De G. M & G. 206.

54. United States v. Pacheco, 69 U.S. (2 Wall) 587, 590 (1865). But, consistent with *Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378–80 (1987), a state may obtain the sovereign lands underlying tidal lands after achieving statehood. Accordingly, Florida's constitution limits sovereign title in tidal lands to those underlying submerged lands water-ward of the mean high water line. FLA. CONST. art. X, § 11 (1970). The Florida Fifth District Court of Appeal explicated this limitation in *Lee v. Williams*, 711 So.2d 57, 63 (Fla. Dist. Ct. App. 1998), that sovereign lands under the Florida Constitution underlie "navigable waters."

55. Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 26–27 (1935). For a discussion of the boundary in estuaries, tidal marshes and tidal rivers and deltas, see FLUSHMAN, *supra* note 36, at 141–231.

56. Florida did so in *Miller v. Bay-to-Gulf, Inc.*, 193 So. 425, 428 (Fla. 1940). Florida has since codified the mean high water line as the average high tide over a tidal epoch of nineteen years. FLA. STAT. § 1277.27(14) (2010).

57. Boston v. Richardson, 105 Mass. 351 (Mass. 1870); Bell v. Wells, 557 A.2d 168, 173 (Me. 1989) (citing State v. Wilson, 42 Me. 9, 28 (1856)).

58. *Bell*, 557 A.2d at 169–70 (noting that privately owned tidelands are subject to an easement allowing public use of the tidelands for fishing, fowling and navigation).

59. Shively v. Bowlby, 152 U.S. 1, 10–11 (1894).

As the law began to develop, several early judicial decisions vaguely described riparian ownership as extending "to the water's edge," or referred to state ownership of the "banks" or "shores" of a river.[60] As more and more waterfront property was developed and its value increased, state legislatures and courts were required to be more specific. Many states, through judicial decision[61] or by statute,[62] extended the title of riparian owners to the low water mark of navigable streams. One of the reasons for adopting the low water mark was to protect the right of the riparian owner to river access. Other states, adhering to the English common law, limited riparian ownership to the high water mark.[63] A small number of states have extended the title of riparian owners to the middle of navigable rivers.[64]

Whereas a relatively uniform interpretation of "high water mark" has been adopted amongst the states as it applies to tideland boundaries,[65] many courts have noted the difficulty in determining the high water mark of a river. In an early decision involving the boundary between Alabama and Georgia on the Chattahoochee River, three divergent opinions were issued. In his dissent, Justice Nelson had this to say about high water marks on rivers:

> [I]n respect to freshwater rivers, the term is altogether indefinite, and the line marked uncertain. It has no fixed meaning in the sense of high-water mark when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of freshwater rivers, by

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60. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845) ("The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively."); Hahn v. Dawson, 134 Mo. 581, 591 (1896) (explaining that a riparian owner owns "to the water's edge").

61. *See* Barre v. Fleming, 1 S.E. 731, 738–39 (W. Va. 1887) (concluding that "the title of the riparian owner of land bounded by the Ohio river extends, at least, to low water mark, subject to the public easement of navigation"); *see also* State *ex rel.* Citizen's Electric Lighting & Power Co. v. Longfellow, 69 S.W. 374, 379 (Mo. 1902) (noting that a State, by judicial decision, can extend the title of riparian owners to the low water mark of navigable streams).

62. MONT. CODE ANN. § 70-16-201 (2010); CAL. CIVIL CODE § 830 (West 2010).

63. McManus v. Carmichael, 3 Iowa 1, 53–54, 57 (1856); Hinman v. Warren, 6 Or. 408, 412 (1877).

64. Houck v. Yates, 82 Ill. 179, 181 (1876); Muench v. Pub. Serv. Comm'n, 53 N.W. 2d 514, 517 (Wis. 1952) (noting that title is "qualified" by the right of the public to use the river for navigation). Some states that originally recognized title of a navigable river to the middle of the stream subsequently changed their laws. For example, although Georgia originally recognized ownership to the middle of a stream, in 1863 Georgia enacted legislation limiting title of riparian owners on navigable streams to the low-water mark, applicable to state grants of land after 1863. Fla. Gravel Co. v. Capital City Sand & Co., 154 S.E. 255, 257 (Ga. 1930).

65. Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 26–27 (1935).

> intendment or construction, whether between States or individuals. It may mean any stage of the water above its ordinary height, and the line will fluctuate with every varying freshet or flood that may happen.[66]

Justice Wayne, writing for the majority, stated that the boundary was intended to be the waters at "their highest flow," and that determining such boundary "requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water." [67] In his concurring opinion, Justice Curtis noted that "neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks." Instead, this line:

> is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream.[68]

In developing a definition for high water mark that translates to a physical location, many states have relied upon the vegetation line as the sole or an important factor:

> Whatever difficulty there may be in determining [the high water mark] in places, this doubtless may be said: What the river does not occupy long enough to wrest from vegetation, so far as to destroy its value for agriculture, is not river bed.[69]

Another approach is to look for a natural line of impression left by the water, such as "the point on the bank or shore up to which the presence and

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66. Howard v. Ingersoll, 54 U.S. 381, 424 (1852) (Nelson, J., dissenting).

67. *Id.* at 415–16.

68. *Id.* at 427 (Curtis, J., concurring).

69. Houghton v. C., D. & M. R. Co., 47 Iowa 370, 374 (1877). The Iowa Supreme Court rejected "the ordinary rises" of the river that occurred in the spring as well as the line that the river impresses upon the soil. *Id.* at 373–74.

action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."[70] Other courts have accepted evidence of water stage and elevation data.[71]

As with the high water mark, courts have struggled to define the low water mark of navigable rivers with precision.[72] Some courts have held that the low water mark is "the point to which the river recedes at its lowest stage."[73] Other courts have determined that the appropriate definition is the ordinary low water mark unaffected by floods or drought.[74]

5. Boundaries on Nonnavigable Rivers

States have consistently adhered to the English common law, extending ownership of riparian land abutting nonnavigable rivers to the middle of the stream.[75]

6. Boundaries on Lakes

English common law provided little guidance with regard to lakes; the issue of sovereign ownership of lakes was not fully addressed by the English courts until 1878.[76] This dearth of English common law, coupled with the diversity in the size and uses of lakes scattered throughout the

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70. Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914).

71. United States v. Cameron, 466 F. Supp. 1099, 1101 (M.D. Fla. 1978) (defining high water mark for purposes of the federal navigational servitude).

72. Union Sand & Gravel Co. v. Northcott, 135 S.E. 589, 593 (W. Va. 1926) ("[I]t is quite true that the line of low water mark could not be fixed for all time with absolute certainty, because at no two periods of the year could the line be delineated on the ground with absolute precision.").

73. *Id.* at 592.

74. Stover v. Jack, 60 Pa. 339, 343 (1869) ("[A]ny other rule than ordinary low-water mark unaffected by drought as the limit of title would carry the rights of riparian owners far beyond boundaries consistent with the interests and policy of the state . . . ." (emphasis omitted)).

75. *See, e.g.*, Bullock v. Wilson, 2 Port. 436, 448 (Ala. 1835) (noting that "the owner of land bounded by a fresh water river, owned the land to the centre of the channel of the river, as by common right"); Foss v. Johnstone, 110 P. 294, 298 (Cal. 1910) (stating that where a land owner borders non-navigable waters they "take[] to the middle of the . . . stream"); Arnold v. Munby, 6 N.J.L. 1 (N.J. 1821) (noting that a "grant of land, bounded upon a freshwater stream or river" extends to the center of that river); Wyckoff v. Mayfield, 280 P. 340, 341 (Or. 1929) ("It is the settled law of this state that a line running to the bank of a stream, or to the stream which is nonnavigable, extends to the center or thread of the stream.").

76. Bristow v. Cormican, [1878] 3 A.C. 641 (H.L.) 641–42 (appeal taken from Ireland) (holding that the crown had no rights of ownership in the shores or beds of a lake beyond the reach of the tide).

United States, has led to the adoption of varying rules amongst the states governing ownership of lake shores and beds.

Some states apply a different test to lakes versus other bodies of water in determining whether lakes are navigable or non-navigable for purposes of title. For example, whereas Massachusetts abided by the English law tidal test to determine navigability of rivers, it has applied a different rule to "great ponds," "the enjoyment of which for fishing and fowling and other uses was common to all, and the title in which and the lands under them was not the subject of private property, unless by special grant from the legislature."[77] Rather than focusing exclusively on a lake's use as a highway of commerce for trade and transport, several states have considered other public purposes in determining whether lakes should be classified as navigable, including whether "the fisheries of the lake are of such a character that they should be exercised in common by the public"[78] and whether the lake is used by noncommercial boats "for pleasure."[79]

Several courts and scholars have questioned the advisability of applying the concepts of high water mark and low water mark, which arose in the context of tidal waters, in establishing lake boundaries. In dissenting to the adoption of the ordinary high water mark as the landward boundary of public trust lands on the Great Lakes, Justice Markham of the Michigan Supreme Court observed:

> [On the Great Lakes there are] no "high" or "low" water marks, as they are scientifically understood. Instead, lake levels are affected seasonally by the natural operation of the hydrologic cycle, which includes precipitation, evaporation, condensation, and transpiration. During the winter . . . more water leaves the lake than enters it . . . resulting in a decline in lake levels. As snow begins to melt in the early spring, runoff into the lakes increases. Further, as temperatures increase, the warm, moist air above the relatively cold lakes limits evaporation to an amount less than the rate of condensation. As a result, average water levels rise throughout the spring and eventually peak during midsummer.[80]

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77. Paine v. Woods, 108 Mass. 160, 169 (1871).

78. Flisrand v. Madson, 152 N.W. 796, 799 (S.D. 1915).

79. Lamprey v. State, 53 N.W. 1139, 1139 (Minn. 1893).

80. Glass v. Goeckel, 703 N.W.2d 58, 98–99 (Mich. 2005) (Markman, J., concurring in part and dissenting).

Nonetheless, most states have established the boundary between state-owned lake shores and beds and adjacent riparian property as either the high water mark[81] or the low water mark.[82] The meander line of a lake as depicted on government surveys is not the boundary.[83]

In spite of the fact that the hydrological and geological characteristics of lakes and rivers are markedly different, most states have applied the same test to both bodies of water in determining the physical boundary of the high or low water mark. For example, the Michigan Supreme Court imported the definition for the high water mark of a lake from Wisconsin, which arose in the context of a river boundary dispute:

> [The ordinary high water mark is] the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark.[84]

As applied to lakes, courts have adopted various definitions of the low water mark, including "the line or level at which the waters of a lake usually stand when free from disturbing causes"[85] and "the low level reached by the waters of a lake under ordinary conditions unaffected by periods of extreme and continuous drought."[86]

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81. Gasman v. Wilcox, 35 P.2d 265, 266 (Idaho 1934); Martin v. Busch, 112 So. 274, 278–87 (Fla. 1972).

82. MONT. CODE ANN. § 70-16-201 (2009); CAL. CIVIL CODE § 830 (West 2010).

83. *See* Hardin v. Jordan, 140 U.S. 371, 380 (1891) (discussing that the meander lines are for bounding and abutting and the real boundary is the water); In re Ownership of Bed of Devils Lake, 423 N.W.2d 141, 143 (N.D. 1988) ("[A] water line, rather than a meander line, ordinarily forms the boundary of a tract of land abutting a navigable body of water.").

84. *Glass v. Goeckel*, 58 N.W.2d at 72 (citing Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914)). *See generally* FLUSHMAN, *supra* note 36, at 295–307 (discussing the rule from Diana Shooting Club in the context of other high water mark tests); Frank E. Maloney, *The Ordinary High-Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L. REV. 465, 467–68 (1978) (discussing how a high water mark is determined).

85. Slauson v. Goodrich Transp. Co., 94 Wis. 642, 645 (1897).

86. South Dakota Wildlife Fed'n v. Water Mgmt. Bd., 382 N.W.2d 26, 27 (S.D. 1986). *See generally* FLUSHMAN, *supra* note 36, at 307–11 (discussing this language in the context of other low water mark tests).

There is divergence amongst states as to the appropriate boundary for non-navigable lakes. As with non-navigable rivers, several states extend riparian title of the beds of non-navigable lakes to the middle of the lake.[87] However, several states limit ownership to the water's edge.[88] One court justified the application of a different rule to lakes as follows:

> Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or confusion, and without serious injustice to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners was the thread of the current . . . . But when this rule is attempted to be applied to lakes and ponds practical difficulties are encountered. They have no current, and, being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore owners in the beds . . . . It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim.[89]

D. The Public Trust Doctrine

The public trust doctrine originated in Roman law. The Institutes of Justinian stated that "the air, running water, the sea, and consequently the shores of the sea" are "common to all mankind."[90] These were public property, or *res communes*. While the English doctrine of the public trust was first codified in the Magna Carta, Saxon and Norman societies

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87. MONT. CODE ANN. § 70-16-201 (2009); CAL. CIVIL CODE § 830 (West 2010).

88. Trs. of Sch. v. Schroll, 12 N.E. 243, 245 (Ill. 1887). In *Fuller v. Shedd*, 44 N.E. 286, 295 (Ill. 1896), the Illinois Supreme Court noted that:

> If we depart from the reasonable rule we have established, the small non-navigable lakes would become the private waters of riparian owners, pertinent to their lands, with exclusive rights thereon as to boating, fishing and the like, from which the body of the people would be excluded—a principle inconsistent with and not suited to the condition of our people or called for as a rule of law.

89. Indiana v. Milk, 11 F. 389, 395 (C.C.D. Ind. 1882).

90. ROBERT W. FREUDENBERG, GOING DOWN TO THE SHORE: ENHANCING COASTAL PUBLIC ACCESS ALONG NEW JERSEY'S SHORELINES 1 (2005), *available at* http://www.csc.noaa.gov/cz/CZ05_Proceedings/pdf%20files/posters/Freudenberg.pdf.

determined that the crown held rights over wildlife and fishing resources.[91] The Norman conquest established William the Conqueror's dominion over all lands in England.[92] The Magna Carta established the Crown's general ownership over the realm, subject to a public trust over all lands lying seaward of the high tide mark, or tidelands.

The public trust doctrine "obligates a state government to act as trustee of the public interest in all public lands and waters in that state."[93] Professor Joseph Sax stated what might be the broadest definition of the doctrine. He opined that the United States conveyed lands to the various states subject to the public trust, so all subsequent grantees are obligated to use those lands in the public interest.[94] Professor Sax did not believe that the public trust obligation was immutable, stating that, "[N]o grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public use."[95] The distinction between "total abdication" versus "diminishment" of government authority is the key. Even Sax notes the conflict between public rights and private benefits.

The U.S. Supreme Court first applied public trust principles in *Martin v. Waddell's Lessee*.[96] The Court cited the Magna Carta in holding that the public trust doctrine barred a conveyance of private oyster harvesting originating under a royal grant. It noted British Crown grants prohibited the crown from imparting public rights in tidelands "when the title is held by a single individual in trust for the whole nation."[97] The State of New Jersey held the lands as well in the public trust, and private proprietors could not impede the public use of the tidelands.

The U.S. Supreme Court's seminal decision on the public trust doctrine is *Illinois Central Railroad v. Illinois*, in which it determined title to

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91. *See, e.g.*, Jane Bell, *The Boundaries of Property Rights in English Common Law*, *in* REPORT TO THE XVIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 11 (2006).

92. Justice J. Bryson, Henry II and the English Common Law; Lecture to the Plantagenet Society of Australia (July 20, 2002).

93. Sidney F. Ansbacher & Joe Knetsch, *The Public Trust Doctrine and Submerged Lands in Florida: A Legal and Historical Analysis*, 4 J. LAND USE & ENVTL. L. 337, 346 (1989).

94. Joseph Sax, *The Public Trust Doctrine in Natural Resource Laws: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476–89 (1970).

95. *Id.* at 488–89.

96. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 411 (1842). Several state decisions had previously applied public trust principles. *See, e.g.*, Browne v. Kennedy, 5 H. & J. 195 (Md. 1821) (applying public trust principles); Arnold v. Munby, 6 N.J.L. 1 (N.J. 1821) (applying public trust principles).

97. *Waddell's Lessee*, 41 U.S. (16 Pet.) at 411.

reclaimed lands and adjoining submerged lands along the Chicago waterfront.[98] The state legislature first granted substantial submerged lands in the harbor to the railroad, but then repealed the act authorizing the conveyance.[99] The Court held that the state may convey sovereign lands only where the conveyance is not contrary to the public interest. The attempted grant of a substantial portion of a major harbor violated the state's public trust obligation. As Sax, then Ansbacher and Knetsch noted, the core holding established the central tenet of the public trust doctrine:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.[100]

The public trust doctrine has continued to develop under state law. Not surprisingly, the public trust doctrine has developed differently among the various states.[101]

II. FLORIDA

Since 1970, the Florida Constitution has provided that the State holds title in the public trust to lands waterward of the mean high water line along the Atlantic Ocean and Gulf of Mexico.[102] Private upland ownership is bounded, constitutionally, by an ambulatory mean high water line.

Florida's Supreme Court held in *Broward v. Mabry* that littoral rights of access, wharfage, and view appurtenant to ownership at the high water line "are property rights that may be regulated by law, but may not be taken

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98. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 443–76 (1892).

99. *Id.* at 449–50.

100. Ansbacher & Knetsch, *supra* note 93, at 347 (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970)).

101. *See generally* Robin Kundis Craig, *A Comparative Guide to Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010) (discussing the public trust doctrine trends of western states); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007) (discussing the various public trust doctrines of thirty-one eastern states).

102. FLA. CONST. art. X, § 11 (1970); *see* Ansbacher & Knetsch, *supra* note 93 (explaining that Florida Constitutional, statutory and common law establish title boundaries in that state along tidally influenced waters at the mean nineteen-year value).

without just compensation and due process of law."[103] In *State v. Florida National Properties, Inc.*, the Florida Supreme Court confirmed that the high water line is a transient boundary, and that an attempt to fix permanently that boundary by statute was unconstitutional.[104] At least, that was so until *Stop the Beach Renourishment* altered the rule dramatically.

A. Background Principles of State Law Regarding Riparian and Littoral Rights

One must analyze Florida law in determining two fundamental points. First, what constitutes a property right under Florida law? Second, when has a state action so deprived property rights as to require compensation? Florida law has long held that riparian or littoral rights are appurtenant to ownership along navigable waters. Additionally, deprivation of any of those rights has long been held to be compensable.

Article I, Section 2 of the Florida Constitution provides: "Basic rights – All natural persons . . . . have inalienable rights, among which are the right to acquire, possess and protect property . . . ." The Florida Supreme Court noted in *Shriners Hospital v. Zrillic* that property rights are "woven into the fabric of Florida history" and stem from organic law, citing to common law, the Declaration of Rights in Florida's original Constitution and the current State Constitution.[105] In significant part, the *Shriners* Court stated: "[T]he phrase 'acquire, possess and protect property' in article I, section 2, includes the incidents of property ownership: the '[c]ollection of rights to use and enjoy property . . . .'"[106]

The *Shriners* court emphasized that real property rights are "inalienable rights grounded in natural law . . . ." and are protected by Article I, section 2 of the Florida Constitution as well as the U.S. Constitution.[107] *Shriners* concluded that reasonable property regulation may require compensation.[108]

Florida long held that lands abutting navigable waters carry appurtenant riparian or littoral rights.[109] This is consistent with U.S. Supreme Court authority. In *Pollard's Lessee v. Hagan*, the U.S. Supreme Court held that

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103. Broward v. Mabry, 50 So. 826, 830 (Fla. 1909).

104. State v. Fla. Nat'l Props., Inc., 338 So. 2d 13, 13 (Fla. 1976).

105. Shriners Hosp. v. Zrillic, 563 So.2d 64, 67 (Fla. 1990).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See, e.g.*, Hayes v. Bowman, 91 So.2d 795, 802 (Fla. 1957) (ruling that a parcel that fronted the navigable Boca Ciega Bay carried rights of wharfage into, access to, and view of the navigable water body).

the equal footing doctrine fixed boundaries of sovereign title to lands underlying tidal waters as of the date of admission to the statehood.[110] Florida entered the Union on March 3, 1845.[111] In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, the U.S. Supreme Court held that a state is free to retain title to certain sovereign beds, but may convey other sovereign beds to private grantees or otherwise constrict the definition of sovereign lands after it achieves statehood:

> Once equal footing doctrine had vested title to the riverbed in [the state] as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have.[112]

In sum, each state's law governs how and whether sovereign lands are altered.[113]

Stop the Beach Renourishment addressed titles along a tidally influenced water, the Gulf of Mexico. Roman jurists held that the sea and foreshore were *res communes*.[114] The dominant English common law rule held that the high water mark was the boundary between sovereign and upland ownership.[115]

Under the equal footing doctrine, Florida held sovereign title underlying all tidally influenced waters upon statehood.[116]

Consistent with *Corvallis*, Florida altered boundaries along tidally influenced waters by common law to limit tidal lands owned by the sovereign to those lands under navigable waters.[117] The 1968 Florida

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110. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845).

111. Theresa Bixler Proctor, *Erosion of Riparian Rights Along Florida's Coast*, 20 J. LAND USE 117 (2004), *available at* http://www.law.fsu.edu/journals/landuse/vol20_1/proctor.pdf.

112. Or. *ex rel* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1987).

113. *See* Barney v. Keokuk, 94 U.S. 324, 338 (1876) (holding that a state may convey sovereign lands to private grantees); *see also* Apalachicola Land & Dev. Co. v. McRae, 98 So. 505, 517 (Fla. 1923) (noting that "it is settled law in [Florida] that private ownership of lands bordering on navigable waters extends only to high-water mark").

114. W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 184, 186 (1921).

115. Attorney-General v. Chambers, (1859) 45 Eng. Rep. 1, 23; 4 De G. M & G. 206; Dean Everett Fraser, *Title to the Soil Under Public Waters—A Question of Fact*, 2 MINN. L. REV. 313, 318–21 (1918).

116. *See generally* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484–85 (1988) (confirming that each state received title to all lands underlying tidally influenced waters upon statehood and holding that each state may alter sovereign lands thereafter).

117. *See, e.g.*, Clement v. Watson, 58 So. 25, 26 (Fla. 1912) (rejecting the "ebb and flow" test, in restricting sovereign lands to those under navigable waters); State v. Black River Phosphate Co., 13 So. 643–44 (Fla. 1893) (discussing the title to the area under navigable waters).

Constitution was amended in 1970 to codify that boundary. The Florida Constitution delineates the boundary between uplands and submerged sovereign lands as follows:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.[118]

That section remains today.

The U.S. Supreme Court established the mean high water line (MHWL) as the boundary for tidelands in *Borax Consolidated, Ltd. v. City of Los Angeles*.[119] The Borax court considered the common law ordinary high water mark, which had been defined as the line of the medium high tide, and held that the scientifically determined MHWL was the modern equivalent of that common law rule.[120] The MHWL as considered in *Borax* is the average high tide over an 18.6-year lunar "epoch."[121]

Florida's Supreme Court first considered the MHWL definition in *Miller v. Bay-to-Gulf, Inc.*[122] The Florida Court attempted to define the "ordinary high tide line" as "the limit reached by the daily ebb and flow of the tide."[123]

In 1974, Florida enacted Chapter 177, Part II of the Florida statutes, entitled the "Coastal Mapping Act."[124] The amorphous definition of high tide line in *Miller* was clarified by Florida statute subsections 177.27(14) and (15):

> 177.27 Definitions -- The following words, phrases, or terms used herein, unless the context otherwise indicates, shall have the following meanings:
>
> . . .
>
> (14) "Mean High Water" means the average height of the high waters over a 19-year period. For shorter periods of

118. FLA. CONST. art. X, § 11 (1970).
119. Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 26–27 (1935).
120. *Id.*
121. *Id.*
122. Miller v. Bay-to-Gulf, Inc., 193 So. 425, 428 (Fla. 1940).
123. *Id.*
124. 1974 Fla. Laws 61 (codified at FLA. STAT. §§ 177.25 to 177.40 (2000)).

> observation, "mean high water" means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value.
>
> (15) "Mean High-Water Line" means the intersection of the tidal plane of mean high water with the shore.[125]

In short, Florida's definition of MHWL since passage of Chapter 177, Part II, parallels *Borax.*[126] Florida has long acknowledged that riparian or littoral rights are appurtenances to lands on navigable waters; those rights cannot be taken without compensation:

> In so far as the declaration alleges the right of ingress and egress to and from the lot over the waters of the bay, it states a common law right appertaining to riparian proprietorship. The common law riparian proprietor enjoys this right, and that of unobstructed view over the waters, and in common with the public the right of navigating bathing, and fishing.[127]

Webb noted that then Florida Statutes section 192.61 [and now section 253.141] "may be accepted as a partial codification of the common law on the subject." [128]

Florida's seminal riparian case was *Hayes v. Bowman.*[129] The Florida Supreme Court explicated those rights further in *Game & Freshwater Fish Commission v. Lake Islands, Ltd.*,[130] where the court held that a rule barring motorboats on a navigable lake was constitutional in general, but struck it down as applied to riparian owners along the lake:

> For the riparian right of ingress and egress to mean anything, it must at the very least establish a protectable interest when there is a special injury. To hold otherwise

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125. Coastal Mapping Act, FLA. STAT. ch. 177.27, §§ 14–15, pt. II (1974).

126. *See* Lee v. Williams, 711 So.2d 57, 62–63 (Fla. Dist. Ct. App. 1998) (finding that sovereign lands under FLA. CONST. art. X, § 11 are "lands under navigable waters").

127. Webb v. Giddens, 82 So.2d 743, 745 (Fla. 1955) (quoting Thiesen v. Gulf, F. & A. Ry. Co., 78 So. 491, 501 (Fla. 1917)).

128. *Id. But see* Feller v. Eau Gallie Yacht Basin, 397 So.2d 1155 (Fla. Dist. Ct. App. 1987) (noting that riparian rights stem from constitution and common law, and are not dependent on statute).

129. Hayes v. Bowman, 91 So.2d 795, 799–800 (Fla. 1957).

130. Game & Freshwater Fish Comm'n v. Lake Islands, 407 So.2d 189 (Fla. 1981).

> means the state could absolutely deny reasonable access to an island property owner or block off both ends of a channel without being responsible to the riparian owner for any compensation. A waterway is often the street or public way; when one denies its use to a property owner, one denies him access to his property . . . . Reasonable access must, of course, be balanced with the public good, but a substantial diminution or total denial of reasonable access to the property owner is a compensable deprivation of a property interest.[131]

Maloney noted that "the term mean high water line appears in Article X, Section 11 of the Florida Constitution [and in several statutes]."[132] Maloney emphasized: "The Florida Coastal Mapping Act of 1974 is especially significant in this regard."[133] Recall that the statutory definition partially codifies *Webb v. Giddens*.[134] Maloney emphasized:

> In that Act it is expressly declared that the Florida Legislature "recognizes the desirability of confirmation of the mean high-water line, as recognized in the State Constitution and defined in Section 177.27(15) as the boundary between state sovereignty land and uplands subject to private ownership."[135]

Maloney listed the following cases that cited the above-noted definition by 1980: *Trustees of Internal Improvement Fund v. Wetstone*;[136] *City of Daytona Beach v. Tona-Rama, Inc.*;[137] *St. Jude Harbors, Inc. v. Keegan*;[138] *Florida Board of Trustees of Internal Improvement Trust Fund v. Wakulla*

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131. *Id.* at 193.

132. FRANK E. MALONEY ET AL., FLORIDA WATER LAW 724–25 (1980), *available at* http://www.ce.ufl.edu/~wrrc/docs/reports/50_florida_water_law.pdf.

133. *Id.* at 725.

134. Webb v. Giddens, 82 So.2d 743, 745 (Fla. 1955).

135. MALONEY ET AL., *supra* note 132, at 725 (quoting FLA. STAT. § 177.26 (1979)). Additionally, Florida Statutes section 177.28, as enacted in 1974, states in pertinent part:

> 177.28 Legal Significance of the mean high-water-line.--
>
> (1) The mean high-water line along the shores of land immediately bordering on navigable waters is recognized and declared to be the boundary between the foreshore owned by the state in its sovereign capacity and upland subject to private ownership.

136. Trs. of Internal Improvement Fund v. Wetstone, 222 So.2d 10, 15 (Fla. 1969).

137. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 78 (Fla. 1974).

138. St. Jude Harbors, Inc. v. Keegan, 295 So.2d 141, 142 (Fla. Dist. Ct. App. 1974).

Silver Springs Co.;[139] and *St. Joseph Land & Development Co. v. Florida State Board of Trustees of Internal Improvement Trust Fund*.[140] Maloney concluded:

> These recent decisions and the statutory provisions mentioned above indicated that the mean high water line is now *well-established as the legal boundary*, between private uplands and the state owned submerged lands in tidal waters of the state.[141]

Maloney explained that "[m]any of the boundary and title problems which beset lands bordering waters are caused by changing shorelines."[142] Maloney noted that high water lines are ambulatory by definition, consistent with *Borax*.[143] Maloney explained the general rule regarding "accretion," or "gradual, imperceptible additions of soil to the shores . . . Florida follows the common law rule which vests title to soil formed by accretion along navigable waters in the owners of abutting lands."[144]

Maloney distinguished man-made additions to uplands, which do not generally alter waterfront boundaries in Florida.[145] Maloney noted a salient exception that stems from the Supreme Court decision in *County of St. Clair v. Lovingston*:[146] "Generally, where the [upland littoral owner] claimant had no part in the erection of an obstruction causing accretion, the fact that the accretion was initiated or otherwise influenced by an artificial process will not impair his claim of title to the land thereby formed."[147]

Maloney cited the only then-extant Florida case on-point, *Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee*.[148] The State sought to enjoin the littoral land owner from constructing a seawall on accreted lands that resulted from a public project. The court refused, holding implicitly in pertinent part that vesting of accreted lands in the state

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139. Fla. Bd. of Trs. of Internal Improvement Trust Fund v. Wakulla Silver Springs Co., 362 So.2d 706, 711 (Fla. Dist. Ct. App. 1978).

140. St. Joseph Land & Dev. Co. v. Fla. State Bd. of Trs. of Internal Improvement Trust Fund, 365 So.2d 1084, 1087 (Fla. Dist. Ct. App. 1979).

141. MALONEY ET AL., *supra* note 132, at 725 (emphasis added).

142. *Id.* at 726.

143. *Id.* at 720–22.

144. *Id.* at 727.

145. *Id.* at 729–30.

146. Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 63 (1874).

147. MALONEY ET AL., *supra* note 132, at 730.

148. Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, 272 So.2d 209, 209 (Fla. Dist. Ct. App. 1973).

as a result of a public works project would constitute a taking.[149] This decision addressed Florida Statutes section 166.051, "which purports to vest title to accretions caused by public works."[150]

The Florida Supreme Court agreed with *Medeira* in *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*[151] The Court held that upland waterfront owners, who did not participate in improvements that resulted in accretion, were entitled to that accretion.[152] As in *Medeira*, the Court held that Florida Statutes section 166.051 did not vest title in the state against such an innocent landowner merely because of the perceived public benefit of the beach renourishment.[153] The opinion cited a myriad of general authority and its prior opinions, including *Florida National Properties*, in holding that the riparian right to alluvial deposits is a property right that cannot be taken without compensation.[154]

B. Beach and Water Access Rights in Florida

In Florida, unconditional access rights to waterways inure solely to riparian owners who hold title adjacent to navigable waters.[155] While *Stop the Beach Renourishment* held that direct access from the parcel is not necessary,[156] the Florida Supreme Court held previously, in *Crutchfield v. F. A. Sebring Realty Co.*, that riparian rights inure to a waterfront parcel and may not be severed from that property.[157]

The law of access to Florida non-navigable waters differs from navigable water rights. While Florida Constitution article X, section 11 confirms sovereign rights below the high water line of navigable waters, each owner of a parcel lying adjacent to a non-navigable waterbody owns a proportionate share of the waterbed, extending to the center. All of the adjacent parcels share a reasonable right to use the surface.[158] The Florida Supreme Court in *Duval v. Thomas*, extended this rule to the situation

149. *Id.* at 209–14.

150. *Id.* at 214.

151. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd., 512 So.2d 934 (Fla. 1987).

152. *Id.* at 941.

153. *Id.* at 939.

154. *Id.* at 936–37.

155. Hayes v. Bowman, 91 So.2d 795, 801 (Fla. 1957).

156. Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 177 L. Ed. 2d 184, 208 (2010).

157. Crutchfield v. F. A. Sebring Realty Co., 69 So.2d 328, 329 (Fla. 1954).

158. Osceola Cnty. v. Triple E. Dev. Co., 90 So.2d 600, 602 (Fla. 1956) (en banc).

where multiple persons own portions of a non-navigable water bottom.[159] The *Duval* Court held that each owner of nonnavigable bottomlands shares reasonable rights of fishing, swimming and boating.[160]

The most thorough treatment of rights in man-made waterbodies in Florida is *Anderson v. Bell*.[161] The Florida Supreme Court in *Anderson* held: "[A]n owner of lands that lie contiguous to or beneath a portion of a manmade lake has no right to the beneficial use of the entire lake merely by virtue of the fact of ownership of the land."[162] The landowner must establish rights by covenants or by establishing an easement or license.[163]

The seminal Florida decision on-point is *Brickell v. Town of Fort Lauderdale*.[164] The Florida Supreme Court affirmed an injunction blocking Brickell from barring public access between two streets that her husband and she had platted on facing banks of the navigable New River.[165] The Court noted: "The courts have frequently said, and we find the same expressions in the text-books, that it is 'inconceivable' and 'preposterous' to contend that a town would be located on the banks of a navigable river and the inhabitants deprived of the right of access to the river."[166]

Many water access cases address implied easement issues. Florida follows the "unity" rule of platting, under which a deed that cites a plat that includes a beach or park implies the grantee has access to that beach or park. *City of Miami v. Florida East Coast Railway Co.*[167] is the most factually fascinating such decision. A plat included a park. This was found to give non-exclusive, implied access by lot buyers to the park.[168] The public's use of the park created an implied dedication by the developer and acceptance by the City that coexisted with the implied rights of the lot buyers within the subdivision. Nonetheless, the developer's plat reserved and therefore retained all riparian rights to the park. The dedicator's sale of the waterfront strip to a railroad prior to the City's acceptance enabled the

159. Duval v. Thomas, 114 So.2d 791, 794–95 (Fla. 1959).

160. *Id.*

161. Anderson v. Bell, 433 So.2d 1202 (Fla. 1983).

162. *Id.* at 1207.

163. One of the authors addressed many of the rights of the public under Florida law to waterfront access in Sid Ansbacher & Susan Cobb Grandin, *Local Government Riparian Rights and Authority*, 70 FLA. B.J. 80–81 (1996).

164. Brickell v. Town of Fort Lauderdale, 78 So. 681 (Fla. 1918).

165. *Id.* at 681.

166. *Id.* at 684.

167. City of Miami v. Fla. E. Coast Ry. Co., 84 So. 726 (Fla. 1920).

168. *Id.* at 729.

railroad to retain the portion of the park where the railroad had constructed warehouses.[169]

The decision in *City of Miami v. Eastern Realty*[170] buttressed *Florida East Coast Railway Co.* The subdividers dedicated a park strip to lot buyers. The plat expressly forbade dedication to the public. Nonetheless, no one objected to long-time City maintenance of the park. The court found this implied a dedication to the City, which the City accepted by its maintenance.[171] Further, the dedicator failed to reserve riparian rights appurtenant to the park's waterfront. Therefore, the dedicator's successors could not enjoin the City from filling City-owned submerged lands lying adjacent to the park.[172]

Two Florida appellate decisions, issued nearly simultaneously, exhibit the fact-specific nature of establishing access rights. *Lanier v. Jones*[173] cited *Cartish v. Soper*[174] in holding that an easement running to the St. Johns River carried the right to build a dock as a reasonable riparian appurtenance.[175] The court found that the dock did not interfere with the servient owner's dock, one hundred feet away.[176] Conversely, the same court virtually simultaneously held that an "Easement Grant for Ingress and Egress to [the] Intercoastal Waterway," which granted access "up to and including the established bulkhead," did not grant any riparian rights, including dockage, in the waters beyond that bulkhead.[177]

C. The Public Trust Doctrine in Florida

Titles in Florida generally generate from one of three sources: (1) Spanish grants to individuals issued prior to January 24, 1818; (2) Spanish grants to the United States; and (3) federal grants to the territory and the state. Each of these carried separate public trust duties.

Spanish land grants were confirmed by Congress pursuant to the Treaty of Amity, Settlement and Limits Between the United States of America and His Catholic Majesty, the King of Spain, February 22, 1918 (the "Adams-

169. *Id.* at 731–33.
170. City of Miami v. E. Realty Co., 202 So.2d 760 (Fla. Dist. Ct. App. 1967).
171. *Id.* at 772–73.
172. *Id.* at 768, 773.
173. Lanier v. Jones, 619 So.2d 387 (Fla. Dist. Ct. App. 1993).
174. Cartish v. Soper, 157 So.2d 150 (Fla. Dist. Ct. App. 1963).
175. *Lanier*, 619 So.2d at 388.
176. *Id.* at 387–88.
177. Hume v. Royal, 619 So.2d 12, 13–14 (Fla. Dist. Ct. App. 1993).

Onis Treaty").[178] The Florida Supreme Court, in *Apalachicola Land & Development Co. v. McRae*, explicated the Spanish colonial sovereign public trust in navigable waters:

> When Spain acquired territory by discovery or conquest in North America, the possessions were vested in the crown; and grants or concessions of portions thereof were made according to the will of the monarch. While the civil law was the recognized jurisprudence of Spain and its rules were generally observed, yet the crown could exercise its own discretion with reference to its possessions.
>
> . . .
>
> Under the civil law in force in Spain and in its provinces, when not superseded or modified by ordinances affecting the provinces or by edict of the crown the public navigable waters and submerged and tide lands in the provinces were held in dominion by the crown . . . and sales and grants of such lands to individuals were contrary to the general laws and customs of the realm.
>
> . . .
>
> By the laws and usages of Spain the rights of a subject or of other private ownership in lands bounded on navigable waters derived from the crown extended only to high-water mark, unless otherwise specified by an express grant.[179]

To wit, the crown retained the navigable waters as the *de facto* colonial highway in Florida. Grants along the waters provided access to the water highway.

At statehood, Florida inherited a public trust duty to maintain submerged lands under tidal waters and, as to nontidal waters, all lands below the ordinary high water line.[180] After common law and the 1970 Florida constitutional amendments limited sovereign submerged lands to navigable waters, the reach of the public trust extended only over lands

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178. Apalachicola Land & Dev. Co. v. McRae, 98 So. 505, 524 (Fla. 1923).

179. *Id.* at 518.

180. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988) (summarizing *Oregon* ex rel *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) as confirming that the equal footing doctrine, admiralty jurisdiction and the public trust doctrine "extended the [public trust] doctrine to waters which were nontidal but nonetheless navigable, consistent with [the Court's] earlier extension of admiralty jurisdiction").

below the mean and ordinary lines underlying tidal and nontidal navigable waters, respectively.[181]

The Florida Supreme Court established the supremacy of the public trust doctrine in *Coastal Petroleum Co. v. American Cyanamid Co.*[182] The court held that the public trust in sovereign lands superseded private claims only absent express, authorized grants.[183] In *State v. Black River Phosphate*, the court held that a strict public trust bars use of sovereign lands by grantees in any manner that is not consistent with the public interest.[184]

Coastal Petroleum held that the public trust doctrine promoted sovereign lands public trust obligations over private claims emanating from swamp and overflowed lands patents.[185] The first Florida Constitution emphasized a public purpose of "improving" swamp and overflowed lands:

> A liberal system of internal improvements, being essential to the development of the resources of the country, shall be encouraged by the government of this State; and it shall be the duty of the general assembly, as soon as practicable, to ascertain by law, proper objects of improvement, in relation to roads, canals and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvement.[186]

The first Florida Legislature resolved to ask Congress to authorize a survey of the Everglades.[187] The federal government appointed Buckingham Smith in 1847 to inspect Lake Okeechobee and the Everglades for possible public works. Smith's report recommended drainage of the lake to facilitate improvement of the Everglades.[188] Ultimately, this led to the passage of the Act of September 28, 1850.[189] Of the 64,895,415 acres of such lands that Congress ever granted, 20,325,013 were in Florida. The Swamp and Overflowed Lands Act required that "[t]he proceeds of said lands, whether

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181. *See, e.g.*, Lee v. Williams, 711 So.2d 57, 63 (Fla. Dist. Ct. App. 1998) ("In Florida, waters are not considered navigable merely because they are affected by the rise and fall of the tides . . . ." (citation omitted)).

182. Coastal Petroleum Co. v. Am. Cyanamid Co., 492 So.2d 339, 342 (Fla. 1986), *cert. denied sub nom.* Mobil Oil Corp. v. Bd. of Trs. of the Internal Improvement Trust Fund, 479 U.S. 1065 (1987).

183. *Id.* at 343.

184. State v. Black River Phosphate, 13 So. 640, 648 (Fla.1893).

185. *Coastal Petroleum Co.*, 492 So.2d at 343.

186. FLA. CONST. of 1838, art. XI, § 2 (repealed 1868).

187. S.J. Res. 5, 1st Gen. Assemb., 1st Sess. (Fla. 1845).

188. S. REP. NO. 30-242, at 16–17 (1848).

189. Swamp and Overflowed Lands Act, ch. 84, 9 Stat. 519 (codified at 43 U.S.C. §§ 982–984 (2006)).

from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclaiming [of] said lands by means of levees and drains."[190] Florida therefore received swamp and overflowed lands with a public trust duty to "reclaim and facilitate the development of swamp and overflowed lands."[191]

III. *STOP THE BEACH RENOURISHMENT*

A. Background

On June 17, 2010, the United States Supreme Court issued its opinion in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.[192] *Stop the Beach Renourishment* reviewed the Florida Supreme Court opinion in *Walton County v. Stop the Beach Renourishment* (*Walton County*).[193] The Florida Supreme Court held that chapter 161 of the Florida Statutes, which fixes a waterfront boundary line after a public beach renourishment project to replace the ambulatory mean high water line that normally defines littoral property, did not constitute a facial taking of private Gulf-front property.[194] The new boundary would be set where the eroded beach met the water, and the new fill would separate the formerly waterfront parcel from the Gulf of Mexico.[195] The majority Florida Supreme Court opinion was made over vehement dissents by Justices Lewis and Wells, who urged that riparian and littoral rights carried rights of contact with the adjacent navigable waters.[196]

On appeal to the U.S. Supreme Court, *Stop the Beach Renourishment* principally addressed two issues. The first one concerned a significant eminent domain question: Can a court be liable for a taking of private property rights?[197] The law clearly establishes liability against legislative and executive branches for takings of property.[198] The *Stop the Beach Renourishment* Court did not have a majority who determined that the judicial branch can be liable for a taking.[199] Nonetheless, Justice Scalia

190. *Id.*
191. Ansbacher & Knetsch, *supra* note 93, at 337, *see supra* notes 4–5 and accompanying text.
192. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 177 L. Ed. 2d 184 (2010).
193. Walton Cnty. v. Stop the Beach Renourishment, 998 So.2d 1102 (Fla. 2008).
194. *Id.* at 1108, 1121.
195. *Id.* at 1108, 1115.
196. *Id.* at 1121 (Wells, J. dissenting); *id.* at 1122 (Lewis, J. dissenting).
197. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. at 192.
198. *Id.* at 197.
199. *Id.* at 197, 199, 208.

wrote for a four-Justice plurality opinion, which also included Chief Justice Roberts and Justices Thomas and Alito, that concluded there was no reason to treat the judicial branch differently from the other two.[200] Even if its decision is not binding, the plurality thus showed a willingness to entertain such claims. Further, Justice Scalia made it clear he was willing to push hard to convince a future fifth Justice to follow suit, creating a majority ruling.

This article focuses on the second issue: Did Florida's creation of a fixed statutorily authorized "erosion control line" (ECL) that replaces the normal property boundary, the ambulatory mean high water line (MHWL), along the Gulf of Mexico or Atlantic Ocean constitute a compensable taking of property rights of Gulf or oceanfront property owners?[201] This issue arises regardless of whether the act itself constitutes the taking or the Florida Supreme Court's holding is the taking.

Under chapter 161 of the Florida Statutes, when a government conducts beach renourishment, the resulting waterward boundary of the formerly beachfront parcel becomes the ECL.[202] The ECL is supposed to be located where the parcel met the ocean or Gulf before the new sand was deposited.[203]

In *Walton County* and *Stop the Beach Renourishment*, private property owners argued that *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.* controlled.[204] The Florida Supreme Court in *Sand Key* held that sand deposits accreting onto Gulf-front parcels vested in the property owner, as long as third parties' activities led to the fill.[205] In contrast, government and public interest representatives argued the language in *Sand Key* was dicta.[206] Those interests said that *Martin v. Busch*[207] controlled.[208] In his opinion in *Stop the Beach Renourishment*, Justice Scalia noted:

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200. *Id.* at 197.

201. *Id.* at 195, 206.

202. FLA. STAT. §§ 161.141–161 (2010).

203. *Id.*

204. *Stop the Beach Renourishment, Inc.*, 177 L.Ed. 2d at 207; Walton Cnty. v. Stop the Beach Renourishment, 998 So.2d 1102, 1114 (Fla. 2008).

205. Bd. of Trs. of Internal Improvement Trust Fund v. Sand Key Assocs., 512 So.2d 934, 941 (Fla. 1987).

206. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. 2d at 208.

207. Martin v. Busch, 112 So. 274 (Fla. 1972).

208. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. 2d at 207; *Walton Cnty. v. Stop the Beach Renourishment*, 998 So.2d 1102.

> In *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), the Florida Supreme Court held that when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high water line [sic] to become dry land, that land continued to belong to the State.[209]

Writing for the Court's plurality, Justice Scalia concluded that *Martin* provided sufficient background principles of Florida state property law to support the Florida Supreme Court decision in *Walton County*.[210] He concluded that the deemed-artificial avulsion from beach renourishment projects governed by chapter 161 was similar to reliction in *Martin*.[211]

Initially, Justice Scalia's reference to the mean high water line is legally wrong. The mean high water line separates private uplands from submerged lands underlying tidally influenced waters. Boundary lines between private and public property in Florida along the Gulf of Mexico, which was what was at issue in *Stop the Beach Renourishment*, are defined by the MHWL.[212] Lake Okeechobee, the subject of *Martin*, is a non-tidally influenced water body, where the ordinary highwater line, or OHWL, is the sovereign boundary.[213] *Martin* itself cites to the OHWL of the lake.[214]

The U.S. Supreme Court first accepted the MHWL as the sovereign boundary of tidewaters in *Borax Consolidated v. City of Los Angeles*.[215] The MHWL is determined by an 18.6-year lunar cycle, which obviously cannot apply to non-tidally influenced waters.[216] (*Borax* used an 18.6 year cycle, but the modern statutory determination in Florida Statute section 177.27 is nineteen years.)[217] Justice Curtis' concurrence in *Howard v. Ingersoll*[218] is the most commonly cited test for determining the MHWL. He said one should use soil and vegetation analysis.

In contrast, the Supreme Court expounded on the OHWL as the boundary of non-tidal waters in *Barney v. Keokuk*.[219] Under English common law, only tidewaters were navigable for purposes of public

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209. *Stop the Beach Renourishment, Inc.*, 177 L. Ed. 2d at 206 (citing *Martin*, 112 So. at 287).
210. *Id.* at 207.
211. *Id.* at 207.
212. *Id.* at 192.
213. *Martin*, 112 So. at 284.
214. Ansbacher & Knetsch, *supra* note 93, at 364.
215. Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 26–27 (1935).
216. *Id.*
217. FLA. STAT. § 177.27 (2000).
218. Howard v. Ingersoll, 54 U.S. 381, 427–28 (1851) (Curtis, J., concurring).
219. Barney v. Keokuk, 94 U.S. 324, 336 (1876).

ownership.[220] Conversely, "[i]n this country, as a general thing, all waters are deemed navigable which are really so."[221] Coincidentally, the *Martin* court noted the difficulty of determining the OHWL in flat and marshy central and southern Florida.[222]

B. Martin v. Busch

The U.S. Supreme Court was vexed by *Martin*. The Justices puzzled at oral argument why the Florida Supreme Court in *Walton County* had not considered, let alone relied upon, this opinion. Multiple Justices asked the advocates why that was so, if *Martin* appeared to support the Florida Supreme Court decision.[223] No one directly answered this question.

One can only guess why the Florida Supreme Court did not at least mention *Martin*. Nonetheless, the Florida Supreme Court majority in *Sand Key* found that *Martin* did not even address accretion or reliction.[224] Rather, the majority concluded that *Martin*'s sole issue was a boundary dispute.[225] The parties in *Martin* were arguing over which survey should be used to identify the ordinary high water mark.[226] The majority opinion in *Sand Key* held that any language concerning reliction or accretion in *Martin* was dicta.[227] Justice Ehrlich wrote a spirited dissent.[228] Nonetheless, *Sand Key* appeared to be the Florida law until *Walton County*.

More to the point, *Martin* addressed a unique set of circumstances. No one acquiring swamp and overflowed lands along the shore of Lake Okeechobee in the early twentieth century had any reasonable expectation of rights to develop waterward of their parcels. First, the Governor and Cabinet did not enjoy the legislatively-delegated authority to grant submerged lands until 1919, almost two decades after Busch's predecessors received their original Swamp and Overflowed Lands patent from the State. Second, the parcel lay next to dikes holding back the massive lake as part of the statutorily-authorized draining of the lake to facilitate "improvement" of the Everglades.

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220. *Id.*

221. *Id.*

222. Martin v. Busch, 112 So. 274, 283 (Fla. 1972).

223. Transcript of Oral Argument at 27, 28, 56, Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 177 L. Ed. 2d 184 (2010) (No. 08-1151).

224. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So.2d 934, 939 (Fla. 1987).

225. *Id.*

226. *Id.*

227. *Id.* at 940.

228. *Id.* at 941–47 (Erlich, J., dissenting).

By comparison, the authors are unaware of any beachfront parcels that would be affected by chapter 161 beach renourishment that would be deraigned from a Swamp and Overflowed Lands patent. The parcels in *Martin* and *Stop the Beach Renourishment* are wildly disparate in location, nature, and reasonable investment-backed expectations.

C. Public Access Grant

The *Stop the Beach Renourishment* decision discounted two fundamental issues of real property law. The first is the historical requirement under Florida law that a parcel touch the water in order to maintain riparian rights.[229] The dissent in *Walton County* cited numerous Florida decisions in driving home that point.[230] The obligation that a riparian parcel touch the water is inherent in Florida property law. It is not historically a mere "ancillary" right.[231] It is noteworthy that the majority opinion in *Walton County* cited no Florida precedent for its conclusion that the right of contact with the water is ancillary.[232]

This riparian right of contact is no surprise to the State. *Florida Attorney General Opinion 85-47* opined that a local ordinance that barred motor vessels within 300 feet of the public beaches would effect a taking of any affected riparian rights.[233] The Florida Attorney General emphasized: "It has been a settled principle of law in this state for a number of years that riparian or littoral rights are property rights that may not be taken without just compensation."[234] The opinion cites as well to multiple decisions, together with the then-existing version of today's section 253.141(1) of the Florida Statutes, as "a partial codification of the common law on the subject," and which statute stated, and still states in pertinent part, that riparian rights "are appurtenant to and are inseparable from the riparian land. *The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach.*"[235] While Justice Scalia held that Florida has the right to fill in its

229. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 177 L. Ed. 2d 184, 206 (2010).

230. Walton Cnty. v. Stop the Beach Renourishment, 998 So.2d 1102, 1122 (Fla. 2008) (Lewis, J., dissenting).

231. *Id.*

232. *Id.* at 1119.

233. Re: Municipalities—Ordinances—Littoral Rights, 1985 Fla. Op. Att'y Gen. 133 (1985).

234. *Id.* (emphases omitted).

235. *Id.* (emphasis added).

own sovereign lands, the Supreme Court opinion nowhere addresses squarely this previously well-established right of direct contact.[236]

Frankly, the matter might be better addressed in as-applied challenges where property owners can demonstrate direct impact on their lands. Coincidentally, that is just what the property owners did originally in *Stop the Beach Renourishment,* and they won at the first appellate level on appeal of an administrative order authorizing the renourishment project.[237] Two key points must be made that did not survive to United States Supreme Court review.

First, the Florida First District Court of Appeal below, in *Save Our Beaches v. Florida Department of Environmental Protection*, treated the impact of chapter 161 "as applied."[238] While the Florida Supreme Court in *Walton County* stated that the lower appellate court certified the question of whether Chapter 161 took riparian rights without compensation "in terms of an as applied challenge," the Florida Supreme Court concluded "the First District actually addressed a facial challenge."[239] That was not so. Not only did the First District frame the issue before it as whether "the final (administrative) order unconstitutionally applies Part I of Chapter 161, Florida Statutes (2005)," but the record is rife with discussions of the impacts of the project upon the properties themselves.[240]

Indeed, the lower appellate court framed one issue as whether the impairment of the property owners' riparian rights meant that the local governments failed to establish "satisfactory evidence of sufficient upland interest" as required by regulation 18-21.004(3) of the Florida Administrative Code, to perform the renourishment project under the permit on appeal.[241] That rule requires in pertinent part that a government applicant for a renourishment permit from the State need not establish that it is the riparian owner adjacent to the sovereign lands being filled "*provided that such activities do not unreasonably infringe on riparian rights.*"[242] While the decision of that lower appellate court addressed, necessarily, general Florida law of riparian rights, the issues as framed and decided were expressly as-applied.

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236. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 177 L. Ed. 2d 184, 208 (2010).

237. Save our Beaches, Inc. v. Fla. Dep't of Envtl. Prot., 27 So.3d 48, 50 (Fla. Dist. Ct. App. 2006).

238. *Id.* at 55, 60.

239. Walton Cnty. v. Stop the Beach Renourishment, 998 So.2d 1102, 1105 (Fla. 2008).

240. *Save our Beaches, Inc.*, 27 So.3d 48 at 56, 59.

241. *Id.* at 52.

242. *Id.* at 52.

The Florida Supreme Court reframed the issue as a facial challenge to chapter 161.[243] Even if the Florida Supreme Court incorrectly saw the First District decision as a facial claim, the higher court was entitled to reframe the question "in a manner that it believes better suits the purposes of review."[244]

Ironically, had the Florida Supreme Court not reframed the issues, it is much less likely the United States Supreme Court would have accepted jurisdiction. An as-applied case is necessarily far more limited to the facts before the tribunal. By reframing the issue as a facial challenge, the Florida Supreme Court made the property owners' challenge more difficult. It is black letter law that virtually all facial challenges must show that the challenged law cannot be applied constitutionally anywhere to any affected person.[245] Conversely, an as-applied challenger need show only that the law is unconstitutional as applied to a narrow set of facts.[246] Nonetheless, a reframed, facial determination of chapter 161's constitutionality set up a claim to the United States Supreme Court that the Florida Supreme Court had fundamentally altered Florida riparian rights law. Ergot—the judicial takings claim.

Second, the Florida Supreme Court reframed the nature of the property owners' claims waterward of the ECL. The property owners raised, and the First District addressed, the issue of whether the renourishment permit effected a taking when it eliminated the property owners' "right to receive accretions and relictions to their property,"[247] citing to the Florida Department of Environmental Protection order below, which "expressly recognized" that section 161.191 of the Florida Statutes "eliminated" those rights.[248] *Sand Key* established that riparian owners vested accretions that were placed as a result of governmental projects.[249] That the First District held in accordance with *Sand Key* was no surprise.

The Florida Supreme Court reframed the issue from accretion to avulsion. The higher court noted that the First District "fail[ed] to consider

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243. *Walton Cnty. v. Stop the Beach Renourishment*, 998 So.2d at 1105.

244. Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 528 (2005).

245. Fla. Dep't of Revenue v. City of Gainesville, 918 So.2d 250, 265 (Fla. 2005) (citing State v. Bales, 343 So.2d 9, 11 (Fla. 1977)).

246. *Id.* at 265.

247. *Save our Beaches, Inc.*, 27 So.3d at 54, 58.

248. *Id.*

249. *See* Bd. of Trs. of Internal Improvement Trust Fund v. Sand Key Assocs., 512 So.2d 934, 941 (Fla. 1987) (holding that accretions caused by development vested in a property owner that did not participate in that development).

the doctrine of avulsion, *most likely because the parties did not raise the issue before the First District.*"[250] The Florida Supreme Court noted that it held in *Sand Key* that accretion may alter boundaries, while avulsive events, such as hurricanes, typically do not do so.[251]

As noted above, the Florida Supreme Court holds broad jurisdiction to reframe issues certified to it for review. The court concluded that accretion is *per se* inapplicable under chapter 161.[252] It held that accretion is only a contingent right, in that it vests solely when deposits are placed on uplands.[253] The majority held further that the right to accretion applies solely to minimal additions, while chapter 161 applies to "critically eroded" beaches and would necessarily involve substantial placement of fill.[254] It held further that the new beach reduces any risk to the upland owner, so there is reduced risk of erosion that should be counterbalanced by rights to accretions.[255] It held that any accretion rights disappear by statute once the ECL becomes the fixed boundary, as the property loses direct contact with the water.[256] Finally, the littoral right of access remains,[257] so any accretion rights are tertiary.

The majority decision, upheld by the United States Supreme Court, totally disregards section 161.191(2), which states in pertinent part that the fixing of the ECL as the boundary eliminates the common law operation to "increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process."[258] The statute clearly affects rights to accretion.

Justice Scalia's opinion essentially allowed the Florida Supreme Court to reframe Florida riparian law to allow chapter 161 to eliminate the right of riparian landowners to contact with the water without compensation. The reframed issue leaves open the question, nominally, whether a particular project affects a taking of property rights that requires the use of eminent domain under section 161.141. Nonetheless, the breadth of the *Walton*

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250. Walton Cnty. v. Stop the Beach Renourishment, 998 So.2d 1102, 1116 (Fla. 2008) (emphasis added).

251. *Id.* at 1114, 1116.

252. *Id.* at 1118.

253. *Id.* at 1118.

254. *Id.*

255. *Id.*

256. *Id.* at 1108.

257. *Id.* at 1118.

258. *Id.* at 1108; Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 177 L. Ed. 2d 184, 207 (2010).

Beach dismissal of common law riparian rights undermines any upland owner's claim for a finding of a taking or any substantial compensation.

The *Stop the Beach Renourishment* decision not only undercuts the Supreme Court's jurisprudence requiring state property law to be based on underlying principles of that state's property law to defeat takings claims, it invites other states to creatively, if not baldly, reframe their water law to accentuate public waterfront access at the expense of upland owners without compensation. Of course, the procedural posture in which the Florida Supreme Court reframed the case, and presented the appeal to the Supreme Court, might have made the result that much more inevitable.

D. Constitutional Questions Left Unanswered

One fundamental question remains unanswered by *Walton County* and *Stop the Beach Renourishment*. Chapter 161 amends the Florida Constitution. It is fundamental law that a statute cannot contract or modify constitutional rights.[259] Nonetheless, this statute appears to do so.

Article X, section 11 of the Florida Constitution sets the sovereign boundary at the mean high water line along beaches.[260] That language is unambiguous. It is beyond debate that the MHWL is an ambulatory boundary. Nonetheless, section 161.191(2) of the Florida Statutes states:

> Once the [ECL] along any segment of the shoreline has been established in accordance with the provision of this act, the common law shall no longer operate or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion, or by any other natural or artificial process . . . .[261]

Insofar as the common law MHWL is incorporated by article X, section 11, the statute seems to amend the Florida Constitution's sovereign boundary.

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259. U.S. CONST. art. V.

260. FLA. CONST. art. X, § 11 (1970).

261. FLA. STAT. § 161.191(2) (2010); *see* Brief of Respondents at 6, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 177 L. Ed. 2d 184, 192 (2010) (No. 08-1151) (quoting FLA. STAT. § 161.191(2) (2010)).

IV. MONTANA

A. Establishment of Riparian Boundaries

In 1889, Montana became the forty-first state to enter the union.[262] Shortly thereafter, the Montana Supreme Court was asked to address the issue of the location of the boundary between riparian lands and navigable rivers in *Gibson v. Kelly*.[263] Mr. Gibson owned land adjacent to the Missouri River. Mr. Kelly entered and occupied a strip of that land located between the low and high water marks. In response to Mr. Gibson's claim to eject Mr. Kelly from the strip of land, Mr. Kelly argued that Mr. Gibson's property ended at the high water mark, and that Mr. Gibson was entitled to use the land between the high and low water marks.

Mr. Kelly relied upon English common law in asserting that Mr. Gibson's boundary ended at the high water mark of the Missouri River.[264] The Montana Supreme Court noted that "the courts of different states have followed different paths," some extending riparian ownership on navigable streams to the high water mark, and others to the low water mark:

> We have concluded, after a review of the decisions of other states upon this subject, that, upon reason and authority, and in view of all the circumstances of this state, we are fully justified in holding that the boundary of land bordering upon a navigable river should, whenever another intent is not expressed, be held to extend to the ordinary low-water mark.[265]

One of the factors taken into account by the Montana Supreme Court was legislation enacted by the 1895 Montana legislature while the case was pending.[266] This legislation, adapted from the California Civil Code, established the low-water mark as the boundary of riparian lands bordering

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262. Enabling Act of Feb. 22, 1889, 25 Stat. 676 (1889).

263. Gibson v. Kelly, 39 P. 517, 518 (Mont. 1895).

264. *Id.* at 519. The territorial government of Montana had enacted legislation providing "[t]hat the common law of England, so far as the same applicable and of a general nature, and not in conflict with special enactments of this Territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative authority." 1887 Mont. Laws 647 (originally enacted as 1865 Mont. Laws 356). The laws enacted by Montana's territorial government remained in force after statehood until altered or repealed. MONT. CONST. of 1889, art. XX, § 1 (repealed 1972).

265. *Gibson*, 39 P. at 519.

266. *Id.*

upon a navigable lake or stream.[267] Ownership by riparian owners of land bordering upon non-navigable bodies of water extended to the middle of the lake or stream.[268] The legislation also confirmed that the State of Montana owned "all land below the water of a navigable lake or stream."[269]

It is important to note that in this early decision, the Montana Supreme Court recognized public trust principles, noting that although riparian landowners own to the low-water mark on navigable rivers, "still the public have certain rights of navigation and fishery upon the river and upon the strip" of land between the high and low water marks.[270] But because Mr. Kelly's use of the land was not limited to fishing or navigation, this principle did not apply, and the Court affirmed his ejectment from Mr. Gibson's land.[271]

B. Early Conflicts Between Riparian Owners and the Public

In the first paragraph of his novella *A River Runs Through It*, Norman Maclean captured the affinity of Montanans for fishing:

> In our family, there was no clear line between religion and flyfishing. We lived at the junction of great trout rivers in western Montana, and our father was a Presbyterian minister and a flyfisherman who tied his own flies . . . . He told us about Christ's disciples being fishermen, and we were left to assume, as my brother and I did, that all first-class fishermen on the Sea of Galilee were fly fishermen and that John, the favorite, was a dry-fly fisherman.[272]

The Native American tribes that originally occupied Montana were dependent upon its streams, rivers, and lakes not only as a source of food, but as corridors of travel and commerce and as sites for inter-tribal meetings and religious ceremonies. The nomadic tribes commonly camped near streams and lakes. Early fur traders relied upon streams and lakes for hunting, trapping, and trading. Huge steamboats paddled regularly up the Missouri River to Fort Benton, transporting goods and people. Miners

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267. Sec. 1291, Civ. C. 1895 (codified at MONT. CODE ANN. § 70-16-201 (2009)).
268. *Id.*
269. Sec. 1091, Civ. C. 1895 (codified at MONT. CODE ANN. § 70-1-202 (2009)).
270. Gibson, 39 P. at 519.
271. *Id.* at 519–20.
272. NORMAN MACLEAN, A RIVER RUNS THROUGH IT AND OTHER STORIES (1976).

relied upon streams to develop and work their placer mines, and foresters floated logs down them.

With Montana's water bodies serving so many different purposes, the Montana Supreme Court has often been called upon to resolve conflicts between competing stakeholders. One of the earliest conflicts arose in 1925, when a landowner brought a trespass action against an avid sportsman for repeatedly hunting and fishing on waters located within his large landholdings.[273] The waters involved not only the navigable Missouri River, but also a small non-navigable stream meandering through the plaintiff's property that the sportsman had waded up from its confluence with the Missouri River, as well as a small pond located wholly within the landowner's property.[274]

The court first addressed the extent of riparian rights on the Missouri River, which it declared (without discussion) to be navigable.[275] The landowner, relying upon English common law, asserted the right to control the use of the river channel itself for all purposes except navigation.[276] The court rejected this argument, noting that "the waters above the bed or channel of a navigable stream at low-water mark are public waters and in this the public have a right to fish," subject to state fishing regulations.[277] The court noted that the sportsman "also had the right to shoot wild ducks upon the surface of the [navigable] stream or flying thereover, if he did not trespass upon the plaintiff's adjacent property."[278] The court ultimately determined that the trespasser had committed a trespass when he walked "above the ordinary low-water mark and in and above the ordinary high-water mark and between said water marks."[279]

With regard to the non-navigable stream, the court confirmed that the riparian landowner owned "the channel of the [river]" and although he "did not own the fish, ferae naturae, he had the exclusive right to fish for them while they were in the waters."[280] The "public have no right to fish in a

273. Herrin v. Sutherland, 241 P. 328, 329 (Mont. 1925). Other issues were involved in the case as well, including the right of the sportsman to fire a gun from a neighbor's property across the landowner's property, the right of the sportsman to cross the landowner's property in order to reach and hunt on adjacent public domain land, and the right to enter enclosed pastures to hunt. *Id.* at 329–30.

274. *Id.*

275. *See id.* at 330 (explaining that the parties conceded that the Missouri River was navigable).

276. *Id.*

277. *Id.* at 331.

278. *Id.*

279. *Id.*

280. *Id.*

non-navigable body of water, the bed of which is owned privately."[281] Accordingly, the sportsman trespassed when, in pursuing his fish, he waded up and down the beds of the non-navigable stream located on plaintiff's land. The court also found that the fisherman trespassed when he crossed the landowner's property to reach the small pond.[282]

Because the *Herrin* decision did not specify if the trespass on the navigable river occurred as a result of the fisherman walking above the high water mark only, or if it also resulted from his "tramping around" between the low and high water marks,[283] the court created some uncertainty as to whether a member of the public using a navigable river trespasses when entering between the low and high water marks. In its 1895 *Gibson v. Kelly* decision, the court had noted that the public had certain rights of navigation and fishery upon the strip between the low- and high-water marks.[284]

To resolve this ambiguity, at least with regards to fishing, the 1933 Montana legislature enacted the "angler's statute," which declared and subjected the riparian landowner's title between the low and high water marks to "the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose."[285] The angler's statute (which is still on the books) does not apply to lakes (whether navigable or non-navigable), nor does it apply to non-navigable streams located on private property. Although not titled as such, this legislation is the first codification in Montana of the concept of the public trust doctrine.

C. Expansion of the Public Trust Doctrine in Montana

In 1972, the people of Montana ratified a new constitution.[286] Unlike the 1889 constitution, Montana's 1972 constitution expressly declares that all waters within the state are the "property of the state for the use of its

281. *Id.*

282. *Id.* at 333.

283. The court characterized as a trespass the sportsman's tramping around "above the ordinary low-water mark and in and above the ordinary high-water mark and between said water marks [of the Missouri River.]" *Id.* at 331.

284. Gibson v. Kelly, 39 P. 517, 519 (Mont. 1895).

285. MONT. CODE ANN. § 87-2-305 (2009).

286. For a discussion of the formation and adoption of the 1972 Montana Constitution, see LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 7–17 (2001).

people."[287] The public's use of waters, however, is "subject to appropriation for beneficial uses as provided by law."[288]

In its territorial days, Montana's economy was driven primarily by agriculture and the extraction of its natural resources. Although these industries continue to be an important part of Montana's economy, tourism now significantly contributes to Montana's economy.[289] Many people from throughout the United States and the world come to Montana to enjoy its spectacular scenery, pristine environment, and wide-open spaces. Among these visitors are thousands of hunters, fishermen, and other visitors whose recreational activities include use of Montana's numerous rivers, streams, and lakes. But the most frequent users of Montana's waters are the residents themselves.

The wide-open spaces that attract so many visitors to Montana are dedicated primarily to agricultural uses. Ranchers and farmers rely upon Montana's rivers, streams, and lakes to provide water for their crops and livestock. To control livestock, many ranchers place fences across streams. Although historically many of Montana's riparian owners allowed trespasses by persons who walked along streams to catch fish, gather berries, or similar uses, if such activities became "annoying or injurious," the landowners would "put a stop to them."[290]

As the frequency of recreational use of Montana's waters increased, the tolerance of some landowners began to wear thin as they dealt with the higher volume of traffic. Although many users walked or floated down rivers without leaving a trace of their presence, all ranchers have stories of those who trampled banks, discarded garbage, damaged fences, harassed livestock, and camped on private property without permission.

The Dearborn River flowed through several sections of land owned by Michael Curran near the rugged eastern front of the Rocky Mountain range. Mr. Curran, who used the land to raise livestock, placed fences across the Dearborn at various locations. The floaters and anglers who scrambled up the Dearborn's banks to portage around these barriers did not receive a friendly welcome from Mr. Curran or his employees. The Montana Coalition for Stream Access filed a lawsuit against Mr. Curran, asserting the

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287. MONT. CONST. art. IX, § 3, cl. 3.

288. *Id.*

289. MONT. OFFICE OF TOURISM, MONTANA ANNUAL OFFICE OF TOURISM REPORT 2010, at 3 (2010), *available at* http://travelmontana.mt.gov/marketingplan/MTOTAnnualReport10.pdf.

290. Herrin v. Sutherland, 241 P. 328, 331 (Mont. 1925) (quoting Albright v. Cortright, 45 A. 634, 648 (N.J. 1900)).

right of the public to recreate on the Dearborn River.[291] Relying upon *Herrin v. Sutherland*, Mr. Curran responded that because the Dearborn was a non-navigable river, he was entitled to control the use of its channel throughout his property.[292] The district court determined:

> [T]he Dearborn River is in fact navigable for recreation purposes under Montana law; that recreation access to it is determined by state law according to one criterion—namely, navigability for recreation purposes; and that the question of recreational access is to be determined according to state, not federal, law.[293]

Mr. Curran appealed.

In its first decision to fully address the public trust doctrine, the Montana Supreme Court ruled that although federal law applies in determining whether a body of water is navigable for purposes of title (i.e., "who owns the streambed"), state law governs the test of "navigability" for purposes of who can *use* the waters.[294] Noting the Montana constitutional provision that all "waters within the boundaries of the state are the property of the state for the use of its people,"[295] the court stated:

> The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.[296]

The effect of the court's ruling was, for the first time in Montana's history, to bring non-navigable waters and recreational uses other than

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291. Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 165 (Mont. 1984).
292. *Id.* at 166, 170.
293. *Id.* at 165.
294. *Id.* at 167–68.
295. MONT. CONST. art. IX, § 3, cl. 3.
296. *Curran*, 682 P.2d at 170.

fishing within the protection of the public trust doctrine.[297] The court concluded that the Dearborn River was navigable not only for purposes of title,[298] but also for recreational purposes.[299] In the companion case of *Montana Coalition for Stream Access v. Hildreth* the court applied the same principles to allow recreational use of the non-navigable Beaverhead River.[300]

In summary, the public has the right to use for recreational purposes those waters in Montana that are "susceptible of recreational use," regardless of whether such waters are navigable or non-navigable for purposes of title.[301] The public's right extends not only to the area between the high water marks,[302] but also where landowners have erected fences or other barriers across a river. "[T]he public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the adjacent owner's property and his rights," including entrance on the riparian owner's property above the high water mark.[303] This surprising extension of the public trust doctrine to allow entrance onto private property above the high water mark was issued with absolutely no discussion of its impact on the property owner's "right to exclude," other than a warning that "the public do not have the right to enter into or trespass across private property in order to enjoy the recreational use of State-owned waters."[304]

D. Montana's Legislative Response

The 1985 Montana legislature responded by codifying the principles of the *Curran* and *Hildreth* rulings in its enactment of the Montana Recreational Use of Streams Act.[305] The Act proclaims that except as otherwise specifically provided, "all surface waters that are capable of

297. *Id.* at 170–71. The court dismissed Mr. Curran's reliance on the *Herrin* case in which an angler was held liable for trespass on two accounts: for wading up a non-navigable stream and crossing above the high water mark of a navigable stream. *Id.* The *Curran* court erroneously characterized the *Herrin* case as irrelevant, without precedential value and "pure dicta." *Id.* The *Curran* court in effect overruled *Herrin*, noting that its holding "is contrary to the public trust doctrine and the 1972 Montana Constitution." *Id.* at 171.

298. *Id.* at 166 (noting that the court's determination that the Dearborn River was navigable for purposes of title was based upon four to five uses of the river for floating logs between 1887 and 1889 (the year Montana gained statehood)).

299. *Id.* at 170.

300. Mont. Coal. for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984).

301. *Id.*

302. *Curran*, 682 P.2d at 172.

303. *Hildreth*, 684 P.2d at 1091 (citing *Curran*, 682 P.2d at 172).

304. *Curran*, 682 P.2d at 172.

305. MONT. CODE ANN. §§ 23-2-301 to 322 (2009).

recreational use may be so used by the public without regard to the ownership of the land underlying the waters."[306] Lakes are excluded from coverage by the Act.[307]

In Montana, many riparian owners place fences across rivers to control livestock or access.[308] Fences are a common occurrence not only on non-navigable streams, but also across many navigable rivers, such as the Dearborn River, because these rivers are easily traversed by livestock and people, not only when frozen in the winter but also during the summer when flows are low as a result of irrigation or natural conditions.[309]

Not only did the Recreational Use of Streams Act codify the *Curran* ruling granting recreational users the right to portage above the high water mark around artificial barriers,[310] it went a step further and required the riparian landowner to bear the expense of constructing those portage routes.[311] The Act also allowed the public to use streambeds of navigable waters below the high water mark for certain uses not addressed in the Curran case, including overnight camping, big game hunting, and the erection of duck blinds and moorages.[312]

Jack Galt and other landowners along the Smith River, a non-navigable river that attracts numerous recreational users to its unblemished beauty, immediately challenged the constitutionality of the Montana Recreational Use of Streams Act, and asked the court to re-examine the issue of public use of waters on non-navigable rivers.[313] In *Galt v. State*, the Montana Supreme Court re-affirmed the right of the public to use both navigable and non-navigable waters for recreational purposes, but it narrowed its ruling in *Curran* by stating:

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306. *Id.* § 23-2-302(1).

307. *Id.* § 23-2-301(2)–(3). Although lakes are not governed by the Act, they were not excluded from and are governed by the rule of decision issued in *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163, 172 (Mont. 1984).

308. In open range states such as Montana, an owner of livestock is generally not liable for the trespass of her livestock onto the property of others, unless the livestock break into an enclosure that is surrounded by a legal fence. Montana law also requires some negligence on the part of the livestock owner before imposing liability for damages to the enclosed property. MONT. CODE ANN. § 81-4-215; Larson-Murphy v. Steiner, 15 P.3d 1205, 1212–13 (2000).

309. Several navigable rivers in Montana are quite shallow in all but the spring run-off season, having been declared navigable based upon a handful of commercial uses by loggers or fur-traders in the late nineteenth century. Although all rivers that have been determined to be navigable under the federal test are subject to the federal navigational servitude, in fact very few of them are used for commercial transport today.

310. MONT. CODE ANN. § 23-2-311(1).

311. *Id.* § 23-2-311(3).

312. *Id.* § 23-2-302(2)(d)–(f).

313. Galt v. State, 731 P.2d 912, 913–14 (Mont. 1987).

> [T]here is no attendant right that such use be as convenient, productive, and comfortable as possible . . . [A]ny use of the bed and banks must be of minimal impact.[314]

The court struck down the statute's provisions allowing overnight camping, the erection of duck blinds and moorages, and the hunting of big game as overbroad.[315]

The court also struck down as unconstitutional the imposition upon the riparian landowner of the expense of constructing portage routes, noting that the landowner "receives no benefit from the portage" and such costs "should be borne by the State."[316]

In clarifying its *Curran* ruling, the Montana Supreme Court acknowledged that the effect of the public trust doctrine was to *create an easement* "in favor of the public" upon privately-owned riparian lands.[317] In its attempt to reconcile the interests between the public and riparian landowners, the Court stated:

> This easement must be narrowly confined so that impact to beds and banks owned by private individuals is minimal. Only that use which is necessary for the public to enjoy its ownership of the water resource will be recognized as within the easement's scope. The real property interests of private landowners are important as are the public's property interest in water. Both are constitutionally protected.[318]

Although the court ruled that the imposition of portage costs upon riparian landowners constituted an unconstitutional taking, it failed to address the issue of whether the imposition of a portage route above the high water mark constituted an unlawful taking, ruling summarily that the public trust doctrine allowed entrance on private lands above the high water mark as necessary to enjoy recreational use of the waters.[319]

In spite of the Court's ruling striking down certain provisions of the Montana Recreational Use of Streams Act as overbroad and

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314. *Id.* at 915.
315. *Id.* at 916.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*

unconstitutional, such provisions still remain on the books. Thus, based upon a reading of the statute, many recreational users mistakenly believe that they have the right, for example, to camp overnight between the low and high water marks of navigable streams.

E. "Public" Versus "Private" Waters

The Montana Recreational Use of Streams Act restricts the public's use of surface waters to "natural" water bodies.[320] The public may not recreate on private impoundments of water, such as stock ponds, nor upon water that is being diverted for a beneficial use, such as irrigation ditches.[321]

The Mitchell Slough is a channel that diverts water from the Bitterroot River for irrigation and other uses before returning sixteen miles later to the Bitterroot. Although the slough was, at one point in time, a natural channel of the Bitterroot, over the past century the Bitterroot, through natural processes, had migrated away from the channel, requiring riparian owners to make significant improvements to the channel, including the construction of headgates and lifts, to assure a continuous flow of water. In a case that began as an administrative proceeding to determine whether permits were required to construct proposed improvements to the Mitchell Slough,[322] the case transformed into a highly publicized battle over the issue of whether the surface waters of the Mitchell Slough were available to members of the public for recreational use.[323] The answer turned on whether the Mitchell Slough was a natural body of water.[324]

After a bench trial at which substantial amounts of both written and oral evidence were admitted, the district court ruled that the waters of the Mitchell Slough were not available for recreational use by the public under

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320. MONT. CODE ANN. § 23-2-301(12) (2009) (defining "surface water," for the purpose of determining the public's access for recreational use, as "a natural water body, its bed, and its banks up to the ordinary high-water mark").

321. *Id.* § 23-2-302(2)(b)–(c).

322. In its first order, the district court upheld under a "clearly erroneous" standard, a ruling made by the Bitterroot Conservation District (BCD) that the Mitchell Slough was not a natural perennially flowing stream for purposes of the Natural Streambed and Land Preservation Act, MONT. CODE ANN. §§ 75-7-101 *et seq*. Bitterroot River Prot. Ass'n. v. Bitterroot Conservation Dist., No. DV-03-476, 2006 Mont. Dist. LEXIS 575, at *7, *17 (D. Mont. Jan. 12, 2006) (*Bitterroot I*). This act regulates projects that result in "a change in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks." MONT. CODE ANN. § 103(5)(a) (2009). As a result, the landowners were not required to obtain a permit to make proposed improvements to the Mitchell Slough. *Bitterroot I*, 2006 Mont. Dist. LEXIS at *15.

323. Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 198 P.3d 219, 222–23 (Mont. 2007) (*Bitterroot II*).

324. *Id.* at 227–28.

the Montana Recreational Use of Stream Act.[325] The district court found that the Mitchell Slough fell within an exception excluding public use of waters that had been "diverted away from a natural water body for beneficial use."[326]

> [T]here is clear and convincing evidence that if man had not manipulated the waters of the Bitterroot River with the Tucker Headgate and other diversions and also excavated the channel of the Mitchell Slough, the Mitchell would no longer flow and it would most likely be a series of ancient, paleo channels connected by man. Nearly all of the credible scientific evidence supports the conclusion that the Mitchell Slough is no longer a natural water body. [327]

The Montana Supreme Court, in a unanimous opinion, ruled that the district court had erred in its interpretation of what constitutes a "natural water body" for purposes of the Montana Recreational Use of Streams Act.[328] The Montana Supreme Court construed the district court's interpretation of natural as requiring "a pristine river unaffected by humans."[329] It rejected this interpretation as "too narrow and inconsistent with the purposes," noting that few Montana streams and rivers would qualify since most have been modified by man in some form or another.[330] Although the Montana Supreme Court did not provide a definition of *natural*, it stated that "[e]vidence of the extent of man's efforts must be considered in conjunction with all other circumstances in a fact-driven inquiry."[331] The Court considered the following evidence in concluding that the Mitchell Slough was a natural body of water:

(1) its perennial flow;[332]

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325. *Id.* at 222.

326. *Id.* at 236 (quoting MONT. CODE ANN. § 23-2-302(2)(b)).

327. Bitterroot River Prot. Assoc. v. Bitterroot Conservation Dist., 2006 Mont. Dist. LEXIS 576, at *5–*6 (D. Mont. May 9, 2006).

328. *Bitterroot II*, 198 P.3d at 239.

329. *Id.* at 238.

330. *Id.* at 242. The district court had relied upon a definition of "natural" from Webster's Dictionary as "arising from; in accordance with what is found in nature; not artificial or manufactured." *Id.*

331. *Id.* at 238.

332. *Id.* at 239.

> (2) the increase in flow from its point of diversion (18.2 cubic feet per second) to the point where it returns to the Bitterroot (43.9 cubic feet per second);[333]
>
> (3) its use as a collection system for return irrigation flows and other surface waters;[334]
>
> (4) its natural origin and the continuing presence of significant portions of the channel in their historic location;[335] and
>
> (5) its fisheries.[336]

The Montana Supreme Court also found that the district court had not given sufficient weight to the Mitchell Slough's capacity for recreational use, as evidenced by a long history of actual usage of its waters by fishermen, hunters, and boaters.[337] The court concluded:

> [T]here is more "going on" here than simply a diversion of water to satisfy water rights. The "huge volume of water" which the District Court noted was diverted by Tucker Headgate dedicates a public resource to a multiplicity of functions discussed herein. Thus, while the Mitchell has been improved primarily by irrigators, it is much more than an irrigation ditch. If the Mitchell was simply an irrigation ditch, there would likely be little or no water flowing in it outside of irrigation season. Here, however, the Mitchell flows year-round and presents the characteristics of a stream throughout all seasons, a condition which, as the District Court acknowledged, has been enhanced by the Landowners.[338]

F. Expansion of the Definition of "Navigable"

On June 13, 1805, Captain Meriwether Lewis arrived at the Great Falls of the Missouri River, the first in a series of waterfalls "which I readily

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333. *Id.* at 241.
334. *Id.* at 240.
335. *Id.*
336. *Id.* at 241.
337. *Id.* at 236–37.
338. *Id.* at 241–42.

perceived could not be encountered with our canoes."[339] Thus began an arduous portage of approximately eighteen miles that was completed on July 14, 1805. Today, Ryan Dam sits at the site of the Great Falls, construction of which was completed in 1915 pursuant to a license issued by the federal government.[340]

In 2003, the parents of several Montana school children asserted a claim in federal court that the owners and operators of certain hydroelectric facilities (including Ryan Dam) should be paying rent to Montana because of the location of their facilities on the Missouri, Madison, and Clark Fork Rivers, which the plaintiffs classified as state-owned navigable rivers.[341] Although the suit was dismissed from federal court for lack of jurisdiction, the matter ultimately ended up before the Montana Supreme Court.[342]

Whether or not the owners of the hydroelectric facilities owed rent to Montana depended upon the "navigability" status of the Missouri, Madison, and Clark Fork Rivers at the time of statehood.[343] Montana asserted that these rivers were navigable, and the state owned title to their streambeds.[344] PPL Montana asserted that these rivers were not navigable at the locations on which the hydroelectric facilities were sited.[345]

In rendering its decision, the Montana Supreme Court noted that the terms "navigability" and "commerce" have been very liberally construed by the United States Supreme Court.[346] The Court also relied heavily upon the U.S. Supreme Court decision of *United States v. Utah*.[347] In the *Utah* case, the U.S. Supreme Court determined that a 4.35-mile stretch of the Colorado River was navigable, while other stretches were not.[348] The U.S. Supreme Court noted generally that conclusions as to navigability should be confined to the particular sections to which the controversy relates.[349] In contrast, the Montana Supreme Court affirmed the district court's conclusion that all

339. THE JOURNALS OF LEWIS AND CLARK 138 (Bernard deVoto ed., 1997).

340. PPL Mont., LLC v. State, 229 P.3d 421, 426 (Mont. 2010).

341. *Id.*

342. *Id.* at 427.

343. *Id.* at 447.

344. *Navigable Water Ways Owned by the State of Montana and Administered by the Department of State Lands*, INTERNET ARCHIVE, http://www.archive.org/stream/navigablewaterwa00montrich/navigablewaterwa00montrich_djvu.txt (last visited Dec. 15, 2010) (asserting that the Clark Fork and Missouri Rivers were navigable, but claimed only the middle section of the Madison River as navigable).

345. *PPL Mont., LLC*, 229 P.3d at 463 (Rice, J., dissenting).

346. *Id.* at 446 (majority opinion).

347. *Id.*

348. United States v. Utah, 283 U.S. 64, 89–90 (1931).

349. *Id.* at 77.

three rivers were navigable in their entirety.[350] The Montana court noted that the stretches of river on which the facilities at issue were located (including a 17-mile stretch of the Missouri River) were merely "short interruptions" that did not affect the navigability of the entire river.[351]

In determining the navigability of the Madison River, the Montana Supreme Court relied upon a single use in 1913 (more than twenty years after statehood) of the river for a commercial log float.[352] The Montana court also concluded that the district court's reliance on evidence of present day uses of the Madison, primarily recreational, was sufficient to establish the susceptibility of the Madison for commercial use at the time of statehood.[353]

PPL Montana has petitioned the U.S. Supreme Court for writ of certiorari.[354] Among other issues, it has challenged as overly broad the Montana Supreme Court's definition of navigability for purposes of title.[355] If upheld, the decision has the potential to bring numerous Montana rivers within the definition of "navigability" for purposes of title, particularly if the U.S. Supreme Court sustains the use of present-day commercial recreational ventures as evidence to establish, at the time of statehood, the navigability of a river in its entirety.

G. Perpendicular Access

The Montana Supreme Court has repeatedly emphasized that the public's right to use the streambeds of navigable and non-navigable waters for recreation does not create a right to access those waters across private property.[356] In spite of a Montana statute proclaiming that a "prescriptive easement cannot be acquired through . . . recreational use of surface waters," including an easement for the purpose of "entering or crossing of

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350. *PPL Mont., LLC*, 229 P.3d at 460–61.

351. *Id.* at 449.

352. *Id.* at 435. Although several circuits have adopted a "log-floating test" in determining the navigability of the river, *e.g.*, Puget Sound Power & Light Co. v. FERC, 644 F.2d 785, 788–89 (9th Cir. 1981), the U.S. Supreme Court has not. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899) ("The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river.").

353. *PPL Mont., LLC*, 229 P.3d at 448.

354. Petition for Writ of Certiorari, PPL Mont., LLC v. State, 229 P.3d 421, 426 (Mont. 2010) (No. 10-218).

355. *Id.* at 2–3.

356. *See, e.g.*, Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1984) (explaining that the public's right to use the streambeds of navigable and non-navigable waters for recreational use does not create a right of access to those waters across private property).

private property to reach surface waters,"[357] in *Wolf v. Owens* the Montana Supreme Court (without a mention of the statute) granted a prescriptive easement across private property for access to the surface waters of the Middle Fork of the Flathead River for recreational use.[358]

In Montana, riparian owners often fence to the abutments of bridges for purposes of livestock and access control. In 2004, the Public Land Access Association (PLAA) brought a suit in Madison County contending that the public trust doctrine entitles the public to access the Ruby River from public rights of way, including public bridges crossing the Ruby River.[359] The PLAA argued that fences installed by landowners up to the abutment of a public bridge were "encroachments" onto the public right of way, and must be removed to allow access to the river by recreational users.[360] The defendant riparian landowners responded that the public's right to use surface waters does not include a right to enter onto or cross private property, and that the public was required to use public access sites to reach the waters of the Ruby River.[361]

In a decision that considered the interests of both parties, the district court ruled that the county had authority to allow landowners to construct fences to the ends of bridges for appropriate reasons, including livestock control.[362] It also ruled that, to access rivers, the public has the right to use the public right of way upon which bridges are constructed (generally about sixty feet on either side of the bridge).[363] Thus, the court permitted landowners to keep their fences, as they were not an "encroachment" on the public right of way, but required them to install gates to facilitate public access.[364]

In 2009, the Montana legislature responded with House Bill 109, establishing a right of the public to access surface waters for recreational use by using public bridges and rights of way.[365] The statute also recognizes the right of landowners to fence up to a bridge's abutment "for livestock

357. MONT. CODE ANN. § 23-2-322 (2009).

358. Wolf v. Owens, 172 P.3d 124, 126–27, 130 (Mont. 2007).

359. Public Lands Access Assoc., Inc. v. Madison Cnty., No. DV-29-04-43, at 4–5 (D. Mont. Oct. 1, 2008), *available at* http://www.plwa.org/viewarticle.php?id=67 (order regarding motions for summary judgment).

360. *Id.* at 4.

361. *Id.* at 5.

362. *Id.* at 11–13.

363. *Id.*

364. *Id.*

365. MONT. CODE ANN. § 23-2-312 (2009).

control or property management"[366] as long as such fences "provide for public passage to surface waters for recreational use."[367] The State must provide "the materials, installation, and maintenance of any fence modifications necessary to provide public passage."[368]

H. Summary of Montana Developments

Although the early Montana courts and legislature strongly protected riparian rights (1) by extending riparian ownership to the low-water mark of navigable waters and to the middle of non-navigable waters,[369] and (2) by affirming the riparian owner's right to exclude the public's use of privately-owned streambeds,[370] these rights have progressively eroded. The first erosion was slight (and, in view of Montana's affinity for fishing, caused little controversy)—the adoption in 1933 of the "angler's statute" allowing fishermen to enter onto the banks of navigable rivers between the low- and high-water marks for purposes of fishing.[371] The second erosion was monumental—the expansion of the public trust doctrine to allow public use of both navigable and non-navigable streambeds for recreational use.[372]

Although the Montana Supreme Court struck down as unconstitutional legislation that imposed the cost of portage routes upon private landowners and allowed public use of private property for camping and big-game hunting, it has failed to fully address whether property owners should be compensated for the easement the Court has recognized in favor of the public to enter onto private property for recreational use of surface waters.[373]

In recent years, the rights of riparian landowners have continued to erode as a result of:

> (1) the extension of public recreational rights in channels that exist today based solely upon man-made improvements;[374]

366. *Id.* § 7-14-2134.
367. *Id.* § 23-2-313(1).
368. *Id.* § 23-2-313(3).
369. Gibson v. Kelly, 39 P. 517, 519 (Mont. 1895).
370. Herrin v. Sutherland, 241 P. 328, 331 (Mont. 1925).
371. MONT. CODE ANN. § 87-2-305.
372. Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1984).
373. *Id.*; Galt v. State, 731 P.2d 912, 916 (Mont. 1987).
374. Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 198 P.3d 219, 241–242 (Mont. 2007).

> (2) the application of "navigable" status to an entire river if a single stretch is, in fact, navigable; [375]
>
> (3) consideration of present-day uses, such as commercial guiding activities, in determining if a river was navigable at the time of statehood;[376]
>
> (4) turning a blind eye to the statutory prohibition against the acquisition of prescriptive easements across private property for access to surface waters for recreational use; [377] and
>
> (5) obligating riparian owners to construct fences abutting public bridges in a manner that allows public passage to the river.[378]

In *Stop the Beach Renourishment*, the U.S. Supreme Court has indicated its reluctance to interfere with a state's power to define the limits of riparian property rights. The U.S. Supreme Court will have the opportunity to review the extent of its deference to state authority to modify riparian property rights if it accepts *certiorari* in the *PPL Montana* case.

V. OTHER CREATIVE EFFORTS TO EFFECTUATE PUBLIC ACCESS TO WATERFRONTS

A brief recitation of several other jurisdictions' efforts to grant or to protect public access to waterfronts emphasizes the schism between public access and private property within coastal communities. We will turn to Hawaii and Texas, each of which presents a fascinating access issue.

A. Hawaii

Hawaii statute provides that the public has a right of access to and along shores that lie below the "upper reaches of the wash of the waves."[379] The various counties generally hold primary duty to establish and maintain access under sections 46-6.5, 115-5, and 115-7 of the Hawaii Revised

375. PPL Mont., LLC v. State, 229 P.3d 421, 449 (Mont. 2010).
376. *Id.* at 447.
377. Wolf v. Owens, 172 P.3d 124, 130 (Mont. 2007).
378. MONT. CODE ANN. § 23-2-313(1) (2009).
379. HAW. REV. STAT. §§ 115-4, 115-5 (1993).

Statutes. Additionally, chapter 205A makes the State responsible for preserving coastal resources and assisting the public access on and below the shoreline.[380]

While most public access is established by easement or similar right-of-way, Hawaii established its Na Ala Hele trails system, also known as the Statewide Trail and Access Program, by enactment of chapter 198D in 1988, to facilitate access to and between beaches and other resources by confirmation of "ancient," or pre-western contact, trails.[381] Section 198D-2 of the Hawaii Revised Statutes "direct[ed] [the Department of Land and Natural Resources (DLNR)] to plan, develop, [and] acquire land or rights for public use of land, construct and engage in coordination activities to implement a trail and access system."[382] The Na Ala Hele trail system is supposed to utilize ancient and historic trails.[383]

Perhaps the most important such trail is the Ala Kahakai National Historic Trail, which is addressed thoroughly in the National Park Service, Ala Kahakai National Historic Trail Comprehensive Management Plan.[384] The plan states that this trail extends about 175 miles "lateral to the shoreline or, within the trail corridor, run mauka-makai (from sea toward the mountain)," from "the northern tip of Hawaii . . . around South Point to the eastern boundary of Hawai'i Volcanoes National Park."[385] This trail, typical of the Na Ala Hele system, combines three kinds of Hawaii trails:

> (1) surviving elements of the ancient *ala loa*, the long trail, which natives made before western contact in 1778;
>
> (2) historic trails that developed on or parallel to the traditional routes post-contact (1778), and before the Highways Act of 1892 (typically, *alanui aupuni* (government roads) began in 1847); and

380. *Id.* § 205A-2 (2001).

381. *Id.* § 198D.

382. DIV. FORESTRY & WILDLIFE, HAW. DEP'T LAND & NAT. RES., REPORT TO THE TWENTY-FOURTH LEGISLATURE: REGULAR SESSION OF 2008: HAWAII STATEWIDE TRIAL AND ACCESS SYSTEM "NA ALA HELE," at 2 (2008).

383. HAW. REV. STAT. § 198D-2; *see infra* note 384 and accompanying text.

384. NAT'L PARK SERV., ALA KAHAKAI NATIONAL HISTORIC TRAIL COMPREHENSIVE MANAGEMENT PLAN 2 (2009), *available at* http://www.nps.gov/alka/parkmgmt/uphoad/ALKA_CMP_low-resolution.pdf.

385. *Id.*

> (3) more recent pathways and roads that created links between these ancient and historic segments.[386]

Notwithstanding the statutory confirmation of "ancient" and "historic" public access rights, the public's access to Hawaiian shores is not unconditional. The Petition for Writ of Certiorari in *Stop the Beach Renourishment* cited famous appellate decisions that originated in Hawaiian water law,[387] and which addressed, or even created, dramatic shifts in long-established water rights in that state. The Hawaiian property rights blog, maintained by Honolulu attorney Robert Thomas, discussed the *Robinson* decision, together with myriad related decisions that have been issued since 1959.[388] The *Robinson* case originated in a private dispute over the surplus water rights in a Kauai stream, which was resolved in a 65-page decision based on ancient, historic, and state water law.[389] The Hawaiian Supreme Court on appeal held sua sponte that neither party held any rights to the waters.[390] Instead, the court held the State possessed the rights.[391] Justice Levinson's vehement dissent on rehearing contended that the court "effectuated an unconstitutional taking of the appellants' and cross-appellants' property without just compensation and should be reversed on this ground as well."[392] After substantial jousting, the case is languishing back at trial court.

Sotomura was a federal suit following a Hawaii Supreme Court decision that found no compensable taking when the waterfront boundary was changed from the common law mean high-water mark to "the upper reaches of the waves" as set in the 1974 enactment of section 115-5 of the Hawaii Revised Statutes.[393] The federal district court held that the definition, still found in today's Hawaiian statute, has no "legal, historical,

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386. *Id.*

387. Petition for Writ of Certiorari at 31–32, Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 177 L. Ed. 2d 184 (2010) (No. 08-1151) (citing Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986); Sotomura v. Cnty. of Haw., 460 F. Supp. 473 (D. Haw. 1978)).

388. *On Judicial Takings, and the Hawaii Water Rights Backstory in* Stop the Beach Renourishment, INVERSECONDEMNATION.COM (June 24, 2009), http://www.inversecondemnation.com/inversecondemnation/2009/06/on-judicial-takings-hawaii-water-rights-and-stop-the-beach-renourishment.html.

389. McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1336 (1973), *on rehearing*, 517 P.2d 26 (1973) (per curiam).

390. *Id.* at 1338–39.

391. *Id.*

392. McBryde Sugar Co. v. Robinson, 517 P.2d 26, 27 (1973) (Levinson, J., dissenting).

393. Sotomura v. Cnty. of Haw., 460 F. Supp. 473, 476, 480 (D. Haw. 1978)

factual or other precedent."[394] Rather, the high water mark had long been the legal and historical oceanfront boundary in Hawaii:

> The [state Supreme Court] decision in *Sotomura* was contrary to established practice, history and precedent, and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.[395]

B. Texas

Texas courts have discussed numerous aspects of that state's public beach access case law and statutes. In the first recent decision, the Texas First District Court of Appeals in *Brannan v. State*, addressed a significant public access issue arising under that state's Open Beaches Act.[396] That act generally grants public access to any portion of a beach as follows:

> [A]ny beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom . . .[397]

Further, the Act requires a notice to purchasers of Gulf-front or nearby parcels that a structure that lies or is rendered seaward of the vegetation line as a result of natural processes may be removed.[398] The statute dictates the form of notice.[399]

After the trial court in *Brannan* ordered the structures at issue removed from the public easement that the court found had "rolled" upland onto the

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394. *Id.* at 480.

395. *Id.* at 481.

396. Brannan v. State, No. 01-08-00179-CV, 2010 WL 375921, at *19 (Tex. Comm'n App. Feb. 4, 2010); *see* TEXAS NAT. RES. CODE ANN. §§ 61.001-254 (West 2001 & Supp. 2009) (covering the use and maintenance of public beaches).

397. *Id.* § 61.001(8).

398. *Id.* § 61.025.

399. *Id.*

private lots, "forces of nature," rather than the government, removed all but three of the houses prior to the appellate decision.[400] The appellate court held it had jurisdiction to address whether to remove the three remaining structures.[401] Also, and significantly, the court found the refusal of the government to maintain the structures and the imposition of the "rolling easement" under chapter 61 as erosion occurred did not constitute compensable takings, either together or alone.[402]

The appellate court noted that *Arrington v. Mattox* held that the Act does not itself create a public beach easement where none exists.[403] The State contended that there existed an implied dedication and acceptance of public use.[404] The appellate court found that for at least forty years, the public had used the local beach where the properties were located.[405] The public had used the beach up to the line of vegetation without asking any private permission for typical beach activities. Finally, members of the public had kept the beach clean. Accordingly, the public obtained easements by implied dedication.[406]

The *Brannan* Court cited various intermediate Texas appellate decisions that upheld rolling easements under the Open Beaches Act and common law.[407] The Court emphasized *Matcha v. Mattox* ex rel *the People of Texas*, which analogized the rolling easement to the common law ambulatory beach title boundary line at the high water mark.[408]

The Court reviewed the background of the Open Beaches Act.[409] It stated the Texas Legislature passed the act in response to *Luttes v. State*,[410] to protect public interest in and use of public beaches. *Luttes* confirmed that the State owned between the mean-low and mean-high-tide lines, or the "wet beach."[411] Private ownership was confirmed as bounded by the mean-

400. *Brannan*, 2010 WL 375921, at *13, *17–*18 (stating that hurricanes and an extraordinary high tide, called a "bull tide," destroyed the other buildings and structures).

401. *Id.* at *14.

402. *Id.* at *8.

403. Arrington v. Mattox, 767 S.W.2d 957, 958 (Tex. App. 1989) (denying writ).

404. *Brannan*, 2010 WL 375921, at *15.

405. *Id.* at *17.

406. *Id.*

407. *Id.* at *18–19.

408. *Id.* at *18 (citing Matcha v. Mattox *ex rel.* Tex., 711 S.W.2d 95, 98–100 (Tex. App. 1986)).

409. *Id.* at *20.

410. Luttes v. State, 324 S.W.2d 167 (Tex. 1958).

411. *See id.* at 187, 191 (describing state holdings as the shore "regularly covered and uncovered by the tide").

high water line.[412] Before *Luttes*, it was believed that the State owned both the wet and dry beaches.[413] The Open Beaches Act was passed to protect previously understood public rights to the Gulf beaches.[414]

The *Brannan* Court distinguished *Nollan v. California Coastal Commission*, where the Nollans were refused a permit unless they gave a public easement between the mean-high-tide mark and their seawall.[415] Conversely, the *Brannan* court stated the Open Beaches Act does not create any public easement; rather, it only protects rights created in a public easement.[416] Here, there was no taking because the homeowners took title subject to a longstanding public easement waterward of the vegetation line.[417] As erosion, a massive high tide, or "bull tide," and hurricanes moved the line landward, the structures could be moved without compensation.[418] One wonders, however, if the high tide and hurricane's effect were properly considered in the rolling easement. The one Texas decision that most directly addressed sudden, avulsive events that "tear away" physical uplands found that avulsion does not alter legal water boundaries.[419] In *Coastal Industrial Water Authority v. York*,[420] the Texas Supreme Court cited numerous decisions nationwide and in Texas for this proposition.[421]

The *Brannan* Court observed that the Texas Supreme Court had recently heard oral argument in *Severance v. Patterson*, on certified question from the Fifth Circuit Court of Appeals. The first issue presented was whether a public beach easement may "roll" when the line of vegetation moves to lands that originally lay landward of the physical easement.[422] The *Brannan* Court rendered its decision because the remaining three property owners asked for prompt disposition while their structures remained standing.[423] The two additional certified questions were whether the rolling easement right emanates in common law or the Open

412. *Id.* (defining the Texas rule to be the same as the common law "mean high tide" rule and basing it on the "mean highest tide" of the two high tides).

413. *Brannan*, 2010 WL 375921, at *20 (citing to Neal Pirkle, *Maintaining Public Access to Texas Public Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1093–94 (1994)).

414. *Id.* at *22.

415. Nollan v. Cal. Coastal Comm., 483 U.S. 825, 836, 841–42 (1987).

416. *Brannan*, 2010 WL 375921, at *22.

417. *Id.* at *26.

418. *Id.*

419. Coastal Indus. Water Auth. v. York, 532 S.W.2d 949, 952 (Tex. 1976).

420. *Id.*

421. *Id.*

422. *Brannan*, 2010 WL 375921, at *22 (citing Severance v. Patterson, 566 F.3d 490, 502–03 (5th Cir. 2009)).

423. *Id.* at *28.

Beaches Act, and whether any compensation was due for the relocated easement.[424] Oral argument in *Severance* took place November 19, 2009.

It must be noted that the majority of the panel in the Fifth Circuit *Severance* case did not find Texas law regarding rolling easements nearly as clear as did the *Brannan* court. The federal majority stated that Texas decisions finding the rolling easement did not affect a taking "offered little to no analysis of the takings issue."[425] The panel majority stated Texas courts were inconsistent as well in determining "[w]hether the public's beach access easement arises by virtue of common law and under what theory—prescription, implied dedication, custom or the OBA itself . . ."[426] Accordingly, the *Severance* majority concluded the following required certification: "Indubitably, no "fixed" background principles of state law are articulated, only mutually inconsistent post hoc rationales. The state Supreme Court must sort out the confusion."[427]

The Texas Supreme Court answered the certified question on November 5, 2010, in *Severance v. Patterson*.[428] The *Patterson* majority found that a public easement on Gulf-front beach does not automatically "roll" landward after an avulsive event:

> Once [a lateral public beach easement is] established, we do not require the State to re-establish easements each time boundaries move due to *gradual and imperceptible changes to the coastal landscape.* However, when a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public easement on the public beach does not "roll" inland to other parts of the parcel or onto a new parcel of land. Instead, when land and the attached easement are swallowed by the Gulf of Mexico in an avulsive event, a new easement must be established by sufficient proof to encumber the newly created dry beach bordering the ocean.[429]

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424. *Id.* at *27.

425. *Severance*, 566 F.3d at 498–99.

426. *Id.* at 499; *see supra* note 417 and accompanying text. *Contra Brannan*, 2010 WL 375921, which concluded that the OBA itself protects, but does not create, public beach easements.

427. *Severance*, 566 F.3d at 499 n.8 (citing Neil E. Pirkle, Note, Maintaining Public Access to Texas Coastal Beaches: the Past and the Future, 46 BAYLOR L. REV. 1093 (1994)).

428. Severance v. Patterson, No. 09-0387, 2010 WL 4371438 (Tex. 2010).

429. *Id.* at *1 (emphasis added).

The Texas Supreme Court expressly disapproved of the *Matcha* line of cases.[430]

Specifically, *Patterson* concluded that the several lower Texas appellate courts finding that a rolling easement existed missed the point:

> The [*Matcha*] court held that legal custom—"a reflection in law of long-standing public practice"—supported the trial court's determination that a public easement had "migrated" onto private property. The court reasoned that Texas law gives effect to the long history of recognized public use of Galveston's beaches, citing accounts of public use dating back to time immemorial, 1836 in this case. However, the legal custom germane to the matter is not the public use of the beaches, it is *whether the right in the public to a rolling easement has existed since time immemorial*. The *Matcha* court's recognition of long-standing "custom" in public use of Galveston's beaches misses the point of whether a custom existed to give effect to a legal concept of a rolling beach, which would impose inherent limitations on private property rights.[431]

The Court cited *Nollan* in holding that imposition of an easement absent such a historically based rolling easement would require compensation.[432]

Justice Medina dissented and Justice Lehrmann joined.[433] Justice Medina contended that the majority made an unsupported, "vague distinction between gradual and sudden or slight and dramatic changes."[434] Needless to say, the *Patterson* majority is the converse of the *Walton Beach* and *Stop the Beach Renourishment* decisions, in holding that accretion and erosion alter oceanfront boundaries, while avulsive events do not do so.[435] The *Patterson* dissent's "one size fits all" rationale implies a more draconian result if the situation were reversed. Justice Medina would "roll" the easement waterward onto new beachfront created by accretion *or* avulsion.[436] The dissent favors lateral public access over private right to exclude in any boundary change along the Gulf.[437]

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430. *Id.* at *14–*15.
431. *Id.* (internal citation omitted).
432. *Id.* at *12 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987)).
433. *Id.* at *15 (Medina, J., dissenting).
434. *Id.*
435. *Id.* at *11 (majority opinion).
436. *Id.* at *17.
437. *Id.* at *19.

VI. *STOP THE BEACH RENOURISHMENT*'S IMPACT ON CUSTOMARY RIGHT OF USE AND ROLLING EASEMENTS IN FLORIDA

The Supreme Court in *Stop the Beach Renourishment* showed great deference to the Florida Supreme Court's holdings regarding public trust and property rights. Indeed, to the extent the Supreme Court held that *Martin v. Busch*,[438] a case never even cited, let alone addressed by the state court, supported the decision in *Walton Beach*, the Supreme Court seemingly applied the "tipsy coachman" rule.[439] This is especially significant, insofar as the Court had to hold the state action was grounded in a fundamental background principle of state law to uphold it against the takings claim.[440] In effect, the *Stop the Beach Renourishment* Court held that a Florida decision that the Florida Supreme Court never mentioned constituted the background principle of state law supporting the decision on review. Regardless, one wonders what the Supreme Court's deference means as to other public use of the beaches in Florida. Particularly, what does the decision portend for the public's rights to use the beaches by customary right?

The Florida Fifth District Court of Appeal, in *Trepanier v. County of Volusia*, noted, correctly, that these issues must ultimately be resolved by the Florida Supreme Court.[441] It is the exact set of issues that various Texas state and federal courts have not resolved conclusively regarding that state's Open Beaches Act. To wit, do public customary rights in a beach move landward as a beach disappears physically? If so, under what circumstances? Implicitly, the final question is, if it does, is the affected property owner due compensation? In a real sense, this is the opposite of *Stop the Beach Renourishment*. What are the respective public and private rights where no renourishment occurs?

The *Trepanier* court noted that Florida Constitution article X, section 11, confirms the State's public trust ownership of submerged sovereign lands lying below the mean high water line of the beaches of the Gulf of

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438. Martin v. Busch, 112 So. 274, 274 (Fla. 1972).

439. The "tipsy coachman" standard originated in *Lee v. Porter*, 63 Ga. 345, 346 (Ga. 1879), where the Georgia Supreme Court quoted Oliver Goldsmith Retaliation (1774): "The coachman was tipsy, the chariot drove home; would you ask for his merits, alas! He had none; what was good was spontaneous, his faults were his own." That is, the lower court reached the right result for the wrong reason, and will be upheld.

440. Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 177 L. Ed. 2d 184, 207 (2010).

441. Trepanier v. Cnty. of Volusia, 965 So.2d 276, 293 n.21 (Fla. Dist. Ct. App. 2006).

Mexico and the Atlantic Ocean.[442] As we have discussed, lands lying above the mean high water line are subject to private ownership. Just as in Texas, the typical ways that the public in Florida obtains an easement to use the "dry beach" are via prescriptive easement, dedication, whether express or implied, coupled with acceptance, or customary use.[443] The specific issue in contention in *Trepanier* was the right to drive on the beach where it eroded after tropical storms and hurricanes in 1999 and 2004.[444]

The court took little time in finding no prescriptive easement. Florida law establishes a prescriptive easement where a use is open, continuous, notorious, and adverse over twenty years.[445] Most prescriptive easement claims fail because there is a strong presumption that use is permissive.[446] Few claimants are therefore able to meet the high burden of establishing adverse use. The *Trepanier* court found the prescriptive claim failed to show it was adverse or continuous. The court noted:

> Appellant's affidavit stated that, before 1999, extensive dunes covered their property seaward of the seawall line and where the County now allows driving. From the record, it is disputed—indeed it appears unlikely—that the public was continuously driving on the part of the beach at issue prior to 1999, or that the public's use was adverse.[447]

The court also discounted the argument that the property owners' predecessor had dedicated the parcel to public use. The Court quoted the plat of the subject development, which stated in pertinent part: "The Coronado Beach Land Company . . . hereby dedicates the *boulevards, avenues, streets, roads, and drives to the public use*."[448] The plat did "not provide the 'clear and unequivocal' proof that the dedicator intended to dedicate" the "dry beach" portion of the platted parcel.[449]

Finally, the *Trepanier* court rejected the right to a "rolling easement" by custom based on the record before it.[450] The court remanded to flesh out the issue. It cited the Florida Supreme Court's decision in *City of Daytona Beach v. Tona-Rama, Inc*., where the majority of the court held that public

442. *Id.* at 284.
443. *Id.*
444. *Id.* at 278.
445. Downing v. Bird, 100 So.2d 57, 64–65 (Fla. 1958).
446. *Id.*
447. *Trepanier*, 965 So.2d at 284–85.
448. *Id.* at 286.
449. *Id.*
450. *Id.* at 293.

beach rights may be established by custom.[451] The Florida Supreme Court in *Tona-Rama* found that no easement was established by prescription, but one was established by custom on the facts of that case.[452] The *Tona-Rama* court held the standard is:

> [T]he recreational use of the sandy area . . . has been ancient, reasonable, without interruption, and free from dispute . . . .[453]

As applied to the facts, the *Tona-Rama* majority stated:

> This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself. Although this right of use cannot be revoked by the land owner, it is subject to appropriate governmental regulation and may be abandoned by the public. The rights of the owner of the dry sand may be compared to rights of a part-owner of a land-locked nonnavigable lake, as described in *Duval v. Thomas*, 114 So.2d 791 (Fla. 1959).
>
> Testimony was presented that the public's presence on the land and its use of the land was not adverse to the interest of the [property owner], but rather that the [owner's] Main Street pier relied on the presence of such seekers of the sea for its business. Thus, the issue of adversity was clearly raised and the evidence failed to show any *adverse* use by the public. . . . The general public may continue to use the dry sand area for their [sic] usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.[454]

Trepanier held that *Tona-Rama* is unclear as to whether right by custom is limited to the area where use was established, or to the entire beach.[455] The court held that the context of *Tona-Rama*, buttressed by Oregon authority, is best read to establish public use by custom solely in the area

451. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 78 (Fla. 1974).
452. *Id.*
453. *Id.*
454. *Id.*
455. *Trepanier*, 965 So.2d at 287.

that was used, versus the entire beach.[456] A clear reading of the majority opinion in *Tona-Rama*, however, shows that the court limited the customary right to "use *this particular* area of the beach."[457] Accordingly, one need not infer that the Florida Supreme Court so limited the use by custom.

Interestingly, Justice Scalia, joined by Justice O'Connor, dissented from the United States Supreme Court's denial of certiorari of a decision that rested on the first Oregon decision, which could be read to establish a public right to custom along the entire Pacific coast of Oregon.[458] Justice Scalia stated that custom was limited to specific individuals in a particular location.[459]

The *Trepanier* court summed up the law of custom as: "[A] certain thing has been done in a certain way in a certain place for so long that no one can remember when it wasn't done that way . . . ."[460] The *Trepanier* court cited Scalia's dissent in *Stevens* in stating: "[I]t appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical."[461] The court concluded that remand was necessary to establish if beach driving was thus customary in "this" stretch of beach.[462]

The Court discussed at length whether any customary use could be subject to a rolling easement. First, it noted that the record on summary judgment, read in the light most favorable to the property owners, showed that avulsion, and not erosion, caused the loss of sandy beach in the area. If so, boundaries would not change.[463]

The *Trepanier* court noted the Texas decision in *Matcha*,[464] where that court held the easement moved over time. Nonetheless, *Trepanier* stated the Texas Court appeared to make a policy, rather than evidentiary, decision.[465] The court remanded to determine whether "the public has a customary right to drive and park on Appellants' property as an adjunct of its right to other

456. *Id.* at 288.

457. *Tona-Rama*, 294 So.2d at 78 (emphasis added).

458. State v. Hay, 254 Or. 584, 462 P.2d 671, 673 (Or. 1969).

459. Stevens v. City of Cannon Beach, 510 U.S. 1207, 114 S.Ct. 1332, 1335 n.5 (Scalia, J., dissenting).

460. *Trepanier*, 965 So.2d at 289.

461. *Id.* at 289.

462. *Id.* at 285.

463. *Id.* at 292–93.

464. Matcha v. Mattox, 711 S.W.2d 95, 100 (Tex. 1986) (holding that "the public easement also shifts with the natural movements of the beach").

465. *Trepanier*, 965 So.2d at 293.

recreational uses of that property."[466] The question of whether an easement established by custom may move landward remains open in Florida.

The question is much more problematic on a renourished beach. Under section 161.211(2), the "provisions of section 161.191(2) shall cease to be operative as to the affected upland" if the agency charged with maintaining the beach fails to do so and "as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line."[467] Under this provision, erosion landward of the ECL continues to decrease the upland owner's property. However, the ECL is not voided by this provision, nor is the "vesting of title" under section 161.191(1) undone. Therefore, if the shoreline then accretes back to the ECL, any further accretions still belong to the state. This provision does not protect the upland owner at all. Instead, it protects the agency from legal responsibility to the upland owner for preventing further erosion.

In a classic case of unintended consequences, the statute would, under these circumstances, divest the public from the right to use the wet sand beaches. Under the statute, the entire area landward of the ECL remains vested in the upland property owner, which would include areas of wet sand if the beach erodes landward of the ECL. While the statute "creates" public easement by custom of waterward of the ECL, the State Brief in *Stop the Beach Renourishment* interprets Chapter 161 in a manner that would preclude a "rolling easement" to establish public use *per se* as a beach erodes upland of the ECL.[468] Given the varieties of erosion, and the odds that what eroded before will erode again, this is not a merely intellectual exercise. Rather, it is a prediction.

Otherwise, nothing in section 161.211 provides meaningful protection to the rights of the upland land owner. The statute does not "balance the interests" of the landowner and the state and return the landowner to the "status quo ante" if the state fails to live up to its end of the balance. Instead, the statute locks in the landowner's loss, provides only illusory rights or protections, and in fact guarantees that the landowner will be subjected to at least a temporary taking.

Even if the Act were interpreted as providing legally defensible rights comparable to traditional riparian rights, the conversion of the ancient property right to a statutory right leaves the upland property owner with no meaningful replacement. Quite simply, under current Eleventh Circuit

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466. *Id.*

467. FLA. STAT. § 161.211(2) (2010).

468. Brief of Respondents at 10–11, Stop the Beach Renourishment Inc. v. Fla. Dept. of Envtl. Prot., 177 L. Ed. 2d 184 (2010) (No. 08-1151).

decisions, statutorily created rights are given no inherent constitutional regard and can be totally abrogated by later legislative acts, limited solely by minimal due process requirements.[469] Nor are statutory rights protected by the takings clause absent some particular vesting under individual facts.

Mere "statutory rights" are not protected under Eleventh Circuit precedent from arbitrary and capricious deprivation by executive actors.[470] Furthermore, statutory rights are no longer protected fully by procedural due process guarantees under the Fourteenth Amendment: under current doctrine in the Eleventh Circuit, the procedural due process protections for a "statutorily created right" are limited to those found in the statute or common law.[471] Here, the Act gives no protections to the landowner to vindicate the "statutory rights," so the landowner would not be entitled to any federal due process protection against any action that deprived the landowner of those rights.

This means that the Legislature could simply rescind the statutorily provided "common law riparian rights" for any reason, without being subject to damages under either substantive due process or as a taking. Therefore, one must question footnote 12 of Justice Scalia's opinion for the *Stop the Beach Renourishment* Court, in which he concluded: "[W]hether the source of a property right is the common law or a statute makes no difference, so long as the property owner continues to have what he previously had."[472] The property owners lost both substantive and

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469. *See, e.g.*, Greenbriar Village, LLC v. Mountain Brook, 345 F.3d 1258, 1263 (11th Cir. 2003) (noting that the city could amend zoning ordinance to extinguish rights in permits, limited solely by the "rational basis" test); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995) ("[S]tate law based rights constitutionally may be rescinded so long the elements of procedural—not substantive—due process are observed.").

470. *See McKinney*, 20 F.3d at 1556 (discussing that only the Constitution creates substantive due process rights); City of Pompano Beach v. Yardarm Rest., Inc., 834 So.2d 861, 869 (Fla. Dist. Ct. App. 2002) (citing *McKinney*, 20 F.3d at 1556) (explaining that substantive due process protects against arbitrary legislative action, not arbitrary executive action); Paedae v. Escambia Cnty., 709 So.2d 575, 577 (Fla. Dist. Ct. App. 1998) (citing *McKinney*, 20 F.3d at 1556) (stating "a right which merits substantive due process protection is protected against government actions regardless of the procedures used to implement them"); *see, e.g.*, Ammons v. Okeechobee Cnty., 710 So.2d 641, 645 (Fla. Dist. Ct. App. 1998) ("Where a state-based right is revoked, it may be constitutionally rescinded where procedural due process is observed." (citing *McKinney*, 20 F.3d at 1556)).

471. *See* DeKalb Stone Inc. v. DeKalb Cnty., 106 F.3d 956, 959–60 (11th Cir. 1997) (holding plaintiffs did not allege a deprivation of Constitutional rights); Boatman v. Town of Oakland, 76 F.3d 341, 346 (11th Cir. 1996) (holding plaintiffs were not entitled to any procedural due process protection against illegal deprivation of permit other than to repair to state court); *McKinney*, 20 F.3d at 1556, 1561, 1565 (discussing that rights based on state law can be revoked provided procedural due process is followed).

472. Stop the Beach Renourishment, Inc. v. Fla. Dep't Envtl. Prot., 177 L. Ed. 2d 184, 208 (2010).

procedural rights by the purported codification of the rights they enjoyed under the United States and Florida Constitutions and at common law.

The "Brief of the Respondents, Florida Department of Environmental Protection & Board of Trustees of the Internal Improvement Trust Fund" (the "State Brief") in *Stop the Beach Renourishment*, stakes a position that undermines any public claim of a "rolling easement" landward of the ECL.[473] The State Brief provided that section 161.141 of the Florida Statutes "requires that the [State] follow the existing, pre-project MHWL in setting the ECL, unless engineering or other requirements dictate otherwise."[474] The brief emphasized section 161.161(5), which states in pertinent part that the State shall set the ECL in a manner that reflects "the need to protect existing ownership of as much upland as is reasonably possible."[475]

The State Brief lists ten ways chapter 161 protects upland owners.[476] Particularly, the brief states the statute does not "change[ ] the rights of private upland owners to their pre-existing parcel of land; none is physically taken; none is subject to different or inconsistent uses."[477] Footnote fifteen quotes section 161.141, in stating the State does not intend to "'extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property.'"[478] The State Brief quotes the section further in noting that "*additions to upland property*" are "'subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project.'"[479] Presumptively, then, the public easement does not extend to the uplands themselves, nor should it be allowed to "roll" *per se* after erosion landward of the ECL.

Stop the Beach Renourishment terminated substantial property rights under the United States and Florida Constitutions and common law. It probably left in place statutes that illegally amended the sovereign boundaries along beach shores established in Florida common law as codified in article X, section 11, of the Florida Constitution. That appears to be an issue, albeit core, for another day. It left two arguably beneficial

473. Brief of Respondents at 10–11, Stop the Beach Renourishment Inc. v. Fla. Dep't Envtl. Prot., 177 L. Ed. 2d 184 (2010) (No. 08-1151).

474. *Id.* at 7–8, 8 n.10.

475. *Id.* at 8 n.10.

476. *Id.* at 9–16.

477. *Id.* at 10–11.

478. *Id.* at 11 n.15.

479. *Id.* at 11 n.15 (quoting FLA. STAT. § 161.141) (emphasis added).

results for private upland owners along the Atlantic Ocean and Gulf of Mexico. First, it gave government sufficient security in public access created under chapter 161 to continue beach renourishment, funds allowing. Second, the State Brief interprets chapter 161 in a manner that indicates the statutorily created public easement waterward of the ECL will not become a "rolling" easement once beaches erode *landward* of the ECL. Perhaps *Stop the Beach Renourishment* will ultimately be a pyrrhic victory.