FLORIDA…WHERE PROPERTY BOUNDARIES FOR PUBLIC BEACH ACCESS MAKE NO "CENTS"

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There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the lifegiving touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same. The attraction of the ocean for mankind is as enduring as its own changelessness. The people of Florida—a State blessed with probably the finest bathing beaches in the world—are no exception to the rule. We love the oceans which surround our State. We, and our visitors, too, enjoy bathing in their refreshing waters.[1]

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1. White v. Hughes, 190 So. 446, 448–449 (Fla. 1939).

I. INTRODUCTION

Florida's pristine white sandy beaches and beautiful ocean waters drive many Floridians to secure their own piece of paradise by acquiring coveted oceanfront property. Other Floridians try to get as close as they can; "[eighty percent] of Florida's residents live within 10 miles of the coast, enjoying the amazing scenery and serenity, water activities and availability of fresh seafood, and much more."[2] Floridians are not the only people attracted to Florida's oceanfront property. Florida's 1,200 miles of coastline also attracts tourists from all over the world,[3] making tourism Florida's number one industry, generating US$67 billion in direct economic benefit.[4] Thus, tourism is crucial to Florida's economy.

2. Fla. Dep't of Env't Prot., *Living Shorelines: Natural Protection of Florida's Coasts*, FLORIDADEP.GOV, https://floridadep.gov/fco/fco/content/living-shorelines (last visited Oct. 29, 2018).

3. 116.5 million tourists visited the state in 2017, setting a new state record. *See* Press Release, Rick Scott 45th Governor of Fla., Gov. Scott: Florida Sets Another Tourism Record in 2017 (Mar. 20, 2018) (available at https://www.flgov.com/2018/03/20/gov-scott-florida-sets-another-tourism-record-in-2017).

4. *Governor Scott Applauds Florida's Tourism Marketing*, FLGOV.COM, https://www.flgov.com/governor-scott-applauds-floridas-tourism-marketing-2/ (last visited Oct. 29, 2018).

A. Climate Change & Sea Level Rise

"Florida has more to lose with sea rise than anywhere else in the U.S."[5] Specifically, Florida's cities, infrastructure, beachfront homes, and natural ecosystems are among the most vulnerable to sea level rise[6] due to Florida's expansive coastline and low elevation. Florida's beaches are especially at risk from sea level rise; the rising seas are shrinking Florida beaches at alarming rates.[7] Tourism, in particular, could take a big hit with rising sea levels and dwindling public beach access as beaches are the single biggest draw for tourists[8] and one of Florida's most valuable resources. Anticipated sea level rise in the state could cause Florida's tourism industry to lose US$178 billion annually by 2100.[9] Therefore, the issue of public beach access in the context of rising sea levels in Florida is one that needs to be addressed sooner, rather than later.

With the rising sea level causing dramatic changes on the beach,[10] the boundaries between privately owned portions of the dry sand and the sovereign lands held in trust for the public are becoming increasingly contested.[11]

In addition to changes resulting from the rising sea levels, the increase in hurricane and storm frequency and magnitude

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5. Alex Harris, *Florida has more to lose with sea rise than anywhere else in the U.S., new study says*, MIAMI HERALD, June 18, 2018, https://www.miamiherald.com/news/local/environment/article213092454.html.

6. *Climate Change and Florida: What You Need to Know,* THE CLIMATE REALITY PROJECT, (Oct. 16, 2018, 9:53 AM), https://www.climaterealityproject.org/blog/how-climate-change-affecting-florida.

7. *See e.g.*, Curtis Morgan*, Rising seas mean shrinking South Florida future, experts say*, MIAMI HERALD, June 22, 2012, https://www.miamiherald.com/latest-news/article1940791.html.

8. THOMAS RUPPERT & ERIN L. DEADY, *Climate Change Impacts on Law and Policy in Florida*, at 224, http://floridaclimateinstitute.org/docs/climatebook/Ch07-Ruppert.pdf.

9. *Climate Change and Florida: What You Need to Know,* THE CLIMATE REALITY PROJECT, (Oct. 16, 2018, 9:53 AM), https://www.climaterealityproject.org/blog/how-climate-change-affecting-florida.

10. Florida, specifically, is more likely to bear the cost of sea level rise than other coastal states, such as California. Florida is surrounded by the ocean on all sides but one. Moreover, Florida's low elevation will cause an amplified effect of even minimal sea level rise. As the sea level rise moves the mean high-water line landward, formerly dry sand will be inundated. Because the mean high-water line determines the boundary line for public and private property, sea level rise has a huge role to play in the clash between private landowners and the rights of the public. *See* Carolyn Ginno, *DO Mess With Texas. . .? Why Rolling Easements May Provide a Solution to the Loss of Public Breaches Due to Climate Change-Induced Landward Coastal Migration*, 8 SAN DIEGO J. CLIMATE & ENERGY L. 225 (2017); *see also* Orrin H. Pilkey & J. Andrew G. Cooper, *Society and Sea Level Rise*, 303 SCIENCE 1781 (2004).

11. *See* Alyson C. Flournoy, *Beach Law Clean Up: How Sea-Level Rise Has Eroded the Ambulatory Boundaries Legal Framework*, 42 VT. L. REV. 89 (2017).

alters the makeup of the sand on the beach, which raises new issues regarding rights of beachfront property owners.[12]

II. COMPETING INTERESTS – WHO CONTROLS?

Local governments have made attempts to adapt to climate change, which has given rise to new issues regarding public access to Florida's beaches.[13] However, there is no landmark court ruling or overarching state law dictating who ultimately controls access to Florida's beaches.[14]

A. Public vs. Private Interests

Many tourists and members of the public believe, albeit wrongly, that the public sand begins where the vegetation line ends and the dry sand begins.[15] However, the reality is that the beach falling landward of the mean high-water line[16] is typically privately owed.[17] The right of public access to the submerged lands seaward of the mean high-water line, sometimes referred to as "wet sand beach,"[18] is well settled in the common law and state statute.[19] Thus, the clash over who "owns" the beach centers around the "dry sand" areas of the beach.

"At the root of the access issue are two competing values deeply entrenched in American society: the notion that private property may be held to the exclusion of others, and the tradition of allowing

12. Lateral access, or public access along the shoreline, has been reduced by beach loss, which has been exacerbated by stronger storms, as well as human responses, such as shoreline armouring. *See* Fla. Sea Grant, *Beaches*, FLSEAGRANT.ORG, http://www.flseagrant.org/wateraccess/beaches/ (last visited Oct. 29, 2018).

13. RUPPERT, *supra* note 8, at 224.

14. Thaddeus Mast, Melissa Nelson Gabriel & Eric Staats, *Who owns Florida's beaches? Not who you think.*, NAPLES DAILY NEWS, Nov. 16, 2017, https://www.naplesnews.com/story/news/special-reports/2017/11/16/who-owns-floridas-beaches-private-landowner-rights-can-clash-public-beach-access/775556001/.

15. *See* Erika Kranz, *Sand for the People: The Continuing Controversy Over Public Access to Florida's Beaches*, 83 FLA. B.J. 10 (2009).

16. The mean high-water line is the boundary line between public and private land in Florida. See below for a more in-depth discussion on the mean high-water line.

17. *See* Kranz, *supra* note 15; *see also* Jane Costello, *Beach Access: Where Do You Draw the Line in the Sand?,* NY TIMES, Jan. 21, 2005 (According to the Florida Department of Environmental Protection, at least 60 percent of Florida beaches are private, offering little or no public access.).

18. Wet Sand Beach, often referred to as "foreshore" refers to the land area between the mean low and mean high water lines, and it's held in public trust, barring private ownership. Thus, it is part of the beach that is publicly owned. *See* Fla. Sea Grant, *Common Law Tools to Promote Beach Access*, FLSEAGRANT.ORG, http://www.flseagrant.org/wateraccess/common-law-statutes/ (last visited Oct. 29, 2018); *see also* Kranz, *supra* note 15.

19. Fla. Const. art. X, § 11.

the nation's coastlines to be free for public use."[20] On one hand, private property owners seek privacy and security.[21] On the other hand, the public believes that the beach "should be, and always has been, free for public use."[22] Thus, lawmakers face many difficult choices when balancing competing interests. Coastal erosion and sea level rise will continue to create conflicts between these competing interests. As the sea level rises and beachfront shrinks, counties will be faced with more public versus private disputes and will need to address the issues more systematically.

B. Gaining Public Access to Florida's Beaches

Unlike other states that have adopted statutes or acts addressing the right of the public to access dry sand areas of the beach,[23] Florida state law has not yet expanded the rights of the public to access the dry sand portions of the beach on a state-wide level, despite demands from the state's constituents.[24] Therefore, for the public to access the wet sand beach held in trust for the people, and the ocean itself, alternative methods of acquiring such a right are necessary. Common alternative methods include the doctrines of prescriptive easement, dedication, and customary use. However, because of the inefficiency and inadequacy of prescriptive easements and dedication to acquire a right to access on a state-wide level, the customary use doctrine remains the primary source of right in Florida.[25]

But what happens when the customary public use of the beach is made impossible by the migration of the ocean's mean high-water line? Do the areas that were subject to the public right of use migrate with the dry sand onto private property that it had not previously applied to? Or, does the public lose its customary right once it is made impossible?

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20. *See* Kranz, *supra* note 15.

21. *Id.*

22. *Id.*

23. For example, New Jersey has expanded its public trust doctrine. In *Matthews v. Bay Head Improvement Association*, 471 A.2d 355 (1984), the state expanded its public trust doctrine to permit swimmers, boaters and fisherman to use part of the dry sand beach falling within private property to sunbathe, rest and relax. The rationale rested on the fact that reasonable enjoyment of the wet sand beach area and the ocean cannot be realized unless some enjoyment of the dry sand beach is also allowed. Additionally, Texas has amended its state laws to extend the area to which public trust rights apply all the way up to the vegetation line. *See* TEX. NAT. RES. CODE ANN. § 61.011(Vernon Supp. 1999).

24. See e.g., Surfrider Foundation, *Policy on Beach Access*, SURFRIDER.ORG, June 27, 2009, https://www.surfrider.org/pages/policy-on-beach-access.

25. Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, Appendix A (2011) (listing the Florida source of right as custom).

Local governments have tried to skirt these questions by implementing county ordinances establishing the public's right of customary use along the dry sand beach throughout its entire county, which has forced property owners to resort to litigation.[26] In the wake of the Florida state legislature's passing of House Bill 631[27] in 2018, the controversy over customary use of dry sand beaches continues to heat up.[28] House Bill 631 has ultimately put more pressure on courts to make the decision about customary use and exacerbated the overwhelming need for the Florida Supreme Court to speak on the issue regarding customary use as it relates to the inevitable migrating boundary lines in the era of climate change and sea level rise.

Regardless of how the issues of customary use ordinances are settled, a new combination of court precedent[29] and sea level rise could threaten the public's right to use beaches to which the public currently has a customary right of recreational use, thus potentially undermining Florida's tourism industry. In the rise of coastal development and changing landscape, private property rights must be balanced with the public's right of use.

This paper focuses on the clash between the property rights of coastal landowners whose plats extend to the mean high-water line and public right to use Florida beaches in the wake of sea level rise caused by climate change. Specifically, this paper addresses the likelihood of whether the Florida Supreme Court will recognize that an established public easement for use of the dry sand beach migrates with changing dry sand beach areas. It further explores whether such easements could be applied to private property to which it had not previously been applied. This paper then concludes with a consideration of potential hypothetical facts that could aid in advancing an argument for the customary use doctrine to apply to the entire coast of Florida.

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26. *See, e.g.,* Alford v. Walton Cty., No. 3:16cv362-MCR-CJK, 2018 WL 4905948 (N.D. Fla. Oct. 9, 2018)("The public's long-standing customary use of the dry sand areas of all of the beaches in the County for recreational purposes is hereby protected.").

27. Fla. HB 631 (2018), codified as Florida Statute 163.035 states, in relevant part: "(2) ORDINANCES AND RULES RELATING TO CUSTOMARY USE.—A governmental entity may not adopt or keep in effect an ordinance or rule that finds, determines, relies on, or is based upon customary use of any portion of a beach above the mean high-water line, as defined in s. 177.27, unless such ordinance or rule is based on a judicial declaration affirming recreational customary use on such beach." See section on HB 631 below for a discussion on statute.

28. Tom McLaughlin, *Petition Calls for Repeal of HB 631*, NWF Daily News, 2018, https://www.nwfdailynews.com/news/20180726/petition-calls-for-repeal-of-hb-631.

29. *See*, RUPPERT, *supra* note 8, at 227 ("Currently, the ambiguous holding of the Fifth District Court of Appeals in the Volusia County case (Trepanier et al. v. County of Volusia), which potentially puts at risk public easements by custom as sea level rise impacts beaches, is the law for all trial courts in Florida; however, if a trial court ruling depending on the Trepanier case is appealed in a district outside of Florida's Fifth District Court of Appeals, the case will not bind that appeals court.").

III. FLORIDA PROPERTY LAW FOUNDATIONS

Understanding the potential outcomes of new legal issues that result from the rising sea levels requires an overview of fundamental and relevant property law doctrines and concepts in Florida law.

A. Oceanfront Landowner Rights, In General

Oceanfront property has long been a dream that has evaded most people. With less availability and a shrinking coastline, this hot commodity is increasingly sought after by buyers from all over the world. A majority of the highest valued property in Florida lies on or near the beaches; and in Florida, these lucky landowners are permitted to purchase plats that extend down to the mean high-water line. Though these property owners may own the dry sand portion of the beach, rights to this beachfront land, like rights to other property, are not absolute.[30]

1. Riparian and Littoral Property

The boundaries between land parcels are usually assumed to be static and unchanging. However, coastal property is not stable, and the boundary line[31] between what is publicly and privately owned routinely moves. Beachfront property that extends to the mean high-water line of a tidal water body is typically called "littoral" property, which is distinguished from property that abuts to a flowing body of water, usually called "riparian" property.[32] Riparian, or littoral property, contrasts with non-littoral property, which is characterized by static and unmoving boundaries.[33]

Owners of beachfront property have special rights when it comes to the beach, known as "littoral rights," in addition to sharing with

30. *See* Kranz, *supra* note 15. ("While beachfront property owners generally have title to the dry sand beach down to the average high tide line, ownership of all others does not necessarily mean that the exclusions-of-others stick is within the bundle of rights attached to this part of the property. Title to any property may be subject to explicit or implied easements, limitations based on traditional right of use, or common law prohibitions of activities considered nuisances.").

31. FLA. STAT. § 177.27(14) and (15) (2019). (Defines the mean high-water line).

32. FLA. STAT. § 253.141 (2019). ("riparian rights are those incident to land bordering upon navigable waters."). Specifically, riparian rights applied only to lands that bordered rivers and streams, whereas littoral rights applied to oceanfront lands.

33. *See* Ginno, *supra* note 10, at 230.

the public the right to fishing, bathing, navigation and commerce.[34] Included in these special littoral rights are the right to have access to the water, the right to reasonably use the water, the right to accretion and reliction, and the right to the unobstructed view of the water.[35] In the context of public use of dry sand beaches, private littoral owners can restrict access to the dry sand area of beach, which is essential to recreation, and can also isolate many beaches by denying the public access across private dry sand.

In Florida, the law permits the seaward boundary of littoral property to change when the line between the water and the dry sand migrates; however, Florida law distinguishes between gradual changes and sudden changes to determine property rights.[36] "Several different processes can change the relative location of the dry sand beach, the [wet sand beach], and [the] submerged lands, all of which have potential impact on the extent of the lands subject to public trust and private ownership."[37] Thus, the distinction between gradual and sudden changes is critical in determining who holds title after a shoreline change. However, in the context of sea level rise and climate change, some commentators have suggested that it may be appropriate to depart from these distinctions due to their inapplicability to the facts that characterize the movement of the coastline resulting from sea level rise.[38]

2. Sudden Movement – Avulsion

Avulsion is used to describe a dramatic shift in the location of the water.[39] This dramatic shift can affect property boundary lines by causing a submersion of dry sand, a deposit of alluvium[40] that transforms the wet sand or submerged land to dry sand, or a rapid

34. Walton Cty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1111 (Fla. 2008).

35. The right of unobstructed view to water is not as common as are other riparian rights in other states. *See* Flournoy, *supra* note 11.

36. *Walton Cnty.*, 998 So. 2d at 1113. *See also* Peloso, *supra* note 25, at 114.

37. *See* Flournoy, *supra* note 11, at 102.

38. *See generally*, Ginno, *supra* note 10, at 231; *See also* Joseph L. Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion and Property Rights*, 11 VT. J. ENVTL. L. 641, 645 (2010) ("The rising sea level [from climate change] is neither gradual like traditional accretion, erosion, or reliction; nor is it sudden and violent like traditional avulsion. We are facing a historically distinct situation that is not a good factual fit with the [traditional common law] rules."); *See also* J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENVTL. L. 625, 633–635.

39. *Avulsion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

40. Alluvium is an accumulation of soil, clay or other material deposited by water; esp., in land law, an addition of land caused by the buildup of deposits from running water, the added land then belonging to the owner of the property which it is added. *Alluvium*, BLACK'S LAW DICTIONARY (10th ed. 2014).

withdrawal of water.[41] In instances of "avulsion" or sudden and dramatic loss of beach due to hurricane or strong storm, property boundaries do not move.[42] In *Walton County v. Stop the Beach Renourishment*, the Florida Supreme Court stated that, "under the doctrine of avulsion, the boundary between public and private land remains the [mean high-water line] as it existed before the avulsive event led to sudden and perceptible losses or additions to the shoreline."[43]

3. Gradual Movement – Accretion or Erosion

In contrast, with accretion or erosion, property boundaries usually move with the shifting mean high-water line.[44] Accretion is the gradual addition of soil to the shore of a riparian (including littoral) owner's land, caused by natural shifting tides, winds, or storms. Florida follows the common law standard for natural accretions: title to accreted land vests in the riparian owner whose land has been extended seaward.[45] In *Walton County*, the Florida Supreme Court stated that, "under the doctrines of erosion, reliction, and accretion, the boundary between public and private land is altered to reflect gradual and imperceptible losses or additions to the shoreline."[46] Florida courts seem to presume a migratory boundary line, and changes are presumed to be caused by gradual accretion or erosion, absent an avulsive event.[47]

B. Florida Public Trust Doctrine

The United States and Florida both inherited the idea of public trust from the English Common Law.[48] Nearly every state has incorporated some version of the public trust doctrine, however, the application of the doctrine is not universal and variation exists among the states.[49] Specifically, "[s]tates vary in both the geographical scope … and the specific … rights that" are afforded to its citizens.[50]

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41. *See* Flournoy, *supra* note 11, at 103.
42. Trepanier v. Cty. of Volusia, 965 So. 2d 276, 292(Fla. 5th DCA 2007).
43. *Walton Cty.*, 998 So. 2d at 1114.
44. *Trepanier,* 965 So. 2d at 292.
45. Bd. of Trs. v. Sand Key Assocs., 512 So. 2d 934, 936 (Fla. 1987).
46. *Walton Cty.*, 998 So. 2d at 1114.
47. *See* Flournoy, *supra* note 11, at 104; *see also* Mun. Liquidators, Inc. v. Tench, 153 So. 2d 728, 731 (Fla. 2d DCA 1963) ("[T]here is a presumption of accretion or erosion as against avulsion.").
48. Brickell v. Trammell, 82 So. 221, 226 (Fla. 1919).
49. *See generally* Peloso, *supra* note 255.
50. *See* Peloso, *supra* note 25, at 57.

In Florida, the public trust doctrine is established in the state's Constitution:

> 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. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.[51]

Thus, Florida common law recognizes three zones that are important in defining property rights on the coast: "submerged lands, foreshore, and dry sand beach."[52] In Florida, like the vast majority of states,[53] the boundary between public and private property rests at the mean high-water line.[54] The mean high-water line is defined by Florida statute.[55] The areas below the mean-high water line—the foreshore, or the "wet sand beach," and submerged land zones—are held in trust by the state for the public.[56] Specifically, the public trust doctrine establishes that these parts of the beach have traditionally been used for travel, hunting, fishing, and more recently, recreation, are held in trust by the state.[57] Thus, the wet sand beach is the only part of the beach that is governed by the public trust doctrine.[58]

On the other hand, the dry sand zone of the beach—the area between the mean high-water line and the vegetation line—is

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51. Fla. Const. art. X, § 11.

52. Flournoy, *supra* note 11, at 98; *see also* Peloso, *supra* note 255, at 60.

53. *See* Peloso, *supra* note 255, at Appendix A.

54. Fla. Const. art. X, § 11; FLA. STAT. § 177.28(1) (1974) (providing that the mean high-water line is the boundary line between public and private lands).

55. FLA. STAT. § 177.27(14), (15) (2019). "Mean high water" means the average height of the high waters over a 19-year period. *Id.* For shorter periods of 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. *Id.* "Mean high-water line" means the intersection of the tidal plane of mean high water with the shore. *Id.* Cf. Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 14 (1935) (stating that the federal rule for calculating the median high-water line is determined by "the average height of all waters over a period of 18.6 years").

56. Wet Sand Beach, often referred to as "foreshore" refers to the land area between the mean low and mean high water lines, and it's held in public trust, barring private ownership. Thus, it is part of the beach that is publicly owned. *See* Fla. Sea Grant, *Common Law Tools to Promote Beach Access*, FLSEAGRANT.ORG, http://www.flseagrant.org/wateraccess/common-law-statutes/ (last visited Oct. 29, 2018); *see also* Kranz, *supra* note 15.

57. *See* City of West Palm Beach v. Bd. of Trs. of the Internal Improvement Trust Fund, 746 So. 2d 1085, 1089 (Fla. 1999).

58. However, there is more to public use of the wet sand area of the beach than the right to do so. To exercise that right, the public must have access. Because much of Florida's beaches are privately owned and public access points have issues of their own, the public must cross private property to gain access to areas held in trust by the state. Without a public right of access across private dry sand, the right to the wet sand areas becomes irrelevant.

subject to private ownership.[59] Therefore, although property below the mean high-water line belongs to the State, private property owners may have the ability to exclude public access to their property.[60]

IV. SOURCES OF PUBLIC RIGHT TO USE OF BEACH IN FLORIDA

Contrary to other states, such as New Jersey and Texas, which have expanded their public trust doctrine to grant public access to dry sand beach via statute or act,[61] the Florida public trust doctrine provides that title of the portion of the beach *below* the mean high-water line is held by the state in trust for all the people.[62] "The "beach," however, includes more land than what is set aside for the people under the public trust doctrine." [63] Thus, because the public trust doctrine only affords the public with certain rights relating to the wet sand beach and the ocean itself, the issue of access to the dry sand beach zone remains in constant contention.

Because of the necessity of public access to the "beach" and not just the ocean water, Florida courts have recognized that the public may acquire rights to the dry sand areas of privately owned portions of the beach through alternative methods.[64] These alternative methods come in the form of easements via prescription, dedication, and custom;[65] however, this paper will primarily focus on the alternative method of custom considering the unworkability[66] of prescriptive easements and dedication in the context of established public easements being applied to private property to which it had not previously been applied.

A. Prescriptive Easements

Prescriptive Easements are one method that the public can use to gain access to private property. In *Downing v. Bird*, the Florida Supreme Court addressed the issue of prescriptive easements and

59. Trepanier v. Cty. of Volusia, 965 So. 2d 276, 284 (Fla. 5th DCA 2007).

60. *See Common Law Tools to Promote Beach Access*, FLORIDA SEA GRANT (last visited Oct. 29, 2018) http://www.flseagrant.org/wateraccess/common-law-statutes/.

61. *See generally* Peloso, *supra* note 25.

62. Fla. Const. art. X, § 11.

63. *Trepanier,* 965 So. 2d at 284.

64. *Id.* at 284–88.

65. *Id.*

66. Both prescriptive easements and dedications are geographically fixed to a certain location on the dry sand beach as they apply to a particular place on a platted map. Thus, the right of public access under these doctrines is not sensitive to the future location of the beach. The public's right of access will attach to the beach no matter how far it moves with the rising seas. Consequently, under the doctrines of prescriptive easement and dedication, the legal issue posed by this paper would be answered in the negative.

held that the public can establish access to private property after demonstrating uninterrupted use of the property for twenty years.[67] The court abandoned the theory that prescriptive right was based on the presumption of a prior grant, and instead treated acquisition of prescriptive easements like acquisition via adverse possession.[68]

The court put forth the elements that are required to establish a prescriptive easement:

> In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition, the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.[69]

Further, the burden of proof is difficult for a claimant to establish as Florida law requires that the claimant's use be adverse.[70] As such, Florida courts have generally not found prescriptive easements over dry sand areas of private beaches because they have found the public's use was not adverse.[71]

Establishing a right of use by prescriptive easement is inefficient and inadequate in Florida. Portions of the dry sand beach are only public after those specific portions have been litigated, meaning there would have to be lawsuits against every beachfront property owner in the state in order to give the public access to the full coast.

Because prescriptive easements apply to a particular place on a platted map, it may be challenging for members of the public to

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67. Kranz, *supra* note 15, at 16; Downing v. Bird, 100 So. 2d 57, 60–61, 65–66 (Fla. 1958).

68. *Bird*, 100 So. 2d at 64. However, the differences are that with adverse possession, there must be a course of possession, whereas a public easement doesn't require such possession. Additionally, adverse possession must be exclusive, whereas public easement use may be in common with the owner or the public. *Id*.

69. *Id.*

70. "Acquisition of rights by one in lands of another, based on possession or use, is not favored in the law and the acquisition will be restricted[;] [a]ny doubts as to the creation of the right must be resolved in favor of the owner." *See Bird*, 100 So. 2d at 64.

71. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974) (holding that there was no prescriptive easement because the use was consistent with that of the owner, who had encouraged the public to come onto his land); City of Miami Beach v. Undercliff Realty & Investment Co., 21 So. 2d 783, 812–13 (Fla. 1945) (holding no prescriptive easement because there was no evidence that the use was adverse); City of Miami Beach v. Miami Beach Improvement Co., 14 So. 2d 172, 177–78 (Fla. 1943) (holding no prescriptive easement because the public use of the beach was "not antagonistic to the ownership of the property").

argue that these easements move with the relative changes in the beach onto private property which it had not previously been applied.[72] Furthermore, it may be difficult and unlikely that a claimant could prove the requisite twenty-year uninterrupted use of the property if there was no adverse use on the particular plat if the boundary line moves inward. Thus, as sea levels rise and the public trust land comes to occupy the formerly dry sand over which the public had an easement, the easement will most likely be lost under Florida law.

B. Dedication

Florida courts have recognized express and implied dedications as sources of public right to use dry sand beach. An implied dedication is the "setting apart of land for public use, and to constitute such a dedication there must be an intention by the owner clearly indicated by his words or act[ions] to dedicate the land to the public use."[73] The essential element of an implied dedication is the intent of the landowner to dedicate the land.[74] Thus, it is difficult to establish the intent of the landowner when he or she is in court objecting to said dedication. Further, the dedications are revocable by the landowner and are granted based on a tract-by-tract basis.[75]

Therefore, obtaining public access by dedication is also ineffective and inadequate in the state of Florida. Because dedications apply to a particular place on a platted map, and owner intent is a prerequisite, "it may be challenging for . . . members of the public to argue that these easements move with the relative changes in the beach."[76] Thus, like prescriptive easements, as sea levels rise and the public trust land comes to occupy the formerly dry sand over which the public had an easement, the easement may be lost.

C. Custom

Access secured through public trust, custom, or statute defines the beach itself, not its current location, as the relevant area to which the public has a right. Unlike other states, such as Oregon, Hawaii and Texas, that have applied the doctrine of custom broadly to the entire state, Florida requires that the particular

72. Peloso, *supra* note 25, at 94.
73. *City of Miami Beach*, 14 So. 2d at 175.
74. *Id.*
75. Brent Spain, *Comment*, *Florida Beach Access: Nothing But Wet Sand*, 15 J. LAND USE & ENVTL. 167, 171 (1999).
76. Peloso, *supra* note 255, at 94.

parcel of beach in contention has been customarily used by the public. Because custom is less fixed on geographic location than prescriptive easements and dedications, established public easements by custom have the greatest potential to move landward with the migrating boundary line and apply to private property to which it had not been applied previously.

However, "[t]he potential right of the public to customary use of dry sand beach areas has been a major point of contention in . . . areas of Florida" that consist of private properties with boundaries that reach down to the mean high-water line.[77] Landowners have pushed back against local government attempts to create customary use ordinances that cover the entire dry sand beach in the county. For example, many local governments have attempted to create ordinances recognizing the public's customary right to use beaches and landowners resorted to litigation.[78]

In addition, the Florida Supreme Court has been silent on the issue of whether an established public easement for use of the dry sand beach could be applied to private property to which is had not previously been applied. Ambiguous holdings in the Courts of Appeal attempting to address such a migration has left the public with more unanswered questions regarding established public easements in the context of rising seas and climate change.

1. Daytona Beach v. Tona-Rama Inc.

The Florida Supreme Court adopted the doctrine of custom in 1974 based, in part, on the rationale that the court recognize[d] the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans in the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this court.[79]

In *City of Daytona Beach v. Tona-Rama Inc.*, a beachfront landowner operated an ocean pier on the dry sand area where he constructed an observation tower.[80] The plaintiff argued right of use by prescriptive easement and the Florida Supreme Court held that

77. *See* RUPPERT & DEADY, *supra* note 8, at 225; *see generally* Kranz, *supra* note 15.

78. *Id.*; *see also* Alford v. Walton Cty, No. 3:16cv362-MCR-CJK, 2018 WL 4905948 (N.D. Fla. Oct. 9, 2018) (Landowners sued arguing that the county did not have the authority to enact a customary use ordinance that extended to all dry sand portions of the beach in the county).

79. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d at 75.

80. *Id.* at 76–77.

there were not sufficient facts to warrant a prescriptive easement because of the lack of adversity inconsistent with the owner's use and enjoyment of the land.[81]

Instead, the court recognized a common law principle of the public's "customary use" of the state's dry sand beaches and adopted the doctrine of customary usage as a means by which the public can establish rights to utilize dry sand areas of Florida beaches for traditional recreational uses.[82] Specifically, the court held

> if the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption, and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as recreational adjunct of the wet sand or foreshore area.[83]

Further, the court noted that:

> the general public may continue to use the dry sandy area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained though custom to use this particular area of the beach as they have without dispute and without interruption for many years.[84]

The court's language concerning the phrase "this particular area of the beach" is not entirely clear.

2. Reynolds v. County of Volusia

The ambiguity of the geographical scope of the decision in *Tona-Rama* was subsequently addressed in a Fifth Circuit District Court of Appeal decision twenty-one years later. In *Reynolds v. County of Volusia*, the Court of Appeal clarified the scope of *City of Daytona Beach v. Tona-Rama, Inc.* and limited the doctrine of custom to use that the *particular* beach supported in the past. The court held that "[the doctrine of customary use] requires the courts to ascertain in each case the degree of customary and ancient use the [*particular*] beach has been subjected to."[85] Thus, the doctrine of custom may only be applied on a case-by-case basis after the *Reynolds* Court

81. *Id.* at 75.
82. *Id.* at 78.
83. *Id.*
84. *Id.*
85. Reynolds v. Cty. of Volusia, 659 So. 2d 1186, 1190 (Fla. 5th DCA 1995). (emphasis added).

limited *Tona-Rama* in scope to the beach that was subject to the original litigation unless and until the Florida Supreme Court speaks more directly on the issue.

3. Trepanier v. County of Volusia

The Fifth District Court of Appeals again acknowledged the issue regarding the scope of the *Tona-Rama* decision in *Trepanier v. County of Volusia*. In considering whether the Florida Supreme Court in *Tona-Rama* announced, as a matter of law, a right by custom for the public to use the entire dry sand beach of the entire coast of Florida, the court relied on its own interpretation of *Tona-Rama* and its dicta in *Reynolds*.[86] Specifically, the court did not believe that the Florida Supreme Court intended to announce a right by custom for public use to the entire sandy beach area of the entire state of Florida, but only to the beach at issue in the case.[87] However, the court did recognize that it is not clear what the *Tona-Rama* court meant by the phrase "this particular area of the beach," and recognized that it may refer to the dry sand in that particular case, or more broadly, to the dry sandy beach part of the beach generally.[88]

Even more, the Fifth District Court of Appeal raised the key issue of whether an established public easement for use of the dry sand beach migrates with the dry sand beach onto and could be applied to private property to which it had not previously been applied.[89] Specifically, the court noted that whether the public's customary right to use the dry sand moved landward along with the dry sand beach was unclear.[90] However, the court intimated the possibility that regardless of whether the sand moved due to avulsion or erosion, an established customary use easement providing the right of the public to recreational use of the privately owned dry sand beach might not migrate landward with the dry sand beach area.[91] The Court of Appeal ultimately remanded the case back to the trial court to make findings of fact to support that the public had established a customary use to the owner's parcels.[92] The trial court found that, over the past century, there was evidence

86. *Trepanier,* 965 So. 2d at 287.
87. *Id.*
88. *Id.*
89. *Id.* at 294; *See also* RUPPERT, *supra* note 8, at 226–27.
90. *Trepanier,* 965 So. 2d at 287.
91. *Trepanier,* 965 So. 2d at 293 ("it is not evident, if customary use of a beach is made impossible by the landward shift of the mean high-water line, that the areas subject to the public right by custom would move landward with it to preserve public use on private property that previously was not subject to the public's right of customary use.")
92. *Id.*

that the beach had varied dramatically and there were times that the dry sand beach had been located in the property of the owners.[93] Thus, the finding of fact in the trial court skirted the key issue raised by the Court of Appeals.

According to one commentator:

> [T]he ambiguous holding of the Fifth District Court of Appeals in the Volusia County case, which potentially puts at risk public easements by custom as sea level rise impacts beaches, is the law for all trial courts in Florida; however, if a trial court ruling depending on the Trepanier case is appealed in a district outside of Florida's Fifth District Court of Appeals, the case will not bind that appeals court. Ultimately, this issue carries so much significance for Florida that it will eventually have to be decided by the Florida Supreme Court.[94]

Because *City of Daytona Beach v. Tona-Rama* was not abundantly clear as to the scope of its decision regarding customary use, the limitations outlined in the Fifth District Court of Appeals decision in *Reynolds* is currently the law for all trial courts in Florida. Thus, the *Reynold's* court limits the use of the doctrine to a specific portion of a specific part of the beach that can only be deemed a right when it has been established by the court, meaning the doctrine is not currently used to grant the public a right of use along the entire coastline of dry sand beach. If the geographic limitations outlined in *Reynolds* do not get overturned by the Florida Supreme Court, it is unlikely that Florida will recognize some type of more general "rolling easement,"[95] and allow established easements to move landward with the mean high-water line. In other words, unless the Florida Supreme Court is willing to explicitly broaden the *Tona-Rama* decision beyond the limitations in *Reynolds*,[96] it is likely that the public will be left without one of its only, and arguably most efficient, tools of securing public access to privately owned beaches.

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93. *See* RUPPERT, *supra* note 8, at 227.

94. *Id*.

95. See *infra* p. 24 and note 106.

96. *See* Kranz, *supra* note 15; *see also* Regulation of Dry Sand Portion of Beach, Op. Att'y Gen. Fla. 2002–38 (2002), http://myfloridalegal.com/ago.nsf/Opinions/45605C3FD5AA4AD985256BC70052F5BD.

V. WILL FLORIDA TAKE THE LEAD FROM ANOTHER STATE?

A. Oregon

Oregon has developed a broader doctrine of custom than the state of Florida. Often considered the pioneering case of customary rights,[97] *State ex rel. Thornton v. Hay* involved the public bringing suit against beachfront property owners to prevent them from enclosing the dry sand area contained in the property deed.[98] The court held that the public did not establish a prescriptive easement to the dry sand, but did establish a right to the dry sand by the doctrine of custom.[99] The court reasoned that the right to use of beaches all across the state belongs to the public as a whole, not just to nearby residents.[100] Further, the public in Oregon has openly used the beach since the time of first settlement, and this continued customary use enables the public to acquire a right to access the dry sand.[101]

The doctrine of customary use was resoundingly affirmed by the United States Supreme Court in *Stevens v. City of Cannon Beach*. In *Stevens*, the court paraphrased the common-law doctrine of custom as defined in *Thornton* as follows:

(1) The land has been used in this manner so long "that the memory of man runneth not to the contrary";

(2) without interruption;

(3) peaceably;

(4) the public use has been appropriate to the land and the usages of the community;

(5) the boundary is certain;

(6) the custom is obligatory, i.e., it is not left up to individual landowners as to whether they will recognize the public's right to access; and

(7) the custom is not repugnant or inconsistent with other customs or laws.[102]

Several other states, including Florida,[103] have adopted the customary rights doctrine to recognize public easements on beaches. In effect, the customary rights doctrine has "moved the lineal

97. *See* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 664 (2010).

98. State ex. Rel. Thornton v. Hay, 462 P.2d 671, 672 (Or. 1969).

99. *Id.* at 676.

100. *Id.*

101. *Id.* at 673.

102. Stevens v. City of Cannon Beach, 854 P.2d 449, 454 (Or. 1993) (paraphrasing Thornton citing Blackstone's Commentaries).

103. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d at 78.

delineation of public rights upland, away from the traditional boundary at the water's edge."[104] Unlike Oregon, however, Florida's doctrine of customary use does not open *all* Florida beaches to the public. Instead, the doctrine requires the courts to "ascertain in each case the degree of customary and ancient use the [particular] beach has been subjected to."[105]

According to one commentator:

> Unfortunately, the Florida Supreme Court's failure to clearly apply the doctrine of customary use to the entire coastline of Florida has consequently hampered one of the doctrine's greatest benefits over prescriptive easements – that of avoiding costly and time-consuming tract-by-tract litigation to establish the public's right to use the dry sand areas of Florida beaches.[106]

B. New Jersey

New Jersey has the most geographically expansive reading of the public trust doctrine and is the only state that applies the public trust doctrine directly to public beach access.[107] New Jersey has also recognized that the public trust extends all the way to the first line of vegetation, covering the whole dry sand beach.[108]

In *Borough of Neptune City v. Borough of Avon-By-The-Sea*, the holding established the proposition that uses protected by the public trust can change over time as the public's use of the shoreline evolves.[109] The court held that the public trust applied to the municipally owned dry sand beach immediately landward of the high-water mark. The court relied on the public trust doctrine to hold that full enjoyment of the foreshore necessitated some use of the upper sand and held that the public's right to use the land was extended to recreational uses.

> The holding in *Avon* was limited to beaches owned by a municipality. However, in *Matthews v. Bay Head*, the court addressed the extent of the public's interest in privately owned dry sand beaches.[110] Here, the scope of the easement was not merely to access the ocean, but also included recreational rights to sunbathe on the beach.[111] The court

104. *See* Blumm, *supra* note 97, at 665.

105. Reynolds v. Cty. of Volusia, 659 So. 2d at 1190.

106. *See* Spain, *supra* note 75, at 182 n.105.

107. *See* Peloso, *supra* note 255, at 92.

108. *See* Peloso, *supra* note 255, at 58; *see also* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984) (holding that the public trust right to bathe is meaningless without the accompanying right to be on the dry sand beach).

109. *See* Peloso, *supra* note 255, at 95; *see also* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54–55 (N.J. 1972).

110. *Matthews*, 471 A.2d at 363.

111. *Id.*

> held the bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge.[112]

The court reasoned that there is no need to limit *Avon*'s holding to municipally owned beaches. Instead, where the use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the public trust doctrine warrants the public's use of the upland dry sand area.[113]

New Jersey, unlike Florida, relied on the expansion of the public trust doctrine to grant the public access to privately owned dry sand beaches. The court did not attempt to apply methods such as prescription, dedication, or custom as an alternative method to the public trust doctrine. For Florida to follow New Jersey precedent, the Florida Supreme Court must be willing to expand the public trust doctrine and not simply rely on the doctrine of customary use. Thus, while considering the issue of whether established public easements migrate with dry sand, utilization of New Jersey Court rationales would not likely come into play under current law.

C. Texas

The Texas legislature has codified Texas public policy of keeping beaches open to the public along with enforcement mechanisms.[114] Specifically, Texas has recognized that the public trust extends all the way to the first line of vegetation, covering the whole dry sand beach.[115] Even more, the Texas Open Beaches Act provides for an easement[116] that moves with the water to preserve the public's right to access beaches in the state. Based on this backdrop, the Texas Supreme Court faced similar issues to those discussed in this paper, including who owns coastal lands, how ownership rights change when the waterline moves, and how climate change effects (such as sea level rise) impact the rights of both public and private citizens.[117]

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112. *Id.* at 365.

113. *Id.*

114. Jennifer A. Sullivan, *Laying out an "unwelcome mat" to public beach access*, 18 J. LAND USE & ENVTL. LAW 331, 338 (2003); *See also* Texas Open Beaches Act, TEX. NAT. RES. CODE ANN. § 61.020 (creating a presumption that the dry sand is public); *See also* TEX. NAT. RES. CODE ANN. § 61.011 (stating policy of the State of Texas).

115. *See* Texas Open Beaches Act, TEX. NAT. RES. CODE ANN. § 62; Peloso, *supra* note 255, at 58

116. Texas has implemented the doctrine of "rolling easements." Rolling Easements have been explained as a "public trust that moves with rising sea levels." *See* Ginno, *supra* note 10, at 238–39.

117. *Id.* at 226.

In *Severance v. Patterson*, a hurricane caused the vegetation line on a portion of the beach to move significantly onto an owner's property, and the owner's property was then seaward of the vegetation line.[118] The court addressed the issue of whether the established easement for public access to the dry sand portion of the beach seaward of the vegetation line continued to encumber the land since the existing house now interfered with public access.[119] Relying on the Texas Open Beaches Act, the Attorney General argued the doctrine of rolling easements.[120] However, the Court limited the application of the Texas Open Beaches Act and did not recognize the doctrine of rolling easements when private land not previously subject to the easement was encumbered as a result of an avulsive event.[121] The court reasoned, "avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property."[122]

Florida, like Texas, does distinguish between avulsion and accretion. If the Florida Supreme Court followed Texas precedent in *Severance* regarding the limited use of rolling easements, it is likely the Court would not permit established public easements to move with the dry sand beach to private property to which it had not previously applied in the case of a hurricane or other avulsive event. On the other hand, in the case of accretion or erosion, which is arguably more akin to rising sea levels, it is possible the Florida Supreme Court could follow the rationale of the *Severance* court and permit an established public easement to move landward with migrating boundary lines and apply to private property to which it had not previously been applied. However, relying on the Texas court's rationale in general may be unlikely, as Florida has not codified any type of open beach act that recognizes the doctrine of rolling easements, meaning the Florida Court would likely lack the underlying policy rationales of the *Severance* decision that are grounded in the Texas Open Beaches Act.

VI. HB 631 – WHAT DOES IT MEAN FOR THE CUSTOMARY USE DOCTRINE?

"Despite numerous calls [over nearly the past fifty years] for legislation at the state level to protect the public's right to utilize

118. Severance v. Patterson, 370 S.W.3d 705, 720 (Tex. 2012).
119. *Id.* at 708.
120. *Id.* at 708–709, 710–711.
121. *Id.* at 732.
122. *Id.* at 725.

the dry sand [beach], . . . state legislatures have failed to do so."[123] In response, Florida cities, especially in the panhandle, have tried to enact ordinances to protect the public right of use to the dry sand areas of the beaches, but the legislature put its proverbial foot down in a House Bill enacted into law in 2018.[124] Despite many pleas for the Florida State legislature to protect the public right to use, the legislature has ultimately passed the baton to the courts.

House Bill 631, codified as Florida Statutes Section 163.035, states in relevant part:

> (2) ORDINANCES AND RULES RELATING TO CUSTOMARY USE.—A governmental entity may not adopt or keep in effect an ordinance or rule that finds, determines, relies on, or is based upon customary use of any portion of a beach above the mean high-water line, as defined in s. 177.27, unless such ordinance or rule is based on a judicial declaration affirming recreational customary use on such beach.[125]

Since the state legislature passed House Bill 631 into law, it is now in the hands of the judiciary to adequately protect the public's right to utilize the dry sand beach. Florida House Bill 631 went into effect July 1, 2018, and is now codified as Florida Statutes Section 163.035. This new statute ultimately blocks local governments from adopting customary use ordinances to allow continued public entry to privately owned beaches even when property owners may want to block off their land. Instead, any city or county that wishes to pass such an ordinance must obtain judicial approval by suing private landowners.[126]

According to Alison Fluornoy, a law professor at the University of Florida, the new law "is very bad for local governments . . . Suing coastal landowners as the only avenue to establish access is not an attractive option." [127] She also points out

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123. *See* Spain, *supra* note 75, at 189.

124. Perhaps this should not be surprising after the governor issued "a gag order on terms 'climate change' and 'global warming' within [the] state's Department of Environmental Protection—an especially notable move, given the state is among the most vulnerable to climate change, with [one thousand] miles of coastline and millions of people living in low-lying areas." *See* Georgina Gustin, *Florida Kids Sue Gov. Scott Over Climate Change: You Have 'Moral Obligation' To Protect Us*, INSIDECLIMATENEWS.ORG, INSIDECLIMATENEWS.ORG, Apr. 16, 2018, https://insideclimatenews.org/news/16042018/florida-climate-change-children-lawsuit-sea-level-rise-flooding-extreme-weather-rick-scott-fossil-fuel.

125. FLA. STAT. § 163.035 (2019).

126. Craig Pittman, *Does new law restrict access to Florida's beaches? Not exactly*, MIAMI HERALD (Apr. 6, 2018), https://www.miamiherald.com/news/local/environment/article208175159.html.

127. Craig Pittman, *New law Scott signed makes public access to beaches harder to establish*, TAMPA BAY TIMES, (Apr. 5, 2018), https://www.tampabay.com/news/environment/New-law-Scott-signed-makes-public-access-to-beaches-harder-to-establish_167015546.

that "requiring a lawsuit means the Legislature put an added burden on the courts without offering any additional funding."[128]

VII. CONSIDERING A HYPOTHETICAL

The question of whether an established public easement for use of the dry sand beach migrates with the dry sand beach onto and could be applied to private property to which it had not previously been applied may be answered, and remedied, with the expansion of the doctrine of custom to *all* dry beach areas on the coast of Florida. Thus, it is relevant to consider hypothetical factual scenarios that could be best suited to argue for the extension of the customary use doctrine to all beaches in Florida, like in Oregon.

A. Where Should It Be Filed?

Perhaps the most ideal case to give rise to Florida Supreme Court review would be one that is litigated outside the jurisdiction of the Fifth District Court of Appeal. Though the trial court would be bound by the Fifth District's precedent, if the case is appealed to a District Court of Appeal outside of the Fifth District, that court would not be bound by the Fifth District's decisions in *Reynolds* and *Trepanier*. Thus, assuming *in arguendo*, said court rules in favor of a broader interpretation of *Tona-Rama*, the district split in the courts would weigh heavily in favor of a Florida Supreme Court review.

B. Potential Factual Scenario

Because the considerations of public and private land rights of coastal land involve a balancing of the competing interests, a scenario that weighs heavily in favor of public interests, while placing minimal burden on the private property owner, would be necessary. Specifically, the following facts, if established, could aid in a balance tipped in favor of the public.

1. Public Has Lost Access to Land Held in Trust

Perhaps the most influential fact would be to prove that the public no longer can access the wet sand beach and ocean water that is held in trust for the people. If the migrating boundary line made it impossible for the public to exercise its right to these areas of land, the Court may be more willing to broaden the doctrine of

128. *Id.*

custom to the entire dry sand beach, as in Oregon, to provide a remedy. Even more, the language in *Tona-Rama* may suggest that the Court meant to establish a right of customary use generally in Florida in its 1974 decision.[129] Similarly, the Court decisions cited in support of its ruling were from Oregon and Hawaii, which have expanded customary use to the entire coastline.[130]

2. Consistent Use Over Long Period of Time

The best-case fact pattern that would provide the foundation to argue for the extension of the customary use doctrine to all Florida beaches would include the private use and the public use being consistent with one another. Furthermore, continued public use of the property in the same exact manner as it had been before the boundary line shifted, where such use inherently falls within the public's customary right to use and access the beach, would be beneficial. Specifically, establishing that there is no discernable effect of the migrating boundary line on Floridians or upland property owners, such that actual practices did not change, would assist in establishing customary use on the dry sand beach itself. [131]

The *Trepanier* court noted that to establish a customary right, the party does not have to prove customary use on the other party's specific parcels of property.[132] Rather, *Tona-Rama* just requires proof that the general area of the beach where the private property is located has customarily been put to such use and that the extent of such customary use on private property is consistent with the public's claim of right.[133] In context of the issue presented here, whether established public easements move with the migrating mean high-water line, the original public use would meet all the

129. For example, language such as: "[w]e recognize the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this Court." Tona-Rama, Inc., *supra* note 103, at 75. Further, the Florida Supreme Court never specifically stated that there was no right to customary use to the entire dry sand beach of the entire coast of Florida. Rather, the *Trepanier* court guessed that the intent of the *Tona-Rama* Court to determine customary use was limited to the litigated part of the beach. Thus, the Florida Supreme Court would not be bound by the *Reynolds* court and its narrowing of the *Tona-Rama* holding.

130. *See* Tona-Rama, Inc., *supra* note 103, at 78.

131. This scenario would be similar to the Oregon case in which the Court established a general doctrine of custom to the entire dry sand beach area. *See* State ex. rel. Thornton v. Hay, 462 P.2d 671, 678 (Or. 1969).

132. *Trepanier,* 965 So. 2d at 287.

133. *Id.*

elements for customary use outlined in *Tona-Rama*.[134] And because the use of custom is not specifically tied to a geographical plot, like prescription and dedication are, the court has more leniency in allowing the boundary line to move with the migrating mean high-water line.

3. Private Rights Encumbered by Superior Right of Public

Further, it would be important to prove that the private property owner could not use the specific portion of the beach for any other purpose that would interfere with the use of the public, as in *Tona-Rama*.[135] Establishing this fact would be influential because the *Tona-Rama* Court held that if the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, it should not be interfered with by the owner.[136] However, the court held that the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as recreational adjunct of the wet sand or foreshore area.[137]

4. Owner Benefits from Public Use of The Land

Proving the private property owner benefits from the public use of the land could further tip the balance in favor of a broadened customary use doctrine. For example, in *Tona-Rama*, the public's presence on 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.[138] Thus, the issue of adversity was raised and the evidence showed that the construction of the tower was consistent with the general recreational use by the public.[139]

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134. The issue of not allowing the boundary line to move with the established public easement will meet all the elements of customary use outlined in *Tona-Rama* once the customary right of use is made impossible. Thus, the need for the boundary line to move is necessary for the public to continue to have access to the public beach.

135. *See* Comment, Doctrine of Customary Rights-Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest, 2 Fla. St. U. L. Rev. 806 (1974).

136. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d at 78.

137. *Id.*

138. *Id; See also* Comment, Doctrine of Customary Rights-Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest, 2 Fla. St. U. L. Rev. 806 (1974).

139. *Tona-Rama, Inc*., 294 So.2d at 78.

5. Accretion – Gradual Change

Furthermore, an effective factual scenario should include a situation in which the established easement was made impossible by the migration of the mean high-water line because of accretion (or erosion), not as the result of an avulsive event such as a hurricane. Though property boundary lines are different than easements as a matter of right, a party could ground its argument in well-established property law that boundary lines move with changes in the mean high-water line due to accretion. Furthermore, sea level rise is more akin to accretion and erosion than to a singular avulsive event. This also may be important to establish because the *Trepanier* court recognized that the established right may move with the dry sand in such cases as this, though the language was not entirely clear.[140]

C. Public Policy

Perhaps the strongest argument for extending the doctrine of custom to all dry sand areas of the Florida coast lies in public policy considerations. Though *Walton County v. Stop the Beach Renourishment, Inc.* considered publicly funded beach nourishment projects, the Florida Supreme Court did recognize a constitutional duty to protect Florida's beaches. [141] Even more, in *Tona-Rama*, the court recognized the propriety of protecting the public interest in, and right of utilization of, the beaches and oceans in the State of Florida and the right of public access to, and enjoyment of, Florida's oceans and beaches.[142] The court explicitly stated that the interest and rights of the public to the full use of beaches should be protected. Thus, if the facts were such that the public use of the beach was made impossible by the migration of the mean high-water line, the Court may rest heavily on its constitutional duty in its rationale of extending the doctrine of custom.

Furthermore, the judiciary may be more inclined to make a definitive ruling, as a matter of public policy and judicial economy, due to the push from House Bill 631. Establishing a right of use to all dry sand areas of all of the Florida coast has the potential of cutting back on the number of lawsuits brought over certain pieces of land. For example, under Florida Statute 163.065, the party bringing suit must provide notice of the specific parcels of property, or the specific portions of the property, for which the customary

140. *See generally, Trepanier*, 965 So. 2d.

141. Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1111 (Fla. 2008).

142. *Tona-Rama, Inc*., 294 So.2d at 75.

affirmation is sought.[143] Without the expansion of the customary use doctrine, courts in Florida will be forced to litigate parcel by parcel, which is extremely time consuming and expensive, rendering it unsustainable over a long period of time.

A final public policy consideration would be the substantial effect on tourism. The amount of money that is lost due to the inaccessibility of the beach could weigh heavily in favor of a broadened customary use doctrine as the Florida economy, as well as the public, would suffer. Thus, making an area that generates a lot of tourism money subject of the action would be a useful tool in litigation.

A case, such as the one presented above, being heard on appeal by the Florida Supreme Court would provide the opportunity for the Court to clarify the scope of its *Tona-Rama* decision regarding customary use. In that 1974 decision, the court relied on Oregon precedent to first recognize the doctrine customary use in Florida. Therefore, it is possible that they may do so again and expand the customary use doctrine to the entire dry sand areas of the beach.

VIII. CONCLUSION

The absence of adequate state legislation expanding the public trust doctrine, in conjunction with the chilling effect House Bill 631 has on local governments, forces the judiciary to bear the burden and responsibility of protecting public access to Florida's beaches. In the context of climate change and the resulting sea level rise, the ever-important boundary—the mean high-water line—is inevitably going to migrate inland. Because of the lack of state-wide legislative response, the only viable tool for maintaining public access to the dry sand areas of the beach—customary use—is at risk.[144]

The issue of whether an established public easement for use of the dry sand beach migrates with the changing dry sand beach area, such that it can be applied to private property to which it had not previously been applied, holds great consequence for both Florida's private landowners and for the public. Due to the significance of the issue, it is one that eventually must be decided by the Florida Supreme Court.

143. FLA. STAT. § 163.065.
144. *See* RUPPERT, *supra* note 8, at 227.