

OF BEACHES, BOUNDARIES AND SOBS

DONNA R. CHRISTIE*

I.	INTRODUCTION.....	20
II.	THE NATURE OF THE PUBLIC’S INTEREST IN THE SHORE.....	23
III.	THE NATURE OF SANDY BEACHES.....	24
IV.	THE NATURE OF LITTORAL BOUNDARIES.....	26
	A. <i>The Legal Significance of Migrating Beach Boundaries</i>	26
	B. <i>The Determination of the Boundary of Littoral Beach Property</i>	30
	C. <i>The Nature of Tides and the Mean High Tide Line</i>	33
V.	BEACH RESTORATION AND BOUNDARIES	37
	A. <i>The Process of Beach Restoration</i>	37
	B. <i>The Florida Beach and Shore Preservation Act</i>	39
	1. Policy and Purpose	39
	2. Establishing Boundaries for the Renourished Beach	40
	3. The Effect of ECL Establishment on Riparian or Littoral Rights	41
	C. <i>Of SOBs: The Challenge for Fixed Boundaries on Renourished Beaches</i>	43
	1. Background	43
	2. Beach Restoration in the Florida Supreme Court.....	45
	a. <i>The Common Law’s Balancing of Public and Private Right in the Shore and Waters</i>	46
	b. <i>The BSPA’s Balancing of Public and Private Interests</i>	48
	c. <i>The Doctrine of Avulsion</i>	48
	d. <i>The Right to Accretion</i>	50
	e. <i>Other Issues</i>	50
	D. <i>Beach Restoration and the BSPA After STBR</i>	51
	1. Sorting Through the Florida Supreme Court’s Interpretation of the BSPA.....	51
	a. <i>Applying STBR in the Case of Critical Erosion Due Entirely to Avulsion</i>	53
	b. <i>Applying STBR in the Case of Critical Erosion Due Entirely to Erosion or to</i>	

* Elizabeth C. & Clyde W. Atkinson Professor of Law, Florida State University College of Law; B.S. Chem. 1969, University of Georgia; J.D. 1978, University of Georgia; Post Doc. 1978-1980, Marine Policy and Ocean Management Program, Woods Hole Oceanographic Institution.

	<i>Combined Forces of Erosion and Avulsion</i>	58
2.	The Future of Beach Restoration and <i>STBR</i> in the U.S. Supreme Court.....	63
	<i>a. The Concept of Judicial Taking</i>	64
	<i>b. Is There a "Taking"?</i>	67
	<i>c. The Consequences of Finding a Judicial Taking</i>	71
VI.	CONCLUSION.....	72

I. INTRODUCTION

My father-in-law was a southern Ohio farmer who grew up, lived, and died within a very short distance of the farming region of Kentucky where Wendell Berry's Mat Feltner of the short story, *The Boundary*,¹ lived his life. Like Mat, he walked his boundaries and worried about his fences and treasured his land and his community. Boundaries were important to him: In the early years of my marriage, when we moved continually, his first act upon visiting our latest rental house was to find the survey markers and walk the boundaries. He embodied the land paradigm of the nineteenth century American philosophy of property at law described by Professor Eric Freyfogle.² To him, boundaries were not just "hypothetical," but had a very "distinct . . . and a physical . . . existence" that focused attention on the actual, physical location of the boundaries and "the landowner's right to exclude."³ And yet, in his annual pilgrimages to Florida,⁴ it is unlikely that he pondered the question of where the boundary lay as he strolled the sandy seashore. He would have been affronted by the signs often encountered today on Florida beaches that pronounce beaches to be private and intimidate beachgoers with the threat of prosecution under (sometimes fictitious) Florida laws.⁵ Had he attempted to search for the boundary, he would have been confounded at the complexity of the dynamic boundary between land and water and amazed that "property" could be defined in terms of limits that

1. WENDELL BERRY, *The Boundary*, in *THAT DISTANT LAND* 289, 290-307 (2004). Wendell Berry's work is seen as part of the heart of the "new agrarianism" movement, which focuses on a connection to land and community. See, e.g., ERIC T. FREYFOGLE, ed., *Introduction: A Durable Scale*, in *THE NEW AGRARIANISM: LAND, CULTURE, AND THE COMMUNITY OF LIFE* xix-xxii (2001). The relationship of humanity to the sea should also embody this kind of spiritual bond and sense of stewardship.

2. Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 *UCLA L. REV.* 77, 98-99 (1995).

3. *Id.* at 98.

4. These trips were always delayed an extra day or two while he checked all his fences.

5. For a slideshow of signs proclaiming private beaches and an archive of articles concerning statewide beach access controversies, see Surfrider Foundation Beach Access Blog, <http://flbeachaccess.blogspot.com/> (last visited Mar. 15, 2010); see also Erika Kranz, *Sand for the People: The Continuing Controversy Over Public Access to Florida's Beaches*, 83 *FLA. B.J.* 10, 11 (2009).

are not only “hypothetical,” but also virtually “unknowable” at any given moment. Are shifting sands somehow different both philosophically and legally when it comes to boundaries, the right to exclude and the nature of title?

Directly addressing this issue, the Florida Supreme Court has stated that:

The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected.⁶

The court’s approach seems to be based on the conclusion that because beaches are not useful for traditional land uses, they are not valuable as private property. The market value of littoral⁷ property seems to repudiate that conclusion,⁸ and the owners of the most expensive property in the state often assume that the bundle of rights purchased includes the right to exclude people from the shore, making boundaries of extreme importance. But unlike Mat Feltner’s boundaries, which engendered stewardship and linked him to his land, his community, as well as past and future generations,⁹ the boundaries that many modern littoral owners seek to enforce may be more related to “the corrupting influence of the market and the aggressive pursuit of self-interest.”¹⁰

The members of the public, too, have a high stakes interest in the boundary of littoral property. Seaward of that boundary are tidelands

6. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77 (Fla. 1974).

7. Littoral means bordered by “a lake or sea.” See 78 AM. JUR. 2D *Waters* § 30 (2008) (defining “littoral rights”).

8. From 2002-2006, the value of coastal properties in Florida more than doubled. Judith Kildow, NATIONAL OCEAN ECONOMICS PROGRAM, FLORIDA OCEAN AND COASTAL COUNCIL, PHASE II, FACTS AND FIGURES, FLORIDA’S OCEAN AND COASTAL ECONOMIES REPORT 16 (June 2008), available at http://www.dep.state.fl.us/oceanscouncil/reports/Facts_and_figuresII.pdf. “Florida’s 367,359 coastal properties were valued for tax purposes in 2006 at \$181B . . .” *Id.*

9. See Eric T. Freyfogle, *Wendell Berry and the Limits of Populism*, in WENDELL BERRY: LIFE AND WORK 175-76 (Jason Peters ed., 2007).

10. *Id.* at 181. Freyfogle also compares Wendell Berry’s writings and theories of progress to the views of civic republicanism:

Civic republicans (Thomas Jefferson among them) worried about the corrupting influence of the market and the aggressive pursuit of self-interest . . . Like the civic republicans, Berry perceives a clash between the common good and the aggressive pursuit of self-interest. He agrees, too, that leadership requires virtue and that virtue is endangered, particularly by money. Good governance, in turn, is a communal aspiration. . . .

Id.

and submerged lands held by the state in the public trust for the use and enjoyment of its citizens.¹¹ The Florida Supreme Court has weighed in as well (and quite eloquently) on the fundamental nature of this public trust right:

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 [sic] touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same. This primeval quality appeals to us. 'Changeless save to the wild waves play, time writes no wrinkles on thine azure brow; such as creation's dawn beheld, thou rollest now.' The attraction of the ocean for mankind is as enduring as its own changelessness. The people of Florida—a State [sic] blessed with probably the finest bathing beaches in the world—are no exception to the rule.¹²

In many areas, the public has gained the right to use the state's sandy beach landward of the boundary,¹³ but the right to use the public trust lands—also known in Florida as sovereignty lands—seaward of the littoral boundary is constitutionally guaranteed.¹⁴ The constitutional provision further protects this right as an essential element of state governance.¹⁵

11. See FLA. CONST. art. X, § 11; see also *Broward v. Mabry*, stating:

Under the common law of England, the crown [sic] in its sovereign capacity held the title to the beds of navigable or tide waters, including the shore or the space between high and low water marks, in trust for the people of the realm, who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America. After the Revolution resulting in the independence of the American States [sic], title to the beds of all waters, navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states respectively. . . . New states, including Florida, admitted 'into the Union on equal footing with the original states, in all respects whatsoever,' have the same rights, prerogatives, and duties with respect to the navigable waters and the lands thereunder within their borders as have the original thirteen states . . .

58 Fla. 398, 407-08, 50 So. 826, 829-30 (1909).

12. *White v. Hughes*, 139 Fla. 54, 58-59, 190 So. 446, 448-49 (1939).

13. Although discussion of the topic is beyond the scope of this article, the public may also gain the right to use areas landward of the boundary by prescription, dedication, custom and other legal means. See generally Gilbert L. Finnel, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627 (1989); and Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

14. See FLA. CONST. art. X, § 11.

15. The Florida Supreme Court had early stated that under the public trust, as a matter of

This article explores public and private interests in beaches and shores, and how the complexities of coastal boundaries contribute to controversies about the use of beaches. The article then looks at how Florida beach management and restoration legislation attempts to protect both the private and public interests in the coast through, among other provisions, establishing a fixed boundary for restored beaches. Finally, the challenges confronting Florida's beach management that have arisen as a result of suits in the Florida Supreme Court and now in the United States Supreme Court will be analyzed.

II. THE NATURE OF THE PUBLIC'S INTEREST IN THE SHORE

*I must down to the seas again, for the call of the running tide
Is a wild call and a clear call that may not be denied[.]*¹⁶

The right of the public to use lands below navigable waters, including beaches below the MHWL, is known as the public trust doctrine.¹⁷ With roots in Roman law and the Institutes of Justinian, the public trust doctrine passed to the states as part of their English common law heritage.¹⁸ "The strength of the public trust doctrine" has been attributed to "its origins; navigable waters and submerged lands [which] are the focus of the doctrine, and the basic trust interests in navigation, commerce, and fishing [which] are the object[s] of its guarantee of public access."¹⁹ The public trust doctrine is implemented as a matter of state law,²⁰ and many states have expanded the scope of the public's interests in access beyond the traditional triad of uses. Particularly, many states, including Florida, recognize re-

common law the state has:

the right and duty . . . to own and hold the lands under navigable waters for the benefit of the people, as such prerogatives are essential to the sovereignty, to the complete exercise of the police powers, and to the welfare of the people of the new states as of the original states of the Union.

Broward, 58 Fla. at 408, 50 So. at 830.

16. JOHN MASEFIELD, *Sea-Fever*, in *SALT-WATER BALLADS* 59 (Elkin Matthews 1913).

17. See *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548 (1894) (describing the history of the public trust doctrine and its acceptance into the common law in the United States); see also Joseph L. Sax, *The Public Trust Doctrine in National Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (revitalizing the public trust doctrine as a tool for protection of the public's interest in the nation's waters and management of resources).

18. See *Shively*, 152 U.S. at 11-17, and Sax, *supra* note 17, at 475-77; see also *Broward*, 58 Fla. at 407-08, 50 So. at 408.

19. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631,710-11 (1986).

20. In *Shively*, the U.S. Supreme Court stated that:

there 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 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.

152 U.S. at 26, 14 S. Ct. at 557.

creational use of sovereignty lands and waters as within the scope of the public trust's common law protections.²¹

The utilitarian purposes originally served by the public trust doctrine²² in preserving the access of the public for economic purposes related to commerce, navigation, and fishing may seem far removed from protecting the public's right to stroll the sands, frolic in the waves, or ruminate on the vastness of the sea. In fact, however, the utility of protecting the ability of the public to exercise these rights in Florida may have greater significance to the economy of the state than protection of traditional public trust uses. Beach tourists, who number over twenty million annually, contribute over \$24 billion to the state's economy each year.²³ The connection of people to the sea nurtures not only their souls, but also the fiscal vitality of the state.

Florida's constitution further supports the proposition that the public trust doctrine embodies a fundamental right of the people to access the beaches and the sea. The Florida Constitution provides in relevant part that "[t]he 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."²⁴

III. THE NATURE OF SANDY BEACHES

Sandy beaches have little relationship to solid land. Kaufman and Pilkey describe beaches as "land which has given itself up to wind and wave."²⁵ Anyone who has spent more than a day on a beach is aware that the shifting sands are never the same from day to day. "The nature of sand is to move,"²⁶ and so beaches and barrier islands²⁷ are dynamic systems.²⁸ The changes are continual and pepe-

21. See *White v. Hughes*, 139 Fla. 54, 58, 190 So. 446, 448-49 (1939); see also 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, 18 (2007).

22. See generally J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SE. ENVTL. L.J. 223, 224-29 (2006).

23. See Florida Atlantic University Center for Urban & Environmental Solutions, *Florida Visitor Study at 1* (2008), available at <http://www.cuesfau.org/publications/Florida%20Visitor%20Study%20-%20February%202008.pdf>.

24. FLA. CONST. art. X, § 11.

25. WALLACE KAUFMAN & ORRIN PILKEY, JR., *THE BEACHES ARE MOVING: THE DROWNING OF AMERICA'S SHORELINE 12* (Anchor Press / Doubleday 1979).

26. *Id.* at 24.

27. In the case of barrier islands, the entire island, not just the beach, is moving. For an excellent discussion of the movement of barrier islands, see Amy H. Moorman, *Let's Roll: Applying Land-Based Notions of Property to the Migrating Barrier Islands*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 459, 465-73 (2007).

28. Beaches and barrier islands are described by geologists as being in dynamic equilibrium, but this does not mean that they are stable over time. Instead, "[d]ynamic equilibrium of beaches describes the tendency for beach geometry to fluctuate about an equilibrium which also

tual:²⁹ Beaches can change drastically within hours when pounded by waves and sculpted by the wind;³⁰ beaches change seasonally due to tides³¹ as well as to water temperatures, atmospheric pressure, and wind differences;³² and beaches can change over relatively short periods due to interruption of sand supply,³³ or over geologic time as shorelines and barrier islands migrate landward in a natural process.³⁴

Commentators agree, however, that sea level rise will have an extreme effect on the dynamic equilibrium of beaches and result in substantial erosion and migration of beaches, with the “retreat being a multiple of the sea-level rise[.]”³⁵ This is because the rising water level will not simply inundate the shoreline, but will induce and accelerate further beach erosion. Leatherman cites several reasons for this:

First, higher water level enables waves to break closer to shore. Second, deeper water decreases wave refraction and thus increases the capacity for longshore transport. Finally, with higher water level, wave and current erosion processes act farther up the beach profile, causing a readjustment of [the] profile. Maintenance of an equilibrium beach/nearshore profile in response to sea level rise requires an upward and landward displacement of the beach in time and space; this translates to erosion in ordinary terms.³⁶

changes with time, but much more slowly.” Maurice L. Schwartz, *Dynamic Equilibrium of Beaches*, in *ENCYCLOPEDIA OF COASTAL SCIENCE* 399 (2005).

29. See generally *id.*

30. See DAVID M. BUSH ET AL., *LIVING BY THE RULES OF THE SEA* 11 (Duke University Press 1996).

31. See KAUFMAN & PILKEY, *supra* note 25, at 68-69.

32. See RICHARD A. DAVIS, JR. & DUNCAN M. FITZGERALD, *BEACHES AND COASTS* 58-59 (Blackwell Science Ltd. 2004).

33. See Schwartz, *supra* note 28, at 399. For example, a significant amount of Florida’s beach erosion is attributed to the building and maintenance of inlets (usually those cut through barrier islands) that interrupt the littoral sand flow. See Florida Department of Environmental Protection, Beach Erosion Control Program (BECP), <http://www.dep.state.fl.us/beaches/programs/bcherosn.htm> (last visited Mar. 15, 2010) [hereinafter BECP Website].

34. Accordingly, “the dynamic equilibrium [of barrier islands] is not limited to the beach and the dunes. The whole island, from sound to ocean, moves with the beach, changing shape and position.” KAUFMAN & PILKEY, *supra* note 25, at 96; see also BUSH ET AL., *supra* note 30, at 11.

35. Schwartz, *supra* note 28, at 399; Stephen P. Leatherman, *Social and Economic Costs of Sea Level Rise*, in *SEA LEVEL RISE: HISTORY AND CONSEQUENCES* 191-93 (Douglas et al. eds. 2001) [hereinafter *SEA LEVEL RISE*]; see also KAUFMAN AND PILKEY, *supra* note 25, at 25-26; James G. Titus, et al., *Greenhouse Effect and Sea Level Rise: The Cost of Holding Back the Sea*, 19 *COASTAL MGMT.* 171, 176-78 (1991); see generally James G. Titus, *Sea Level Rise*, in U.S. EPA OFFICE OF POLICY, PLANNING, AND EVALUATION, *REPORT TO CONGRESS, THE POTENTIAL EFFECTS OF GLOBAL CLIMATE CHANGE ON THE UNITED STATES*, 118-43, available at http://www.epa.gov/climatechange/effects/downloads/rtc_sealevelrise.pdf.

36. *SEA LEVEL RISE*, *supra* note 35, at 189.

Florida's 825 mile of sandy shorelines,³⁷ like most of the world's sandy shorelines,³⁸ have retreated during the last century. Relatively recent data show that the state had 217.6 miles of critically eroding beach and 114.8 miles of non-critically eroding beach in 1989.³⁹ Data also shows that by 2008, there were "396.4 miles of critically eroded beach, 8.9 miles of critically eroded inlet . . . [and] 95.5 miles of non-critically eroded beach[.]"⁴⁰ Accelerated sea level rise during this next century will assure that the landward mobility of these beaches will continue and increase.

IV. THE NATURE OF LITTORAL BOUNDARIES

In view of the nature of beaches to move, it seems evident that upland property boundaries that reference the sea as a natural boundary of property⁴¹ would also be migratory, and this is indeed the case.

A. The Legal Significance of Migrating Beach Boundaries

Although different processes may cause the apparent effect, the land/sea boundary may migrate either landward or seaward. The gradual and imperceptible⁴² addition of material⁴³ to a beach is known as accretion and results in the legal boundary moving seaward.⁴⁴ Conversely, and as is more often the case in Florida, the slow and imperceptible encroachment of the sea on the land, erosion, moves the boundary landward.⁴⁵ This is the general rule when the sea erodes

37. Memorandum from Ralph R. Clark on Beach Conditions in Florida: A Statewide Inventory and Identification of the Beach Erosion Problem Areas in Florida 89-1 (5th ed. December 1993), available at http://www.dep.state.fl.us/beaches/publications/pdf/fl_beach.pdf.

38. SEA LEVEL RISE, *supra* note 35, at 189.

39. Florida Department of Environmental Protection, Bureau of Beaches and Coastal Systems, Division of Water Resource Management, *Critically Eroded Beaches in Florida* 1 (June 2009), available at <http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt09.pdf> [hereinafter *Critically Eroded Beaches*].

40. *Id.* at 3.

41. It is ironic that a major purpose of boundaries is to provide certainty and permanence. Consequently, in boundary descriptions, immutable, natural monuments, such as rocks, trees, and *water bodies* are given priority in property descriptions by courts over other kinds of property descriptions. *See, e.g.*, *County of St. Clair v. Lovington*, 90 U.S. 46, 62 (1874) (explaining that "[i]t is a universal rule that course and distance yield to natural and ascertained objects. (citation omitted). A call for a natural object, as a river, a spring, or even a marked line, will control both course and distance."); *see also* JESSE DUKEMINIER ET AL., *PROPERTY* 516 (6th ed. 2006), and AARON L. SHALOWITZ, *II SHORE AND SEA BOUNDARIES* 470 (1962).

42. The United States Supreme Court has stated that "[t]he test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *Lovington*, 90 U.S. at 68.

43. The deposited material is called alluvion. *See id.* at 66-67.

44. *Id.* at 66-69.

45. *See generally* BLACK'S LAW DICTIONARY 582 (8th ed. 2004) (defining "erosion").

the coastline by removing material from the shore, but the gradual subsidence (or submergence) of land or rising of sea level will bring about the same result.⁴⁶ In all these circumstances, the apparent effect is that the water slowly and imperceptively overtakes the land. Avulsive events—sudden and perceptible changes in the location of the seashore—however, do not alter the boundary.⁴⁷ There is some question as to whether the doctrine of avulsion should apply to ocean shorelines,⁴⁸ but Florida courts have recognized that the doctrine applies to the open beaches in the state,⁴⁹ and Florida legislation further reinforces this conclusion by defining the MHWL as “the boundary between the foreshore owned by the state in its sovereign capacity and upland subject to private ownership[,]”⁵⁰ but preserving “the legal effects of accretion, reliction, erosion, or avulsion.”⁵¹

46. The general rule is that the slow, imperceptible submergence of land causes the boundary to move. There is some inconsistency in the rule, however, when dealing with ownership of the property if it re-emerges. See BRUCE S. FLUSHMAN, *WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS* 97 n.122. (Roy Minnick ed., 2001) [hereinafter FLUSHMAN, *WATER BOUNDARIES*]. Florida’s rule concerning land that re-emerges after it is totally eroded away is that the prior owner does not reacquire ownership. See *Schulz v. City of Dania*, 156 So. 2d 520, 522 (Fla. 2d DCA 1963) (explaining that “there can be no right of title by subsequent accretion when the lands have themselves become completely submerged and there is no visible land to which lands by accretion could attach.”). Cf. *Kruse v. Grokap, Inc.*, 349 So. 2d 788 (Fla. 2d DCA 1977) (holding that the MHWL, not just the current water level, must be landward of the eroded property, not just the current water line, for the land to be lost to submergence).

47. See, e.g., *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 946 n.6 (Fla. 1987) [hereinafter *Sand Key Assocs.*] (stating “[w]hen ‘new’ land is formed by the process by [sic] avulsion, title remains in its former owner. (citation omitted).”). A second circumstance where the boundary does not change is when the upland owner fills in state lands or causes artificial accretions, the “accreted land remains with the sovereign.” *Id.* at 938.

48. See FLUSHMAN, *WATER BOUNDARIES*, *supra* note 46, at nn. 177-78 (discussing Texas cases which reject application of the doctrine of avulsion to tidal lands because it could result in the private ownership of tidelands inhibiting public access and use of beaches, and because the rule would complicate the identification of littoral boundaries); see also Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1885 (2000) (arguing that language in North Carolina statutes providing that the MHWL is the seaward boundary of upland property abrogates the common law doctrine of avulsion for oceanfront property), and Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-first Century*, 83 N.C. L. REV. 1427, 1440-44 (2005).

49. See *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970); see also *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116-17 (Fla. 2008) [hereinafter *STBR*], and Florida Coastal Mapping Act of 1974, FLA. STAT. § 177.28(2) (2009). A trial court in Florida found that:

the law of avulsion insofar as it is attempted to be applied in this case should be rejected as the law of Florida, partly because of the authorities which exclude such theory applied to seashores . . . and also . . . because of the impracticability of applying it intelligently . . . the Court prefers to adopt a firm principle of law on avulsion in this state as it relates to land areas washed by the Gulf or the sea (as distinguished from rivers) than to leave the question open to uncertainty, and thus encourage vexatious and ingenious litigation.

Siesta Props., Inc. v. Hart, 122 So. 2d 218, 222-23 (Fla. 2d DCA 1960). The district court was subsequently overruled on the issue. *Id.*

50. FLA. STAT. § 177.28(1) (2009).

51. *Id.* § 177.28(2).

Interestingly, the earliest treatise in the United States on coastal law, Joseph K. Angell's *Tide Waters*, described the movement of the boundary as a result of accretion as an exception to the general rule that:

when the sea by casting up sand and other substances makes an accession to the land . . . the accession so made belongs to the sovereign, as it is no more than a part and parcel of the *fundus maris*, or bottom of the sea, which as has been shewn was previously the property of the sovereign.⁵²

Today, however, accretions are viewed as part of the bundle of rights that accrue to a littoral owner,⁵³ and in litigation over the nature of a boundary change, additions to coastal property are usually presumed to be accretions.⁵⁴ A number of rationales have been given for the vesting of alluvion in the littoral owner as a riparian right. A Florida appellate court summarized policies advanced by the doctrine of accretion as follows:

(1) De minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.⁵⁵

An early United States Supreme Court case has gone so far as to state that as a matter of the federal law:

[t]he riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The

52. JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND IN THE SOIL AND SHORES THEREOF 68 (Harrison Gray 1826).

53. For example, the Florida Supreme Court has stated: upland owners hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water. These special littoral rights 'are such as are necessary for the use and enjoyment' of the upland property, but 'these rights may not be so exercised as to injure others in their lawful rights.' Though subject to regulation, these littoral rights are private property rights that cannot be taken from upland owners without just compensation. *STBR*, 998 So. 2d at 1111 (citations omitted).

54. See FLUSHMAN, WATER BOUNDARIES, *supra* note 46, at 99-100. The same presumption applies to erosion versus avulsion. *Id.*; see also *Mun. Liquidators, Inc. v. Tench*, 153 So. 2d 728, 731 (Fla. 2d DCA 1963), and *Schulz v. City of Dania*, 156 So. 2d 520, 521 (Fla. 2d DCA 1963).

55. *Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 212-13 (Fla. 2d DCA 1973) [hereinafter *Medeira Beach Nominee*].

title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.⁵⁶

The comparison of the right to future alluvion to the fruit of trees or the increase of flocks seems an inapt and anachronistic analogy. The primary value of riparian or littoral land is not that it may produce more land, and the policy for recognizing the right to accreted land is not to encourage the filling of submerged land or creation of more land,⁵⁷ but to provide access to the water. The Supreme Court has subsequently stated that "[a]ny . . . rule [other than the right of the riparian owner to future alluvion] would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property"⁵⁸ In *Thiesen v. Gulf, Florida & Alabama Railway Co.*, the Florida Supreme Court stated:

The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller.⁵⁹

The ambulatory boundary that results from accretions or erosion assures that no intervening ownership between the upland owner and the sea impedes the continued physical and visual access to the water upon which every other riparian right depends.

While the littoral owner bears the risk of losing land to erosion, there is authority for the proposition that a littoral owner has a li-

56. *County of St. Clair v. Lovington*, 90 U.S. 46, 68-69 (1874) (emphasis added).

57. In fact, if the upland owner fills in state lands or causes artificial accretions, the "accreted land remains with the sovereign." *Sand Key Assocs.*, 512 So. 2d 934, 938 (1987).

58. *Hughes v. Washington*, 389 U.S. 290, 293 (1967). The Court also noted that the rule helped stem litigation about the original location of the boundary. *Id.* at 294.

59. *Thiesen v. Gulf*, 75 Fla. 28, 78, 78 So. 491, 507 (1919) (Ellis, J., on reh'g).

mitted right to reclaim land lost in an avulsive event. In his well-known treatise on water law, Henry Farnham relies on Hale's *De Jure Maris* and Sander's *Justinian* to support the proposition that "[i]f a portion of the land of the riparian owner is suddenly engulfed, and the former boundary can be determined or the land reclaimed within a reasonable time, he does not lose his title to it."⁶⁰

Long-term changes occur in the beach by accretion, erosion, sea level rise, and by other gradual and imperceptible, as well as natural and human-induced, phenomena. Such changes, however, are only the beginning of how wind, waves, and sea level changes contribute to the movement of beaches. The seasonal profile of beaches can range widely and greatly affect the area of submerged or emergent beach.⁶¹ Even daily effects of wind and waves can change the contours of a sandy beach: "beaches are ever-changing, restless armies of sand particles, always on the move."⁶²

B. The Determination of the Boundary of Littoral Beach Property

The line of demarcation between private property and sovereignty tidelands subject to the public trust derives in most U.S. jurisdictions from the English common law as set out by Sir Matthew Hale in *De Jure Maris*, published in 1787,⁶³ and in subsequent cases applying his theory of sovereign rights and the public trust.⁶⁴ Hale designated lands covered by the "ordinary high tide," identified as neap tides, as the boundary.⁶⁵ However, perhaps due to confusion about Hale's meaning of the terms, courts and individual states have adopted various interpretations of ordinary high tide.⁶⁶ Considering that beaches

60. 1 HENRY PHILIP FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS: INTERNATIONAL, NATIONAL, STATE, MUNICIPAL, AND INDIVIDUAL INCLUDING IRRIGATION, DRAINAGE, AND MUNICIPAL WATER SUPPLY* 331 (1904) (citation omitted).

61. See WILLARD BASCOM, *WAVES AND BEACHES: THE DYNAMICS OF THE OCEAN SURFACE* 250-55 (1980); see generally Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. Rev. 185, 232-35 (1974). A 1974 Florida case noted "a predictable, seasonal loss and replenishment of approximately 90 feet of beach sand." *Trs. of Internal Improvement Fund v. Ocean Hotels, Inc.*, 40 Fla. Supp. 26, 27 (Fla. 15th Cir. Ct. 1974).

62. BASCOM, *supra* note 61, at 249.

63. See AARON L. SHALOWITZ, *I SHORE AND SEA BOUNDARIES* 91 n.20 (1962) [hereinafter I SHALOWITZ];

64. Maloney & Ausness, *supra* note 61, at 188-89, 198-205.

65. See I SHALOWITZ, *supra* note 63, at 91; see also *Borax Consol. v. City of L.A.*, 296 U.S. 10, 23-24 (1935).

66. Maloney & Ausness, *supra* note 61, at 203-06; see, e.g., *Ocean Hotels, Inc.*, 40 Fla. Supp. at 30 (explaining that "the state argues persuasively that the [Miller v. Bay-to-Gulf, Inc., 193 So. 2d 425 (1940)] case which formulated a definition of 'ordinary high tide' as requiring an averaging of what the opinion termed 'neap tides,' as opposed to an averaging of *all* high tides, is based on a misconception of early common law principles."). It should also be noted that several states have changed the common law, and in Delaware, Maine, Massachusetts, Pennsylvania and Virginia, private property may extend to the low tide line. See JOSEPH J. KALO ET AL., *COASTAL AND OCEAN LAW* 1 (3d ed. 2007).

and their water interfaces are so dynamic, it would seem that an interpretation linked to a visually recognizable indicator of lands ordinarily inundated by water would afford the clearest and most utilitarian demarcation for the boundary. While the boundary might change regularly, visible indicia would still serve to locate the migrating boundary. Some states have adopted this approach. Hawaii, for example, uses the “the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves”⁶⁷ Washington’s Supreme Court at one time defined “ordinary high tide” as the “line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation,”⁶⁸ *i.e.*, the vegetation line. While such visual indicators may not address all boundary issues, day-to-day users of the beach can clearly identify the area of public ownership which they are entitled to use as a matter of law.

The boundary for littoral property is not, however, always only a matter of state property law. The U.S. Supreme Court has held that if the ocean shoreline property is traced to a federal grant, federal law applies to the determination of the littoral boundary.⁶⁹ In *Borax Consolidated v. Los Angeles*, the Court had to determine the boundary between upland conveyed by the United States to a private party and tidelands that had previously been granted to California upon admission to the Union.⁷⁰ The Court held that federal law controlled, but it

67. See *In re Ashford*, 440 P.2d 76, 77 (Haw. 1968), and HAW. REV. STAT. § 205A-1 (2001) (defining “shoreline”). Hawaii’s law concerning coastal boundaries, however, is based on Hawaiian custom rather than the common law. In *County of Hawaii v. Sotomura*, the Hawaii Supreme Court held that:

as a matter of law . . . where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth.

517 P.2d 57, 62 (1973).

68. *Harkins v. Del Pozzi*, 310 P.2d 532, 534 (Wash. 1957); see also *Shelton Logging Co. v. Gosser*, 66 P. 151 (Wash. 1901) (finding the vegetation line and the mean high tide line to be the same). In *Hughes v. State*, however, the Washington Supreme Court adopted the mean high water line as:

‘[T]he line of ordinary high tide’ as used in Article 17 of the constitution is not a term of technical exactness. It is indefinite at best and an over-simplification of a phenomenon inherently complex and variable. In the absence of any indication to the contrary, we deem the word “ordinary” to be used in its everyday context. The “line of ordinary high tide” is not to be fixed by singular, uncommon, or exceptionally high tides, but by the regular, normal, customary, average, and usual high tides. One cannot sit and watch the tide reach its stand at different elevations on each turn as it ebbs and floods without realizing that a line to be fixed by it must be based upon an average. Thus the line of ‘ordinary high tide’ is the average of all high tides during the tidal cycle.

410 P.2d 20, 26-29 (Wash. 1966), *rev’d on other grounds*, 389 U.S. 290 (1967).

69. See *Borax Consol.*, 296 U.S. at 22 (stating that “[t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question.”). Further, in the case of a federal grant, the question of what riparian rights accrue to the grantee is also a matter of federal law. See *Hughes v. Washington*, 389 U.S. at 292.

70. *Borax Consol.*, 296 U.S. at 16 (1935).

left unanswered the question of what was meant by the ordinary high water mark by determining that when the shoreline “is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails,”⁷¹ still left unanswered the question of what was meant by the ordinary high water mark. The Court specifically rejected the notion that the boundary was a physical mark on the shore made by the waters—“it means the line of high water as determined by the course of the tides.”⁷² The Court reviewed the variability of tides based on the cycles of the moon in relation to the position of the earth and sun, and concluded that the ordinary tide should be determined by the mean of all the high tides.⁷³ Although early cases considered these cycles as monthly and annual events,⁷⁴ the Court relied upon the assessment of the United States Coast and Geodetic Survey that the average of the high tides over a period of 18.6 years reflected a complete cycle of periodic lunar variations.⁷⁵ The federal definition of the ordinary high water boundary, then, is the intersection with the shore of the tidal plane at the height of the mean of all the high tides over a period of 18.6 years.

Although there is the potential for seafront properties in some states to be treated inconsistently depending on whether state or federal law applies to the determination of their seaward boundaries, the adoption by many states,⁷⁶ including Florida, of the federal mean high water definition for coastal property boundaries has created less potential for this situation to arise. The Florida Coastal Mapping Act of 1974⁷⁷ defines mean high water as “the average height of the high waters over a 19-year period.”⁷⁸ The mean high water line is “the intersection of the tidal plane of mean high water with the shore.”⁷⁹

71. *Id.* at 23 (quoting *United States v. Pacheco*, 69 U.S. 587, 590 (1864)).

72. *Id.* at 22.

73. *Id.* at 23-34. The Court could find “no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time.” *Id.* at 26.

74. *Id.* at 24 (citing *Attorney General v. Chambers*, 4 De G.M. & G. 206 (1854)).

75. *Id.* at 26-27; see also *Maloney & Ausness*, *supra* note 61, at 196 (stating that “[t]he variations in the major tide-producing forces are a result of changes in the moon’s phases, declination to the earth, distance from the earth and regression of the moon’s nodes. The variations which occur because of this latter factor will go through one complete cycle in approximately 18.6 years.”) (citation omitted).

76. See generally *Maloney & Ausness*, *supra* note 61, at 206 (explaining that “[b]ecause *Borax* is a progressive decision which incorporates the most accurate methodology for determining tidal boundaries; it has been followed by a number of state courts and should eventually displace the older common-law ‘ordinary high water mark’ standard.”) (citation omitted).

77. FLA. STAT. §§ 177.25-.40 (2009).

78. *Id.* § 177.27(14). In addition, “[f]or 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.*

79. *Id.* § 177.27(15).

C. *The Nature of Tides and the Mean High Tide Line*

The “alternate rising and falling of the level of the sea,”⁸⁰ usually twice each day, is known as the tide.⁸¹ There are three basic types of tides: semidiurnal tides which complete the full tidal cycle of high and low water in half a day; daily tides which complete a tidal cycle in a day; and mixed tides which exhibit two high and two low tides a day, but with significant differences between the two high tides or between the two low tides of the day.⁸² The range of the tide, on the other hand, is the magnitude of rise and fall of the tide.⁸³ While locations may experience the same types of tides, the time and range of the tides may vary greatly.⁸⁴ Even at the same location, the range of the tides varies from day to day.⁸⁵ Tidal range is a very localized phenomenon, related not only to primary forces of the sun and the moon, but also to bottom topography, the configuration of ocean basins, the configuration of bays and estuaries, and meteorological effects.⁸⁶ The mean high tide level undulates along the coastline and cannot be determined by application of a single contour line along the shore,⁸⁷ but has to be established by averaging the high tides *at a specific place* on the coastline.⁸⁸

The determination of the mean of high water level over the requisite nineteen years, known as a tidal epoch,⁸⁹ is technically determinable with some degree of precision. The National Oceanic and Atmospheric Administration’s National Ocean Service (NOS) and its predecessor federal government agencies have monitored tides for more than 150 years.⁹⁰ NOS currently maintains a network of 175 long-term, continuously operating tide measurement stations throughout the country which serve as controls for determining tidal datums for short-term tidal datum stations.⁹¹ In Florida, the Depart-

80. H.A. MARMER, TIDAL DATUM PLANES 1 (U.S. Dep’t of Commerce Coast & Geodetic Survey, Spec. Pub. No. 135, rev. ed. 1951), available at http://docs.lib.noaa.gov/rescue/cgs_specpubs/QB275U35no135RevEd1951.pdf.

81. *Id.* at 5-7.

82. *Id.* at 9.

83. *Id.* at 4.

84. *Id.* at 9.

85. *Id.* at 4.

86. See Peter K. Nunez, *Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem*, 6 SAN DIEGO L. REV. 447, 450 (1969).

87. See Maloney & Ausness, *supra* note 61, at 246.

88. George M. Cole, *Tidal Water Boundaries*, 20 STETSON L. REV. 165, 172 (1990).

89. *Id.* at 171. For information about the current tidal datum epoch, see National Tidal Datum Epoch 1983-2001, <http://data.labins.org/2003/SurveyData/WaterBoundary/EpochNotice/epoch.htm> (last visited Mar. 15, 2010).

90. See Cole, *supra* note 88, at 175.

91. See National Oceanic and Atmospheric Administration, The National Water Level Program (NWLP) and the National Water Level Observation Network (NWLON), <http://tidesandcurrents.noaa.gov/nwlon.html> (last visited Mar. 15, 2010). Tidal datums must be local to be useful for identifying the MHW for the epoch, so short-term tidal stations must be set up in the

ment of Environmental Protection's (DEP) Bureau of Survey and Mapping has established and maintained numerous additional tide stations.⁹² The Florida Coastal Mapping Act of 1974 imposes standards and methods for the establishment of local tidal datums⁹³ and requires that surveyors purporting to establish a local tidal datum and determine the mean high-water line for recording or court purposes must submit a copy of the results to DEP.⁹⁴ Information on tidal datums from NOS and Florida tidal stations, as well as local tidal datums established by private surveyors, is made available to the public and the surveying community through DEP's Internet-based Land Boundary Information System (LABINS).⁹⁵ The use of the proper surveying procedures and availability of reliable, consistent control tidal datums allows one to confidently determine the level of the mean high water over a tidal epoch for a particular sandy beach area. The tidal datum for the mean high tide, however, provides only the vertical element necessary to establish a littoral property boundary. The mean high water line boundary is found at the point at which the horizontal tidal plane of the mean high water intersects with the shore.⁹⁶ The vertical determination of mean high water is basically stable, being based on observations over nineteen years.⁹⁷ The horizontal element of the boundary determination on a sandy beach is anything but stable. The intersection of the horizontal plane of mean high water changes with erosion and accretion, seasonal variations in the beach, wind, waves, storms and man-made changes to the beach—anything that changes the profile of the beach. As a result, “[a] water boundary determined by tidal definition is . . . not a fixed visible mark on the ground, but represents a condition at the water's edge during a particular instant of the tidal cycle.”⁹⁸ It follows that even the most accurate determination of the MHWL for a dynamic sandy beach is no more than a snapshot of the boundary at that particular time and place.

area of the property where the boundary is to be established. Short-term tidal observations from the new station can be interpolated by comparing to simultaneous observations with an established station where the nineteen-year MHW is known and using a ratio of the tide ranges observed at the two stations. See Cole, *supra* note 88, at 172.

92. See Cole, *supra* note 88, at 176; see also Department of Environmental Protection (DEP), Survey & Mapping, <http://www.dep.state.fl.us/lands/survey.htm> (last visited Mar. 15, 2010).

93. FLA. STAT. § 177.38 (2009).

94. *Id.* § 177.37.

95. See DEP, About LABINS, <http://data.labins.org/2003/General/about.cfm> (last visited Mar. 15, 2010).

96. See Aaron L. Shalowitz, *Boundary Problems Raised by the Submerged Lands Act*, 54 COLUM. L. REV. 1021, 1038 (1954) [hereinafter *Boundary Problems*].

97. See *Id.* Because sea level rise is not the same on all areas of the coast, and because sea level rise may accelerate in the near future, the National Tidal Datum Epoch may not be the most accurate basis for calculating the current MHW for a locality. See Cole, *supra* note 88, at 173-74.

98. *Boundary Problems*, *supra* note 96, at 1039.

The circumstance of this ambulating boundary confounds not only property owners and beach users, but also courts. A California case, *People v. William Kent Estate Company*,⁹⁹ involved the determination of the boundary on a beach that fluctuated about eighty feet on a relatively predictable seasonal basis.¹⁰⁰ The appellate court rejected the notion of accretion and erosion applying to such a regular fluctuation of the beach and the boundary, and sought permanence by requiring that the boundary be set by “fixing an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line.”¹⁰¹ In a Florida case involving similar seasonal fluctuations of the beach, the trial court also rejected the idea of a property boundary migrating with the seasonally growing or receding beach as “not acceptable as a property law concept.”¹⁰² The court further stated that the ambulatory boundary would be “impractical in that it is too uncertain to be enforced . . . [and] contrary to all notions of specific boundary limitations and would engender more problems than it would resolve.”¹⁰³ The Florida court rejected the *Kent Estate* solution, however, because it would result in the MHWL being seaward of the boundary for a significant part of the year, violating the Florida Constitution and the public trust doctrine.¹⁰⁴ Instead, the court found the winter tide, the most landward mean high water line, to be the permanent boundary.¹⁰⁵ Neither of these cases has been subsequently followed: The *Kent Estate* case has been reinterpreted and rejected by subsequent caselaw in California,¹⁰⁶ and Florida’s *Ocean Hotels, Inc.*, case was presumably preempted by the Florida Coastal Mapping Act of 1974¹⁰⁷ and not subsequently followed. The cases demonstrate, however, the tension between traditional concepts of property law and the application of ambulatory boundaries to dynamic sandy beach systems. The cases also illustrate that it is not only laymen who find the concept of a “movable freehold”¹⁰⁸ to be confusing and incompatible with their notions of “property.”

The impracticality of enforcing trespass complaints led one Florida community to adopt a policy of allowing beachgoers to use the

99. *People v. William Kent Estate Co.*, 242 Cal. App. 2d 156 (Dist. Ct. App. 1966).

100. *Id.* at 158.

101. *Id.* at 161; *see generally* Nunez, *supra* note 86, at 464-68.

102. *Trs. of Internal Improvement Fund v. Ocean Hotels, Inc.*, 40 Fla. Supp. 26, 32 (Fla. 15th Cir. Ct. 1974).

103. *Id.*

104. *Id.* at 32-33.

105. *Id.* at 33.

106. FLUSHMAN, *WATER BOUNDARIES*, *supra* note 46, at 127-28.

107. *See* FLA. STAT. § 177.27(17) (2009).

108. *Ocean Hotels, Inc.*, 40 Fla. Supp. at 32.

beach up to twenty feet landward of the MHWL.¹⁰⁹ Of course, twenty feet from the MHWL is just as indeterminate as the MHWL, so the city has at times used the debris line or the wet sand line as a surrogate for the MHWL.¹¹⁰ The policy has not provided a resolution to more than a decade of disputes between the public beachgoers. A local organization, Save Our Beaches (SOBs), is currently suing the City of Destin in regard to the private property boundary, alleging that the city is allowing continuing trespasses on private property.¹¹¹

Can the confusion be addressed by simply permanently fixing the boundaries of littoral property? The short answer is no, for both legal and policy reasons. First, if littoral land can be traced to a federal grant, the U.S. Supreme Court has held that state legislation or judicial decisions attempting to fix the boundary would not effect a change in the ambulatory nature of the boundary.¹¹² When the Washington Supreme Court found that the coastal boundary was fixed by the state's constitution at the time of statehood, terminating the littoral rights of an adjacent owner who traced title to a federal grant,¹¹³ the U.S. Supreme Court in *Hughes v. Washington* held that federal law controlled the interpretation of the grant.¹¹⁴ Relying on *Borax*,¹¹⁵ the Court found that federal law defined the littoral rights granted to federal grantees, and that such grantees were entitled to accretions to the shoreline.¹¹⁶ Consequently, fixing the boundary as a matter of state law would not affect federal grantees and could lead to disparate treatment of landowners.

A second reason to reject the idea of a permanent boundary is also found in *Hughes* in Justice Stewart's dissent. He viewed the Washington court's decision as changing the state's property law in a manner that constituted an uncompensated taking of Mrs. Hughes property—

109. See Fraser Sherman, *BATTLE FOR THE BEACH: Charges Fly As City Seeks To Clarify 20-foot "Rule of Thumb,"* THE DESTIN LOG, August 5, 2009, available at <http://www.thedestinlog.com/articles/beach-10350-city-thumb.html> [hereinafter *BATTLE FOR THE BEACH*], and Fraser Sherman, *Resurrected Lawsuit Puts City's Beach Access Rules Behind Closed Doors,* THE DESTIN LOG, July 21, 2009, available at <http://www.thedestinlog.com/articles/beach-1051-behind-puts.html> [hereinafter *Resurrected Lawsuit*]; see also Jennifer A. Sullivan, *Laying Out an "Unwelcome Mat" to Public Beach Access*, 18 J. LAND USE & ENVTL. L. 331, 340-46 (2003), and S. Brent Spain, *Florida Beach Access: Nothing But Wet Sand?* 15 J. LAND USE & ENVTL. L. 167, 186-90 (1999).

110. See *BATTLE FOR THE BEACH*, *supra* note 109, and *Resurrected Lawsuit*, *supra* note 109.

111. See *BATTLE FOR THE BEACH*, *supra* note 109, and *Resurrected Lawsuit*, *supra* note 109.

112. See *Hughes v. Washington*, 389 U.S. 290, 292 (1967).

113. *Hughes v. State*, 410 P.2d 20, 31-32 (Wash. 1966).

114. *Hughes v. Washington*, 389 U.S. at 292.

115. *Borax Consol. v. City of L.A.*, 296 U.S. 10 (1935).

116. *Hughes v. Washington*, 389 U.S. at 293; see also Maloney & Ausness, *supra* note 61, at 229 (stating "[t]he exact scope . . . is not entirely clear. While *Hughes* involved a federal patent made prior to statehood, . . . *Borax* involved patents made after statehood. It is therefore likely that federal law will govern wherever a federal patent is involved.").

the right to the land that had accreted since statehood.¹¹⁷ Thus, changing state property law may raise constitutional questions if it “constitutes a sudden change in state law, unpredictable in terms of the relevant precedents”¹¹⁸ impairing “pre-existing property interests.”¹¹⁹

Policy considerations also undermine the concept of a fixed littoral boundary for an unstable coastline. Where the shore is accreting, fixing the boundary deprives the littoral owner’s property boundary contact with the MHWL, potentially jeopardizing the right of access which is the underlying basis for all other littoral rights. Where the shoreline is eroding, leaving a fixed boundary under water as the beach erodes, the public’s rights to use of sovereign waters and the wet sand area of the beach are unreasonably compromised.

Thus, attempting to fix a permanent shoreline boundary between upland owners and sovereignty lands can be problematic. There is one situation, however, where a fixed boundary is the most reasonable policy resolution and, if legislation is designed properly, should avoid constitutional problems. This is where the state and/or federal government renourishes critically eroding beaches or beaches that are retreating dramatically in the face of erosion and sea level rise.

V. BEACH RESTORATION AND BOUNDARIES

A. *The Process of Beach Restoration*

As the coastlines have continued to erode during the last few decades due to storms, sea level rise, and manmade impacts such as building of inlets, development and population growth along the coasts has also continued.¹²⁰ Responses to the migration of beaches include retreat and hard armoring of the coastline and beach restoration.¹²¹ The level of development in many coastal areas has made large-scale retreat of development economically unviable, and although hard armoring of the coastline may protect structures, it gen-

117. *Hughes v. Washington*, 389 U.S. at 294-98.

118. *Id.* at 296.

119. *Id.* at 298. Apparently in an attempt to deal with the unique hydrography of Florida’s lakes (for example, large lakes of more than 5,000 acres can suddenly drain in few days), Florida enacted legislation to fix the boundaries of navigable, meandered lakes at their position at the time of statehood. *State v. Fla. Nat’l Props.*, 338 So. 2d 13, 14-15 (Fla. 1976) (citing FLA. STAT. § 253.151). In *Florida National Properties*, the Florida Supreme Court held the migratory ordinary high water line to be the boundary, stating that “[a]n inflexible meander demarcation line would not comply with the spirit of [sic] letter of our Federal or State Constitutions nor meet present requirements of society.” 338 So. 2d at 19.

120. See generally NOAA COASTAL SERVICES CENTER, SOCIAL AND DEMOGRAPHIC TRENDS THAT AFFECT THE NEED FOR BEACH NOURISHMENT, in BEACH NOURISHMENT: A GUIDE FOR LOCAL GOVERNMENT OFFICIALS, available at <http://www.csc.noaa.gov/beachnourishment/html/human/socio/change.htm> (last visited Mar. 15, 2010).

121. See KALO ET AL., *supra* note 66, at 303-15.

erally leads to further loss of the beach and public trust tidelands.¹²² Many states and communities have chosen to restore or renourish beaches. The perceived benefits of beach nourishment include storm damage protection, enhancement of recreation and tourism, and related benefits such as “[i]ncreased business and tax revenues[,] [e]nhanced property values[,] [i]ncreased property tax revenues[,] [j]ob creation[,] [e]nvironmental benefits[,] [and] [a]esthetic benefits.”¹²³

Florida has an extensive beach management program authorized under the Florida Beach and Shore Preservation Act.¹²⁴ Through 2006, the Florida Legislature has appropriated over \$582 million for beach erosion control and hurricane recovery;¹²⁵ and state, local, and federal authorities currently manage over 200 miles of restored beaches.¹²⁶ Because beach loss due to sea level rise in the state is currently not as significant a factor in beach migration as background erosion rates, Florida’s response to sea level rise in the next fifty to one hundred years will likely be to continue restoration and renourishment of beaches.¹²⁷ Accelerating sea-level rise will require that projects be adapted by moderately increasing the volume of sand placed on the beach, but even under those circumstances, it is projected that restoration and renourishment will continue to be cost effective.¹²⁸

Beach restoration generally involves the collection of sand by dredging from offshore sites. Tons of sand, as much as a million cubic yards in a typical project, may then be pumped in a slurry of sand and

122. Jenifer E. Dugan, et al., *Ecological Effects of Coastal Armoring on Sandy Beaches*, 29 MARINE ECOLOGY 160, 161 (Suppl. 1. 2008).

123. NOAA COASTAL SERVICES CENTER, TYPES OF ECONOMIC BENEFITS ASSOCIATED WITH BEACH NOURISHMENT PROJECTS, *in* BEACH NOURISHMENT: A GUIDE FOR LOCAL GOVERNMENT OFFICIALS, available at <http://www.csc.noaa.gov/beachnourishment/html/human/socio/types.htm>.

124. See FLA. STAT. ch. 161 (2008).

125. BECP Website, *supra* note 33.

126. *Id.*

127. E-mail from Dr. Nicole Elko, Coastal Coordinator, Pinellas County, Dep’t of Env’tl. Mgmt., to Donna Christie, Elizabeth C. & Clyde W. Atkinson Professor of Law, Florida State Univ. College of Law (June 10, 2009, 11:24 EST) (on file with author). Dr. Nicole Elko cautions, however, about the long-term effects of beach renourishment as a response to sea level rise when she writes:

If beaches are elevated and stabilized (horizontally) by shore protection efforts, the adjacent geologic and environmental systems will be prohibited from migrating landward and upward. At some unknown value of sea level rise at some unknown time in the long-term future (>100 yrs), this will result in a loss of nearshore coastal features and habitat. Before continued shore protection can be affirmed as an appropriate long-term adaptation strategy for sea level rise, an analysis must address these and other impacts to the surrounding coastal systems. Meanwhile, we are safe to continue our programs, as long as we plan appropriately for the future.

Id.

128. Nicole Elko, *Planning for Climate Change: Recommendations for Local Beach Communities* 14 (forthcoming 2009) (manuscript at 14, on file with author).

water to the beach through huge pipes.¹²⁹ As the water drains, leaving the sand deposited on the beach, bulldozers sculpt the beach to the specifications of the design profile.¹³⁰ The project generally continues twenty-four hours a day as the beach is widened from one hundred to two hundred feet.¹³¹

B. The Florida Beach and Shore Preservation Act

1. Policy and Purpose

In 1986, the Florida Legislature enacted the Beach and Shore Preservation Act (BSPA)¹³² to manage and protect Florida's critically eroding beaches. The Legislature specifically found that beach erosion has "advanced to emergency proportions" and that the state has a "necessary governmental responsibility to properly manage and protect Florida beaches . . . from erosion" and therefore directed "that the Legislature make provision for beach restoration and nourishment projects[.]"¹³³ Restoration projects were declared to be "in the public interest"¹³⁴ and limited to critically eroded beaches¹³⁵ or shoreline that would benefit an adjacent critically eroded beach.¹³⁶ Projects must provide benefits consistent with the state's beach management plan¹³⁷ and be "designed to reduce potential upland damage or mitigate adverse impacts caused by improved, modified, or altered inlets, coastal

129. See *infra* note 131 and accompanying text.

130. See BECP Website, *supra* note 33; see also Robert G. Dean et al., *Beach Nourishment with Emphasis on Geological Characteristics Affecting Project Performance*, in *Beach Nourishment: A Guide for Local Government Officials* (NOAA) (last visited Mar. 15, 2010), available at <http://www.csc.noaa.gov/beachnourishment/html/geo/scitech.htm>. For an interesting description of a beach restoration project on the west coast of Florida, see Cindi Peters, *Shifting Sands: A Slightly Technical View of Beach Restoration*, available at <http://www.islandtime.com/ShiftingSands/tech.shtml>.

131. A recent project at Cape San Blas deposited more than 3.6 million cubic yards of sand from offshore to create 225 feet of new beach. See Jennifer Portman, *Cape San Blas Saved – For Now*, TALLAHASSEE DEMOCRAT, June 29, 2009, at 1A-2A.

132. FLA. STAT. § 161 (2009).

133. *Id.* § 161.088.

134. *Id.*

135. "Critically Eroded Shoreline" is defined as:

a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which, although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

FLA. ADMIN. CODE r. 62B-36.002(4) (2003).

136. § 161.088.

137. Beach management plans are developed pursuant to section 161.161(1), Florida Statutes (2009), and approved by the legislature under section 161.161(2), Florida Statutes (2009).

armor, or existing upland development.”¹³⁸ To receive state funding, projects must provide adequate public access and protect natural resources and endangered and threatened species.¹³⁹ Projects “must have an identifiable beach erosion control or beach preservation benefit,” and projects providing only recreational benefit cannot be funded by the state.¹⁴⁰

2. Establishing Boundaries for the Renourished Beach

Before construction of a beach restoration project, the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees), who holds title to sovereignty lands in Florida,¹⁴¹ must establish the line of mean high water and an erosion control line (ECL) for the area to be restored.¹⁴² The MHWL is the primary reference for the Board of Trustees to establish the erosion control line (ECL) for the project,¹⁴³ but it may also be set by taking into account the “requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.”¹⁴⁴ If the ECL must be located landward of the MHWL in order to accomplish the project, the land seaward of the ECL may be condemned through eminent domain proceedings.¹⁴⁵ After surveying and establishing a proposed ECL, the Board of Trustees holds a public hearing to receive “evidence on the merits of the proposed erosion control line and . . . of locating and establishing such requested erosion control line[.]”¹⁴⁶ and may subsequently approve or disapprove the proposed ECL.¹⁴⁷

Approval of the ECL by the Board of Trustees is subject to chal-

138. *Id.* § 161.088.

139. *Id.* § 161.101(12).

140. *Id.* § 161.101(13).

141. *Id.* § 253.001; *see also id.* § 253.02(1) (vesting sovereignty lands in the Board of Trustees—the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture).

142. *Id.* § 161.161(3).

143. *Id.* § 161.161(5).

144. *Id.* Sections 161.141 and 161.191, Florida Statutes (2009), read together, establish that if the ECL is located seaward of the MHWL, section 161.191(1) can actually operate to increase the upland owner’s title seaward of the MHWL, but it does not authorize a taking of the upland property landward of the MHWL. Section 161.141 indicates that if the ECL must be located landward of the MHWL in order to accomplish the project, the land seaward of the ECL must be condemned through eminent domain proceedings.

145. *Id.* § 161.141 (stating that “[i]f an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.”).

146. *Id.* § 161.161(4).

147. *Id.* § 161.161(5).

lenge for substantive or procedural errors.¹⁴⁸ If there is no timely challenge, the Board of Trustees files its resolution approving the erosion control line in the public records and records the survey showing the area of beach to be protected and the erosion control line in the book of plats of the county or counties where the erosion control line lies.¹⁴⁹ Once the resolution and survey are filed, title to all land seaward of the ECL is:

vested in the state by right of its sovereignty, and title to all lands landward of [the ECL are] vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.¹⁵⁰

3. The Effect of ECL Establishment on Riparian or Littoral Rights

Once recorded, the ECL not only replaces the MHWL as the boundary of sovereignty land and upland private property, but also fixes the boundary so that it is no longer ambulatory. The BSPA specifically states that the “common law shall no longer operate 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”¹⁵¹ Under the common law then, the upland is technically no longer littoral land, because the ambulatory MHWL is no longer the boundary. The Act goes on, however, to provide statutory protection for virtually all of the common law rights that characterize riparian or littoral ownership, as follows:

Any upland owner or lessee who . . . ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights [except those associated with boundary change related to accretion and erosion]. . . , including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, ei-

148. *See id.* § 161.181, and § 26.012(2)(g).

149. *Id.* § 161.181. If timely review of a project or ECL is taken, the Board of Trustees may still continue with recording of the ECL and the beach restoration unless there has been a “final decision of a court of competent jurisdiction preventing the implementation of a beach erosion control project or invalidating, abolishing, or otherwise preventing the establishment and recording of the erosion control line[.]” *Id.* Of course, the state may incur liability if it proceeds while litigation is pending.

150. *Id.* § 161.191(1).

151. *Id.* § 161.191(2).

ther naturally or artificially, seaward of any erosion control line . . . , except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.¹⁵²

In effect, the BSPA redefines littoral land to be land bounded by the ECL and preserves all access and access-dependent littoral rights.

Administrative rules further protect the riparian owner by assuring that persons other than the riparian owner cannot get permits to carry out activities on sovereign submerged lands adjacent to the littoral property. Rule 18-21.004(3)(b) of the *Florida Administrative Code*, provides that “[s]atisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands”¹⁵³ Because the littoral owner’s access rights are protected by the BSPA for government projects, the rule provides an exception for government beach restoration or enhancement projects, “provided that such activities do not unreasonably infringe on riparian rights.”¹⁵⁴ Implementing rules further provide that “[n]one of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in Section 253.141, F.S.,¹⁵⁵ of upland property owners adjacent to sovereignty submerged lands.”¹⁵⁶

Further statutory protection for littoral owners is set out in section 161.141, Florida Statutes, which provides that “[i]f an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by

152. *Id.* § 161.201.

153. FLA. ADMIN. CODE r. 18-21.004(3)(b) (2009).

154. Moreover, “[s]atisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or *when a governmental entity conducts restoration and enhancement activities*, provided that such activities do not unreasonably infringe on riparian rights.” *Id.* (emphasis added).

155. Section 253.141(1), Florida Statutes (2008), provides the following description of riparian rights:

Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They 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. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

156. FLA. ADMIN. CODE r. 18-21.004(3)(a).

eminent domain proceedings.”¹⁵⁷ Finally, if the beach restoration is not commenced within a two-year period, is halted for more than six-months, or authorities do not maintain the restored beach, the ECL may be cancelled.¹⁵⁸

*C. Of SOBs: The Challenge for Fixed Boundaries on
Renourished Beaches*

1. Background

Since at least the mid-1990s, the Gulf of Mexico coast along sections of the Florida Panhandle has been experiencing serious erosion exacerbated by a series of storms and hurricanes starting in 1995.¹⁵⁹ Areas that once had broad, sugar-sand beach and dune systems now have only ribbons of sand along the shore that have become battlegrounds for use by increasing numbers of coastal property owners and recreational beach users. For example, the city of Destin has tried futilely to mediate disputes between upland property owners and members of the public for more than a decade.¹⁶⁰ While beach restoration in the area would alleviate the pressures caused by the intensity of the use on a narrow strip of beach, some property owners view beach restoration projects under the BSPA as simply building a public beach in front of their property, creating the opportunity for more disturbance of their use and enjoyment by unwelcome interlopers.¹⁶¹

The Florida Department of Environmental Protection (DEP) began a process of extensive studies, consultations, and construction design after finding that the beaches of Destin and Walton County were critically eroded in 1995.¹⁶² As a result of the DEP’s efforts, on July 30, 2003, the city and county applied for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (JCP) to restore approximately 6.9 miles of beaches.¹⁶³ After a survey to determine the

157. FLA. STAT. § 161.141 (2009).

158. *Id.* § 161.211.

159. *See STBR*, 998 So. 2d 1102, 1106 (Fla. 2008).

160. *See generally* Sullivan, *supra* note 109, at 330-46.

161. *See, e.g.*, Save Our Beaches, Inc., <http://saveourbeaches.net/> (last visited Mar. 15, 2010) (stating “[t]he only objective of the City of Destin is to make all privately owned Gulf front beach open to the public.”).

162. *Critically Eroded Beaches*, *supra* note 39, at 48-49.

163. *STBR*, 998 So. 2d at 1106. A beach nourishment permit requires both regulatory authorization from the DEP, which includes a coastal construction permit and a wetland environmental resource permit, and a proprietary license from the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees). *See* FLA. STAT. ch. 161, *and* FLA. ADMIN. CODE ch. 62B-41, *see* FLA. STAT. ch. 373, *and* FLA. ADMIN. CODE ch. 62-312; *see* FLA. STAT. ch. 253, *and* FLA. ADMIN. CODE ch. 18-21. The proposed project was described as follows:

The application proposed to dredge sand from an ebb shoal borrow area south of East Pass in eastern Okaloosa County, using either a cutter head dredge (which disturbs the sand on the bottom of the borrow area and vacuums it into a pipeline which delivers it to the project area) or a hopper dredge (which fills itself and is moved to the

MHWL, the Board of Trustees adopted and recorded the ECL at the surveyed MHWL,¹⁶⁴ and a Notice of Intent to Issue the Permit was issued by DEP on July 15, 2004.¹⁶⁵

The fixed boundary provision of Florida's BSPA was challenged indirectly by two organizations representing shorefront property owners in Destin and Walton County, Florida.¹⁶⁶ Save Our Beaches, Inc. (SOB) has 150 members, representing the owners of approximately 112 properties, and Stop the Beach Renourishment, Inc. (STBR) represents the owners of five beachfront properties.¹⁶⁷ SOB and STBR filed two petitions for administrative hearings challenging the issuance of the permit and the ECL, which were consolidated for purposes of the hearing.¹⁶⁸ Deferring constitutional challenges for adjudication in court, the administrative law judge (ALJ) found that the permit applicants met the applicable standards and recommended issuance of the permit.¹⁶⁹ DEP entered a final order on July 27, 2005, affirming that the JCP was properly issued.¹⁷⁰

SOB and STBR challenged the final order in the First District Court of Appeal. The court's decision put the Florida Beach Erosion Control Program in jeopardy by finding that the BSPA deprived the beachfront property owners of their constitutionally protected riparian rights without just compensation,¹⁷¹ and that riparian rights could not be severed from riparian land.¹⁷² Consequently, the court concluded that the government must show "sufficient upland interest" to carry out a beach restoration project,¹⁷³ because if the "project can-

project site). On the project site, heavy equipment moves the dredged sand as specified in the design plans. The project is executed in this manner and progresses along the beach, usually at a pace of about 300 to 500 feet a day.

STBR, 998 So. 2d at 1106.

164. *Id.*

165. *Id.*

166. See *Save Our Beaches v. Fla. Dep't of Env'tl. Prot.*, 31 Fla. L. Weekly D1173 (Fla. 1st DCA 2006) [hereinafter *Save Our Beaches*].

167. Neither organization owns property in the affected area, but "[b]oth *Save Our Beaches* and *Stop the Beach Renourishment* were incorporated not for profit in Florida for the purpose of protecting and defending the natural resources of the beaches, protecting private property rights, and seeking redress of past, present, and future authorized and/or inappropriate beach restoration activities." *Id.* at 5 (emphasis added).

168. *Id.* at 1.

169. Specifically, the ALJ found that "Destin and Walton County gave reasonable assurance that applicable water quality standards will not be violated and . . . Destin and Walton County have obtained, or are able to obtain, all requisite private property rights necessary to implement the proposed project." *Id.* at 1.

170. *Id.* at 2.

171. *Id.* at 10.

172. For this proposition, the District Court of Appeal relied on *Belvedere Development Corp. v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), which held that in an eminent domain action, the state could not acquire riparian property in fee simple absolute with an express reservation to the landowners of the riparian rights that appertained to the acquired land. *Id.* at 652-63.

173. *Id.* at 11. The court in *STBR* was referring to the fact that the city and county could not fall into the exception to Florida Administrative Code Rule 18-21.004(3)(b), which allows

not reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.”¹⁷⁴

The case was certified to the Florida Supreme Court, which accepted jurisdiction¹⁷⁵ and heard the case in April 2007. At both the administrative hearing and district court levels, SOB was found to lack standing and was not a party to the Florida Supreme Court proceedings.¹⁷⁶

2. Beach Restoration in the Florida Supreme Court

Although, according to the Florida Supreme Court, the District Court of Appeal had dealt with the constitutional challenge to the BSPA as a facial challenge, the question certified to the Florida Supreme Court was “in terms of an applied challenge.”¹⁷⁷ The supreme court rephrased the certified question: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?”¹⁷⁸ The court noted that while review of the constitutionality of a statute and the interpretation of a constitutional provision are questions of law to be reviewed *de novo*, “legislative acts [have] a presumption of constitutionality.”¹⁷⁹ The court’s test for finding a statute facially unconstitutional required “that no set of circumstances exists under which the statute would be valid.”¹⁸⁰

restoration by the government when “such activities do not unreasonably infringe on riparian rights.” *Id.* at 2 (emphasis in original).

174. *Id.* at 31-32 (quoting FLA. STAT. § 161.141 (2003)).

175. *Walton County v. Save Our Beaches, Inc.*, 937 So. 2d 1100 (Fla. 2006); Fla. Dep’t of Envtl. Prot. v. *Save Our Beaches, Inc.*, 937 So. 2d 1099 (Fla. 2006).

176. *STBR*, 998 So. 2d 1102, 1106 n.5 (Fla. 2008).

177. *Id.* at 1105. The question certified to the Florida Supreme Court by the district court was:

[h]as Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

Id. The Florida Supreme Court further noted that the district court “should have refrained from considering what is essentially a facial challenge since Stop the Beach Renourishment (STBR) acknowledged that it was a party in circuit court to a facial challenge of the same act.” *Id.* at 1105 n.1. (citation omitted).

178. *Id.* at 1105 (citations omitted). Interestingly, neither the district court nor the Florida Supreme Court discussed whether the constitutional challenge and analyses were under the Federal or the Florida Constitution.

179. *Id.* at 1109.

180. *Id.* (citing Fla. Dep’t of Revenue v. *City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)). In federal constitutional analysis, this proposition was set out in *United States v. Salerno*, 481 U.S. 739, 746 (1987). Professor Adler describes the *Salerno* Doctrine, as follows:

There are two types of constitutional challenges, ‘as-applied’ challenges and ‘facial’ challenges. As-applied challenges are the standard kind of constitutional challenge,

The Florida Supreme Court's analysis proceeded by reviewing the common law relationship of upland owners and the public in regard to the state's beaches and the impact of the BSPA on the common law, and then by addressing the lower court's decision.¹⁸¹ While not further providing an explanation of its standard of review, the court put particular emphasis on "how the Act effectuates the State's constitutional duty to protect Florida's beaches in a way that facially balances public and private interests."¹⁸² The court emphasized "that littoral rights are [not] subordinate to public rights" in Florida,¹⁸³ but the analysis also reflected that the rights of the public and the constitutional obligations and interests of the State must be appropriately balanced with private property rights.¹⁸⁴

a. The Common Law's Balancing of Public and Private Right in the Shore and Waters

In Florida, public rights in the lands and waters seaward of the MHWL have been recognized under both the common law and the Florida Constitution.¹⁸⁵ Florida's public trust doctrine is derived from the English common law and state courts have adopted a traditional view of the doctrine, holding that "[t]he state holds the fore-shore in trust for its people for the purposes of navigation, fishing and bathing."¹⁸⁶ The trust is governmental in nature, and title is held by the state "not for purposes of disposition to individual ownerships, but . . . in trust for all the people."¹⁸⁷

The public trust doctrine as applied to Florida's beaches also has constitutional aspects. The Florida Constitution provides that "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

while facial challenges are unusual. A facial challenge to a rule should succeed only if (1) there exists no set of circumstances under which the rule could be constitutionally applied, or (2) the facial invalidation of the rule is warranted by the "overbreadth" doctrine, a special doctrine limited to the First Amendment.

Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1386-87 (2000) (citation omitted).

181. *STBR*, 998 So. 2d at 1109.

182. *Id.* at 1109.

183. *Id.* at 1111. The court compared Florida law to North Carolina's law which has established "that littoral rights are subordinate to public trust rights." *Id.* at 1111 n.9.

184. *See id.* at 1115.

185. *Id.* at 1109.

186. *Id.* at 1109 (quoting *White v. Hughes*, 139 Fla. 54, 59, 190 So. 446, 449 (1939)); *see also* *Brickell v. Trammell*, 77 Fla. 544, 558-59, 82 So. 221, 226 (1919); *Clement v. Watson*, 63 Fla. 109, 112, 58 So. 25, 26 (1912); *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957); *and* *State v. Gerbing*, 56 Fla. 603, 609, 47 So. 353, 355-56 (1908).

187. *STBR*, 998 So. 2d at 1110 (quoting *Brickell*, 77 Fla. 544, 558-59, 82 So. 221, 226 (1919)).

for all the people.”¹⁸⁸ The Florida Supreme Court also pointed out that article II, section 7, subsection (a) further obligates the State “to conserve and protect Florida's beaches as important natural resources.”¹⁸⁹ In summary, the court concluded that “the State has a constitutional duty to protect Florida's beaches, part of which it holds ‘in trust for all the people.’”¹⁹⁰

Littoral owners in Florida hold certain rights—bathing, fishing, and navigation—in common with the public, but those rights are not superior to the rights of other members of the public.¹⁹¹ The court identified “special or exclusive common law littoral rights” that are “‘necessary for the use and enjoyment’ of the upland property”¹⁹² as “(1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water.”¹⁹³ The court confirmed that littoral rights are property rights, subject to regulation, but requiring compensation if taken.¹⁹⁴ The court emphasized, however, that a compensatory taking must involve a substantial impairment of riparian rights.¹⁹⁵

While littoral rights have been identified in numerous cases and defined as property rights, the court noted that they have been “broadly and inexactly stated”¹⁹⁶ and observed that the “nature of these rights rarely has been described in detail.”¹⁹⁷ The court proceeded to explain that the rights to access, use, and view are fundamentally easements based on the present use of the shore and water by the littoral owner; the right to accretion is distinct from these rights in that it is “a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction.”¹⁹⁸ The doctrine of avulsion mitigates the hardship

188. FLA. CONST. art. X, § 11.

189. *STBR*, 998 So. 2d at 1110. Specifically, Article II, section 7(a) of the Florida Constitution states that “[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.”

190. *Id.* at 1110-11 (quoting FLA. CONST. art. X, § 11).

191. *Id.* at 1111.

192. *Id.* (quoting *Ferry Pass Inspectors’ & Shippers’ Ass’n v. White’s River Inspectors’ & Shippers’ Ass’n*, 57 Fla. 399, 403, 48 So. 643, 645 (1909)).

193. *STBR*, 998 So. 2d at 1111.

194. *Id.*

195. *Id.* (citing “*Game & Fresh Water Fish Comm’n v. Lake Islands, Ltd.*, 407 So. 2d 189 (Fla. 1981) (holding that boating regulation was unconstitutional as to littoral owner because it substantially denied the right of access)); *see also* *Webb v. Giddens*, 82 So. 2d 743 (Fla. 1955) (finding that culvert substantially impaired littoral owner's right of access); *cf.* *Duval Eng'g & Contracting Co. v. Sales*, 77 So. 2d 431 (Fla. 1954) (holding that upland owners had no right to compensation when there was only a slight impairment of littoral rights and owners did not show a material disturbance of the littoral rights to access and view”).

196. *STBR*, 998 So. 2d at 1111 (citing *Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955)).

197. *Id.*

198. *Id.* at 1112.

caused by applying the doctrines of accretion or erosion to sudden, perceptible changes in the water line.¹⁹⁹ These common law doctrines of accretion, erosion, and avulsion, relating to the dynamic littoral boundaries, were characterized by the court as a balancing of the public and private interests in the dynamic shoreline.²⁰⁰ The common law has not, however, addressed the issue of how public and private interests in the shoreline are affected by public beach restoration projects.²⁰¹

b. The BSPA's Balancing of Public and Private Interests

The legislature enacted the BSPA to effectuate its “constitutional duty to protect Florida’s beaches.”²⁰² The Florida Supreme Court found that the Act continues to strike a careful balance between public and private interests by preserving the public’s “vital economic and natural resources[]” while protecting upland property from future damage and preserving the littoral owner’s rights to access, use, and view.²⁰³ The court concluded that “just as with the common law, the Act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests.”²⁰⁴

c. The Doctrine of Avulsion

The Florida Supreme Court found that the lower court had inappropriately found that beach restoration would normally result in the MHWL moving seaward and the accreted beach accruing to the ownership of the upland owner because the District Court of Appeal had failed to take into account the doctrine of avulsion.²⁰⁵ The Florida Supreme Court was not, however, referring to the artificial addition of sand to the beach as a relevant avulsive event. Instead, the court identified the 1995 hurricane that contributed to the designation of the area as a critically eroded beach as a relevant avulsive event.²⁰⁶ The court found that “when the shoreline is impacted by an avulsive event, the boundary . . . remains the pre-avulsive event MHWL[.]” and that the state, like other littoral owners, “has the right to restore

199. *Id.* at 1114. The doctrine of avulsion may also create hardship for the upland owner if the avulsive event creates land seaward of the pre-avulsive MHWL. *See id.* at 1114, 1116. The upland owner is no longer the owner to the MHWL and not a littoral owner entitled to common law littoral rights. *See id.* at 1116.

200. *Id.* at 1112.

201. *Id.* at 1114.

202. *Id.* at 1114-15.

203. *Id.* at 1115.

204. *Id.*

205. *Id.* at 1116.

206. *Id.*

its shoreline up to that MHWL.”²⁰⁷ Consequently, the court concluded that the Act is facially constitutional because it does no more than what would be allowed under the common law.²⁰⁸

The Florida Supreme Court’s interpretation seems to create an inverse application of a right to reclaim land after an avulsive event. Because the State’s submerged land *is* bounded by the MHWL, however, one might analogize that the State has the same rights to reclaim its land as an upland littoral owner. But since the State’s ownership is of land that was already submerged, what *land* does the state have to *reclaim*? While it is not immediately obvious, the state does have crucially important *land* to reclaim between the pre-avulsive low and high water lines. These tidelands are the critical link for the public in their access to beaches. An avulsive event that submerges the MHWL far seaward of the ocean’s current reach potentially leaves the public with no guaranteed access to the sea or use of the beaches. In addition, if the public had created rights to use the beach above the MHWL, these lands, too, may be submerged and inaccessible to the public.²⁰⁹

207. *Id.* at 1117.

208. *Id.* at 1117-18.

209. Texas deals with this issue by characterizing a public easement on the dry sand above the MHWL as a “rolling easement” which follows the actual movement of the dry sand beach. *See Severance v. Patterson*, 566 F.3d 490, 493 (5th Cir. 2009). In *Matcha v. Mattox*, the Texas Court of Appeals explained as follows:

Indeed, the theory of a migratory public easement is compatible with the doctrine of custom and the situations that often give rise to a custom. A public easement on a beach cannot have been established with reference to a set of static lines on the beach, since the beach itself, and hence the public use of it, surely fluctuated landward and seaward over time. The public easement, if it is to reflect the reality of the public’s actual use of the beach, must migrate as did the customary use from which it arose. The law cannot freeze such an easement at one place any more than the law can freeze the beach itself.

711 S.W.2d 95, 100 (Tex. App. 1986), *cert. denied* 481 U.S. 1024 (1987). *But see Severance*, in which the Federal Court of Appeals certified the question of the existence, nature and effect of the “rolling easement” doctrine to the Supreme Court of Texas. *Severance*, 566 F.3d 490. The court also recognized a unique application of the Fourth Amendment ripe and that *Severance* had a claim for “seizure” of her property. *Id.* at 500. In Florida, however, one appellate court, in *Trepanier v. County of Volusia*, has rejected the logic of the “rolling easement.”

There is no doubt that if the mean high water line moves onto private property, the right of the public up to the mean high water line does migrate because of the constitutional reservation of title to all land seaward of the mean high water line. However, the right to use privately-owned land based on custom is on an entirely different footing. First, reading the facts in the light most favorable to Appellants, it appears that avulsion, rather than erosion was the source of the loss of the dry sand beach where the public’s undisputed customary right to recreational use, including driving, has historically been exercised. If land is lost by avulsion, boundaries do not change. *See Siesta Props[, Inc., v. Hart]*, 122 So. 2d 218, 224, (Fla. 2d DCA 1960)]. Certainly, if it can be shown that, by custom, use of the beach by the public as a thoroughfare has moved seaward and landward onto Appellant’s property with the movement of the mean high water line, that public right is inviolate. However, 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 customary right of use.

d. The Right to Accretion

The Florida Supreme Court additionally rejected the district court's conclusion that the BSPA was facially unconstitutional because it constituted a taking of the littoral right to accretions.²¹⁰ By categorizing the right to accretion as a contingent right and "a rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water[.]" the court could determine that the doctrine of accretion had no application in the context of the BSPA.²¹¹ The court explained that the reasons for the law to recognize a littoral right to accretions identified in *Medeira Beach*²¹² were irrelevant to the application of the BSPA.²¹³ Neither the amount of land concerned nor the legal principles involved can be categorized as *de minimus*. Further, the BSPA absolves the littoral owner of the risk of loss from erosion by creating state responsibility for maintenance of the beach. Consequently, there is no need to balance that risk with a right to accreted land. The land created is not without an owner, and the ECL clearly establishes the boundary between the state and upland owner. Finally, the most important attribute of littoral ownership, the right of access, is preserved.²¹⁴

e. Other Issues

The court quickly dismissed the final arguments in the case. The court found that, in Florida, there is no independent littoral right to have contact with the water's edge.²¹⁵ The MHWL that marks the littoral boundary does not coincide with the water's edge, but is the average of the high tides over a nineteen-year period.²¹⁶ The fact that there are periods when the state-owned foreshore separates the littoral owner from the water "has never been considered to infringe upon the upland owner's littoral right of access, which the ancillary right to contact is meant to preserve."²¹⁷ Because any right of contact is merely ancillary to the right of access and the BSPA preserves the rights of

965 So. 2d 276, 292-93 (Fla. 5th DCA 2007).

210. *STBR*, 998 So. 2d at 1118.

211. *Id.* (citations omitted).

212. *See Medeira Beach Nominee*, 272 So. 2d 209, 212-13 (Fla. 2d DCA 1973), and text accompanying note 55.

213. *STBR*, 998 So. 2d at 1118.

214. *Id.*

215. *Id.* at 1119.

216. *Id.*

217. *Id.* at 1119.

ingress and egress, the right of contact with the water is not unconstitutionally taken.²¹⁸

The final issue involved the question of whether the proposition announced by the Florida Supreme Court in *Belvedere Development Corp.*,²¹⁹ i.e., that riparian rights cannot be severed from riparian property, applied to the BSPA.²²⁰ Noting that the rule in *Belvedere* was limited to condemnation of riparian lands, the court found the case clearly distinguishable because it did not involve condemnation of upland and because, unlike the parties in *Belvedere*, “upland owners under the Act continue to have the ability to exercise their littoral rights to access, use, and view.”²²¹

D. Beach Restoration and the BSPA After STBR

The U.S. Supreme Court has granted *certiorari* in the Florida Supreme Court’s *STBR* decision,²²² continuing to leave the future of boundaries and beach restoration in Florida in a state of limbo. Even if the Florida court’s opinion is not found to be a taking requiring compensation, the case leaves serious questions about the future of beach restoration in Florida. This section will discuss the issues raised by the *STBR* case and then address the challenges raised by the U.S. Supreme Court case.

1. Sorting Through the Florida Supreme Court’s Interpretation of the BSPA

While the Florida Supreme Court found the BSPA to be facially constitutional, the court left many questions unanswered by its apparent misunderstanding of the causes of critical erosion of Florida’s beaches and its somewhat unorthodox analysis of the issues relating to avulsion. First, the court found the state had the right to reclaim the beach and retain ownership of the created land based on the proposition that littoral owners have the right to reclaim land lost after an avulsive event.²²³ The court summarized as follows:

In the context of restoring storm-ravaged public lands, the State would not be doing anything under the Act that it would not be entitled to accomplish under Florida’s common law.

218. *Id.* at 1120.

219. *Belvedere Dev. Corp. v. Dep’t of Transp.*, 476 So. 2d 649 (Fla. 1985).

220. *STBR*, 998 So. 2d at 1120.

221. *Id.*

222. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 129 S. Ct. 2792 (2009).

223. *STBR*, 998 So. 2d at 1117-18.

Like the common law doctrine of avulsion, the Act authorizes the State to reclaim its storm-damaged shoreline by adding sand to submerged sovereignty lands.²²⁴

The court noted as factual background that the beach at issue was damaged by Hurricane Opal in 1995 and subsequently by Hurricane Georges (1998), Tropical Storm Isidore (2002), and Hurricane Ivan (2004).²²⁵ The court further observed that as a matter of state common law, “hurricanes, such as Hurricane Opal in 1995, are generally considered avulsive events that cause avulsion.”²²⁶ The court made no specific finding, however, that the landward migration of the beach in the case was caused exclusively by avulsive events. To sustain the Act against a facial challenge, such a finding was irrelevant—the court had only to identify a single set of circumstances in which the statute would be valid.²²⁷ In fact, although hurricanes may exacerbate the landward migration of a beach, the avulsive event is rarely the only cause for erosion to reach “critical” stages.²²⁸ The court’s holding, consequently, bases the facial constitutionality of the BSPA on circumstances that may rarely, if ever, exist. The actual circumstances will usually involve difficult evidentiary issues in determining the degree of migration of the beach due to avulsion or erosion and determination of the substantive effect of multiple causes.²²⁹

224. *Id.* at 1117.

225. *Id.* at 1106 & n.4.

226. *Id.* at 1116 (citing *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970)); see also *Ford v. Turner*, 142 So. 2d 335, 339 (Fla. 2d DCA 1962), and *Siesta Props., Inc. v. Hart*, 122 So. 2d 218, 222-23 (Fla. 2d DCA 1960).

227. *STBR*, 998 So. 2d at 1109 (citing *Fla. Dep’t of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)).

228. Beaches that are impacted by storms and hurricanes, but are not subject to additional stresses due, for example, to depletion of sand supply by other actions, sometimes have the ability to recover to a certain extent naturally. This can only happen when the beaches are healthy in terms of their coastal processes. Telephone Interview with Paden Woodruff, Environmental Administrator, Beach Erosion Control Program, Bureau of Beaches and Coastal Systems, Department of Environmental Protection (Sept. 14, 2009). See generally Robert A. Morton et al., *Stages and Durations of Post-Storm Beach Recovery, Southeastern Texas Coast, U.S.A.*, 10 J. COASTAL RES. 884 (1994), and A.O. Gabriel & R.D. Kreutzwiser, *Conceptualizing Environmental Stress: A Stress-Response Model of Coastal Sandy Barriers*, 25 ENVTL MGMT. 53 (2000).

229. In a Texas case involving the beach restoration at Corpus Christi, the court held that in order for the littoral owners to claim that the boundary had not moved prior to the renourishment, they had to show that all the loss of the disputed land was due to avulsion. In *City of Corpus Christi v. Davis*, the court held:

It is undisputed that not all the shoreline loss was attributable to sudden and obvious causes, although it is true that hurricanes and northers have been responsible for a substantial part of the total loss of the shoreline. Nevertheless, the evidence is that forces other than hurricanes and northers, such as summertime night winds and quick water action, are at work slowly shifting away the sands of North Beach. Such forces are classically erosive, not avulsive. The Davises failed to overcome the presumption that the State held title to the disputed acreage by proving that the total loss of the shoreline resulted from avulsive action.

622 S.W.2d 640, 646 (Tex. App. 1981).

a. Applying STBR in the Case of Critical Erosion Due Entirely to Avulsion

Applying the BSPA as though critical erosion is due exclusively to avulsion would potentially provide a windfall for littoral owners. The court stated that “when restoring storm-ravaged shoreline, the boundary under the Act should remain the pre-avulsive event boundary.”²³⁰ The BSPA provides that setting of the ECL “shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.”²³¹ In the case of an avulsive event, the pre-avulsive boundary may be far seaward of the current MHWL. Reclamation of state-owned former tideland would require the restoration of a significant amount of privately-owned beach, and the ECL would likely be located nearer the current MHWL than the boundary line prior to the avulsive event. The *STBR* court noted that “if the ECL does not represent the pre-hurricane MHWL, the resulting boundary between sovereignty and private property might result in the State laying claim to a portion of land that, under the common law, would typically remain with the private owner.”²³² In such a situation, the court’s implication is that land between the pre-avulsive MHWL and the ECL might be acquired by eminent domain.²³³ The littoral owner could potentially receive the benefit of the protection provided by the newly-restored, publicly-funded beach and increased property value afforded by the proximity to a wide, healthy beach, as well as a payment for the submerged land “taken” between the ECL, and pre-avulsive MHWL.²³⁴ Beach restora-

230. *STBR*, 998 So. 2d at 1117.

231. FLA. STAT. § 161.161(5) (2009).

232. *STBR*, 998 So. 2d at 1117 n.15 (stating that “because *STBR* alleges what is essentially a facial challenge, it is unnecessary for this Court to address this as-applied issue.”).

233. *See id.* at 1117 n.15; *see also id.* at 1126 (Lewis, J., dissenting).

234. An alternative, proposed by Justice Lewis in his dissent in *STBR*, would be setting the ECL at the pre-avulsive MHWL. *Id.* at 1112. The littoral owners would then have title to the dry sand area of the restored beach. Great expense to the public would be incurred primarily for the benefit of the upland owners. Such a result would presumably be precluded by Article VII, section 10, of the Florida Constitution prohibiting the appropriation of public money for a private purpose where the public benefit is only incidental. FLA. CONST. art. VII, § 10. In a Florida Attorney General Opinion specifically addressing the issue of improvements to private beach areas in the context of beach maintenance, the Attorney General explained:

The expenditure of public funds is limited by the provisions of s. 10, Art. VII, State Const., prohibiting the state or counties or municipalities or any agency thereof from using, giving, or lending its taxing power or credit to aid any private interest or individual. It is only when there is some clearly identified and concrete public purpose as the primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished, that the state or its subdivisions may disburse, loan or pledge public funds or property to a nongovernmental entity. *O’Neill v. Burns*, 198 So. 2d 1 (Fla. 1967). The Florida Supreme Court in *Orange County Industrial Development Authority v. State*, 427 So. 2d 174 (Fla. 1983), reaffirmed its test that the

tion would remain subject to controversy, but the debate would shift its focus to the setting of the ECL and subsequently, the value of the littoral land to be taken by eminent domain.²³⁵

There are some hurdles for the littoral owner, however, in establishing that the pre-avulsive MHWL lies seaward of the ECL. In a challenge to the location of the boundary between the state and upland property owner, the party claiming avulsion normally has the burden of proof. In *Municipal Liquidators, Inc. v. Tench*,²³⁶ for example, the Florida District Court of Appeals stated that “the law seems clear as to these principles of law: in the event of erosion or submergence, the title to the land covered by water reverts to the State; erosion is presumed over avulsion; and the burden of proof is upon the party alleging avulsion.”²³⁷ Further, because of the complexity of coastal processes and the intervention of human activities and structures, the determination of the ECL and the MHWL may involve complex technical and scientific issues and a high degree of scientific uncertainty. In such situations, the court will give great deference to agency determinations.²³⁸

purpose served in the proposed expenditure must be paramountly a public one. If, however, the benefits to a private party are the paramount purpose of a project, then the expenditure is not constitutionally valid even if the public derives some benefit therefrom.

86-68 Fla. Op. Att’y Gen. 4 (1986). Although restoration of the public trust tidelands after an avulsive event may be an important public purpose, it is difficult to rationalize that the public purpose is paramount when up to two hundred feet of private beach may be created to accomplish the preservation of perhaps a few yards of public tidelands. Section 161.088, Florida Statutes, also requires that projects “must have a clearly identifiable beach management benefit consistent with the state’s beach management plan[.]” and “shall be funded in a manner that encourages all cost-saving strategies[.]” § 161.088. The defining of “beach restoration” in Section 161.021(4), Florida Statutes (2009), as “the placement of sand on an eroded beach for the purposes of restoring it as a recreational beach and providing storm protection for upland properties” also precludes a project that has results in overwhelming benefits only to upland owners. *Id.* § 161.021 (emphasis added).

235. In such a circumstance, the state will have to revisit the question of whether beach restoration continues to be economically justifiable.

236. *Mun. Liquidators, Inc. v. Tench*, 153 So. 2d 728 (Fla. 2d DCA 1963).

237. *Id.* at 731; see also *Kissinger v. Adams*, 466 So. 2d 1250, 1252 (Fla. 2d DCA 1985), and *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644 (Tex. App. 1981) (explaining “[b]ecause the acreage in question was covered by the sea at the time of the commencement of the reclamation project, it is presumed that title is in the State. This Court has concluded that the Davises failed to overcome that presumption by proving that the disputed acreage submerged as the result of avulsion.”). Moreover, 93 C.J.S. *Waters* § 187 states that:

One claiming that the change in a bed or stream was by avulsion rather than by accretion has the burden of showing the avulsion, by showing a sudden change, or by a preponderance of the evidence by showing that the changes were violent and subject to being perceived while they were going on.

93 C.J.S. *Waters* § 187 (citations omitted).

238. The circumstances are analogous to the technical and scientific complexity of setting the coastal construction control line (CCCL). In reviewing the establishment of a CCCL, a Florida District Court held that:

[t]he complexity of the scientific and technical issues in this case and the consequent deference necessarily given to DNR’s expertise vividly illustrate the limited role an appellate court can play in resolving disputes arising out of an administrative agency’s

Additional questions arise from the Florida Supreme Court's discussion of a right of littoral owners to reclaim land lost to avulsion within a "reasonable time."²³⁹ Most fundamentally, what constitutes a reasonable time for an upland owner to reclaim? If land that is subject to avulsion is not reclaimed within a reasonable time by the upland owner, littoral owners may argue that the public may not use the current foreshore because public rights only attach to the pre-avulsive foreshore.²⁴⁰ Further, if the public makes use of the navigable waters over the land lost to avulsion, unreasonable delay in reclaiming the land could lead to conflict between public and private interests.²⁴¹ Finally, reclamation beyond the time when the shoreline ecosystems have established a new equilibrium would disrupt the environment of the shoreline area. While a reasonable time may vary somewhat with particular circumstances, leaving the determination to ad hoc analyses leaves this area of property law unreasonably unclear and should be addressed by the legislature.²⁴²

The court relied on scant authority in recognizing the right to reclaim, but Farnham, the court's primary authority, seems to go further than simply limit the time to reclaim and to preclude continued private ownership of submerged land if it is not reclaimed within a reasonable time. He states that "the sudden submergence of a parcel of land on the foreshore does not destroy the title of the private owner *if* within a reasonable time it can be reclaimed and the former boundaries established."²⁴³ There are strong policy justifications for recognizing this as a limitation not only on the right to reclaim the submerged land, but also on the right to reclaim the title to the submerged land. First, there is a presumption that the submerged lands belong to the state.²⁴⁴ The failure of the upland owner to prove avulsive loss and

exercise of delegated discretion in respect to technical matters requiring substantial expertise and 'making predictions . . . at the frontiers of science.'

Island Harbor Beach Club, Ltd. v. Dep't of Natural Res., 495 So. 2d 209, 223 (Fla. 1st DCA 1986), *review denied* 503 So. 2d 327 (Fla. 1987).

239. See *STBR*, 998 So. 2d at 1117.

240. The fact that the party claiming avulsion has the burden of proof to establish that the change in the water's reach was avulsive and did not change the boundary means that the current MHWL is the presumptive property boundary between upland and state lands. The public would consequently have a presumptive right to use the foreshore. See *infra* text accompanying notes 243-45.

241. See, e.g., *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976). Texas recognizes that subsidence of land "does not necessarily destroy the title of the owner" and recognizes the right in some instances for the owner to reclaim the land, "[s]o long as the general public or a public body has not come to use the site for navigation, thereby raising a conflict between private and public interests[.]" *Id.* at 954.

242. See, e.g., CAL. CIV. CODE §§ 1014, 1015 (2009) (requiring reclamation within one year).

243. FARNHAM, *supra* note 60, at § 848 (emphasis added). Farnham also states: "If a portion of the land of the riparian [or littoral] owner is suddenly engulfed, and the former boundary can be determined or [if] the land reclaimed within a reasonable time, he does not lose his title to it." *Id.* § 74 (emphasis added).

244. See *Mun. Liquidators, Inc. v. Tench*, 153 So. 2d 728, 731 (Fla. 2d DCA 1963) (stating that "the law seems clear as to these principles of law: in the event of erosion or submergence,

the boundary prior to the avulsion within a reasonable time unduly leaves ownership in limbo leading to controversy over public use of the foreshore.²⁴⁵ In addition, the submerged land provides no continuing benefit to the owner who does not reclaim, because the navigable waters above the land continue to be subject to public use.²⁴⁶ Because submerged land is presumed to belong to the state, the concept of a *reasonable time* should serve the purpose of a statute of limitations on the right to reassert title based on proof that the change of the MHWL was avulsive, establishment of the pre-avulsive MHWL, and restoration of the submerged beach by the littoral owner.²⁴⁷

Further issues arise if the State or another governmental entity decides to reclaim a critically eroded beach that has been lost solely due to an avulsive event before the upland owner has a reasonable time to reclaim her land. If the ECL is set at or near the post-event MHWL, the pre-avulsion property boundary may be seaward of the ECL, and the *STBR* case suggests that the governmental authority must institute eminent domain proceedings and compensate for land taken seaward of the ECL.²⁴⁸ If the right to ownership of the lost land is based on the reclamation within a reasonable time, however, must

the title to the land covered by water reverts to the State; erosion is presumed over avulsion; and the burden of proof is upon the party alleging avulsion.”), *Kissinger v. Adams*, 466 So. 2d 1250, 1251-52 (Fla. 2d DCA 1985) (appellants did not refute the presumption of erosion created by competent testimony and corroborated by a survey, and did not present conclusive evidence that the location of the mean high water mark was caused by avulsion), and *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644 (Tex. Ct. App. 1981) (explaining that “[b]ecause the acreage in question was covered by the sea at the time of the commencement of the reclamation project, it is presumed that title is in the State.”).

245. *C.f.* FLA. ADMIN. CODE r.18-21.019(4)(a) (1998) (stipulating that an application for a disclaimer from the Board of Trustees for up to an acre of land submerged by an avulsive event requires proof of avulsion and must be applied for within five years). This rule creates a time certain, but one that is perhaps unduly long. It should be noted also that this rule has rarely been applied to tidally influenced lands.

246. *See Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931), *cert. denied*, 284 U.S. 649 (1931) (holding that glass-bottomed boats could operate in Silver Springs even if the land beneath the water is privately owned). The court stated:

The public right of navigation entitles the public generally to the reasonable use of navigable waters for all legitimate purposes of travel or transportation, for boating or sailing for pleasure, . . . and in any kind of water craft the use of which is consistent with others also enjoying the right possessed in common. As to that right a riparian owner, though he also has a qualified or bare technical title to the soil covered by the navigable water opposite his upland, is entitled to no preference or priority, his right in that regard being only concurrent with that of other members of the public, and to be exercised in a way not inconsistent with the enjoyment of the same right by others. He cannot, any more than can one who has no title to riparian or submerged land, acquire an exclusive right to use navigable water opposite his upland for travel or navigation for purposes of business or of pleasure or v diversion.

Id. at 359 (citations omitted).

247. Note that this analysis is not based on the failure to reclaim within a *reasonable time* as an argument for abandonment of submerged land by the upland owner, but on the presumption that submerged land belongs to the state and that other claims to such land should be asserted within a reasonable time. *Cf.* *City of New York v. Realty Assocs.*, 176 N.E. 171 (N.Y. 1931).

248. *See supra* notes 230-33 and accompanying text.

an upland owner show both the intent and means to reclaim before he is entitled to compensation under the BSPA? If one assumes that even an owner with no intent or means to reclaim the beach must be compensated in the scenario described, then there is potential for anomalous results depending on whether the government brings an eminent domain action or if the land owner sues for inverse condemnation. In an eminent domain action, the upland owner is entitled to the market value of the land,²⁴⁹ which, although submerged, could still have significant value because of the right to reclaim it.

If the government does not bring an eminent domain action, however, and the littoral owner must bring an inverse condemnation action to press the claim of an uncompensated taking, a different provision of the BSPA applies. In 2007, in response to the district court's decision in *Save Our Beaches*,²⁵⁰ the Florida legislature amended the BSPA to provide that:

[i]n any action alleging a taking of all or part of a property or property right as a result of a beach restoration project, in determining whether such taking has occurred or the value of any damage alleged with respect to the owner's remaining upland property adjoining the beach restoration project, the enhancement, if any, in value of the owner's remaining adjoining property of the upland property owner by reason of the beach restoration project shall be considered. If a taking is judicially determined to have occurred as a result of a beach restoration project, the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the damage, if any, resulting to such remaining adjoining property of the upland property owner by reason of the beach restoration project, but such enhancement in the value shall not be offset against the value of the property or property right alleged to have been taken. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.²⁵¹

The intent of the legislature is clear. In determining whether compensation is due (*i.e.*, has there been a taking?) or determining the compensation if a taking is found, the enhanced value of the upland owner's property due to the restoration project must be taken into

249. *See, e.g.*, *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (noting that the Court has used the concept of fair market value to determine a condemnee's loss).

250. *Save Our Beaches*, 31 Fla. L. Weekly D1173 (1st DCA 2006).

251. FLA. STAT. § 161.141 (2009).

account. This means unless a physical taking is established, an extremely substantial impairment of rights and property value would need to be shown to offset the enhanced property value to make a case for a taking. Further, even if a taking is found to have occurred, damages will be nominal at best. The Legislature could not have intended the result to turn on whether the recovery by the landowner was in eminent domain or inverse condemnation. When public funds are spent for the public purposes that are served by beach restoration, adjacent upland property owners are the recipients of substantial "giving"²⁵² to their property's value as well as any potential "taking," and any compensation to upland littoral owners should reflect that reality.

b. Applying STBR in the Case of Critical Erosion Due Entirely to Erosion or to Combined Forces of Erosion and Avulsion

The narrowness of the Florida Supreme Court holding leaves the BSPA open to continued "as applied" challenges. The application of the Act that the Florida Supreme Court finds constitutional is simply the restoring of the beach to the pre-avulsion *status quo* based on a common law right to reclaim land after an avulsive event. This rationale does not apply for restoration projects where the damage to the beach is the result of erosion or, arguably, where the beach is damaged by combined forces of erosion and avulsion,²⁵³ rather than by damage that is caused solely by avulsion. If damage is due solely to erosion, there will be no dispute that the current MHWL and the

252. See generally Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295 (2003).

253. When the damage to the shoreline is caused by both avulsion and erosion, the relative amount of loss attributable to each source may be impossible to determine. In addition, the causes of erosion may be responsible for not allowing natural processes to restore a beach after a hurricane. Under such circumstances, it may be impossible for the upland owner to establish with any certainty that the current MHWL does not represent the boundary. See FLA. ADMIN. CODE r. 18-21.019(5) (1998) (presuming ownership by the state in the case of land submerged by a combination of avulsion and artificial erosion). A quitclaim deed from the Trustees to reclaim such submerged land may only be issued in limited circumstances, i.e.:

1. The area adjacent to the eroded lands is already substantially bulkheaded or armored;
2. The toe of the reclaimed land or associated armoring extends no further waterward than adjacent properties;
3. The reclamation will not, on the average, relocate the line of mean or ordinary high water more than 30 feet waterward of the current line;
4. The land to be reclaimed does not exceed one-half acre in size;
5. The land to be reclaimed is not located within an aquatic preserve; and
6. The sale is in the public interest.

Id. r. 18-21.019(5)(a). Further, the littoral owner must pay for the land, and any quitclaim deed issued must "contain a reverter which requires the deeded property to be reclaimed within one year of the date of issuance of the quitclaim deed" and "reserve lateral public access across the land to be deeded when the area has historically been used by the public for access." *Id.* r. 18-21.019(5)(d)-(e).

property boundary will coincide, as will—generally—the ECL. The restoration project is not reclaiming land lost to avulsion, but adding sand to submerged, state lands seaward of the common law and statutory property boundary, creating new land seaward of the ECL. To be constitutional as applied to this circumstance, must the state be doing no more than what is allowed under the common law? What background principles are applicable? What is the legal character of adding sand to the beach under these circumstances?

The turbulent and very perceptible process of pumping tons of sand onto a beach for twenty-four hours a day described earlier in this article²⁵⁴ cannot by any stretch of legal terminology or the imagination be considered gradual and imperceptible²⁵⁵ allowing the process to be categorized as accretion and granting ownership to the littoral owner under common law principles.²⁵⁶ This does not necessarily mean, though, that the process is avulsion. Avulsion is often defined as “sudden or perceptible loss of or addition to land *by the action of the water*”²⁵⁷ suggesting that the avulsion doctrine applies only to natural avulsive events.²⁵⁸ Numerous courts that have addressed this issue, including the U.S. Supreme Court,²⁵⁹ have found that direct filling of submerged land is an avulsive event.²⁶⁰ In *Bryant v. Peppe*,²⁶¹ the

254. See *supra* notes 130-31 and accompanying text.

255. In *Sand Key Associates, Ltd.*, the Florida Supreme Court stated that “[g]radual and imperceptible” means that, although witnesses may periodically perceive changes in the waterfront, they could not observe them occurring.” 512 So. 2d 934, 936 (Fla. 1987). The court further favorably cited the United States Supreme Court in, defining the phrase:

[For the change to be perceptible, it] is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. “The test as to what is gradual and imperceptible . . . is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.

Id. at 936 (quoting *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912)).

256. The Florida Supreme Court has held that if *accretion* is not caused by littoral owner, it is irrelevant whether the accretion is natural or caused by human action, usually referred to as artificial accretion. *Id.* at 937. Florida courts have also recognized, however, that if an owner fills adjacent submerged land or causes the accretion, the created land does not belong to the riparian owner and the boundary does not change. See *Medeira Beach Nominee*, 272 So. 2d 209, 212 (Fla. 2d DCA 1973). The rationale is not that the filling of adjacent submerged land is avulsive, but “that since land below the ordinary high water mark is sovereignty land of the state, to permit the riparian owner to cause accretion himself would be tantamount to allowing him to take state land.” *Id.*

257. *Sand Key Assocs.*, 512 So. 2d at 936 (emphasis added); see also *Siesta Props., Inc. v. Hart*, 122 So. 2d 218, 224 (Fla. 2d DCA 1960) (stating “avulsion [is] defined as the sudden or violent *action of the elements*, the effect and extent of which is perceptible while it is in progress.”) (emphasis added).

258. The notion is that a littoral owner accepts the risk of natural avulsive changes to property, but not to intervention by the state that denies littoral rights.

259. *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (recognizing the filling of submerged land around Ellis Island as an “avulsive” change under the common law).

260. See *City of Waukegan, Ill. v. Nat'l Gypsum Co.*, 587 F. Supp. 2d 997, 1005 (N.D. Ill. 2008) (explaining that “[t]he same rules apply both to natural avulsions (e.g., a sudden storm or flood) and artificial avulsions (e.g., excavation along waterfront property). *E.g.*, *J.P. Furlong Enters., Inc. v. Sun Exploration & Prod. Co.*, 423 N.W.2d 130, 134 (N.D.1988); *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 520 (Miss.1986).”)

261. *Bryant v. Peppe*, 238 So. 2d 836 (Fla. 1970).

Florida Supreme Court left room for broader interpretation in stating that avulsion is “a sudden change in the land formation resulting *usually* from the elements[,]”²⁶² and its analysis focused not on whether the additions to the shoreline are created naturally or artificially, but whether the change in the shoreline was gradual and imperceptible or sudden and perceptible.²⁶³ The court held that “[t]he particular parcel here in question was originally sovereignty land; and it did not lose that character merely because, by avulsion, it became dry land.”²⁶⁴ In support of its conclusion, the court relied upon a case that involved “artificial avulsion” through a state drainage project.²⁶⁵ The court did not find the distinction between natural and artificial avulsion relevant to the issue of the ownership of previously submerged state lands.²⁶⁶

If beach restoration is avulsion, the BSPA does no more than reflect common law principles that strip an upland owner of littoral status when an avulsive event adds land seaward of the former MHWL.²⁶⁷ Indeed, the statute seems to be written based on that assumption and reflects common law principles. Finding that beach restoration by pumping tons of sand onto the beach is avulsion is a straightforward way of applying common law principles to carry out the intent of legislature to continue state ownership of the land created seaward of ECL.²⁶⁸ This result, which deprives the upland owner of littoral status and rights, may seem harsh, but it is the same result that would be achieved through application of the state’s background common law principles concerning avulsion.²⁶⁹ As a policy

262. *Id.* at 837 (emphasis added).

263. *Id.* at 838-39.

264. *Id.* at 838 (citation omitted).

265. The *Bryant* Court favorably cited *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), which involved the artificial lowering of a lake by a State drainage project, finding it “somewhat similar” to the avulsive change in *Bryant*. *Id.* at 838. The court stated that “[t]here, the avulsion resulting in the water bottom becoming dry was artificially rather than naturally created, resulting from a drainage project undertaken by the state.” *Id.* at 838-39. The *Bryant* court remarked that in *Martin*, “[t]he court noted that, when the water receded suddenly, the ‘title to such lands, which remained in the state just as it was when covered by the lake’ [and that the] ‘riparian rights doctrine of accretion and reliction does not apply to such lands.’” *Id.* at 839 (quoting *Martin*, 93 Fla. at 578, 112 So. at 288 (Brown, J., concurring)).

266. See *Bryant*, 238 So. 2d at 838-39.

267. In *Bryant*, the Florida Supreme Court found that “it must be held that plaintiff-respondents were charged with notice that the sudden avulsion of the parcel in controversy gave them no more title to it than they had to the water bottom before its emergence as dry land.” *Id.* at 839.

268. Statutes that apply background principles of property law will not be considered a taking of private property. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (explaining that even in the case of a regulation that prohibits all beneficial use or removes all economic value of property, no unconstitutional, compensable taking of property has occurred if the regulation reflects limitations that “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”).

269. See *Bryant*, 238 So. 2d at 836; *Martin*, 93 Fla. at 540, 112 So. at 276; *Mun. Liquidators, Inc. v. Tench*, 153 So. 2d 728 (Fla. 2d DCA 1963); and *Siesta Props., Inc. v. Hart*, 122 So. 2d 218 (Fla. 2d DCA 1960). Littoral or riparian owners are charged with the knowledge that avulsive changes can fix their boundaries, even to the extent that their land is no longer bounded by the

matter, however, adopting this analysis may be unnecessarily broad. Although the BSPA does not have such draconian consequences, justifying the consequences of the Act by categorizing the restoration as an avulsive change leaves upland property owners vulnerable to the government's exclusive discretion in using adjacent sovereignty land²⁷⁰ and contributes strong fuel for property rights advocates.

An alternative analysis could recognize that restoring beaches to deal with modern day problems caused by erosion and sea level rise simply does not neatly fit into common law categories of accretion or avulsion—it is *sui generis*. New legal principles are necessary to address the public interests and effect on private property rights. The legislature and the courts have the ability to fill in gaps in the common law that fail to address these modern day problems and issues adequately. The Florida Supreme Court's analysis in *STBR* recognizes that the Act applies only in the limited situation of restoration or renourishment of critically eroding beaches²⁷¹ and fully explains how the Act balances property rights and public interests and distributes the benefits and burdens of the state's projects.²⁷² Significantly, the BSPA goes beyond what would be allowed by applying principles of common law avulsion by restoring the former littoral owners' access-related rights and assuring that no structures will be built on the beach between the upland owner and the water.²⁷³ The Act further protects the upland owner from uses of the beach inconsistent with littoral rights by providing that the state not permit uses that "may be injurious to the person, business, or property of the upland owner or lessee[]" and that local governments and "special districts are authorized and directed to enforce this provision through the exercise of their respective police powers."²⁷⁴ There is no substantial impairment of rights because "upland owners may continue to access, use, and

MHWL, and result in the extinguishment of riparian rights.

270. The Florida Supreme Court's reasoning in *Thiesen v. Gulf, Florida & Alabama Railway Co.*, should also be taken into account. 75 Fla. 28, 78 So. 491 (1918). There the railroad company filled in lands adjacent to the riparian's upland and built and operated docks, piers, and terminals, abrogating all of the upland owner's littoral rights. *Id.* at 492. The submerged lands had been transferred by the Florida legislature to the City of Pensacola and, subsequently, to the railway authority. *Id.* at 491, 492-93. The question was whether the upland owner could maintain an action against the railroad for deprivation of riparian rights. *Id.* at 491. The court held that the private company, acting for private gain, could not claim immunity for damages to riparian rights because of incidental benefits to commerce and navigation. *Id.* at 507. The court intimated that a state-sponsored project to improve navigation may not be required to compensate the landowner, presumably because of the navigation servitude or the public trust doctrine. *Id.* at 491-94. Arguments could be made that government-sponsored beach restoration does benefit commerce and the public trust uses of the shoreline, but does not substantially impair any riparian rights as in *Thiesen*. *Id.* at 501-507.

271. *STBR*, 998 So. 2d 1102, 1107-08 (2008).

272. *Id.* at 1115.

273. FLA. STAT. § 161.201 (2009).

274. *Id.*

view the beach and water as they did prior to beach restoration.”²⁷⁵ The preservation of these common law littoral rights under the BSPA provides a result far more fair than simply applying the common law of avulsion and concluding that the now land-locked upland owners have no littoral rights. The loss of the right to accretions is not a compelling reason for arguing that lands created seaward of the ECL should not continue to be owned by the state. In balancing the public and private interests, the equity of continued ownership of state-owned lands created by a state-funded project which not only preserves vital riparian rights related to access, but also provides protection of upland and enhances land values seems unquestionable.²⁷⁶ Borrowing Justice Ehrlich’s words in *Sand Key Associates, Ltd.*:

[w]hen the state attempts to provide a public benefit, title to the sovereignty lands exposed in the process continue to belong to the state. Any other holding would lead to the absurd result that a state sponsored and approved project, undertaken to create a public benefit, would divest the state of its sovereignty lands and grant a private landowner a windfall at the expense of the public.²⁷⁷

Florida Supreme Court precedent also supports the constitutionality of the BSPA in the case of restoring eroded beaches. In *Bryant v. Peppe*, the court upheld state title of previously submerged sovereignty lands that emerged due to a natural avulsive event, a hurricane.²⁷⁸ The court supported its finding by comparing the case to the “somewhat similar”²⁷⁹ case of *Martin v. Busch*,²⁸⁰ where the state caused the emergence of submerged sovereignty lands through artificial avulsion—the lowering of the water level of a lake.²⁸¹ *Martin* is even more on point for analysis of the BSPA, which, like *Martin*, involves both

275. *STBR*, 998 So. 2d at 1115.

276. Even if upland owners add beach sand seaward of the MHWL at their own expense to enhance an eroded beach, the created beach continues to belong to the state. This long-accepted common law principle denies upland owners the right to appropriate state lands to their own use by filling. In *Sand Key Associates, Ltd.*, the Florida Supreme Court noted:

that the common law has never allowed a waterfront owner to receive title to artificially created accretions when he caused those additions to his land by improvements. In this circumstance, title to the accreted land remains with the sovereign. The district court in *Medeira Beach* explains: “[S]ince land below the ordinary high water mark is sovereignty land of the state, to permit the riparian owner to cause accretion himself would be tantamount to allowing him to take state land.” 272 So. 2d at 212.

512 So. 2d 934, 938 (Fla. 1987).

277. *Id.* at 946 (Ehrlich, J., dissenting).

278. *Bryant v. Peppe*, 238 So. 2d 836 (Fla. 1970).

279. *Id.* at 838.

280. *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927).

281. *Bryant*, 238 So. 2d at 838-39.

artificial avulsion²⁸² and a state project to protect upland owners from property damage. *Martin* held that “[i]f to serve a public purpose, the state, . . . lowers the level of navigable waters so as to make the water recede and uncover lands below the original high-water mark, the lands so uncovered below such high-water mark, continue to belong to the state.”²⁸³ Although beach restoration projects cause the water to recede by raising the land, these projects along a critically eroded shoreline are clearly analogous to the circumstances in *Martin*. The court has held that the principle does not apply where a public project to reclaim eroded beaches causes “artificial accretion” to occur to off-site littoral lands.²⁸⁴ But in the case of most current beach restoration projects, sand is pumped directly on the site, and the government action meets the criteria suggested by the district court of appeal in *Medeira Beach* that the emergence of submerged state lands must both be the intent of the project and the cause of the created beach to be analogous to *Martin*.²⁸⁵

In the circumstances of restoring a beach that is critically eroded due to erosion, application of the BSPA would be constitutional under general state common law principles as well as Florida Supreme Court precedent. Further, beach restoration under these circumstances may legitimately be considered *sui generis*, and the BSPA provides an appropriate balancing of the public interest and private property rights.

2. The Future of Beach Restoration and *STBR* in the U.S. Supreme Court

The U.S. Supreme Court has granted certiorari in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*²⁸⁶ to address three questions. As presented, the first question accepted by the Court asks whether “[t]he Florida Supreme Court invoked ‘nonexistent rules of state substantive law’ to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court’s decision cause a ‘judicial taking’

282. In his dissent in *Sand Key Associates, Ltd.*, Justice Ehrlich did not agree that the artificial lowering of the lake level in *Martin* could be categorized as avulsion, but this conclusion led him to read the case more broadly than the majority, rather than restricting its application. 512 So. 2d at 946 n.6 (Ehrlich, J., dissenting).

283. *Martin*, 93 Fla. at 574, 112 So. at 287.

284. *Sand Key Assocs.*, 512 So. 2d at 941.

285. See *Medeira Beach Nominee*, 272 So. 2d 209, 212 (1973) (finding that accretion caused by a remote government project was not controlled by *Martin*, and asserting that “[i]n order for the instant case to be analogous, the groin project of the City of Madeira Beach would have had to be intended to produce the accretion which occurred and the groin system would have to be in fact the cause of the accretion.”).

286. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 129 S. Ct. 2792 (2009).

proscribed by the Fifth and Fourteenth Amendments to the U.S. Constitution?"²⁸⁷ The answer to this first question is likely to have the most effect on beach restoration, boundaries, and public access, and will be the focus of this discussion.²⁸⁸

a. The Concept of Judicial Taking

It is clearly resolved that the legislative and executive branches fall within the scope of the Fifth and Fourteenth Amendments of the Constitution requiring due process and just compensation for the "taking" of property. Less clear is whether courts are subject to the Constitution's taking provisions and whether decisions of state courts are subject to review by federal courts to determine whether their decisions are within these constitutional bounds.²⁸⁹ In particular, can a court ruling "go too far" in reinterpreting state property law so that compensation is due?²⁹⁰

In the 1897 case, *Chicago, Burlington & Quincy Railroad v. City of Chicago*, the Supreme Court held that Fourteenth Amendment due process provisions make the takings and compensation protections of the Constitution applicable to the states²⁹¹ and announced that state court judgments could "take" property.²⁹² By the 1930s, however, the "concept of judicial takings seemed dead."²⁹³

287. Brief of Petitioner at i, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, No. 08-1151, 2009 WL 2509219 (U.S. 2009) [hereinafter Petitioner's Brief].

288. The latter two questions in the case will not be addressed in the scope of this section's discussion. Question two asks whether "the Florida Supreme Court's approval of a scheme that eliminates constitutional littoral rights and replaces them with statutory rights [is] a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?" *Id.* This issue seems to be a *red herring* and it is unlikely that a viable issue is presented. Littoral rights are not created by the Constitution. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). They exist as background principles of state property law. *Id.* Legislatures can always codify common law property rights or even create new statutory property rights. The fact that property rights exist as a matter of statutory law, rather than common law, makes them no less subject to the protections of the Constitution.

Question three asks whether "the Florida Supreme Court's approval of a scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without . . . a judicial hearing, or the payment of just compensation [is] a violation of the Due Process [and Takings] Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?" Petitioner's Brief, *supra* note 287, at i. If the BSPA provisions do not meet due process requirements, the Act can simply be amended to meet necessary requirements. Additional requirements may, however, substantially affect the timeline and cost when beach restoration is several miles long and involves potentially hundreds of owners.

289. See generally Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990). Thompson's article is considered the seminal article on this subject.

290. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (announcing the principle that a non-confiscatory government regulation of property "goes too far" in diminishing the value of property and can constitute a taking requiring just compensation under the Fifth Amendment). Justice Holmes' conclusion was that a regulation could amount to the equivalent of an act of eminent domain. *Id.*

291. *Chi., Burlington, & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 235-37 (1897).

292. *Id.* at 241.

293. Thompson, *supra* note 289, at 1467.

The modern reincarnation of the doctrine appeared in the concurring opinion of Justice Stewart in *Hughes v. Washington* in 1967.²⁹⁴ The case involved the Washington Supreme Court's finding that the state's 1889 constitution fixed the littoral boundary at the MHWL at the time of its adoption, cutting off the littoral rights of Mrs. Hughes, oceanfront property owner.²⁹⁵ The majority held that federal law must be applied to interpret Mrs. Hughes' title, which was derived from a federal grant.²⁹⁶ Federal law recognized her right to the substantial beach that had accreted to her littoral property.²⁹⁷ Justice Stewart argued that the case should be decided under state law,²⁹⁸ and that:

[t]o the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, [it should be accepted] as conclusive. But to the extent that it constitutes *a sudden change in state law, unpredictable in terms of the relevant precedents*, no such deference would be appropriate."²⁹⁹

He went on to conclude that the "Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature" ³⁰⁰

More recently, Justice Scalia has expressed his openness to consideration of the judicial takings concept in the context of state courts' use of background principles of law to insulate regulations from takings claims. Justice Scalia authored the majority opinion in *Lucas v. South Carolina Coastal Council*, which held that a regulation that takes all value of land is a categorical taking unless the prohibited use of the property did not inhere in the owner's title based on background principles of state property law.³⁰¹ In his scathing dissent to the denial of certiorari in *Stevens v. City of Cannon Beach*, Justice Scalia clearly accepted the proposition that a cause of action for taking could arise from the Oregon court's invoking a "new-found 'doc-

294. *Hughes v. Washington*, 389 U.S. 290, 298 (1967).

295. *Id.* at 291.

296. *Id.* at 292.

297. *Id.* at 292-94.

298. *Id.* at 296-97 (Stewart, J., concurring).

299. *Id.* at 296 (Stewart, J., concurring) (emphasis added).

300. *Id.* at 298 (Stewart, J., concurring).

301. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); see also W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1494 n.31 (2004). Sarratt explains as follows:

For the *Lucas* loophole to be implicated, the state court must at least purport to be applying an old, background principle of property law. For the judicial takings problem to arise, the rule, whether claimed to be new or old, must simply originate from the state courts and somehow upset settled expectations in property rights.

Id.

trine of custom” to prohibit an owner’s construction project that would interfere with the public’s use of the beach.³⁰² He stated that

. . . a State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate ‘background law’— regardless of whether it is really such— could eliminate property rights.³⁰³

As explained in the next section, *STBR* may not be the most appropriate case, however, for further development of this principle.

The argument for recognizing a court’s decision reinterpreting property to the extent that it constitutes a taking is straightforward: “[J]udicial changes in property law raise the same concerns as legislative and executive takings[.]”³⁰⁴ so courts should be subject to the same constitutional restrictions as the other branches of government. But although Barton Thompson’s seminal article on judicial takings proposed that courts should not be exempt from constitutional takings requirements,³⁰⁵ most commentators³⁰⁶ and courts³⁰⁷ reject the argu-

302. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332, 1335 (1994) (Scalia, J., dissenting from denial of certiorari).

303. *Id.* (stating “a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”) (quoting *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)).

304. Thompson, *supra* note 289, at 1544.

305. *See id.*

306. Sarratt’s review of the literature cites, *e.g.*, Williamson B.C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts “Take” Property?*, 2 U. HAW. L. REV. 57, 90-91 (1979), Bradford H. Lamb, *Robinson v. Ariyoshi: A Federal Intrusion Upon State Water Law*, 17 ENVTL. L. 325, 353 (1987), and Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 381 (2001). Sarratt, *supra* note 301, at 1495 n.33. He also points out Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 517 n.10 (1986) and Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 51-52 (1964), as assuming that the takings doctrine does not apply to the judiciary. *Id.* In addition to Thompson and Sarratt, other commentators arguing the existence of a judicial takings doctrine include David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1378-79 (1996), and John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from “Startling” State Court Overrulings*, 11 HARV. J.L. & PUB. POL’Y 297, 299 (1988).

307. *See* Sarratt, *supra* note 301, at 1510 (noting that Justice Stewart’s concurrence “has never been followed by a majority of the Court, and the Court has since declined offers to take up the issue again”), and J. Nicholas Bunch, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747, 1754 (2005) (remarking “[a]lthough the argument [in favor of judicial takings] has been raised in the courts, it has been rejected time and time again.”) (citations omitted). In a recent Federal Claims Court case, the court stated:

[r]esearch reveals only one case holding that a judicial decision that overturned prior case law could be considered a taking, *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985). That case, however, was subsequently vacated by the Supreme Court on other grounds, 477 U.S. 902, 902, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986), and eventually dismissed as unripe, 887 F.2d 215, 219 (9th Cir. 1989).

ments for recognition of a judicial takings concept. The arguments for rejecting the concept are more nuanced, but a fundamental issue is simply that the courts do have eminent domain power and the logic for extending the compensation requirement to regulatory taking does not exist.³⁰⁸ A complete discussion is beyond the scope of this article, but a recent Federal Claims Court case summarized the concerns of federal courts about recognizing the concept of a judicial taking, as follows:

As Justice Brandeis said famously in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), ‘the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a [takings] claim under the Fourteenth Amendment’ This rule has been applied to both state and federal judgments and orders. At least at one level of abstraction, these decisions proceed from the theory that courts do not create or change the law, but merely interpret and administer the Constitution, the law as declared by the legislature, and the common law. As such, ‘the constitutional obligation not to ‘take’ property does not fall equally on all branches.’ Roderick E. Watson, ‘The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings,’ 2001 Utah L.Rev. 379, 438 (2001). Indeed, were the court to accept plaintiff’s syllogism, it would constantly be called upon by disappointed litigants to act as a super appellate tribunal reviewing the decisions of other courts to determine whether they represented substantial departures from prior decisional law. *See Reynolds [v. Georgia]*, 640 F.2d at 703 (rejecting claim that a decision of the Georgia Supreme Court effectuated a taking, noting that federal courts are not ‘designed to serve as additional appellate reviewers of state court judgments’) . . . Such an approach, fortunately, is untenable.³⁰⁹

b. Is There a “Taking”?

In order to apply the concept of a judicial taking, there must first be a taking of property that falls within the prohibitions of the Fifth

Brace v. United States, 72 Fed. Cl. 337, 359 n.35 (2006), *aff’d per curiam*, 250 F. App’x. 359 (2007), *cert. denied*, 128 S. Ct. 1658 (2008).

308. *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY TAKINGS 229-30 (Foundation Press 2002).

309. *Brace*, 72 Fed. Cl. at 359 (citations omitted).

and Fourteenth Amendments. But “[s]urely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer.”³¹⁰ If the Supreme Court is to take the extreme step of declaring that a state supreme court’s interpretation of state property law is a constitutional taking, such an action would seem to be appropriate only in cases where the state court has made extremely startling pronouncements that both egregiously deviate from expectations of property rights created by previous law *and* that substantially affect the value of the property or authorize state action that would fall into a category recognized as a *per se* taking.³¹¹ In *Hughes v. Washington*, Justice Stewart’s concurrence argued that a physical appropriation of a large expanse of beach that had accreted over almost a century would have been a taking.³¹² In *City of Cannon Beach*, Justice Scalia argued that the Oregon Supreme Court’s decision “open[ed] private property to public use [which] constitutes a taking[.]”³¹³ The *STBR* case does not involve the acquisition or physical occupation by the state of any land³¹⁴ nor does it open up private property to the public.

If the Florida Supreme Court’s determinations—that the right to accretion is not relevant in the context of beach restoration and that

310. *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring).

311. In *Lingle v. Chevron U.S.A., Inc.*, Justice O’Connor explained the scope of categorical or *per se* takings as follows:

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. A second categorical rule applies to regulations that completely deprive an owner of ‘all economically beneficial us[e]’ of her property.

544 U.S. 528, 538 (2005) (citations omitted). Justice Rehnquist and Justice Scalia have also included the right to exclude (perhaps a subcategory of a “permanent physical invasion” or including an affirmative public easement as a permanent physical invasion) in the scope of *per se* takings. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-80 (1979), and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831-32 (1987).

312. *Hughes v. Washington*, 389 U.S. at 294-98.

313. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1207 (1994) (citations omitted).

314. Although, the petitioners argue the “changing of the property boundary from the MHWL to the ECL is a physical taking [and that] recording of the ECL change[s] the legal descriptions in *STBR*’s members’ deeds and physically divests them of all littoral rights.” Petitioner’s Brief, *supra* note 287, at 18. Because the appeal is of an “on its face” challenge to the *BSPA*, the Florida Supreme Court’s analysis was based on the circumstance of the ECL being set at the pre-avulsive MHWL and not changing the boundary in a manner that would divest the upland owner of any land. There is no record to support an “as applied” claim that the ECL is landward of the petitioners’ boundaries and that the state is physically occupying private land. Florida Supreme Court precedent clearly provides that littoral rights “give no title to the land under navigable waters” that could be implicated. *Brickell v. Trammell*, 77 Fla. 544, 561, 82 So. 221, 227 (1919). The idea of *physical* divestment of intangible rights simply has no precedent; a taking by permanent physical occupation requires that the government “directly invade[] and occupy[] the owner’s property.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). For reasons of history and tradition, the Court has found this sort of actual, physical and permanent intrusion on private land a “special kind of injury” to owner, warranting protection under a categorical rule. *Id.*

the right to touch the water is merely a corollary of the right of access, which is preserved by the BSPA—do not involve the kind of changes in the law that fall into any category of *per se* taking, what kind of takings analysis should the Supreme Court apply to the question of whether there has been a judicial taking?³¹⁵ Should the analysis be based on the degree of interference with expectations or the amount of the property's diminution of value? Or should the U.S. Supreme Court simply continue to defer to state supreme courts when their judgments are even arguably within the legitimate scope of application and interpretation of state property law principles entrusted to those courts? If the Supreme Court wishes to carve out an exception in the case of dramatic changes in property law that amount to *per se* takings, this hardly seems to be the appropriate case.

STBR was the Florida Supreme Court's first opportunity to analyze riparian rights in the context of beach restoration under the BSPA. It was entirely appropriate for the court in this matter of first impression³¹⁶ to do what courts do in applying and interpreting the law to determine whether the common law right of accretion, the only right not specifically preserved by the Act, had any relevance in the context of the BSPA. The court applied a reasoned analysis of why the concerns that lead to the application of the doctrine were not present in the state's beach restoration scheme and found that the right was not implicated.³¹⁷ Justice Stewart stated that a state court decision is entitled to deference so long as it "conforms to reasonable expectations."³¹⁸ Do upland owners seriously expect state and federal taxpayers to spend millions of dollars to restore beaches primarily for their exclusive benefit? Several facts lead to the conclusion that there is nothing startling in the court's determination that the right to accretions was not taken. Such facts include: that the Florida Court could have used other analyses based on traditional legal principles to reach the same conclusion concerning the effect of the BSPA on litto-

315. In *STBR*, the Court could possibly base a *taking* on a determination that the Florida Court had previously said (albeit in dicta) that the right to future accretions is a vested interest and that the BSPA and the court's decision takes away that individually identified vested right. But an approach that does not look at the significance of the diminution of property rights on the whole of the property or consider the policies furthered by the change seems inconsistent with both takings jurisprudence and the analysis courts traditionally use in overruling precedent. See, e.g., *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381-82 (1977) (overruling *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), in which the Supreme Court overruled its prior decision that federal law, rather than state law, applied to determine ownership of accreted property along inland waters). The Court took into account "institutional considerations," including the degree of interference with the expectations of property owners, the extent to which it would interfere with settled titles, and that the constitutional sovereignty of states was involved. *Id.*

316. One commentator has noted that "before a judicial decision can raise Takings Clause concerns, it must affect property interests founded upon settled precedent. No one reasonably expects the first interpretation of a statute to be definitive or conclusive." Bunch, *supra* note 307, at 1755.

317. See *supra* notes 210-14 and accompanying text.

318. *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

ral rights,³¹⁹ that the BSPA had embodied the principle since 1986 without challenge on the issue,³²⁰ and that courts in other states have decided beach restoration cases to have the same effect.³²¹

Undoubtedly, the Florida Supreme Court has stated in *dicta* that the right to accretions includes the right to future alluvion. *State v. Florida National Properties*, the case relied upon by *STBR* for this position, based that conclusion in important aspects, however, on the mistaken conclusion that “Federal, not State, law governs the resolution of boundary line disputes between the sovereign and private owners whose lands border navigable bodies of water.”³²² Reliance on this case is consequently problematic. Because all of Florida’s cases involving the right to accretion have involved the ownership of actually accreted land, the language concerning future alluvion as a vested right is *dicta*.

The right of contact with the water³²³ has been sporadically mentioned as a riparian or littoral right in Florida Supreme Court cases in connection with the right of access.³²⁴ Even a cursory analysis of this statement demonstrates that it cannot be taken literally. Tidal waters will reach the MHWL boundary of littoral land only half of the time daily, at best, and on a seasonal basis, waters may not reach the MHWL for months at a time. Since the MHWL is based on a nineteen-year average, there can actually be years when the littoral owner

319. For example, the court could have based the determination that the right to accretion is not implicated because the process of restoration is avulsion and cuts off the littoral right to accretions.

320. It is clear that mere enactment of a law does not make it a “background principle” as the concept is used in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The *Palazzolo* Court did not decide that a legislative enactment could not become a background principle. *Id.* at 630 (stating “[w]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law . . .”).

321. For example, in *Mississippi State Highway Commission v. Gilich*, the Mississippi Supreme Court held that when the government artificially recovers public trust lands to build beaches, it does not “render lands once a part of the public trust, the property of private land owners.” 609 So. 2d 367, 375 (Miss. 1992). By confirming state ownership of beach created between the upland and the sea, the court cut off any right to accretion. The Mississippi Supreme Court also noted, however, that because the shoreline was still there, the Giliches could continue to exercise their littoral rights and “are not entitled to compensation for any loss of littoral rights.” *Id.* at 375-76. See also *Slavin v. Town of Oak Island*, 584 S.E.2d 100 (N.C. Ct. App. 2003) (renourished beach created by the Corps of Engineers vested in the state [leaving no waterfront for accretions to occur]), *cert. denied* 590 S.E.2d 271 (N.C. 2003).

322. *State v. Fla. Nat’l Props.*, 338 So. 2d 13, 16-17 (Fla. 1976). The court in *Florida National Properties* applied *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). However, *Bonelli* was subsequently overruled to re-establish state law as controlling in the case of interpreting fresh water boundaries of a federal land grant. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371-72 (1977). There was also no indication in *Florida National Properties* that land traced to a federal grant was involved. 338 So. 2d at 16.

323. In the brief for the Supreme Court, *STBR* restated its claim as the littoral right to contact with the MHWL. Petitioner’s Brief, *supra* note 287, at 24.

324. See *Sand Key Assocs.*, 512 So. 2d 934, 936 (Fla. 1987) (stating that riparian rights include “the right of access to the water, including the right to have the property’s contact with the water remain intact . . .”).

must cross sovereignty lands to reach the sea. The BSPA specifically provides that the beach created seaward of the ECL is also held as sovereignty lands,³²⁵ and as the Florida Supreme Court pointed out in *STBR*, “the renourished beach may be wider than the typical foreshore, but the ultimate result is the same.”³²⁶ The right to contact relates to protection of access by prohibiting intervening ownership between upland property and sovereignty lands. This is not an issue under the BSPA.

c. The Consequences of Finding a Judicial Taking

Oddly enough, a finding by the Supreme Court that the BSPA constitutes a taking of the right to accretions or other riparian rights will likely have little effect on beach restoration in the state. The “recapture” provisions that the Florida legislature passed in 2007 as an amendment to the BSPA require that compensation for a taking in connection with a beach restoration project must include consideration of the enhanced value of the upland property.³²⁷ As a general proposition, the increase in value of property that was previously endangered by erosion and that would be protected and enhanced by a two-hundred-foot wide beach will offset the value of the right to accretions for property on a critically eroding beach. Reminiscent of the Supreme Court’s decision in *Loretto v. Teleprompter Manhattan CATV Corp.*,³²⁸ a far-reaching principle could be established in a case where application of the principle has little practical effect on the case at hand.³²⁹

There are much broader consequences for the coasts, however, than just the effect of such a finding on Florida’s BSPA. Statutes and court decisions in other states will find the determination of state ownership of restored beaches subject to review as regulatory or judicial takings, potentially upsetting state policies on beach management³³⁰ and leading to the need to reassess responses to climate

325. Title to all land seaward of the ECL is “deemed to be vested in the state by right of its sovereignty . . .” FLA. STAT. § 161.191 (2009).

326. *STBR*, 998 So. 2d 1102, 1119-20 (2008).

327. FLA. STAT. § 161.141 (2009). See *supra* note 251 and accompanying text.

328. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

329. In *Loretto*, the Supreme Court established the principle that any government-authorized permanent physical intrusion, no matter how insignificant, is a taking. *Id.* at 434-35. After the case was remanded, the Commission on Cable Television set the compensation at \$1 as sufficient because it concluded that the value of the access to cable television actually increased the building’s value. The New York Court of Appeals sustained statutory provisions allowing the Commission to set the compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 432 (N.Y. 1983).

330. A 2000 NOAA study found that all of the Atlantic and Gulf states, except Maine and Maryland, and California on the West coast have beach nourishment policies. See CASEY HEDRICK, NAT’L OCEANIC & ATMOSPHERIC ADMIN., TECHNICAL DOCUMENT NO. 00-01, STATE,

change and sea-level rise. The independence of state courts in defining the law of their coasts will be at issue at a time when the law needs to be able to respond to these new challenges of the twenty-first century.

Of particular importance to the coast is judge-made law related to the public trust doctrine. Its evolution is dependent on the ability of state courts to respond to the needs of society in relation to the use, enjoyment, and protection of the seas and shores. Additionally, public beach access, too, has depended on the courts to “find” law that can protect the public’s right to use the shore. Commentators have often cited these particular issues as areas where state courts need to be constrained,³³¹ and use by courts of doctrines like custom are likely targets for judicial takings challenges. The coasts are clearly identified targets of proponents of the concept of judicial taking.

VI. CONCLUSION

Henry David Thoreau once said, “The sea-shore is a sort of neutral ground, a most advantageous point from which to contemplate this world.”³³² No more a *neutral ground*, the coasts are the venue for the drama of property law that has been playing out for the last few decades. From *Nollan v. California Coastal Commission*³³³ to the acceptance of certiorari in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,³³⁴ the Supreme Court has chosen the nation’s increasingly scarce sandy beaches as the stage for defining the constitutional limits of private property protection. For the most part, the majority of the Court has disregarded the fact that coastal land has special characteristics in that its shores are unstable and dynamic;³³⁵ because its ocean boundaries are indeterminable to laymen—both littoral owners and beach users; because public interests play a more important role in defining the rights of littoral owners due to the interface with public trust lands and waters; and because the rights of both the littoral owner and the public are as fragile as the shoreline and the beaches when the ocean encroaches on the shore. Of the justices finding a categorical taking in *Lucas*, only Justice Kennedy, in his concurring opinion, seemed to intimate a sensi-

TERRITORY, AND COMMONWEALTH BEACH NOURISHMENT PROGRAMS: A NATIONAL OVERVIEW, Table 1 at 7 (OCRM Program Policy Series, March 2000).

331. See, e.g., Thompson, *supra* note 289, at 1480 n.125 and 1507-08; and Sarratt, *supra* note 301, at 1487-88, 1492, 1511-12.

332. HENRY DAVID THOREAU, CAPE COD 131 (Dover Publications 2004).

333. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

334. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 129 S. Ct. 2792 (2009).

335. In fact, it is hard to even characterize barrier islands and spits as *land* since they are primarily unaggregated piles of sand that are constantly moving.

bility to the differences of coastal property.³³⁶ In *STBR*, it is important for the U.S. Supreme Court to recall, however, that the Florida Supreme Court has not ignored the unique nature of the coasts: “The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title.”³³⁷ It is not “startling” that the Florida court carefully balanced the rights of private property owners and the public in analyzing the effect of the BSPA on common law rights.

Florida’s Beach and Shore Preservation Act³³⁸ addresses the problem of critically eroded beaches that have reached emergency proportions in the state.³³⁹ The Act does not deviate substantially from common law principles relating to littoral rights and completely protects the right of access that all other littoral rights are recognized to protect. The Act even promotes peaceful use of beaches by providing the upland owner and beach user some degree of certainty as to the boundary between private lands and sovereignty lands open to public use. Unless millions of dollars per mile of public funds are to be expended to build private beaches, as a simply practical matter, the right to accretions is abrogated because the upland owner will no longer have land periodically inundated by water to which accretions can attach.³⁴⁰ Is this result *startling*?

The response of government to manage beaches by restoration cannot be addressed as fully and fairly³⁴¹ by common law principles concerning littoral rights as it is through the BSPA. High rates of unabating, background beach erosion, coastal storms, sea-level rise, the concentration and vulnerability of coastal populations, and the importance of beaches to the public trust and the state’s economy have led

336. Justice Kennedy stated:

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. *Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.*

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) (citation omitted) (emphasis added).

337. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77 (Fla. 1974).

338. FLA. STAT. §§ 161.011-161.45 (2009).

339. *Id.* § 161.088.

340. As an even more practical matter, a critically eroding beach facing a century of sea-level rise is unlikely to have prospects of any land accreting to its boundaries in any event.

341. Recall that traditional application of the doctrine of avulsion could cut off all littoral rights.

the state to its current policy on beach restoration and management. The BSPA was enacted to address issues affecting littoral owners that are not directly addressed by common law principles and provides benefits to littoral owners of critically eroding beaches that neither nature nor the common law would provide. State courts must have the independence to interpret whether and how common law property rights apply to government responses and adaptations, like the BSPA, that will be essential to the future of the coasts as landward migration of the shores continues and accelerates with sea-level rise. What is “startling” is that the future of the coasts, the rights of the public to use beaches, and even the continued existence of the current shoreline properties could potentially be affected by the claims of a few littoral owners whose primary complaint purports to be that they are deprived of a right to accretions on a critically eroding beach and who are unlikely to receive more than nominal compensation if declared winners in the case.³⁴²

The fixing of an established boundary on restored beaches between private and sovereignty land by the BSPA is not a panacea that will relieve all controversy. It will, however, unequivocally establish areas where the public may use the beach without interference. It should be noted, though, that littoral property owners are not always acting unreasonably, especially when members of the public abuse the right to use the beaches. The sense of stewardship that private ownership encourages must also be part of the ethic of use of public trust lands. Local governments must also accept responsibility for regulating and managing the use of beaches and access issues *before* conflicts arise. Beaches, like the boundaries discussed early in this

342. In a recent case, dissenting Judge Wiener described the context of a Texas property rights case with similar implications, as follows:

Although undoubtedly unintentionally, the panel majority today aids and abets the quixotic adventure of a California resident who is here represented by counsel furnished *gratis* by the Pacific Legal Foundation. (That non-profit's published mission statement declares that its *raison d'être* includes 'defend[ing] the fundamental human right of private property,' noting that such defense is part of each generation's obligation to guard 'against government encroachment.') The real *alignment* between Severance and the Pacific Legal Foundation is not discernable from the record on appeal, but the real *object* of these Californians' Cervantian tilting at Texas's Open Beaches Act ('OBA') is clearly not to obtain reasonable compensation for a taking of properties either actually or nominally purchased by Severance, but is to eviscerate the OBA, precisely the kind of legislation that, by its own declaration, the Foundation targets. And it matters not whether Ms. Severance's role in this litigation is genuinely that of the fair Dulcinea whose distress the Foundation *cum* knight errant would alleviate or, instead, is truly that of squire Sancho Panza assisting the Foundation *cum* Don Quixote to achieve its goal: Either way, the panel majority's reversal of the district court (whose rulings against Severance I would affirm) has the unintentional effect of enlisting the federal courts and, via certification, the Supreme Court of Texas, as unwitting foot-soldiers in this thinly veiled Libertarian crusade.

Severance v. Patterson, 566 F.3d 490, 504 (5th Cir. 2009) (Wiener, J., dissenting).

paper, can be part of what creates a sense of community, rather than a source of controversy.