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## **Beach Nourishment: the Erosion of Private Littoral Property Rights?**

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A planned beach nourishment project in Destin, FL, is being challenged by littoral property owners on the grounds that it will effectively extinguish their constitutional property rights to accretion and to have their property remain in contact with the water. This paper will examine the intersection of public and private rights and property boundaries created by such projects.

### Facts

In 1995 Hurricane Opal severely eroded beaches in the City of Destin and Walton County, prompting the Department of Environmental Protection to place them on its list of critically eroded beaches.<sup>1</sup> That status put the area up for consideration for beach nourishment projects under Florida's Beach and Shore Preservation Statutes, which state that beach erosion poses "a serious menace to the economy and general welfare of the people of this state." The statutes also declare it "a necessary governmental responsibility to properly manage and protect Florida beaches ... from erosion" and further stipulate that "the Legislature make provision for beach restoration and nourishment projects," which it declares to be "in the public interest."<sup>2</sup>

The takings claim posited by the Destin property owners is based on the fact that a beach nourishment project fronting their littoral property will entail the establishment of an Erosion Control Line (ECL) as the permanent seaward boundary of their property. The state, following completion of the project, subsequently gains title to all lands seaward of the ECL, namely the replenished beach and any additional lands that may be added thereto by accretion.<sup>3</sup> Though the statute nonetheless preserves all other common-law littoral rights for such property owners,<sup>4</sup> they still lose the right to have their property

remain in contact with the water and the right to accretion, both of which are recognized by the courts<sup>5</sup> and the taking of which may require compensation.<sup>6</sup> Though the DEP has not faced such a legal challenge in the past,<sup>7</sup> this paper will present several court rulings on analogous situations in order to shed light on the present case.

### **Traditional Littoral Rights**

In Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, the Supreme Court of Florida enumerated the rights of littoral property owners as:

(1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property.<sup>8</sup>

That the Court in that case also stated that such rights "constitute property" and "may not be taken without just compensation"<sup>9</sup> is seemingly at odds with F.S. 161.191, which takes away said right to accretion without making any provisions for compensation, and whose constitutionality has been questioned.<sup>10</sup> Littoral property owners also possess the rights to wharf out to navigable waters and make reasonable use of the water flowing past the littoral land,<sup>11</sup> but neither is relevant in this instance.

### **Relevant Cases**

Regarding the loss of contact with the water, at least three cases are pertinent. In Martin v. Busch, the Supreme Court of Florida ruled that state actions could deprive an upland property owner of his riparian status. Specifically, the court said:

If to serve a public purpose the State, with the consent of the Federal authority, 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.<sup>12</sup>

Should the same logic apply when the state raises submerged lands for a beach nourishment project? Even though Martin v. Busch involves riparian property on a lake, it would seem so, given the Supreme Court of Florida's ruling in State v. Gerbing, in which the court said regulation and disposition of the uses of the foreshore rests with the state:

The rights of the people of the State in the navigable waters and the lands thereunder including the shores or space between ordinary high and low water marks, in the State, are designated for the public welfare, and the State may regulate such rights and the uses of the waters and the lands thereunder for the benefit of the whole people of the State as circumstances may demand,<sup>13</sup>

The main argument for the littoral property to maintain contact with the water would seem to be access to navigable waters. However, the Supreme Court in U.S. v. Commodore Park said the government could destroy a riparian owner's access to navigable waters under the authority vested in the Commerce Clause:

Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream.<sup>14</sup>

In the case at hand, federal governmental authorization for beach nourishment projects is found in Public Law 84-826 of 1956, which expanded the authorization of the U.S. Army Corps of Engineers to engage in such projects on privately owned beaches when public benefits would result<sup>15</sup> - one of the asserted governmental intents in Destin.<sup>16</sup> Though in some beach nourishment projects direct and immediate access to portions of the beach and/or water may be impeded by dune construction and require compensation, the loss or impairment of these have not been claimed in Destin.<sup>17</sup> In addition, dunes contemplated in the project designs are not expected to block ocean views of private littoral owners given the elevation of most upland dwellings.<sup>18</sup>

The right of access and/or to maintain contact with the water, clearly key for both littoral and riparian property owners, is also linked intrinsically to the right of accretion, as stipulated in Hughes v. Washington. In that case, the U.S. Supreme Court noted that denying the right to accretion "would leave riparian owners continually in danger of losing access to water which is often the most valuable feature of their property."<sup>19</sup> However, the Court followed by noting that "... it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland" (i.e. the state). In a concurring opinion, Justice Black reiterates state authority with respect to regulating private property, an opinion that would seem to underscore the validity of Florida's Beach and Shore Preservation Statutes as a legitimate exercise of the state's police power:

Surely 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. And surely Washington or any other State is free to make

changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules.<sup>20</sup>

### Accretion

The right to accretion has long been a key common law rule governing littoral property boundaries, one of the purposes of which is to guarantee that littoral property remains, in fact, littoral. However, it must be noted that the common law rule of avulsion does not always guarantee such a right, since avulsive changes to the shoreline – those deemed sudden and perceptible by action of the water, as in the case of a hurricane - generally do not result in changes to boundary lines.<sup>21</sup>

In a recent law review article, University of North Carolina Law Professor Joseph Kalo notes that since the seaward boundary of littoral property does not move following an avulsive event, a storm that adds 50 feet of beach to the shoreline would leave a littoral property owner's boundary line 50 feet from the water, effectively taking away his/her littoral status and, technically, rights. By contrast, a storm that removes 50 feet of beach would leave that same property line 50 feet seaward of shoreline, effectively giving the owner possession of submerged lands, which are generally owned by the state and held in trust for the public. Despite this lack of consistency these common law rules can have on property boundaries, North Carolina has apparently solved any potential problems by not differentiating between the effects these processes have on said property lines by adding the phrase "by any process of nature" into its statutes. The phrase effectively lumps avulsion and accretion together with respect to their effect on littoral boundary lines.<sup>22</sup>

Hence, the property line remains ambulatory regardless of the natural process responsible for the change to the shoreline.

The relevance of state property laws rights to the processes of accretion, erosion, reliction and avulsion is made in Oregon v. Corvallis Sand & Gravel Co., in which the Supreme Court said "this Court has held that subsequent changes in the contour of the land ... are governed by the state law."<sup>23</sup> Hence, Florida, as trustee of the tidelands,<sup>24</sup> is entrusted to decide how best to respond to a constantly evolving shoreline and, in the process, wield its paramount authority over private littoral or riparian rights. In California, the courts have gone a step further and ruled that a private littoral owner may be denied the right to accretion based on the conclusion that the proposed public benefits of a public trust project substantially outweigh any private benefits the sand may have provided.<sup>25</sup>

In that case, Miramar Co. v. The City of Santa Barbara, a California court ruled against a littoral property owner whose beach had been denuded of sand following the construction of a breakwater. In its ruling, the court noted that "the littoral rights of an upland owner who owns no title to tidelands adjoining his property are subject to termination by whatever disposition of the tidelands the state chooses to make." The court also made a direct reference to the state's responsibility and authority under the Public Trust Doctrine:

The withdrawal of the sandy accretions, constituting the damage to plaintiff's land, was an incidental consequence of the state's use of the public domain for a public interest that was at all times superior to private littoral rights.<sup>26</sup>

Even in the dissenting opinion Justice Carter fails to condemn the loss of the right to accretion and instead suggests that it may indeed be extinguishable: "It may be that the abutting owner has no vested right in future accretions, that is, possible future additions to his land, as against the state."<sup>27</sup>

Thus it would seem that Florida can undertake beach nourishment projects for public trust purposes based on ownership of the tidelands and also, perhaps, its authority in navigable waters as relates implicitly to commerce. Indeed, the argument has been made that the Public Trust Doctrine be expanded to include sand as a vital natural resource that forms coastal beaches.<sup>28</sup> That argument is based, in part, on the fact that the coast and its sandy beaches represent some of the most valuable resources of coastal states.<sup>29</sup> In a state such as Florida, in which tourism is the largest industry, the economic and social impacts of a coastline void of beaches are obvious.

### **Expansion of Public Trust Doctrine**

In her article, "Sand Rights: a Legal System to Protect the Shores of the Sea," Katherine E. Stone argues that the transport of sand along the coastline should be incorporated into states' public trust doctrines. Noting that the California Supreme Court said in Marks v. Whitney that the public trust doctrine applies to non-traditional environment and "recreational values," in addition to the traditional purposes of navigation, fisheries and commerce, Stone states that "[p]rotection from shoreline erosion would also seem to be a proper trust purpose."<sup>30</sup> Such is the stated intent in Destin, where engineers have concluded that, as a result of critical erosion, "too many" of the area's dwellings are susceptible to damage or destruction.<sup>31</sup> Though Stone is concerned primarily with

governmental actions that *produce* beach erosion, beach nourishment projects intended to mitigate or ward against destructive erosion could fall under such an expanded public trust doctrine given the obvious community and public benefits - not to mention the protection of privately owned dwellings. In addition, public trust status for beach nourishment projects would subsequently preclude any takings claims<sup>32</sup> as in Destin.

### Takings

While both federal and state courts have ruled that the riparian right to accretion may not be taken without payment of just compensation,<sup>33</sup> Florida, North Carolina and Texas have passed legislation vesting title to newly raised submerged lands with the state.<sup>34</sup> Apparently aware that such beach nourishment projects effectively terminate some rights of littoral owners, the states responded to the loss of property owners' physical littoral status by granting them "substitute statutory littoral rights."<sup>35</sup> However, only Florida expressly states that the littoral owner loses the right to accretion,<sup>36</sup> while that loss is implied by Texas and North Carolina since they declare the newly raised lands to belong to the state.

Thus, the issue at hand revolves around whether or not littoral owners' customary rights to use the beach have been impaired to such an extent that compensation should be required.<sup>37</sup> In other words, are the loss of contact with the water and the right to accretion substantial enough to override overwhelming public benefits and warrant compensation? Kalo suggests an answer, noting that although a "technical taking of littoral rights" may be occurring, compensation need only be paid when "a project does adversely impact oceanfront owners and littoral rights are not voluntarily relinquished."<sup>38</sup> The remaining

task then becomes how to determine the degree of adverse impact that would trigger compensation.

### Conclusion

Given the fact that the Destin property owners stand to gain 50-100 additional feet of dry, sandy beachfront<sup>39</sup> that will undoubtedly protect their homes in the future, the issue of whether they face any truly adverse impact by losing a right to future accretions would appear moot. Though such a conclusion is hardly rooted in law, the fact that the "vast majority" of coastal properties are protected by national flood insurance at great taxpayer expense<sup>40</sup> should sway the tide in favor of the government's ability to flex its regulatory muscle as a legitimate exercise of its police powers. And, since the Destin property owners are only seeking to stop the project on constitutionality issues, the matter of compensation need not be fully addressed here.

In addition, it may be argued that the state's interest in protecting its tidelands and beaches - extremely valuable economic assets and natural resources - falls under its public trust responsibilities. Based on the facts and the cases presented here, both the federal and state governments have solid grounds on which to legitimize their authority to undertake beach nourishment projects that adversely impact private property. However, the lines become blurred over the issue of compensation and when and whether or not such should be awarded for impaired or lost littoral rights.

## Bibliography

Campbell, Jean k. "Where the Beach?: Drawing a Line in the Sand to Determine Shoreline Property Boundaries in the United States and the Resulting Conflict Between Public and Private Interests." Hawai'i Environmental Law Program Paper Series, Summer 2000. Online.

Kalo, Joseph, J. "North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century." North Carolina Law Review. Volume 83, Number 6 (September 2005). LexisNexis Academic.

Maloney, Frank E. & Ausness, Richard C. "The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping." North Carolina Law Review. Volume 53, Number 186 (1974). LexisNexisAcademic.

Stone, Katherine and Kaufman, Benjamin. "Sand Rights: A Legal System to Protect the 'Shores of the Sea.'" Shore and Beach. Volume 56, Number 3 (July 1988). pp 7-14. RSMAS Library.

<http://www3.csc.noaa.gov/beachnourishment/html/human/law/history.htm>

## FOOTNOTES

(1) Written opinion of Division of Administrative Hearings judge on Destin hearing [http://www.waltonsun.com/doah\\_ruling.htm](http://www.waltonsun.com/doah_ruling.htm)

(2) Florida Statute 161.088 **Declaration of public policy respecting beach erosion control and beach restoration and nourishment projects.**--Because beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions, it is hereby declared to be a necessary governmental responsibility to properly manage and protect Florida beaches fronting on the Atlantic Ocean, Gulf of Mexico, and Straits of Florida from erosion and that the Legislature make provision for beach restoration and nourishment projects... The Legislature declares that such beach restoration and nourishment projects, as approved pursuant to s. 161.161, are in the public interest;

(3) Florida Statute 161.191 **Vesting of title to lands.**--1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty... 2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, 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, except as provided in s. 161.211(2) and (3).

(4) Florida Statute 161.201 **Preservation of common-law rights.**--Any upland owner or lessee who by operation of ss. 161.141-161.211 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 as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

(5) Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, 512 So. 2d 934, 936-37 (Fla. 1987)

(6) Maloney, p. 236, and Kalo.

(7) Telephone interview with Paden Woodruff, administrator of Florida Dept. of Environmental Protection's Beach Erosion Control Program, 11/02/05

(8) Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, 512 So. 2d 934, 936-37 (Fla. 1987)

(9) "We have also held that riparian or littoral rights are legal rights and, for constitutional purposes, the common law rights of riparian and littoral owners constitute property... [Citation] In Brickell, we said these riparian or littoral rights are "property

rights that may be regulated by law, but may not be taken without just compensation and due process of law,"

(10) Maloney, p. 236

(11) Kalo

(12) Martin v. Busch, 93 Fla. 535; 112 So. 274 (1927)

(13) State v. Gerbing, 56 Fla. 603; 47 So. 353 (1908)

(14) U. S. v. Commodore Park, 324 U.S. 386 (1945)

(15) <http://www3.csc.noaa.gov/beachnourishment/html/human/law/tables/at1.htm> P.L. 84-826 of 1956 "expanded the authority for federal shore protection to include privately owned shores where substantial public benefits would result." Under Section 103 of the River and Harbor Act (33 USC 426g), "the Corps was authorized to participate in the cost of protecting the shores of publicly owned property and private property where public benefits result." The authority for the Corps to conduct beach erosion control work without specific congressional authorization is included in several different authorities, referred to collectively as the Continuing Authorities Program. Under one of these authorities, Section 103 of the River and Harbor Act of 1962, the Corps is authorized to participate in the cost of protecting from storm damage the shores of publicly owned property and private property where public benefits result.

(16) <http://www.cityofdestin.com/pages/BeachRe/beach.html>

(17) <http://www.saveourbeaches.net/>

(18) Woodruff interview

(19) Hughes v. Washington, 389 U.S. 290 (1967)

(20) Ibid.

(21) Maloney, p. 225

(22) Kalo

(23) State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)

(24) Florida Constitution. Art. X, Section 11. Sovereignty lands. – The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below the mean high water lines, is held by the state by virtue of its sovereignty, in trust for all the people.

(25) Stone, p. 8

(26) Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170

(27) Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170

(28) Stone, p. 4

(29) Stone, p. 5

(30) Stone, p. 15

(31) <http://www.cityofdestin.com/pages/BeachRe/beach.html> "The Study revealed that Destin's six-mile stretch of coastline is a naturally mildly-accreting system. This is good news. The bad news is that continued erosion over the last eight years has led to a "sand-starved" system that needs a serious "jump-start" in repairing the damages incurred, getting new sand back in the system, and keeping further erosion at bay. Waiting for "nature to take its course" is no longer practical in the most critically eroded area from the Walton County line west to Henderson Beach State Park. Too many structures are in danger of being destroyed with another major storm. Beachgoers are left with little beach to enjoy."

(32) Stone, p. 15

(33) State of Florida and Board of Trustees of the Internal Improvement Trust Fund, v. Florida National Properties, Inc., No. 45787 Supreme Court of Florida 338 So. 2d 13 (1976) p. 6

(34) North Carolina General statute 146-6(a) states that "if any land is, by any process of nature ... raised above the high watermark of any navigable water, title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directing adjoined the navigable water."

Texas Natural Resources Code. Chapter 33. Management of Coastal Public Land. Subchapter A. General Provisions. § 33.136. Property Rights: Preservation of Littoral Rights.

e) An upland owner who, because of erosion response activity undertaken by the commissioner, ceases to hold title to land that extends to the shoreline as altered by the erosion response activity is entitled to continue to exercise all littoral rights possessed by that owner before the date the erosion response activity commenced, including rights of ingress, egress, boating, bathing, and fishing.

(f) In this section, "erosion response" means an action intended to address coastal erosion, mitigate the effect of coastal erosion, or maintain or enhance beach stability or width. The term includes: (1) beach nourishment; (2) sediment management; (3) beneficial use of dredged material; (4) construction of breakwaters; (5) dune creation or enhancement; and (6) revegetation.

(35) Kalo

(36) Florida Statute 161.191 Vesting of title to lands 2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, 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, except as provided in s. 161.211(2) and (3).

(37) Kalo

(38) Kalo

(39) Woodruff interview

(40) Campbell, p. 5

## Martin v. Busch (Suprem. Ct. v. FL)

- state lowered waters
  - riparian lost contact w/ water
  - uncovered lands still belong to state
- } analogous to moving the HWL seaward via a beach nourishment project

## State v. Beebe (Supreme Ct of FL)

- disposition & regulation of foreshore rest of state for the benefit of the whole people of the state

## Rivers & Harbors Act (Section 103)

- authorize the ACOE to "participate in the cost of protecting privately owned shores" ... where public benefits result

- Supreme Court HUGHES v. WASHINGTON - The laws of land property... is left to the states to develop + administer

## Oregon v. Coxwell & Paul (Supreme Court)

- change to the contour of the land are governed by state laws

## Riparian Rights

(A) riparian rights subject to

- ① reasonable state regulation
- ② public rights in foreshore
- ③ traditional limits to all property rights (rights)

(B) Subordinate to:

- (1) Federal Nav. Servitude
- (2) State's paramount rights in navigable waters

(C) "somewhat insecure ... and subject to considerable control by the owner of the neighboring tidelands (i.e. state) (HUGHES v. WASHINGTON)

(D) subject to termination by whatever disposition of the tidelands the <sup>state</sup> chooses to make  
(Merriman v. City of San Barbara)