

## STUDENT WORKS

### CALMING THE STORM: PUBLIC ACCESS TO FLORIDA'S BEACHES IN THE WAKE OF HURRICANE-RELATED SAND LOSS

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#### I. INTRODUCTION

In 2004, Florida experienced the most active hurricane season since weather records were first recorded in 1851.<sup>1</sup> Hurricanes Charley, Frances, Ivan, and Jeanne and Tropical Storm Bonnie damaged the beach and dune system, inland structures and property, and infrastructure in most of Florida's coastal counties.<sup>2</sup> Similarly, in 2005, Hurricanes Dennis, Katrina, Ophelia, Rita, and Wilma and Tropical Storms Arlene and Tammy exacerbated erosion conditions throughout the State and substantially reduced the width of Florida's beaches available for public access.<sup>3</sup>

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\* © 2009, Forrest J. Bass. All rights reserved. Recent Developments Editor 2008–2009, *Stetson Law Review*. B.A., Flagler College, 2006; J.D., Stetson University College of Law, 2009. I thank my wife Amy, my parents Carter and Vickie, and my sister Celia for their encouragement and patience during law school and particularly during the writing of this Article. I also thank editors Cristen H. Martinez, Lauren R. Pilkington, and Jennifer L. Morris McPheeters for their editorial assistance and Legal Assistant/Paralegal Michael R. Sepe for his service to the *Stetson Law Review*.

1. Bureau of Beaches and Coastal Sys., Div. of Water Resource Mgt., Dept. of Envtl. Protec., St. of Fla., *Critically Eroded Beaches in Florida* 2 (available at <http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt6-08.pdf>) (updated June 2008).

2. *Id.*

3. *Id.* The 2005 hurricane season reduced the statewide amount of critically eroded beaches by 42.6 miles. *Id.* (noting that this was roughly a 13.2% increase in hurricane activity); see *infra* App. 1 (providing a map tracking the paths of major storms occurring between 2001 and 2006); Axel Graumann, Tamara Houston, Jay Lawrimore, David Levinson, Neal Lott, Sam McCown, Scott Stephens & David Wuertz, NOAA's Natl. Climatic Data Ctr., *Hurricane Katrina: A Climatological Perspective* 1, <http://www.ncdc.noaa.gov/oa/reports/tech-report-200501z.pdf> (2005). During this time, Hurricane Katrina had sustained winds of eighty miles per hour, causing substantial flooding, damage, and killing fourteen

The culmination of these storms left a trail of destruction and exposed the serious and continuous threat that hurricanes and severe weather events pose on Florida's beaches and public beach access.<sup>4</sup> Critical erosion can significantly reduce the amount of beaches available for public use.<sup>5</sup> Beaches that have lost much of their sand offer less space for recreation, public facilities become more vulnerable to destruction, and the shoreline loses its visual appeal.<sup>6</sup> Erosion can also destroy structures built along the coast.<sup>7</sup> When sand and vegetation systems are washed away, the protection they provide for structures built on the coast is also lost.<sup>8</sup> Further, eroding beaches offer fewer habitats for species of animals and plants that are dependent upon the dunes and beaches.<sup>9</sup>

Despite the continuous threat from hurricane-related sand loss, Florida's beaches are widely known as a haven for fishing, sunbathing, swimming, and public recreation.<sup>10</sup> The Florida Supreme Court has recognized that there is a public interest in Florida's beaches and that private ownership may not unduly restrict

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people. *Id.*

4. See Fla. Stat. § 161.091(3) (2008) (explaining that beach erosion is highly detrimental to Florida's coast and the ability to sustain Florida's predominant industry—beach-related tourism). Forty percent of all hurricanes that strike the United States make landfall in Florida. Eric S. Blake, Edward N. Rappaport & Christopher W. Landsea, Natl. Hurricane Ctr., *The Deadliest, Costliest, and Most Intense Tropical Cyclones from 1851 to 2006 (And Other Frequently Requested Hurricane Facts)*, [http://www.nhc.noaa.gov/Deadliest\\_Costliest.shtml](http://www.nhc.noaa.gov/Deadliest_Costliest.shtml) (2007). Eighty-three percent of all category four or higher hurricanes make landfall in either Florida or Texas. *Id.* Sixty percent of all hurricanes reaching Georgia initially make landfall in Florida. *Id.* This generally results in Florida receiving the brunt of the storm, with Georgia only receiving the lingering effects after the storm has exacted the majority of its damage. *Id.*

5. Fla. Stat. § 161.088 (2008) (noting that beach erosion is a "serious menace" to the stability of Florida's beaches and economy); *but see id.* at § 187.201(8)(b)(2) (explaining that it is the Florida Comprehensive Plan's policy to ensure the public's right to access Florida's beaches).

6. See Surfrider Found., *State of the Beach, Florida Summary*, [http://www.surfrider.org/stateofthebeach/05-sr/state\\_summary.asp?zone=SE&state=fl](http://www.surfrider.org/stateofthebeach/05-sr/state_summary.asp?zone=SE&state=fl) (accessed July 2, 2009) (recognizing the damage to Florida's sandy beaches as a result of hurricane activity).

7. *Id.*

8. *Id.* (noting that the 2004 hurricane season "reshaped long stretches on both coasts, worsened already serious erosion, erased tens of millions of dollars worth of recent beach rebuilding and destroyed or seriously damaged some 2,000 seaside buildings").

9. A. Sts. Marine Fisheries Commn., *Beach Nourishment: A Review of the Biological and Physical Impacts 1* (Habitat Management Series No. 7 2002) (available at <http://www.asmf.org/publications/habitat/beachNourishment.pdf>).

10. *Trepanier v. Co. of Volusia*, 965 So. 2d 276, 286 (Fla. 5th Dist. App. 2007) (citing *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77 (Fla. 1974)).

the public's right to access and enjoy the coastline.<sup>11</sup> The tension between private landowners' ownership interests and public beach access has been the source of intense debate, protracted litigation, and a plethora of unsuccessful legislative remedies.<sup>12</sup> This tension manifested itself when the 2004 and 2005 hurricanes battered Florida's coastline and dramatically reduced the amount of dry sand available for public beach access.<sup>13</sup> Coastal counties were forced to determine whether the public's right to access Florida's beaches migrates inland after hurricane-related sand loss or whether the right is constricted by frozen, arcane boundaries that cannot shift inland to facilitate public beach access. The latter restriction on public beach access could effectively abolish the public's right to access parts of Florida's beaches because the dry sand within the area previously associated with customary public beach access may have been destroyed during the hurricanes.

The purpose of this Article is not to argue the merits of public beach access because the Florida Supreme Court has already recognized that the public enjoys a customary right to access Florida's beaches through the Public Trust and Customary Rights

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11. *Tona-Rama*, 294 So. 2d at 75 (explaining that Florida courts have long recognized the public's right to access and enjoy Florida's oceans and beaches); J. Edwin Benton, *Government and Politics in Florida* 1 (J. Edwin Benton ed., 3d ed., U. Press of Fla. 2008) (explaining that Florida is widely known for its "vast coastlines touching the Atlantic Ocean and Gulf of Mexico" and also for its devastating hurricanes that made "unwelcome visits" to Florida in 2004). Volusia County, Florida defines the beach as the "lands and waters lying seaward of the seawall or line of permanent vegetation and within three miles seaward of the mean low water mark." Code of Volusia Co. (Fla.) § 205.6. Further, Volusia County has established that a public right-of-way exists over the beach by title, dedication, prescription, custom, or otherwise. *Id.*; see *infra* pt. II (discussing the preceding doctrines and their use as means of providing public beach access).

12. See generally W. Roderick Bowdoin, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 Fla. L. Rev. 586 (1973) (describing the controversy surrounding beachfront-property ownership and public beach access); see also James Madison, *The Federalist, A Commentary on the Constitution of the United States*, No. 10 (E.H. Scott ed. 1787) (opining that "the most common and durable source of factions, has been the various and unequal distribution of property.—Those who hold and those who are without property, have ever formed distinct interests in society"); Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 Geo. Intl. Env. L. Rev. 375 n. 6 (2007) (citing Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* 93 (2003) (noting that "[a]ll individual and public claims [to property] are subject to dispute, discard, evolution, and change, as societally constructed understandings")).

13. See e.g. *Trepanier*, 965 So. 2d at 278 (showing the tension that arose between private landowners' ownership interests and public beach access in the wake of the 2004 and 2005 hurricane seasons).

Doctrines.<sup>14</sup> The Florida Supreme Court has not yet considered whether the public's right to enjoy Florida's beaches for recreational purposes survives dry-sand loss and inland shifts of Florida's beaches resulting from hurricanes and other severe weather events.<sup>15</sup> This Article argues that Florida should establish a migratory concept of public beach access in order to preserve public beach access in the wake of hurricane-related beach loss. A rigid and inflexible concept of customary public beach access may not provide the public with adequate territory to enjoy its right to Florida's beaches after hurricanes and other severe weather events reduce the dry-sand area abutting the ocean. Public beach access could be yet another casualty of the storms if customary rights are not permitted to move with natural realignments of Florida's shoreline. However, a migratory concept of public beach access would preserve the public's right of access by expanding and contracting with the natural changes in Florida's beaches resulting from hurricanes and other severe weather events.<sup>16</sup> This Article is not meant to provide an all-encompassing analysis of sea-level rises and dry-sand loss.<sup>17</sup> Rather, it is intended to de-

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14. This Article relies on the background principles of the Florida Supreme Court's customary-public-beach access jurisprudence and related scholarship and takes the analysis a step further to consider the impact of hurricane-related sand loss on the public's customary right to access Florida's beaches. *See infra* pts. II–III (discussing the methods of providing public beach access and describing Florida's case law relating to public beach access).

15. *Trepanier*, 965 So. 2d at 293 n. 21 (noting the Florida Supreme Court should decide whether the public's right of access is ambulatory and therefore shifts inland as the tides rise following hurricane-related sand loss).

16. Appellee's Ans. Br. at 10–11, *Trepanier v. Co. of Volusia*, 965 So. 2d 276 (Fla. 5th Dist. App. 2007). "If the general principle of fixed boundaries were pushed to its logical conclusion, if the boundaries of the public right to use the dry sand beach are frozen once perfected, erosion could result in the public's right being entirely covered by water . . . and useless for its original purposes." *Id.*; *see also Bruce v. Garges*, 379 S.E.2d 783, 785 (Ga. 1989) (holding that the public's right to access Georgia's beaches expands and contracts with the forces of nature).

17. There is a wealth of scholarship focusing on sea level rises attributed to alleged global climate change. *See generally e.g.* Zhu H. Ning, R. Eugene Turner, Thomas Doyle & Kamran Abdollahi, Gulf Coast Regl. Climate Change Impact Assessment, *Integrated Assessment of the Climate-Change Impacts on the Gulf-Coast Region*, (2003) (available at <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/gulfcoast/gulfcoast-complete.pdf>) (discussing the impacts of sea-level rises on coastal landscapes). Various models have been created to predict possible changes in the beaches' composition as a result of climate change and sea level rise. *Id.*; *see also* Curtis Krueger & Craig Pittman, *Rising Sea Level Already Eating Away at Florida's Coastline*, St. Petersburg Times (Mar. 28, 2008) (attributing sea-level rises to melting glaciers and the ocean water's thermal expansion and al-

velop a foundation for preserving public beach access in the wake of hurricane-related sand loss along Florida's beaches through the adoption of a migratory concept of customary public beach access.

Part II of this Article surveys the commonly applied doctrines for providing public beach access. Part III discusses Florida's case law relating to public beach access and demonstrates its limited application to hurricane-related beach loss. Part IV addresses the potential takings issue associated with a migratory concept of public beach access. Part V argues that a migratory concept of public beach access is necessary to preserve public beach access in the wake of hurricane-related beach loss. Part VI considers the economic necessity of a migratory right of public beach access, and this Article concludes in Part VII.

## II. HISTORICAL FOUNDATIONS FOR PUBLIC BEACH ACCESS

This Section will begin with a discussion of the Public Trust Doctrine and the extent to which it facilitates public beach access. However, the Public Trust Doctrine's application is limited and may not fully cover all dry sand abutting the ocean. Accordingly, prescriptive easement, dedication, or the Customary Rights Doctrine must also be utilized in order to provide public access to the full expanse of Florida's beaches.

### A. Public Trust Doctrine—A Public Right to Access the Beaches

The Public Trust Doctrine provides that property held below the mean high-water line (MHW line)<sup>18</sup> is held by the State in trust for all people.<sup>19</sup> The inland area above the MHW line is sub-

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leging that Florida's coast may experience a fifteen to twenty inch rise in the sea abutting its coast). While there may be a need to address the potential impact of global climate change on public beach access, the purpose of this Article is not to address the merits of global climate change or its relation to dry-sand loss and public beach access. Rather, the balance of this Article will be limited to hurricane-induced changes in the composition of Florida's beaches and its impact on public beach access.

18. The MHW line is the average height of the high waters over a nineteen-year period. Fla. Stat. § 177.27(14) (2008).

19. Fla. Const. art. 10, § 11. The U.S. Supreme Court has placed the Public Trust Doctrine in the following context: "[t]here are [some] things which belong to no one, and the use of which is common to all." *Geer v. Conn.*, 161 U.S. 519, 526 (1896); *Restatement*

ject to private ownership.<sup>20</sup> Public access to land seaward of the MHW line is a deeply engrained concept, with its roots tracing back to the Roman Empire.<sup>21</sup> The Florida Supreme Court has recognized that the Public Trust Doctrine is a sufficient basis for providing public access to the beaches *below* the MHW line.<sup>22</sup> Florida's Public Trust Doctrine's effectiveness in providing public beach access may be limited to only part of the beaches and may not extend broadly enough to encompass the full terrain between the tide and dune-vegetation system after hurricanes and other severe weather events change the beaches' dry-sand composition.<sup>23</sup>

In other jurisdictions, the Public Trust Doctrine has been extended inland beyond the MHW line to facilitate public beach access. In *Matthews v. Bay Head Improvement Association*,<sup>24</sup> the

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(Third) of Property: Servitudes § 2.18 cmt. c (1998) (explaining that once public use of property is established, it is open to all members of the public, rather than specific residents of a particular locality); cf. Nicole L. Johnson, Student Author, *Property Without Possession*, 24 Yale J. on Reg. 207, 219–220 (2007) (citing David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 Ecology L. Q. 3 (2005) (explaining that the Doctrine of Prior Appropriation is “motivated by a variety of factors, including economic efficiency, considerations of distributive justice, and other political forces”). The allocation of Western water rights between exclusionary-private ownership and public appropriation is governed by the Doctrine of Prior Appropriation which rests on the following fundamental principles: the maximum utilization of water resources and prevention against monopolistic control and the “recognition that water is fundamentally public in character, belonging to the citizens of the state.” *Id.* at 220.

20. Fla. Stat. § 177.28(1) (2008).

21. Mike Ratliff, *Public Access to Receding Beaches*, 13 Hous. L. Rev. 984, 985 (1975–1976) (citing the Institutes of Justinian 91 (T. Sandars trans., 7th ed., 1970)). The Magna Carta's drafters similarly recognized public interest in coastal-water resources, emphasizing the need to prevent navigational obstructions. *Id.*

22. See *Tona-Rama, Inc.*, 294 So. 2d at 78 (holding that the public holds a customary right to access Florida's beaches where recreational use has been ancient, reasonable, without interruption, and free from dispute).

23. Ratliff, *supra* n. 21, at 986–987 (explaining that the strip of dry sand between the MHW line and the vegetation line is outside the reach of public ownership); Appellee's Ans. Br. at 5, *Trepanier v. Co. of Volusia*, 965 So. 2d 276 (explaining that “much of what the public knows and uses as the beach lays upland of the [MHW] line and is subject to private ownership”). Because the Public Trust Doctrine facilitates public beach access only up to the MHW line, public access to the dry-sand areas inland of the MHW line must be provided by some other means. Karen Oehme, *Judicial Expansion of the Public Trust Doctrine: Creating a Right of Access to Florida's Beaches* 3 J. Land Use & Environ. L. 75, 77, 87 (1987) (noting that some writers have suggested that other doctrines may be needed to provide public beach access to areas not covered by the Public Trust Doctrine).

24. 471 A.2d 355 (N.J. 1984); see also *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54–55 (N.J. 1972) (extending the Public Trust Doctrine to lands the Public Trust Doctrine did not previously cover because the doctrine should be flexible and

New Jersey Supreme Court held that the public's right to enjoy the beaches for recreational activities including bathing, swimming, and other shore activities extended inland beyond the MHW line by virtue of the Public Trust Doctrine.<sup>25</sup> The Court explained that the public's interest in New Jersey's beaches must be preserved because the right to enjoy the tideland was inseparable from the right to enjoy the dry land above the MHW line.<sup>26</sup> Accordingly, the Court concluded that extending the Public Trust Doctrine was necessary because passage to the seashore is essential to the public's right to enjoy ocean-related recreation and necessary to promote the general welfare.<sup>27</sup> However, the Florida Constitution grants public beach access to only the area below the MHW line and may not sufficiently accommodate public beach access inland of the MHW line.<sup>28</sup> Thus, additional doctrines may be necessary to provide public access to the dry-sand area inland of the MHW line in Florida.

### B. Prescriptive Easement

A prescriptive easement may be established through the adverse use of another person's land for a continuous period of time without permission, where the owner fails to prevent such use.<sup>29</sup>

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capable of being extended to meet the public's needs in the face of "challenging conditions").

25. *Mattheus*, 471 A.2d at 364, 365, 369 (explaining that beaches are "unique" and "irreplaceable").

26. *Id.* at 363 (citing *Lusardi v. Curtis Point Prop. Owners Assn.*, 430 A.2d 881, 886 (N.J. 1981) (encouraging greater public access for recreational purposes in light of the "growing concern about the reduced 'availability to the public of its priceless beach areas'").

27. *Id.* at 365. However, the Court explained that the public's right to access the foreshore should not be limited merely to passage. *Id.* at 365. The public should be permitted some recreational usage of the foreshore including "intermittent periods of rest and relaxation beyond the water's edge." *Id.*

28. Fla. Const. art. 10, § 11. The Restatement of Property notes that this limitation is not uncommon—most jurisdictions recognizing the Public Trust Doctrine provide that it allows public access only to the point of the MHW line and does not include portions of dry-sand beaches above the MHW line. *Restatement (Third) of Property: Servitudes* § 2.18 cmt. g. Accordingly, additional means of providing public beach access to the area landward of the MHW must be considered.

29. Jon W. Bruce & James W. Ely, *The Law of Easements and Licenses in Land* § 5.1 (West 2001). In *Downing v. Bird*, the Florida Supreme Court explained that a prescriptive easement may be used to provide access to the public in the same manner that private access may be accomplished through prescriptive easements. 100 So. 2d 57, 64 (Fla. 1958) (citing *Couture v. Dade Co.*, 112 So. 75, 77–79 (Fla. 1927) (explaining that prescription is one method by which the public may acquire a right to use private land)).

Prescriptive easements are premised on the idea that if a property owner fails to prevent such prolonged use, the individuals accessing such land should be treated as having a right to access the property.<sup>30</sup> The elements of a prescriptive easement are generally associated with the concept of adverse possession<sup>31</sup> and may be established where the following elements are demonstrated: (1) continuous use for the statutory period of twenty years, (2) actual, adverse, under a claim of right, and (3) known or so open, notorious, and visible that knowledge of the adverse use can be imputed to the owner.<sup>32</sup> As with adverse possession, the adverse use must be with intentional disregard for the property owner's rights.<sup>33</sup> Thus, the permissive-use element is often used as a defense to a prescriptive easement over coastal property.<sup>34</sup> If use is permissive, then the property owner is free to revoke at any time. Claimants must be able to demonstrate a reasonably certain line in order to establish the easement.<sup>35</sup>

In the context of public beach access, there is much controversy over whether a prescriptive easement is an adequate method of providing public access to Florida's beaches.<sup>36</sup> First, there is an evidentiary problem in demonstrating continuous use. Absent exclusive use for the statutory period of twenty years,

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30. Bruce & Ely, *supra* n. 29, at § 5:1 (citing Tiffany, *Law of Real Property* § 796 (3d ed.)).

31. See *Crigger v. Fla. Power Corp.*, 436 So. 2d 937, 942 (Fla. 5th Dist. App. 1983) (noting that prescriptive rights are acquired in much the same way that title is acquired by adverse possession); see also 3 Am. Jur. 2d *Adverse Possession* § 4 (1964) (explaining that the real difference between adverse possession and prescription is that the former "results in full and complete title to property" whereas prescription "relates to incorporeal hereditaments, or rights, such as easements").

32. *Downing*, 100 So. 2d at 64.

33. *Id.*

34. *Id.*

35. *Id.*

36. Additionally, claimants seeking to establish a prescriptive easement may have difficulty establishing the extent to which other parties may access the property by virtue of the putative-prescriptive easement. For example, in *Cook v. Proctor & Gamble Cellulose Co.*, Florida's First District Court of Appeal distinguished between public-prescriptive easements and private-prescriptive easements. 648 So. 2d 180 (Fla. 1st Dist. App. 1994). The court concluded that a claimant may bring a claim on behalf of only the "handful of persons" having business on the property at issue. *Id.* at 181 (internal citations omitted); see also Fla. Stat. § 704.01(1) (2008) (providing that an implied grant of necessity may be established where no other practicable way of ingress and egress can be accomplished). However, an implied grant of necessity is unlikely to be a successful foundation for public beach access because the statute generally contemplates roads to houses and businesses, not recreational activity.



courts will decline to presume the use was continuous.<sup>37</sup> Second, the permissive-use element is problematic. Courts do not require “evil intent . . . or hostility,” but the adverse use must be with intentional disregard for the property owner’s rights.<sup>38</sup> A formal claim of right is not necessary; however, where there is a dispute over whether the public’s use of the beaches is adverse or merely permissive, Florida courts may decline to find a prescriptive easement over the property.<sup>39</sup> Moreover, public beach access through a prescriptive easement is inadequate because the use must be limited to a specific area. If the use is not continuous within a particular area or if the use was permissive for any time during the statutory period, courts are unlikely to extend a prescriptive easement over the land.<sup>40</sup>

### C. Dedication

Although dedication does not require a formal act, dedication may be achieved by filing a written instrument expressing the owner’s intent to allow his or her property to be used by the public.<sup>41</sup> A publicly accepted plat may also be filed designating any streets, alleys, or parks on the property.<sup>42</sup> A deed to property should be recorded with language describing the public’s rights in the land.<sup>43</sup> Essentially, dedication requires the landowner to take an affirmative act designating his or her property for the public’s use.<sup>44</sup> Additionally, the writing requirement must clearly indicate

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37. *Downing*, 100 So. 2d at 64.

38. *Crigger*, 436 So. 2d at 944 n. 16.

39. *See Trepanier*, 965 So. 2d at 284 (noting that permissive use of the dry-sand portion of the owners’ property may be a defense to a prescriptive easement and may allow the owners to revoke the easement).

40. *Id.* Alternatively, some claimants have sought to access Florida’s beaches through an implied easement of necessity. For example, in *Index, Inc. v. Moon*, Florida’s Third District Court of Appeal rejected the plaintiff’s petition to grant an implied easement of necessity to ingress and egress over defendant’s property in order to scuba dive in the Atlantic Ocean. 534 So. 2d 879, 879 (Fla. 3d Dist. App. 1988). The court explained that the plaintiff’s claim should be rejected because there were alternative locations to access the beaches to achieve the “beneficial use and enjoyment of the property.” *Id.* (internal citations omitted).

41. *City of Palmetto v. Katch*, 98 So. 352, 353 (Fla. 1923).

42. *Kirkland v. City of Tampa*, 78 So. 17, 21 (Fla. 1918).

43. *Brevard Co. v. Blasky*, 875 So. 2d 6, 11 (Fla. 5th Dist. App. 2004).

44. *City of Miami v. Fla. E. Coast Ry. Co.*, 84 So. 726, 729 (Fla. 1920).

the owner's acquiescence to the public's use.<sup>45</sup> However, this approach has been greeted with very little success because owners may be reluctant to acquiesce to the public's use of their property.<sup>46</sup>

#### D. Customary Rights Doctrine

Custom is an English theory by which citizens could acquire the right to use land in specific locations.<sup>47</sup> For the public to establish a customary right to access property, the public's use must be "ancient, reasonable, without interruption and free from dispute."<sup>48</sup> In England, the Crown owned tidal lands and the beds of navigable waters, which were subject to public use for navigation, fishing, and other uses.<sup>49</sup> Similarly, most American jurisdictions recognize some form of the public's customary right to access beaches, shorelands, and navigable waters.<sup>50</sup>

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45. *Miller v. Bay-to-Gulf, Inc.*, 193 So. 425, 427 (Fla. 1940).

46. See e.g. *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825 (1987) (holding that requiring beachfront-property owners to dedicate a portion of their land for the construction of a public sidewalk amounted to a taking). In addition to the problems associated with owners offering certain rights to the public, questions of proper acceptance may also arise. The Third Restatement of Property notes that where dedication is used to provide public access, in some instances there is no definite grantee nor is formal acceptance required. *Restatement (Third) of Property: Servitudes* § 2.18 cmts. d–e.

47. S. Brent Spain, Student Author, *Florida Beach Access: Nothing but Wet Sand?* 15 *J. Land Use & Envtl. L.* 167, 175 (1999).

48. *Trepanier*, 965 So. 2d at 286 (citing *Tona-Rama*, 294 So. 2d at 78). Additionally, the *Trepanier* court explained that the public may acquire a customary beach right because "[t]he sandy portion of the beaches . . . [have] served as a thoroughfare . . . for fisherman and bathers, as well as a place of recreation for the public." *Id.* (citing *Tona-Rama*, 294 So. 2d at 77).

49. *Restatement (Third) of Property: Servitudes* § 2.18 cmt. g.

50. *Id.* American beaches, shorelands, and navigable waters have been historically open to public use by virtue of the Customary Rights Doctrine. *Id.* The public's use of "unenclosed, wild, or vacant lands" such as dry-sand beaches was of little concern or contention. *Id.* However, with the progression of private development and ownership, courts were forced to consider whether public beach access is permissive and subject to revocation or whether public beach access is a customary right that may not be revoked by the incursion of private ownership. *Id.* Courts adopting the latter view have tended to rely on the Customary Rights Doctrine rather than revocable theories of servitude such as prescription or dedication. *Id.* Moreover, at least one jurisdiction has gone further and engrafted the Customary Rights Doctrine into its Constitution. *Id.*; Haw. Const. art. XII, § 7 (requiring the state government to recognize and protect traditional and customary rights held by native Hawaiians); see also *In re Application of Ashford*, 440 P.2d 76, 86 (Haw. 1968) (describing the relationship between the ancient Hawaiian concept of *ma ke kai*—the location of public and private boundaries along the seashore—and the more modern Customary Rights Doctrine).

In *Thornton v. Hay*,<sup>51</sup> the Oregon Supreme Court held that the public enjoys a customary right to use Oregon's beaches for recreational purposes and that beachfront owners may not unreasonably interfere with the public's right to enjoy Oregon's beaches.<sup>52</sup> The Court in *Thornton* held that customary public beach access need not be confined to a particular lot.<sup>53</sup> Rather, the Court applied Custom to Oregon's entire coast in order to avoid tract-by-tract litigation.<sup>54</sup> The Court expressly indicated that the public's right of access to Oregon's beaches is so openly and notoriously assumed that anyone purchasing property along Oregon's coast is charged with having knowledge of the public's access and may not interfere with the public's right.<sup>55</sup>

The advantage of providing for public beach access through the Customary Rights Doctrine rather than prescription or dedication is that it is not necessary to establish customary use for each particular dry-sand area subject to private ownership.<sup>56</sup> Additionally, the Customary Rights Doctrine offers a degree of irrevocability and finality that other types of servitude do not provide. Keeping these advantageous principles in mind—efficiency, uniformity, and finality—the following Section will discuss Florida's adoption of the Customary Rights Doctrine while also noting the uncertainty that lingers from the few decisions relating to customary public beach access in Florida.

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51. 462 P.2d 671 (Ore. 1969).

52. *Id.* at 673 (denying a homeowner's attempt to construct a fence on the dry-sand portion of the beach abutting his property).

53. *Id.* at 676.

54. *Id.*; see also Anderson, *supra* n. 12, at 425 (discussing the *Thornton* court's explanation that a "beach-by-beach determination" of the public's right of access would be unduly burdensome and unnecessary).

55. *Thornton*, 462 P.2d at 678.

56. *Restatement (Third) of Property: Servitudes* § 2.18 cmt. g (noting the advantage of the Customary Rights Doctrine is that it may not be necessary to establish that each particular beach area was used for the requisite period without the beachfront-property owners' consent).

*III. FLORIDA'S CASE LAW: PUBLIC BEACH ACCESS  
IS A CUSTOMARY RIGHT—BUT IS IT A  
MIGRATORY RIGHT?*

This Section will describe the Florida Supreme Court's landmark decision in which it held that the Customary Rights Doctrine extends the right of public access to Florida's beaches. This Section will address the importance of the Court's holding while illuminating the issues left unaddressed in Florida's public beach-access jurisprudence.<sup>57</sup>

*A. City of Daytona Beach v. Tona-Rama, Inc.—  
The Court Recognizes the Public's Customary  
Right to Access Florida's Beaches*

In *City of Daytona Beach v. Tona-Rama, Inc.*,<sup>58</sup> the Florida Supreme Court held for the first time that the public is vested with a customary right to access Florida's beaches.<sup>59</sup> The Court explained that beachfront-property owners must be prevented from interfering with the public's enjoyment of Florida's beaches where recreational use has been ancient, reasonable, without interruption, and free from dispute.<sup>60</sup> Moreover, the Court fervently declared that the character and potential of Florida's beaches "require separate consideration from other lands with respect to the elements and consequences of title."<sup>61</sup> However, the Court completed only half of the analysis and left unclear whether the public's customary right to access Florida's beaches is a static concept

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57. In *Walton County v. Stop the Beach Renourishment, Inc.*, the Florida Supreme Court noted that "[s]ince the vast development of Florida's beaches, there has been a relative paucity of opinions from [the Florida Supreme Court] that describe the nature of the relationship at common law between the public and upland owners in regard to Florida's beaches." 998 So. 2d 1102, 1109 (Fla. 2008). Although the Court noted that the boundary between sovereign lands held in public trust and private property is a "dynamic boundary, which is located on a shoreline that, by its very nature, frequently changes," the Court limited its analysis to the ownership of restored dry-sand areas rather than considering the broader concept of whether the public's customary right to access Florida's beaches is migratory. *Id.* at 1112, 1121 (emphasizing that the Court's decision was "strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act").

58. 294 So. 2d 73.

59. *Id.* at 78.

60. *Id.*

61. *Id.* at 77.

or a right that shifts with changes in the beaches' dry-sand composition. Consequently, the import of *Tona-Rama* on public beach access in the wake of hurricane-related sand loss remains to be seen.

### B. Bracing for Impact—Florida's Fifth District Court of Appeal Forecasts the Looming Quandary

In *Trepanier v. County of Volusia*,<sup>62</sup> Florida's Fifth District Court of Appeal confronted the tension between beachfront homeowners and the public's right to access the beaches in Volusia County, Florida.<sup>63</sup> Alfred Trepanier filed suit in Volusia County on behalf of himself and other beachfront property owners in New Smyrna Beach, Florida.<sup>64</sup> In Volusia County, public driving lanes were established to facilitate public access to the coastal county's beaches.<sup>65</sup> The posts reflecting the public-driving lanes were moved annually to account for varying conditions including ero-

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62. 965 So. 2d 276.

63. *Id.* The Court considered the case on appeal after the trial court entered summary judgment in favor of the county against appellants' inverse condemnation action. *Id.* at 279, 280. A claim for inverse condemnation occurs when a regulation or governmental action other than eminent domain proceedings effects a taking by substantially interfering with the property owner's rights. *First English Evangelical Lutheran Church v. Co. of L.A.*, 482 U.S. 304, 316 (1987). Further, a court's finding of inverse condemnation triggers the Fifth Amendment's Compensation provision. *Id.* at 315; Daniel R. Mandelker, *Land Use Law* 361 (4th ed., Lexis 1997) (citing *First English*, 482 U.S. at 304; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981)). Inverse condemnation may occur even without formal proceedings, so long as the government action has the effect of interfering with the property owner's rights. *Id.* at 361. Further, compensation becomes due to an affected property owner regardless of the government's efforts to invalidate the statute. *Id.* (citing *First English Evangelical Lutheran Church*, 482 U.S. at 421 (indicating that "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective")). Moreover, it is important to note that a claim for inverse condemnation may succeed even though it is only temporary. *Id.* at 357.

64. *Trepanier*, 965 So. 2d at 278.

65. *Id.* at 279. The county realigned the beach's public-driving lanes each year. *Id.*; see Volusia Co. Code (Fla.) § 205.1 (1996) (providing that vehicular access to areas not reasonably accessible from public parking facilities is essential to ensuring the public is able to use the beach for recreation and other customary uses). The border between privately-owned, non-public land and that which the public was free to access varied from year-to-year, "depending on conditions." *Trepanier*, 965 So. 2d at 279. Volusia County moved the landward public-access boundary if the water level rose inland. *Id.* Consequently, when the 2004 hurricanes removed huge amounts of sand from Volusia County's beaches, the County dealt with this loss by adjusting the inland barrier. *Id.* The HCZ (habitat conservation zone) generally begins at the "toe"—the landward base of the dune—and extends seaward for thirty feet. *Id.*

sion and hurricane-related damage to the beaches.<sup>66</sup> Trepanier's claim was that the county improperly allowed parking and driving on his and other owners' property, which was covered by dunes and natural vegetation prior to the 2004 hurricane season.<sup>67</sup> The 2004 hurricanes severely damaged the highly sensitive dunes and vegetation that the county sought to protect in an area designated as a habitat conservation zone (HCZ).<sup>68</sup> Consequently, between 1997 and 2004, Volusia County moved the public-driving boundary and the HCZ inland to ensure that the public was able to access the beaches.<sup>69</sup>

The court surveyed the various means of providing public beach access, including those described in the foregoing text and explained that if the public were permitted to access the beaches within the newly delineated public-access areas, it would be based on Custom.<sup>70</sup> Moreover, the court explained that establishing a customary right of access should not be made on a statewide level by "judicial fiat"; rather, establishing a customary use is "intensely local" and "anything but theoretical."<sup>71</sup> Thus, the court

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66. *Id.* The general rule is that where littoral property—property that abuts a lake, ocean, or sea—has slowly eroded, boundaries generally shift with the MHW line. *Bd. of Trustees of the Internal Improvement Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987); John R. Barlow II & Donald M. VonCannon, *Skelton on the Legal Elements of Boundaries and Adjacent Properties* 331 (2d ed., Lexis 1997) (citing *Bone v. May*, 225 N.W. 367 (Iowa 1929) (quoting *Payne v. Hall*, 185 N.W. 912 (Iowa 1921))). The MHW line is defined as the "line the water impressed on the soil by covering it for sufficient periods to deprive the soil of vegetation." Richard G. Hildreth & Ralph W. Johnson, *Ocean and Coastal Law* 36 n. 1 (Prentice-Hall 1983) (citing *Hughes v. State*, 410 P.2d 20 (Wash. 1966)). One author defined the MHW line as "a legal fiction" established by "averaging all high tides over an 18.6 year cycle, as determined by the Department of Commerce, National Oceanic Survey." Jennifer A. Sullivan, Student Author, *Laying Out an "Unwelcome Mat" to Public-Beach Access*, 18 J. Land Use & Envtl. L. 331, 333–334 (2003) (internal citations omitted). Alternatively, where tides do not fluctuate, the MHW line is delineated between the dry sand and the wet sand. *Id.* at 334; see also *Black's Law Dictionary* 1520 (Brian A. Garner ed., 8th ed., West 2004) (describing the mean high tide as the "average of all high tides over a period of 18.6 years" and defining tideway as "[l]and between high- and low-water marks."). There is no question that the public enjoys a right to access the beach *below* the MHW line. Rather, the issue is the extent to which the public may access dry sand *above* the MHW line.

67. *Trepanier*, 965 So. 2d at 279.

68. *Id.* at 278–279.

69. *Id.* at 279 n. 3 (observing that Volusia County moved the public driving and parking lanes up to sixty feet inland).

70. *Id.* at 284–287; *supra* pt. II(D) (describing the Customary Rights Doctrine).

71. *Trepanier*, 965 So. 2d at 289; but see *Thornton*, 462 P.2d at 676 (holding that the Customary Rights Doctrine has regional application and should not be confined to individ-

appeared to advocate a parcel-by-parcel analysis of the public's customary access of the beaches. The court eschewed any broad definition of customary access and seemed content that a lot-by-lot determination of the public's access is an efficient use of judicial resources.<sup>72</sup>

However, this approach does not adequately embrace the nature of the public's recreational access to Florida's beaches. Beaches are a place where people go for recreation, relaxation, or merely to stroll along the coast.<sup>73</sup> Thus, it is improper to confine the analysis to whether the public has historically accessed a single beachfront parcel.<sup>74</sup> When individuals visit the beach, they do not generally confine their recreation to a single area. Rather, beachgoers assume the freedom to roam and to enjoy the expanse of dry sand along Florida's coast.<sup>75</sup>

The *Trepanier* court opined that a landward shift of the MHW line, while limiting the public's use of the beach, did not necessarily mean that the public's recreational-access area also moved landward.<sup>76</sup> The court rejected Volusia County's argument that the public's customary right moves with the sea's advances and retreats in order to provide an area between the tide and the landward vegetation line.<sup>77</sup>

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ual tracts along Oregon's coast).

72. See *Trepanier*, 965 So. 2d at 288–289 (discussing customary usage doctrine as requiring courts to ascertain the degree of customary and ancient use on a lot-by-lot basis); Oehme, *supra* n. 23, at 87–88 (explaining that a lot-by-lot determination of the public's right to access the beach is cumbersome and expensive).

73. See Anthony James Catanese Center, Fla. A. U., *Economics of Florida's Beaches, The Impact of Beach Restoration* 1, [http://www.flseagrant.org/program\\_areas/coastal\\_hazards/publications/economics\\_beaches\\_restoration.pdf](http://www.flseagrant.org/program_areas/coastal_hazards/publications/economics_beaches_restoration.pdf) (2008) (noting that Florida's beaches are an important place for people to enjoy family outings and leisurely activity).

74. See *Thornton*, 462 P.2d at 676 (explaining that customary public beach access should not be construed as a tract-by-tract activity; rather, the public's use and enjoyment of the beach has regional application).

75. See *infra* n. 100 (describing the beachgoers' expectation of the right to enjoy the beach for recreational purposes); see also *Concerned Citizens of Brunswick Co. Taxpayers Assn. v. Holden Beach Enter.*, 404 S.E.2d 677, 679 (N.C. 1991) (considering the extent of public beach access in the context of a public-prescriptive easement). In *Concerned Citizens*, the Court noted that the public's right of use should not be confined to a "definite and specific line of travel" in order to establish the public's right to access the beaches of North Carolina's Outer Banks. *Id.* at 683.

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

77. *Id.* at 292–293; see *infra* App. 2 (illustrating the coastal boundaries and the limited area in which the public could enjoy the beach after the tide's landward shift and a reduction in the dry-sand area available for recreation).

## C. Chasing a Red Herring: Avulsion v. Erosion

The *Trepanier* court held that the case should be remanded, partially because it was unclear whether erosion or avulsion caused the change in the beach's dry-sand composition.<sup>78</sup> The court relied on *Siesta Properties v. Hart*,<sup>79</sup> in which Judge Harold Sebring explained the general rule that erosion is a gradual and imperceptible encroachment that imposes a loss on the owner, whereas avulsion is a sudden or violent action of the elements that does not change boundaries.<sup>80</sup> Unfortunately, the court in *Trepanier* avoided a final decision on the migration of the public's right to access Florida's beaches, partially because the record was not fully developed on the erosion versus avulsion issue.<sup>81</sup> However, in *Feinman v. Texas*,<sup>82</sup> Texas' First District Court of Appeals explained that labeling hurricane-related damage as either erosion or avulsion is immaterial to determining the location of the public's right to access.<sup>83</sup> The court explained that the differences between erosion and avulsion are pertinent to defining owners' underlying title but are not determinative of the location of the public's right to access the beach.<sup>84</sup> Therefore, the *Trepanier* court could have decided the migration issue, despite the lack of evidence as to erosion versus avulsion, rather than prolonging a determination of the migration of the public's right to access the beaches.

In summary, cases have been decided with regard to public beach access<sup>85</sup> as well as the impact of sudden weather events on boundaries between private-property owners.<sup>86</sup> *Trepanier* was the

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78. *Id.* at 292–293.

79. 122 So. 2d 218 (Fla. 2d Dist. App. 1960).

80. *Trepanier*, 965 So. 2d at 283 (citing *Siesta Props.*, 122 So. 2d 218; quoting *Black's Law Dictionary* 132 (Bryan A. Garner ed., 7th ed. 1999) (defining avulsion as “[a] forcible detachment or separation. A sudden removal of land caused by change in a river's course or flood.”)); *Siesta Props.*, 122 So. 2d at 223–224 (quoting *In re City of Buffalo*, 99 N.E. 850, 852 (N.Y. App. Div. 4th Dept. 1912)).

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

82. 717 S.W.2d 106 (Tex. App. 1st Dist. 1986).

83. *Id.* at 114–115.

84. *Id.* at 115.

85. See e.g. *Tona-Rama*, 294 So. 2d at 78 (establishing the public's customary right to access Florida's beaches).

86. See *supra* nn. 79–80 and accompanying text (discussing *Siesta Props.*, 122 So. 2d at 223–224 (undertaking an analysis of the difference between avulsion and erosion and its



first Florida case to consider the viability of public beach access after hurricanes destroy the area where the public accesses the beach.<sup>87</sup> *Trepanier* is significant because it expressly signals that the *Tona-Rama* analysis is not complete.<sup>88</sup> The court explained that the Florida Supreme Court will ultimately have to decide whether the public's recreational-access right is migratory or is lost in the wake of hurricane-related damage to Florida's beaches.<sup>89</sup>

#### IV. FACING THE STORM: CONFRONTING THE TAKINGS ISSUE

In *Palm Beach Mobile Homes, Inc. v. Strong*,<sup>90</sup> the Florida Supreme Court explained that the degree of a constitutionally protected property right “must be determined in the light of social and economic conditions which prevail at a given time.”<sup>91</sup> Accordingly, this Section will first explain that a coastal-property owner's title does not include the right to exclude the public from accessing Florida's beaches because the public's right preceded private acquisition of Florida's beaches. Second, this Section will argue that the migration of a customary right of public beach access is not a compensable taking. Third, this Section will consider the ever-changing nature of beaches' boundaries and composition, and it will discuss the impetus behind landward shifts of the public's customary right to access the beach. Finally, this Section concludes that facilitating public beach access by virtue of a migra-

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impact on boundary disputes between private landowners)).

87. See Shannon H. Tan, *Recent Development: Trepanier v. County of Volusia*, 37 Stetson L. Rev. 631, 631, 633 (2008) (discussing public beach access after hurricanes in 1999 and 2004 eroded the beach severely).

88. See *Trepanier*, 965 So. 2d at 293 n. 21 (noting that the Florida Supreme Court will ultimately have to define the scope of *Tona-Rama* and the migration of the public's customary right to access Florida's beaches). “Though the parameters of Florida's customary rights doctrine are unclear, [*Tona-Rama*] does seem to evince a judicial policy favoring public use of privately owned dry sand areas.” S. Brent Spain, *Case Comment, Doctrine of Customary Rights—Customary Public Use of Privately Owned Beach Precludes Activity of Owner Inconsistent with Public Interest.—City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), 2 Fla. St. U. L. Rev. 806, 814 (1974).

89. *Trepanier*, 965 So. 2d at 293 n. 21.

90. 300 So. 2d 881 (Fla. 1974).

91. *Id.* at 884; but see Fla. Const. art. X, § 6(a) (providing that “[n]o private property shall be taken except for a public purpose and with full compensation . . .”).

tory boundary for public access does not implicate Florida's Takings jurisprudence.

The Florida Supreme Court in *Tona-Rama* held that beachfront property requires separate consideration from other property with regard to the elements and consequence of title.<sup>92</sup> The Court explained that the public is vested with an interest and right to the full use of the beach without interference from the owner.<sup>93</sup> Accordingly, where the public's customary use of the beach has been established, private landowners may not exclude the public from accessing the dry-sand area abutting the ocean's water.<sup>94</sup>

#### A. Unbundling the Sticks: Do Beachfront-Property Owners Hold the Right to Exclude?

If a beachfront-property owner's "bundle of sticks"<sup>95</sup> does not include the right to deny customary public beach access, a homeowner cannot argue that he or she has suffered a compensable taking when the public-access boundary is shifted inland.<sup>96</sup> For a

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92. *Tona-Rama*, 294 So. 2d at 77.

93. *Id.*

94. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 454 (Ore. 1993) (citing *Thornton*, 462 P.2d at 593–595).

95. Littoral rights are those that property owners hold when their property abuts a lake, ocean, or sea. *Bd. of Trustees of the Internal Improvement Fund*, 512 So. 2d at 936. Such rights are generally analogous to riparian rights, which are the rights that property owners hold when their property abuts a river or stream. *Id.* Riparian and littoral rights generally include the following element: the right to use the water shared by the public, and the following vested rights: "(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." *Id.* (citing *Hughes v. Wa.*, 389 U.S. 290 (1967); *Brickell v. Trammel*, 82 So. 221, 227 (Fla. 1919) (describing riparian and littoral rights as granting owners rights of navigation, commerce, fishing, and boating)). Similarly, Florida Statutes Section 161.201 provides that beachfront-property owners hold the "rights of ingress, egress, view, boating, bathing, and fishing." Fla. Stat. § 161.201 (2008). Further, the Statute provides that "the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed . . . except such structures required for the prevention of erosion." *Id.* Finally, the statute provides that no uses of the shoreline shall be permitted which are "injurious to the person, business, or property of the upland owner." *Id.*

96. *Trepanier*, 965 So. 2d at 293 (conceding that the existence of a customary right to access the beach defeats a Takings claim). The court explained that if the public could establish a customary right to access the beach, and if this right were migratory, then no takings claim would exist. *Id.*; Appellee's Ans. Br. at 2, *Trepanier v. Co. of Volusia*, 965 So. 2d 276 (Fla. 5th Dist. App. 2007) (asserting that beachfront-property owners "cannot

beachfront-property owner to argue that a compensable taking has occurred, he or she must first establish a loss or at least some threat to a protected property right.<sup>97</sup> However, the Florida Supreme Court in *Tona-Rama* established that the public has customarily used Florida's beaches since time immemorial.<sup>98</sup> Accordingly, no compensable loss occurs because the public's customary access preceded coastal ownership.<sup>99</sup>

Further, the property that beachfront owners hold is notably different from inland property.<sup>100</sup> Inland-property boundaries do

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seek redress when the right to exclude others is not part of their property interest”).

97. See *Stevens*, 854 P.2d at 456 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–1029 (1992) (explaining that extending the doctrine of Custom to Oregon's beaches is not a compensable taking because Custom “inhere[s] in the title itself” and the right to exclude the public from the dry sand is not part of coastal owners’ “bundle of rights”)); see also *Anderson*, *supra* n. 12, at 425 (explaining that beachfront-property owners never had the right to exclude the public from the beach). Where beachfront-property owners held no expectation of the right to exclude public beachgoers from the dry-sand abutting the ocean before hurricane-related sand loss, it is unreasonable for beachfront-property owners to expect a right to exclude public beachgoers after hurricane-related sand loss.

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

99. See Appellee's Ans. Br. at 8, *Trepanier v. Co. of Volusia*, 965 So. 2d 276 (Fla. 5th Dist. App. 2007) (stating that beach erosion will cause loss of private ownership regardless if the owner holds title to a lot or to the mean high water line). “If one accepts the benefits of living on the ocean, one must likewise be willing to shoulder the burdens that may arise.” *Id.*; see also Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 *Ocean & Coastal J.* 47, 65 (2005–2006) (stating that “shoreline property owners do not have any reasonable expectation of privacy on the dry sand beach itself because it is flat, open, and readily observable from both the public trust beach and boats on the ocean . . . their perceived lack of privacy is often due to their own choices”). In *United States v. St. Thomas Beach Resorts, Inc.*, the United States District Court for the Virgin Islands explained that the Virgin Islands’ Open Shorelines Act—which recognized the public’s long-standing, customary right to access the beaches—resulted in no compensable taking from beachfront-property owners. 386 F. Supp. 769, 772 (D.V.I. 1974).

100. *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (holding that a riparian owner’s title to land abutting a waterway is “not as full and complete” as title to inland property which has no connection to a waterway); see also *Lucas*, 505 U.S. at 1028–1029 (explaining that a government would be able to assert a permanent easement over a coastal owner’s property based on a pre-existing limitation on the landowner’s title); *Gibson v. U.S.*, 166 U.S. 269, 276 (1897) (holding that riparian ownership is coupled with the “obligation to suffer the consequences . . . of the dominant right of the [g]overnment” in navigable waters); *Sullivan v. Richardson*, 14 So. 692, 709 (Fla. 1894) (explaining that “the heaven, the stars, the light, the air, and the sea are all of them things belonging so much in common to the whole society of mankind that no one person can make himself master of them, nor deprive others of the use of them . . .”); *Anderson*, *supra* n. 12, at 426 (distinguishing cases granting public access across a beach from the establishment of a “right to roam” over inland property); Appellee's Ans. Br. at 3–4, *Trepanier v. Co. of Volusia*, 965 So. 2d 276 (Fla. 5th Dist. App. 2007) (discussing that any property interest in the beach is subject to the public’s right of use).

not generally shift once they are delineated,<sup>101</sup> but beaches are in a constant state of change and continuously shift with daily-tidal fluctuations, sea-level rises, and catastrophic weather events.<sup>102</sup> Compensation schemes currently in place are incompatible with this fluid concept of property because the boundaries assigned to coastal areas are difficult to predict or to rely upon.<sup>103</sup> Thus, it is impracticable to compensate a homeowner for marginal fluctuations in the dry-sand area abutting the sea. At times, the sandy beach will shift inland; however, at other times it will broaden seaward and allow the public to recreate further away from the beachfront owner's property.

#### B. Inland Migration of Public Beach Access: A Governmental Usurpation or a Reasonable Response to Hurricane-Related Sand Loss?

It is essential to consider whether facilitating an inland migration of the public's beach-access rights is a governmental encroachment or merely a natural realignment of littoral boundaries. Whereas other takings claims generally involve government decisionmaking as to the location of a public easement or use, hurricane-induced changes in the beaches' dry-sand composition have no element of government intent or control.<sup>104</sup> Thus, it is not

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101. See Barlow & VonCannon, *supra* n. 66, at 302 (discussing the static nature of inland-property boundaries).

102. See *Owen v. U.S.*, 851 F.2d 1404, 1413 (Fed. Cir. 1998) (explaining that "the sand comprising that shorefront property is in a constant state of flux"); see also Ratliff, *supra* n. 21, at 1013 (explaining that beachfront-property owners must understand that purchasing beachfront property is a high-risk gamble and that the "loss created by [dry-sand loss] should be borne by the gambling landowner, rather than the innocent members of the public who simply want access to the ocean").

103. *Nollan*, 483 U.S. at 852 n. 6 (emphasis removed) (Brennan & Marshall, JJ., dissenting) (explaining that "[u]nlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is not constant"); see also Ratliff, *supra* n. 21, at 1013–1014 (opining that treating the boundaries of public beach access as fixed and definite amounts to creating a legal fiction with no factual basis because the public's use and enjoyment of the beach adapts to changes in the beaches' composition and location).

104. See *Bruce*, 379 S.E.2d at 785 (noting that the forces of nature dictate expansions and contractions in the public's easement over Georgia's beaches); but see generally *Lucas*, 505 U.S. at 1003 (holding that South Carolina's categorical proscription on new beachfront construction amounted to a compensable taking). The *Lucas* Court explained that compensation without inquiring into the public interest is proper where the regulation denies all economically beneficial or productive use of land. *Id.* at 1027. The sole inquiry in determin-

as though local governments are overtly or capriciously moving public-access areas inland.<sup>105</sup> Rather, coastal counties such as Volusia County in *Trepanier* are at the mercy of the elements and must carefully determine how to adapt public beach access to hurricane-related sand loss.<sup>106</sup> A broad scheme of compensation is unfeasible in light of the dynamic fluctuations resulting from daily changes in the tide and seasonal damage resulting from hurricanes and other severe weather events.<sup>107</sup> Accordingly, changes in beaches' width, which are thrust upon coastal govern-

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ing whether the regulatory scheme amounts to a compensable taking is whether the regulation deprives the property of all value and use. *Id.* The Supreme Court held that a categorical proscription on new construction would amount to a complete denial of all economically-viable uses of the property which would make it a compensable taking. *Id.* at 1015. The Court noted that a state may resist compensation in these situations where it can demonstrate that the proscribed use was never part of the owner's title. *Id.* at 1027. However, it is important to consider that *Lucas* was limited to regulatory proscription denying an owner all economically viable use of his property. *Id.* at 1015 (explaining that there is no provision for any consideration of the public interest where a regulatory taking effects a physical invasion onto privately held property). It offered no analysis as to whether beachfront-property owners' bundle of rights includes the right to insulate their property from public beach access. Similarly, the Supreme Court's physical-invasion takings analysis is distinguishable from the issue of public beach access because coastal owners have not been definitively vested with the right to exclude. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (holding that a taking existed where a one and a half cubic foot cable box was attached to an apartment building); cf. *supra* n. 95 (describing the littoral rights of a beachfront-property owner). John D. Echeverria, head of Georgetown Law Center's Environmental Law and Policy Institute, has argued that the U.S. Supreme Court should re-evaluate its categorical rule in the wake of Hurricane Katrina. Professor Echeverria further contends that if *Lucas* had been argued *post*-Katrina, the Court would have decided the case differently. John Gibeaut, *Up Against the Seawall*, 92 ABA J. 45, 50 (July 2006). Perhaps the Court would have been less reluctant to consider the public welfare impact of its categorical rule.

105. "The extent of the easement depends on the behavior of the ocean, not the caprice of government." Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast* 34 Ecol. L.Q. 533, 568 (citing *Severance v. Patterson*, 485 F. Supp. 2d 793, 803–804 (S.D. Tex. 2007)).

106. See *Trepanier*, 965 So. 2d at 279 (discussing Volusia County's annual realignment of public driving and parking lanes to counteract the effects of hurricane-related beach loss).

107. Further, it is difficult to assign a cost to an area where the particular use is in a continual state of change. At times, the area will be exclusively occupied by the landowner. Whereas, at other times public beachgoers may be swimming, sunbathing, or walking. "While the familiar market in land sales readily accommodates bargaining to determine which user should possess a particular parcel, no comparably well-developed market exists to facilitate bargaining over which of several conflicting uses of neighboring parcels should prevail." David W. Barnes & Lynn A. Stout, *Cases and Materials on Law and Economics* 21 (Thomson West 1992).

ment entities by natural forces, should not carry with them the burden of compensation.

In summary, as the Florida Supreme Court held in *Tona-Rama*, the public's customary right to access the beach preceded the beachfront owners' acquisition of their parcels.<sup>108</sup> No compensable taking occurs where the public enjoys a pre-existing right to access Florida's beaches. Thus, inland shifts in public beach access following hurricane-related sand loss do not trigger the Fifth Amendment's compensation requirement because customary public access is not compensable.<sup>109</sup> Because the Takings Clause is not implicated, the following analysis will discuss the foundation upon which a migratory concept of public beach access can be developed, and it will demonstrate how alternative approaches to deal with public beach access following hurricane-related sand loss fail to provide adequate protection for the public's right to access Florida's beaches.

*V. AFTER THE STORM HAS PASSED: DEVELOPING A  
MIGRATORY CONCEPT OF PUBLIC ACCESS INTO  
A PRACTICABLE MEANS OF PRESERVING  
PUBLIC BEACH ACCESS*

In response to the significant damage resulting from hurricane-related beach loss, the Florida Supreme Court should adopt a migratory concept of customary public beach access to ensure that the public continues to enjoy the beach after changes in the beaches' dry-sand composition.<sup>110</sup> As the court in *Trepanier* noted,

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108. See 294 So. 2d at 79 (holding that the public's customary use of the beach for recreation has existed since time immemorial); see also *supra* pt. III(A) (discussing the Florida Supreme Court's holding in *Tona-Rama, Inc.*); *Stevens*, 854 P.2d at 454–455 (describing the Oregon Supreme Court's holding in *Thornton v. Hay* establishing a customary right of public access did not implicate the Takings Clause); cf. *U.S. v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769, 772 (D.V.I. 1974) (noting that whatever property rights that beachfront-property owners may hold, they are subordinate to “the paramount right of the public to use the said beach as established by firmly, well settled, long standing custom”).

109. *Trepanier*, 965 So. 2d at 293 (explaining that if the county had prevailed on the Custom argument that it would defeat the landowners' Takings claim).

110. See *infra* Apps. 3–4 (illustrating legal responses to hurricane-related beach loss); see also *Bruce*, 379 S.E.2d at 785 (citing *Rolleston v. St.*, 266 S.E.2d 189 (Ga. 1980) (explaining that the public's easement to Georgia's beaches is subject to expansion and contraction by the forces of nature)); *Bruce & Ely*, *supra* n. 29, at § 7.3 (explaining that certain

it is presently unclear whether the public's customary right of access may shift inland after hurricane-related sand loss.<sup>111</sup> If the Customary Rights Doctrine is an archaic, static concept that does not concurrently shift with sudden changes in the beaches' composition, then the area associated with public access could be relegated to the submerged lands below the high tide and effectively lost until the beach naturally accretes or is restored through a re-nourishment program.<sup>112</sup> Conversely, a migratory concept of public beach access would allow the public to enjoy the dry-sand area that survives in the wake of hurricane-related beach loss. The public's right to access Florida's beaches should not be a frozen concept. Rather, the public's right should expand and contract with the forces of nature.<sup>113</sup>

A migratory-public easement has already been recognized in the context of public access to lakefront property in Florida.<sup>114</sup> In *Feig v. Graves*,<sup>115</sup> Florida's Second District Court of Appeal explained that the width and level of the public's easement over the lakeshore should vary according to the lake's tidal movements.<sup>116</sup> Public access to privately owned beachfront should be treated likewise.<sup>117</sup>

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easements and public uses of private property cannot be located with precision).

111. 965 So. 2d at 293 n. 21.

112. *Concerned Citizens*, 404 S.E.2d at 683 (noting that the "forces of nature" should be factored into the determination of where the public's right of access lies). "To require that there be no change, or at most only very slight change, in . . . an area highly vulnerable to the forces of wind, shifting sand, ocean tide, flooding from ocean or sound, etc., would effectively bar [public access] in many locales of the coastal area of our state." *Id.*

113. *Bruce*, 379 S.E.2d at 785. In the same way that the boundary may have been shifted inland to accommodate hurricane-related sand loss, the boundary may then be shifted seaward once the beach has been re-nourished or naturally accretes. *Id.*

114. *Feig v. Graves*, 100 So. 2d 192 (Fla. 2d Dist. App. 1958).

115. *Id.*

116. *Id.* at 196 (explaining that variations in the lake's shore would result in additions or limitations on the abutting owner's fee but would be subject to an easement in favor of the public).

117. *See Hyland v. Fonda*, 129 A.2d 899, 905 (N.J. Super. App. Div. 1957) (holding that it is reasonable for an easement to vary in location and dimension for the convenience and necessity of the easement holder).

### A. Texas' Beaches and the Rolling Right of Public Beach Access

Texas has already established a framework upon which Florida could develop a migratory concept of public beach access. In *Severance v. Patterson*,<sup>118</sup> the United States District Court for the Southern District of Texas explained that Texas' common law recognizes a "rolling beach easement" over Texas' beaches.<sup>119</sup> The court explained that the public's right of access preceded a beachfront owner's purchase.<sup>120</sup> Stated differently, beachfront-property owners purchased their property subject to the background principles of Texas' law, namely that of the rolling public easement.<sup>121</sup> Thus, no compensation is required where the use was not previously part of the owner's estate.<sup>122</sup> The court concluded that the public's easement expands and contracts with the dynamic, natural boundaries of Texas' beaches.<sup>123</sup>

Similarly, in *Matcha v. Mattox*,<sup>124</sup> Texas' Third District Court of Appeals explained that the concept of customary beach access assumes that the area assigned to public access moves with the beaches' changes.<sup>125</sup> The court rejected any notion that the public's customary access should be confined to a set of static lines that do not fluctuate with the beaches' landward and seaward fluctuations.<sup>126</sup>

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118. 485 F. Supp. 2d 793 (2007).

119. *Id.* at 804 (explaining that the Federal Constitution does not guarantee or require static concepts of real property (citing *Ohio v. Ky.*, 444 U.S. 335, 337 (1980))).

120. *Id.* at 803 (explaining that the public's interest is superior to that of the private owner and effectively defeats the owner's takings claim).

121. *Id.* at 804; *see supra* pt. IV (explaining that coastal ownership is subject to a dominant, pre-existing right of the public to access the beach).

122. *Severance*, 485 F. Supp. 2d at 804. "This natural movement does not work a constitutional wrong." *Id.*

123. *Id.* at 796.

124. 711 S.W.2d 95 (Tex. App. 3d Dist. 1986).

125. *Id.* at 100 (noting that "[t]he 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").

126. *Id.* (explaining that custom and migratory public beach access is compatible because the beach itself and the public's use of it have assuredly fluctuated landward and seaward over time). The court explained that the law cannot freeze public beach access "at one place any more than the law can freeze the beach itself. Custom is, after all, a reflection in law of a long-standing public practice, and therefore the legal result should mirror the factual reality as closely as possible." *Id.*



In *Feinman v. Texas*,<sup>127</sup> Texas' First District Court of Appeals adopted a rolling-easement approach in the context of public beach access following Hurricane Alicia.<sup>128</sup> The court explained that shifting the public-access area inland was "absolutely necessary" to preserve public access after the storm.<sup>129</sup> The court dismissed the owners' argument that public-access boundaries are static.<sup>130</sup> Rather, the court opined that the public-access line is dynamic and moves inland after a hurricane.<sup>131</sup>

B. A Migratory Right of Customary Public Beach Access  
Reflects the Public's Expectation of Continued  
Use after Hurricane-Related Sand Loss

Given the widely held presumption that the public has a right to enjoy the beach for recreational activities,<sup>132</sup> public beach access is likely to continue even after hurricane-related beach loss. If the public-access easement does not concurrently shift inland to facilitate this adaptation, then coastal municipalities may confront unwarranted public beach access by treating beachgoers as trespassers.<sup>133</sup> When beachgoers traverse the dry-sand area adjacent to the water, there is an expectation of a right to access; no one could reasonably anticipate being considered a trespasser on such private property.<sup>134</sup> Unfortunately, this would be the result if courts utilize a static concept of customary access to address public beach access after hurricane-related beach loss. A frozen right of public access could translate into the right of coastal-property owners to exclude the public from the only remaining dry sand

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127. 717 S.W.2d 106 (Tex. App. 1st Dist. 1986).

128. *Id.* at 113.

129. *Id.*

130. *Id.* at 114.

131. *Id.*

132. See *Tona-Rama*, 294 So. 2d at 78 (explaining that the public has a right to access the dry-sand area as a "recreational adjunct" to the public's right to access the wet-sand area that is covered by the Public Trust Doctrine).

133. Fla. Stat. § 810.09 (2008) (defining trespassing as the unauthorized and willful entry on the property of another or willfully remaining on the property after being asked to leave).

134. Thompson, *supra* n. 99, at 62–63 (explaining people's behavior often indicates that they do not accept the legitimacy of exclusionary-beachfront ownership) (citing *Concerned Citizens v. Holden Beach Enters.*, 404 S.E.2d 677, 685–686 (N.C. 1991) (describing fishermen and sunbathers who tore down "No Trespassing" signs along the North Carolina shoreline and used them as firewood)).

abutting the water.<sup>135</sup> However, this approach cannot withstand scrutiny under Florida's law, which seems to provide that beachfront-property owners may not unreasonably interfere with the paramount and preexisting right of the public to access Florida's beaches.<sup>136</sup> Accordingly, the Florida Supreme Court should hold expressly that while beachfront-property owners maintain the underlying title to their property, it is subject to a migratory right of public access to the dry-sand area abutting the ocean for recreational purposes.

C. Beachfront-Property Owners May Not Unreasonably  
Interfere with the Public's Customary Right  
to Access Florida's Beaches

Florida law must anticipate and confront a potential response from coastal property owners to a migratory concept of public beach access. Coastal property owners may seek to construct some form of barrier or other impediment to preclude public access to the dry sand abutting the water. However, in *Bonifay v. Dickson*,<sup>137</sup> Florida's First District Court of Appeal addressed the concept of dedication<sup>138</sup> and explained that once the public has acquired an easement over land, property owners may not exercise their rights to interfere unreasonably with the public's easement.<sup>139</sup> Similarly, in *Diamond v. State*,<sup>140</sup> the Hawaii Supreme Court considered whether beachfront-property owners could properly exclude the public from the dry-sand beach by planting and maintaining salt-tolerant plants.<sup>141</sup> The owners argued that the plants formed a natural vegetation line that should be used as a boundary for public beach access.<sup>142</sup> However, the Court rejected

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135. *Matcha*, 711 S.W.2d at 100.

136. *See supra* pt. IV (explaining that coastal ownership may not include the right to exclude the public from the dry sand abutting the water).

137. 459 So. 2d 1089 (Fla. 1st Dist. App. 1987).

138. *See supra* pt. II(C) (introducing the concept of dedication as a means of facilitating public beach access).

139. *Bonifay*, 459 So. 2d at 1095 (internal citations omitted); *accord Sundell v. New London*, 409 A.2d 1315, 1318 (N.H. 1979) (noting the ability of beachfront-property owners to construct boat houses and wharves to the extent that they do not unreasonably interfere with the rights common to the public).

140. 145 P.3d 704 (Haw. 2006).

141. *Id.* at 718.

142. *Id.* at 717-718.

this artificial attempt to delineate the boundaries of public beach access, adopting the plaintiff's argument that the owners' planting efforts "[do] not represent the highest wash of the waves, and therefore does not [accurately] represent the [natural] shoreline."<sup>143</sup> Accordingly, in the event that the Florida Supreme Court interprets the Customary Rights Doctrine to provide a migratory right of public beach access, the Court should also caution beachfront-property owners against unreasonably interfering with the public's right by erecting structural or vegetative barriers.<sup>144</sup>

In summary, the public's customary right to access Florida's beaches should not be viewed as a frozen concept that does not account for changes in the beaches' dry-sand composition and tidal variations. Hurricanes and other natural occurrences continually reshape Florida's beaches and their boundaries. "Archaic judicial responses are not an answer to a modern social problem."<sup>145</sup> Rather, adopting a flexible concept of customary access is necessary to ensure that the public is able to enjoy the right of recreational access to Florida's beaches.<sup>146</sup>

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143. *Id.* at 718 (emphasis omitted).

144. However, it would be unreasonable for the Florida Supreme Court to adopt an unbridled migratory concept with no restriction or limitation. Accordingly, it is necessary to consider limitations on the public's migratory right. If no dune system, vegetation line, or other natural delineation sustains the hurricane's impact, the public's customary right of public access should not be permitted to encroach on existing structures or fixtures of a beachfront owner's property. Florida Statutes Section 810.09 defines a parcel's unenclosed curtilage as "the unenclosed land or grounds, and any outbuildings, that are directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling." The migratory standard for public beach access could be considered in accordance with Florida's definition of "unenclosed curtilage" to maintain a sense of ownership and privacy for beachfront homeowners.

145. *Matthews*, 471 A.2d at 365. "Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights . . . depend[s] on the . . . [l]ocation of the dry sand area in relation to the foreshore." *Id.*; see also *Borough of Neptune City*, 294 A.2d at 54 (explaining that "ancient prerogatives of navigation and fishing" should not preclude the principles of public beach access from being "molded and extended to meet changing conditions and needs of the public").

146. See Appellee's Ans. Br. at 17–19, *Trepanier v. Co. of Volusia*, 965 So. 2d 276 (Fla. 5th Dist. App. 2007). "The unavailability of dry sand would eliminate the right of recreational use of the ocean." *Id.* at 19. (citing *Matthews*, 471 A.2d at 365 (explaining that the lack of publicly accessible dry-sand beaches "would seriously curtail and in many situations eliminate the right to the recreational use of the ocean"))).

*VI. RELIEF EFFORT: ECONOMIC ARGUMENTS FOR  
A MIGRATORY CONCEPT OF CUSTOMARY  
PUBLIC ACCESS*

Florida's tourism industry is largely reliant on revenue generated from beach-related activities.<sup>147</sup> If a frozen concept of public beach access is adopted, entire regions of Florida's beaches may no longer be accessible to out-of-town tourists and Florida residents alike. This devastating impact on beach-related tourism could have crippling effects on the State—jobs may be lost, tax revenues may plummet, and resources diverted to beach re-nourishment projects would be rendered futile. However, adopting a flexible, migratory concept of public beach access would ensure that the public is able to enjoy the beach and contribute to Florida's economy as well as maximize the utility of resources devoted to restoring Florida's shoreline. Moreover, a migratory concept of public beach access would serve a gap-filling purpose in the interim while beach-restoration efforts are pursued.<sup>148</sup> This Section will discuss the economic necessity of a migratory concept of public beach access and will explain that the financial burden placed on the public for beach-restoration projects should be coupled with a flexible concept of customary public beach access.

A. Allocating a Scarce and Invaluable Resource:  
Florida's Receding Beaches

Florida attracts hundreds of thousands of beachgoers each year who expect to access the beach without holding title to any beachfront property.<sup>149</sup> One of the problems associated with addressing Florida's perspective on public beach access and confronting the Takings issue is estimating the costs and benefits of scarce environmental resources such as Florida's beaches.<sup>150</sup>

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147. Catanese, *supra* n. 73.

148. Ideally, beach-restoration efforts and natural accretion will facilitate a long-term solution to public beach access. However, provisions must be made for the period of time between identifying a critically eroded area, engineering and planning the restoration project, allocating sufficient financial resources, and completing the project.

149. Catanese, *supra* n. 73 (noting that tourists and residents cherish the opportunity to access Florida's beaches for leisure activities).

150. See Barry C. Field & Martha K. Field, *Environmental Economics: An Introduction* 16 (3d. ed., McGraw-Hill 2002) (describing the difficulty associated with placing a value on

While there are approximately 825 miles of tidal shoreline in Florida,<sup>151</sup> Florida's Bureau of Beaches and Coastal Systems research indicates that 396.4 miles of Florida's beaches are critically eroded.<sup>152</sup> The Bureau labels an area as critically eroded when a segment of the shoreline has experienced damage which threatens recreational activity, wildlife habitat integrity, upland development, or other important cultural resources.<sup>153</sup>

#### B. Beach Re-Nourishment Efforts: Restoring Florida's Beaches to Facilitate Public Beach Access

It is inequitable to allow beach-restoration projects to proceed while failing to take necessary steps to ensure the public has a right to access the beach.<sup>154</sup> The U.S. Geological Survey states that re-nourishment projects have an average cost of \$1 million per mile and are generally sustainable for no more than four years due to beach loss.<sup>155</sup> Failing to shift the customary-access boundary in conjunction with these efforts would confer an enormous benefit on privately owned land at the expense of public resources and funding.

In Florida Statutes Section 161.141, the Florida Legislature declared the State's policy to be that any dry-sand additions to property upland from the MHW line become property of the inland property owner and not the State.<sup>156</sup> Although the newly restored property becomes property of the inland owner, the property is subject to a "public easement for traditional uses of the

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a natural resource). For example, the authors describe a fictional island in the Florida Keys known for its pristine beauty and vast wildlife. *Id.* at 204–205. The authors submit that a price may be placed on the island if developed, but it is impossible to ascertain the value of the island if left in its natural state for all to enjoy. *Id.*

151. Catanese, *supra* n. 73 (describing Florida's coastline).

152. Bureau of Beaches and Coastal Sys., *supra* n. 1, at 2–3 (introducing the cumulative impact of hurricanes on Florida's critically eroded beaches as of 2008).

153. *Id.* at 4.

154. *See generally* Fla. Dept. Environ. Prot. Bureau of Beaches and Coastal Sys., 2004 Hurricane Recovery Plan for Florida's Beach and Dune System, [http://bcs.dep.state.fl.us/reports/2004\\_hrp.pdf](http://bcs.dep.state.fl.us/reports/2004_hrp.pdf) (Nov. 30, 2004) (describing the Agency resources required to restore Florida's beaches).

155. U.S. Geological Survey, Coastal & Marine Geology Program, *Fact Sheet—Limited Sand Resources for Eroding Beaches*, <http://coastal.er.usgs.gov/wfla/factsheet/> (last updated Mar. 24, 2004).

156. Fla. Stat. § 161.141 (2008).

[state].”<sup>157</sup> This provision appears to sustain public beach access in areas traditionally associated with public access and contemplates uses “consistent with [those] that would have been allowed prior to the need for the restoration project.”<sup>158</sup> In summary, this measure ensures private ownership of acreage resulting from beach restoration projects, subject to a public easement for activities similarly conducted prior to the beach’s destruction.

Florida’s share of the expense associated with 2004 beach re-nourishment was roughly \$70 million.<sup>159</sup> Re-nourishment projects generally involve local governments matching state funds.<sup>160</sup> Thus, in the end, the 2004 beach re-nourishment effort will cost about \$140 million when participating local governments match the \$70 million of state funds. “In 2005, the U.S. Army Corps of Engineers pumped \$156 million [worth] of sand onto Florida beaches to replace what was washed away by rising sea levels and more intense storms.”<sup>161</sup> This was 20% more than the accumulated spending of the seven previous years.<sup>162</sup>

### C. Beach-Related Tourism: Florida’s Economic Lifeblood

The preservation and restoration of public beach access incentivizes economic development of Florida’s coastal areas.<sup>163</sup> Sales tax revenues, parking fees, fines, and tourism dollars are all generated from recreational public beach access to Florida’s beaches.<sup>164</sup> For example, beach-related tourism directly generated \$21.9 billion in 2000.<sup>165</sup> This included \$700 million in sales tax revenue and provided 442,000 jobs.<sup>166</sup> Nearly one-third of non-

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157. *Id.*

158. *Id.*

159. Fla. Dept. Environ. Prot. Bureau of Beaches and Coastal Sys., *supra* n. 154, at 3.

160. Catanese, *supra* n. 73.

161. Surfrider Foundation, *State of the Beach Report*, [http://www.surfrider.org/stateofthebeach/05-sr/state\\_summary.asp?zone=SE&state=fl](http://www.surfrider.org/stateofthebeach/05-sr/state_summary.asp?zone=SE&state=fl) (accessed July 2, 2009).

162. *Id.*

163. *Cf.* Mary Lowndes Bryan, *Which Way to the Beach? Public Access to Beaches for Recreational Use*, 29 S.C. L. Rev. 627, 627 (1978–1979) (arguing that the public has an economic stake and social interest in South Carolina’s tidelands).

164. Catanese, *supra* n. 73; *Duval v. Thomas*, 114 So. 2d 791, 795 (Fla. 1959) (expressing the “judicial knowledge of the importance of ‘tourism’ to our state”).

165. Catanese, *supra* n. 73 (noting that “[b]eaches contribute to expanding federal, state, and local tax bases; increase sales, income, and employment opportunities from resident and visitor spending; and enhance property values”).

166. *Id.*

resident tourists visited Florida's beaches in 2003.<sup>167</sup> Florida ranks behind only California with regard to the size of its tourism revenues.<sup>168</sup> Further, more tourists visit Miami Beach each year than Yellowstone, the Grand Canyon, and Yosemite combined.<sup>169</sup> Florida's official tourism-marketing initiative spent \$475,000 in 2005 as part of its hurricane-impact grant program to encourage Florida tourism and reassure the public that Florida's beaches were again open for business.<sup>170</sup> Thus, sustaining public beach access through a migratory right of customary access is essential to the economic viability of Florida and its tourism industry in the interim between hurricane-related sand loss and beach-restoration efforts.

Freezing public-access boundaries along Florida's beaches would cripple the State's economy and would be incompatible with the State's beach-restoration efforts aimed at facilitating public beach access. The economic benefits of public beach access and the financial undertaking associated with beach restoration militate in favor of crafting a flexible means to access Florida's beaches. Therefore, a migratory concept of public beach access is necessary to protect Florida's economic and financial interests in its beaches.

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167. *Id.*

168. Cyber Diver News Network, *Tourism Takes a Dive in Hurricane-Ravaged Florida*, <http://www.cdninfo.com/travel/t040924/t040924.html> (Sept. 25, 2004) (comparing the economic downturn resulting from the 2004 hurricane season to the 20% drop in Florida tourism following the September 11, 2001 terrorist attacks); *but see* Susan A. MacManus, Thomas A. Watson & Andrew F. Quecan, *The Economics and Politics of Financing Florida's Many Governments* in *Government and Politics in Florida* 294, 299 (J. Edwin Benton ed., 3d ed., U. Press of Fla. 2008) (describing the resilience of Florida's tourism industry in the aftermath of the September 11, 2001 terrorist attacks and the 2004 and 2005 hurricane seasons). For a narrower perspective, consider Lee County, where Hurricane Charley destroyed an average of sixteen feet of the county's beaches, resulting in a 24% decrease in annual tourism and fourteen million dollars of lost tourism dollars in the month immediately following Hurricane Charley. Robert Neal, *Impacts of Hurricane Charley on the Southwest Florida Coastline Focusing on Lee County* 2, 10, <http://www.fsbpa.com/05Proceedings/01-Robert%20Neal.pdf> (Feb. 2005) (explaining the benefits that a sandy beach provides to a coastal county).

169. Catanese, *supra* n. 73.

170. Visit Florida, Hurricane Impact Grants, *Funding Empowers Destinations to Market-Tourism Product* (May 18, 2005) (copy on file with Author).

*VII. CONCLUSION*

Hurricanes and other severe weather events will continue to impact Florida's cherished coast. Static concepts of real property boundaries offer inadequate protection for public beach access in the wake of hurricane-related sand loss. Public beachgoers should not be forced to surrender their right to access Florida's beaches after hurricanes and other severe weather events suddenly reduce the area of dry sand along Florida's shoreline. Rather, Florida's approach to public beach access must be flexible and open to the inevitability of hurricanes striking its coast and damaging the dry sand that has forever been associated with public beach access. Adopting a migratory concept of customary public beach access will ensure that the public's right is not lost in the wake of hurricanes looming on the horizon.