No. 09-0387

IN THE SUPREME COURT OF THE STATE OF TEXAS

CAROL SEVERANCE,

Plaintiff-Appellant,

v.

JERRY PATTERSON, Commissioner of the Texas General Land Office;
GREG ABBOTT, Attorney General for the State of Texas; and
KIRK SISTRUNK, District Attorney for the County of Galveston, Texas,

Defendants-Appellees.

On Certified Questions from the United States
Court of Appeal for the Fifth Circuit

PLAINTIFF-APPELLANT'S BRIEF ON THE MERITS

ORAL ARGUMENT REQUESTED

J. DAVID BREEMER
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Plaintiff-Appellant
Carol Severance

IDENTITY OF PARTIES AND COUNSEL

Plaintiff-Appellant:

Carol Severance

Defendants-Appellees:

JERRY PATTERSON, Commissioner of the Texas General Land Office; GREG ABBOTT, Attorney General for the State of Texas; and KIRK SISTRUNK, District Attorney for the County of Galveston, Texas

Attorney for Plaintiff-Appellant:

J. DAVID BREEMER
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorney for Defendants-Appellees:

DANIEL L. GEYSER, Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
Telephone: (512) 936-1897
Facsimile: (512) 474-2697

BARRY C. WILLEY
Attorney-in-Charge
Galveston County Legal Department
4127 Shearn Moody Plaza
123 25th Street
Galveston, TX 77550
Telephone: (409) 770-5562
Facsimile: (409) 770-5560

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

State Statutes

Page

Miscellaneous

Page

ISSUES PRESENTED

1. Does Texas recognize a "rolling" public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication, or customary rights in the property so occupied?

2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the Open Beaches Act (OBA)?

3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

INTRODUCTION

This case comes to this Court upon the Fifth Circuit's certification of questions pertaining to the nature and effect of the Texas OBA. The core dispute is whether State Officials (Officials) may enforce the OBA so as to turn private property into a public beach when (1) natural events—like Hurricane Ike—destroy beach vegetation seaward of the private land, leaving plants in existence only further inland, (2) without proving that the public ever used or acquired access on the private area under common law; *i.e.*, by

prescription, dedication, or customary law, and (3) without compensation. This OBA policy is called a "rolling easement."

Under the rolling easement, the Officials claim they need only prove the elements of a common law easement along a specific ribbon of shore once in time, or perhaps never,[1] to assert a public easement to the vegetation line, however far inland it goes, without further proof of a common law easement. The Fifth Circuit has asked this Court whether this is an accurate expression of state law and, if so, whether it is a common law doctrine or construction of the OBA. The Fifth Circuit has also asked whether state law compensates property owners subject to the rolling easement and its effects. These effects include denying the property owners' right to exclude strangers from her land, denying her the right to repair or rebuild a beach home damaged by storm, and potential loss of windstorm insurance necessary to secure mortgages. *See* Vernon's Texas Statutes and Codes Annotated, Nat. Res. Code §§ 61.013; 61.014(b); 61.018, 61.0181 (hereinafter Tex. Nat. Res. Code).[2] Most dramatically, State Officials claim the rolling easement gives them the right to remove any preexisting, lawfully built beach home when the rolling easement encroaches on the land on which the structure sits. Appendix at 00106-10 (letters to Ms. Severance).

---

[1] The Bolivar Peninsula is an example. To counsel's knowledge, State Officials have never proven that the public has acquired a common law easement on the private dry sand areas at Crystal Beach or adjacent areas. And yet, they still enforce public access (and restrictions on private use) on all private Bolivar land seaward of the vegetation line because of Hurricane Ike or for other reasons.

[2] Unless otherwise noted, all cites to Natural Resources Code § 61.001, *et. seq.*—the Open Beaches Act—refer to the current version of the statute. When former versions of the statute are referenced, the year of enactment will be identified in the cite.

This case is not about whether public beach access is important or should be protected. It is about the means used to achieve that end. The "rolling easement" concept may provide State Officials with a convenient way to acquire public beaches in an era of eroding coastlines without the expense and burden of proving easements under the common law. But expediency has never been a substitute for the rule of law. State law does not allow officials to impose public beaches on private land outside established state law understandings—both common and statutory—that require an easement claimant to prove the elements of a common law easement on that land, or pay compensation. Instead, Texas law holds that the owners of fee simple real property on the Gulf coast retain their right of exclusive use and enjoyment until State Officials prove that public rights in an easement have been established under the recognized common law doctrines of prescription, dedication, and customary law.

The rolling easement theory is unwise as well as illegal. As a gaping exception to the common law of public easements, it seriously threatens the stability and viability of private property along the Texas shore. As high erosion moves the vegetation line inland over time, more developed private property—land which has never been considered public—is pressed into public use under the rolling easement. The result is public and private conflict, costly litigation, destruction of investments, loss of tax revenue, and more. Today we are concerned with homes that are supposedly unlawful and subject to uncompensated removal because a storm moved the vegetation. In the future, it may be businesses and coastal industries, like petrochemical plants. This is not an advisable, constitutional, or necessary beach access policy. The public always has, and will continue to retain, rights in beach land between the

low and mean high tide, and to such larger areas where the public can judicially prove those rights. Nothing in this suit changes that. If the State desires additional inland public beach areas, there are many lawful ways to get it, including paying for it. But leveraging the inland movement of vegetation as a short cut to obtaining uncompensated easements over developed, private land is not one of them. This Court should hold that the rolling easement is not common law, and that it violates the Texas Constitution as a construction of the OBA.

STATEMENT OF THE CASE

This case originated with a lawsuit filed by Carol Severance in the federal district court in 2006. Ms. Severance owns several beach homes on West Galveston Island, which she has historically rented as vacation homes to families. *Severance v. Patterson*, No. 07-20409, 2009 WL 1089440, at *2 (5th Cir., Apr. 23, 2009). She purchased the homes in April, 2005. *Id.* There is no recorded public beach access easement on her land, nor has anyone ever obtained a judgment that her properties are impressed with a common law public access easement. *Id.* When purchased, one of Severance's homes was landward of the vegetation line; another was partially seaward.

In late summer of 2005, Hurricane Rita moved the vegetation line wholly landward of Severance's homes. *Id.* In May, 2006, officials with the Texas General Land Office (GLO) conducted a survey verifying that the vegetation line was landward of her homes. Soon after, in June, 2006, a two-year moratorium on OBA enforcement ceased. *Id.* GLO Commissioner Patterson subsequently sent Ms. Severance letters stating that her homes were "on the public beach" because he had determined that the vegetation line was inland of her

homes. Plaintiff's Appendix to the Brief on the Merit (Appendix) at 00106-110. The letters further stated that her homes violated the OBA and were subject to OBA enforcement at any time. *Id.* State Officials offered Ms. Severance $40,000 to off-set the out-of-pocket costs of removing her homes to a new location, but offered nothing to compensate her for the loss of her real property right to exclusive and beneficial use and enjoyment of her land and homes. Plaintiff's Appendix at 00107, 00109, 00111.

Ms. Severance sued in the federal district court, seeking a declaration and injunction holding that the Officials' enforcement policy violated her federal constitutional rights because it took her land for public use without proof of the elements of an easement under prescription, dedication, or customary law, and without compensation. *Severance*, 2009 WL 1089440, at * 2. The district court dismissed the suit. *Id.* But on appeal, the Fifth Circuit held that Severance had stated a viable claim that the OBA rolling easement policy violated her rights under the Fourth Amendment of the United States Constitution, depending on the state law status and effect of the challenged rolling vegetation-line easement. *Id.* at * 8-10. Thus, it certified the aforementioned legal questions on the rolling easement policy to this Court. *Id.* at *10.

HISTORICAL, LEGAL, AND PRACTICAL BACKGROUND

It is important to understand the genesis of the OBA, the source of the rolling easement policy, and its consequences for property owners, to resolve the issues in this case. As the following shows, as an aspect of OBA enforcement, the rolling easement theory arose

relatively recently but, since its inception, it has had a devastating effect on private rights in coastal land and homes.

A. The Origin and Terms of the First OBA

The OBA was enacted soon after this Court's 1958 decision in *Luttes v. State*. In *Luttes*, this Court rejected the State's argument that coastal land grants governed by Spanish civil law were subject to public ownership to the bluff or vegetation line. *Luttes* held that public ownership of the shore did not go so far inland, but extends only to the mean high tide line. 324 S.W.2d 167, 192-93, 198-99 (Tex. 1958) (rejecting dissenting argument that it would "be the better part of wisdom to set the line [of public beach ownership] at the high water mark, the vegetation line"). No one on the *Luttes* Court, including a dissenting justice, mentioned the existence or possibility of a "rolling" public access easement on the dry sand area.

In 1959, the State enacted the first OBA. The original Act states, in pertinent part:

> An Act affirming and protecting the right of the public use of certain state-owned beaches or such larger area extending from the line of mean low tide to the line of vegetation, *in the event* the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of a continuous right in the public.

See Appendix at 001 (emphasis added). In another section, the 1959 Act states that any public access claimed to the vegetation line is subject to "proof of easement." *See* Vernon's Ann. Civ. Stat. art. 5415d § 2(2); Appendix at 002. There is no mention of an easement that migrates upland onto private property without proof of a preexisting right.

B. The Modern OBA and the Origin of a Rolling Easement Policy

1. The Textual Requirements of the Current OBA

Since the 1959 Act, the state legislature has amended the OBA on several occasions. But it has always retained the core of the original language on the scope of beach access to the vegetation line. The current statute specifically states:

> [I]f the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

Id. § 61.011(a). A recently proposed amendment to the Texas Constitution mirrors this language.[3]

---

[3] Because the text of the proposed amendment, which will be voted on by Texas voters in November, 2009, simply repeats the OBA language at issue here to define a public beach, and does not adopt a "rolling easement," the amendment does not alter the issues in this case or the scope of this Court's review. The proposed amendment states in pertinent part:

> SECTION 1. Article I, Texas Constitution, is amended by adding Section 33 to read as follows:
>
> Sec. 33. (a) In this section, "public beach" means a state-owned beach bordering on the seaward shore of the Gulf of Mexico, extending from mean low tide to the landward boundary of state-owned submerged land, and any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico *to which the public has acquired a right of use or easement to or over the area by prescription or dedication or has established and retained a right by virtue of continuous right in the public under Texas common law*.
>
> (b) The public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach. The right granted by this subsection is dedicated as a permanent easement in favor of the public.
>
> (c) The legislature may enact laws to protect the right of the public to access and use a public beach and to protect the public beach easement from interference and encroachments.
>
> (d) This section does not create a private right of enforcement.

Tex. H.R.J. Res. 102, 81st Leg., R.S. (2009) (emphasis added).

Texas common law requires judicial proof of certain facts to establish that the public acquired a right of use or easement under the common law rules identified in the OBA. *Bains v. Parker*, 182 S.W.2d 397, 399 (Tex. 1944) (at common law, "[t]he burden is on the party claiming an easement in another's land to prove all of the facts necessary to establish the easement").

In particular, to obtain an easement over a certain area by prescription, the claimant must prove elements of adverse possession on the area, showing: (1) possession of the land; (2) use or enjoyment of it; (3) an adverse or hostile claim; (4) an exclusive dominion over the area and appropriation of it for public use and benefit; (5) for more than the ten-year statutory period. *Moody v. White*, 593 S.W.2d 372, 377 (Tex. Ct. App.-Corpus Christi 1979); *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923, 937 (Tex. Ct. App.-Houston 1964).

To acquire an easement by dedication, the claimant must prove: (1) the landowner did or clearly intended to dedicate the area in question to public use; (2) the landowner was competent to do so; (3) the public relied on the acts of the landowner and will be served by the dedication; (4) there was an offer and acceptance of the dedication. *Moody*, 593 S.W.2d 378; *Seaway Co.*, 375 S.W.2d at 936.

The doctrine of continuous right refers to the English doctrine of immemorial custom. *See* Appendix at 007 (portion of original OBA referring to customary law). It is not established that English customary law applies at all in this state. *City of Galvaston v. Menard*, 23 Tex. 349, 1859 WL 6290 *39 (1859). But if it does as a general matter, it cannot apply to the half of Texas coastal property governed by Spanish civil law, rather than English

common law. In any event, if and where customary law applies, the claimant of an easement under that law must prove that the alleged custom exists on the subject land, and that it is immemorial, continuous, peaceable, reasonable, certain (as to a class of persons, locality, and scope), compulsory, and consistent. *See Trepanier v. County of Volusia*, 965 So. 2d 276, 286-90 (Fla. Ct. App. 2007); *Bell v. Town of Wells*, 557 A.2d 168, 185 n.8 (Me. 1989); David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 Envtl. L. Rep. 10003, 10004-15 (2000); William Blackstone, 1 Commentaries *43-44.

2. The Mysterious Origin of the "Rolling Easement"

The origin of the rolling easement concept is not entirely clear. By some accounts, it first surfaced in the mid-1960s as a litigation position in an OBA dispute. *See* Mike Ratliff, *Comment, Public Access to Receding Beaches*, 13 Hous. L. Rev. 984, 1010 (1976). But the Attorney General's Office made no mention of the concept in articulating its position on the OBA at a 1972 conference sponsored by the Texas Law Institute, and in fact took a position opposed to a rolling easement, stating: "The enforcing official cannot merely show a barricade or obstruction between the line of mean high tide and the vegetation line but must prove further that the public in fact has acquired an easement to the area in question by reason of dedication, prescription, estoppel and continuous right." *See* Assistant Attorney General Louis Newman, *The State's View of Public Rights to the Beaches*, in The Beaches: Public Rights and Private Use: Proceedings of A Conference, Texas Law Institute of Coastal and Marine Resources (1972) (hereinafter, Newman, *The State's View*, Texas Law Institute

Proceedings), Appendix at 0031-35. In 1975, the rolling easement was still so novel that a law review article at that time could "propose" it as a new "solution" to the difficulties posed by the OBA's demand for proof of prescription, dedication, and customary right. *See* Ratliff, *Public Access to Receding Beaches*, 13 Hous. L. Rev. at 1006.

The first published appellate cases on the OBA did not mention a rolling easement. *See State v. Markle*, 363 S.W.2d 332 (Tex. Civ. App.-Houston 1962); *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923. These cases simply considered public access to the vegetation line in accord with the plain language of the OBA; *i.e.*, treated access in that area as contingent on proof of prescription, dedication, and custom on a defined and static parcel. *Seaway*, 375 S.W.2d. at 930. The third appellate decision followed substantially the same course. *Moody*, 593 S.W.2d at 377.

The rolling easement did not gain real traction until it became clear that the Gulf coast (along with any public easements existing there under common law doctrines like prescription) was rapidly eroding. In 1986, an appellate court overtly discussed and sanctioned the rolling easement in a published judicial decision for the first time. *Feinman v. State*, 717 S.W.2d 106, 1101-11 (Tex. Ct. App.-Houston 1986). But the court's decision in *Feinman* still required the State to *prove the elements of prescription and dedication* on the area claimed for public use, on which no easement had been previously proven, before it could "roll" an easement onto that area. *Id.* A few other appellate decisions have approved the rolling easement as a construction of the OBA. Nevertheless, the rolling easement doctrine has never been subjected to rigorous analysis under the common law. This Court

has never addressed the issue, and the certified questions provide this Court with its first opportunity to do so.

C. The Impact of the Rolling Easement on Beach Property Ownership

While the origin of the rolling easement policy is unclear, its impact on the ownership and use of private property along the Gulf Coast is not. Under the theory, the destruction of plant life seaward of private land, and landward migration of the vegetation line, converts all areas that become seaward of the new line into a public beach protected by the OBA. According to State Officials, this event in turn eviscerates the rights of the fee simple landowner. In particular, when the rolling easement migrates onto privately owned land (whether adjacent to the shore or farther inland), State Officials assert that the owner:

1. Cannot exclude any member of the public from any area of the owners' private property, whether or not the area is developed; Tex Nat. Res. Code § 61.014(b). This is a loss of "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (citations omitted).
2. Has no right to build into the area seaward of the vegetation line. *Id.* § 61.013.
3. Has a limited right to repair a preexisting home that was lawfully built on the subject area. 31 Tex. Admin. Code (TAC) § 15.5(c).
4. Has no right to rebuild a preexisting home destroyed by a storm, even if the home was lawfully built when the vegetation line was seaward of the property, and even if the owner simply wishes to build on the same footprint; *id.*

5. Has no legal right to a functioning, preexisting home; rather, the home is subject to forcible removal as an "encroachment" on the rolling easement area. *Id.* § 61.018(a); § 61.0183(c); *see also* Appendix at 0062; 00106 (letter to Severance).

6. May have windstorm insurance revoked. *Id.* §61.0184(b); Texas Ins. Code § 2210.004 (Vernon 2007).

7. Is subject to stiff financial penalties for maintaining a long-existing home or any other structure after the vegetation line moves landward of the structure; 31 TAC § 15.9.

State officials may or may not choose to enforce the home removal aspect of the policy after a storm, depending on various considerations, but they claim a right to do so at any time. Appendix at 00106.

SUMMARY OF ARGUMENT

Imposition of a rolling easement converts real property that has been held and developed under full fee simple ownership one day into a "public beach" the next, without any evidence that the public ever set foot on or acquired an interest in the property by proof of facts under the common law. *See* Appendix at 00112 (State's position on rolling easement in this case); Mark D. Holmes, *What About My Beach House?: A Look at the Takings Issue As Applied to the Texas Open Beaches Act*, 40 Hous. L. Rev. 119, 135 (2003). While it may be commonly assumed that this doctrine is state law, this is only because State Officials have so persistently made this claim in recent years. But repetition of a fiction does not make it truth. The truth is that neither Texas civil nor common law recognizes the Officials' rolling easement doctrine. Nor can it be found in the text or intent of the OBA. The concept likely

came from the imaginations of the State's lawyers—after passage of the OBA—as a means of imposing public access along eroding Gulf shores to the vegetation line, outside *Luttes*' limitations, and without the difficulty and expense of proving prescriptive, dedicatory, or customary access rights on the subject land. *Compare* Newman, *The State's View*, Texas Law Institute Proceedings; Appendix at 0030-32, *with* Ratliff, 13 Hous. L. Rev. at 1006-10.

The Court cannot and should not change the common law or civil law, or construe the OBA, to allow the rolling easement policy. The rolling easement concept is irreconcilable with this Court's prior decisions setting the line of public beach ownership at the high tide line. Further, permitting a transitory vegetation line to define the boundary of public beach easements is incompatible with the conditions of the Texas Gulf coast. Given the developed nature of some sections of the Texas coast, its high erosion rate, and its exposure to storms, an easement moving inland with the vegetation will continually unsettle vested property rights, resulting in unfairness, economic insecurity, confusion, and a profligate waste of government resources. *See* Appendix at 0046-48, 0050 (enforcement costs); 0083-88. Where will a rolling easement stop? At the Intercoastal Canal? At Canyon Lake? According to State Officials, as long as erosion keeps moving the vegetation inland, all denuded land is a public beach. Such a doctrine is not only dysfunctional, it unconstitutionally strips private property owners of preexisting common law rights inhering in their title, including the traditional rights of fee simple owners to exclude trespassers, and to exclusively use and enjoy their property unless and until some adverse claimant proves the factual elements that establish an easement under common law. Finally, any claim that rolling

easement policy is inherent in the OBA statute fails under the Texas Constitution and United States Constitution. *See Estate of W. T. Waggoner v. Gleghorn*, 378 S.W.2d 47, 50 (Tex. 1964); *Opinion of the Justices*, 649 A.2d 604, 619-11 (N.H. 1994).

There is, in short, no precedential, doctrinal, logical, or constitutional rationale for accepting the rolling easement as law. Holding so does not deprive State Officials of their ability to preserve the public's access to or use of sandy beaches of the Gulf coast. The Officials have many lawful, available tools. On those sections of the coast on which the public has established or can establish a common law access easement, the Officials may protect and enforce it under the OBA. If the Officials believe more land is needed because of erosion or population growth, they may purchase easements or title from adjoining landowners or acquire land by eminent domain. This regime preserves the settled principles of Texas common law, and fairly and constitutionally distributes the burden of providing public beach parks among the public as a whole. The rolling easement doctrine distorts both principles.

I

THE ROLLING EASEMENT THEORY DOES NOT COME FROM THE STATE'S COMMON LAW OF COASTAL PROPERTY OWNERSHIP

Texas law must generally be grounded in common law or positive legislative enactments. *Courand v. Vollmer*, 31 Tex. 397 (1868) ("The common law of England (so far as it is not inconsistent with the constitution or the acts of congress now in force) shall . . . be the rule of decision in this republic, and shall continue in force until altered or repealed

by congress."). As the following shows, the rolling easement is not rooted in any common law rule.

A. The Rolling Easement Has No Basis in Texas Common or Civil Law

To protect the power they now wield along the Texas coast, State Officials will assert that the rolling easement is a traditional principle of Texas law. But if this is true, one would expect to find some evidence of a rolling beach easement in Spanish civil law[4] and English common law. *See Rudder v. Ponder*, 293 S.W.2d 736, 737-38, 741-42 (Tex. 1956) (discussing application of Spanish and English law to Texas shore). But there is none. Indeed, while this Court has recognized that these historic sources of law grant public beach ownership to the mean high tide line, it *has repeatedly rejected* the argument that public rights go to the vegetation line. *Rudder,* 293 S.W.2d at 742-43; *Luttes*, 324 S.W.2d at 192; *John G. & Marie Stella Kenedy v. Dewhurst*, 90 S.W.3d 268, 284-86 (Tex. 2002).

Early Texas decisions contemplating the possibility of unique local rules as to riparian land also fail to approve anything like a migrating public easement above the tide line. *City of Galveston v. Menard*, 23 Tex. at 359-60, 399; *Diversion Lake Club v. Heath*, 86 S.W.2d 441, 443-44 (Tex. 1935). In the 1935 *Diversion Club* case, this Court stated that "[t]he right to fish in public water *does not* [automatically] *carry with it a right to cross or trespass upon privately owned land* in order to reach the water." *Id.* at 445 (emphasis added). Out of the many beach boundary decisions issued by this Court prior to the OBA, most of which exhaustively examine historic beach common law, *one cannot find a single passing reference*

[4] About half of Texas coastal land is subject to Spanish civil law, rather than English common law. *See* William Gardner Winters, Jr., *The Shoreline for Spanish and Mexican Grants in Texas*, 38 Tex. L. Rev. 523, 525 (1960).

to a public easement that rolls with the vegetation line. *See id.*; *see also State v. Balli*, 190 S.W.2d 71 (Tex. 1944); *Rudder*, 293 S.W.2d 736; *De Merritt v. Robison*, 116 S.W. 796 (Tex. 1909).[5] Early Texas law review articles addressing the law of the coastline are similarly devoid of any reference to a migrating beach easement. *See*, *e.g.,* Winters, *The Shoreline for Spanish and Mexican Grants in Texas*, 38 Tex. L. Rev. 532; Kenneth Roberts, *The Luttes Case—Locating the Boundary of the Seashore*, 12 Baylor L. Rev. 141 (1960).[6]

None of the United States Supreme Court's decisions on the English common law of shoreline ownership mentions a migrating easement on the dry sand area. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894). Similarly, none of the other states with shores governed by English common law doctrines recognizes a rolling easement. Rather, these states hold that, under the common law, public beach rights extend only to the mean high tide. *Purdie v. Attorney Gen.*, 732 A.2d 442, 445 (N.H. 1999); *Bell*, 557 A.2d at 173, 179; *Marks v. Whitney*, 491 P.2d 374, 378-84 (Cal. 1971); *Trepanier v. County of Volusia*, 965 So. 2d at 284. Many states have considered and *rejected* the argument that the common law extends public beach rights onto private property above the high tide line, without prescriptive easement-type proof of such rights or payment of compensation, as the rolling easement theory does. *Opinion of the Justices*, 649 A.2d at 619-11; *Purdie*, 732 A.2d at 666-67; *Bell*, 557 A.2d

---

[5] It is no answer to say that early Texas courts did not refer to a rolling easement to the vegetation line because everyone assumed public beach ownership extended to the vegetation line until *Luttes*. Long before *Luttes*, the United States Supreme Court and this Court identified the high tide line as the extent of the public beach, at least for land granted under English common law. *See Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 22, 26 (1935); *Menard*, 23 Tex. 349, 1859 WL 6290 *9, *35.

[6] The authority on Spanish civil law accepted by this Court—*Las Siete Partidas* —fails to identify a rolling easement above the waterline. *See Winters*, 38 Tex. L. Rev. at 528-30 (providing translations of portions of *Las Siete Partidas* pertaining to public rights along the shore).

at 178-79); *Trepanier*, 965 So. 2d at 293 ("[T]he migration of the public's customary use of the beach *is a matter of proof*.") (emphasis added).[7]

In *Seaway*, the first Texas appellate case reviewing the OBA in depth, the Houston Court of Appeals rejected the idea that Texas common law reserves a public access easement on private property above the tideline:

> [The State] seek[s] to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power to cut off convenient access. We know of no such rule of law. *In our extensive research we have found no cases so holding nor have any been cited us.* In some cases the expression is used that the sovereign holds the seashore for use by the members of the public. We think this is true *but this is far from holding that grants by the sovereign of land above the seashore are impressed by implication with a reserved easement in favor of the public to furnish access by land to the shore*.

Seaway, 375 S.W.2d at 929 (emphasis added).

State Officials have never pointed to authority from this Court on Spanish civil law, English common law, or Texas law that identifies a rolling public beach easement to the vegetation line. They cannot do so. There is no such authority because the rolling easement doctrine is a modern fabrication designed to escape this Court's decision in *Luttes* setting the beach boundary at the high tide line, without the burden of proving the common law requirements to establish an easement farther inland. *See, e.g.*, Ratliff, *Public Access to*

[7] The Hawaii Supreme Court has construed the State of Hawaii's unique Native Hawaiian monarchial traditions to grant public ownership of the beaches to the vegetation line. *In re Ashford*, 440 P.2d 76 (Haw. 1968). Since *Luttes* held that Texas' own legal traditions and common law set the boundary at the mean high tide line, not the vegetation line, *In re Ashford* and its progeny are irrelevant to this state's law.

Receding Beaches, 13 Hous. L. Rev. at 00106-10; Newman, *The State's View*, Texas Law Institute Proceedings (identifying proof issue as a problem for enforcing the OBA), Appendix at 0031-32 .

B. Texas Appellate Decisions Do Not Identify Any Common Law Authority for a Rolling Easement

Officials may assert that Texas appellate courts have anchored the rolling easement in common law. This is incorrect. *See* Shannon H. Ratliff & Richard A. Fordyce, *Shoreline Boundaries Part I: Legal Principles*, in CLE International, Texas Coastal Law Conference, (May 19 & 20, 2005) (Houston, Texas) (hereinafter Ratliff, *Shoreline Boundaries*), Appendix at 0036-45. In *Moody*, 593 S.W.2d 372, the Corpus Christi court said in dicta that "[t]he rule has been established that easements may shift from time to time, just as navigable rivers may change course from avulsion," but it cited no authority. *Id*. at 379. In *Feinman*, the Houston court cited *Luttes* as precedent for the rolling easement. 717 S.W.2d at 110. But, as shown above, *Luttes* is silent on public access above the high tide line; to the extent it suggests anything by implication, *Luttes* repudiates such a concept.

1. Coastal and River Shoreline Title Boundary Law Is Inapposite

Unable to find any direct authority for the rolling easement, some appellate decisions analogize to the doctrine of seashore title boundaries. *See Feinman*, 717 S.W.2d at 110; *Matcha v. Maddox on Behalf of the People*, 711 S.W.2d 95 (Tex. Ct. App.-Austin 1986). In so doing, the *Matcha* court stated:

> The most analogous situation involves the transitory line between state and private property on the beachfront. *It is established that the line of mean high*

> *tide marks the boundary between private beachfront property and the state's submerged property. Furthermore, this boundary line may move landward or seaward as the beach moves*, and the *property lines move accordingly*. *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71 (1944), *City of Corpus Christi v. Davis*, 622 S.W.2d 640 (Tex. App. 1981, *writ ref'd n.r.e.*). [If the sea encroached and the upland owner lost his land, he had no redress; if alluvion formed adjoining the seashore, the latter receded with the tide line, and ... any new alluvion which formed above the tide line should become a part of the contiguous upland estate.]

Matcha, 711 S.W.2d at 99 (emphasis added).

This analogy is far off the mark. *See* Ratliff, *Shoreline Boundaries*, Appendix at 0042-43. The recognition in *Balli* and *Davis* that private title may be lost to the public when the high tide line moves inland says nothing about alleged public rights on dry land landward from the tidal boundary. The law of erosion-based ownership change, which controls along the seashore and some other waters, hinges solely on *the tide line, because it is clearly established as a title boundary by common law*. This Court has never extended the shifting title concept to areas of dry sand. To say that shifting title boundaries linked to shifting tides supports shifting easements on dry sand based *on migrating plants* is to compare apples to oranges. There is no comparison. *Smith v. Bruce*, 244 S.E.2d 559, 569 (Ga.1978) (dedicated beach access way can be lost to erosion); *Scureman v. Judge*, 747 A.2d 62, 66-67 (Del. 1999); Ratliff, *Shoreline Boundaries*, Appendix at 0042.

Matcha and Feinman also attempted to analogize the rolling easement to river boundaries. The *Matcha* court stated:

> Our courts have had more experience with riverfront easements, and the rule is well-established that erosion and accretion along a river can move property lines. In *Nonken v. Bexar County*, 221 S.W.2d 370 (Tex. Civ. App.1949, *writ ref'd n.r.e.*), the court upheld a roadway easement over a creek even though the

> roadway had shifted some 35 feet over the years due to rains and washouts along the creek bottom.

Id. at 99-100.

The only thing this adds to the inapposite comparison to tide-based title change, is the cite to *Nonken v. Bexar County*, 221 S.W.2d 370 (Tex. Ct. App. 1949). *Nonken* involved a property owner's claim that a public road bisecting his land and crossing a river at one point (it did not run along the river edge) had been abandoned or not properly established. 212 S.W.2d at 371-72. The *Nonken* court concluded that the road existed as a fact by prescription, *id.* at 372, 374, and upheld the easement even though a small portion had moved over time, based on actual public use and the established nature of the bulk of the easement. *Id.* at 374. Unlike the rolling easement theory, there was no massive shift of an easement from one location to another in *Nonken*. Rather, the easement in *Nonken* was by and large in the exact same place it had always been. *Id.* at 374. Morever, that easement—even the small portion that purportedly shifted—was premised on *actual and proven* public use. *Id*. In contrast, State Officials assert the rolling beach easement applies whether the public has ever stepped on the claimed area or not. *Nonken* does not support this.

Notably, the decision from this Court that comes closest to considering an implied public easement on dry land to and along public water bodies rejects the theory. *Diversion Lake Club*, 86 S.W.2d 447. Similarly, out-of-state cases that actually consider something like a migrating easement along a river reject the idea. *Deltic Farm and Timber Co. v. Bd. of Comm'rs*, 368 So. 2d 1109, 1112 (La. Ct. App. 1979) (rejecting the proposed relocation of a river line public servitude lost to erosion); *Commonwealth v. Beeson*, 30 Va. 821 (1832)

(same); *see also McCammon v. Meredith*, 830 S.W.2d 577, 580 (Tenn. Ct. App. 1991) (easement cannot be relocated).

2. *Mercer* Does Not Support a Moving Easement Impressing Land on Which No Public Use Has Occurred

A few Texas decisions, including perhaps the first decision to accept the Officials' position on a rolling easement, rely heavily on the English case of *Mercer v. Denne*, 2 Ch. 538 (1905). In *Mercer*, an English court considered whether the English doctrine of customary law allowed fishermen to continue drying their nets on shoreland they had long used for that purpose. *Id.* at 539-42. A private property owner claimed there could be no legitimate custom to dry nets on the area in question because it was accreted land, and therefore net drying could not have occurred there from "time immemorial." *Id.* at 540-42. The court rejected this and upheld the fisherman's right to dry their nets on the area, holding either that (1) the accreted land was to be treated, under English law, as having been in existence when accretion and the custom began centuries ago; *id.* at 582; or (2) that the land had in fact accreted completely in times past. *Id.* at 584.

Unlike the rolling easement theory, the easement of use upheld in *Mercer* was based on actual use of the area by the fishermen who claimed it. *Id.* at 541-42. Moreover, in *Mercer*, there was no wholesale shift of the easement's location, as with the rolling easement, because the court held that area claimed by the fishermen never moved as a matter of fact or law. *Id.* at 582, 584. But even if there was a shift, the area newly claimed in *Mercer* had still been subject to actual use for a long period, *id.* at 540-42, *long enough to warrant a prescriptive easement under Texas law*. The rolling beach easement has nothing in common

with this, because it seeks to impose public rights without proof of prior, actual public use. *See* Appendix at 00112 (State Officials's pleadings in this case).

In sum, there is no common law principle in Texas, or elsewhere, allowing a riparian easement that is becoming useless due to erosion to roll onto new areas of private real property because of a shift in the vegetation line. *Diversion Lake Club*, 86 S.W.2d at 443-44; *Seaway*, 375 S.W.2d at 929; *Trepanier*, 965 So. 2d at 293; Henry Philip Farnham, *Law of Waters and Water Rights*, 672 (1904) ("The right of way of the public does not vary or fluctuate with the bed of the river so as to entitle the public, when the highway is completely washed away, to substitute for it a sufficient quantity of the adjacent land of the owner of the fee" without just compensation.).[8]

II

THE OBA DID NOT AND STILL DOES NOT CREATE A ROLLING EASEMENT, AND THE TEXAS AND UNITED STATES CONSTITUTIONS FORBID SUCH A CONSTRUCTION OF THE ACT

A. The Plain Language of the Original OBA (1959-1978) Does Not Support the Rolling Easement Theory

State officials and courts often fall back on the OBA itself when confronted with the lack of any common law support for the rolling easement doctrine. But this is also a futile effort. Nothing in the OBA enacted in 1959 expressly authorizes a migrating public access easement. *Feinman*, 717 S.W.2d at 110-11 ("The [OBA] does not specifically state that the

[8] Farnham's Treatise was favorably cited by this Court in *Diversion Lake Club*, 86 S.W.2d at 443-44.

public's easement moves with the vegetation line."). The original OBA demands proof of a common law easement by prescription, dedication, or customary right over any private area on which the State seeks to claim and enforce public access. *See* Vernon's Ann. Civ. Stat. art. 5415(d) § 2(2), Appendix at 002; *State v. Markle*, 363 S.W.2d 332 ("The article merely declares it to be the policy of the State that members of the public shall have the free and unrestricted right of ingress and egress . . . to the area between the line of mean low tide and the line of vegetation *in the event* that the right of use or an easement to such area has been acquired by prescription or dedication, or use has been retained by virtue of continuous right in the public."), *id.* at 335; cf. *Seaway*, 375 S.W.2d at 930**.**

In 1972, the Attorney General's Office recognized the limited scope of the OBA; stating:

> [The OBA provision stating] 'in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continuous right in the public' . . . limits the public's right to those areas where it has acquired a right of use or easement by prescription, dedication, estoppel and continuous right.

The same commentary went further in seeming to reject a rolling easement theory:

> It is often difficult to resolve whether such a [common law] right . . . has been established; this necessarily involves a question of fact for a jury determination. The enforcing official *cannot merely show a barricade or obstruction between the line of mean low tide and the vegetation line, but must prove further that the public in fact has acquired an easement to the area in question by reason of dedication, prescription, estoppel and continuous right*. This is a difficult task, requiring much investigation and the expenditure of large sums of money. *One must determine what use the public has made of the beach in the past*, secure

> ancient documents to show the beach has been used by the public for many years and obtain witnesses to testify to the nature of that use. It is an enormous undertaking.

Newman, *The State's View*, Texas Law Institute Proceedings; Appendix at 0031-32; *see also* Richard J. Elliot, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 Baylor L. Rev. 383, 386 (1976) ("The legislature has apparently sought to avoid . . . constitutional problems by qualifying affirmatively-declared public rights with an interesting condition precedent . . . . *[T]he public must have already acquired these identical rights under the common law doctrines of prescription or dedication*.") (emphasis added). An early law review author aptly summarized the limited scope of the original OBA as a codification of common law requiring proof of easements:

> Hence, the literal overall meaning of the policy statement might be paraphrased: if these enumerated [access] rights have already been acquired by the public, independently of this Act, it is the policy of this state that these rights shall be recognized; and a violation of such rights, if they have been so acquired, is offensive to the public policy. *Substantively, then, we have a mere statutory restatement of common law rights.*

Id. (emphasis added).

B. Amendments to the OBA

Recent amendments to the OBA have sometimes been used to support the argument that the legislature has engrafted the rolling easement doctrine into the OBA. Of particular relevance are Sections 61.020 and 61.025. But neither of these sections authorizes the rolling easement doctrine.

1. The Public Use Presumption

Between 1959 and 1991, the OBA proclaimed that, "*subject to proof of easement*," a "showing that the area in question is embraced within the area from mean low tide to the line of vegetation shall be prima facie evidence" of public access rights. *See* Appendix at 002; (1959 Act); 0014 (Sec. 61.020 (2) in 1978 OBA). But 1991 amendments to the OBA *deleted* the "subject to proof of easement" condition precedent. *See* 1991 Tex. Sess. Law Serv. Ch. 295 (SB 1053), § 61.020(2), Appendix at 0019. Thus, the current version of the OBA simply says that, in a judicial proceeding, a showing that land is seaward of the vegetation line is prima facie evidence that "there is imposed on the area a common law right or easement in favor of the public for ingress and egress to the sea." *See* OBA § 61.020(a)(2). The current OBA also states that the landward location of vegetation "is prima facie evidence that: (1) the title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea." *Id.* § 61.020(a)(1).

State Officials and those favoring the rolling easement theory might construe the foregoing OBA section to support the theory. *Arrington v. Texas General Land Office*, 38 S.W.3d 764, 766 (Tex. Ct. App-Houston 2001) (emphasis added) ("It is implied [in the OBA] that the easement moves up or back to each new vegetation line."). Yet, this requires a highly strained and unconstitutional interpretation. Initially, it should be noted that the presumption in Section 61.020 is for use in judicial proceedings; as such, it cannot support the current administratively imposed rolling easement policy. The presumption also is substantively deficient as a justification for the rolling easement policy. After all, in Texas,

a rebuttable presumption does nothing to change the burden of persuasion, and little to change the burden of proof; one subject to the presumption must only come forth with minimal contrary evidence to eviscerate the presumption. *General Motors Corp. v. Saenz on Behalf of Saenz*, 873 S.W.2d 353, 359 (Tex. 1993).

The presumption in Section 61.020—that the location of the vegetation line by itself implies public use sufficient to establish a common law easement—is impotent from the start given the private and developed nature of Texas' coastline. The fact that a parcel is owned in fee simple, has a house or other structure on it, one privately used and lawfully developed, alone rebuts the presumption and thus defeats any rolling easement policy implied from such a presumption. *Combined Am. Ins. Co. v. Blanton*, 353 S.W.2d 847, 849 (Tex. 1962) ("[A] presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts.'") (quoting Jones on Evidence (2d ed.), § 32)).

Applying the presumption in the guise of a rolling easement policy in this context, *i.e*, where the established fact (location of the vegetation line) does not rationally support the presumed fact (public use of previously developed, privately held land), is unconstitutional. *Snell v. State*, 518 S.W.2d 382, 383 (Tex. Ct. Crim. App. 1975) (rational connection needed to sustain presumption).

2. The 1985 Disclosure Provision

Another OBA amendment on which State Officials rely is Section 61.025. That provision requires the sellers of land seaward of the Intercoastal Canal to include an OBA disclosure page in any contract for the sale of property. For two decades after its addition to the OBA in 1985, the Section 61.025 disclosure provision stated, in relevant part: "The extreme seaward boundary of natural vegetation that spreads continuously inland customarily marks the landward boundary of the public easement." But last year, the disclosure section was amended to also state: "If you own a structure located on coastal real property near a Gulf coast beach, it may come to be located on the public beach because of coastal erosion and storm events." Tex. Nat. Res. Code § 61.025(a).

The most sensible reading of the section is that it simply reflects the Officials' current rolling easement policy, which is challenged here, rather than establishing or driving that policy. Consequently, Section 61.025 says nothing about the question of whether the rolling easement is lawful as a construction of the OBA. However, if one stretches the provision to convert into a source of the policy, rather than a reflection of it, perhaps one can argue that it supports a rolling easement. But, as the next section shows, such an interpretation cannot be accepted because it is unconstitutional.

C. The State and Federal Constitutions Forbid a Rolling Easement Interpretation

Where possible, this Court must "construe statutes to avoid constitutional infirmities." *John G. and Marie Stella Kenedy*, 90 S.W.3d at 706 (citations omitted). Despite the modern amendments to the OBA, the Act cannot be construed to allow a rolling easement because its

imposition of access without proof of a common law easement violates both state and federal constitutional law, and renders such a construction "void." *Estate of Waggoner*, 378 S.W.2d at 50; *State v. Black Bros*., 297 S.W. 213, 219 (Tex. 1927) (taking a way of necessity requires just compensation).

This Court has held that the legislature may not constitutionally declare an easement where none exists. *Id.* Other state courts have reached the same conclusion. *Hornsby v. State Dep't of Highways*, 132 So. 2d 871, 873 (La. 1961) ("The legislature is powerless to establish servitudes where none already exist. To do so would constitute a taking . . . of private property, without compensation previously made, and would be violative of the Constitution."). Many state courts *have specifically found that legislative acts increasing public access and use of beachfront private property amounts to an unconstitutional taking. Opinion of the Justices*, 649 A.2d at 609-10 (New Hampshire Supreme Court strikes down as unconstitutional a statute that "recogniz[ed] a public easement in the 'dry sand area' of historically accessible coastal beaches."); *Purdie*, 732 A. 2d. at 447 (Even if a legislature has "the power to change or redefine the [beach access] common law to conform to current standards and public needs, property rights [first] created by the common law may not be taken away legislatively without due process of law.") (citations omitted); *Bell*, 557 A.2d 168 (statute increasing public rights in private beachfront land beyond that allowed by traditional common law is a taking); *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974) ("The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase.").

The same principle applies to imposition of public access on private property near other bodies of water. *See Galt v. State of Montana*, 731 P.2d 912, 912-16 (Mont. 1987) (A stream access statute caused an unconstitutional taking by "giving the public right to a recreational use [on private property] which is not necessary for the public's enjoyment of its [common law] water ownership.")**.**

The United States Supreme Court also has held that governmental acts that impose public access on coastal private property owners cause an unconstitutional taking. *Kaiser Aetna* v. *United States***,** 444 U.S. 164,179-80 (1979) (holding that the government's demand for public access of a private lake was an unconstitutional taking); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-33, 832 n.2 (1987) (rejecting a coastal regulator's claim that it could demand public access on beachfront property as a condition of development not impeding access, free of constitutional liability, even though the access demands arose from a preexisting, statutory program).

In light of the settled law of takings, a construction of the OBA that allows the rolling easement doctrine violates Article I, Section 17 of the Texas Constitution and the Takings Clause of the Fifth Amendment to the United States Constitution because it statutorily imposes public access on private property owned (and often developed) in fee simple, to which the public has no established common law claim. *Black Bros.*, 297 S.W. at 219; *Deltic Farm and Timber Co.*, 368 So. 2d at 1112. For this reason, a rolling easement construction of the OBA is void, and cannot be considered to be part of state law. *Estate of Waggoner*, 378 S.W.2d at 50.

III

THE COURT SHOULD NOT CHANGE THE COMMON LAW TO ADOPT THE ROLLING EASEMENT BECAUSE THERE IS NO VIABLE VEHICLE FOR THIS ALTERATION, AND IT IS INCONSISTENT WITH THE CONDITIONS OF THIS STATE AND THE CONSTITUTION

Because the state and Federal Constitutions prohibit a construction of the OBA that takes private property outside the common law, the Officials may urge this Court to change common law to allow the theory. The Court should decline because there is no precedent in Texas or otherwise, that could constitutionally facilitate changing Texas common law to allow a rolling beach easement, and such an alteration is incompatible with prevailing Texas coastal conditions.

A. The Rolling Easement Doctrine Effectively Overrules *Luttes* and Its Progeny

It must be remembered that, in holding on multiple occasions that the mean high tide line defines the landward extent of public beach rights along the Gulf coast, this Court has directly considered and *rejected* the argument that such rights extend upland to the vegetation line. *Rudder,* 293 S.W.2d at 742-43; *Luttes*, 324 S.W.2d at 192; *John G. & Marie Stella Kenedy*, 90 S.W.3d at 284-86. Since the rolling easement doctrine imposes public rights to the vegetation line simply because that is where the vegetation is, it effectively resuscitates the losing position in *Luttes* and makes an end-run around the majority opinion in *Luttes* and similar cases.

It makes no difference that the rolling easement doctrine does not literally involve a title boundary, as in *Luttes*. For, as currently enforced, the rolling easement functions as a title-shifting device whether or not Officials call it by that name. According to Officials, when the rolling easement migrates onto private land with the vegetation, it eviscerates all meaningful incidents of title ownership. The property owners lose the right to exclude, the right to declare that the land is private, the right to make economically beneficial use of the land, the right to rebuild on the land, and, potentially, the right to repair and to insurance. From the property owner's view, this is the same as simply losing title to the public to the vegetation line. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) ("[T]otal deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."). And such a result is exactly what this Court rejected in *Rudder,* 293 S.W.2d at 742-43; *Luttes*, 324 S.W.2d at 192; *John G. & Marie Stella Kenedy*, 90 S.W.3d at 284-86. Adopting the rolling easement doctrine is tantamount to abrogating *Luttes* and its progeny *sub silentio*.

B. The Oregon Custom Case Is Unpersuasive and Inapplicable to Texas Conditions

State Officials may press the Court to allow the rolling easement by altering state law along the lines of the Oregon Supreme Court's decision in *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969). But *Hay* has no bearing here. In *Hay*, the Oregon Court purported to apply the English doctrine of custom to find that the Oregon public had a right to use the dry sand areas along the entirety of that state's coastline. *Hay* does not have any value here though, for the following reasons:

1. This Court has never adopted the English doctrine of custom and, if it did, it would not apply to the portions of the Texas coast—about half—governed by Spanish law. Neal L. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and The Future*, 46 Baylor L. Rev. 1093, 1108 (1994) ("[B]ecause Spanish or Mexican civil law controlled at the time of the original grant, the public would have no customary right in these lands.").

2. On the Oregon coast subject to the decision in *Hay*, unlike here, "the vegetation line remains relatively fixed." *Hay*, 462 P.2d at 674. This means the area of public use recognized by *Hay* is fixed, too, again unlike the rolling easement at issue here.

3. *Hay* did not properly apply the Blackstonian elements of the doctrine of custom to reach its expansive result. In particular, the *Hay* court failed to apply the requirement that a proposed customary use *first be proven to exist as fact* at trial. William Blackstone, 1 Commentaries at *76. *Hay* also misapplied the criteria for legal recognition of a proven customary use, namely, rules mandating that the custom be "certain"—in the correct sense of occurring in a finite place, practice and persons—and "reasonable," in the sense of not having an excessive impact on private property. *See* 12 (1) Halsbury's Laws of England, ¶ 606 (4th ed. 1998) (summarizing law of custom); David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?* 30 Envtl. L. Rep. at 10012-15 (discussing Blackstonian customary elements as applied and defined by English courts).

4. The *Hay* reasoning does not makes sense for a Texas coastline that is, unlike Oregon's at the time of *Hay* (1969), substantially developed.

5. The Oregon Supreme Court narrowed *Hay* in *McDonald v. Halvorson*, 780 P.2d 714, 724 (Or. 1989), rejecting the proposition that *Hay* authorized access to all dry sand areas regardless of their geographical circumstances and without respect to past public use.

6. "The *Hay* decision . . . has been the subject of . . . considerable criticism." *Trepanier*, 965 So. 2d at 288.

Even if the Court was tempted to make a radical change in the common law akin to that effected by *Hay*, so as to allow the rolling easement, it could not do so consistent with constitutional limitations. *Great S. Life Ins. Co. v. City of Austin*, 243 S.W. 778, 780 (Tex. 1922). To the contrary, given *Luttes*, and the traditional regime requiring proof of easements prior to enforcing them on private land, such a course would constitute an objectively unreasonable and unconstitutional understanding of the common law. *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (A "state cannot be permitted to defeat the constitutional prohibition against taking property . . . by the simple device of asserting retroactively that the property it has taken never existed at all."); *Bell*, 557 A.2d at 179 n.21 (A "state, under the guise of interpreting its common law, cannot sanction a physical invasion of the property of another.").

C. Creation of a Common Law Rolling Easement Is Inconsistent with Texas Conditions

The Gulf Coast of Texas is currently characterized by two features that did not exist in times past, and which counsel against adoption of the rolling easement theory as state law. First, it is subject to a very high erosion rate, much of which is man-made. *See* Erosion Map of Upper Texas Coast, the Texas Shoreline Change Project, Bureau of Economic Geology,

University of Texas, *available at* http://coastal.beg.utexas.edu/website/uppercoast/viewer.htm (last viewed, May 26, 2009); Appendix at 0094; Texas General Land Office, Coastal Erosion Planning and Response Program Act Report to the 81st Legislature (2009), at 5-6; Appendix at 0090-93. [9]

Second, the coast has been intensively developed in modern times. *See* Annual Data on Galveston County Single-Family Building Permits 1980-2008; Brazoria County Single-Family Building Permits, 1980-2008, Real Estate Center, Texas a & M University, *available at* http://recenter.tamu.edu/data/bpc/sfc167a.htm; http://recenter.tamu.edu/data/bpc/sfc039a.htm (last viewed, May 26, 2009), Appendix at 00118-19. The coastal population, and associated development, is projected to increase in coming years. *See* Texas Coastal Management Program Annual Report 2008, Appendix C (County Population), Appendix at 00120.[10]

The rolling easement policy is ill-suited to this situation, as the General Land Office has acknowledged. *See* Press Release, General Land Office, *Patterson: Enforcement of the Open Beaches Act Deferred*, Sept. 18, 2008 ("Patterson said the current laws, rules and policies don't take into consideration such a massive storm on such a highly developed area

---

[9] Ms. Severance requests that the Court take judicial notice of high erosion, and the official documents from the General Land Office recognizing the high erosion rate under Texas Rules of Evidence, Rule 201. The necessary facts and sources have been provided to the Court in the Appendix. *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Texas*, 878 S.W.2d 598, 600 (Tex. 1994) (holding that "[a]court of appeals has the power to take judicial notice for the first time on appeal" and taking judicial notice of an order from a state agency).

[10] Severance also requests judicial notice of increasing population and development permitting on Texas coast. Credible documents from the General Land Office and Texas A&M Real Estate Center showing these facts have been provided in the Appendix. *See id.*; *Graff v. Whittle*, 947 S.W.2d 629, 635 n.25 (Tex. Ct. App.-Texarkana 1997, *writ denied*) (taking judicial notice that Red River County's population is less than 50,000).

of the coast"); Appendix, at 73;[11] Press Release, General Land Office, *Patterson Announces $1.3 Million to Move Homes Off Beach* ("We can no longer apply 1959 solutions to 2006 problems.");[12] Appendix at 56.[13] The problem is that, with high erosion and powerful storms, a rolling easement moves onto vast tracts of private land that the public has never used for travel or any other reason.[14] Appendix at 00112; Holmes, *What About My Beach House?,* 40 Hous. L. Rev. at 135; *see also* Richard L. Watson, Ph. D., Evaluation of Coastal Responses to Hurricane Ike Through Pre-Storm and Post-Storm Aerial Photography, Shore and Beach, Vol. 77, No.2; Appendix at 00101-02 (photos showing deep inland migration of the vegetation line—and potential public beach under the rolling easement theory—after Hurricane Ike).

This scheme would be objectionable when the Gulf coast was characterized by cattle ranches; in today's developed environment, it is totally unacceptable. Allowing the "public beach" to migrate inland based only on the vegetation transforms long-existing and lawful homes into illegal beach encroachments, even though the homes never moved. Although the affected homes are often still usable, local government does not know what it can allow in

---

[11] http://www.glo.state.tx.us/news/docs/2008-Releases/09-18-08-OBA.pdf (last viewed, May, 30, 2009).

[12] http://www.glo.state.tx.us/news/docs/2006-Releases/06-07-06-Open-Beach-Act-Plan.pdf (last viewed, May, 30, 2009).

[13] All General Land Office Press Releases referred to here are included in the Appendix and available and verifiable at: http://www.glo.state.tx.us/news/index.html (last viewed, May 27, 2009).

[14] State officials may assert that because the vegetation line (and thus the alleged rolling easement) can move seaward as well as landward, beachfront landowners stand to gain land as well as lose it under a rolling easement policy. This is a false supposition; since private owners hold fee simple title to the high tide line, the possibility that the vegetation may migrate seaward simply means that the owner is losing less, not gaining. But beyond that, the premise is false. For while it may be true that the vegetation can move seaward in the short run, the generally high and continuous erosion rate moves it progressively landward in the long run. *See* Appendix at 0091, 0094.

terms of repairs and rebuilding, thus delaying and often simply refusing repairs out of caution or confusion. *See*, *e.g.*, *Mikeska v. City of Galveston*, 451 F.3d 376, 379-81 (5th Cir. 2006) (permits allowed for 30 homes seaward of the vegetation line, but denied to 7 others). Homes are subject to uncompensated removal; even those homeowners allowed to make repairs are told their repaired homes can be removed any day, destroying marketability. *See* General Land Office Emergency Rule Notice to Landowners, Sept. 29, 2008[15] ("Being granted the permit authority to repair a house possibly on the public beach is no guarantee that the house will not someday be subject to a removal action."); Appendix, at 75.

Faced with the difficulties of enforcing a rolling easement policy on a highly developed coast, state and local officials find themselves in a bind. *See*, *e.g.,* General Land Office Press Release, Texas General Land Office Post-Ike Update #4, Sept. 18, 2008[16] ("[T]he current laws, rules and policies don't take into consideration such a massive storm on such a highly developed area of the coast."); Appendix, at 73. The result is ad-hoc rule making which is designed to modify the effect of the rolling easement**,** but which makes the law appear arbitrary. Examples of such rule making abound after Hurricane Ike,[17] with perhaps the most

---

[15] http://www.glo.state.tx.us/res_mgmt/coastal/ike/EmergencyRuleNotice-SampleLetter.pdf (last viewed, May 30, 2009).

[16] http://www.glo.state.tx.us/news/docs/2008-Releases/09-18-08-Post-Ike-update-4.pdf (last viewed, May 30, 2009).

[17] After Hurricane Ike moved the vegetation line past developed areas, the General Land Office: (1) Allowed homes seaward of the vegetation line, but damaged less than 50% to be rebuilt, but provided no similar lenience toward businesses, churches and other non-residential structures; *see* Texas Administrative Code § 15.17(g)(2)(A) (Emergency Ike Rules); Appendix at 0070-71; *see* http://www.glo.state.tx.us/res_mgmt/coastal/ ike/Ikeemergencyrules-09-12-08.pdf (last viewed May 40, 2009); (2) "Deferred" or "suspended" removal of post-Ike homes seaward of the vegetation and allowed repairs, General Land Office Press Release, Texas General Land Office Post-Ike Update #4, Sept. 18, 2008, Appendix at 0073; http://www.glo.state.tx.us/news/docs/ 2007-Releases/09-12-07-Sum-Judgement.pdf (last viewed, May 30, 2009); (3) but denied the same treatment to homes in Surfside, Texas, that are seaward of the vegetation line because of different storms. *Compare* General Office Press Release, Emergency Ike Rules § 15.17(g)(2)(C) (excluding homes subject to ongoing enforcement from Emergency Rules); Appendix at 0074; *with* Press Release General Land (continued...)

flagrant example being the Texas legislature's attempt to totally exempt beachfront property on the Bolivar Peninsula, and nowhere else, from OBA regulation after Hurricane Ike. *See* HB. No. 770, Appendix at 0083-88.

If the rolling easement is enshrined, Texas will witness the same scenario: a perpetual appropriation of developed private property, and confusing and unfair enforcement. As Commissioner Patterson himself has observed in a press release: "As long as there is erosion of the Texas coast, this problem will not go away . . . . The Texas coast is eroding—there are homes on the beach now and there'll be more in the future." *See* Press Release, General Land Office, *Patterson Announces $1.3 Million to Move Houses Off Beach*, June 7, 2006,[18] Appendix at 0056-57. Enforcement of a rolling easement policy in this context will require costly and inefficient litigation. *See* General Land Office, *Texas Land Commissioner Jerry Patterson's Plan for Texas Open Beaches*, June, 2006, Appendix at 0054[19] ("[I]t could cost hundreds of thousands of dollars in legal expenses to remove one house from the public

---

[17](...continued)
Office, Surfside Houses on Beach Must Go, Sept. 12, 2007 (recognizing removal enforcement against Surfside homes); Appendix at 000062; (4) Set the vegetation line after Ike at an admittedly fictional, and temporary, location of 4.5 feet above sea level for permitting purposes, Appendix at 0076, and declared that homes straddling this artificial line after Ike would be treated as if wholly landward of the vegetation line; meaning there would no prohibition on construction on such areas. Appendix, at 0079-80. However, this artificial line is temporary, and the only apparent trigger for a return to the normal rules (*i.e.*, use of the real vegetation line) is the whim of the GLO Commissioner. General Land Office, FAQ's About Emergency Repairs and the Temporary 4.5-Foot Elevation Line, at 4-5; Appendix at 77-80; http://www.glo.state.tx.us/ike/press/FAQsIkeEmergrule.pdf (last viewed May 30, 2009). Further, homes straddling the real vegetation line, due to events other than Ike, are not treated as wholly landward of that line (as are homes subject to the 4.5-foot line) and, therefore, they are subject to pre-Ike rules restricting repairs and building. 31 Tex. Admin Code § 15.5(c); *id.* at 15.11 (a).

[18] http://www.glo.state.tx.us/news/docs/2006-Releases/06-07-06-Open-Beach-Act-Plan.pdf (last viewed, May 30, 2009).

[19] http://www.glo.state.tx.us/news/archive/2006/docs/PATTERSONPLAN.pdf (last viewed, May 30, 2009).

beach."); General Land Office *Two-Year [OBA] Moratorium Fact Sheet*[20] (suggesting cost of OBA enforcement is more than cost of purchasing land for public beaches), Appendix at 0050 .

IV

STATE OFFICIALS CURRENTLY OFFER NO COMPENSATION FOR LANDOWNERS SUBJECT TO A ROLLING PUBLIC EASEMENT WITHOUT PROOF OF COMMON LAW RIGHTS, BUT THEY MUST DO SO TO CONSTITUTIONALLY CONTINUE THE POLICY

The final certified question in this case asks:

> To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

A. State Officials Have Never Provided Just Compensation for Takings of Property Caused by the Rolling Easement

To date, State Officials have refused to compensate any private property owner for any loss of property interests resulting from enforcement of the rolling easement on their land. They have only offered to off-set a homeowner's out-of-pocket costs for "voluntarily" removing a beach home seaward of the vegetation line.[21] Appendix at 0054; 0056-59, 00107.

---

[20] http://www.glo.state.tx.us/news/archive/2004/events/pdfs/2-Year_Fact_Sheet-6-7-04.pdf (last viewed, May 30, 2009).

[21] Press Release, Tex. Gen. Land Office, *Patterson Announces $1.3 Million to Move Homes off Beach* (June 7, 2006), http:// www.glo.state.tx.us/news/archive/2006/docs/Press-Release-June7-FINAL-06-07-06.pdf.; Press Release, Tex. Gen. Land Office, *Applications Being Accepted for Grant Money to Move Houses Off Public Beach* (July 21, 2006), http:// www.glo.state.tx.us/news/docs/2006-Releases/07-10-06-reimburse-details.pdf.; Letter from Jerry Patterson, Comm'r, Tex. Gen. Land Office, to Owners of 116 Houses on the Public Beach (July 19, 2006), http:// www.glo.state.tx.us/news/archive/2006/docs/Letter_to_Homeowners-19July2006.pdf. (last viewed, May 19, 2009).

They have refused to provide money to purchase replacement land. Appendix at 00107 ¶ 3. Officials offer no compensation for the appropriation of an owner's real property for use as a "public beach." *Id.* at 00111. They will not compensate property owners for the loss of property value or rental income they suffer when forced to abandon their land to the public. Officials will not compensate property owners when they are deprived of their right to rebuild beach homes damaged by storms. 31 TAC § 15.5(c). Officials will not provide just compensation for denial of new construction on land that has become seaward of the vegetation line.

A recent legislative enactment may give the Land Office Commissioner discretion to purchase property on which there are homes subject to removal because the vegetation line has moved landward. Appendix at 00120. But this is not constitutionally adequate. The legislation does not purport to provide compensation for the denial of repair or construction permits, or for the landowner's right to exclude trespassers in an instance where no structure is subject to removal. More generally, the Officials' constitutional obligation to pay just compensation for taking private property interests through the rolling easement is not a matter of official whim. It is mandatory.

B. The State and Federal Constitutions Require Just Compensation for Denial of Property Rights Caused by the Rolling Easement

State Officials must pay just compensation for all private losses caused by imposing and enforcing a rolling easement on private property, to the vegetation line, without proving

the factual elements of a prescriptive, dedicatory, or customary law easement over the affected land.[22]

1. The Officials Must Compensate for Enforcing a Public Access Way on Previously Unencumbered Private Land

When government authorizes public access on private property, what results is a text book taking requiring just compensation. *See Kaiser Aetna*, 444 U.S. at 180; *Nollan*, 483 U.S. at 831-32 ("A 'permanent physical occupation' has occurred, for purposes of that [just compensation] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."); *Opinion of the Justices*, 313 N.E.2d at 568 ("The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase."). Here, the rolling easement causes a quintessential physical invasion of private property by imposing a public access easement on land not already so encumbered. As such, its enforcement must be accompanied by just compensation.

. Indeed, the right of property owners to exclude strangers is so essential, and subject to such heightened constitutional protection, that constitutional liability for taking that right cannot be avoided even under a purported conflicting background principle of property law. *See Kaiser Aetna*, 444 U.S. at 177-80 (holding that the government's navigational servitude

[22] Sovereign immunity will not shield State Officials from a constitutional claim for just compensation. *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

did not allow it to open a private waterway to the public free from the obligations of the Takings Clause); *see also Nollan*, 483 U.S. at 833 n.2.

Finally, for constitutional purposes, it does not matter if a parcel subject to the rolling easement was previously encumbered in part by a valid common law public easement before it is subject to the rolling easement in its entirety. An expansion of an existing easement over adjacent property—where no common law easement has ever been proven—triggers the obligation to pay compensation for taking the new area. *Owen v. United States*, 851 F.2d 1404, 1415 (Fed. Cir. 1988).

2. Officials Must Compensate for Forced Removal of Lawfully Built, Non-Nuisance Homes and/or Denial of Building Permits for Land Seaward of the Vegetation Line

Under the state and Federal Constitution, land use restrictions that fall short of a physical invasion can still trigger the constitutional duty to pay compensation to the affected property owner. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005). Requiring removal of homes, barring rebuilding of damaged homes, and prohibiting new construction seaward of the vegetation line, *see* 31 TAC § 15.5(c)(1), frustrates the owner's right to make economically beneficial use of land and thus triggers the constitutional duty to compensate. *City of Austin v. Teague,* 570 S.W.2d 389, 393 (Tex. 1978); (when property owners lost all use of their land "the City by indirection acquired the scenic easement at no cost . . . . [and unconstitutionally] singled out plaintiffs to bear all of the cost for the community benefit "); *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 675 (Tex. 2004)

(denial of all economically beneficial use automatically triggers a duty to compensate); *Lucas*, 505 U.S. at 1017-19 (1992) (same).

3. Other Property Restrictions Arising from the Rolling Easement May Trigger a Just Compensation Obligation

The foregoing is not intended as an exhaustive list of the circumstances under which a property owner is entitled to just compensation for the impact of restrictions arising from the rolling easement. Just compensation is required for all land use restrictions that arise from imposition of a public access easement on privately owned land, without proof of the existence of a common law easement, which "constitute an unreasonable interference with the landowner's right to use and enjoy the property." *Taub v. City of Deer Park,* 882 S.W.2d 824, 826 (Tex. 1994). This standard might come into play where the government denies permits for repair and utilities for existing beach homes on the ground that they are on the rolling easement.

4. The Rolling Easement Cannot Be Constitutionally Immunized by an Assumption of Risk Defense

State Officials often assert that property owners have no right to constitutionally attack the rolling easement policy when it is enforced against them because they assumed the risk of the easement when they bought beachfront land subsequent to implementation of the policy. This "assumption of risk" or "notice" defense has been repeatedly rejected by the Supreme Court, in both physical invasion takings cases and regulatory takings cases. In *Nollan*, a public access case, the Court concluded that the government's "announcement" that it would take a property interest upon application for a permit was irrelevant to its liability

when it so acted. *Nollan*, 483 U.S. at 833 n.2. The *Nollan* Court further declared that a property owner's right to challenge a land use restriction as a taking is not "altered because they acquired the land well after the [government] had begun to implement its policy." *Id.* In the same way, property owners on the Gulf coast do not lose their constitutional right to challenge the rolling easement as a taking simply because the government announces that the owner's purchase of beachfront land may ultimately subject her to the rolling easement policy and its restrictions. *Id.*

Allowing State Officials to escape the Constitution based on an assumption of risk defense that derives force from the Officials' own policy announcements and actions allows the government to erase constitutional property rights over time simply by passing regulations and publicizing their policies. This "ought not to be the rule." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) ("Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."). A local government could not escape the First Amendment simply by posting notices at the town limits (or in property contracts) explaining that when you choose to live in town you will not be allowed to say certain things. Neither can State Officials escape the Takings Clause by

putting notices in real property purchase contracts or otherwise warning beachfront landowners that the Officials will confiscate their property when the vegetation line moves landward. *See Palazzolo*, 533 U.S. at 626-28.

As a last resort, State Officials will likely claim that striking down the rolling easement policy and/or requiring just compensation for its continued implementation will result in a parade of horribles. Their preferred doomsday claim is that public beaches will cease to exist if they cannot use the rolling easement to secure upland areas for public access as erosion moves inland. This is nothing but hyperbole. Many state and local beach parks inland of the water already exist. The State can purchase easements for beach recreational use. It can purchase or condemn the fee. Or it can try to prove the existence of common law easements, as it has in the past. Subject to constitutional limitations, it may be able to condition new building permits along the coast on reasonable measures designed to increase or protect access. *Nollan*, 483 U.S. at 831-33. But it may not impose an uncompensated public invasion on dry sand areas of private property for no other reason than that a storm or erosion pushed the vegetation line inland. The common law does not allow it, the OBA does not require it, and the Texas Constitution forbids it.

CONCLUSION

The Court should answer the first question certified by the Fifth Circuit by concluding that the rolling easement doctrine is not a valid principle of state law. The Court should answer the second question by concluding that the rolling easement is neither a common law

principle or a constitutionally valid construction of the OBA. The court should answer the third question by concluding that the Texas Constitution requires that State Officials provide just compensation to affected property owners if they wish to continue enforcing a rolling easement.

DATED: June 11, 2009.

Respectfully submitted,

_____

J. DAVID BREEMER
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Plaintiff-Appellant
Carol Severance

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff-Appellant's Brief on the Merits was filed with the Clerk this 12th day of June, 2009, via Federal Express, postage prepaid. I further certify that two copies of the foregoing brief, and an electronic copy on diskette in pdf format, were served this day via first-class mail upon each of the following:

Daniel Luke Geyser
Kenneth Charles Cross
Office of the Attorney General
Natural Resources Division
P.O. Box 12548
Austin, TX 78711-2548

BARRY C. WILLEY**
Attorney-in-Charge
Galveston County Legal Department
4127 Shearn Moody Plaza
123 25th Street
Galveston, TX 77550

_____
DONNA M. GREENE