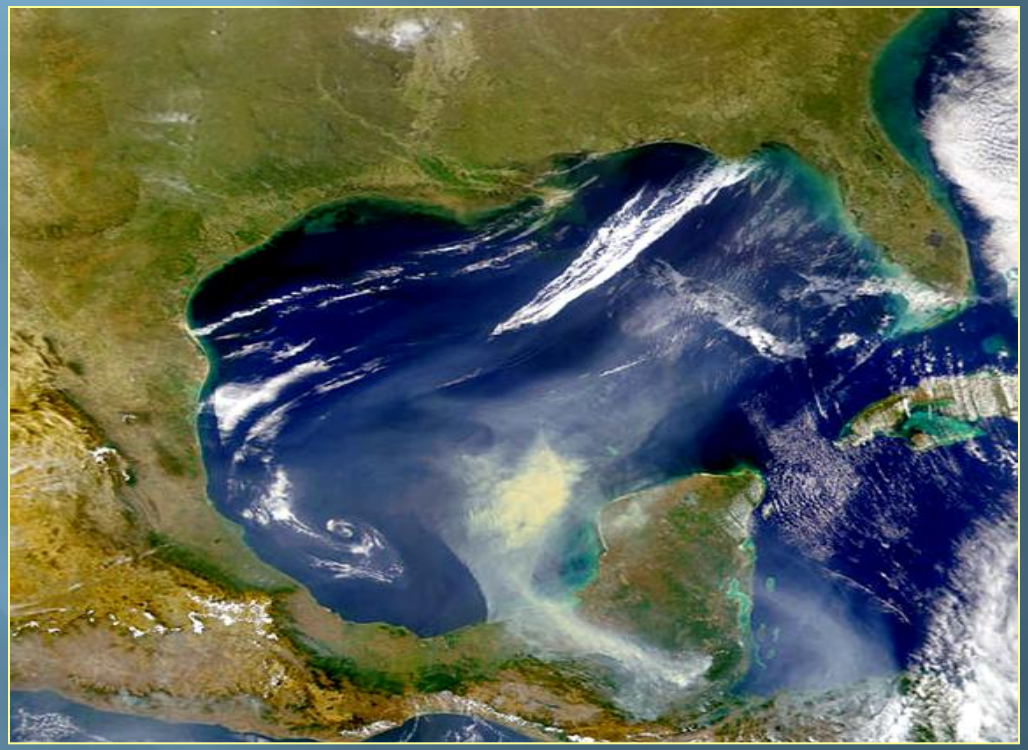
Rolling Easements in Coastal Texas and Their Possible Application in Florida and Other Gulf States



by

Richard J. McLaughlin

Harte Research Institute for Gulf of Mexico Studies

Overview of Presentation

- Historical context of beach access and rolling easements in Texas
- Quick review of the Open Beaches Act and relevant judicial decisions including *Severance v. Patterson*
- Brief discussion of whether the rolling easement doctrine is a viable option in Florida

TEXAS A&M UNIVERSITY CORPUS CHRISTI | HARTE RESEARCH INSTITUTE FOR GULF OF MEXICO STUDIES

nationalatlas.gov™
Where We Are

TEXAS

FEDERAL LANDS AND INDIAN RESERVATIONS

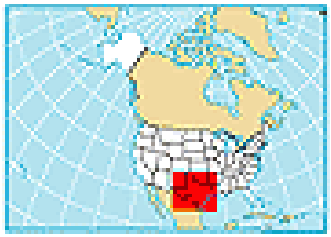
- Bureau of Reclamation
- Department of Defense (incl. Active Army Corps of Engineers lakes)
- Fish and Wildlife Service / Wilderness
- Forest Service / Wilderness
- National Park Service / Wilderness

Some small sites are not shown, especially in urban areas.

MILES
0 50 100 150 200
Albers equal area projection

Abbreviations

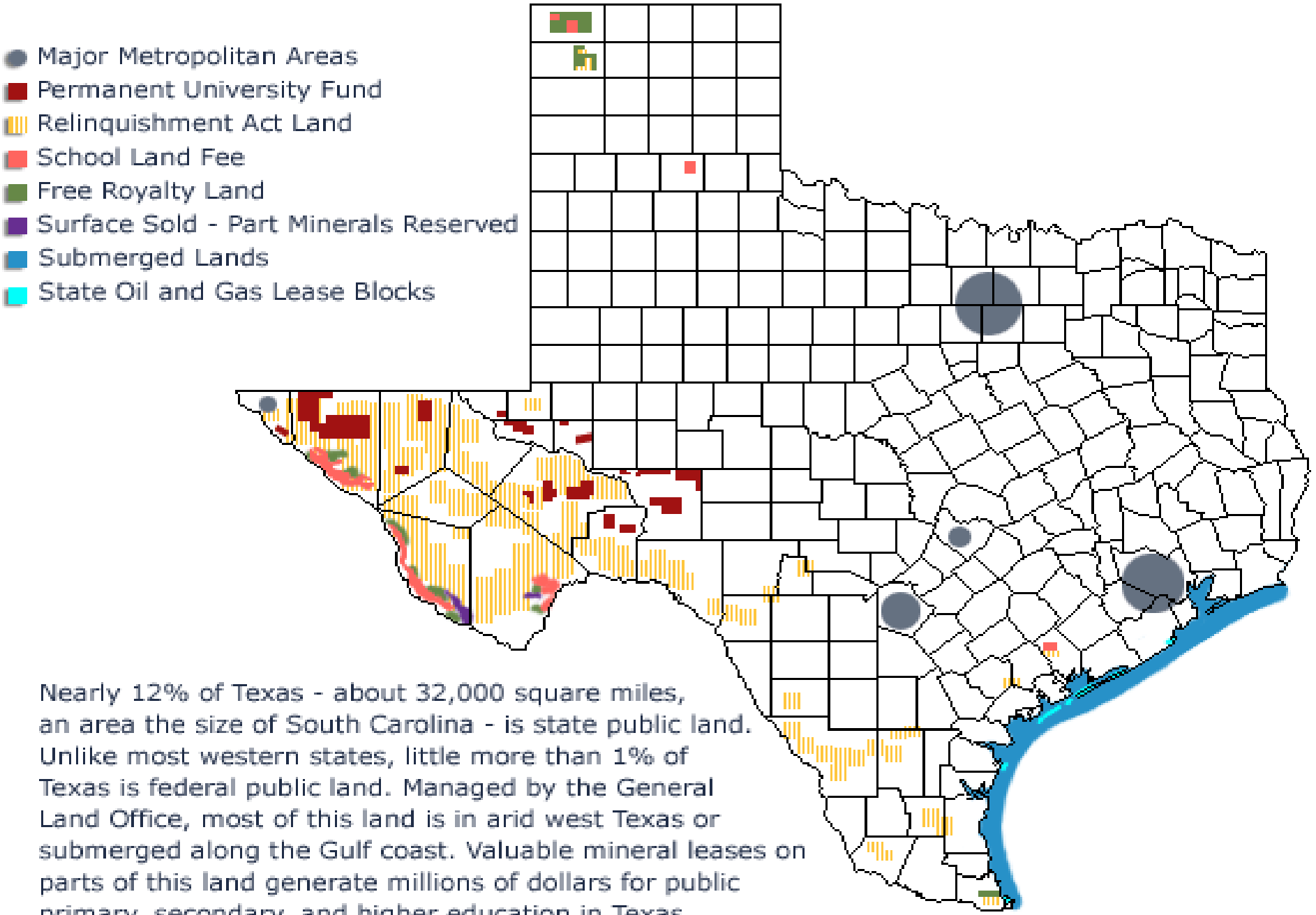
AFB	Air Force Base
NAS	Naval Air Station
NF	National Forest
NG	National Grassland
NHP	National Historical Park
NP	National Park
NRA	National Recreation Area
NWR	National Wildlife Refuge



NEW MEXICO
OKLAHOMA
ARKANSAS
LOUISIANA
CHIHUAHUA
COAHUILA
NUEVO LEON
TAMAULIPAS
DURANGO
MEXICO
GULF OF MEXICO
Red River
Rio Grande
Pecos River
Amarillo
Lubbock
Wichita Falls
Abilene
Dallas
Fort Worth
El Paso
Midland
Odessa
Big Spring
San Angelo
Waco
Temple
Austin
Houston
Beaumont
San Antonio
Corpus Christi
Laredo
Brownsville

U.S. Department of the Interior
U.S. Geological Survey

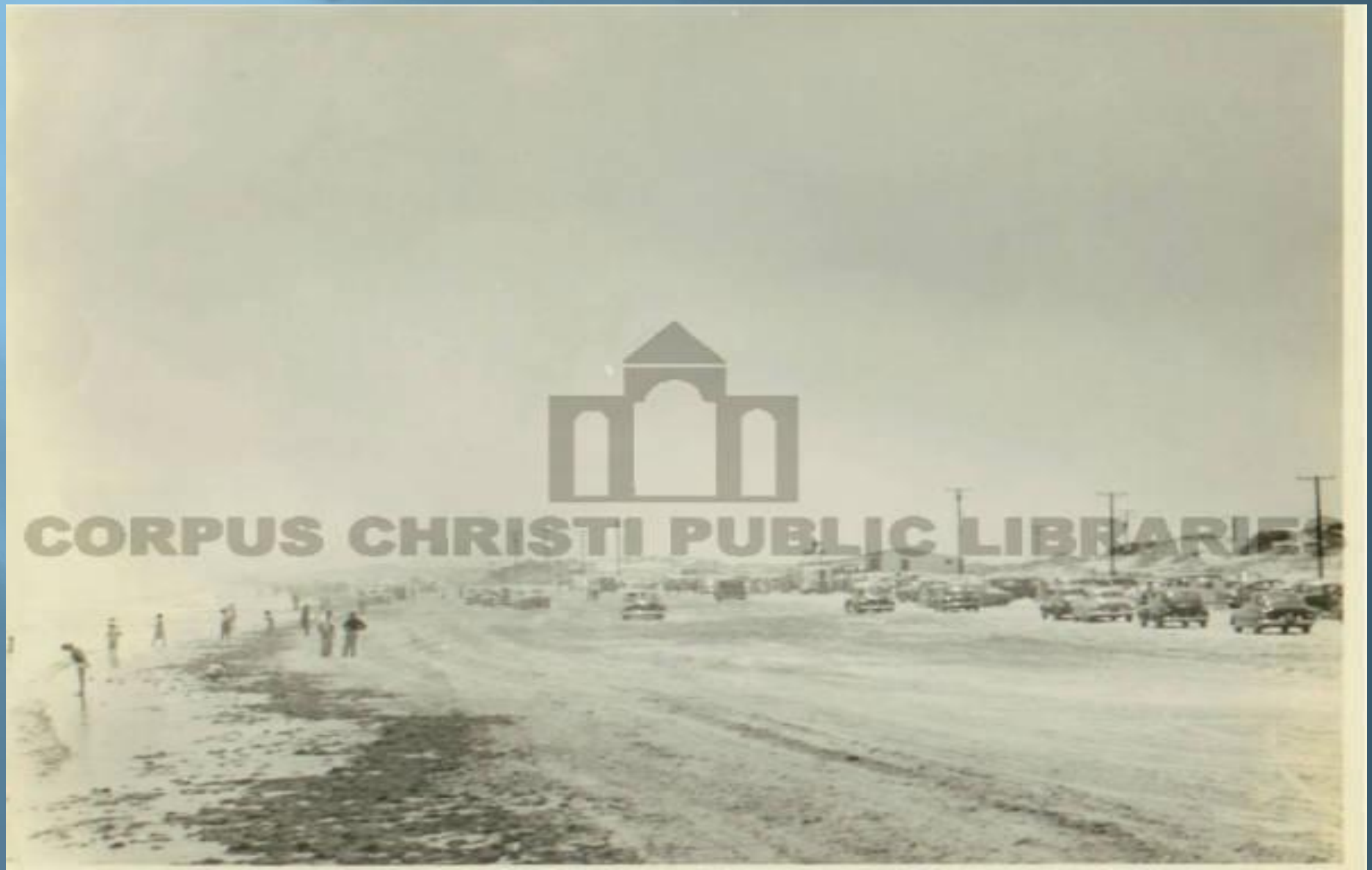
Texas Public Lands



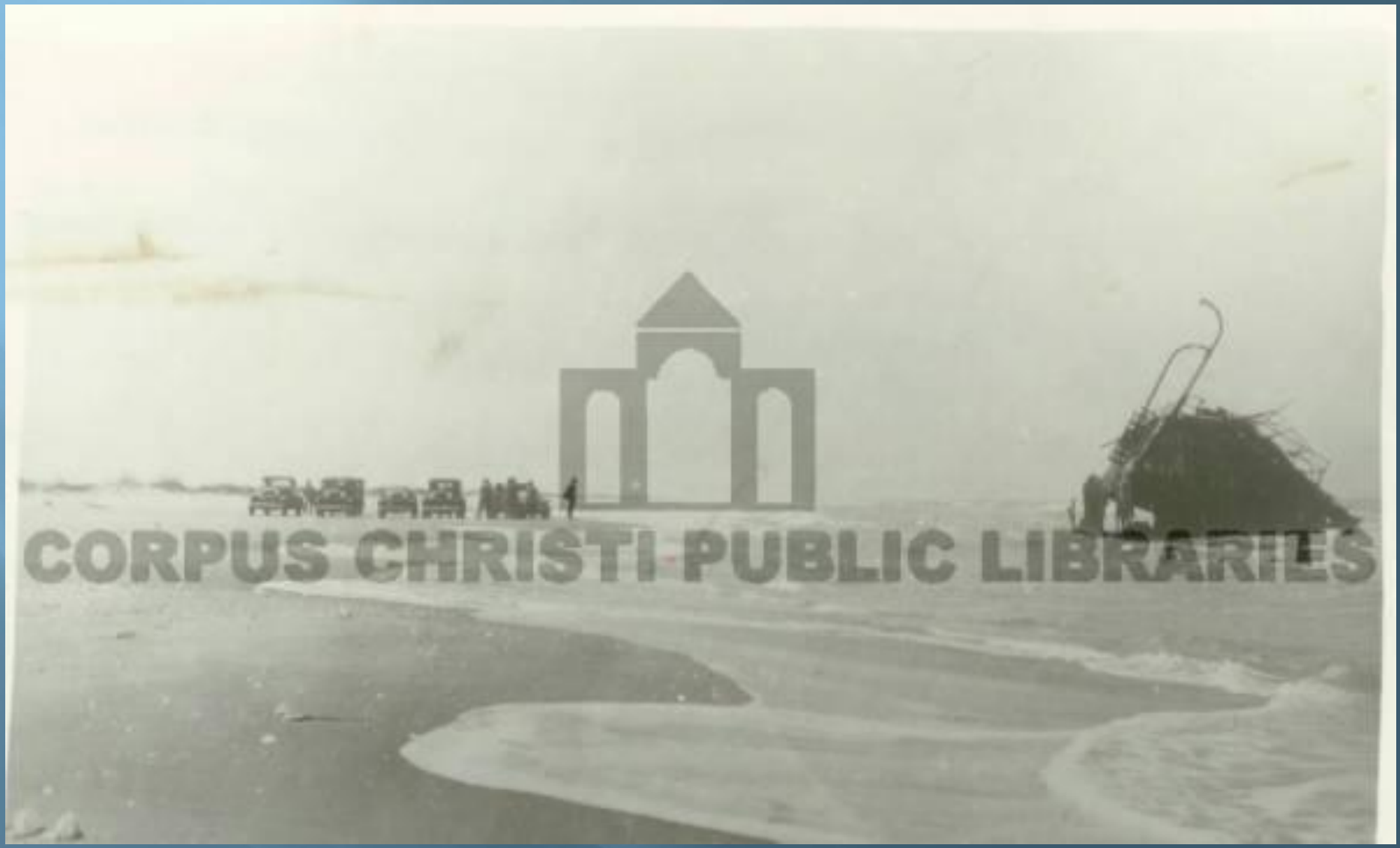
Nearly 12% of Texas - about 32,000 square miles, an area the size of South Carolina - is state public land. Unlike most western states, little more than 1% of Texas is federal public land. Managed by the General Land Office, most of this land is in arid west Texas or submerged along the Gulf coast. Valuable mineral leases on parts of this land generate millions of dollars for public primary, secondary, and higher education in Texas.

Spring Break in Corpus Christi

Corpus Christi Beach 1954

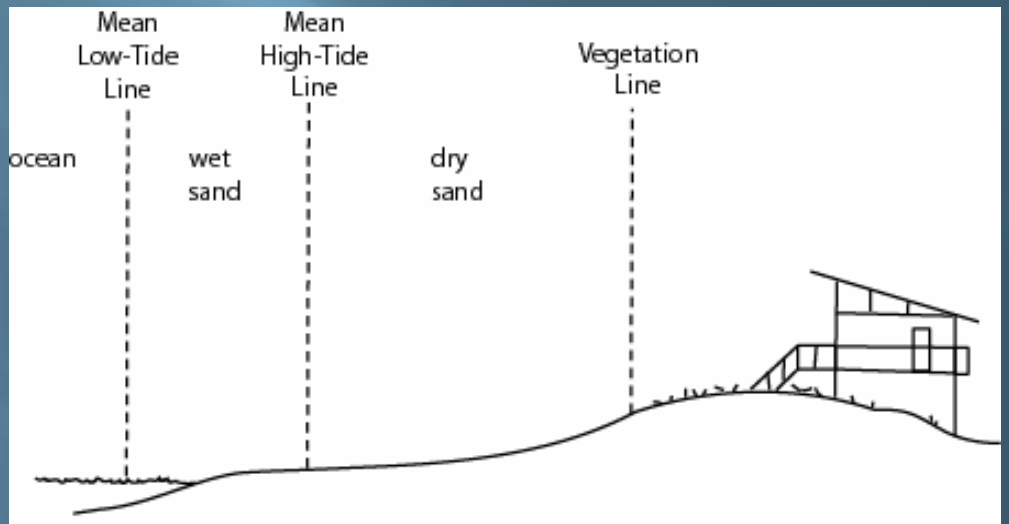


Corpus Christi Beach 1938



Historical Context of Beach Access in Texas

Public was shocked by 1958 Texas Sup. Ct. decision ***Luttes v. State*** – ruled state only owned "wet sand" portion of the beach



Typical divisions of the beach. Note that, in Delaware, Maine, Massachusetts, Pennsylvania, and Virginia, private rights may extend to the mean low-tide line. [Adapted from D. Brower, Access to the Nation's Beaches: Legal and Planning Perspectives 19-20, 60-61 (1978)].

Texas Legislature Responded

- 1959 – **Texas Open Beaches Act** adopted
- "Public policy of the state" to secure "the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico."
- Safeguards access to the beach "if the public has acquired a right of use or easement…by **prescription**, **dedication**, or has retained a right by virtue of **continuous right** in the public"

- A Rolling easement is specifically referenced by providing natural boundaries of the easement as the area between “the line of mean low tide” and “the line of vegetation bordering on the Gulf of Mexico.”

- Rolling easement = the easement moves with the line of vegetation. It contracts or expands based on natural forces

- Public’s right of access is protected by prohibiting persons from “creat[ing], erect[ing], or construct[ing] any obstruction, barrier, or restraint” that interferes with the public easement

1985 OBA Amendment and 2009 Incorporation into State Constitution

- 1985 Amendment requires all sales contracts for real property on a beach facing the Gulf of Mexico to include the following clause: "OWNERS OF STRUCTURES ERECTED SEAWARD OF THE VEGETATION LINE (OR OTHER APPLICABLE EASEMENT BOUNDARY) OR THAT BECOME SEAWARD OF THE VEGETATION LINE AS A RESULT OF PROCESSES SUCH AS SHORELINE EROSION ARE SUBJECT TO A LAWSUIT BY THE STATE OF TEXAS TO REMOVE THE STRUCTURES."

- In November 2009 State voted in referendum to incorporate the OBA into the State Constitution – passed with 77 % of the vote!

Jim Titus EPA

Source: Jim Titus EPA

Legal Challenges to OBA

- More than a dozen legal challenges to OBA since 1959 – Most involve Takings claims challenging underlying background principles of common law (ie. prescription, dedication or continuous right)

- As *Lucas* made clear, a takings cannot occur if background principles show that the use was not part of the title to begin with

- All upheld the public easement by finding **implied dedication** or **prescription** due to the longstanding use of the beaches for transportation and recreation.

- Only one court, *Matcha v. Mattox* (Tex. App. – Austin 1986) found the public acquired an easement by **continuous use or custom**

Legal Challenges to Rolling Easements

- Recent challenges question whether rolling easements are part of the background principles of Texas common law or instead a creation of OBA
- Question of first impression addressed in *Brannan v. State of Texas* (Tex. App. – Houston 2009) which found:
  - property subject to the rolling easement was historically dedicated for the public's use.
  - force of nature not the government caused the line of vegetation to move landward of the owner's houses
  - easement is tied to the natural boundaries and rolls with changes to these boundaries
  - Rolling easements are part of background principles because of long standing rules prohibiting property owners from interfering with an existing public easement = **NO TAKING**

Severance v. Patterson (Texas Sup. Ct. Nov. 5, 2010)

- Rejects *Brannan* in part by ruling that rolling easements **do** exist if created by slow process of erosion, but do **not** exist if created by a sudden and rapid change known as "avulsion"
- **Impact:**
  - Rejects traditional rule of avulsion in Texas. Unlike other jurisdictions, boundary does not remain static. Instead, the state waits two years and then applies same rules as erosion and accretion.
  - Hurricane Rita allegedly caused the shift of the vegetation line so public no longer has access to beach at Severance property or any other beach area where avulsion is involved
  - State has the burden to provide proof that new prescriptive easement has been established = very difficult or impossible
  - Separating ongoing erosion from avulsion does not accurately reflect geologic reality along Texas coast

Aftermath of *Severance*

- State cancelled a long planned $40 million beach renourishment project because constitution prohibits spending public money to benefit private property
- More than 30 *amicus* briefs supporting a rehearing of the case were submitted
- On March 11, 2011 Texas Sup. Ct. granted a motion for rehearing, which was heard on April 19th. No final determination has been made

Impact on Florida

- Among Gulf States, Florida has moved the furthest toward adopting a rolling easement doctrine
- *City of Daytona Beach v. Tona-Rama, Inc*. (1974), held that the public has a customary right to access Florida's beaches – based on parcel by parcel determination
- *Trepanier v. County of Volusia* (Fifth District Court of Appeals 2007) opened the door to rolling easement doctrine depending on whether the mean high tide line moved due to erosion (public acquires right) versus avulsion (boundary remains static).
- Florida Sup. Ct. will have to make final determination. If *Severance* is upheld on rehearing it will surely weaken the case in Florida

Application of Rolling Easements in Other Gulf States

- Rolling easements and the OBA in Texas evolved in a very unique historical context.
- In Texas they were created to protect public access not for environmental purposes relating to SLR
- Historical contexts and existing laws in other Gulf states are quite different

- Thank you!