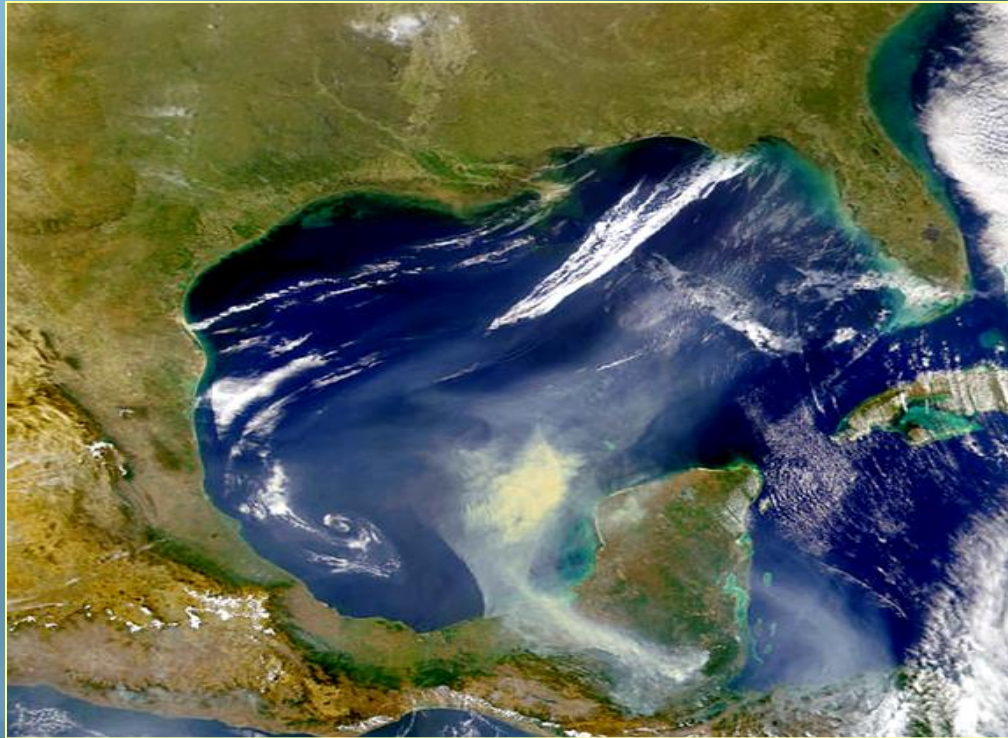


An Overview of Rolling Easements in Coastal Texas



by

Richard J. McLaughlin

Harte Research Institute for Gulf of Mexico
Studies

Texas A&M University-Corpus Christi

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



FEDERAL LANDS AND INDIAN RESERVATIONS

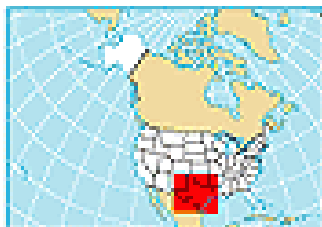
- Bureau of Reclamation
- Department of Defense
Great Lakes Army Corps of Engineers (Lago)
- Fish and Wildlife Service / Wilderness
- Forest Service / Wilderness
- National Park Service / Wilderness

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

0 50 100 150 200
MILES
Albers equal area projection

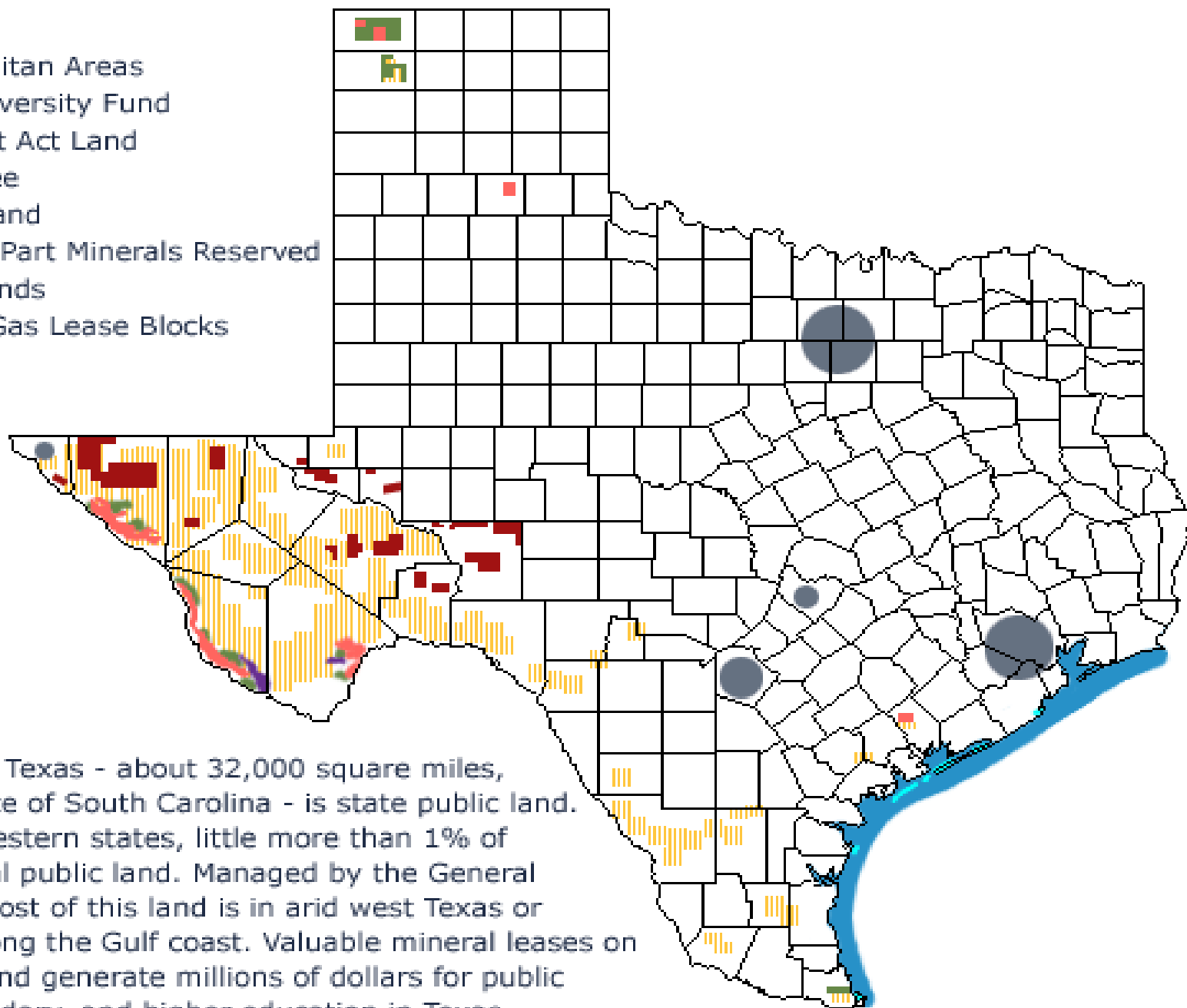
Abbreviations

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



Texas Public Lands

- Major Metropolitan Areas
- Permanent University Fund
- ▨ Relinquishment Act Land
- School Land Fee
- Free Royalty Land
- Surface Sold - Part Minerals Reserved
- Submerged Lands
- State Oil and Gas Lease Blocks



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

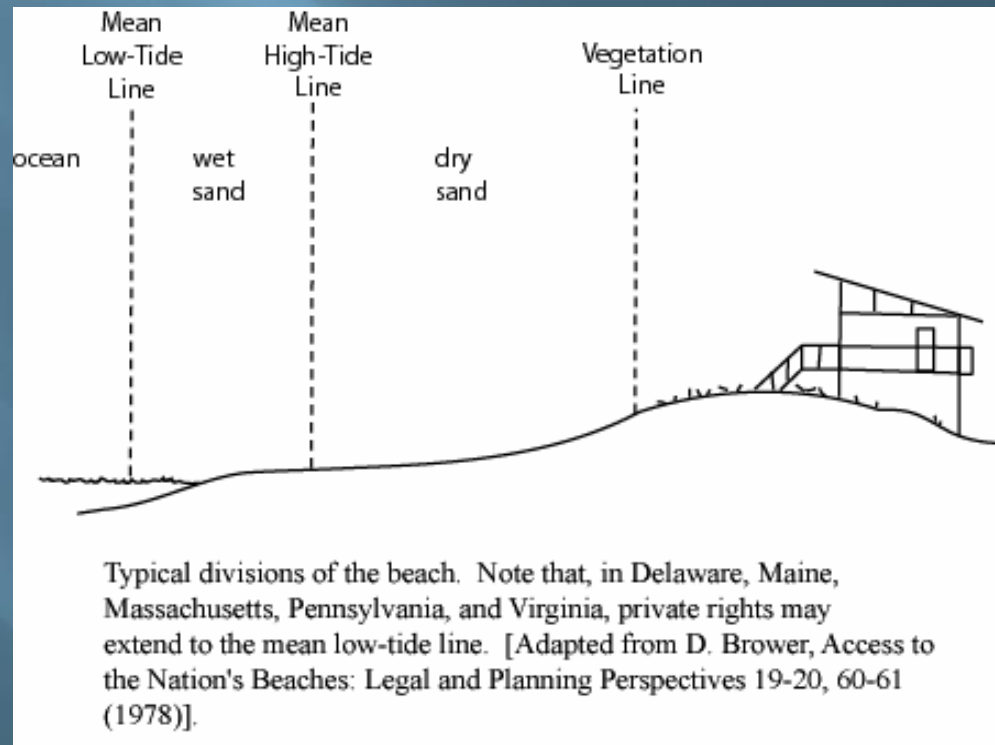


Corpus Christi Beach 1938



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



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)
- ▣ All were unsuccessful!

Carol Severance Home Galveston Island

- ▣ Carol Severance challenges whether rolling easements are part of the background principles of Texas common law or instead a creation of OBA



Severance v. Patterson

(Texas Sup. Ct. Nov. 5, 2010 upheld on rehearing March 30, 2012)

- ▣ Rejects existing law 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:**
 - 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
- ❑ Texas General Land Office is now trying to determine which vegetation lines have been moved due to avulsion vs. erosion – NOT EASY
- ❑ Legislative and Constitutional options are being considered in the current legislative session.



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.

Application of Rolling Easements in States Other Than Texas

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

- Thank you!