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Ellis Pickett

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## SEVERANCE v. YOUR TEXAS PUBLIC BEACH

*By: Ellis Pickett*

### I. INTRODUCTION

Coastlines, like riverbanks, are dynamic. They continually move, usually imperceptibly, but in storm events they can move a great distance. This movement affects both private and public property rights.

The State owns “submerged lands,” wherever they happen to be at the time.<sup>1</sup> In legal documents in Texas, terms such as “along the river” and “with the meanders of the river” describe property boundaries.<sup>2</sup> The difference between Gulf of Mexico and riverfront property is gulf beaches are open to the public, whereas the sand along rivers is private property.<sup>3</sup> There is no Open Beaches Act for rivers.

Owners of beachfront property acknowledge the fact that the shore moves at the whim of nature. It has long been established that the coastline is dynamic; therefore, only an easement that moves with the shore is workable.

### II. BACKGROUND

I am not an attorney, student of law, or a scientist. I am a beach user since 1955 and a Texas surfer since 1963. I am a keen observer of the Texas coast. I have photographed hundreds of beach houses and documented erosion since 1998. In the 1960s, I “cut donuts” in my ‘56 GMC pickup on beaches from Sabine Pass to the Rio Grande. What was once dry, sandy beaches are now one hundred to three hundred feet or more beyond the shore. The sand is now beneath the Gulf of Mexico. I have continually used the beach seaward of, beneath, and landward of the house Carol Severance owned at 13107 Bermuda Beach Drive. I have taken dozens of photographs of that location over many years, including public use thereof. Sea level has been rising for about twenty thousand years.<sup>4</sup> Approximately 64% of the Texas coast suffers from long-term, critical erosion and is moving towards Austin every day.<sup>5</sup>

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1. TEX. NAT. RES. CODE ANN. § 11.012(c) (West 2011).

2. *See generally* Diversion Lake Club v. Heath, 86 S.W.2d 441, 447 (Tex. 1935) (stating that boundary line is a gradient of the flowing water in a river); Manry v. Robison, 56 S.W.2d 438, 445 (Tex. 1932) (stating that when a river takes over land by erosion, the owner loses title to that land).

3. *Compare* NAT. RES. § 61.012, *with* Nat. Res. § 61.001(8) (inferring an analogy between riverfront property and non-beach property).

4. JOHN B. ANDERSON, THE FORMATION AND FUTURE OF THE UPPER TEXAS COAST: A GEOLOGIST ANSWERS QUESTIONS ABOUT SAND, STORMS & LIVING BY THE SEA 20 (2007).

5. TEX. GEN. LAND OFFICE, COASTAL EROSION PLANNING & RESPONSE ACT, REPORT TO THE 81ST TEXAS LEGISLATURE, at i (2009), *available at* [http://www.glo.texas.gov/what-we-do/caring-for-the-coast/\\_publications/cepra-report-2009.pdf](http://www.glo.texas.gov/what-we-do/caring-for-the-coast/_publications/cepra-report-2009.pdf).

In 1959, the Texas legislature passed the Open Beaches Act (“OBA”) to protect public access to the Gulf Coast shoreline.<sup>6</sup> This was done in response to the public outcry because of the Texas Supreme Court’s *Luttet v. State* decision.<sup>7</sup> The legislature recognized that no one could foretell where the beach would be, so they described, in simple language, the boundaries between public and private property.<sup>8</sup> The OBA codified the public’s rights to access and use the sandy beach between the Gulf of Mexico and the vegetation line.<sup>9</sup> The OBA, with its roots in Spanish, English, and Roman law and the public trust doctrine, has been upheld in Texas courts.<sup>10</sup> The public has a right to use the beaches for commerce, fishing, travel, and recreation.<sup>11</sup>

### III. EROSION V. AVULSION

The law concerning riverine avulsion is well understood and accepted. Sudden changes in a river’s course can create oxbow lakes and move the “meander of the river” great distances.<sup>12</sup> Property owners understand this, and if a river suddenly jumps from one location to another, the only property you lose is what has become submerged. “That’s my barn over there.” If your barn is now on the other side of the river, it is still yours. But this concept relies on the fact that your dry land remains dry. If your barn somehow remains intact but is now in the river, you no longer own the property on which it rests. If your barn is partially in the water, you must remove it.

In *Severance v. Patterson*, although the Texas Supreme Court agreed that chronic erosion does move property lines, the Court got it wrong on avulsion.<sup>13</sup> The Court apparently assumed that if the Gulf shore moves suddenly, there would be dry land created somewhere that is still within the property’s original description. That did not happen. In fact, that has not happened in any avulsive event in my lifetime.

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6. NAT. RES. § 61.011.

7. *Brannan v. State*, No. 01-08-00179-CV, 2010 WL 375921, at \*16 (Tex. App.—Houston [1st Dist.] Feb. 4, 2010, pet. filed).

8. *See* NAT. RES. § 61.011.

9. *Id.* § 61.012.

10. *See Arrington v. Mattox*, 767 S.W.2d 957 (Tex. App.—Austin 1989, writ denied); *Feinman v. State*, 717 S.W.2d 106 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.); *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App.—Corpus Christi 1979, no pet.), *superseded by statute*, Act of May 31, 1981, 67th Leg., R.S., ch. 613, 1981 Tex. Gen. Laws 2412–13, *amended by* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1195–96.

11. NAT. RES. § 61.012.

12. *See Severance v. Patterson*, No. 09-0387, 2010 WL 4371438, at \*1 (Tex. Nov. 5, 2010).

13. *Id.* at \*10.

#### IV. PRIVATE PROPERTY RIGHTS AND PUBLIC PROPERTY RIGHTS

The OBA is a deed restriction for the Texas coast.<sup>14</sup> Beachfront property is a risky investment. Ownership includes not only rights but also responsibility. There are private property rights, but there are also public property rights. Which has more merit? The public has a right under the OBA and the 2009 constitutional amendment to access and use the sandy areas.<sup>15</sup> This is a public trust that is shared by twenty-four million Texans.

The Pacific Legal Foundation (“PLF”) argued that the public easement is stationary.<sup>16</sup> No one who understands the coast’s dynamic nature would agree that a “public beach easement” is fixed in location. The public beach is the sand between the water and the vegetation.<sup>17</sup> The PLF’s argument reminds me of golf course property owners who complain about broken windows—they knew the risk before they purchased the property.

If Severance prevails and the people’s right to use our beach is abridged, there will be little public support for insurance subsidies or special funding that benefits the very few people who own beachfront property.

#### V. REASONABLE EXPECTATION

According to the General Land Office (“GLO”), Texas has some of the “highest coastal erosion in the country.”<sup>18</sup> Research shows that 63% of the Texas coast is eroding at more than two feet per year, and some locations have experienced erosion of more than ten feet per year.<sup>19</sup> These rates are for chronic, daily erosion and do not include storm-induced erosion, which can be sixty feet or more in a matter of days.<sup>20</sup> The only locations on the northern Gulf coast that are not eroding are found in an area between a few miles west of Sabine Pass and a mile or two east and west of the Galveston jetties.<sup>21</sup> Some of the highest erosion rates are found on the west end of Galveston Island.<sup>22</sup>

On a trip to a private historical preserve in the Yucatan ten years ago, we kayaked estuarine mangroves. Our guide told us to “watch for the ancient Mayan road.” As we neared a very well preserved

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14. NAT. RES. § 61.013(a)–(b).

15. TEX. CONST. art. I, § 33(b); NAT. RES. § 61.013.

16. Plaintiff-Appellant’s Reply Brief on the Merits at 2, *Severance v. Patterson*, 2010 WL 4371438 (Tex. Nov. 5, 2010) (No. 09-0387), 2009 WL 3508909, at \*2.

17. NAT. RES. § 61.012.

18. TEX. GEN. LAND OFFICE, *supra* note 5, at i.

19. *Id.* at 3.

20. RICHARD L. WATSON, *COASTAL LAW AND THE GEOLOGY OF A CHANGING SHORELINE* 19 (2005), available at <http://texascoastgeology.com/papers/coastlawgeol.pdf>.

21. See ANDERSON, *supra* note 4, at 71.

22. *Id.*

stone temple, he asked if we had seen the road. Of course not; there was nothing but water and mangroves. He told us to look down. There, below nearly three feet of water, was a perfectly preserved road—perfectly straight, perfectly level, and about twelve feet wide. We had been paddling over it almost the entire time. Do you think the Mayans built an underwater road? Of course not. This had been dry land in recent times. Sea level rise and subsidence had devoured a great engineering feat of the ancient rulers of North America.

Carol Severance purchased her Galveston rental income properties in 2005, six years *after* a minor tropical storm, Frances, badly eroded the north coast of Texas.<sup>23</sup> Although over one hundred miles away, that storm moved the vegetation line landward such that over one hundred houses were now on the public beach easement.<sup>24</sup> In 1999, six years before her purchase, the Kennedy Drive property had already been placed on a well-known GLO list of houses “wholly or in part” on the public beach easement in violation of the OBA.<sup>25</sup>

Everyone realizes that beachfront property is a risky investment. A few years ago, I surveyed a number of Texas coastal banks. I found that not one offered a mortgage loan on front-row beach property. Most bankers suggested “something a few rows back.” The only loans I found available were from inland banks and mortgage brokers who were unaware or unconcerned with erosion.

You can purchase fire insurance; health insurance; and storm, flood, theft, and life insurance, but I have found no company that will write an erosion insurance policy. If you cannot get a loan or insurance, that is called a “bad business plan.”

## VI. CONCLUSION

As stated in our amicus brief to the Court, “Perhaps ‘roll’ is a regrettable choice of vocabulary to describe the dynamics of the Texas coast.”<sup>26</sup> But the fact is, the coastline moves. It is the duty of the State to properly steward the public commons—our waters, parks, and coastlines.

The OBA uses the “mean low tide,” “mean high tide,” and “line of vegetation” to describe the dynamic nature of the beach and public easement.<sup>27</sup> Mr. Breemer’s oral argument that the “easement . . . is a fixed, static property that is confined, it’s defined, it’s bounded by the path of public travel that existed when the easement was created,”

23. See *Severance v. Patterson*, No. 09-0387, 2010 WL 4371438, at \*2 (Tex. Nov. 5, 2010).

24. *Id.* at \*8.

25. *Id.*

26. Brief of Amicus Curiae Surfrider Foundation, *Severance v. Patterson* at 5, 2010 WL 4371438, (Tex. Nov. 5, 2010), *reh’g granted*, (No. 09-0387), available at <http://www.supreme.courts.state.tx.us/ebriefs/09/09038742.pdf>.

27. See TEX. NAT. RES. CODE ANN. § 61.013(c) (West 2011).

creates a submerged easement, which is an unusable, expensive, and unworkable concept.”<sup>28</sup>

The OBA rolling easement is a concept that my five-year-old granddaughter can understand: the water is for splashing, the sand is for sand castles, and stay out of the weeds. A person who chooses to purchase high-risk property should not expect the people of Texas to subsidize that risk. *Caveat emptor*.

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28. Transcript of Oral Argument of David Breemer, *Severance v. Patterson*, 2010 WL 4371438 (Tex. Nov. 5, 2010) (No. 09-0387), 2011 WL 1706939 *available at* <http://www.supreme.courts.state.tx.us/oralarguments/transcripts/09-0387rh.pdf>.