

# Shifting Sands, Bedrock Law: Public Ownership of Tidelands

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**The wet part of a beach belongs to the people of that state,** with very few exceptions. More accurately, the land seaward from the mean high tide line is state land, sometimes called tidelands. That's a helpful designation to the landowners adjoining the beach who don't have to pay taxes on that portion on the property. It is also a benefit to the people in general, who can use that beach for recreation.

The bedrock principle that tidelands belong to the state dates over 1500 years to when Justinian the Great ruled the Roman Empire. One court described the Justinian code as establishing that “the seashore [is] common property and not public property, [which] remains as a guiding principle in all or nearly all jurisdictions which acknowledge the common law...”<sup>1</sup> What is less clear is what happens when the mean high tide line changes. When the public lands change, the public's access to those lands may also change.

## Public Access to Tidelands

States have different rules pertaining to public access to tidelands. Some states, like Florida, have it built into their state constitutions. Others, like Mississippi, have statutes that establish those rights: “[Tidelands and submerged lands](#) are held by the state in trust for use of all people.” Also, the idea that tidelands belong to the people is part of the common law, meaning law established by practice rather than by statute or court decision. Public access provisions can make all the difference to the public's enjoyment of a beach.

Texas, for example, governs its beaches largely through the Open Beaches Act, enacted to preserve and enhance the “the public's right of access to and use of beaches.” In Texas, as with so many other things, a public beach is defined to be a bigger area than for most states. A [public beach in Texas](#) includes the land “inland from the line of mean low tide to the line of vegetation,” described by the statute as a “[larger area](#),” rather than the more typical high

water mark. The area from the Gulf of Mexico to the mean high tide is known as the wet beach; the area from the mean high tide to the vegetation line is known as the dry beach. The wet beach is the public trust beach, owned by the State of Texas for the use of the people. The dry beach becomes a “public” beach when “the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial.” It is [against the law](#) to build an obstruction that blocks the public's use of the beach.

In contrast, the public's right to use the wet sands in the state of Alabama is not so clearly provided in law. While 1 of the 772 sections to the Alabama Constitution guarantees the “use of the shores,” it is in the context of fishing and transportation, not recreation, although it can be presumed by custom that the public may access the wet beach for that use as well.

Mississippi law states that the tidelands are held in trust for the use of all people, and Section 90 of the 1890 state constitution prohibits the state from donating, either directly or indirectly, state-owned lands to private parties.

## Easements and Rolling Easements

The terms “right of use” or “easement” are important. An easement is a property right that lawyers refer to as a “burden.” That is because an easement transfers some of the property rights of the owner to someone else, and the owner no longer has the ability to use the entire property any way they want to the exclusion of others. In this case, when people walk across property to get to a beach, and there is an easement, that property is considered a burdened estate. The easement is filed with the property deed and is said to run with the land, meaning it lasts as long as the land does. The easement allows only the activities and purposes described within the

recorded document. For example, an easement for a public footpath does not mean that motorized vehicles are allowed.

Not all easements are written and recorded, however. Some are established over a long period of time, a right of use described in law as a prescriptive easement. In order to establish a prescriptive easement the use must be continuous, open, and undisputed. This is where things get tricky. In the Texas statute, a long period of time means “since time immemorial.” Other states, however, may set a specific number of years to establish a prescriptive easement. If the easement is not purchased outright and recorded, but is established by custom, any dispute will likely have to be determined by a court.

Additionally, as beaches change over time, the rights to access may change. For example, hurricanes can change the shoreline, making it farther inland. In states where the public is allowed access based on where the mean high tide line is, the landowner has just lost the rights to some of their property. Where the public’s right to access is based on an easement, and those borders change, the easement is referred to as a rolling easement.

The Supreme Court of Texas held when a sudden event shifts the boundary between private and public beach, as opposed to gradual events, there was no rolling easement for public access. Instead, a new easement must be established by the state on behalf of the public.<sup>2</sup> In the Texas case a hurricane moved the vegetation line so far inland that a home was on the dry beach seaward of the vegetation line. The court had to decide whether the public easement had moved farther inland as well, which would mean the home was now on a public beach. Because state law prohibits encumbering public beaches, the house would have to be removed.<sup>3</sup> However, the court said that the dry sand was no longer public beach, and the state would have to purchase an easement to establish a new one.

In Alabama, things are different. The Gulf has overtaken homes on the western part of Dauphin Island, for example. According to data from 2011, that area of Dauphin Island loses 12.7 feet of beach a year.<sup>4</sup> Although the coastline has changed, the building set-back was based on a mean high tide line that is now 100 yards into the water. The public access beach is underwater, even at low tide.<sup>5</sup> Homes are on what would be state lands if the mean high tide line were drawn today. Alabama, unlike Texas, does not appear to have a law requiring the state to remove obstacles from the public beach.

## Gradual Changes

When the Gulf overtakes lands gradually, pulling them into the wet beach or totally submerging them, generally, states deem the private lands lost to the public trust. This harkens back to a less ancient but still very old British law of the mid-1700s. In the case of lands gained from the sea “where the gain is by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. . . . these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.”<sup>6</sup>

Thus, for hundreds of years common law holds that where the change to property along the sea occur gradually, the gain (or loss) belongs to the landowner. More recent court decisions agree. When the change is sudden, however, the landowner does not gain the benefit of the extra property or bear the burden of the loss. A further distinction can be made when the change is due to man-made causes.

## Accretion due to Man-Made Causes

In the U.S. Supreme Court case of *California State Lands Commission v. United States*, the Court considered the accretion (or addition) to the shoreline of a Coast Guard station which was federal property since before the state was established.<sup>7</sup> Over time, sand piled up on the shore of the station as the result of a jetty, and the State of California argued that the new property belonged to the state, as it had title to tidelands.

The Court noted the difference between federal and California state law in addressing ownership of accreted property when an artificial source causes the gain. Where the accretion occurs naturally, under state law, the upland owner gains that property, with the mean high tide mark indicating the property’s edge. Where an artificial event, such as the construction of the jetty in this case, causes the accretion, state law holds that “the boundary does not move but becomes fixed at the ordinary high water mark at the time the artificial influence is introduced.”<sup>8</sup>

However, the Supreme Court held that federal law applied, relying on the 1953 Submerged Lands Act. The Submerged Lands Act affirms that [states hold title to tidelands](#) up to the mean high tide at the time they became a state, and clarifies that [accretions to lands held by the United States](#), are deemed United States’ property. No distinction is made for accretions resulting from artificial causes.

Results may differ state to state when state law is applied. In Mississippi, the state supreme court held that a beach created by artificial means was state property, and did not belong to the beachfront landowners who held title to “the water’s edge.”<sup>9</sup> In that case a beach was created not by a storm, or gradual accretion, but by the government’s bringing in sand. The court said the dispositive issue as to ownership was whether it was natural or man-made.

In fact, after federal funds paid for a significant portion of a beach in Harrison County, the United States brought suit when public access to the beach was thwarted. In *United States v. Harrison County*, the Fifth Circuit rejected the Mississippi Supreme Court decision that had awarded the landowner the right to the property.<sup>10</sup> The federal court of appeals noted Section 95 of the Mississippi Constitution provides that “lands belonging to . . . the state, shall never be donated directly or indirectly to private corporations or individuals.” The court blocked any further steps to restrict any members of the public from using the beach.

### Federal Money for Beach Access

As discussed above, public beach access can give states the right to federal funding. For example, the U.S. Army Corps of Engineers (Corps) “renourishes” public beaches by adding sand as part of its hurricane and storm damage reduction policy. According to the *Planning Guidance Notebook* of the Corps, protection is for public areas or to result in public benefits. The guidelines are based in part on the 1946 federal law authorizing the Corps to replenish public beaches.<sup>11</sup> That law was the basis for the United States’ lawsuit against Harrison County, discussed above.

Public access to public beaches is part of the Corps’ evaluation to see if projects are eligible. Simply holding tidelands in public trust is not enough evidence of a public benefit. There must be adequate rights-of-way providing access to those public lands; adequate public parking (generally construed as public parking within a half-mile of the beach) is an indication of public use and access according to the guidelines.<sup>12</sup> Where only people from a specific community are allowed on a so-called public beach, the Corps treats the beach as private property.

This could prove problematic for Alabama where the Alabama Supreme Court has indicated that “public” for a public beach can be limited to a specific group and not the public in general. In *Ritchey v. Dalgo*, the court found that a

“dedication” allowing access to a public beach was created where a subdivision plat allowed residents of certain subdivisions to cross property to get to the beach.<sup>13</sup> A dedication is a donation of property to the public use. The court held that a dedication existed despite the fact that only a small portion of the public was actually allowed to use the beach. It would seem that this beach would not be eligible for full federal funding if it needed Corps’ renourishment.

### Conclusion

While the Romans figuratively set in stone that tidelands belong to the people, and common law passed from England before the U.S. Constitution holds that gradual gains to the dry sands belong to the shore owners, the real answer as to whether the public has access to tidelands via dry sands is that it all depends. The right to use and enjoy tidelands shifts based on a state’s enforcement of uncontested public access. And the right to that public access appears to be at the discretion of the state government based on its interpretation of that common law right. 🦋

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### Endnotes

1. State of Texas v. Balli, 144, 195 (1944).
2. Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).
3. The Open Beach Act requires the government to “strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement.” Tex. Nat. Res. Code § 61.011(c).
4. Catherine M. Janasie, *Climate Impacts for the Southeastern U.S. and Dauphin Island, AL*, Mississippi-Alabama Sea Grant Legal Program (May 2013).
5. Gilbert M. Gaul, *On the Alabama Coast, the Unluckiest Island in America*, YaleEnvironment 360 (Sept. 5, 2019).
6. See, St. Clair Co. v. Lovington, 90 U.S. 46, 67 (1874) (quoting renowned jurist Sir William Blackstone of the 1700s).
7. 457 U.S. 273 (1982).
8. Carpenter v. Santa Monica, 63 Cal. App. 2d 772, 794 (1944).
9. Harris v. State, 256 So.3d 574 (Miss. 2018).
10. 399 F.2d 485 (5th Cir. 1968).
11. U.S. Army Corps of Engineers, *Planning Guidance Notebook*, § 3-4 (ER-1105-2-100, April 22, 2000).
12. U.S. Army Corps of Engineers, *Planning Guidance Notebook*, § 3-4(b).
13. 514 So.2d 808 (Ala. 1987).