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Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches

Oregonians can boast rightfully about the unique privilege of beach access and recreation that the public enjoys on Oregon's 362-mile coastline. Although about half of Oregon's beaches are privately owned,¹ Oregon's Supreme Court in 1969 invoked the English doctrine of custom to declare an easement for the public to enjoy Oregon's privately titled dry sand beaches.² Nationally, Oregon is credited with, and sometimes criticized for, resuscitating the custom doctrine as applied to

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¹ Peter D. Sleeth & Foster Church, *Oregon's Crowded Coast*, THE OREGONIAN (Portland), July 6, 1997, at A1 (54% of Oregon coastline is held in public ownership and 46% held privately).

² State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). This article will refer to the dry sand area as it was defined in *Thornton*—the land between the line of mean high tide and the visible line of vegetation. *Id.* at 672-73. This article will also refer to uplands property, meaning property immediately landward of the line of vegetation. Finally, this article will refer to the wet sand area, meaning the land lying seaward of the mean high tide line and extending to the extreme low tide line. The litigants in *Thornton* conceded the state's ownership of the wet sand area. *Id.* at 673. See also OR. REV. STAT. § 390.615 (1997) (ownership of the shore from ordinary high tide to extreme low tide is vested in the State of Oregon and held as a state recreation area; as originally enacted in 1913, this legislation designated the wet sands as a public highway, a 1947 amendment changed the purpose to one of public recreation).

beach rights.³ In almost all other states with ocean frontage, public recreation rights on privately owned beaches exist on a piecemeal basis that relies primarily on the parcel-specific doctrines of easements by prescription and implied dedication.⁴ Several states have refused to apply the custom doctrine on behalf of the beach-going public or have concluded that the elements of custom were not established.⁵ Custom has found favor elsewhere in cases involving beaches in Florida, Hawai'i, and Texas.⁶ In Texas, however, the customary use of beaches has not reached its Supreme Court for consideration.⁷ In contrast to the border-to-border application of custom in Oregon,⁸ the Florida Supreme Court has applied custom to dry sand beaches on a parcel-specific basis.⁹ Finally, a federal court has held that the application

³ See David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1417 (1996).

⁴ See generally Vitauts M. Gulbis, Annotation, *Implied Acceptance, By Public Use, of Dedication of Beach or Shoreline Adjoining Public Waters*, 24 A.L.R. 4th 294 (1981). See also PAUL D. KOMAR, *THE PACIFIC NORTHWEST COAST* 175 (1998) (noting in comparison to Oregon that less than one-fifth of the 1200 miles of coastline in California is open to the public); Jonathan M. Hoff, Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 UCLA L. REV. 1049, 1058 (1981) ("In a state such as California, . . . where private ownership and development of the beach area have been more common, evidence may not be available to show public use of a particular beach site since the beginning of the state's history. The custom theory certainly cannot be applied broadly to the entirety of California's beachland.").

⁵ See, e.g., *Smith v. Bruce*, 244 S.E.2d 559, 569 (Ga. 1978) (rejecting custom doctrine); *Department of Natural Resources v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975) (claimant could not establish custom antiquity requirement). See also *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984) (describing the custom doctrine as an "archaic judicial response" to the problem of beach access, and employing the public trust doctrine to invalidate the practice of quasi-public association to limit access to municipal beach by non-residents); on New Jersey's use of the public trust doctrine, see generally Thomas J. Fellig, *Pursuit of the Public Trust: Beach Access in New Jersey from Neptune v. Avon to Matthews v. BHIA*, 10 COLUM. J. ENVTL. L. 35 (1985).

⁶ In addition to its use in Florida, Hawai'i, and Texas, the custom doctrine has been relied upon to establish public rights to use Virgin Island beaches. See *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769 (D. V.I. 1974) (requiring removal of fences erected by private club on dry sand), *aff'd*, 529 F.2d 513 (3d Cir. 1975).

⁷ See *Matcha v. Mattox*, 711 S.W.2d 95, 98 (Tex. App. 1986) *writ ref'd n.r.e.* (Jan. 19, 1986), *cert. denied*, 481 U.S. 1024 (1987) (holding public had acquired right to use private landowner's beach under ancient common law doctrine of custom).

⁸ See discussion *infra* Part I.B.

⁹ See *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 78 (Fla. 1974) (concluding that through undisputed and uninterrupted use for many years the public had gained rights under custom to use a particular beach); see also *Reynolds v. County of Volusia*, 659 So.2d 1186, 1190 (Fla. Dist. Ct. App. 1995) (stating that cus-

of custom to Hawaiian beaches by Hawai'i's Supreme Court is contrary to established precedent there and an unconstitutional taking.¹⁰

Although much has been written about Oregon's unique legacy of public privilege to use private beaches, that scholarship has tended to focus on articulation as well as spirited critique of the custom doctrine.¹¹ More recently, commentators have addressed the question of whether the public's beach rights can withstand scrutiny under the constitutional takings doctrine.¹² In contrast, this Article assumes that the custom doctrine is

tom doctrine as annunciated in Florida requires a court to ascertain in each case the degree of ancient use made of the beach).

¹⁰ See *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 479-81 (D. Haw. 1978) (stating that in contrast to Oregon's application of custom, no evidence of public use was offered in state court to establish customary use of the beach in controversy, also noting that evidence in federal court demonstrated ancient private uses of Hawai'i's most widely-known beach—Waikiki Beach; and concluding that fixing the boundary of public use and ownership as the line of vegetation rather than the high water mark was contrary to established practice, history, and precedent), *rejecting* *County of Hawaii v. Sotomura*, 517 P.2d 57, 62 (Haw. 1973) (holding that for purposes of proceeding to condemn registered oceanfront property, the seaward boundary should be located along the vegetation line rather than debris line); see also *In re Ashford*, 440 P.2d 76, 78 (Haw. 1968) (finding the boundary of parcels described in royal patents as running along the sea to be line of vegetation on the basis of ancient tradition, custom, and usage). Hawaiian courts have also developed an indigenous version of the custom doctrine that extends to beachfront property and guarantees the gathering rights of Native Hawaiians. See *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n*, 903 P.2d 1246 (Haw. 1995) (affirming ruling that agencies approving development permit must determine if Native Hawaiian gathering rights have been customarily practiced on the undeveloped land and must explore possibilities to preserve them); see generally *Bederman*, *supra* note 3, at 1431 (positing that this decision repudiated the English common law doctrine of custom in favor of an indigenous construction of the doctrine); Paul Sullivan, *Traditional and Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. (forthcoming 1999); Laura C. Harris, Note, *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission: Expanding Hawaii's Doctrine of Custom*, 3 OCEAN & COASTAL L.J. 293 (1997).

¹¹ See, e.g., *Bederman*, *supra* note 3, at 1417, 1447-55 (calling Oregon's use of the custom doctrine "an extraordinary streak of judicial activism, self-consciously implementing instrumental changes in the state's property law"); Neal E. Pirkle, Comment, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 BAYLOR L. REV. 1093, 1103-04 (1994) (accusing the Oregon Supreme Court of having greatly altered the custom doctrine by substantially reducing the time needed to meet the antiquity requirement). The dissent of Justices Scalia and O'Connor to the denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), criticized the Oregon Supreme Court's application of custom as inconsistent with the requirement under English common law that a custom benefit only inhabitants of particular districts rather than the public at large. See *id.* at 1212 n.5.

¹² See *infra* Part III for an overview of the takings doctrine as applied to Oregon beaches.

sufficiently embedded in Oregon's history and case law as precedent to withstand reconsideration of the doctrine and to constitute a background principle of state law for purposes of the takings doctrine. With these assumptions, the Article examines the largely ignored relationship between the rights of the public,¹³ as the holder of a recreational easement established by custom, and the often-competing rights and interests of the dry sand owner.

I

THE NATURE OF THE PUBLIC'S CUSTOMARY RIGHTS ON OREGON BEACHES

A. *Equivalency of Custom Rights and Easements*

In the landmark litigation of *State ex rel. Thornton v. Hay*,¹⁴ the trial court had concluded that the public acquired an easement in the dry sand area for recreational purposes. The Oregon Supreme Court affirmed the trial court by using the English doctrine of custom to establish, presumably, the same right to use the dry sand area for public recreational purposes as would exist under a prescriptive easement.¹⁵ In a subsequent decision, the Oregon Supreme Court described *Thornton* as having estab-

¹³ Pursuant to Oregon's so-called "Beach Bill," the public's beach rights or easements are declared vested in the State of Oregon and are administered as state recreation areas. See OR. REV. STAT. § 390.610 (1997).

¹⁴ See *State ex rel. Thornton v. Hay*, 254 Or. 584, 587, 462 P.2d 671, 673 (1969).

¹⁵ *Id.* at 594-98, 462 P.2d at 676-78. Oregon's Beach Bill, which preceded the *Thornton* decision, provides that where public use has been sufficient to create easements in the public "through dedication, prescription, grant or otherwise," those rights shall be vested in the State of Oregon as state recreation areas. OR. REV. STAT. § 390.610 (1997) (amended in 1969 to provide, among other things, that public use may establish "rights" as well as easements). This legislation created no affirmative rights and was dependent on litigation like the *Thornton* case to confirm the existence of any such public rights. See *McDonald v. Halvorson*, 308 Or. 340, 355, 780 P.2d 714, 721 (1989) (stating that nothing in the Beach Bill suggests that the legislature intended to acquire any interest not already vested in the public). See generally Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 ENVTL. L. 383, 409 (1974) (reporting that fear of an unconstitutional taking led the legislature to change the wording of the initial Beach Bill that would have established public rights in a dry sand area). The Beach Bill, however, is often falsely credited with establishing the public's recreational easement rights in Oregon beaches. See, e.g., BONNIE HENDERSON, *EXPLORING THE WILD OREGON COAST* 70-71 (1994) (maintaining that the Beach Bill recognized that the public had established its right to use the beach in Oregon); TERENCE O'DONNELL, *CANNON BEACH: A PLACE BY THE SEA* 106 (1996) (positing that the Beach Bill was introduced out of fear that Oregon beaches would otherwise be lost to the public).

lished an “easement” in favor of the public for recreational purposes.¹⁶ Much of this Article’s analysis, therefore, will assume that the public’s custom rights in Oregon are in the nature of an easement, particularly one acquired by prescription. Although it is possible that issues of landowner and easement-holder rights and responsibilities will be resolved differently under the common law custom doctrine than under the common law of easements, this is unlikely because the English doctrine of custom treats rights acquired by custom as quasi-easements.¹⁷ Being mindful of the dissent to the petition for certiorari in *Stevens v. City of Cannon Beach*, in which Justice Scalia accused the Oregon Supreme Court of creating the custom doctrine rather than describing it,¹⁸ Oregon’s doctrine of custom may be sui generis—distinct from both the common law of easements and the English doctrine of custom.¹⁹ But given the similarity of rights acquired by custom and those acquired by prescription,²⁰ Oregon courts most likely will apply the law of easements, at least as highly persuasive authority, to issues involving the relative rights and responsibilities of the dry sand owner (as holder of the servient estate) and the public.²¹

¹⁶ See *State Highway Comm’n v. Fultz*, 261 Or. 289, 491 P.2d 1171, 1172 (1971).

¹⁷ See 12 HALSBURY’S LAWS OF ENGLAND ¶ 429 (Lord Halsbury of St. Marylebone, ed., 4th ed. 1975) (noting that custom rights are analogous to easements but are not strictly grants of easement because easements must be granted to specific persons; custom, by contrast, is shared by beneficiaries whose membership is continually changing and fluctuating in number).

¹⁸ See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J. and O’Connor, J., dissenting from denial of certiorari).

¹⁹ See *supra* note 10 for discussion of the evolution in Hawai’i of an indigenous custom doctrine.

²⁰ Existing Oregon case law does recognize some differences between easements acquired by prescription and those by custom. As stated by the Oregon Supreme Court in *Thornton*, prescription applies only to the specific tract of land before the court; in contrast, custom can be established with regard to a larger region. *State ex rel. Thornton v. Hay*, 254 Or. 584, 595, 462 P.2d 671, 676 (1969). Custom requires a showing of antiquity extending beyond Oregon’s prescriptive period of 10 years. See *id.* at 677 (recognizing that public use of the beach in *Thornton* extended beyond 60 years). Another significant distinction also derives from the *Thornton* case. The landowners argued that their consent to the public’s beach use precluded application of the doctrine of prescriptive easements. The court viewed landowner consent to Oregon beach-goers, however, as “wholly consistent” with the establishment of rights by custom. *Id.* at 678. See generally Delo, *supra* note 15, at 410. Note that these differences relate to the means of acquiring rights rather than to the nature and exercise of the rights once acquired.

²¹ In some instances the relationship between the beach owner and the public is controlled by Oregon statute or regulation. For example, see *infra* Part II.B.6 for a discussion of regulation of landowner and public rights to extract beach materials.

B. *Spatial Parameters of Customary Easement Rights*

Although the *Thornton* litigation involved only the dry sand area fronting the Surfsand Motel in Cannon Beach, Oregon, language in the Oregon Supreme Court's decision (particularly the policy it expressed that oceanfront lands from border-to-border "ought to be treated uniformly"²²) and the court's preference for custom over the parcel-specific doctrine of easements by prescription support the existence of the customary easement on all Oregon beaches.²³ In *McDonald v. Halvorson*,²⁴ however, the Oregon Supreme Court construed *Thornton* to speak only to those beaches that abut the ocean²⁵ and that have histories of public use like "the Cannon Beach area."²⁶ Although the Cannon Beach area is a "classic, dry-sand beach,"²⁷ under *McDonald*, the public's beach easement extends to gravel and boulder beaches²⁸ and other areas adjacent to the foreshore so long as they have the requisite similar history of public recreational use.²⁹ Following *McDonald*, dry sand owners who can establish

²² *Thornton*, 462 P.2d at 676.

²³ In litigation involving a privately owned sand dune east (landward) of the vegetation line in Cannon Beach, the Oregon Court of Appeals affirmed the trial court's finding that the state failed to establish public rights under the prescriptive easement, implied dedication, and custom doctrines. See *State Highway Comm'n v. Bauman*, 16 Or. App. 275, 517 P.2d 1202 (1974).

²⁴ 308 Or. 340, 780 P.2d 714 (1989).

²⁵ *Thornton*'s establishment of custom, therefore, may not extend to beaches that abut coastal creeks, rivers, and bays, or to beaches on the bayside of ocean-fronting sand spits.

²⁶ *McDonald*, 308 Or. at 357-58, 780 P.2d at 723-24. The *McDonald* litigation involved the beach area surrounding Little Whale Cove, a unique freshwater pool formed adjacent to the ocean's edge by a rock formation that prevents the discharge of two freshwater streams directly into the ocean. Ocean water enters the cove only during storms or extreme high tides. The Oregon Supreme Court affirmed the trial court's judgment denying any public right of recreational use on the narrow beach along the cove. The court reasoned that this beach did not abut the ocean, nor was there any showing of customary use of this beach. Rather, there was evidence that for many years beach-goers there were treated as trespassers. *Id.* at 724. See generally Jo Anne C. Long, Note, *McDonald v. Halvorson: Oregon's Beach Access Law Revisited*, 20 ENVTL. L. 1001 (1990). Promotional materials for residential subdivision sales at Little Whale Cove represent that all properties and amenities are private, including the only private beach in Oregon. See SITE PLAN, LITTLE WHALE COVE (on file with *Oregon Law Review*); Videotape, Little Whale Cove at Depoe Bay, Oregon (on file with *Oregon Law Review*).

²⁷ *McDonald*, 308 Or. at 359, 780 P.2d at 724.

²⁸ This extension is especially of benefit to the public given the potential in strong El Niño or La Niña cycles for dry sand beaches to erode to beaches of gravel and boulders.

²⁹ *McDonald*, 308 Or. at 359, 780 P.2d at 724. See *Stevens v. City of Cannon*

that their beach has little or no history of public use may hold their title free of the public's easement.

C. Relocating the Recreational Easement on Shifting Sands

The Oregon Supreme Court's decision in *Thornton* addressed public rights in the dry sand area, which it defined as the land between the mean high tide and the visible line of vegetation.³⁰ Globally, most seashores are advancing inland, perhaps as a result of the phenomenon of global warming.³¹ Should Oregon's coastline, as marked by the line of vegetation, advance landward, will the public's recreational easement follow?³² Or must the public again establish its right to recreate on newly created dry sand beaches under the doctrine of custom (by demonstrating

Beach, 510 U.S. 1207, 1210 n.2 (1994) (Scalia, J. and O'Connor, J., dissenting from denial of certiorari) (observing that while *McDonald* generally narrowed *Thornton* with regard to the scope of custom, in this respect *McDonald* seemingly expanded the reach of custom).

³⁰ State *ex rel.* Thornton v. Hay, 254 Or. 584, 586, 462 P.2d 671, 672-73 (1969) (noting that Oregon legislation refers to the ordinary high-tide line and other sources to the mean high-tide line and stating that for purposes of the *Thornton* litigation the lines would be considered the same). For purposes of the 1969 Beach Bill that requires, among other things, a special permit for beach improvements, Oregon law maps out the location of the line of vegetation using a coordinate system. See OR. REV. STAT. § 390.770 (1997) (specifying location of the vegetation line under the Oregon Coordinate System that replaced the topographic boundary under the 1967 Beach Bill), *id.* § 390.760 (describing certain land located above the 16-foot elevation line but seaward of the line in OR. REV. STAT. § 390.770 that is excepted from the requirement of a special permit for beach improvements). See *infra* note 121 and accompanying text for discussion of the statutory improvement permit.

³¹ See 16 U.S.C. § 1451L (1998) (finding of Congress that coastal states must anticipate that global warming may result in substantial sea level rise); see generally KOMAR, *supra* note 4, at 23-24 (asserting that as a result of uplifting plate movement, the sea level at Oregon coast either is not rising or rising less rapidly than on the East and Gulf Coasts, but noting the uncertainty presented by global warming); LENA LENCEK and GIDEON BOSKER, *THE BEACH: THE HISTORY OF PARADISE ON EARTH* 277 (1998).

³² If the gradual advance of the ocean were to submerge the beach owner's land, the state would acquire title to that submerged tideland. See *Wilson v. Shiveley*, 11 Or. 215, 4 P. 324 (1884). Title to the wet sand area is thus ambulatory and moves inward with the encroaching ocean. See also *Lechuza Villas West v. California Coastal Comm'n*, 70 Cal. Rptr. 2d 399 (Ct. App. 1997) (finding the boundary between private beach property and state's tidelands, being the mean high tide line, ambulatory, not fixed), *cert. denied*, 119 S. Ct. 163 (1998); *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App. 1986) *writ ref'd n.r.e.* (Nov. 19, 1986), *cert. denied*, 481 U.S. 1024 (1987) (stating that mean high tide boundary between privately owned beach-front and state-owned tidal waters migrates as the beach moves). Cf. *Bergh v. Hines*, 692 N.E.2d 980 (Mass. App. Ct. 1998) (declaring it well-settled that express easements stated to run along shoreline boundaries are not fixed and will follow the naturally changing shoreline).

longstanding use of that new beach area), under the related doctrines of prescription, dedication, public trust,³³ or by purchase? If so, these doctrines would now collide with an Oregon statute intended to eliminate actions for acquisition of public rights on private land made available for recreational use.³⁴

Given the requirement under the custom doctrine of ancient use so long that "the memory of man runneth not to the contrary,"³⁵ a custom of recreational use might not automatically extend landward to newly created beach area.³⁶ However, authority under the English doctrine of custom supports the "rolling" nature of a shore-front easement, at least in an analogous context in which the ocean had receded and the custom involved drying nets at the water's edge.³⁷ More recently, a Texas appellate court has held that customary public beach rights are subject to relocation when the line of vegetation advances landward, in that case due to a hurricane:

³³ One of the concurring judges in the *Thornton* litigation would have grounded the public's rights to recreate in the public trust doctrine rather than under custom. See *Thornton*, 254 Or. at 599, 462 P.2d at 678 (Denecke, J., concurring). Some commentators have advocated use of the public trust doctrine over custom in establishing and maintaining public beach rights. See, e.g., Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 677 (1989); Richard G. Hildreth, *The Public Trust Doctrine and Coastal and Ocean Resources Management*, 8 J. ENVTL. L. & LITIG. 221 (1993). The public trust doctrine appears to provide the greatest flexibility in relocating the public's rights in relation to shifting beaches. Cf. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) in which the court stated:

Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

³⁴ See OR. REV. STAT. § 105.692 (1997) (providing that an owner who directly or indirectly permits any person to use land for recreational purposes neither gives that person a right to continued use without the owner's consent nor creates a presumption that the owner intended to dedicate the land; also providing that this law does not diminish public rights to use land for recreational purposes acquired by dedication, prescription, grant, custom, or otherwise existing before October 3, 1979).

³⁵ *Thornton*, 254 Or. at 596, 462 P.2d at 677.

³⁶ See WALLACE KAUFMAN & ORRIN H. PILKEY, JR., *THE BEACHES ARE MOVING: THE DROWNING OF AMERICA'S SHORELINE* 248-49 (1979) (questioning whether existing beach rights acquired under the doctrines of prescriptive easement, dedication, or custom will extend to beaches formed behind a vegetation line advancing landward).

³⁷ See *Mercer v. Denne*, 2 Ch. 538 (1905). See generally Finnell, *supra* note 33, at 651-53 (1989).

[T]he theory of a migratory public easement is compatible with the doctrine of custom and the situations that often give rise to a custom. A public easement on a beach cannot have been established with reference to a set of static lines on the beach, since the beach itself, and hence public use of it, surely fluctuated landward and seaward over time. The public easement, if it is to reflect the reality of the public's actual use of the beach, must migrate as did the customary use from which it arose.³⁸

However, whether Oregon courts will adopt the "rolling" easement approach is unclear. In *McDonald v. Halvorson*, the Oregon Supreme Court concluded that *Thornton* spoke only about those coastal areas with "histories of use like the Cannon Beach area."³⁹ Would a new beach located landward of the previous vegetation line have this requisite history of public use?

Moreover, the "rolling" easement approach becomes even more problematic when the public's easement is claimed to have rolled past the beach owner's improvements, now located seaward of the vegetation line. In *Matcha v. Mattox*, a Texas appellate court affirmed an injunction that ordered the removal of a storm-damaged house that had been crossed by the landward movement of the vegetation line during a hurricane.⁴⁰ A Texas federal district court judge, however, while recognizing the rolling nature of beach easements there, held later that forcing the removal of existing structures would require compensation as a taking.⁴¹

Consider the potential for the seaward retreat of the ocean. When the ocean (as measured by the high-tide line) gradually recedes and the dry sand area expands seaward, the general rule is that the dry sand owner will gain title to this new beach.⁴² Whether the public's recreational rights attach to the new beach or remain landward also depends on whether Oregon courts

³⁸ *Matcha v. Mattox*, 711 S.W.2d 95, 100 (Tex. App. 1986) writ *ref'd n.r.e.* (Nov. 19, 1986), *cert. denied*, 481 U.S. 1024 (1987). Cf. *Feinman v. State*, 717 S.W.2d 106, 113 (Tex. App. 1986) writ *ref'd n.r.e.* (Jan. 14, 1987), *reh'g of writ of error overruled* (Feb. 18, 1987) (concluding that public recreation rights established on Texas beaches through implied dedication shift with the changing vegetation line).

³⁹ *McDonald v. Halvorson*, 308 Or. 340, 358, 780 P.2d 714, 723 (1989).

⁴⁰ *Matcha*, 711 S.W.2d 95.

⁴¹ See *Hirtz v. Texas*, 773 F. Supp. 6, 10 (S.D. Tex. 1991), *vacated on other grounds*, 974 F.2d 663 (5th Cir. 1992).

⁴² *State v. Sause*, 217 Or. 52, 80, 342 P.2d 803, 817 (1959) (stating the rule that if the change is gradual, the boundary of the upland will follow the water; if the change is sudden (known as avulsion), the boundary stays unchanged).

adopt the "rolling" easement concept. Many of the same considerations apply as when the beach advances landward. Supporting the "rolling" easement is a notable English custom case holding that the coastal custom of drying fishing nets followed the receding shoreline.⁴³ In the case of the ocean's retreat, the rights of the private owner to maintain existing improvements on the uplands property would not be jeopardized. Moreover, because the public historically has recreated in the wet sand area, movement of the beach seaward may not present a problem under the *McDonald v. Halvorson* standard.

A related scenario would involve movement of the vegetation line seaward across the former dry sand area. The issue here would be whether the public's recreational rights in the former dry sand area, once crossed by the vegetation line, would be lost.⁴⁴ Under the standard in *McDonald v. Halvorson*, the history of public use of what was once beach property supports the continuance of the public's easement rights. But the concept of a "rolling" beach easement, if adopted by Oregon courts, would yield a rule under which the public's easement would attach to the dry sand area and move landward or seaward depending on coastal forces.⁴⁵ Given the tendency in recent times for seas to

⁴³ *Mercer v. Denne*, 2 Ch. 538 (1905).

⁴⁴ The overlay of public regulation in Oregon of the dry sand area, which is defined on the upland side by the vegetation line, would present a related but separate issue. The State Parks and Recreation Department is authorized to recommend adjustment of the vegetation line to the legislature. OR. REV. STAT. § 390.755 (1997). If the legislature were to adjust the line seaward, the new uplands would be removed from statutory regulation of the dry sand, including the statutory restrictions on new structures. See *infra* Part II.B.3. However, unless the Oregon courts extinguish the public's recreational easement under the "rolling" easement concept, the public could still retain rights in the uplands property to be governed by the judicial principles of easement law discussed *infra* Part II.B. See generally Guillermo M. Díaz, Analysis of Coastal Changes Along the New River Spit, Bandon Littoral Cell, Relevant to an Adjustment of the Statutory Vegetation Line on the South Coast of Oregon (Master's thesis, Oregon State University (Corvallis)) (on file with Oregon State University Library) (reporting that beachfront owners near Bandon, Oregon have requested a seaward relocation of the statutory vegetation line to reflect the growth of beach on their spit).

⁴⁵ The RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8(3) (Tentative Draft No. 4, Apr. 5, 1994) enables the holder of the servient estate to make reasonable changes in the location or dimensions of an easement to permit normal use of the servient estate where those changes "(a) do not significantly lessen the utility of the servitude, or (b) increase the burdens on the holder of the servitude benefit, or (c) frustrate the purpose for which the servitude was created. . . ." Arguably, these standards would be satisfied if the beach grew seaward by an amount equal to the moving vegetation line, and if that beach movement were at least semi-permanent.

rise and to claim existing beaches, this “rolling” easement concept seems prospectively to favor the public’s interest.⁴⁶

II

THE DRY SAND OWNER’S “BUNDLE OF STICKS”

The following discussion assumes both that the private landowner’s title encompasses the dry sand area and that the public has a customary easement in that beach for recreational purposes. It also assumes that principles of easement law will control the relationship of these parties. With these assumptions, it explores the relative rights and responsibilities of the beach owner and the beach-going public.

A. *Balancing Public and Private Interests*

Under Oregon easement law, the rights of the easement holder and of the landowner “are limited, each by the other, so that there may be reasonable use by both.”⁴⁷ As provided in the Restatement (Third) of Property (Servitudes) § 4.9, the landowner is entitled to make any use of the servient estate that does not unreasonably interfere with the enjoyment of the easement for its intended purpose.⁴⁸ Applied to the dry sand area, this standard would contemplate a balancing of the interests of the beach owner in the profitable use of her land and those of the recreating public to ensure a safe and aesthetically pleasing experience.⁴⁹ For example, these interests may balance in favor of

⁴⁶ See KAUFMAN & PILKEY, *supra* note 36, at 250 (reaching this conclusion); see also James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998) (suggesting rolling easements as a means of protecting tidelands from development).

⁴⁷ *Miller v. Georgia-Pacific Corp.*, 48 Or. App. 1007, 1016, 618 P.2d 992, 996 (1980).

⁴⁸ Oregon courts have adopted this standard. See, e.g., *Ericsson v. Braukman*, 111 Or. App. 57, 62, 824 P.2d 1174, 1178 (1992) (“The owner of the servient estate may use the area subject to an easement, if that use does not unreasonably interfere with the easement owner’s rights.”). The Florida Supreme Court has applied this standard specifically in the context of beach rights by construing the doctrines of custom and of prescriptive easement to allow the beach owner to make any use of the beach consistent with the public’s recreation rights. See *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974) (concluding that an observation tower erected in a dry sand area was consistent with public recreational use). See further discussion of *Tona-Rama* *infra* Part II.B.3.

⁴⁹ Cf. OR. REV. STAT. § 390.655 (1997) (articulating standards for improvements to ocean shore and other property regulated by State Parks and Recreation Department that include the public need for “healthful, safe, esthetic surroundings and

allowing the landowner to remove newly created sand dunes to preserve property views, or to prevent inundation of uplands property, where removal does not sacrifice the public's beach experience.⁵⁰ In contrast, safety was one factor that tipped the balance in favor of the public's interest, leading the Oregon Supreme Court to halt construction of a private road on the beach that would jeopardize the public's escape from tidal waters.⁵¹ Seawalls often will impair the aesthetic beauty of the beach,⁵² potentially resulting in the displacement of sand and thereby reducing the amount of beach available for public recreation.⁵³ Structures built on the dry sand would also reduce the beach area available for public use, whereas certain improvements (e.g., an observation tower) might facilitate public recreation.⁵⁴

Professor Marc Poirier has argued that through federal flood insurance and other means the public is subsidizing private beachfront development.⁵⁵ From this conclusion he argues that beachfront development restrictions should be upheld against takings challenges. It follows that one of the factors to be considered in balancing landowner and public beach rights is the extent of such public subsidies and the potential for destruction of the

conditions"); OR. ADMIN. R. 736-020-0005 to -0030 (1997) (elaborating on these standards). Supporting the public's side of the balance is research by Professor Carol Rose who documented the virtues of public access and socialization in concluding that doctrines such as custom that provide public access to certain locations are "as important as the general privatization of property in other spheres of our law." Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 781 (1986).

⁵⁰ See *infra* Part II.B.6. Of course, other factors would be relevant in any such determination, such as the extent to which the sand dunes prevent beach erosion.

⁵¹ See *infra* Part II.B.3. One of the factors cited by the Oregon Department of Parks and Recreation in denying the permit for the seawall leading to the litigation in *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207 (1994), was that the seawall would pose an escape route obstacle to beach users fleeing the surf. *Id.* at 134 n.4, 854 P.2d at 451 n.4.

⁵² For illustrations of the visual impacts of seawalls on the Oregon coast see KOMAR, *supra* note 4, at 181-83.

⁵³ See generally James W. Good, *Ocean Shore Protection Policy & Practices in Oregon: An Evaluation of Implementation Success* (1992) (Ph.D. dissertation, Oregon State University (Corvallis)) (documenting effects of seawalls in Oregon on sediment supply); see also Carmel Finley, *Engineer Proposes Lincoln City Seawall Plan*, THE OREGONIAN (Portland), June 10, 1996, at B1 (remarks of state official that seawalls decrease beach sand supply).

⁵⁴ See *infra* Part II.B.3.

⁵⁵ See Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243 (1993).

desired shorefront improvements. From this perspective, a seawall might be urged on the basis that its use will preserve upland improvements.⁵⁶

McDonald v. Halvorson articulated a standard for recognizing public custom rights on beaches that have a history of public use like "the Cannon Beach area."⁵⁷ As part of the balancing of the rights of the public against those of the dry sand owner on beaches impressed with custom, it may be relevant to examine more particularly the current and potential future public use of the specific beach in controversy. If the beach lies in a sparsely populated area and is subject to substantially less foot traffic than beaches within municipal boundaries, it may be reasonable to allow the landowner certain uses that would infringe too severely on public rights to be permissible on more trafficked beaches.

Another balancing factor, though more properly the subject of consensual bargains than for courts in litigation, is any agreement between the beach owner and the public to exchange rights. For example, a landowner seeking a permit to develop an uplands structure that will encroach somewhat onto the beach might persuade government officials that a consensual grant of public beach access through the uplands property (in the form of an easement) outweighs the displacement of beach by the proposed structure.⁵⁸

B. Examining the Landowner's "Bundle of Sticks"

The Oregon Supreme Court speculated in *State ex rel. Thornton v. Hay* that "one explanation for the evolution of the custom [in Oregon] of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose."⁵⁹ In fact, the beach has value and purpose for the dry sand owner beyond recreation. Whether these uses remain in the Oregon beach owner's "bundle of sticks" is the subject of the discussion below.

⁵⁶ But see Titus, *supra* note 46, at 1332 (stating that private seawalls generally are unable to withstand a severe storm). One of the factors cited by the Oregon Department of Parks and Recreation in denying the seawall permit in the *Stevens* litigation was that the proposed design failed to protect the uplands property against wave overtopping and the 100-year flood. *Stevens*, 317 Or. at 134 n.4, 854 P.2d at 451 n.4.

⁵⁷ *McDonald v. Halvorson*, 308 Or. 340, 358, 780 P.2d 714, 723 (1989).

⁵⁸ Cf. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (conditioning a building permit for uplands residence on the landowner's involuntary grant of public access easement across uplands to beach held a taking).

⁵⁹ *State ex rel. Thornton v. Hay*, 254 Or. 584, 588-89, 462 P.2d 671, 673-74 (1969).

1. *No Right to Exclude*

The most fundamental of property rights, the right to exclude others,⁶⁰ generally is missing from the beach owner's "bundle of sticks." *Thornton* involved the state's successful action to enjoin the owners of an oceanfront motel from fencing in the dry sand to create a private beach for motel guests only.⁶¹ The essence, then, of the relationship between the beach owner and the public as holder of a recreational easement is the loss of the landowner's right to exclude the recreating public from the dry sand area. In contrast to California, where some landowners "tak[e] tickets and charg[e] admission to their beaches,"⁶² to date there are no private beaches in Oregon.⁶³

The beach can be a dangerous place, especially during winter storms when storm surges and tidal waters often inundate the otherwise dry sand area. Having lost the right to exclude beachgoers under the custom doctrine, must beach owners take precautions to ensure the safety of beachgoers, or at least to warn them of hazards? An Oregon statute relieves the beach owner, and other owners of property used for recreation purposes, from such liability.⁶⁴

As stated above, the general standard in easement law permits reasonable use by both the landowner and the easement

⁶⁰ Cf. *Nollan*, 483 U.S. at 831 ("We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (internal quotation marks omitted).

⁶¹ See BRENT WALTH, *FIRE AT EDEN'S GATE: TOM MCCALL & THE OREGON STORY* 187-92 (1994) (describing the erection by the Hays in 1966 of a fence running to the high-tide line that enclosed tables and cabanas for guests as well as a sign reading "Surfsand [Motel] Guests Only").

⁶² Larry Bacon, *Whose Beach Is It, Anyway?*, *EUGENE REGISTER-GUARD*, Aug. 2, 1992, at D1 (remarks of state attorney in the litigation of *Stevens v. City of Cannon Beach*).

⁶³ Promotional materials for Little Whale Cove, the subject of litigation in *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989), advertise the only private beach on the Oregon coast. See SITE PLAN, LITTLE WHALE COVE (on file with *Oregon Law Review*), Videotape: Little Whale Cove at Depoe Bay, Oregon (on file with *Oregon Law Review*).

⁶⁴ See OR. REV. STAT. § 105.682 (1997) (owner not liable in contract or tort for any personal injury, death, or property damage arising out of use of land for public recreation purposes); *id.* § 105.688 (this immunity extends to lands adjacent to the ocean shore, but is unavailable if the landowner charges for use. Therefore, the immunity may not protect the landowner who sells permission to a non-owner to extract beach materials; see *infra* Part II.B.6).

holder.⁶⁵ Presumably, then, the beach owner retains the right to exclude unreasonable uses of her beach by the public. Under the common law of easements, misuse of an easement is subject to injunction.⁶⁶ In the unlikely event that the court cannot fashion an injunction to prevent the damaging use, the easement may be forfeited.⁶⁷ Reasonableness of use of an easement will depend on the circumstances of each case.⁶⁸ In the context of a beach easement, it is unclear whether sustained or episodic vandalism (particularly of the beach owner's adjoining uplands property), littering,⁶⁹ disturbing the peace, unlawful burning, discharge of illegal fireworks, public nudity, violence, or criminal activity constitutes unreasonable use, particularly when the conduct is criminal and other enforcement mechanisms exist.

This standard of reasonableness to protect the landowner against misuse is related to the standard of reasonableness used to confirm the custom of Oregon beach recreation in the first instance. In *Thornton*, the Oregon Supreme Court had concluded that the English custom requirement of reasonableness was satisfied by evidence that the public had made appropriate

⁶⁵ See *supra* Part II.A.

⁶⁶ See JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* ¶ 9.08 (1988); 4 RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* § 34.20 (1997).

⁶⁷ See BRUCE & ELY, *supra* note 66, ¶ 9.08; POWELL & ROHAN, *supra* note 66, § 34.20.

⁶⁸ *Miller v. Georgia-Pacific Corp.*, 48 Or. App. 1007, 1016, 618 P.2d 992, 996 (1980).

⁶⁹ See Stan Federman, *Cannon Beach Motel Owner Fights for Right to Fence Off Private Beach for Guests*, *THE OREGONIAN* (Portland), May 14, 1967, at 25 (Bill Hay, co-owner of the Surfsand Motel and the co-defendant in *Thornton*, had justified his barricading the dry sand in front of his motel because of alleged "constant public vandalism" on the beach, including leaving behind broken bottles and garbage). When the *Thornton* decision was announced, then-Governor Tom McCall described the public responsibilities that would govern use of their recreational easement:

We must see that the beaches are used in a lawful manner.

We must ensure that property of adjacent landowners is secure from harm.

We must protect neighboring residents from disorderly behavior by the few who are found in every group.

And all of us must dedicate ourselves to stopping litter and vandalism in this splendid recreation area.

Paul Harvey Jr., *Public Beach Rights Affirmed*, *THE OREGONIAN* (Portland), Dec. 23, 1969, at 1. See also John Griffith, *Mess on Beach Prompts State to Respond*, *THE OREGONIAN* (Portland), Nov. 11, 1998, at C18 (reports of broken bottles, condoms, drug paraphernalia, and human waste left behind by holiday beach users on Oregon beach).

use of the beach and that municipal police had intervened to prevent inappropriate uses.⁷⁰

In 1986, the Oregon Supreme Court rejected a claim by the same hoteliers from the *Thornton* litigation who sought to challenge the state's allowance of vehicle parking on their beach as a nuisance and a trespass.⁷¹ Although the claim may have been brought more properly as one to enjoin misuse of the public's easement, the standard for private nuisance applied by the court looked to the reasonableness of the use in controversy. Thus, it duplicated the analysis for misuse of an easement. Based on the history of vehicular traffic on the plaintiffs' beach, public parking was held reasonable and not a nuisance.⁷² Similarly, the long-standing history of vehicular use would validate parking under the doctrine requiring reasonable use of easements. Because these related doctrines apply the standard of reasonableness on a case-by-case basis, however, one cannot state a blanket rule for Oregon beaches. For example, parking may not be part of the history of a specific beach, and parking particularly may impact a beach owner whose uplands property lays so low that automobiles impair the landowner's view.⁷³

Closely related to misuse of the public's beach easement rights is the potential of a landowner's challenge to excessive public use. Servient estate owners have often challenged easement holders who heavily increased their use of the easement, or who,

⁷⁰ See *State ex rel. Thornton v. Hay*, 254 Or. 584, 596, 462 P.2d 671, 677 (1969). For discussion of the English custom reasonableness requirement, see *Bederman*, *supra* note 3, at 1392-95. See also *Delo*, *supra* note 15, at 397-98 (observing that under the English doctrine of custom, reasonableness refers to legal reasonableness as a policy matter rather than the standard used in *Thornton* that looked to the reasonableness of the actual use by those claiming the custom; concluding, however, that a good argument can be made that the Oregon beach recreation custom satisfies the English standard).

⁷¹ *Hay v. Oregon Dep't of Transportation*, 301 Or. 129, 719 P.2d 860 (1986).

⁷² *Id.* at 142-43, 719 P.2d at 869.

⁷³ Consider the potential adverse impacts on the beach owner of a public highway or roadway built on beach property. Presumably, this use would interfere unreasonably with the beach owner's recreation rights and upland property values and require compensation to the landowner. Although there is a history of public use of the beach area for transportation purposes, this use was predominately on the wet sand area, and Oregon's era of commercial beach travel by horse and auto stages ended some years ago with the opening of the Oregon Coast Highway and other transportation advances. See generally Gary Meier, *When the Highway Was Sand*, 10 OREGON COAST MAGAZINE, Jan.-Feb. 1991, at 26. Moreover, the sandy beach remained open for recreational use and scenic view between infrequent coaches, as opposed to the obstruction an asphalt road would pose. *Id.*

through developments in technology or otherwise, changed their use of the easement, in either case increasing the burden on the servient estate.⁷⁴ As in the case of a challenge for misuse (e.g., littering an access easement), challenges to excessive use (e.g., increased traffic on an access easement resulting from development of the dominant estate) or to changed use (e.g., introducing vehicles on an easement for rail traffic) will be judged under the overarching standard of reasonableness. Due to increases in state and national population, development of tourism infrastructure in coastal communities, and transportation advances, public use of Oregon beaches has undoubtedly increased since public recreation rights were recognized in 1969 by *Thornton*.⁷⁵ Still, it is unlikely that a beach owner would succeed in obtaining restrictions on the extent of beach use by the public.⁷⁶ In most cases, public use over the years has risen steadily rather than abruptly. This normal increase in use by the easement holder seems reasonable.⁷⁷ Moreover, increased use of the beach may inure to the benefit of commercial uses of uplands property such as hotels and restaurants. That benefit, in turn, has enhanced the property values of residential owners of uplands property.

In *Thornton*, the Oregon Supreme Court spoke of the public's historical recreational use of the dry sand area "for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede."⁷⁸ Although public

⁷⁴ See generally 7 THOMPSON ON REAL PROPERTY § 60.04(a)(1)(iii) (David A. Thomas, ed. 1994).

⁷⁵ See Peter D. Sleeth & Foster Church, *Oregon's Crowded Coast*, THE OREGONIAN (Portland), July 7, 1997, at A1 (reporting results of poll naming coast as favorite destination for vacationing Oregonians with 57% of Oregonians visiting regularly; also reporting coastal population boom and increased traffic counts on Oregon's coastal highway). Cf. Katherine Niven, *Beach Access: An Historical Overview*, 2 N.Y. SEA GRANT L. & POLICY J. 161, 162-63 (1978) (citing a study in the 1960s that predicted participation in outdoor recreation activities by the year 2000 would be quadruple the 1960 level).

⁷⁶ One possible argument on behalf of the landowner would be that the increased public use interferes with the owner's own use of the beach for recreational purposes. Cf. *Leabo v. Leninski*, 438 A.2d 1153 (Conn. 1981) (opening private beach to the public would unreasonably interfere with the rights of parties holding an easement to use the beach for bathing purposes).

⁷⁷ Cf. *Logan v. Brodrick*, 631 P.2d 429 (Wash. Ct. App. 1981) (holding that traffic increase on consensual easement for access to resort due to population growth and burgeoning public interest in recreation did not unreasonably burden servient owner).

⁷⁸ *State ex rel. Thornton v. Hay*, 254 Or. 584, 588, 462 P.2d 671, 673 (1969).

use generally is the same today as during the period when the custom of public recreational use was established, there are some minor differences (e.g., the introduction of land windsail devices and all-terrain vehicles),⁷⁹ as well as the prospect for future evolution of recreational beach use. Under the law of easements, including that of prescriptive easements, courts recognize that the easement holder may modify her use of the easement, such as to take advantage of technological advances, so long as the modified use does not unreasonably burden the servient estate.⁸⁰ The English custom doctrine has recognized the same flexibility of reasonable modification; in the case of a custom to recreate, the nature of the recreation may vary with the prevailing fashion.⁸¹

2. *Right Against Exclusion*

The rights of dry sand owners can be described in a sarcastic tone by pointing out they at least retain the right to use the beach with the rest of the public. In fact, there is more substance to this right than first appears.⁸² Among other things, the public should be unable to erect any structure that would unreasonably burden, rather than advance, the dry sand owner's beneficial use of her

⁷⁹ Cf. OR. ADMIN. R. 736-030-0030 (1998) (prohibiting windsails on Cannon Beach and Seaside beaches).

⁸⁰ See, e.g., *Firebaugh v. Boring*, 288 Or. 607, 618, 607 P.2d 155, 161 (1980):

[I]n determining whether a particular use of a prescriptive easement is permissible, a comparison should be made between (A) the use by which the easement was created, and (B) the proposed use considering these factors: (1) the relative burdens upon the servient tenement; (2) the nature and character of the uses of the easement; and (3) the purposes achieved through the uses of the easement.

For easements created by express grant, as opposed to those obtained by prescription, the court will also consider the intent of the parties. See, e.g., *Bernards v. Link*, 199 Or. 579, 248 P.2d 341 (1952) (construing grant of right-of-way for hauling logs to allow the easement holder to keep abreast of "developments of the times" and convert from trains to logging trucks). See generally RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), *supra* note 45, § 4.10 (allowing the manner, frequency, and intensity of easement use to change to take advantage of technology developments and to accommodate normal development so long as the change does not cause unreasonable damage to or interfere unreasonably with enjoyment of the servient estate); *BRUCE & ELY*, *supra* note 66, ¶ 7.05; *POWELL & ROHAN*, *supra* note 66, § 34.13 (stating that uses that have no connection with or resemblance to the adverse use by which a prescriptive easement was created are not permissible).

⁸¹ See 12 HALSBURY'S LAWS OF ENGLAND, *supra* note 17, ¶¶ 425, 434. But cf. *Blundell v. Catterall*, 106 Eng. Rep. 1190 (K.B. 1821) (rejecting the expansion of custom to use shorelands for fishing to include bringing horse-drawn bathing machines (a portable bath-house device) across the beach).

⁸² For example, the public could not sell to one beach landowner the right to establish a private beach on a neighboring owner's beach property.

beach. For example, public restrooms would serve little purpose for a beach owner with such facilities in an adjoining residence or motel. In contrast, picnic and sports amenities could benefit the beach owner equally with the public.⁸³ Consider finally the example of permanent or semi-permanent camping structures such as "yurts." Again, in all likelihood these would not benefit a beach owner with adjoining overnight facilities, and, in fact, actually might compete with them.

In addition to their potential to interfere with the beach owner's use of the dry sand, public structures on the beach may impair the value of uplands development. These additions might unreasonably impair the scenic view rights through the beach that the dry sand owner should enjoy.⁸⁴

Oregon's custom doctrine ensures the public's right to use the dry sand beaches for recreational purposes. It does not, however, provide access rights through adjoining uplands property titled in the dry sand owner, at least in the absence of establishment of access rights under the doctrines of prescriptive easements or implied dedication or by eminent domain.⁸⁵ The beach owner with adjoining uplands property, therefore, enjoys a potential right of convenient beach access not shared by the public.⁸⁶

One potentially thorny issue involves the question of to what extent municipal ordinances or other laws that restrict the public's right to use the beach may govern dry sand owners. For example, assume that a municipality adopts a beach curfew operative during nighttime hours. Could that curfew properly extend to the beach owner on her own property?⁸⁷ What about

⁸³ See *supra* text accompanying notes 44 & 73 for a related discussion of whether public parking on the beach unreasonably burdens the dry sand owner.

⁸⁴ Although generally the law does not recognize the establishment of view easements by prescription, *e.g.*, *Hill v. The Beach Co.*, 306 S.E.2d 604 (S.C. 1983), this doctrine should have no place in this context of beach owner rights.

⁸⁵ See Fran Recht, *The Coast Isn't Safe*, THE OREGONIAN (Portland), July 6, 1997, at D5 (lamenting the loss of beach access through private development of uplands). It is possible that the public trust doctrine, at least as applied in New Jersey, may serve as a basis for obtaining access rights through uplands property. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984) (suggesting that under the public trust doctrine the public has a right of reasonable access to the sea).

⁸⁶ Where the beach owner desires to secure access through stairs that will extend into the dry sand area, presumably the principles discussed in the next section for construction of structures will apply.

⁸⁷ Cf. OR. ADMIN. R. 736-030-0020 (1998) (prohibiting overnight camping or sleeping on the beach in several Oregon coastal communities).

to guests of a beach owner's adjoining motel operation?

3. *Right to Construct Improvements*

Ordinarily, it would seem that improvements constructed by a landowner on the beach would interfere unreasonably with the public's easement rights.⁸⁸ For example, the Oregon Supreme Court affirmed an injunction against completion of a road being constructed on the beach by the dry sand owner—the road would occupy or enclose over an acre of beach and would impede public escape from tidal waters, as well as result in erosion of the beach through lateral displacement of sand.⁸⁹

Some landowner improvements, however, may further the public's recreational experience and may, on balance, constitute reasonable uses. For example, the Florida Supreme Court remarked that the landowner's erection in the dry sand of a seventeen-foot diameter observation tower "was consistent with the recreational use of the land by the public and could not interfere with the exercise of any easement the public may have acquired. . . ."⁹⁰ Presumably the landowner planned to charge the

⁸⁸ These materials focus on the standard under the common law of easements for construction of improvements by the servient landowner. Oregon law requires that beach owners obtain a special permit issued by the State Parks and Recreation Department for beach improvements. OR. REV. STAT. § 390.640 (1997). The standards for such permits include consideration of the "public need for healthful, safe, esthetic surroundings and conditions" as well as the "need for recreation and other facilities and enterprises in the future development of the area." *Id.* § 390.655; see also OR. ADMIN. R. 736-020-0005 to 0030 (1998) (elaborating on statutory standards). These standards appear to be quite similar to the standard of reasonableness employed under the common law of easements. The ramifications of this overlap of statutory regulation on the rules of easement law are discussed *infra* Part III.

Oregon's Land Conservation and Development Commission (LCDC) has adopted planning goals for Oregon land planning that encompass its beaches. The Implementation Requirements for LCDC's Goal 18 require that government prohibit residential developments as well as commercial and industrial buildings on Oregon beaches. OR. ADMIN. R. 660-015-0010 (1998). The Oregon Supreme Court in *Stevens v. City of Cannon Beach*, 317 Or. 131, 147, 854 P.2d 449, 459 (1993), *cert. denied*, 510 U.S. 1207 (1994), observed that the Implementation Requirement 4 of LCDC Goal 18 appears to allow for construction of single-family dwellings in the dry sand area. Goal 18, however, encompasses the dry sand beach as well as dunes and lands upland of the dry sand. Implementation Requirement 4 exempts single-family dwellings from the requirement that government protect groundwater from drawdown that leads to intrusion of salt water or other adverse effects. It does not appear to exempt single-family dwellings from the prohibition of residential developments on the beach.

⁸⁹ See *State Highway Commission v. Fultz*, 261 Or. 289, 293, 491 P.2d 1171, 1173 (1971).

⁹⁰ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77-78 (Fla. 1974)

public for admission to this elaborate tower that was to be entered by a rising, rotating gondola in the mode of an amusement park attraction. Allowing the landowner to erect improvements to enhance recreation, such as volleyball courts, firepits, and picnic tables, for free public and private use seems reasonable.⁹¹ Permitting the dry sand owner to erect more elaborate improvements and to charge admission to recoup investment costs and to profit seems contrary to the easement rights of the public. Indeed, it could be argued that a private motel on the dry sand area enhances the beach experience of those who pay to stay there, but such an improvement would certainly contradict the ruling in *Thornton* that involved a mere fence. Oregon courts and regulatory authorities should view proposed beach improvements cautiously and approve only those that both benefit the public and that are available for public use without charge.

One potential exception to the condition that beach improvements benefit the public is where the infringement on the public's recreation rights, on balance, is very slight in relation to the utility of the improvement to the beach owner. Examples may include stairway landings that provide convenient access for the landowner while displacing only a small amount of the beach,⁹² as well as underground pipelines or conduits that do not alter the

(above statement was dictum as it related to claim of prescriptive beach easement because court held the public had not acquired an easement by prescription; however, court concluded public had rights in beach by custom and appeared to apply the same standard in stating that the owner can make any use of the property consistent with the public's custom of recreational use). See generally Case Comment, 2 FLA. ST. U. L. REV. 806 (1974).

⁹¹ Query whether landscaping the beach would interfere with public recreation. Cf. *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App. 1986) writ *ref'd n.r.e.* (Nov. 19, 1986), cert. denied, 481 U.S. 1024 (1987) (affirming an injunction against dry sand owners prohibiting any construction of structures or placement or nourishment of plants that interfered with public recreation). Because the vegetation line has served in Oregon as the landward boundary of the public's custom rights, any planting of vegetation on the beach by the landowner could create confusion in ascertaining the location of the public's rights.

⁹² Consider the potential for the intrusion onto the beach of structural supports attached to a building that overhangs the beach, or the intrusion of an overhanging building supported entirely by uplands property. Analogous authority has applied the easement balancing test to conclude that a walkway 16 feet above an access easement to connect the servient owner's buildings did not unreasonably interfere with use of the right of way. See *Minneapolis Athletic Club v. Cohler*, 177 N.W.2d 786 (Minn. 1970). Of course, one purpose of the public's beach easement is an aesthetic component that ordinarily would not play a role in balancing the rights of a landowner and a holder of an access easement.

physical characteristics of the beach or pose a safety risk.⁹³

4. *Right to Keep Existing Improvements*

Before the public's easement rights were articulated in *Thornton*, improvements were erected in isolated instances on the dry sand beach in Oregon. These improvements range from buildings to additions appurtenant to buildings, such as seawalls. Responding to the claim of the plaintiffs in the *Stevens* litigation that *Thornton's* establishment of custom could not be applied to existing beach owners retroactively, the Oregon Supreme Court stated that *Thornton's* date—1969—was not relevant. Rather, the public's easement rights pre-dated the *Thornton* decision and "came into being long before" the plaintiffs acquired their beach property in 1957.⁹⁴ Therefore, there undoubtedly are improvements on Oregon beaches that, when erected, violated the public's then-existing easement rights.⁹⁵

Certain of these improvements were erected in the period between adoption of the Beach Bill in 1967⁹⁶ and issuance of the *Thornton* decision in 1969. During that time there was great uncertainty over the extent, if any, of the public's rights in the dry sand beaches.⁹⁷ At minimum, the Beach Bill required the land-

⁹³ OR. REV. STAT. § 390.715 (1997) requires a permit for pipelines, cable lines, and other conduits across or under the beach and payment of "just compensation" by the permittee. See also OR. ADMIN. R. 736-020-0040 (1998) (detailing considerations for issuance of permits). Presumably, no compensation would be due from the dry sand owner. When the permittee is someone other than the beach owner, the statute requires the landowner's consent to issuance of the permit. OR. REV. STAT. § 390.715(2) (1997).

Cases arising under easement law have recognized the ability of the servient owner to construct improvements underneath a right of way in appropriate circumstances. See, e.g., *Reutner v. Vouga*, 367 S.W.2d 34 (Mo. Ct. App. 1963) (servient owner could construct storm sewer system under roadway easement).

⁹⁴ See *Stevens v. City of Cannon Beach*, 317 Or. 131, 135, 854 P.2d 449, 452 n.9 (1993), cert. denied, 510 U.S. 1207 (1994); Appellants' Opening Brief and Abstract of Oregon at 5, *Stevens v. City of Cannon Beach*, 114 Or. App. 457, 835 P.2d 940 (1992), aff'd, 317 Or. 131, 854 P.2d 449 (1993) (stating that the plaintiffs had owned the lots in controversy since 1957).

⁹⁵ Some of these structures, on balance, may be consistent with the rights of the servient estate owner to use the servient land in a manner that does not infringe unreasonably on the easement holder. The discussion that follows assumes that the improvement is unreasonable and violated the public's easement rights when erected.

⁹⁶ See *supra* note 15 for a discussion of the Beach Bill.

⁹⁷ Likely, there was some urgency during this time to develop vacant uplands and beach property now that the controversy over beach rights had ascended to the fore-

owner to seek a special permit for beach improvements.⁹⁸ Also during that period, Oregon's most notable encroachment onto the dry sand—two ten-story condominium towers in Lincoln City known as the Inn at Spanish Head—was erected.⁹⁹ To obtain a permit under the Beach Bill, the condominium project developer deeded to the state over an acre of beach property for public use.¹⁰⁰ Although the parties apparently assumed that the public had no recreational rights in this developer's beach,¹⁰¹ an assumption likely incorrect in retrospect,¹⁰² conveying fee simple rights to the public in part of the beach ought to validate these improvements.¹⁰³

front of media attention with the adoption of the Beach Bill in 1967 and the initiation of the *Thornton* litigation.

⁹⁸ See *supra* note 13.

⁹⁹ There was some uncertainty as to the extent the condominium development would encroach onto the dry sand. Apparently the buildings themselves were built behind the 16-foot elevation line under the 1967 Beach Bill, but the seawall built along the base of the structure ran 30 to 50 feet into the dry sand area. See *Lincoln City Resort Wins Highway Agency Okay*, THE OREGONIAN (Portland), Nov. 18, 1967, at 1. For a photograph of the Inn at Spanish Head as constructed see BERT WEBBER & MARGIE WEBBER, BAYOCEAN, THE OREGON TOWN THAT FELL INTO THE SEA 174 (1989). It is apparent from viewing the condominium resort in person that part of the building foundation and appurtenances such as staircases and terraces also encroach into the dry sand area as judged by the likely path of the vegetation line.

¹⁰⁰ See *Resort Wins Highway Agency Okay*, *supra* note 99, at 1. The land donated was reportedly valued at \$25,700, perhaps on the basis of real property tax assessments before recognition of the public's easement rights. Note the permit was approved by the Highway Department, since replaced in this function by the Oregon Department of Parks and Recreation.

¹⁰¹ See *State Studies Roadblock for Beach Resort Plans*, THE OREGONIAN (Portland), June 29, 1967, at I1 (reporting comments of developer that it was not going to raise the question of whether the public had been using the beach there, although the developer thought it had not been used for 30 to 40 years because a big log pileup made it hard to reach). See also *Beach Use Policy*, THE OREGONIAN (Portland), Sept. 7, 1967, at I38 (opining in editorial that the Spanish Head resort will intrude on no usable portion of a log-clogged beach).

¹⁰² Given the circumstances in the preceding note, undoubtedly the developer today would argue under *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989), that the beach was not similarly situated as the beach in the *Thornton* litigation. See discussion *supra* Part I.B. Alternatively, assuming custom rights existed on the beach, the developer would argue that, on balance, the encroachment did not unreasonably interfere with public rights on a little-used beach.

¹⁰³ See also *Florence Project Owners Donate Beach to Public*, THE OREGONIAN (Portland), March 30, 1968, at 14 (reporting that developers of an oceanfront resort known as Driftwood Shores had quitclaimed to the state all rights to about 800 feet of ocean frontage). On the question of the authority of the Highway Department or other state agency to convey any public recreational easement rights that may have existed, Oregon statutes authorize agencies to sell public property whenever the public interest may be furthered. Presumably, this authority extends to the public's

Uncertainty surrounds those improvements erected subsequent to the public's acquisition of easement rights¹⁰⁴ but before the *Thornton* decision and for which no conveyance or other special consideration was required as a condition to any building permit. Presumably, because *Thornton* was decided some thirty years ago, the beach owner would claim today that the beach area on which the improvements were located had reverted fully to private ownership by adverse possession. Oregon case law,¹⁰⁵ as well as authority in other states,¹⁰⁶ recognizes the potential for the servient landowner to extinguish an easement by adverse possession, such as by erecting permanent structures on the easement,¹⁰⁷ for the requisite prescriptive period—ten years in Oregon.¹⁰⁸ But under the common law of adverse possession, the doctrine is not available to establish rights against a government body.¹⁰⁹ Because the public's easement rights in Oregon beaches are declared vested in the state of Oregon by the Beach Bill,¹¹⁰ this limitation might prevent a beach owner from claiming adverse possession. Prior to enactment of the Beach Bill in 1967, however, whether the State of Oregon owned the public's easement rights (in existence "long before" 1957)¹¹¹ is less certain.

Apart from adverse possession, easements may be lost by abandonment or by the closely related doctrine of estoppel. Abandonment, however, requires unequivocal proof of intent to

custom easement. See OR. REV. STAT. § 390.620 (1997) (no portion of ocean shore can be alienated except as provided by law); *id.* § 271.310 (1997) (stating that political subdivision may sell property it possesses or controls to the government or to a private individual or corporation when the property is not needed for public use or when the public interest may be furthered).

¹⁰⁴ Any beach improvements erected before the public acquired easement rights on Oregon beaches should be free of the public's easement (although perhaps not the regulatory overlay of the Beach Bill). Here the beach owner could establish under the *McDonald* standard that the specific beach land underneath the improvements had no requisite history of public use. See *supra* Part I.B.

¹⁰⁵ See, e.g., *Faulconer v. Williams*, 327 Or. 381, 964 P.2d 246 (1998) (easement extinguished by adverse possession); *Slak v. Porter*, 128 Or. App. 274, 280-82, 875 P.2d 515, 520 (1994) (same result).

¹⁰⁶ See POWELL & ROHAN, *supra* note 66, ¶ 424 (stating that a servient owner may extinguish an easement by adverse use for the prescriptive period).

¹⁰⁷ See BRUCE & ELY, *supra* note 66, ¶ 9.07 (citing cases involving buildings and other obstructions of easements).

¹⁰⁸ See OR. REV. STAT. § 12.050 (1997) (limiting action for recovery of possession of realty to one commenced within 10 years of the loss of possession).

¹⁰⁹ See 29 OR. ATT'Y GEN. OP. 187, 188 (1959) (easement owned by State of Oregon cannot be lost by adverse possession).

¹¹⁰ OR. REV. STAT. § 390.610 (1997).

¹¹¹ See *supra* note 15 and accompanying text.

abandon; mere nonuse of an easement (here one obstructed by an improvement), without more, ordinarily is not conclusive.¹¹² Estoppel involves action by the servient owner to its material detriment in reliance on conduct of the easement holder.¹¹³ Arguably, the issuance by a municipality or county of a building permit would constitute an estoppel.¹¹⁴ It is unclear, however, whether action by some municipality would be attributed to the public, or to the state as caretaker of the public's easement, for purposes of an estoppel. Moreover, there is authority in the related context of the public trust doctrine under which no defense in the nature of laches or estoppel may be asserted against the state.¹¹⁵

Under the English doctrine of custom, an act of Parliament could extinguish a customary right.¹¹⁶ Presumably the Oregon legislature can act in appropriate circumstances to protect the landowner's investment expectations in cases of beach development before the public's rights were established firmly in *Thornton*. Analogously, in order to protect the investments of dozens of oceanfront homeowners whose homes were traversed by a long-forgotten cliffside right-of-way¹¹⁷ that had been platted in 1890 but never built, a coastal county vacated the road in 1998.¹¹⁸ Another similar situation involves forces of nature that relocate

¹¹² See *Connor v. Lucas*, 141 Or. App. 531, 920 P.2d 171 (1996); see generally 7 THOMPSON, *supra* note 74, § 60.08(b)(3)(i) (nonuse must be accompanied by affirmative and unequivocal acts indicating intent to abandon). See also BRUCE & ELY, *supra* note 66, ¶ 9.05[2] (criticizing approach of some states that recognize an exception under which easements acquired by prescription are terminated by nonuse of the easement for the period of prescription).

¹¹³ See generally BRUCE & ELY, *supra* note 66, ¶ 9.05[2]; 7 THOMPSON, *supra* note 74, § 60.08(b)(4); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), *supra* note 45, § 7.6 (providing rule for modification or extinguishment of easement by estoppel).

¹¹⁴ Cf. BRUCE & ELY, *supra* note 66, ¶ 9.06[2] ("One circumstance calling for application of the [estoppel] doctrine arises when the owner of a servient estate, acting on authorization from the easement holder, constructs a substantial improvement that obstructs the easement."). Another possible factor supporting an estoppel could be the assessment and collection of real property taxes on the improvements.

¹¹⁵ See *Corvallis Sand & Gravel Co. v. State Land Board*, 250 Or. 319, 439 P.2d 575 (1968) (holding that a defense of laches was not available in an ejectment action by the state against a sand and gravel company using land underlying a navigable river).

¹¹⁶ See 12 HALSBURY'S LAWS OF ENGLAND, *supra* note 17, ¶ 441.

¹¹⁷ The controversy apparently involved only uplands property and not the dry sand beach.

¹¹⁸ See John Griffith, *Unbuilt Road Becomes Issue in Yachats*, THE OREGONIAN (Portland), Feb. 12, 1998, at D2.

the beach landward of existing improvements.¹¹⁹ Here, however, a Texas appellate court affirmed an order to remove a building in circumstances arguably more compelling than our landowner who built before Oregon's custom doctrine was announced.¹²⁰

5. *Right to Construct Protective Structures*

Consistent with the standard that balances the interests of the landowner and the easement holder, structures such as seawalls vital to protect existing or planned improvements on uplands property may be permissible in certain circumstances. For example, the protective structure might be sought on a beach that is used by the public only sporadically. Other relevant factors may include the extent of dry sand area displaced by the structure, whether the structure jeopardizes public escape from wave action, whether existing uplands structures are imperiled by erosion and the immediacy of that threat,¹²¹ and the extent to which the appearance of the structure detracts from the aesthetic experience of the beach-going public.

One reading of the Oregon Supreme Court's decision in *Stevens v. City of Cannon Beach*¹²² is that beach owners have no property right to construct protective structures and that they derive any such right solely from Oregon law that allows these structures only in specified circumstances where uplands devel-

¹¹⁹ See *supra* Part I.C.

¹²⁰ *Matcha v. Mattox*, 711 S.W.2d 95, 97, 101 (Tex. App. 1986) *writ ref'd n.r.e.* (Jan. 14, 1987), *cert. denied*, 481 U.S. 1024 (1987) (affirming judgment ordering landowner to remove beach house and other obstructions to public's use of relocated beach). Consider the rules that would apply if an encroaching project such as the Inn at Spanish Head were to be destroyed by natural forces or otherwise. Presumably, a special beach improvement permit allowing the repair or reconstruction would be required from the State Parks and Recreation Department. See OR. REV. STAT. § 390.650(5) (1997) (exempting applications for beach improvement permits from the potential for a public hearing when the permit is to repair or replace a building that existed before the Beach Bill took effect in 1967).

¹²¹ ORS 390.650 (1997), which specifies the procedure for issuance of a permit for beach improvements such as seawalls, authorizes an emergency permit where property or property boundaries are in imminent peril of being destroyed by wave action; the emergency permit may be issued without a public hearing and without adherence to standards articulated in ORS 390.655 that require consideration of the public need for recreation and other factors of public interest.

¹²² 317 Or. 131, 854 P.2d 449 (1993) (affirming the dismissal of an inverse condemnation action brought by beach owners who were denied a permit to build a seawall in furtherance of intended development of their uplands property for hotel purposes), *cert. denied*, 510 U.S. 1207 (1994).

opment existed on January 1, 1977.¹²³ That reading is inconsistent with the common law of easements which considers a proposed use by the servient owner on a case-by-case basis and balances the necessity of the proposed use against its intrusion on enjoyment by the easement holder. If this easement standard is applied to beach protective structures, then grounds may exist for takings challenges arising out of the denial of permits for their construction, even for uplands property not developed before 1977.¹²⁴ Under the standard for takings articulated in *Lucas v. South Carolina Coastal Council*,¹²⁵ prohibiting construction might be seen as depriving the upland property of all economically beneficial use. Because the background principle of custom would not necessarily deprive the landowner of the right to construct the seawall, the custom doctrine would not save Oregon's outright prohibition of certain protective structures from being compensable on its face.¹²⁶ Regarding protective structures sought for land developed before 1977, a different analysis applies that still holds the potential for a regulatory taking. Roughly, the existing regulatory considerations for approval of such structures¹²⁷ are similar to what a court would consider under the easement standard of balancing. Should those regulatory standards be misapplied, a taking could result.

6. *Right to Remove or to Prohibit Removal of Beach Materials*

The collection and removal of beach materials holds value that

¹²³ See *Stevens*, 317 Or. at 143, 854 P.2d at 457 (holding that because of the custom doctrine the plaintiffs never owned the property interests they claimed were taken by the denial of a permit to construct a protective structure); see also OR. ADMIN. R. 736-020-0010(6) (1998) (in accordance with LCDC Goal 18, permit applications for beachfront protective structures will be considered only where development existed on January 1, 1977).

¹²⁴ See *infra* Part III.

¹²⁵ 505 U.S. 1003 (1992).

¹²⁶ See *id.* at 1015 (recognizing at least two categories of regulatory action as compensable without regard to a case-specific inquiry into the public interest advanced by the regulation: regulations that involve a physical invasion of property and regulations that deny all economically beneficial use of the property).

¹²⁷ These standards include those in LCDC Goal 18, Implementation Requirement 5, which specifies that the criteria for approving permits for beach protective structures shall provide that "(a) visual impacts are minimized; (b) necessary access to the beach is maintained; (c) negative impacts on adjacent property are minimized; and (d) long-term or recurring costs to the public are avoided." DEPT OF LAND CONSERVATION AND DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES 33 (1995 ed.) (incorporated by reference into OR. ADMIN. R. 660-015-0010 (1998)).

ranges from aesthetic (e.g., recreational collection of driftwood) to monetary (commercial excavations of sand and minerals for resale or to preserve an ocean view from uplands property).¹²⁸ Depending on the circumstances, removal of beach materials by the dry sand owner could improperly infringe on the public's easement rights. For example, removing sand could create an artificial beach "lake" and reduce the dry sand area available for recreation.¹²⁹ In contrast, the landowner's removal of salvage washed ashore (e.g., commercial fishing nets) ordinarily would not interfere with public recreation.¹³⁰

The public's right to gather and remove beach materials may be more limited than the landowner's.¹³¹ Rights to remove land materials, being in the nature of a profit à prendre, ordinarily could not be claimed under the English doctrine of custom.¹³² It is unclear to what extent, if any, this limitation survives in Ore-

¹²⁸ See LCDC Goal 18, Implementation Requirement 7, *id.* at 33-34 ("Grading or sand movement necessary to maintain views or to prevent sand inundation may be allowed for structures in foredune areas only if the area is committed to development and only as part of an overall plan for managing foredune grading.").

¹²⁹ Unreported litigation in 1968 initiated prior to *Thornton* involved the state's efforts to enjoin the removal of 20,000 yards of sand from the beach as fill for a resort development. The removal of the sand created a beach "lake" several hundred feet long. See *State Hopes to Stop Beach Sand Removal*, THE OREGONIAN (Portland), Jan. 16, 1968, at I14; Stan Federman, *Here Goes Neskowin Again on Beach Law . . . Or Does It?*, THE OREGONIAN (Portland), Jan. 14, 1968, at F8.

¹³⁰ See Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 187 (1974) (stating that in contrast to English common law where the right to a wreck was in the sovereign, in America the case law allows the littoral owner to claim this salvage).

¹³¹ Recent litigation in Florida involved the takings claim of dry sand owners directed at federal harbor improvements allegedly disrupting the replenishing of sand on their beach. See *Applegate v. United States*, 35 Fed. Cl. 406 (1996); see generally Jeremy N. Jungreis, *Drawing Lines in the Shifting Sands of Cape Canaveral: Why Common Beach Erosion Should Not Yield a Compensable Taking Under the Fifth Amendment*, 11 J. LAND USE & ENVT. L. 375 (1996). This potential standing to sue for a taking based on displacement of sand may constitute another "stick" in the beach owner's bundle.

¹³² See, e.g., 12 HALSBURY'S LAWS OF ENGLAND, *supra* note 17, ¶¶ 413, 431-32; Andrea C. Loux, Note, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183, 196 (1993); *Blewett v. Tregonning*, 111 Eng. Rep. 524 (K.B. 1835) (holding that practice of removing beach sand is a profit that cannot be claimed by custom); *Constable v. Nicholson*, 143 Eng. Rep. 434 (C.P. 1863) (reaching the same result for alleged custom to gather beach sand and gravel). Apparently, rights in the nature of a profit, though not subject to acquisition by custom, could be acquired in England by prescription. See 12 HALSBURY'S LAWS OF ENGLAND, *supra* note 17, ¶ 431 n.1.

gon's adoption of the custom doctrine.¹³³ An older Oregon case did apply this English rule in holding that a right to fish in an Oregon river, being a profit, could not be acquired by custom.¹³⁴ In *State ex rel. Thornton v. Hay*, however, the court described the history of public beach use in Oregon to include the gathering of wood¹³⁵—a right in the nature of a profit. Because in most cases Oregon regulations require a permit to remove beach materials and condition that permit on permission from the dry sand owner, this issue is not likely to result in litigation at the instance of the landowner.¹³⁶

7. *Right to Conduct Commercial Activities on the Beach*

The Department of Parks and Recreation closely regulates the conduct of commercial activities (e.g., lunchcarts and horse rentals) on beaches, presumably those activities of both the dry sand owner and the enterprising public. For example, permits for commercial activities other than special events require, among other things, a finding that the activity existed at the specific beach location on the effective date of the regulations.¹³⁷ Moreover, department permission is required to distribute printed information, such as leaflets, on the beach.¹³⁸ Analyzed under the standard of balancing the interests of landowners and easement holders, commercial activities of the landowner that facilitate or further the public's recreational experience may be consistent with the public's custom rights. Regulation that restricts the activities of the landowner, therefore, may be subjected to case-

¹³³ Hawai'i's custom doctrine rejects this limitation under English law in favor of an indigenous construction of the doctrine that recognizes the exercise of traditional Hawaiian rights to gather food, wood, plants, and other items. See *Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1269 (Haw. 1995).

¹³⁴ *Hume v. Rogue River Packing Co.*, 51 Or. 237, 244, 92 P. 1065, 1070 (1907).

¹³⁵ *State ex rel. Thornton v. Hay*, 254 Or. 584, 586-87, 462 P.2d 671, 673 (1969).

¹³⁶ See OR. REV. STAT. § 390.725 (1997) (authorizing regulations to govern removal of beach materials, but requiring written permission of landowner where removal affects private lands); OR. ADMIN. R. 736-020-0035 (1998) (requiring a permit for removal of sand, rock, minerals, marine growth, or other natural products, other than fish and wildlife, agates, or souvenirs, and requiring authorization from the fee owner for removal from privately owned lands); *id.* 736-027-0030, to -0045 (requiring permit for salvage removal and permission if title to beach where salvage is located belongs to private persons); *id.* 736-026-0015 ("upland property owner wishes will be respected when considering vehicle permits for [drift]wood gathering.").

¹³⁷ *Id.* 736-021-0130(3).

¹³⁸ *Id.* 736-021-0140(2).

specific analysis as a taking.¹³⁹ Conversely, commercial activities conducted by the enterprising public should be subject to injunction if they infringe unreasonably on the rights of the beach owner.¹⁴⁰

III

CONSTITUTIONAL DIMENSIONS OF COMPETING PUBLIC AND PRIVATE INTERESTS ON OREGON'S BEACHES

Regulatory takings claims by Oregon beach owners in many instances will turn on the relationship between the *Thornton* custom doctrine and the overlay in Oregon of state and local regulation of beach improvements and other beach uses.¹⁴¹ As recognized by the Oregon Supreme Court in *Stevens v. City of Cannon Beach*, the custom doctrine is one of those background principles of state law inhering in a landowner's title that even may sustain regulation depriving the owner of all economic use of the land.¹⁴²

The following standards summarize the current thinking of the United States Supreme Court for takings claims brought under the federal Constitution. In *Lucas v. South Carolina Coastal Council*,¹⁴³ the Supreme Court described two situations in which regulation is compensable on its face without inquiry into the public interest it advances: regulation that results in a physical invasion of property and regulation that denies "all economically beneficial or productive use of land."¹⁴⁴ Such regulation, however, will survive constitutional scrutiny when it inheres in the landowner's title under pre-existing "background principles" of

¹³⁹ One particularly onerous requirement in the Department of Parks and Recreation regulations is that no money can be exchanged or payment made on the beach for approved activities (other than a special event). *Id.* 736-021-0130(3)(c).

¹⁴⁰ Consider the hypothetical situation of a beach festival, operating under a special event permit under OAR 736-021-0130, that will involve the erection of tents that impair the view from uplands structures. For more discussion of the parameters of reasonable uses of the beach by the public, see *supra* Part II.B.1.

¹⁴¹ *Cf.* *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993) (affirming the dismissal of an inverse condemnation action brought by beach owners who were denied seawall construction permits by both the Oregon Department of Parks and Recreation and the City of Cannon Beach), *cert. denied*, 510 U.S. 1207 (1994).

¹⁴² *Id.* 317 Or. at 142, 854 P.2d at 456.

¹⁴³ 505 U.S. 1003 (1992).

¹⁴⁴ *Id.* at 1015.

state property law or nuisance.¹⁴⁵ For takings that are less than complete (leaving some economically beneficial or productive use), the legitimacy of the regulation may depend on the degree that it frustrates so-called investment-backed expectations.¹⁴⁶ More particularly, exactions and development conditions (e.g., conditioning a building permit on dedication of a pedestrian pathway) require both an “essential nexus” between some “legitimate state interest” (e.g., reducing traffic) and the condition, as well as a showing of “rough proportionality” between the condition and the impact of the proposed development.¹⁴⁷

The *Lucas* litigation successfully challenged South Carolina’s Beachfront Management Act which prevented the petitioner from erecting any permanent habitable structure on his coastal property and left his lots without economic value.¹⁴⁸ Because the Oregon Supreme Court recognizes the custom of beach recreation as a background principle of Oregon law for purposes of takings claims,¹⁴⁹ presumably any overlay of Oregon regulation that deprives the beach owner of all economically beneficial use nevertheless would survive a takings challenge. There are, however, several potential scenarios under which custom would fail as a background principle in Oregon and expose confiscatory legislation to challenge as a taking.¹⁵⁰

First, under *McDonald v. Halvorson*,¹⁵¹ only those beaches

¹⁴⁵ *Id.* at 1029.

¹⁴⁶ See *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998) (plurality decision includes investment-backed expectations as among factors in scrutinizing regulation under takings clause). But see *Dodd v. Hood River County*, 317 Or. 172, 184-85, 855 P.2d 608, 615-16 (1993) (refusing to decide whether investment-backed expectations are part of the takings analysis under the Oregon constitution). See generally *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* 14-17 (David L. Callies, ed. 1996) (predicting that the Supreme Court will apply some variant of the investment-backed expectations standard to partial takings).

¹⁴⁷ *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Oregon city failed to demonstrate sufficient relationship between exactions of dedicated floodplain and pedestrian/bicycle pathway and the petitioner’s proposed building expansion). It is not clear whether the standard in *Dolan* applies when scrutinizing a regulation that does not involve an exaction or development condition.

¹⁴⁸ *Lucas*, 505 U.S. at 1016 n.7 (applying finding of trial court that the Act left the petitioner’s lots without economic value).

¹⁴⁹ See *supra* note 139 and accompanying text.

¹⁵⁰ Note that these potential grounds for nullifying custom as a background principle are also important for partial takings—where the regulation that effects a partial taking is consistent with a recognized custom, then ordinarily the particular use it denies was not part of the landowner’s reasonable investment-backed expectations.

¹⁵¹ 308 Or. 340, 780 P.2d 714 (1989).

with "histories of use like the Cannon Beach area" are impressed with custom. Thus, beach owners who can demonstrate that their beach has little or no history of public use may hold their title free of customary rights.¹⁵²

Second, although the Supreme Court declined an opportunity to do so when it denied certiorari in *Stevens v. City of Cannon Beach*,¹⁵³ the possibility exists that the Court may substitute its own definition of state background principles of property law for that of a state court. Under this interventionist approach, presumably the Court would examine whether Oregon's use of custom in *Thornton* was an "objectively reasonable application of relevant [Oregon] precedents."¹⁵⁴

Third, the location of Oregon's overlay of beach regulation, based on coordinate mapping of the vegetation line, does not always coincide with the actual line of vegetation specified in *Thornton* as the landward boundary of the public's custom rights.¹⁵⁵ This discrepancy is amplified by the ambulatory nature of the coastline and the potential for the custom doctrine and Oregon's beach regulation to deal differently with a relocated vegetation line.¹⁵⁶

¹⁵² See *supra* Part I.B. Some commentators have questioned whether Oregon's custom doctrine, as applied in *Thornton* from border-to-border, denies beach owners their due process right to be heard when custom is applied to their beach. See, e.g., Bederman, *supra* note 3, at 1443-46; Steve A. McKeon, Comment, *Public Access to Beaches*, 22 STAN. L. REV. 564, 585 (1970). See also *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1214 (1994) (Scalia, J. and O'Connor, J., dissenting) (objecting to denial of certiorari given "serious" due process claim of petitioners that *Thornton* could not have determined their rights to the beach since they were not parties to the *Thornton* litigation). The holding in *McDonald* seems to have taken most of the bite from this due process argument. Under *McDonald*, those who dispute the application of custom to their beach presumably can attempt to establish a history of private rather than public use.

¹⁵³ *Stevens*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207 (1994).

¹⁵⁴ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992) (stressing that an affirmative decree eliminating all beneficial uses supported by background principles of property law "may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.").

¹⁵⁵ See *Office of the Majority Leader, House of Representatives, HB 1045*, 55th Leg., 1st Reg. Sess. 18 (Or. 1969) (stating that the line of vegetation determined under the new coordinate system in the 1969 Beach Bill, replacing the topographic line in the 1967 Beach Bill, will be a straight line that coincides approximately with the vegetation line).

¹⁵⁶ See *supra* Part I.C. for discussion of the potential for relocating the public's customary easement on shifting sands and *supra* note 44-45 for discussion of the potential to relocate the vegetation line for purposes of Oregon's regulation of beach improvements and other beach uses. For example, if the vegetation line were

Fourth, under the doctrine of custom, the public's recreation rights on Oregon beaches extend to the line of vegetation but no further landward.¹⁵⁷ Sentiment is growing in Oregon to restrict development on uplands property in order to avert uplands "condomania" that impairs the aesthetic experience of beachgoers and limits beach access.¹⁵⁸ As articulated in *Thornton*, the public's custom does not include any scenic view easement extending to private uplands property. Thus, efforts to regulate uplands development generally must stand or fall without the support of the background principle of custom.¹⁵⁹

Finally, as evident in the central theme of this article, the public's custom rights leave the beach owner free to make any use of the beach that does not infringe unreasonably on the public's recreational experience. In most instances, Oregon's regulatory overlay contemplates a similar balancing of public and private interests. For example, the regulatory criteria for approving permits for beach protective structures, such as seawalls, closely resemble the factors a court would apply in balancing public easement and private ownership rights under the common law.¹⁶⁰ Nevertheless, the potential exists for the adoption of regulations imposing absolute prohibitions on coastal uses that, on balance, may otherwise be reasonable under the common law. In at least one instance—the prohibition of protective structures fronting uplands property that was not developed before 1977—Oregon's

to move landward, it is possible that the legislative line would be changed. In contrast, Oregon courts might reject the concept of a rolling easement and custom rights would end seaward of the legislative reach of beach regulation. In these circumstances, custom could not be relied upon as a background principle in the newly created beach area.

¹⁵⁷ See *supra* notes 44-45.

¹⁵⁸ Fran Recht, *The Coast Isn't Safe*, THE OREGONIAN (Portland), July 6, 1997, at D5 (editorial laments that development is blocking traditional pathways to the beach and that beachgoers must tolerate ugly and dense uplands development with more to come); Peter D. Sleeth & Foster Church, *Twenty Miserable Miles*, THE OREGONIAN (Portland), July 7, 1997, at A1 (reporting recent remarks of former Oregon governor Bob Straub that a private uplands area above a beach state park is an Oregon treasure that no developer should have the right to "mess" up).

¹⁵⁹ There is some possibility that the background property principle of nuisance would justify prohibitions on uplands development. But see *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992) (holding on remand from the Supreme Court that the petitioner's proposed development of his two lots does not amount to a common law nuisance). There is also the possibility, although more remote, that if Oregon adopts the rolling easement doctrine, see *supra* Part I.C., then prohibiting uplands development could be argued as consistent with the eventual encroachment of custom landward with the rising ocean and shifting beach.

¹⁶⁰ See *supra* note 53.

current regulatory overlay appears to have exceeded the bounds of balance.¹⁶¹

Because of the unique relationship between the dry sand beach and uplands property, these principles for a "total" economic taking may seldom apply to the takings claim of an Oregon beach owner. Presumably, most coastal landowners who own the dry sand beach also own uplands property adjacent to their beach. Since most of the severe regulation of coastal uses applies to the beach and not the uplands, it rarely should be the case that regulation denying all economically beneficial use of the beach has the same impact on the uplands property.¹⁶² Thus, there may not be a total taking if courts include uplands property in determining whether beach regulation has denied all beneficial economic use. In the broader setting of takings of property generally, commentators describe this uncertainty as the denominator problem.¹⁶³ Because there is great confusion among the federal courts in defining the relevant parcel for purposes of takings claims, this issue must await guidance from the Supreme Court.¹⁶⁴

CONCLUSION

In Oregon, the conflict between public and private interests on its beaches has surged in recent years. Following the use of custom in 1969 to establish easement rights in favor of the public came a wave of litigation defining the reach of custom on Oregon shores.¹⁶⁵ Most recently, litigation has focused on whether the

¹⁶¹ See *supra* Part II.B.5.

¹⁶² An example of when beach regulation nonetheless could render uplands property without economically beneficial use involves the denial of a seawall permit necessary for development on low-lying uplands. Another example could be where denial of a seawall leads to destruction of existing uplands improvements.

¹⁶³ See, e.g., Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996).

¹⁶⁴ Robert H. Freilich, et al., *Regulatory Takings: Factoring Partial Deprivations into the Taking Equation*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS (noting in particular the confusion resulting from the question posed by Justice Scalia in *Lucas* as to whether the owner has suffered a deprivation of all economic use when a regulation requires the developer to leave 90% of a tract in its natural state).

¹⁶⁵ E.g., *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989) (holding public rights did not extend to beach fronting freshwater pool adjacent to ocean); *State Highway Commission v. Bauman*, 517 P.2d 1202 (Or. App. 1974) (affirming trial court finding that state failed to establish public rights to use sand dune landward of vegetation line).

custom doctrine and complementary regulation effect a taking of the beach owner's property. As the public's customary rights mature in coastal titles, the focus of disputes will shift from land-owner efforts to uproot the public interest entirely to efforts to define the respective rights and responsibilities of beach owners and the public in the same sands. Looking further ahead, increasing dissatisfaction with coastal condomania, combined with the likelihood of rising seas and retreating shorelines, will sweep the public's attention landward to what is now the uplands. Other coastal states will see similar struggles, but perhaps only in Oregon will they be viewed through the lens of the custom doctrine.

