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A Stake in the Sand

By ANDREW RICE

The sands found Destin first. They started off eons ago, from the Appalachian Mountains, washing their way down the rivers that flow into the Gulf of Mexico. Winnowed to pure, hardy quartz, the sediment moved with the gulf's currents and gathered into the necklace of narrow barrier islands that buffer Florida's Panhandle. Time and tides refined the sand into a soft, sun-bleached powder. By the 1830s, when a Yankee sea captain named Leonard Destin sailed down to the wilderness of the Florida Territory, he discovered beaches as dazzling and white as a fresh blanket of snow. The sight evidently impressed the captain, for his reaction — like that of so many migrants who followed — was to claim a piece of the shore. Destin landed, built a [New England](#) Colonial-style house and started a fishing business, becoming the first recorded white settler in the beach town that now bears his name.

For a long time after that, very little changed in the community of Destin. Well into the 1970s, the town still had fewer than 2,000 full-time residents and was traversed by just one east-west thoroughfare, a two-lane highway with shoulders made of crushed seashells. But then word got out about its emerald green water, its mountainous dunes and, most of all, that sugary sand. Beachgoers arrived, followed by developers, who swiftly set about bulldozing Destin's pine barrens to build condominiums, amusement parks, [golf](#) resorts and luxury outlet malls, swelling the property-tax base to \$4.5 billion. Flush with new tourism revenues, the town fathers adopted a sanguine civic motto: Destin was, they declared, "the world's luckiest fishing village."

Among Destin's many blessings was a gift of coastal dynamics. There's an old saying that buying property is wise, because God isn't making any more of it. But that didn't seem to hold true in Destin. Because of the complexities of currents and bathymetry, the gulf kept bringing its beaches more sand. In the early 1980s, there was a major brouhaha over what to do with 60-some acres that had accreted to a peninsular spit called Holiday Isle, newfound land that was claimed by developers, and though that was an extreme case, all along the coast beaches were growing wider and more alluring. The Panhandle is conservative

country, closer to Alabama than [Miami](#), and the desires of property owners were seldom contravened. As speculators strung the coastline with hulking condo construction, only a few longtime residents remained wary of the folly of staking out shifting sands.

One winter evening, I met a gray-bearded former fisherman named Dewey Destin — Leonard’s great-great-grandson and an elected councilman in his namesake town — at a seafood restaurant he operates on one of the family’s old pieces of waterfront. Gesturing out across a harbor toward Holiday Isle, he told me that before the development boom, “people didn’t build over there, because only a fool would live over there, because [hurricanes](#) would wash whatever you built away.” When he was in high school, in the late 1960s, kids threw campfire parties out on the deserted peninsula. “You look at it now,” Destin said. “You can see all the high-rises.” And sure enough, a few of the developments over there were in danger of falling into the ocean, as waves encroached on their foundations. The town’s luck had suffered a reversal: the sand nature had given, it was taking away. Destin was now eroding.

In this, the town’s plight was far from unusual. Both human interventions, like current-altering jetties, and natural phenomena — storms, mostly, though rising sea levels should soon start to play a part — have dire consequences for the world’s coastlines, the vast majority of which are currently slipping out to sea. Destin’s fortunes began to change in 1995, with Hurricane Opal, a Category 3 storm that wiped out 20-foot dunes and cut into the beach like a knife, changing its former tidal patterns. Over the following decade, its beaches eroded at a rate of roughly five feet per year. In order to safeguard their immense economic value and to augment the oceanfront’s protection against future storms, Destin appealed to the government of Florida, which like many states operates a program to counter erosion along its 825 miles of sandy beaches, nearly half of which are designated as critically endangered.

This “nourishment” program, which involves an expensive process of dredging and pumping submerged sand back onto beaches, has been around for four decades and is one of Florida’s more popular public initiatives, a lifeline for many communities in a tourism-dependent state. So it came as a great surprise when, in Destin, the prospect of restoring the shore ran into fierce opposition. The battle over the beach, featuring charges of extremism, selfishness and dirty dealing, started as a typical squabble at town hall. But last December, it culminated with an argument before the [United States Supreme Court](#).

The legal case is complicated, but at its crux, it presents a conflict between private property rights and the public interest, one in which the court is weighing abstruse issues of eroding

and accreting power. Yet on a practical level, it has left some legal scholars befuddled. Usually, people protest when they're losing something, not regaining. "One of the great questions," says Benjamin Barros, a law professor at Widener University who has closely followed the case, "is why would a beachfront property owner oppose beach nourishment?" To answer that, you have to know the history of another question, one that has long bedeviled Destin: who owns that covetable sand?

"Private Beach," the sign warned, with a big red stop signal. "No Trespassing." On a stormy morning, unusually high waves crashed almost to the base of the wooden signpost staked at the edge of Linda Cherry's property. "The bottom line," Cherry was saying, "is you've got to leave Mother Nature alone." As the wind whipped the thin strip of beach that separates the gulf from her three-story Destin vacation home, Cherry tried to explain how she'd become a leader in the fight against Florida's efforts to counter erosion. The details were a tad arcane, but the root justification was simple: she, too, just wanted to be left alone.

A petite, aggressively effervescent 59-year-old, Cherry bought her beach house in 2004. She and her husband run a political polling firm in Florida's capital, Tallahassee, where she keeps a bronze bust of [Ronald Reagan](#) in her office. Cherry worked for both of Reagan's presidential campaigns and shares his conservative belief that government should have strictly limited powers over property holders. That's why she has a problem with nourishment, because under Florida law, a substantial portion of beach the program creates belongs to the state. "They add 100 feet of sand," Cherry said. "So you no longer own waterfront property, you own public beachfront property."

Her concerns were not simply a matter of abstract ideology. During peak summer weeks, an estimated 65,000 visitors descend on Destin, and Cherry would rather see the beach wash away than cede an inch of it to the sunbathing, beer-drinking, stereo-blaring masses. In this sense, the controversy surrounding the shrinking beach is not so much a matter of coastal dynamics, or constitutional rights, but rather the perennial divisions that afflict seaside development. The road Cherry lives on, Scenic Highway 98, was a wide-open strip a generation ago, but now it's lined with million-dollar villas, bunched together like stucco tenements. Yet even as the beach became barricaded with private property signs, developers continued to build at an overheated pace. As a consequence of overexpansion, there's been a surge of conflict over a diminishing resource, sand.

Cherry, who owns three beachfront rentals in addition to her vacation house, originally came to Destin because of its reputation as an upscale retreat. Her comfortable living room is filled with books — "Little Pink House," about a Supreme Court clash over property rights,

autobiographies of [Dolly Parton](#) and [Trent Lott](#) — and has a big bay window, which gives her an expansive view of the usually placid gulf. When Cherry bought the place, she and her husband were looking forward to quiet weekends of reading, but instead, she has found herself dealing with a constant stream of interlopers. “It’s almost become a war zone,” she said. She doesn’t want to stop anyone from strolling past, she stresses, but the quarrels begin when people — many of them spilling over from a public beach next door — sit down and start making themselves at home.

Later that afternoon, in her living room, Cherry introduced me to one of her neighbors, Mike Wright, the plain-spoken proprietor of a string of McDonald’s franchises, who also bought his place in 2004. Together they recounted a litany of trespasses. Cherry has a problem with couples staging barefoot weddings outside her back door, while Wright told me he’d discovered people steaming in his hot tub. But mostly it was small-bore stuff, a catalog of gathering annoyances: noise, litter, trampled sea oats. Cherry pulled out a digital camera to show me incriminating pictures of sunny days, beached watercraft and multicolored umbrellas. “A lot of it is innocent enough,” Wright said. “They don’t realize it, even though we have signs there that say very clearly that this is private beach. The first words out of their mouth usually are, ‘How in the world can you own the beach?’ And it’s like I tell my kids: through an awful lot of hard work.”

Much as the homeowners might believe they’ve paid handsomely for their privacy, however, the public feels viscerally entitled to the shore. The sentiment has some legal basis. Centuries of jurisprudence have upheld the doctrine that a certain portion of the coastline is held in public trust. But what that means to beachgoers varies, in part because the archaic principle was intended to protect activities like fishing and navigation, not building sandcastles. Some states recognize a customary public right to use beaches for recreation, regardless of what property holders say, but others allow greater latitude for exclusion — an issue that is a cause of widespread litigation. In the last decade, California courts have considered whether [Malibu](#) homeowners can post “No Trespassing” signs, while [Connecticut](#)’s have declared that the beaches of Greenwich and other exclusive towns, which once barred nonresidents, are open to all. In Florida, the general rule is that the water belongs to the state, dry land belongs to the deed holder and the middle ground, the wet area between the high and low tide lines, is open to everyone. But because this demarcation involves a boundary — the waterline — that always moves, there is continual skirmishing along the border between public and private.

In Destin, the battle for the beach began about a decade ago, not coincidentally, right

around the time the area's real estate market exploded. (The average sale price of residential properties more than doubled during the first half of the 2000s and reached a peak of \$950,000 in August 2006, according to data from the Emerald Coast Association of Realtors. Since the crash, the average has fallen back to around \$350,000.) Worried that tourists were being chased off the beach, Destin's city council considered an ordinance to declare the first 20 feet of dry sand public. That was tabled, however, amid objections that it amounted to confiscation of property. Instead, the city fell back to what Dewey Destin called a deliberately "nebulous policy," calling for sheriffs' deputies to act as informal arbitrators, determining the high tide line via markers like seaweed. Naturally, this has led to inconsistent enforcement and complaints from both sides.

One summer day in 2004, Bob Biel, an air-conditioning contractor who had been coming to Destin since childhood, got enraged after he was kicked off the beach in front of a high-rise. "It was never like this before," he told me. "These are mostly people from up North who bought condos." A big Jimmy Buffet enthusiast, Biel got together some other local Parrot Heads — members of the singer's fan club — and staged a beach sit-in. In response to the public outcry, he says, the police relaxed their interpretation of the rules. But what Biel sees as victory feels like a violation to some beachfront owners. They say that in return for seeking the enforcement of trespassing laws, they've been sent hate mail and maligned by the local press. Some evictees curse them out or even push them around. "We have been demonized," Mike Wright said, "because we live the American dream." He went so far as to try to get a restraining order against a pair of men who twice tried to set up a row of fishing rods along his beach.

By the time the proposal to rebuild Destin's beaches was made, Cherry and her allies were scrutinizing the government's every move for evidence of infringement. And they thought they found it in the fine print of Florida's law, which alters the way property boundaries are demarcated on nourished beaches by setting a fixed erosion control line, beyond which the shore is public. It's supposed to be a small trade-off for property owners, who get a bigger — though shared — taxpayer-financed beach, not to mention a more effective buffer against hurricanes. But Cherry saw it as a fool's bargain. "They go into the effort of saying, 'We're doing this to protect the beach and to protect the upland owners,' " she said. "I'm sorry, you'll never in a million years get me to believe that. It was strictly to provide the public beach that they sought."

In response, Cherry and around 170 other property owners formed an organization called Save Our Beaches. Their cause caught the attention of the Southeastern Legal Foundation, a

conservative group that advocates for strengthened property rights. Cherry raised money to hire a major Tallahassee law firm and brought a lawsuit to stop the nourishment. Craig Barker — Destin's mayor and a Republican like most everyone in town — wondered if some compromise could have been found between the relatively small number of complaining property owners and the larger public that wanted to share the beach, perhaps one centered on that small-town virtue of politeness. But the beach nourishment's opponents saw no constitutional room.

"If 10 very nice, well-mannered strangers come into your front yard and begin using your picnic table, and they're very, very nice — is that acceptable to you?" asked Shannon Goessling, the Southeastern Legal Foundation's executive director. Being a property owner means having the right to say, "Keep out," she said. "There is no middle ground."

A few miles down Destin's shoreline from Linda Cherry's house, middle ground was just as hard to see, as waves lapped against the base of Jetty East, a seven-story condominium complex. Jerry Stalnaker, an ex-military pilot who is the building's general manager, showed me around as construction equipment labored to replace a recently collapsed seawall. We walked down a boardwalk to a gazebo that was raised on stilts out over the ocean. Stalnaker had earlier showed me a picture of the same structure in 1989, separated from the gulf by hundreds of feet of white beach. "It used to be you couldn't even see the water," he said. Now the sea was eating away at Jetty East.

For years, Stalnaker — along with municipal and county authorities — has been begging the state government to restore some sand. But nothing has happened yet, because Jetty East's phase of the beach nourishment is embroiled in litigation brought by allies of Linda Cherry. "I think they're a bunch of elitists," Stalnaker told me. Of course, you could argue that the original sin was building Jetty East in the first place, near the farthest tip of Destin's Holiday Isle peninsula. "Nobody likes to admit when they've done something really stupid," says Orrin Pilkey, a [Duke University](#) geologist who is a world-renowned expert on erosion. He argues that it would be wiser to tear down misplaced properties than to fight an endless battle against the ocean. But that idea doesn't carry much weight in a place like Destin, where billions are invested along the waterline. "We had to protect the golden goose," said Brad Pickel, a marine scientist and consultant who played a key role in devising the area's beach nourishment plan.

The idea that new beach created through nourishment belongs to the public was upheld by Florida's State Supreme Court in 2008. But in a blistering dissent, one justice accused the majority of having "butchered" the law to create a "dangerous precedent" that altered the

rights of waterfront-property owners. The wording seemed tailored to encourage an appeal to the U.S. Supreme Court on the claim that the majority had acted so capriciously that its ruling amounted to an unconstitutional “taking” of property. This judicial takings theory is untested but popular among conservative thinkers affiliated with groups like the Pacific Legal Foundation, which helped the homeowners with their appeal. To universal surprise, the Supreme Court accepted the case.

Last December, an attorney for the homeowners, Kent Safriet, made his argument before the Supreme Court. In questioning, several justices seemed quizzical about what exactly the property owners were being forced to give up. “You didn’t lose one inch,” [Stephen Breyer](#) said. But others from the court’s conservative wing sounded more sympathetic, hatching high-spirited hypotheticals about hot-dog vendors and raucous spring break parties. In the end, though, even [Antonin Scalia](#) seemed to waver. “I’m not sure it’s a bad deal,” he said, later interjecting that the alternative “may not change the property line, but all of your property might be underwater.”

Linda Cherry was sitting in the gallery that day, feeling mixed emotions. On the one hand, she felt proud that her argument had made it to the highest court in the land. On the other, it was too late to save her beach from nourishment. Because of technicalities of legal standing, she and many of her neighbors had been ruled out of the case at a lower court level, and only a small subset of plaintiffs made it to the Supreme Court. In 2007, with her legal avenues exhausted, the project went ahead on Cherry’s stretch of the beach. Over several days, huge pipes were run across her property, and a grayish slurry, sucked from the ocean bottom, was disgorged along her beachfront. Construction equipment moved the sand until it formed a new, much wider, partly public beach. Cherry wanted to stand in front of the bulldozers in protest, but her lawyers advised against it, for her safety. “It had to be how the French felt when they saw the German tanks coming across their property,” she said. “It was an absolute, total violation of our constitutional rights.”

When Cherry looks out her bay window to-day, she says she doesn’t see any benefit. The waves seem to be creeping closer than ever. In fact, Orrin Pilkey says that restored beaches erode twice as quickly as natural ones. For its part, the state readily acknowledges that it can never add enough sand to win the fight against the tides. A good project is one that needs to be replenished once every 10 years.

Not long ago, one of the “No Trespassing” signs Cherry put along her eastern property line was submerged by the advancing gulf. Cherry took it down but stored it underneath her house. She wants to be ready if the sands ever come back.

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