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Would federal jurisdiction extend to a case in which surface runoff carries pesticides from a farmer's field to a marsh, and months later pollutes a distant water body? While *Holland* does not address these issues, the language of the Amendments and their purpose, as interpreted by the court, should support the exercise of federal control in such situations.

Real Property—DOCTRINE OF CUSTOMARY RIGHTS—CUSTOMARY PUBLIC USE OF PRIVATELY OWNED BEACH PRECLUDES ACTIVITY OF OWNER INCONSISTENT WITH PUBLIC INTEREST.—*City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974).

Defendant corporation McMillan and Wright, Inc., was the record owner of 15,300 square feet of dry-sand waterfront property in Daytona Beach.[1] The corporation obtained a permit to build an observation tower intended for operation in conjunction with an amusement pier on the property. The Attorney General of Florida and Tona-Rama, Inc., the operator of an existing observation tower, claimed the defendant was infringing on a public easement and sought to enjoin the construction. The trial court refused to issue a temporary injunction and the tower was completed. The court then entered summary judgment for plaintiffs, finding that because defendant's land was servient to a public prescriptive easement, the City of Daytona Beach had improperly granted the building permit. The corporation was ordered to remove its tower.[2]

The district court of appeal affirmed[3] the finding of the trial court, despite defendant's contention that public use of the dry sand area

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"trade effluents, sewage effluent or other poisonous, noxious or polluting matter" by means of any "wells, bore-hole, pipe or other work, into any underground strata within a river authority's area . . . ."

1. Private ownership of Florida beaches extends only as far as the line of mean high water. The area above this line is known as the dry sand area. The state owns the land seaward of the mean high-water line. This area is referred to as the foreshore or wet sand area. *See* Florida Coastal Mapping Act, Fla. Laws 1974, ch. 75-56, § 4; Commentary, *The High Water Mark: Boundary Between Public and Private Lands*, 18 U. FLA. L. REV. 553 (1966).

2. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 74-75 (Fla. 1974).

3. City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Fla. 1st Dist. Ct. App. 1972).

was not sufficiently adverse to the owner's interest to raise a prescriptive easement.[4] The supreme court reversed,[5] declaring that existing public uses of the beach were "consistent" with erection of the tower.[6] In the court's opinion the element of adverse use required to raise a prescriptive easement did not exist,[7] even though residents testified that they had long assumed the property was public and that it had been treated as such.[8] Even if a prescriptive easement had been established, the court reasoned that erection of the tower was consistent with public recreational use and hence could not infringe public rights.[9] The court then applied the ancient doctrine of customary rights, finding that even without a prescriptive easement the public has enforceable recreational rights in the dry sand area.[10] Because the presence of the tower was considered consistent with those rights, however, the court sanctioned its construction.[11]

The *Tona-Rama* court did not overrule cases recognizing the possibility of public acquisition of prescriptive easements in beach

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4. *Id.* at 767. The district court emphasized that its decision was not based on policy considerations favoring public recreational use of beach areas; the court insisted it merely was applying prescriptive easement principles to a specific tract that had been subject to unusually intensive public use—use which necessitated provision of city sanitation and police services, and even installation of showers on privately owned property:

> There are many beaches along our entire shoreline that area [*sic*] resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive easement to use privately owned beaches.

Id. at 770.

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

6. *Id.* at 78.

7. The opinion stated:

> That portion of the land owned by defendant which is not occupied by the pier has been left free of obstruction and been utilized by sunbathing tourists for untold decades. These visitors to Daytona Beach, including those who have relaxed on the white sands of the subject lands, are the lifeblood of the pier. As such, they have not been opposed, but have been welcomed to utilize the otherwise unused sands of petitioner's oceanfront parcel of land.
>
> . . . .
>
> The use of the property by the public was not against, but was in furtherance of, the interest of the defendant owner. Such use was not injurious to the owner and there was no invasion of the owner's right to the property.

Id. at 76-77.

8. Brief for Petitioner at 10-13, Brief for Respondent at 7-9, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974).

9. 294 So. 2d at 77.

10. *Id.* at 78.

11. *Id.*

land.[12] Rather, the court purported to apply traditional prescriptive easement principles. Those principles were established in Florida in *Downing v. Bird*,[13] wherein the court had reviewed the similarities—and distinctions[14]—between adverse possession and prescriptive easements.

Under *Downing* prescription requires open, notorious and continuous adverse use under claim of right for the prescriptive period, with the actual or constructive knowledge and acquiescence of the property owner.[15] *Downing* stressed that claimants' use is presumed permissive[16] and indicated that claimants must present clear evidence of adverse use, unsupported by evidentiary presumptions such as those employed in other jurisdictions.[17] The *Downing* court further stated that claimants' use must be "inconsistent" with the owner's use and enjoyment.[18] This inconsistency requirement, however, did not seem

12. *See* City of Miami Beach v. Undercliff Realty & Inv. Co., 21 So. 2d 783 (Fla. 1945); City of Miami Beach v. Miami Beach Improvement Co., 14 So. 2d 172 (Fla. 1943). In neither case did the claimant succeed in establishing the public easement. The *Tona-Rama* court implied that these decisions stand for the inherent absence of adversity in public use of private beach land. *See* 294 So. 2d at 75-76. But in both prior cases lack of adversity was posited on specific evidentiary factors. In *Miami Beach Improvement Co.* the claimant city, during the prescriptive period, had accepted an easement from the owner for the construction of bulkheads off his property. *See* 14 So. 2d at 177-78. In *Undercliff Realty* the owner had blocked access to the beach with signs and obstructions, 21 So. 2d at 784, and the claimant city, during the prescriptive period, had used a tax deed to convey to a private party an unencumbered title to part of the disputed property. 21 So. 2d at 785-86.

Both of the early beach cases thus turned ultimately on the failure of the claimants to meet their burdens of proof. In each case the claimant's past actions militated against finding a municipal claim of public access. And neither claimant supported the assertion of a public claim of right with anything more than evidence of long-continued public use. Past actions of municipalities in dealing with beach area now would have much less weight; in Downing v. Bird, 100 So. 2d 57, 61 (Fla. 1958), the court recognized that public easements may be acquired apart from the rights of a city—and in spite of its actions.

13. 100 So. 2d 57 (Fla. 1958).

14. The distinctions drawn in *Downing* were that prescription requires adverse use rather than possession, and that, to establish prescription, use need not be exclusive but may be exercised in common with the owner or the public. *Id.* at 65. The *Tona-Rama* court implied that exclusivity is a necessary element of prescription, 294 So. 2d at 76, and erroneously asserted that prescription requires adverse possession of the owner's land. *See id.* at 77.

15. *See* 100 So. 2d at 64.

16. *See id.*

17. *See id.* at 64-65. The rule in the majority of American jurisdictions is that although the claimant has the ultimate burden of proof, a showing of open, notorious and continuous use for the prescribed period creates a presumption that the use is adverse. *See* Annot., 170 A.L.R. 776, 778-89 (1947).

18. "In both [adverse possession and prescription] the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to

to alter the traditional approach to adversity which, whether phrased in terms of adversity, hostility or claim of right, focuses on the attitude of the *claimant*, and asks whether he is using the owner's property as though he has full right to do so.[19]

In *Tona-Rama*, however, the court looked to the *owner's* attitude toward the claimants, apparently reasoning that because the owner's present economic interests dictated a hospitable rather than a hostile attitude, the public's attitude could not be hostile either. In effect, the court was willing to regard the presumption of permissive use as conclusive even if supported only by an owner's willingness to grant unsought an unacknowledged permission;[20] public refusal to recognize

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stop it, such as an action for trespass or ejectment." 100 So. 2d at 64. "There is nothing to show that the use made by the public was inconsistent with the rights of the owner . . . which supports rather than overcomes the presumption that any such use was permissive." *Id.* at 66.

19. "What is required [for adverse use] is simply conduct amounting to an assertion that the claimant has a perfect right to do that which he is doing." 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 23.03, at 537 (1973). *See also* RESTATEMENT OF PROPERTY § 458, comment *c* (1944) (critical factor is nonrecognition of owner's authority either to prevent or permit the use).

Generally, "inconsistency" is used to explain—but not to narrow—the adversity requirement. *See* RESTATEMENT OF PROPERTY § 459, comment *a* (1944); Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYR. L. REV. 935, 952 (1973). The *Downing* court implied that the test of inconsistency—or adversity—is whether claimant's acts give the owner a legal right to stop the use. *See* note 18 *supra*. In *Tona-Rama* the owner did have the right to stop public use, even though he chose not to exercise it, since he was entitled to eject persons who repudiated his permission or never recognized his title. In the former situation—ripening of an initially permissive use into an adverse use—the owner must receive clear notice of the adverse claim. *See* RESTATEMENT OF PROPERTY § 458, comment *j* (1944). If the issue had been one of adequate notice, inconsistency might have been relevant in another sense altogether. *See* note 24 *infra*.

20. "If the use of an alleged easement is not exclusive and not inconsistent with the rights of the owner of the land to its use and enjoyment, it would be presumed that such use is permissive rather than adverse. Hence, such use will *never* ripen into an easement." 294 So. 2d at 76 (emphasis added). Similar language has been criticized for its "obvious casuistry." *See* Annot., 170 A.L.R. 776, 794 (1947). *But see* J.C. Vereen & Sons v. Houser, 167 So. 45, 47 (Fla. 1936).

The *Vereen* case, which injected the inconsistency language into Florida law, did not take a narrow view of the concept; it also approved language of a South Carolina case stating that open, continuous and notorious use, not permissive from its inception, creates the presumption of adverse use. *See* 167 So. at 48, *quoting from* Williamson v. Abbott, 93 S.E. 15 (S.C. 1917). But the *Tona-Rama* case was consistent with the restrictive decision from which the *Vereen* language was drawn, Jesse French Piano & Organ Co. v. Forbes, 29 So. 683, 685 (Ala. 1901). That case involved an attempt to secure a prescriptive easement of light and air by alleging claimant's shutters had been open and shut over the owner's property for the prescriptive period. The Alabama court, faced with an attempt to outflank its rejection of the ancient lights doctrine, turned to the textbooks for support rather than illumination. The authority relied on for the statement quoted above states elsewhere that a showing of actual damage to the servient owner is unnecessary, provided some right was invaded so as to create a cause of action. 2 W. WAIT, ACTIONS AND DEFENSES 701 (1877). The cases relied on by the Alabama

the owner's title was not considered. The semantic hook on which this rationale hangs is use "inconsistent with the owner's use and enjoyment of the land."[21] Theoretically, property rights embrace potential as well as present interests; acts entirely consistent with an owner's present economic interests may be highly inconsistent with his larger interest in preserving public acknowledgement of his right to exclusive possession. In *Tona-Rama,* for instance, nonpermissive construction of the tower by someone other than the owner could have been consistent with the owner's interest in attracting visitors to the pier but inconsistent with the owner's claim of full title. But the *Tona-Rama* court looked only to present enjoyment,[22] although *Downing,* which *Tona-Rama* purported to follow, strongly implied that a showing of inconsistent use is not foreclosed simply by evidence that public use of land is consistent with an owner's present enjoyment.[23]

court provided little more support. One drew a careful distinction between inconsistency with the exercise of a right and inconsistency with the right itself, holding only the latter was sufficient to extinguish a mineral easement. *See* Arnold v. Stevens, 41 Mass. (24 Pick.) 106, 114 (1839). The second case held merely that the digging of a ditch—which created no cause of action in itself—would not initiate a prescriptive easement to flood the owner's land; the prescriptive period could begin only when flooding onto the owner's land created a cause of action. Roundtree v. Brantley, 34 Ala. 544, 553 (1859).

Compare Professor Boyer's discussion of explicit—as opposed to merely presumptive—permission:

> The use must not be permissive. Permissive in this sense means more accurately in subordination to the rights of the servient owner. It is clear that some conduct which started as permissive may in fact constitute adverse use . . . . This might occur in instances of a parol grant of an easement . . . contravening the Statute of Frauds. Such user would be permissive in that the use was consented to by the landowner. It might not, however, be in subordination to such owner's rights in that the person exercising the easement may very well be claiming the right to continue.

1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 23.03, at 538 (1973) (footnote omitted).

21. 294 So. 2d at 77.

22. In taking this narrow view of inconsistency the court relied heavily on language from J.C. Vereen & Sons v. Houser, 167 So. 45, 47 (Fla. 1936), *quoting from* Jesse French Piano & Organ Co. v. Forbes, 29 So. 683 (Ala. 1901): " ' *"One circumstance always considered is whether the user is against the interest of the party suffering it, or injurious to him. There must be an invasion of the party's right, for, unless one loses something, the other gains nothing."* ' " 294 So. 2d at 76 (emphasis added by the court). The Alabama court could have focused on the nature of the use, finding that the use in itself was insufficient to give notice of an adverse claim. *Compare* Carrig v. Dee, 80 Mass. (14 Gray) 583, 585 (1860) (swinging window is not a use that encroaches "visibly or tangibly" on the owner's enjoyment of his property). Instead, the Alabama court adopted an interpretation of inconsistency that looked only to present enjoyment—the interpretation endorsed by *Tona-Rama.*

23. In *Downing* a public easement was claimed in a road leading to the owner's house and used primarily by him and his guests. The court regarded such consistency with the owner's present use of the land as supportive of the presumption of permission, but nonetheless invited the claimant to amend his pleadings and to introduce proof of inconsistency. 100 So. 2d at 65-66.

If inconsistency with present enjoyment had not been regarded as dispositive of the adversity issue in *Tona-Rama*, the court could have reached the same result on other theories,[24] thus avoiding its restrictive interpretation of prescription. That interpretation would seem applicable to all prescriptive easement claims,[25] making it virtually impossible for such claims to succeed.[26] But whatever the effect of *Tona-Rama* on prescriptive easement claims involving property other than beaches, the court clearly rejected the notion, adopted elsewhere,[27] that long-continued use of beaches by members of the public is adverse per se or creates a presumption of adverse use that the owner must rebut. Because of Florida's stringent adversity requirement—

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24. The court could have held that the evidence offered—provision of municipal services and testimony by individual members of the public as to their subjective attitudes—was not the clear and substantial proof required to overcome the presumption of permissive use. *See* Downing v. Bird, 100 So. 2d 57, 64 (Fla. 1958). Alternatively, the court could have found that the evidence was insufficient to show the owner's constructive knowledge of the public claim of right; the court could have reasoned that use inconsistent with the owner's present interests serves a vital notice function. *Cf.* Annot., 170 A.L.R. 776, 796 (1947). And even if a prescriptive easement had been found, the court could have provided solid authority for holding that the observation tower—which occupied a circle of sand only 17 feet in diameter—was not a significant interference with public rights. *See* RESTATEMENT OF PROPERTY § 481, comment *a* (1944).

25. Note, however, that after disposing of the prescriptive easement claim the court prefaced its holding on customary rights with a statement that beaches "require separate consideration from other lands with respect to the elements and consequences of title." 294 So. 2d at 77.

26. Traditional prescriptive easement cases arise when the owner obstructs a long-existing use of his property. He dams a ditch, blocks a road or builds a fence because a previously unobjectionable use—one that has not hindered practical enjoyment of the property—comes to interfere with present or anticipated practical enjoyment of the property. *See, e.g.,* Hunt Land Holding Co. v. Schramm, 121 So. 2d 697 (Fla. 2d Dist. Ct. App. 1960). In *Hunt* the servient owners, planning to fill and subdivide a mangrove swamp, blocked a drainage ditch running across the property. In the prescriptive easement action, the servient owners contended claimants' use had not been adverse because the ditch drained the owners' land as well as the claimants' and because the owners were entitled to the presumption of permissive use. Noting that under *Downing* a presumption of permissive use is not conclusive, and that exclusivity is not required for prescription, *id.* at 700-01, the court held that plaintiffs had presented sufficient proof to rebut the presumption and had established that "the use was inconsistent with the rights of the owners to their use and enjoyment of the lands." *Id.* at 701. Analyzed in terms of the *Tona-Rama* rationale, the *Hunt* decision is erroneous; ditching a mangrove swamp is not adverse until the owner attempts to put the swamp to economic uses incompatible with the ditch. *See also* Annot., 170 A.L.R. 776, 795 (1947), noting that the Alabama rule on which the *Tona-Rama* court relied makes it difficult for a prescriptive easement ever to be established.

27. *See, e.g.,* Elmer v. Rodgers, 214 A.2d 750 (N.H. 1965); State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Ore. 1969) (prescriptive easement recognized as alternative basis for holding); Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964) (prescriptive easement recognized as alternative basis for holding). *See generally* Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription*, 24 SYR. L. REV. 935 (1973).

and its adoption of the customary rights doctrine[28]—it seems that prescription, like implied dedication,[29] will continue to be ineffectual for securing public recreational rights in Florida's beaches—less than five percent of which are publicly owned.[30]

By recognizing the principle of customary rights, however, the court adopted a flexible theory for securing public rights. This venerable English doctrine grants inhabitants of a locality or members of certain classes the right to use privately owned land when a custom of usage has existed "from time immemorial, without interruption, and as of right; [is] certain as to the place, and as to persons; and [is] certain and reasonable as to the subject matter or rights created."[31] In the United States the doctrine was applied in a few nineteenth century cases,[32] but largely lay dormant until the Oregon Supreme Court, in *State ex rel. Thornton v. Hay*,[33] applied the doctrine to confirm public rights in dry-sand beach areas. The Oregon court invoked the customary rights doctrine, instead of prescriptive easement theory, because it believed that the former doctrine could eliminate the tract-by-tract litigation characteristic of prescription cases, and because it regarded the shoreline as sui generis.[34] The court might have added that the customary rights approach is likely to ensure maximum beach availability to the public; prescriptive easement and implied dedication decisions spur beach property owners

28. Public activity engaged in as a customary right cannot be adverse since owners have no legal right to prevent such activity. *See* Graham v. Walker, 61 A. 98, 99 (Conn. 1905). Florida beach owners thus might find themselves raising customary rights to defeat a claimed prescriptive easement.

29. Use of implied dedication to find public rights in beaches is illustrated by Gion v. City of Santa Cruz, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), and Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964). The California court held that implied dedication could be based on adverse use, and use was adverse if the public used the beach without seeking permission. The owner was held to have the burden of showing permissive use. *See* Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970). Such an implied dedication approach is not available in Florida, since it has been held that "mere user by the public, without the consent or objection of the owner, does not show intention to dedicate." Miller v. Bay-to-Gulf, Inc., 193 So. 425, 427 (Fla. 1940). *See also* Commentary, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 589-90 (1973); 2 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 30.04, at 850 (1973).

30. Of Florida's 6265 miles of shoreline, only 277 miles are publicly owned. Pennekamp, *Recycling of the Beaches*, Miami Herald, Aug. 12, 1974, § A, at 6, col. 6.

31. 3 H. TIFFANY, LAW OF REAL PROPERTY § 935, at 623 (3d ed. 1939). *See generally* Graham v. Walker, 61 A. 98 (Conn. 1905); 1 W. BLACKSTONE, COMMENTARIES *75-*78; J. BROWNE, LAW OF USAGES AND CUSTOMS §§ 1-33 (1st Amer. ed. 1881); COKE ON LITTLETON, *110b, *113b, *115a, *115b, *344a; C. GALE, LAW OF EASEMENTS 3-6 (12th ed. 1950); J. GRAY, THE RULE AGAINST PERPETUITIES §§ 572-82 (3d ed. 1915).

32. *See, e.g.*, Knowles v. Dow, 22 N.H. 387 (1851).

33. 462 P.2d 671 (Ore. 1969).

34. *Id.* at 676.

to fence out the public, especially in jurisdictions that refuse to regard prohibitory signs as sufficient evidence of an owner's non-acquiescence in public use.[35]

Though there was initial doubt whether *Thornton* reached all beaches in the state,[36] subsequent cases have confirmed its statewide applicability.[37] The *Thornton* court recognized that general application of the customary rights doctrine was inconsistent with English law, but concluded "it does not follow that a custom, established in fact, cannot have regional application and be enjoyed by a larger public than the inhabitants of a single village."[38]

The supreme court in *Tona-Rama* provided few guidelines for application of the customary rights doctrine in Florida.[39] The court simply stated:

> If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.[40]

The court noted that exercise of customary rights creates no interest in the land itself, cannot be revoked by the land owner, can be abandoned by the public and is subject to governmental regulation.[41]

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35. *See* Comment, *This Land Is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092, 1094 (1971); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 584 n.129 (1970); Commentary, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 590 n.36 (1970). *See also* C. DUNSCOMBE, RIPARIAN AND LITTORAL RIGHTS 62 (1970).

36. *See* Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 584-85 (1970).

37. *See, e.g.*, State Highway Comm'n v. Fultz, 491 P.2d 1171 (Ore. 1971).

38. 462 P.2d at 678 n.6. This approach does violence to the English view. Coke wrote: "The law of *England* is divided . . . into three parts; 1. the common law . . . 2. statutes . . . and 3. particular customes . . . . I say particular, for if it be the generall custome of the realme, it is part of the common law." COKE ON LITTLETON *115b. *See also id.* at 344a.

39. The matter was not adequately briefed by the parties. The four briefs submitted to the court totaled 135 pages. Discussion of customary rights occupied less than two pages in a single brief, the respondent's (claimant's), even though the attorney general, in the complaint filed before his withdrawal from the *Save Sand Key* case, had submitted an elaborate customary rights argument. *See* Brief for Petitioner, appendix at 26-28, United States Steel Corp. v. Save Sand Key, Inc., No. 44,402 (Fla. June 12, 1974).

40. 294 So. 2d at 78.

41. *Id.*

The court did not, however, define the period of use required to raise customary rights, nor did it clearly indicate the geographic scope of its decision. Some of the court's language suggests a determination that a customary right of recreational beach use exists generally in Florida.[42] Yet, in discussing Daytona Beach, the court referred to customary rights acquired "to use this particular area."[43]

Tona-Rama seems at least to sanction findings of customary use in particular localities—an approach clearly consistent with English practice,[44] and one that should curtail most of the tract-by-tract litigation required under the prescriptive easement or implied dedication doctrines. Though the parameters of Florida's customary rights doctrine are unclear, the decision does seem to evince a judicial policy favoring public use of privately owned dry sand areas.[45] By adopting a theory long ignored, the court has provided itself with a most flexible doctrine. It can, if it chooses, follow the Oregon court in recognizing public recreational rights in all state beaches. Or—if overwhelmed by the sensitivity to private ownership rights reflected in its adverse possession

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42. "We recognize the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches." *Id.* at 75.

> The beaches of Florida are of such character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are [*sic*] of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected.

Id. at 77.

Note also that the two decisions cited in support of the customary rights doctrine—*In re* Ashford, 440 P.2d 76 (Hawaii 1968), and *Thornton*—affected all state beaches. Also, a law review commentary cited by the Florida court had recommended adoption of the customary rights doctrine precisely because the court could provide statewide public rights in a single decision. *See* Commentary, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586, 590-92 (1973).

43. 294 So. 2d at 78.

44. *See* note 38 *supra*; J. BROWNE, *supra* note 31, §§ 6, 22.

45. *See* note 42 *supra*. To the extent that strong language foreshadows strong policy, the court's language at 294 So. 2d at 78 is auspicious—it was drawn virtually verbatim from the proposed Open Beaches Act of 1969, H.R. 6656, 91st Cong., 1st Sess. § 101 (1969), *reprinted in* Commentary, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches*, 25 U. FLA. L. REV. 586 (1973). The court also might have been influenced by pro-beach rights policies emerging from the Florida Legislature. *See, e.g.*, Fla. Laws 1974, ch. 74-102, § 1, which bars expenditure of public funds for beach restoration unless provisions are made for public access, parking and use. *See also* Pennekamp, *Recycling of the Beaches*, Miami Herald, Aug. 12, 1974, § A, at 6, col. 6 (indicating the potential impact of the beach restoration law on the Miami Beach area).

and prescriptive easement decisions[46]—the court can use the consistency theory it has espoused in *Tona-Rama* to severely limit the public's rights.

As Justice Boyd seemed to fear in his *Tona-Rama* dissent,[47] the consistency standard may give the court even more latitude in the area of customary rights than in that of prescriptive easements. But it is clear already that the customary rights doctrine will give the courts considerable discretion in balancing the economic rights of taxpaying property owners against the recreational rights of the public.[48] As long as private uses are related to, and do not unreasonably interfere with, public recreational uses, *Tona-Rama* suggests private uses will prevail.[49]

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46. The *Downing* case noted that "[a]cquisition of rights by one in the land of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted." 100 So. 2d at 65. This judicial disfavor seems to be increasing. In the adverse possession case of Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973), the court said: "Today . . . the policy reasons that once supported the idea of adverse possession may well be succumbing to new priorities." Read together, *Tona-Rama* and *Meyer* suggest that prescription and adverse possession may have been restricted to the point of abolition. *Cf.* 287 So. 2d at 42 (Adkins, J., dissenting).

47. 294 So. 2d at 79.

48. This discretion may prove to serve a vital role in providing responsible coastal zone management. Prescription theories freeze the prescribed use until it is abandoned. *See* Degnan, *supra* note 27, at 967. Customary rights decisions may allow the courts more latitude in cases where land management policies call for utilization of quasi-public beaches for other than recreational purposes. Such a result could be reached, for example, through the "reasonable use" requirement of customary rights. *See* J. BROWNE, *supra* note 31, §§ 21-23.

49. In *Tona-Rama* the tower occupied a circle of sand only 17 feet in diameter. 294 So. 2d at 77. Recreational structures that occupy larger areas—such as the wall of hotels envisioned by the dissenting opinions, *see id.* at 79, 81—would require harder decisions. But it should be noted that the majority opinion twice calls attention to the inequity of collecting taxes on land that an owner may not use to his economic advantage. *See id.* at 75, 77. Justice Boyd's dissenting opinion expresses a similar concern. *See id.* at 80. In *Downing* the court held that assessment and collection of taxes would not necessarily estop municipalities from asserting public rights. 100 So. 2d at 61. But the court's evident sensitivity to the taxation issue may make it a key element in the balancing of public and private interests.