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CONFERENCE ON TEXAS COASTAL LAW
Juggling Conflicting Demands And Inconsistent Application Of The Rules
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SHORELINE BOUNDARIES, PART I: LEGAL PRINCIPLES

Shannon H. Ratliff †
Ratliff Law Firm P.L.L.C.

I. Introduction

The organizers of this conference have given it a provocative subtitle: "Juggling Conflicting Demands And Inconsistent Application Of The Rules." At first glance, it is tempting to suggest that the topic on which I am contributing this paper—the legal principles governing the task of locating shoreline boundaries in Texas—is a haven of conflicts and inconsistencies. Given the topic's complex history, some may see it as being so.

I prefer, however, to offer a thesis that is facially less provocative yet arguably more radical, and is in any event far more optimistic: namely, that Texas shoreline boundary law is—in its current condition, and when correctly understood—essentially consistent and surprisingly simple. Most of the core principles are long settled, some for decades or longer. Where genuine grey areas exist, it is generally because those grey areas involve conundrums that have been brought about by scientific or technological developments that probably could not have been, and in any event were not, anticipated by the ancient Roman, Spanish, Mexican, and English authors from whom Texas derives the bases of its seashore boundary law.

I say "genuine" grey areas because for multiple reasons, Texas seashore boundary law has often been fraught with political controversy, and one product of that controversy has been a battle among our branches of government: a tug-of-war between the Texas judiciary on one side, which in the main has pulled toward bringing certainty and stability to seashore land title, and its legislative and executive branches on the other, which have at times pulled against that certainty in order to address various public or political controversies. That struggle has in turn caused parties sometimes to assert the existence of "grey areas" concerning subjects about which preexisting precedent, if correctly understood and applied, had actually left none.

Political controversy has also led to another pattern that at times has disrupted the certainty of the governing rules: a pattern of occasional legislative overreaction, or "overcorrection," in response to judicial decisions that are unpopular with responsible state agencies or other interested groups.

Beyond recognizing this history of controversy and tension among Texas branches of government, understanding Texas seashore boundary law correctly also means bearing in mind certain historical facts that make this state unique. For example, while all or most other states are either influenced or controlled by federal decisions governing seashore boundaries in at least some respects, Texas—due to its unique prestatehood history as a sovereign republic—is not. This means that where

† As some who know the author personally may observe, the following paper in some respects exceeds—in its style and perhaps (though I hope less dramatically so) some aspects of its content as well—my usual degree of formality and erudition at events like this one. The author acknowledges Richard A. Fordyce, commercial litigator and colleague at the Ratliff Law Firm, for his substantial contributions to this paper's preparation.

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other states' laws of seashore ownership often must look to and follow federal decisions on key issues, Texas law has its choice: as to certain ancient Spanish, Mexican, and English laws, Texas takes mandatory cues and is bound to carry forward the vested rights as defined by **those** sources; but as to federal decisions, Texas—uniquely among the states—may pick and choose, adopting only those rules that this state finds persuasive in light of its own unique history and circumstances.

I urge readers to approach this paper with these background thoughts and principles in mind. In support of this, the paper begins by identifying the sources of title to real property in Texas: the status of pre-statehood grants of land, the crucial notion of vested rights, and the important role that is still played by the laws of the several sovereigns that preceded the State of Texas in presiding over the Texas coast. *See* Section II. The paper then discusses the Texas Legislature's broad power to alienate land covered by the sea, which materially exceeds the restricted power of alienation that is wielded by the legislatures of many other states. *See* Section III. Next, this paper discusses the two ancestral regimes relevant to Texas seashore boundaries—Spanish/Mexican civil law and English common law—and traces how the method of locating the line between private and public interests in seashore property became settled under each paradigm as construed by this state's courts. *See* Sections IV, V, & VI. Out of necessity the paper then discusses the Open Beaches Act: a landmark piece of legislation that as to much of the property on the Texas coast effectively unsettled many seashore boundaries almost as soon as they had been settled by our courts. *See* Section VII. This paper then examines issues that arise when the proximity of land and water is physically changed: the four phenomena known as "accretion," "erosion," "reliction," and "subsidence," and the relevance of each one to seashore boundaries. *See* Section VIII. From there, the paper turns to consider an especially difficult question: the unresolved question of where, in applying boundary rules, the "sea" should be deemed to end and "inland waters" such as rivers, streams, and lakes (which are sometimes governed by different rules) should be deemed to begin. *See* Section IX. Finally, the paper considers a new piece of legislation that, like the Open Beaches Act before it, threatens to infuse Texas seashore boundaries with new uncertainty, and suggests some reasons why this new legislation is very likely ineffectual and is, in any event, certainly unwise. *See* Section X.

II. Background: The Basis Of Title To Coastal Property In Texas

Every square inch of real property in Texas was originally owned by one or more of four successive governments: first Spain; then Mexico; then the Republic of Texas; and finally, the State of Texas. *E.g.*, *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404, 407-08 (1932). Every privately-held title to any real property in Texas originated with a grant or patent from one of those four governments. Each time the government transitioned from one sovereign to the next, the transfer of sovereignty included a guarantee that the grants of real property made by the outgoing sovereign would be protected under the new regime. *E.g.*, *id.*[1] Thus, every privately-held title to real property that currently exists in Texas can and must be traced to an originating grant from one of those four governments. *Id.*

The scope and meaning of that grant will be determined according to the granting government's apparent intent. *John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 282-83 (Tex. 2002). That intent is embodied in the historical laws of that granting government as they existed at the time the grant was made, and those historical laws—as interpreted by Texas courts—can and must be treated as the defining source of every right to every piece of real property in

[1] *See also*, *e.g.*, Protocol of Querétaro, May 26, 1848 (statement by U.S. Senate explaining certain aspects of Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922); *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438, 443 (1932).

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Texas. *E.g.*, *id.*; *see also*, *e.g.*, *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 98-99 (1944). The rights that are so governed include not only the nature, location, and method of defining the boundary of the granted property but also the grantee's rights in the event of future contingencies like accretion or erosion, which are "vested rights" equal to any others even though they relate to future events. *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438, 443-44 (1932).

The origination of title to Texas real property differs from title origination in other states because unlike land in most or all other states, land in Texas was generally not owned by the federal government of the United States before becoming owned by the State of Texas.[2] This means that while federal property law sometimes plays a controlling role in locating seashore boundaries in other states (because the state's title to its land devolved from the title formerly held by the federal government before statehood), federal law plays **no** direct role in locating Texas coastal boundaries; instead, Texas owners' rights are determined solely by the **Texas** judiciary's interpretation of the granting government's historical laws, and federal interpretations are given, at most, a persuasive but nonbinding effect. *Compare*, *e.g.*, *Kenedy Mem. Found.*, 90 S.W.3d at 281-86 (deciding seashore boundary's location based solely on Texas courts' own interpretation of Mexican civil law) *and Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 191-92 (1958) (commenting that Texas Supreme Court is "not bound" by federal seashore boundary-locating decisions, but may consider them as persuasive authority) *with*, *e.g.*, *California v. United States*, 457 U.S. 273 (1982) (using federal law to determine seashore boundary in California) *and Hughes v. Washington*, 389 U.S. 290 (1967) (using federal law to determine seashore boundary in Washington).

In customary coastal law parlance, coastal land is divided into three categories: submerged land, upland, and tideland. Peter H.F. Graber, *The Law of the Coast in a Clamshell*, 1983 Texas Bar J. 684, 685-86 nn.7-27. "Submerged land" is offshore land: land that lies seaward of the line of mean low tide and is legally deemed to be permanently and continuously covered by the sea. *Id.* "Upland," or "fast land," is land that lies landward of the applicable high water line (which can vary depending on the nature of the grant, as discussed in Sections V & VI below) and that is legally deemed to be dry land not covered by the sea. *Id.* In between these two categories lies the "tideland": the land that alternates regularly between being covered and uncovered by the sea due to the fluctuation of the tide. *Id.* Unfortunately, the phrases "submerged land" and "tideland" have sometimes been exchanged in Texas decisions and statutes, as well as in important federal decisions, producing some confusion about the two terms' customary meanings. *Id.*; Michael W. Reed, SHORE & SEA BOUNDARIES 392 (U.S. Dept. of Commerce 2000) (hereinafter, "Reed 2000") (Appendix A, "Glossary of Terms").[3] To help promote precision and clarity, this paper will adhere to the customary definitions set forth in this

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[2] Other than the original thirteen colonies, each other state began its life as a "territory" in which all land was owned by the United States before being "given" to the state at time of statehood. *See generally*, *e.g.*, *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 511-21 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). By contrast, Texas became a state through a treaty-like arrangement between two sovereign republics: a so-called "Annexation Resolution" that was introduced in Congress on March 1, 1845 and then enacted on December 29, 1845. *See United States v. States of La.*, *Tex.*, *Miss.*, *Ala.* & *Fla.*, 363 U.S. 1, 37 (1960); *Butler v. Sadler*, 399 S.W.2d 411, 414 (Tex. App.—Corpus Christi 1966, writ ref'd n.r.e.).

[3] For example, the meaning of the term "tideland" became confused partly as a result of the so-called "Tidelands Litigation" (or "Tidelands Controversy"), the popular name for the decades-long battle that raged from 1947 throughout much of the twentieth century between the federal government and certain coastal states to decide which submerged land was owned by the federal government and which submerged land was owned by the states. *See generally* Reed 2000 at 002-171 (comprehensively reviewing the dispute). Despite its misleading popular name, that dispute involved **submerged** land—offshore land **seaward** of the line of mean low tide—and did not involve "tideland" as that term is customarily defined. *See id.* at 392 (Appendix A, "Glossary of Terms").

paragraph even though Texas decisions and statutes do not consistently do so.

In analyzing seashore boundaries, it is invariably asserted as a starting point that all submerged land and tideland are both the property of the State of Texas. *E.g.*, *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413-15 (Tex. 1943). This statement's founding basis is the venerable rule—which in general terms was shared by both the civil law of Spain/Mexico and the common law of England, though some details and contours differed—that land covered by the sea belonged to the King. *E.g.*, *Manry*, 56 S.W.2d at 446-47. The Texas Legislature has enshrined this background rule in several statutes that claim as property of the State of Texas all of the submerged land and tideland from private owners' property lines to the seaward boundary of Texas.[4]

This statement is misleading if left standing alone. Crucially, it must be understood that **in Texas, State ownership of coastal land is only a background default rule that can be, and in many instances has been, freely modified.** For example: although in some other states the legislature actually lacks power to alienate its fee simple title to submerged land and tideland (*see* note 8 below), Texas law disagrees. On the contrary, it has long been settled that the Texas Legislature has full authority to convey fee simple title of submerged/tideland from the State to other owners, including individuals, corporations, and political subdivisions like cities, counties, and special purpose districts. *City of Galveston v. Menard*, 23 Tex. 349 (1859); *City of Port Isabel v. Missouri Pac. R.R. Co.*, 729 S.W.2d 939, 943-44 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.); *see also* notes 8 & 9 below. Furthermore, a claimant's burden in proving private title to submerged land or tideland differs from the burden that must be carried to prove private title to ordinary dry land only in degree, not in nature; the claimant need merely show with heightened certainty and specificity that the inclusion of submerged land or tideland within the originating grant's bounds was the granting sovereign's intent.[5] Because the scope and meaning of conveyances by the State of Texas of submerged land and tideland

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[4] *E.g.*, Tex. Nat. Res. Code § 11.012(c) ("The State of Texas owns the water and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries provided in this section, including all land which is covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide."); Tex. Parks & Wild. Code § 1.011(c) ("All the beds and bottoms and the products of the beds and bottoms of the public rivers, bayous, lagoons, creeks, lakes, bays, and inlets in this state and of that part of the Gulf of Mexico within the jurisdiction of this state are the property of this state. The state may permit the use of the waters and bottoms and the taking of the products of the bottoms and waters."); Tex. Water Code § 11.021 ("The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.").

[5] A claimant seeking to establish title to submerged land or tideland must prove that the granting government had a "certain and specific intention" to include submerged land or tideland within the bounds of the private grant or patent, and if that threshold of proof is not met then a court will presume "that there has not been any act of the State divesting itself of title" to the land. *Compare Menard*, 23 Tex. at 396-98 *with Lorino*, 175 S.W.2d at 413-15; *see also Anderson v. Polk*, 117 Tex. 73, 297 S.W. 219, 222-23 (1927). It is well established that despite this relatively high threshold of proof, claimants can establish title to submerged land and tideland against the State, and in countless cases they have done so. *E.g.*, *Menard*, 23 Tex. at 392-400 (finding that title to a portion of Galveston Bay had been conveyed away by State); *see also*, *e.g. State v. Lain*, 162 Tex. 549, 349 S.W.2d 579, 581-86 (1961) (reaffirming scope of title decided in *Menard*); *State v. Aransas Dock & Channel Co.*, 365 S.W.2d 220, 223-25 (Tex. Civ. App.—San Antonio 1963, writ ref'd) (same holding as to submerged lands in Red Fish Bay and Corpus Christi Bay); *Baylor v. Tillebach*, 49 S.W. 720, 722 (Tex. Civ. App. 1899, no writ) (same as to bed of tidal bayou); *accord*, *e.g.*, *North American Dredging Co. v. Jennings*, 184 S.W. 287, 287-88 (Tex. Civ. App.—Galveston 1916, no writ) (presuming, without dispute, that bed of tidal bayou was privately owned because it lay within the bounds of the grant). This Texas rule differs from that of many other states, some of which have found that their legislatures' powers to alienate submerged land and tideland are restricted by a common law doctrine of "public trust." *See* note 8 below.

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are often central issues in boundary disputes on the Texas coast, the ways in which the Texas Legislature has defined and limited the State's power to make such conveyances must now be reviewed and understood.

III. The Scope Of The State's Power To Convey Submerged Land And Tideland

In 1909, the Supreme Court decided that the legislation originally defining Public School Land had not identified submerged land and tideland with sufficient clarity to include them in the Permanent School Fund. *De Meritt v. Robison*, 102 Tex. 358, 116 S.W. 796, 797 (1909).[6] Accordingly, for many decades submerged land and tideland were not part of the Fund and the Legislature remained free to alienate interests in submerged land and tideland on whatever terms it chose. In general practice, such alienation consisted mainly of the General Land Office's leasing of oil and gas interests under certain submerged/tideland-specific leasing legislation enacted in 1919. *Butler v. Sadler*, 399 S.W.2d 411, 416 (Tex. App.—Corpus Christi 1966, writ ref'd n.r.e.) (discussing former Tex. Rev. Civ. Stat. art. 5353, now located at Tex. Nat. Res. Code § 52.011).

The Legislature dedicated the mineral estates of the submerged land and tideland to the Permanent School Fund in 1939, and dedicated their surface estates to the Fund in 1941. *Id.* at 418 (discussing former Tex. Rev. Civ. Stat. art. 5415a § 3 and 5421c-3 § 2, both now located in relevant part at Tex. Nat. Res. Code § 11.041); Tex. Atty. Gen. Op. M-356 at 6 (1956) (same). Unlike much other Public School Land, however, the submerged land and tideland were not dedicated for the purpose of being sold to private owners pursuant to vacancy procedures; instead, the School Land Board was initially restricted to alienating only the oil and gas interests as already authorized by the preexisting mineral leasing statute of 1919. *Butler*, 399 S.W.2d at 421; Tex. Nat. Res. Code § 52.011. Subsequently, separate legislation put the School Land Board in charge of also managing the surface estates in the State's submerged land and tideland. Tex. Nat. Res. Code §§ 33.001, 33.004, 33.011. This legislation authorizes the School Land Board to alienate the State's surface estates in submerged land and tideland in two limited ways: first, by granting leases and easements, but only to certain types of entities and for certain enumerated purposes, Tex. Nat. Res. Code §§ 33.001(g), 33.103, 33.105-.136; and second, by making certain "exchanges of coastal public land for littoral property," Tex. Nat. Res. Code § 33.001(g). These limited powers are apparently exclusive: that is, the School Land Board's limited statutory powers to convey leases and other "lesser interests" are the only power held by any State agency to alienate any estates in submerged land and tideland. *State v. Executive Condominiums, Inc.*, 673 S.W.2d 330, 332-33 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (analyzing Tex. Nat. Res. Code § 33.001(g) and holding that the Commissioner of the General Land Office generally "lack[s] the authority" to convey fee simple title to "coastal public land," a defined term that includes most submerged land and tideland).[7]

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[6] This holding flowed from the general rule that although the Texas Legislature has the power to alienate, convey, and dedicate submerged land and tideland, the granting language must be especially explicit in order to accomplish that result. *De Meritt*, 116 S.W. at 796-97 (explaining that grants are presumed not to include submerged land and tideland unless the grant's language very clearly shows otherwise; the boundary of a littoral grant will be the applicable line of high tide unless the language contains special language that indicates a specific "intention to extend the grant beyond that line").

[7] Practitioners should not be confused by a new 2003 statute that generally authorizes state agencies to convey away fee simple title to Permanent School Fund land so long as the conveyance is for market value and the Governor does not object. *See* Tex. Nat. Res. Code § 31.0671 (added by Act of June 20, 2003, 78th Leg., R.S., ch. 1091, § 31). Under the rule that specific provisions prevail over general ones, this new section should not displace section 33.001(g)'s preexisting provision that only "lesser estates" in coastal public land may be alienated by the State unless specifically conveyed by the Legislature itself. *Compare id. with* Tex. Nat. Res.

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As already mentioned, although asserting that submerged land and tideland are presumptively "owned by the State" is a necessary starting point in analyzing title to coastal land, the presumption is fully rebuttable and is subject to at least four categories of exceptions.

First and most obviously: it is commonplace for estates in submerged/tideland to be held by non-State owners through mineral leases, surface leases, and other lesser interests as authorized by the longstanding statutes discussed immediately above, and many leases and other lesser interests in real estate are forms of "ownership." *E.g.*, *Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003) (so-called "lease" of mineral estate is actually, in substance, a fee simple determinable); Tex. Atty. Gen. Op. JM-572 (lease of lake bed surface constitutes "ownership" for many legal purposes).

Second: when the Legislature dedicated the State's submerged land and tideland to the Permanent School Fund in 1939 and 1941, it naturally dedicated only those particular submerged lands and tidelands that were still owned by the State at that time. Thus, any pre-1941 conveyances of submerged/tideland surface estates or pre-1939 conveyances of submerged/tideland mineral estates were unaffected by the Permanent School Fund dedication; a conveyance that was effective under the granting sovereign's historical law when made remains effective today. *E.g.*, *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404, 407-08 (1932); *see also* note 1 above.

Third: although the statutory scheme prohibits the School Land Board or other State agencies from conveying the fee title of submerged/tideland to other owners (*see* note 7 above), the Legislature **itself** remains fully free to make such conveyances; the only restriction is that since its dedication of the submerged/tideland in 1939 and 1941, the Legislature can validly make such conveyances only if the Permanent School Fund receives compensation for the sale. *Compare* Tex. Atty. Gen. Op. M-356 (1969) (Legislature cannot constitutionally withdraw assets from Permanent School Fund without compensating the Fund) *with* Tex. Atty. Gen. Op. H-881 (1976) (Legislature can make a valid fee simple conveyance of submerged/tideland that has been dedicated to the Permanent School Fund, but only if the Fund is compensated for the sale).[8] In other words, under Texas law—

Code § 33.001(g) *and* Tex. Gov't Code § 311.026(b) (specific provisions prevail over general ones); *see also McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. Comm'n App. 1942, opinion adopted) (new enactments should be construed as being "in harmony with the existing law" unless some contrary intent is plainly shown).

[8] The Legislature's freedom to alienate submerged/tideland distinguishes Texas from several other states, some of which have interpreted the so-called "public trust doctrine" so expansively as to prohibit the State from validly alienating submerged/tideland to any private owner, even if attempted directly through a specific Legislative act. *See generally*, *e.g.*, Eric Pearson, *Illinois Central & the Public Trust Doctrine in State Law*, 15 Va. Envt'l L.J. 713 (1996) (hereinafter, "Pearson 1996") (discussing the "landmark decision" of *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892) and the varying ways in which it has been adopted by different states). Although some Texas decisions have invoked a narrowed version of the "public trust doctrine" as an aid when construing the scope of the powers granted to state **agencies,** they have specifically **rejected** the suggestion that this doctrine in any way limits the power of the Legislature itself to alienate submerged/tideland if it chooses to do so. *Compare State v. Executive Condominiums, Inc.*, 673 S.W.2d 330, 332-33 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (quoting *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028 (1940) for principle that due partly to public trust doctrine, State's title to submerged/tideland differs from title to other State land and can be divested only as specifically authorized by express legislative grant) *with*, *e.g.*, *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 58-60 (Tex. App.—Corpus Christi 1993, writ denied) (explaining that the *Illinois Central*-style public trust doctrine "has not fared well" in Texas; rejecting suggestion that every submerged/tideland conveyance by the State carries an implicit reservation, restriction, or encumbrance for the general public's benefit, and holding instead that such conveyances are encumbered only by whatever reservations, if any, may be explicit in the grant). The fact that the land owned by the State of Texas at time of statehood (unlike that of other states) was not previously owned by the federal government may be one reason

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unlike that of many other states—there is **no policy-based prohibition** against private ownership of underwater land; on the contrary, the boundaries of a private grantee's ownership are determined by the intentions of the original granting sovereign as evidenced by the words of the original grant, and the grantee's rights are vested rights that were carried forward and preserved each time Texas transitioned from one sovereign to the next.[9]

Fourth and finally: though the rules are not fully settled, it appears that the location of the State's submerged/tideland boundary can sometimes vary depending on the means by which the land's inundation with sea water came about: land that becomes inundated due to subsidence, for example, may be treated differently than land that becomes inundated due to accretion or erosion, as a separate section will discuss. *See* Section VIII below.

IV. Determining Which Regime Governs The Boundary: English Common Law Or Spanish/Mexican Civil Law

As already mentioned, each historical regime change in Texas included a guarantee that the property rights granted by the outgoing sovereign would be fully respected and protected by the incoming sovereign. *See* Section II above. Accordingly, and consistent with ordinary rules of title interpretation, in locating the boundary between a private landowner's property and the adjacent State-owned submerged land or tideland, Texas law focuses on giving effect to the grantor's intent. *Id.* Naturally that intent must be determined by construing the language of the original grant or patent from which the owner's rights are derived; but where principles of background law are needed in order to find the precise legal meaning of that language, those principles must be drawn from the law that was in effect at the time the grant was originally made. *Id.* Furthermore, those historical background laws often will themselves literally constitute "expressions of the grantor's intent," since in many seashore disputes the originating grant whose meaning is being litigated is a grant or patent that was originally issued by the government itself. *Id.*

Many land titles in Texas devolve from grants originally made by the government of Spain or Mexico. Since the grantor's intent controls, every such grant must be interpreted according to the ancient civil law of Spain and Mexico and that ancient law will continue to define the owner's vested rights today. This ancient civil law also governs grants that were made by the Republic of Texas between March 2, 1836 (the Republic's declaration of independence from Mexico) and January 20, 1840 (the day the Republic adopted the common law to replace the civil law as the rule of decision). *E.g.*, *Giles v. Ponder*, 275 S.W.2d 509, 518-19 (Tex. App.—San Antonio 1955), *aff'd sub nom. Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736 (1956) (explaining that from March 2, 1836

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for the public trust doctrine's relative weakness in this state. *Compare* Pearson 1996, 15 Va. Envt'l L.J. at 718 text accompanying n.25, *Mississippi State Hwy. Comm'n v. Gilich*, 609 So.2d 367, 373 (Miss. 1992), *and Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-81 (1988) *with Natland Corp.*, 865 S.W.2d at 58-60; *see also supra* note 2 & accompanying text. Given all this, it is arguably ironic that since 1959, certain coastal private property in Texas has been subject to a legislated equivalent to the "public trust doctrine"—the Open Beaches Act—which a separate section will discuss. *See* Section VII below.

[9] *Compare* note 1 above (discussing private property rights' preservation through transitions of government) *with Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. Comm'n App. 1935, opinion adopted) (recognizing private ownership of underwater land because located within boundaries of original grant), *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52 (Tex. App.—Corpus Christi 1993, writ denied) (same), *Port Acres Sportsman's Club v. Mann*, 541 S.W.2d 847, 849 (Tex. App.—Beaumont 1976, writ ref'd n.r.e.) (same), *Fitzgerald v. Boyles*, 66 S.W.2d 347 (Tex. Civ. App.—Galveston 1931, writ dism'd) (same), and *Fisher v. Barber*, 21 S.W.2d 569 (Tex. Civ. App.—Beaumont 1929, no writ) (same); *cf. also Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976).

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until January 20, 1840, "the old Mexican laws" together with the Constitution of 1836 and the intervening legislation by the Congress of the Republic constituted "the code of laws for that period"). Thus, civil law governs interpretation of every grant that was made prior to January 20, 1840, regardless of whether it was made by Spain, Mexico, or the Republic of Texas. *Id.* Commentators have traditionally estimated that such civil law grants account for roughly fifty percent of the littoral land on the Texas seashore.[10]

In determining whether property is governed by civil or by common law, the controlling date is the day the originating grant or patent became perfected, final, and complete such that it was superior to, and fully enforceable against, the former title of the government that granted it under that government's laws. *Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736, 739-41 (1956). Thus, an earlier date on which an "equitable" or "imperfect" right in the land may have accrued—for example by way of a preliminary "land certificate" or survey—is immaterial for purposes of the determination; the final issuance date of the perfected patent or grant controls. *Id.* By the same token, where it is impossible to locate or produce a copy of the original patent or grant, the sufficiency of the proof of title will be determined according to the procedural laws that were in effect when the sovereign made the grant. *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 87-88 (1944). Thus, "a title [that was] good against the Mexican government" under Mexican procedures at the time it was issued will be "good also against the State of Texas" so long as it appears that ancient Mexican procedural laws are satisfied, and good title may be proved—applying the standards that those ancient Mexican procedures would have used—"even though final certificate of title has not issued and even though the proceedings were otherwise incomplete." *Id.*

When a grant is of land bordering the ocean, the grant's language commonly includes a call to either the "shore" or the "waters" of the sea. When discerning the grantor's intention in any type of land grant, calls to "natural objects"—such as a body of water or a shoreline—have the highest priority and prevail over all other types of calls (such as compass-based descriptions of course and distance, i.e. metes and bounds). *E.g.*, *Higginbotham v. Davis*, 35 S.W.3d 194, 196-97 (Tex. App.—Waco 2000, pet. denied) (discussing, *inter alia*, *Stafford v. King*, 30 Tex. 257 (1867)). Hence, the precise legal meaning of a call to the "shore" or "waters" is the paramount task in interpreting most littoral grants. But unlike natural objects having fixed locations, the sea's edge is constantly moving due to astronomic and meteorological factors, and it is not self-evident how that constantly-moving natural object should be translated into a fixed and surveyable line. The law must make a choice.

In making that choice, there are at least five conceivable and very different locations at which the sea's moving edge might be legally "fixed." First, the shore might be defined as the furthest point inland, measured horizontally, that the sea water ever reaches under any and all circumstances—i.e. including extreme conditions such as hurricanes and other storms. Second, it might be defined as the furthest point inland, measured horizontally, that the sea water reaches under "ordinary" circumstances—i.e. excluding extreme conditions such as hurricanes and other storms. Third, the shore might be defined as the furthest point inland, measured horizontally, that is reached by sea water, but to try to distinguish water brought there by astronomic (i.e. tidal) forces from water driven there by atmospheric and meteorological (i.e. nontidal) forces like the wind. Fourth, the shore might be set using an apparent physical landmark such as an observable horizontal point on the ground at which the type of vegetation changes, the topsoil's nature differs, or there is an abrupt change in the elevation of the ground. Fifth and finally, the shoreline might be located by measuring the purely

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[10] *E.g.*, Kenneth Roberts, *The Luttes Case—Locating the Boundary of the Seashore*, 12 Baylor L. Rev. 141, 141 text accompanying n.2 (1960) (hereinafter, "Roberts 1960") ("approximately one half"); William Gardner Winters, Jr., *The Shoreline for Spanish & Mexican Grants in Texas*, 38 Tex. L. Rev. 523, 525 text accompanying note 17 (1960) (hereinafter, "Winters 1960") (same).

vertical elevation of the water offshore as it rises and falls with the tide, projecting a horizontal elevation line onto the shore using standard surveying techniques, and then defining the "shoreline" as being the point at which this horizontal elevation line intersects the land.

As for both common law and civil law grants, Texas law has decisively chosen the fifth of these options—vertical measurement of an offshore water level—as the meaning of a water's edge call. It has conclusively rejected the other four. Because this choice was not made easily, but was surrounded by controversy, the next two sections discuss its history in detail.

V. The Common Law Boundary Rule: "Mean High Water"

The common law of England used a simple-sounding phrase to describe the legal limit of the shore: ancient decisions and treatises said that a littoral grant's call to the sea was bounded by the point at which the land became regularly covered by "the flux and reflux of the sea at ordinary tides," a point that was commonly referred to as the "ordinary high water mark." Frank E. Maloney & Richard C. Ausness, *The Use & Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C.L. Rev. 185, 202 (1974) (hereinafter, "Maloney & Ausness 1974") (quoting *Blundell v. Catterall*, 106 Eng. Rep. 1190, 1199 (K.B. 1821)); *see also* Kenneth Roberts, *The Luttes Case—Locating the Boundary of the Seashore*, 12 Baylor L. Rev. 141, 143 (1960) (hereinafter, "Roberts 1960"). Unfortunately, however, the phrases "ordinary tide," "ordinary high water," and "mark" were susceptible to varying interpretations. Their meanings remained vague until the U.S. Supreme Court—in fixing the boundary of a federal land grant in California—considered and defined them in the landmark decision of *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935).

Borax considered and rejected several possible alternatives. First, it flatly rejected one side's contention that "high water mark" meant "a physical mark made upon the ground by the waters," i.e. a physical landmark produced by the water's horizontal movement over the ground. *Borax*, 296 U.S. at 22. Instead, the court decided that the term necessarily meant "the **line of high water** as determined by the course of the tides." *Id.* (emphasis added). It then defined "line of high water" as meaning the vertical elevation of the water offshore, which would then be projected horizontally to its intersection with land using standard surveying techniques. *Compare id. with* Maloney & Ausness 1974, 53 N.C.L. Rev. at 205. Second, the court considered whether "ordinary high water" meant an average of all daily high tide-gauge measurements taken during the relevant period of time, or only of some of them. One side argued that so-called "spring tides" should be eliminated from the average because they were not "ordinary," and that only "neap tides" should be included in the average. *Borax*, 296 U.S. at 23-26.[11] But the court rejected that position: it held that there was "no justification" for limiting the universe of daily high water levels being averaged and that instead, the "high water mark" would be defined as the "mean [i.e. average] of **all** the [daily] high tides." *Id.* at 26 (emphasis added). Third and finally, the court considered what period of time should be treated as the cycle for which the "mean high water" level would be averaged. It chose 18.6 years: the period that had been determined by the United States Coast and Geodetic Survey as the length of the periodic, recurring cycle of astronomic forces on the moon and, therefore, the tide. *Id.* at 26-27; *see also* Maloney & Ausness 1974, 53 N.C.L. Rev. at 205-06 (interpreting *Borax*); Roberts 1960, 12 Baylor L. Rev. at 150 (describing astronomic basis of 18.6-year cycle).

Because the seashores of many states were once owned by the federal government (*see*

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[11] "Spring tides" are the high water readings that occur when the moon is either new or full and therefore is exerting a comparatively strong pull. Roberts 1960, 12 Baylor L. Rev. at 149-50. "Neap tides" are the high water readings that occur when the moon is in its first and third quarters and therefore is exerting a comparatively weak pull. *Id.*

note 2 above), *Borax* has actual controlling effect on some seashore boundary issues in other states, which are determined in some respects by federal law. Maloney & Ausness 1974, 53 N.C.L. Rev. at 206; *Hughes v. Washington*, 389 U.S. 290, 290-93 (1967). This is not true in Texas, however, since in Texas—unlike every state other than the original thirteen colonies—the seashore has never, not even temporarily, been owned by the federal government at any time. *Compare* note 2 above *with*, *e.g.*, Maloney & Ausness 1974, 53 N.C.L. Rev. at 206 (noting that since the controlling impact of *Borax* "is limited to federal grants," the case "apparently would not be binding in Texas"). Nonetheless, while recognizing that it was not actually bound by *Borax*, the Texas Supreme Court in 1956 applied a rule for littoral grants governed by the common law that was identical to the *Borax* test (though it did so without explicitly adopting *Borax* by name), and this was subsequently construed as a *de facto* adoption of *Borax*. *Compare Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736, 741-43 (1956) (affirming application of *Borax*-type method to common law grant) *and Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 191-92 (1958) (commenting that Texas Supreme Court is "not bound by" *Borax* but views it as highly persuasive) *with* Carol Eggert Dinkins, *Texas Seashore Boundary Law: The Effect of Natural & Artificial Modifications*, 10 Houston L. Rev. 43, 45 nn.20-21 & accompanying text (1972) (hereinafter, "Dinkins 1972") (describing *Rudder* as an "adopt[ion]" of "the *Borax* ruling as the proper delineation of the common law seashore boundary for Texas") *and* Roberts 1960, 12 Baylor L. Rev. at 156 (opining that there was never "any real controversy" in Texas over the littoral boundary of common law grants and that *Rudder* imported *Borax*'s definition of "mean high water" into Texas law).[12] Thus, it has long been settled that for grants governed by the common law (i.e. grants made on or after January 20, 1840), the 18.6-year-cycle, all-daily-high-tide-gauge-readings *Borax* definition of "mean high water" is the live and functioning definition of the littoral seashore boundary.[13]

The basic process for locating the mean high water line boundary under a common law grant—which for historical reasons actually receives its most thorough explanation in *Luttes*, a civil law case—is as follows. First, the best available universe of daily high tide-gauge readings must be compiled for the location in question. Ideally, these readings will come from tide gauges located near the property; and if a boundary dispute arises or is anticipated, then one or more local gauges should be installed in that location for the purposes of obtaining these data. *Luttes*, 324 S.W.2d at 181. The Supreme Court has suggested that daily data should be collected for a minimum period of at least one year. *Id.* Then, those daily data points for the specific location are projected over the life of the entire 18.6-year cyclical tidal epoch, which is accomplished via "the further and quite simple step of correction against the nearest tide gauge which has been in operation for the full [18.6]-year tidal cycle." *Id.* Finally (for common law grants), all 18.6 years of high tide-gauge data points are averaged to identify a single line, the elevation of "mean high water," which is projected horizontally onto the land using survey techniques, and the littoral owner's boundary is fixed at the point at which

[12] Some commentators have occasionally suggested that some Texas decisions prior to *Rudder* anticipated the rule of *Borax* in some meaningful way. *E.g.*, Dinkins 1972, 10 Houston L. Rev. at 45 n.21 (citing *De Meritt v. Robison*, 102 Tex. 358, 116 S.W. 796, 797 (1909) alongside *Rudder*). I have seen no support for this conclusion: *De Merritt*, for example, merely stated generally that the boundary of a common-law littoral seashore grant was "the line of ordinary high tide," the familiar phrase that—until *Borax*—was often repeated but was never meaningfully defined. *Compare De Meritt*, 116 S.W. at 797 *with* Maloney & Ausness 1974, 53 N.C.L. Rev. at 202-06.

[13] *E.g.*, *Feinman v. State*, 717 S.W.2d 106, 110 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) ("The division between public and private ownership under the common law, which governs Texas grants after 1840, is the mean high tide [i.e. mean high water] line."); *Seaway Co. v. State*, 375 S.W.2d 923, 930-31 (Tex. Civ. App.—Houston [14th Dist.] 1964, writ ref'd n.r.e.) ("The line of mean high tide...is the average of all high tides [i.e. daily high water readings] over a lunar cycle of 18.6 years.").

this elevation intersects the land. *Id.* at 174, 181.[14]

Due to technological improvements and an increased investment of resources by the National Ocean Service ("NOS") within the National Oceanic and Atmospheric Administration of the U.S. government ("NOAA"), the ease and practicality of using the *Borax* method to locate boundaries on the Texas Gulf Coast has increased substantially since Texas adopted the test in 1956. For example, according to some reports, as of 1972 there were only four government-sponsored tide gauges operating continuously on the Texas coast: at Brownsville, Galveston, Corpus Christi, and Sabine Lake. Dinkins 1972, 10 Houston L. Rev. at 45 n.16. Today, by contrast, the NOS now maintains thirty-four tide gauges covering the entire length of the coast, and data from these gauges—updated daily—is made continuously available to the public directly through the NOS website. *See* http://tidesandcurrents.noaa.gov/coastline.shtml?region=tx. Thus, the factors that led the Texas Supreme Court to embrace a tide-gauge-based measure of boundary location—certainty, objectivity, and ease of application—have been strengthened by subsequent governmental investments and technological developments. *Compare id. with Luttes*, 324 S.W.2d at 181.

A concept crucial to *Borax* is that even though the *Borax* boundary is referred to often as the elevation of "mean high **tide**," it is far more accurately described as the elevation of "mean high **water.**" *See Luttes*, 324 S.W.2d at 173, 182-83 (unmistakably and very deliberately equating the phrase "mean high water" with "mean high tide").[15] It is an accepted fact that wind, barometric changes, and other meteorological factors affect the vertical height of the water along the coast, causing that level to rise above or fall below the level that the waters would occupy if they were being affected solely by astronomic and gravitational forces (i.e. by the tide alone). *See*, *e.g.*, Roberts 1960, 12 Baylor L. Rev. at 145-48. It is also accepted and known that despite their rather confusing name, so-called "tide gauge" readings reflect the vertical height being reached by sea water **regardless of cause;** their base readings do not try to factor out the influence of wind and other meteorological forces. *See id.* Although modern tide gauges do gather meteorological data,[16] and although meteorological influences can in theory be factored out through a complex mathematical operation,[17] the law has decided for simplicity's sake that to locate the so-called "mean high tide" elevation in surveying a seashore boundary, ordinary "tide gauge" data reflecting mean high **water** will be averaged and used as the elevation, and these data will necessarily include meteorological influences commingled freely together with the astronomic influences that are "tidal" in nature. *Id.*; *see also*

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[14] For a clear and detailed explanation of this method, including background about tidal behavior and data, see Roberts 1960, 12 Baylor L. Rev. at 144-56. An illustrated guide to tides and measurement methods is available on the website of the National Ocean Service within the National Oceanic and Atmospheric Administration of the U.S. government. *See* http://www.nos.noaa.gov/education/kits/tides.

[15] *See also*, *e.g.*, *John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 272 (Tex. 2002) (noting that for purposes of the *Luttes* rule, the parties had "agree[d]" that measurement of mean high "tide" was "synonymous" with measurement of mean high "water"); U.S. Dep't of Commerce, National Oceanic & Atmospheric Admin., National Ocean Serv., Ctr. for Operational Oceanographic Prods. & Servs., *Tide & Current Glossary* at 11 (1999 ed.) (defining "high tide" as "high water," and then defining "high water" as the "maximum height" of ocean water resulting from combined effects of both "periodic tidal forces" **and** "meteorological, hydrologic, and/or oceanographic conditions").

[16] *See* http://www.nos.noaa.gov/education/kits/tides/tides11_newmeasure.html (noting that the NOAA's modern tide gauges, unlike their older counterparts, now record 11 different oceanographic and meteorological parameters including wind speed and direction, water current speed and direction, air and water temperature, and barometric pressure).

[17] Roberts 1960, 12 Baylor L. Rev. at 146 n.16.

Luttes, 324 S.W.2d at 173, 182.[18]

VI. The Civil Law Boundary Rule: "Mean Higher High Water"

Unlike the definition of a water's edge call for a common law patent, which was never highly controversial in Texas (*see* text accompanying note 12 above), controversy about how to interpret the same language in a civil law grant raged for years. The main reason for this controversy was that the authority setting forth the rule that necessarily governed such grants—the ancient document Las Sietes Partidas—was written in ancient Spanish dating from the middle ages and, due to its age and the lack of contemporaneous interpretive sources, was susceptible to wildly varying translations and interpretations. *See Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 177-78 (1958).

According to the edition accepted by the Texas Supreme Court as authoritative, the relevant language read as follows: "*e todo aquel lugar es llamado ribera de la mar quanto se cubre el agua della, quanto mas crece en todo el an o, quier en tiempo del inuierno o del verano*." *Id.* In *Luttes*, the Supreme Court translated this language "rather literal[ly]" as follows: "and all that place is called shore of the sea insomuch as it is covered by the water of the latter, however most it grows in all the year, be it in time of winter or of summer." *Id.*[19]

This language had gone unanalyzed for generations. In 1859, the Texas Supreme Court had commented in passing dicta that "the rule of the civil law made the shore extend to the line of highest tide in winter," *City of Galveston v. Menard*, 23 Tex. 349, 399-400 (1859), and that comment was repeated casually and often in other opinions' dicta for decades without elaboration or analysis.[20] But throughout these casual mentions, the original Spanish went unanalyzed and its meaning remained unadjudicated. It was not until *Luttes* that the Texas Supreme Court scrutinized the original Spanish, weighed the competing interpretations, and announced the definitive rule.

Luttes required the Supreme Court to locate the boundary between privately-owned upland and State-owned tideland arising from a civil law Mexican grant of littoral land located in Cameron County (between Port Mansfield and Port Isabel) whose eastward boundary was defined by a call to the shore of the Laguna Madre. 324 S.W.2d at 168-69.[21] With the Legislature's consent, the

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[18] While the impact of meteorological forces on **vertical** water levels offshore as measured by "tide gauges" is rolled into the mean high water calculation, mean high water obviously does **not** reflect those forces' impact on water's **horizontal** movement after water hits the land, because under the *Borax*-style, tide-gauge-based model, the water's horizontal reach is irrelevant. Roberts 1960, 12 Baylor L. Rev. at 146-47. Though certain parties contended for years after *Luttes* that water's horizontal reach should be considered when fixing boundaries, the Texas Supreme Court foreclosed those arguments in 2002, as the next section will discuss.

[19] For comparison, other well-known translations of this passage include: (1) "by seashore is meant all that space which is covered by the water of the sea at its highest tide during the entire year, be it in winter or in summer"; (2) "and by the seashore is understood, all of that space of ground covered by the waters of the sea, in their highest annual swells, whether in winter or summer"; (3) "by the shore of the sea we understand whatever part of it is covered with water, whether in winter or in summer"; and "all that ground is designated the shore of the sea which is covered with the water of the latter at high tide during the whole year, whether in winter or in summer." Winters 1960, 38 Tex. L. Rev. at 528 (quoting various competing translations).

[20] *E.g.*, *Heard v. Town of Refugio*, 129 Tex. 349, 103 S.W.2d 728, 732-33 (1937); *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Tex. 559 (1885); *Giles v. Ponder*, 275 S.W.2d 509, 510 (Tex. App.—San Antonio 1955), *aff'd sub nom. Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736 (1956).

[21] *See also Luttes v. State*, 289 S.W.2d 357, 356-58 (Tex. App.—Waco 1956), *rev'd*, 324 S.W.2d 167 (1958) (intermediate opinion setting forth trial court's findings of undisputed facts).

littoral landowner and his oil and gas lessee sued the State of Texas in trespass to try title claiming ownership of roughly 3,400 acres of mud flats in the Laguna. *Id.* Plaintiffs based their claim on two separate contentions: first, that there was "no substantial difference" between the common law and civil law rules defining the boundary and that they therefore owned the disputed land simply because it was now located above the level of mean high water as defined by *Rudder-Borax*; and second, that they owned the disputed land because it consisted of "accretions," i.e. imperceptible deposits of alluvion (silt and sediment) that had been added gradually to the private owner's upland estate since the time the grant was originally made. *See Luttes v. State*, 289 S.W.2d 357, 359-60 (Tex. App.—Waco 1956), *rev'd*, 324 S.W.2d 167 (1958) (intermediate opinion quoting plaintiffs' trial theories).[22] Based on the famous dicta in *Menard* and other opinions, the State argued that under Las Sietes Partidas, the elevation should not be calculated as an **average** of high tide-gauge readings, but instead should be fixed at the **single highest** high tide-gauge reading that occurred during the course of any one year. *Luttes*, 289 S.W.2d at 370, 375 (intermediate opinion outlining State's theories and quoting trial court's conclusions of law).[23] The State also argued that it had retained title to the disputed land because plaintiffs had failed to prove that the disputed land had been created by accretion. *Id.* at 359-60 (intermediate opinion). The district court found for the State, and the intermediate court affirmed.

After granting review "in the hope of being able to eliminate the confusion that appears to exist...as to what...is the correct definition of the shore," the Supreme Court adopted the plaintiff landowner's interpretation of Las Sietes Partidas, and rejected the State's. *Luttes*, 324 S.W.2d at 179-82. The court rejected the State's suggestion that a single "highest" tide gauge reading be used on the ground that such an interpretation was not dictated by the language of Las Sietes Partidas and was, in its view, contrary to "common sense." *Id.* It commented that if the line were to be based on only a single level, or on an average of a "few exceptional levels," then the "line of shore" would not be "shore in the commonly accepted sense of being regularly covered and uncovered by water," and the court found that interpretation unreasonable. *Id.* ("It is difficult to believe that the ancient writers of the partidas had in mind a shore which was different from the commonly accepted idea thereof.").

The court held that instead of fixing the elevation at the single highest reading for the year, the elevation should instead be calculated in a manner similar to the common law "mean high water" rule—that is, it should be fixed as the average of daily high readings over an 18.6-year period—but with one difference: in order to square this rule with the use in Las Sietes Partidas of the word "highest" or "most," instead of averaging **both** of the high water readings from each day (as under the *Borax* common law rule), only the **higher** of each day's high tide-gauge readings should be counted, and the lower should be discarded from the average. *Id.* at 181, 187, 191. In reaching this conclusion, the court explained away its prior "highest tide in winter" language in *Menard* and that opinion's progeny as insignificant dicta that had been mentioned only "incidentally" and that hence had no controlling force. *Id.* at 183-85. It likewise distinguished a similar "highest tide in winter" comment in a 1951 Fifth Circuit opinion, *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 195 (5th Cir. 1951) (which also involved a grant abutting the Laguna Madre) on the bases that (1) the comment in *Humble* had been immaterial dicta, and (2) the federal court's interpretation of prior Texas courts' dicta, being merely an *Erie* guess, lacked precedential weight on this fundamental question of Texas property law. *Luttes*, 324 S.W.2d at 185-86.

The Supreme Court also specifically rejected the State's alternate proposal for locating the boundary, which was that a horizontal landmark on the shore—a so-called "bluff line" at which the nature of the topsoil and the vegetation changed—should be treated as the boundary. *Luttes*, 324

[22] The legal rules governing accretion will be discussed shortly. *See* Section VIII below.

[23] *See also Luttes*, 324 S.W.2d at 174-75 (Supreme Court describing trial court's methodology).

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S.W.2d at 192-93 ("To say that merely because there exists, at the western edge, a 'bluff line' or a 'vegetation line', marking where the waters at some undisclosed period in the past evidently did reach with regularity, the latter line is the line of mean higher high tide, would, in our opinion, be much less reasonable than to fix a line of mean higher high tide by exclusive resort to tide gauges."). In doing so it echoed the U.S. Supreme Court's reasoning in *Borax*, which in a common law context had rejected one side's suggestion that the phrase "high-water mark" should be construed as "a physical mark made upon the ground." *See* Section V above.

By expressly rejecting the State's alternative theories and the older opinions' confusing dicta, *Luttes* appeared to resolve the question of how the civil law boundary of a littoral seashore grant should be defined under Texas law—and it was interpreted by contemporaneous commentators as having accomplished just that. *E.g.*, Roberts 1960, 12 Baylor L. Rev. at 163 ("The effect of this decision [*Luttes*] should be to foreclose future disputes concerning the seaward boundary of land grants in the State of Texas."). But subsequent controversy threatened the success of *Luttes*' attempt to settle the issue with certainty. The Legislature responded to it by enacting the Open Beaches Act, which will be discussed later. *See* Section VII below. Meanwhile, the General Land Office resisted its meaning for years, contending that *Luttes* had not established a conclusive rule and continuing to assert a "bluff line" or "vegetation line" boundary in some locations. After more than forty years, the Texas Supreme Court finally examined the GLO's arguments in *John G. & Marie Stella Kenedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002).[24]

The court in *Kenedy* eventually confirmed *Luttes*' finality and broad applicability, but the decision did not come easily. After initially affirming the intermediate court's holding that non-tide-gauge factors such as a "bluff line" could be considered under certain circumstances, the Supreme Court granted rehearing. In 2002, the court issued a second opinion holding instead that regardless of any topographical idiosyncrasies that may characterize a particular piece of coastal land, the tide-gauge-based method of *Luttes* (and *Rudder*) must provide the basis for locating **every** littoral boundary that is defined by a call to the Texas seashore.[25]

Kenedy involved roughly 35,000 acres of mud flats in Kenedy County, north of and substantially similar to the mud flats involved in *Luttes*: the land was periodically inundated by shallow sea water, but the water's horizontal motion was caused predominantly by meteorological forces, not by tidal forces, and the water's depth when present varied irregularly in different spots across the land as a result. *Kenedy Mem. Found.*, 90 S.W.3d at 271. The plaintiffs claim to the land was based on two civil law grants that, similar to the grant in *Luttes*, defined the land's eastward boundary by a call to "the waters of the Laguna Madre." *Id.* at 270. In the early 1950's, the Fifth Circuit had adjudicated a dispute between two competing oil and gas lessees involving about one-fifth of the same land and had found that leases issued by the State were superior to those issued by the private landowners because the disputed land was part of the Laguna Madre's bed rather than adjacent to it. *See generally Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 195 (5th Cir. 1951). But the Fifth Circuit had based its decision on a pre-*Luttes* interpretation of Mexican civil law—the "highest tide in winter" dicta from *Menard* that *Luttes* had disapproved. Furthermore, its decision had not been a full-fledged title adjudication because the State was not, and for jurisdictional reasons could not have been, properly made party to the case in federal court. *Compare id. at* 194-95 (invoking

[24] For candor's sake I must disclose that I participated as counsel for the plaintiffs in this case.

[25] The only limited exception, it now appears, is that for certain situations in which certain special factors are responsible for causing former fast land to drop or sink below the current high water line, a boundary may remain fixed at a **former** mean high/higher high water line rather than ambulating. The scope and applicability of these special rules are not fully settled and are discussed in a separate section. *See* Section VIII below.

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Menard dicta as civil law boundary rule), 197-98 (eliminating State as party) *with Kenedy Mem. Found.*, 90 S.W.3d at 286-89 (explaining why *Humble Oil* lacked preclusive effect).

Against this backdrop, in the mid-1980's the littoral landowners filed a survey with the General Land Office asserting that because all of the mud flats west of the Intracoastal Waterway lay above the surveyed line of mean higher high water, *Luttes* dictated that the land all be deemed legally **adjacent** to the Laguna Madre—not part of it—and therefore their call to the Laguna Madre actually ran to the Intracoastal Waterway's edge. *Kenedy Mem. Found.*, 90 S.W.3d at 270, 273. In response, the State contended that because tidal influence in the disputed area was negligible, *Luttes*' tide-gauge-based rule could not be meaningfully applied and the Laguna Madre's shoreline should instead be determined by the periodic horizontal reach of the water on land, which it argued was best proved by a so-called "bluff line": the same physical mark on the ground (consisting of a slight rise in elevation and a visible change in vegetation and terrain, about six miles landward of the Intracoastal Waterway) that the State had asserted as an alternative theory in *Luttes*. *Id.*

The State made two main arguments advocating the horizontal-reach "bluff line" in place of *Luttes*' vertically-measured tide-gauge line, but on rehearing the Supreme Court rejected them both.

First, the State argued that the *Luttes* rule should apply only when the boundary is alleged to have moved due to accretion or reliction, and that where no such allegation is made, the lines shown on historical surveys and maps should control over current mean water levels. *Kenedy Mem. Found.*, 90 S.W.3d at 281-83.[26] The Supreme Court rejected that first set of arguments because: (1) although *Luttes* itself involved an allegation of accretion (and ultimately was decided in the State's favor on that ground[27]), the court's opinion nowhere suggested that its interpretation of the civil law boundary rule should be applied only in accretion cases; and (2) since *Luttes* had conclusively interpreted what the original grantors (the governments of Spain and Mexico) intended when they conferred a vested right by calling to the edge of a body of water in a grant, that intention was controlling and could not be altered by any grantee's or surveyor's subsequent misinterpretation. *Id.* In other words, the grantors' original intentions could not now be rewritten without disturbing the analysis of *Luttes*, and the State had shown no compelling reason why *Luttes* should be disturbed. *Id.*[28]

Second, the State argued that no boundary could be located based on "mean higher high **tide**" because the water's horizontal movement across land was indisputably caused mainly by **meteorological** forces, not **tidal** ones, and because the NOAA had classified the Laguna Madre as "nontidal." *Id.* at 283-86. The State further argued that a horizontal landmark such as the "bluff line" and historical surveys could properly be used in place of vertical water levels under a famous sentence

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[26] There was evidence that some of the landowners' predecessors-in-title had treated the State's asserted "bluff line" as though it were the private property's edge and that nineteenth-century surveys had done so as well. *Kenedy Mem. Found.*, 90 S.W.3d at 282-83.

[27] Although the Supreme Court in *Luttes* adopted the landowners' interpretation of Mexican civil law and rejected the State's, the State ultimately prevailed because the landowner had relied mainly on an accretion theory and had not rested his case mainly on attacking the State's interpretation of the original grants. *Luttes*, 324 S.W.2d at 187-91. Because the district court had found as a factual determination that the plaintiffs had not carried their burden of proving their accretion theory, the Supreme Court remanded the case so that the intermediate court could review the evidence's factual sufficiency on that point, and on remand the intermediate court held that the district court's finding was supported by sufficient evidence and could not be disturbed. *Compare id. with Luttes v. State*, 328 S.W.2d 920, 923 (Tex. App.—Waco 1959, no writ).

[28] In refusing to consider the conduct of the plaintiffs' predecessors-in-title, the court was careful to note that the State's title claim was not based on an adverse possession rationale. 90 S.W.3d at 283.

in *Luttes*' closing passage (added on rehearing) that, according to the State's interpretation, had contemplated that under certain unspecified circumstances, unspecified methods other than "exclusive resort to tide gauges" could be used to determine the "upper median line of the shore." *Compare id. with Luttes*, 324 S.W.2d at 192. The Supreme Court rejected this second set of arguments for four reasons: (1) by its terms, *Luttes* had expressly contemplated vertical offshore measurement of **water** levels, not "tide" levels; (2) it was undisputed that the land in question all lay well above the relevant mean higher high water elevation; (3) the alleged loophole sentence *Luttes*' closing passage had not authorized use under any circumstances of any method other than an average of daily water level measurements; and (4) *Luttes* had specifically rejected a "bluff line" boundary materially identical to the one being asserted by the State. *Kenedy Mem. Found.*, 90 S.W.3d at 283-86. The court also noted that the civil law interpreted by *Luttes* had predated the United States' tide-measuring agencies "by more than a century" and that its applicability was not tied to the practices of NOAA (or any other government agency) in any way. *Id.* at 284.

In the end, the Supreme Court's decision appeared to turn on a conclusion that the Kenedy County land was not materially distinguishable from the land involved in *Luttes* and that unless *Luttes* were to be disapproved, the rule stated by *Luttes* had to dictate the result. *Id.* at 283-84 (discussing similarities between the Luttes' and the Kenedy Foundation's land). Justices Enoch, Baker, and Hankinson dissented based on a contention that *Luttes* dictated measurement of tide levels, not water levels, and that it should not be applied where—as here—the water's horizontal movement was dominantly caused by forces other than the tide. *Id.* at 291-99 (Enoch, J., dissenting). But the majority rejected that contention on the ground that *Luttes*' applicability should not vary with technology's ability to distinguish tidal forces from nontidal ones. *Id.* at 289-91 ("a brief word in response to the dissent"). Since *Luttes* had expressly equated "high tide" with "high **water**" and had placed no special premium on tidal influence, replied the majority, *Luttes*' rule could and should be straightforwardly applied to all property bordering the sea regardless of whether the water's motion was "tidal" or not. *Id.*

By applying *Luttes* straightforwardly to the Kenedy County mud flats, the Supreme Court's *Kenedy Memorial Foundation* should foreclose assertions in future boundary disputes that when construing littoral grants the location of the "shore" may be determined by any method other than *Borax*-style averaging of vertical offshore water levels. *Kenedy Memorial Foundation* specifically affirms that this method must be used for civil law as well as common law grants, without exception, and that the only difference between civil law and common law measurements is that the civil law averages only the higher of each day's two high water readings, while the common law averages both of them. Interestingly, it appears that as a practical matter this decision probably eliminates any material physical difference between civil law and common law boundaries at the vast majority of locations on the Texas coast. Despite the Supreme Court's occasional comment that some Texas coast locations see two high-tide cycles each day,[29] the NOAA and other expert authorities generally take the position that there is only **one** daily tidal cycle at the vast majority of places on the Gulf coast.[30] This means that in most Gulf coast locations, the result yielded by the *Luttes-Kenedy*

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[29] *Luttes*, 324 S.W.2d at 191 (stating that "along the Texas coast there are generally two daily high tides and two daily low tides"); *Kenedy Mem. Found.*, 90 S.W.3d at 272 (stating that "[a]t times on the Texas coast there are two daily high tides and two daily low tides").

[30] *E.g.*, Reed 2000 at 385 (Appendix A, "Glossary of Terms") (defining "diurnal tide" as a tide that has a cycle of approximately one day and that has only "one high and one low tide per day"; noting specifically that this one-high-tide cycle is "the typical tide in the Gulf of Mexico"); *see also* http://www.nos.noaa.gov/education/kits/tides/media/supp_tide07b.html (NOS world map showing tide cycles on coasts; showing entire Gulf coast as having a diurnal cycle rather than a semi-diurnal one).

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civil law test (that of averaging only daily **higher** high water readings, by eliminating the lower of each day's two high tide-gauge readings) apparently will differ little, if at all, from the result yielded by the *Rudder-Borax* common law test (that of averaging all high water readings for each day).[31]

Though I must admit a bias based on my participation (*see* note 24 above), I strongly believe that *Rudder*, *Luttes*, and *Kenedy* are good policy because their mathematical and objectively verifiable tide-gauge-based formulas create certainty where otherwise uncertainty would reign. If the "horizontal reach" model asserted by the State had been adopted, then eyewitness testimony about the "highest wave" ever observed in a given location (or worse, hearsay reports made of statements allegedly made by one's ancestors) would lead to endless disputes and litigation over littoral boundaries—a poor policy in the subject matter of real property boundaries, where the policies of *stare decisis* and certainty are at their strongest.[32] Given the benefit of certainty imparted by *Rudder-Luttes*' vertically-measured, tide-gauge-based rule, I find irony in the fact that as to many Texas beaches, the Legislature unsettled *Rudder* and *Luttes* very soon after they were decided via the Open Beaches Act—as the next Section will discuss.

VII. The Open Beaches Act: Good Policy, Bad Law

As just explained, the aim of *Rudder*, *Luttes*, and *Kenedy* was to settle the legal boundary of every coastal littoral owner's private property grant or patent under both civil and common law using a surveyed, vertically-based mean-water-elevation test—and as to coastal land that does not include a beach bordering on the open Gulf of Mexico, they probably do. But the same cannot fairly be said as to any beachfront land that "border[s] on the Gulf of Mexico," because within twelve months after the Supreme Court attempted in *Luttes* to settle that boundary's location with a predictable, mathematically verifiable rule, the Legislature unsettled that rule through an historic piece of legislation: the Open Beaches Act (the "OBA," or the "Act").[33] *See generally* Tex. Nat. Res. Code §§ 61.001-.026, 61.121-.131 (containing the OBA as subsequently codified and amended).[34]

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[31] *See* Winters 1960 at 525 n.15 (explaining that where the tide is "diurnal" rather than "semi-diurnal," the "mean high water" and "mean higher high water" tests will become the same).

[32] *See Kenedy Mem. Found.*, 90 S.W.3d at 281 n.36 & accompanying text ("*[S]tare decisis* is never stronger than in protecting land titles, as to which there is great virtue in certainty.") (citing *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 193 n.3 (Tex. 1968) and *Cross v. Wilkinson*, 111 Tex. 311, 234 S.W. 68, 70 (1921)).

[33] The OBA was initially known by its pre-codification article name, "article 5415d" and currently resides in the sections of the Natural Resources Code cited above in the principal text (Subchapters A, B, and D of Chapter 61). The OBA's importance is reflected by the amount of time being dedicated to it at this conference: I believe that at least two other presentations are dedicated entirely to discussing the Act's practical ramifications and impact on the daily practices of coastal law practitioners. The practical details of the Act I leave in their capable hands to address. I focus my discussion instead on the Act's larger policy context and the growing constitutional concerns that throw the Act's validity into some question, especially as it has been interpreted thus far by Texas courts.

[34] Though I limit my discussion to the Open Beaches Act, I hereby note the existence of another piece of important legislation: the Dune Protection Act (the "DPA"), which was enacted in 1973. Tex. Nat. Res. Code §§ 63.001-181 (current location of DPA, as amended). Like the OBA, the DPA imposes regulations that restrict the uses to which littoral seashore owners may put privately owned land, and some observers have questioned whether it is fully constitutional in every respect. *See, e.g.*, Kent Trulsson, Comment, *The Texas Dune Protection Act After Lucas v. South Carolina Coastal Council*, 45 Baylor L. Rev. 151 (1993). Unlike the OBA, however, the DPA has not yet yielded a substantial body of published judicial opinions interpreting its scope, meaning, and constitutionality. Accordingly, I leave the task of reviewing the DPA for another day, and merely

(footnote continued on next page)

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The Texas Legislature enacted the OBA in 1959 in reaction to a public controversy that arose in the wake of *Luttes*. *See* Mike Ratliff, Comment, *Public Access To Receding Beaches*, 13 Houston L. Rev. 984, 993-94 (1976). The OBA's proponents contended that the *Rudder-Luttes* mean high water line unsettled the general public's conception of what land constituted publicly-owned "beach," especially as applied to beaches facing the Gulf of Mexico, because the surveyed mean high water line was not visually observable by beach users. Those proponents contended that as a practical matter, the public generally viewed a visible "vegetation line"—a breed of horizontal mark on the land of which the "bluff line" asserted by the State in *Luttes* was one example—as demarcating the line between public beach and private land. *Cf. id.* In essence, the OBA's proponents contended that the surveyed, vertically measured, tide-gauge-based *Luttes* line would interfere with and upset the public's expectations. Those proponents' concerns were aggravated by the actions of some littoral seashore owners who, after *Rudder* and *Luttes* clarified the location of their land's legal boundary, had begun fencing off portions of beach above the *Rudder-Luttes* line that had traditionally not been fenced off. *See id.*

The Legislature's method of reacting to *Luttes* via the OBA was simple and ingenious. It began by implicitly acknowledging the constitutional limits of its powers. Tacitly, the Legislature recognized that it lacked power to declare that a visible "vegetation line," rather than mean high/higher high water, was the boundary of the littoral owners' land because doing so would unconstitutionally interfere with landowners' vested property rights; it recognized, in other words, that it could not simply overrule *Luttes* and *Rudder*.[35] To avoid that potential constitutional infirmity, the Legislature selected a different path to a similar end: it unearthed and relied on the notion that under ancient common law and civil law, the public was held in some locations to have acquired an "easement" over the beach through many years of public use. The Legislature reasoned that since the public's easement in each such location would have been either established by the public before the littoral land was ever alienated by the granting government in the first place, or else ratified by private owners in the chain of title who had permitted the public use to occur, the littoral owner's title would have been burdened by the public easement from the title's inception. And since the public's easement was not only a preexisting burden on each littoral owner's land title but also was a creature of the preexisting common law (or civil law, as applicable), went the reasoning, new legislation enforcing the easement would not be altering anyone's property rights; it would merely be enforcing the property rights as they already existed.

Against that philosophical backdrop, the Legislature then decreed through the OBA that as to beaches directly facing the open Gulf,[36] although the littoral landowners' "title" boundary would nominally remain at the mean-water-elevation decided by *Rudder* and *Luttes*, the public would be presumed to have an "easement" that ran from the line of mean low tide to the shoreward "natural line of vegetation," and this entire area would be known as a "public beach." *See* Tex. Nat. Res. Code §§ 61.001(8), 61.011(a), 61.012-.014, 61.016-.017, 61.020, 61.025. The Act then declared that the public should be allowed "free and unrestricted" access to this area, and rendered it illegal for any littoral

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note that it is an additional layer of regulation with which littoral seashore owners must necessarily become intimately familiar. The bulk of the administrative rules implementing details of both the OBA and the DPA have been promulgated mostly in two chapters of the Texas Administrative Code, Chapter 15 and 16 of Title 31. *See* 31 Tex. Admin. Code §§ 15.1-16.54. Coastal practitioners and owners are urged to become closely familiar with this important regulatory framework.

[35] *Subaru of Am. v. David McDavid Nissan*, 84 S.W.3d 212, 219-20 (Tex. 2002) (statutes may not constitutionally impair vested substantive rights) *and Langever v. Miller*, 76 S.W.2d 1025, 1030-32 (Tex. 1934) (same).

[36] *See* note 55 below (discussing definition of beaches to which OBA was intended to apply).

landowner to take any action that interfered in any way with the public's access to this entire band of beach. *Id.* at §§ 61.011(a)-(c), 61.013-.014, 61.018. It decreed that any person's construction of any building, fence, or other structure constituted a prohibited form of "interfere[nce]" with the public's right of access. *Id.* at § 61.013. It furthermore directed that the Attorney General should file civil lawsuits against littoral landowners to enjoin such interference and encroachment, up to and including forcible removal of preexisting homes. *Id.* at § 61.018.[37] Finally, the Act rendered it a civil offense for any person to place any sign or other marker on or near any public beach—or to "make or cause to be made any written or oral communication"—either "stat[ing] that the public beach is private property" or in any other manner "represent[ing]...that the public does not have the right of access to the public beach" guaranteed by the OBA. *Id.* at § 61.014(b). Since the "natural line of vegetation" is practically always further inland than the *Rudder-Luttes* mean high/higher high water line, the OBA's public easement will in most situations encompass some property to which the title is, under *Rudder-Luttes*, privately owned by the littoral grantee. *Compare* Tex. Nat. Res. Code § 61.013(c) *with* Sections V & VI above.

The OBA was unquestionably well intentioned. Its laudable policy purpose was to ensure that many Texas beaches would be kept mostly open to the public, thereby preventing a patchwork of fenced-off private beaches from evolving as had occurred in many eastern states. The Act tried to accomplish this without impairing the littoral owners' constitutional property rights by trying to limit itself to only those beaches on which the government could affirmatively prove that the public had already acquired an easement under preexisting law, and by purporting not to alter or affect the scope of littoral owners' preexisting titles to their land. *See former version of* Tex. Nat. Res. Code § 61.020(2) (Vernon 1978) (providing that the existence of a public easement was "subject to proof" by the State); Tex. Nat. Res. Code § 61.023 (asserting that the Act should not "be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach"). But the Act was not consistent on this front: in another subsection, it provided that as to all beaches within its scope, there would be a rebuttable presumption that for the entire beach from mean low water up to the "vegetation line," the land title of a littoral owner did not "include the right to prevent the public from using the area for ingress and egress to the sea." *See former version of* Tex. Nat. Res. Code § 61.020(1) (Vernon 1978). This presumption conflicted with the traditional common law rule that in order to prove the existence of a public easement, the State would need to carry the burden of proof.[38]

Since the right to exclude the public is "one of the most essential sticks" in the so-called "bundle of rights" that constitute title to private property, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), the only way the OBA could actually live up to its promise of not "affecting in any way" the title of littoral landowners[39] would have been to limit the OBA's impact strictly to locations in which a preexisting public easement could be affirmatively proved. In several sections, the OBA purported to impose precisely such a limit. Tex. Nat. Res. Code §§ 61.011(a) (providing that the OBA should apply only to beaches in which the public "has acquired"—i.e. has **already** acquired at common law—a "right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public"), 61.012 (same), 61.013(a) (same), 61.014(a) (same). In other places, however, the Act's language varied in subtle ways that arguably left

[37] Subsequent to initial enactment, the enforcement section was amended and now provides that county attorneys and district attorneys also have authority to bring OBA enforcement suits. Tex. Nat. Res. Code § 61.018.

[38] *E.g.*, *Seaway Company v. State*, 375 S.W.2d 923, 928-29 (Tex. Civ. App.—Houston [14th Dist.] 1964, writ ref'd n.r.e.).

[39] Tex. Nat. Res. Code § 61.023.

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the precise meaning of that requirement shrouded with doubt.[40]

As the next few paragraphs will review, the OBA has been interpreted by the Texas courts of appeals in ways that as a practical matter have left that originally intended limitation behind. The net effect has been that as to beaches governed by the OBA, the *Rudder-Luttes* mean high/higher high water line has been replaced for many intents and purposes by the "vegetation line" boundary that the Texas Supreme Court specifically rejected in *Luttes*. Yet importantly, while the intermediate courts' decisions have arguably carried the OBA into constitutionally perilous territory, the Texas Supreme Court has still, in the forty-five years since the OBA was passed, never spoken on it in any respect: as to both the meaning and the constitutionality of the Act, our high court has stayed silent. Meanwhile, the U.S. Supreme Court has expressed concern about the constitutionality of other states' statutes that materially resemble the OBA in some important respects.[41] Given our Supreme Court's silence about the Act coupled with the intervening pronouncements by the U.S. Supreme Court, the OBA's constitutionality and future are by no means stale issues, but rather are live questions of Texas property law that have yet to be fully resolved.

Our intermediate courts of appeals' expansive interpretation of the OBA evolved gradually. In the first published decision, *Seaway Company v. State*, the Fourteenth Court emphasized that the State had the burden of affirmatively proving that the public had actually used the disputed beach area sufficiently to create an easement either by "prescription" (i.e. adverse possession) or by "implied dedication" (in essence, an estoppel based on the failure of the littoral owners, or their predecessors-in-title, to take actions to prevent the public's use). 375 S.W.2d 923, 928-29 (Tex. Civ. App.—Houston [14th Dist.] 1964, writ ref'd n.r.e.). It then undertook a lengthy and painstaking review of the historical evidence of public use before finding, at last, that the easement had been proved. *Id.* at 930-35.[42]

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[40] In its general "Definitions" section, the Act defines "public beach" as including any area seaward of the vegetation line "to which the public has acquired the right of use or easement to or over the area by prescription, dedication, **presumption,** or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom." Tex. Nat. Res. Code § 61.001(8) (emphasis added). In its "Prohibition" section, the Act defines "public beach" as including any area seaward of the vegetation line "to which the public has acquired the right of use or easement to or over the area by prescription, dedication, **or estoppel,** or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom." Tex. Nat. Res. Code § 61.013(c) (emphasis added).

[41] *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *see also Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332 (1994) (Scalia, J., dissenting from majority's denial of certiorari review).

[42] In taking this approach to the case, the *Seaway* court explicitly refused to give any weight to the evidentiary presumptions created by "Section 2" of the OBA. *Seaway*, 375 S.W.2d at 929-30 (discussing former "Section 2," subsequently codified at Tex. Nat. Res. Code § 61.020). The court's comments reveal a concern that in enacting the OBA's "Section 2" presumptions, the Legislature might have overstepped the constitutional limits of its power to alter preexisting property rights; but because the State itself had specifically disclaimed any reliance on those sections, the court found it unnecessary to decide those sections' constitutionality, and the question was left for another day. *Id.*; *see also State v. Markle*, 363 S.W.2d 332, 336 (Tex. App.—Houston 1962, orig. proceeding) (making similar observations in factually related case). The court's concern about the presumption's constitutionality was well-founded: as federal decisions involving *Erie* analyses make clear, presumptions and burden of proof are substantive matters—not merely "procedural" or "remedial" ones—and hence constitute a vested property right of which citizens may not constitutionally be deprived without compensation. *Compare Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 209-12 (1939) (presumptions and burdens of proof are substantive rights), *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-10 (1945) (same), *and American Dredging Co. v. Miller*, 510 U.S. 443, 453-54 (1994) (same) *with*, *e.g.*, *Subaru of Am. v. David*

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While *Seaway* purported to require the State to establish the existence of a public easement through affirmative proof, its analysis was arguably flawed in two respects. First, most of the historical evidence it cited merely established use of "the beach" generally; it did not specifically establish use of the **disputed** territory, which was the privately-owned area between the *Rudder-Luttes* mean high/higher high water line and the vegetation line. *Id.* at 930-35. Second, the analysis employed questionable logic by finding that the public's easement had been established by both "prescription" and "dedication" at the same time—two theories that logically might have been considered mutually exclusive if their elements had been strictly enforced. *Id.* at 935-38.[43]

The courts remained essentially quiet about the OBA from 1964 until 1979. Then, picking up where *Seaway* left off, a series of five intermediate decisions from 1979 to 1989 effectively eliminated the requirement that the existence of a public easement be affirmatively proved in any meaningful way.[44] Collectively these five opinions went beyond *Seaway* by adding two important new principles: (1) besides the "prescription" and "dedication" theories adopted by *Seaway*, Texas law also recognizes the controversial doctrine of easement by "custom";[45] and (2) the public's easement is a so-called "rolling" easement that has no fixed location but that instead travels with the vegetation line and relocates every time the vegetation line moves.[46] Several of the decisions reconfirmed *Seaway*'s arguably illogical holding that "prescription" and "dedication" can be simultaneously

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McDavid Nissan, 84 S.W.3d 212, 219-20 (Tex. 2002) (statutes may not constitutionally impair vested substantive rights) *and Langever v. Miller*, 76 S.W.2d 1025, 1030-32 (Tex. 1934) (same).

[43] Finding an "easement by prescription" requires finding that the public's use was **adverse and hostile** to the landowner's wishes; if the public's use is "a **permissive** use under the owner," then it is not "adverse" and does not qualify. *Seaway*, 375 S.W.2d at 937-38 (emphasis added); *accord Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 127-28 (Tex. App.—Corpus Christi 1986, no writ); *Moody v. White*, 86 S.W.2d 372, 377-78 (Tex. Civ. App.—Corpus Christi 1979, no writ). By contrast, finding an implied "easement by dedication" requires finding the exact opposite: that the owner (or, more likely, the owner's predecessors-in-title) through conduct has in effect **given permission** for the public use, which the owner is thereafter estopped from retracting. *E.g.*, *Feinman v. State*, 717 S.W.2d 106, 112-13 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Villa Nova Resort*, 711 S.W.2d at 128; *Seaway*, 375 S.W.2d at 935-37. No published Texas decision has inquired or explained how it is logically possible for the public's use to be simultaneously permissive and hostile, yet several of them have effectively so found. *See* note 47 below.

[44] In chronological order, these five decisions were: *Moody v. White*, 86 S.W.2d 372 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App.—Austin 1986, writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1024 (1987); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120 (Tex. App.—Corpus Christi 1986, no writ); *Feinman v. State*, 717 S.W.2d 106 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); and *Arrington v. Mattox*, 767 S.W.2d 957 (Tex. App.—Austin 1989, writ denied), *cert. denied*, 493 U.S. 1073 (1990).

[45] *See Matcha*, 711 S.W.2d 98-99 ("This Court will overrule the points of error and will affirm the judgment upon the basis that the public acquired a right of use or an easement in the vicinity of the Matchas' property by custom.") (citing, *inter alia*, *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)); *Feinman*, 717 S.W.2d 113-14 (also citing *Thornton* and affirming finding of custom).

[46] *See Moody*, 593 S.W.2d at 379 ("On one boundary the public beach [i.e. the easement] is determined by the line of mean low tide, while the landward side is marked by the line of vegetation. Although these boundaries do tend to shift occasionally, they can be determined at any given point in time. The rule has been established that easements may shift from time to time, just as navigable rivers may change course[.]") (citing no authority; arguably dicta); *Matcha*, 711 S.W.2d at 99-101 (quoting *Moody*'s dicta as the main basis for finding that "easements bordering on a body of water" are "migratory" and their locations "may be moved by the water's action"); *Feinman*, 717 S.W.2d at 108-111 (finding, without citing any Texas easement authority, that the concept of a "rolling easement" is "implicit in the Act" and that the Legislature intended the OBA easement to follow the vegetation line without necessity of location-specific proof).

found,[47] and some, like *Seaway*, failed to insist that the public-use evidence focus specifically on the disputed above-the-*Luttes*-line territory.[48]

Though certainly well-intentioned, these five decisions in places used questionable logic to support their results. For example: in finding that the location of the OBA's public easement is a "rolling" one that "migrates" with the movement of the vegetation line, some of these decisions invoked non-easement opinions that involved **title** boundaries of littoral grants.[49] Such analyses fail to recognize that *Luttes* and other boundary cases all turned on interpreting what the littoral grantor intended via an express call to a natural monument in an express grant—a wholly separate question from that of implied public easements. Since the public easement question is fueled by different policies and controlled by different legal rules, rules from boundary decisions like *Luttes* do not necessarily transfer automatically to the public easement context. Similarly, many of the opinions relied heavily on non-Texas authority, an approach that is suspect since the OBA was supposed to enforce public rights that already preexisted under **Texas** law and were already limiting and burdening the titles of littoral seashore owners.[50] Another example is that in deciding that the public's easement migrated with the vegetation line, one influential opinion relied on the idea that in enacting the OBA, the **Legislature** intended the easement to migrate—an inquiry that would have been irrelevant if the court had merely been enforcing, as the OBA's drafters intended, **nonstatutory** rights already existing under Texas case law.[51] These decisions also fail to recognize that the "custom" doctrine (which they have adopted from other states' laws) arguably conflicts with the Texas rule (which differs from those of other states) that littoral grants and patents are not burdened with any "implied reservations" of public rights.[52] Finally, in rebuffing owners' constitutional attacks, some opinions have pretended that the Act's constitutionality was decided by the *Seaway* court in 1964, when in reality *Seaway* explicitly **declined** to decide that question—and, in dicta, suggested that it harbored some doubts.[53] Other

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[47] *Feinman*, 717 S.W.2d at 112-14 (affirming findings of dedication and prescription); *Villa Nova Resort*, 711 S.W.2d at 127-28 (same); *Moody*, 593 S.W.2d at 377-79 (same).

[48] *Moody*, 593 S.W.2d at 377-79 (discussing evidence that the public had used "the beach" generally, but without specifying evidence of above-the-*Luttes*-line use); *see also Matcha*, 711 S.W.2d at 99 (same).

[49] *E.g.*, *Feinman*, 717 S.W.2d at 110-111 (misdescribing *Luttes* as an "easement" case); *Matcha*, 711 S.W.2d at 99-100 (relying on dicta in *Moody*, 593 S.W.2d at 379, which assumed—without citing any authority—that the rules governing littoral/riparian title boundaries applied to easements).

[50] *E.g.*, *Feinman*, 717 S.W.2d at 110-111 (relying mainly on decisions from England, Hawaii, and Illinois); *Matcha*, 711 S.W.2d at 98 (basing "custom" doctrine wholly on cases from England, Oregon, Florida, Idaho, and Hawaii).

[51] *Feinman*, 717 S.W.2d at 109-111 (concluding that a "rolling easement" was **"implicit in the Act"**) (emphasis added).

[52] *Compare Matcha*, 711 S.W.2d at 98-99 (importing "custom" doctrine into Texas law from other states) *with*, *e.g.*, *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 58-60 (Tex. App.—Corpus Christi 1993, writ denied) (refusing in non-OBA case to find public easement based on theories of "implied reservations" and custom, and explaining that in Texas, the only reservations for the public's benefit are those that are "explicit in the grant" from the granting government); *see also Seaway*, 375 S.W.2d at 929 (rejecting theories of implied reservations and custom).

[53] *Compare Moody*, 593 S.W.2d at 379-80 (stating that *Seaway* "resolved" the landowners' takings attack) *with Seaway*, 375 S.W.2d at 929-30 ("We find it unnecessary to pass on the assertions of unconstitutionality...in this case[.]"); *see also* note 42 above & accompanying text.

decisions have discarded landowners' constitutional challenges with little analysis or none.[54]

Perhaps emboldened by these opinions' expanding approach to the Act, the Legislature during the 1980's and early 1990's made two amendments that extended the OBA beyond its original reach.

First: in 1985 the Legislature added a new section entitled "Disclosure to Purchaser of Property." Tex. Nat. Res. Code § 61.025. Since August 26, 1985, this section has required that every transaction conveying land located seaward of the Intracoastal Waterway include an express acknowledgement by the purchaser that the public "has acquired" an easement up to the vegetation line. *Id.* The section further requires sellers to inform purchasers that if the vegetation line moves, then the public's easement will move with it, rendering any seaward structures subject to mandatory removal by the State. *Id.* By asserting globally by statute that the public "has acquired" an easement over all beachfront governed by the Act, and by legislatively approving the controversial "rolling easement" rule, this amendment has plainly undercut the original drafters' intention that the State would be required to prove a public easement case-by-case under preexisting rules of common law. *Compare id. with Seaway*, 375 S.W.2d at 930-35 (requiring beach-specific evidence of use). Also, by requiring the identical disclosure in every sale of land located seaward of the Intracoastal Waterway, this amendment has also exacerbated confusion about the universe of beaches to which the OBA should be applied.[55]

Second: in 1991, the Legislature eliminated important OBA language that had previously required the public's easement to be affirmatively proved case-by-case for each location, substituting a presumption in its place. *Compare former version of* Tex. Nat. Res. Code § 61.020(2) (Vernon 1978) (previously providing that the existence of a public "prescriptive right or easement" was "subject to **proof**") (emphasis added) *with current version of* Tex. Nat. Res. Code § 61.020 (providing now that for all OBA land located seaward of the vegetation line, it is presumed that "there is imposed on the

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[54] *E.g.*, *Matcha*, 711 S.W.2d at 101 (disposing of constitutional takings challenge by stating merely, without analysis or authority, that "[t]he points of error are overruled"); *see also Arrington*, 767 S.W.2d at 958 (contending that the Act's constitutionality was satisfactorily "addressed" in *Matcha*); *Feinman*, 717 S.W.2d at 115 (finding that owners' due process, due course, and equal protection complaints were waived by their failure to raise them in the district court below).

[55] I know based on my own personal recollections and experience than in originally enacting the OBA, the Legislature intended the Act to apply solely to Gulfward-facing beaches—that is, to beaches on the **seaward shore** of the barrier islands and other open Gulf beaches—and specifically intended that it **not** apply to other beaches such as the barrier islands' bayward-facing shores. Several of the Act's sections unambiguously express that intent. *See* Tex. Nat. Res. Code §§ 61.011 ("bordering on **the seaward shore of** the Gulf of Mexico") (emphasis added), 61.012 (same), 61.013(c) (same), 61.023 (same). Unfortunately, however, the only published opinion on this question misinterpreted the Act as encompassing land that did not actually face the open Gulf. *Gulf Holding Corp. v. Brazoria County*, 497 S.W.2d 614, 615, 618 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (applying Act to beach at San Luis Pass because it was "part of the system of waters...known as the Gulf of Mexico"); *see also* Tex. Atty. Gen. Op. H-1310 (1978) (describing *Gulf Holding* as having held that a beach "which did not front on Gulf was actually a Gulf beach"). This confusion may have arisen from the fact that in some of its sections, the Act uses the broader phrase "bordering on the Gulf of Mexico" and omits the limiting phrase "seaward shore." *E.g.*, Tex. Nat. Res. Code §§ 61.001(8) ("bordering on the Gulf of Mexico"), 61.012 (same), 61.013(c) (same), 61.014(a), 61.122 (same), 61.129 (same). Several years after *Gulf Holding*, section 61.025 exacerbated that confusion. Tex. Nat. Res. Code § 61.025(a) (requiring OBA disclosure in every contract for sale of land that is located "seaward of the Gulf Intracoastal Waterway"). I believe that in practice, many continue to presume—correctly—that the Act should be applied solely to Gulfward-facing beaches alone; but due to expansive misinterpretations such as *Gulf Holding* and section 61.025, the question apparently remains a potential subject of debate.

area a common law right or easement in favor of the public").

The net effect of these judicial and legislative developments is that today, when the government brings an OBA enforcement suit to have a structure removed, it is common for trial courts to grant summary judgment for the government based solely on the vegetation line's location, without requiring **any** evidence of actual public use.[56] In other words: notwithstanding the *Seaway* court's expressed concern in 1964 that the "Section 2 presumption" could well constitute an unconstitutional deprivation of vested rights, the blanket presumption of a Gulfwide public easement has effectively migrated into Texas law without ever receiving a full-fledged constitutional analysis.[57]

Despite this history of expansive interpretation, it appears that the final chapter in the OBA saga has not yet been written. Several signs suggest that the tide may be turning on some of the Act's more extreme provisions as well as on some of the more expansive ways in which it has been interpreted and applied.

First: in 1992 the U.S. Supreme Court issued *Lucas v. South Carolina Coastal Council*, an essentially 6-to-3 decision[58] that reversed the South Carolina Supreme Court's decision that had upheld of South Carolina's Beachfront Management Act against a takings-based constitutional attack. 505 U.S. 1003 (1992). Writing for the majority, Justice Scalia explained that unless the South Carolina Supreme Court could find a ground in South Carolina's preexisting common law (such as the doctrine of nuisance) that would have barred the littoral owners from building the structures they wanted to build on their beach property, the statute's prohibition of new construction would necessarily constitute a taking of valuable property rights for which compensation would be owed. *Id.* at 1009-10, 1020-32.[59] On remand from the high court, the South Carolina Supreme Court found it could not identify any such preexisting common law ground, and held the State liable for takings compensation. *See Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 485-86 (S.C. 1992).

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[56] *E.g. Arrington v. Texas General Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no writ) (rejecting owners' contention that State had to show any "actual use" by the public; affirming summary judgment because no fact issue "pertaining to the public's actual use of the beach" was "material to the disposition of this case"); *see also Hirtz v. State of Texas*, 773 F. Supp. 6, 8-9 (S.D. Tex. 1991), *vacated on other grounds*, 974 F.2d 663 (5th Cir. 1992) (granting summary judgment for State as to public easement's existence based on a belief that under *Seaway* and *Matcha*, the "dry beach" throughout Texas is uniformly "burdened with an easement" and that no case-specific evidence of public use is required).

[57] The closest any published opinion has come to limiting the Act on any constitutional ground was the federal district court's 1991 opinion in the *Hirtz* litigation, which ruled that although the State could constitutionally prevent littoral owners from building new structures on easement-burdened beach, it could not require removal (or prohibit maintenance) of existing ones without paying takings compensation. *Hirtz*, 773 F. Supp. at 10 (explaining that the State, in asserting a right to remove existing structures from land burdened by a public OBA easement, was confusing the State's limited easement rights with rights that only the fee simple owner could constitutionally hold). Unfortunately, that significant decision was vacated by the Fifth Circuit on the ground that the district court had inadvertently destroyed its own subject matter jurisdiction, *see Hirtz v. State of Texas*, 974 F.2d 663, 664-67 (5th Cir. 1992), and its analysis has never been cited by any Texas case.

[58] Justice Scalia wrote the opinion for a majority consisting of Justices Rehnquist, O'Connor, and Thomas and former Justice White; Justice Kennedy wrote a short separate concurrence; Justice Stevens and former Justice Blackmun each wrote a dissent; and Justice Souter wrote separately to protest that certiorari had been granted improvidently.

[59] "Only on this showing [i.e. of a preexisting common law limitation on the owner's title] can the State fairly claim that, in proscribing all such beneficial uses [of the land, i.e. construction and development], the Beachfront Management Act is taking nothing." 505 U.S. at 1031-32.

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The controversial *Lucas* was followed by an even more controversial case, *Stevens v. City of Cannon Beach*, in which Justice Scalia wrote to protest the majority's denial of review. 510 U.S. 1207, 114 S. Ct. 1332 (1994). Joined by Justice O'Connor, in a constitutional challenge to an Oregon Supreme Court's decision on *Lucas*-like facts, Justice Scalia argued that by refusing to review the Oregon Supreme Court's account of its own common law for substantive accuracy and intellectual honesty, his colleagues had effectively deprived *Lucas* of all teeth; without some credible threat of intellectual-honesty review by the high court, he argued, there was no check or balance to prevent state supreme courts from misstating what the state's common law had "always" been in order to excuse the State from takings liability. 114 S. Ct. at 1334-35.[60] Although the majority's decision not to review *Stevens* was a defeat for littoral owners, Justice Scalia's accusation that the Oregon Supreme Court had indulged in pretextual reasoning nonetheless signals that the nationwide controversy over OBA-type legislation is continuing to grow. Fueled partly by Justice Scalia's *Stevens* dissent, the last decade has seen a groundswell in published commentaries attacking such legislation as an unconstitutional derogation of private property rights.[61]

Second: recent legislative and administrative changes have slowed or curbed enforcement of some aspects of the OBA, putting the future scope of its enforcement into doubt. Beginning in 1999, the Attorney General's office has apparently taken the position that private homes should now be removed under the OBA only if there is clear evidence that a home significantly blocks public access to the beach or presents an imminent threat to public health, and has declined to seek removal of many homes despite the migration of the vegetation line.[62] Similarly, with the support of the

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[60] "As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings,...neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*...would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights. '[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.'" 114 S. Ct. at 1334 (ellipses added; brackets original) (quoting *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)).

[61] *E.g.*, W. David Sarratt, Note, *Judicial Takings & the Course Pursued*, 90 Va. L. Rev. 1487 (2004) (critiquing open beach legislation and related judicial decisions on constitutional grounds); David L. Callies & J. David Breemer, *Selected Legal & Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions", & the Misuse of Investment-Backed Expectations*, 36 Val. U.L. Rev. 339 (2002) (same); James Burling, *The Latest Take on Background Principles & the States' Law of Property After Lucas & Palazzolo*, 24 U. Haw. L. Rev. 497 (2002); David J. Bederman, *The Curious Resurrection of Custom: Beach Access & Judicial Takings*, 96 Colum. L. Rev. 1375 (1996) (same); Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) (same); *see also Transcript of the University of Hawaii Law Review Symposium: Property Rights After Palazzolo*, 24 U. Haw. L. Rev. 455 (2002). Even commentators who fervently support coastal regulations and public easements have theorized that statutes prohibiting property development necessarily create some takings liability, and have urged state governments to avoid disputes by compensating littoral owners for desired easements. *E.g.*, James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands & Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279, 1357-61 (1998); Richard C. Ausness, *Wild Dunes & Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 Denv. U.L. Rev. 437, 469-70 (1992); *cf. also* Peter C. Meier, *Stevens v. City of Cannon Beach: Taking Takings into the Post-Lucas Era*, 22 Ecology L.Q. 413 (1995); Kent Trulsson, Comment, *The Texas Dune Protection Act After Lucas v. South Carolina Coastal Council*, 45 Baylor L. Rev. 151 (1993).

[62] *See*, *e.g.*, *Mikeska*, 328 F. Supp. 2d at 674-75 (discussing Attorney General's position); *see also* Mark D. Holmes, Comment, *What About My Beach House? A Look at the Takings Issue as Applied to the Texas Open Beaches Act*, 40 Houston L. Rev. 119, 133-34 nn.138-140 (same). Although I disagree with the Holmes article's assertions about the OBA's constitutionality and preexisting Texas common law, the article nonetheless provides useful information about the factual background of recent disputes.

General Land Office the 2003 Texas Legislature added a new section to the OBA that gives the GLO discretion to impose a two-year suspension of house-removal suits after the vegetation line has been moved by a storm, to wait and see if natural forces cause the vegetation line to migrate back to the seaward side of the house. Tex. Nat. Res. Code § 61.0185 (effective June 18, 2003).

Third and finally: even though forty-five years have now elapsed since the OBA's original enactment, constitutional challenges are still being brought and litigated, creating the possibility that the Act may yet receive meaningful constitutional review. One case currently alive in the state court system is *Brannan v. State*, Cause No. 15802*JG01 in the 239th Judicial District Court of Brazoria County, Texas. In *Brannan*, several houses belonging to littoral owners in Surfside, Texas were left potentially subject to OBA removal after the vegetation line moved landward due to (1) damage caused by 1998's Tropical Storm Frances and (2) cumulative net beach erosion that, according to the landowners' allegations, has resulted principally from public works projects undertaken by various government entities.[63] Pursuant to the limited-enforcement OBA policy adopted in 1999 (discussed above), the State initially indicated that it would not seek removal of the landowners' homes; yet the landowners, apparently unwilling to rely on the State's voluntary forbearance, filed a declaratory judgment suit in 2001 challenging the OBA as applied to their homes on multiple constitutional bases including takings, due process, and due course of law.[64] After the landowners filed their declaratory judgment suit, the State filed counterclaims seeking removal of the homes, but it then voluntarily stayed that portion of the case pursuant to two-year moratorium orders issued by the GLO on June 7, 2004 pursuant to new section 61.0185 of the Natural Resources Code.[65] The district court rejected the plaintiffs' constitutional attacks, and it is possible that those rulings may yet be appealed. As of this writing, however, it appears that settlement discussions are ongoing, so the likelihood of a future appeal is currently unknown.

Another current case—this one in the federal system—is *Mikeska v. City of Galveston*. In *Mikeska*, the federal court in Galveston granted a take-nothing summary judgment against littoral owners who claimed that by physically interfering with (and refusing to issue necessary permits for) their efforts to repair their Galveston beach house after Tropical Storm Frances, the City of Galveston had violated equal protection, due process, and the takings clause. *Mikeska v. City of Galveston*, 328 F. Supp. 2d 671 (S.D. Tex. 2004). The owners have appealed that ruling to the Fifth Circuit, and as of this writing the case is scheduled for oral argument in May, 2005.[66] Although the appeal's constitutional challenges are comparatively narrow, the appeal presents a chance that at least some aspects of the OBA and issues concerning its enforcement may receive some meaningful constitutional review from the Fifth Circuit at last.[67]

In sum, littoral owners of property subject to the OBA remain governed by two different and conflicting boundaries at once: the vertical, tide-gauge-based survey line adopted by *Rudder-*

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[63] *See* Section VIII below (discussing the mounting body of evidence that cumulative net beach erosion is not a natural condition and generally results from the impact of public works projects).

[64] *See generally*, *e.g.*, Pls.' Opp'n to State Defs.' Mot. for Summ. J. (filed Jan. 21, 2004) in Cause No. 15802*JG01 in the 239th Judicial District Court of Brazoria County, Texas.

[65] *See* Letter from Asst. Atty. General to Ted Hirtz (Rule 11 Agreement) dated October 5, 2004, in Cause No. 15802*JG01 in the 239th Judicial District Court of Brazoria County, Texas.

[66] *See* Appeal No. 04-41147 in the U.S. Court of Appeals for the Fifth Circuit (currently pending).

[67] In the last published Fifth Circuit appeal of an OBA dispute, the merits were never reached because the Circuit found that the district court had destroyed its subject matter jurisdiction over the case. *See* note 57 above (discussing *Hirtz v. State of Texas*, 974 F.2d 663, 664-67 (5th Cir. 1992)).

Luttes, and the horizontally-measured "vegetation line" boundary enshrined by the OBA. Meanwhile, however, the OBA's constitutional soundness has never yet been analyzed by the Texas Supreme Court or the Fifth Circuit, and intervening decisions by the U.S. Supreme Court have thrown its constitutionality (and aspects of the intermediate Texas opinions enforcing it) into a newly questionable light.[68] In addition, though the issue has never been raised in any published opinion that I can recall, I question whether section 61.014 of the Act—the section that prohibits any person from posting "any sign, marker, or warning" as well as from making or causing to be made "any written or oral communication" to any other person expressing the opinion that any portion of OBA-governed beach is privately owned—could successfully be challenged as an unconstitutional infringement on littoral owners' First Amendment rights to free speech.[69] Until these issues are finally resolved, coastal practitioners and landowners should not assume that the OBA is necessarily carved in stone, but instead should keep an eye on this important and still-emerging area of coastal boundary law.

VIII. The Impact Of Accretion, Erosion, Reliction, And Subsidence On Boundaries, And The Debate Over "Natural" Vs. "Artificial" Causation

The purpose of the *Rudder-Luttes-Kenedy* rule is to create certainty and stability of boundary location, but that objective is in some places challenged by the physical characteristics of the Texas coast. Courts and commentators have long commented that the shorelines of Texas and other Gulf states differ from, for example, the predominantly rocky shorelines of West Coast states in that Gulf shorelines are sandy and are more generally prone to measurable vacillation and change.[70] It is now generally accepted that most portions of the open Texas coast are experiencing net erosion, and in 1999 the Texas Legislature amended the State's existing coastal management scheme to address what it perceived as an erosion crisis there.[71]

What is crucial to understand about this is that according to a mounting body of evidence, net erosion is arguably not a predominantly natural or ordinary occurrence. On the contrary: under natural conditions, hurricanes and other forces will periodically cause marked and visible erosion in a

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[68] *See* text accompanying notes 58-61 above.

[69] This section places littoral owners into a no-win box between the OBA's mirror-image theories of "prescription" and "dedication." Despite having a good faith belief that the public has never established a preexisting easement over a given stretch of beach, the littoral owner is prohibited by section 61.014 from expressing that opinion in any form. This skews both the "prescription" and "dedication" analyses, both of which are estoppel-related concepts predicated upon on the owner's presumptive freedom of objecting to, contesting, or discouraging the public's adverse use.

[70] *Compare United States v. States of La.*, *Tex.*, *Miss.*, *Ala.* & *Fla.*, 394 U.S. 1, 2-5 (1968) ("*The Texas Boundary Case*") (discussing erosion and accretion that altered contour of Texas shoreline between 1845 and the mid-1960's) *with United States v. States of La.*, *Tex.*, *Miss.*, *Ala.* & *Fla.*, 394 U.S. 11, 83-84 (1969) ("*The Louisiana Boundary Case*") (contrasting Louisiana's sandy, allegedly shifting coastline with the rocky, allegedly more stable California shore); *see also*, *e.g.*, Kent Trulsson, Comment, *The Texas Dune Protection Act After Lucas v. South Carolina Coastal Council*, 45 Baylor L. Rev. 151, 152 nn. 9-10 & accompanying text (1993) (discussing evidence of erosion on Texas coast).

[71] In 1999, the Texas Legislature passed the Coastal Erosion Planning & Response Act ("CEPRA"), which enshrined as a legislative finding the idea that many Texas beaches are eroding away and authorized a new system of reports and projects to combat erosion in the places where it is being observed. *See* Tex. Nat. Res. Code §§ 33.601-.612. According to the latest report delivered pursuant to this legislation, roughly 229 of the open Texas coast's total 367 miles of shoreline are experiencing measurable net erosion, and portions of the Texas coast's 3,300 miles of protected bay shoreline may be experiencing net erosion in some locations as well. *See* Texas General Land Office, CEPRA Report to the 78th Texas Legislature, at 6-15 (March 2003) (the "2003 CEPRA Report").

sandy shoreline, but much or all of the land lost will often be replenished with sand from other sources—from nearby dunes, from nearby river mouths, or from sand drifting laterally along the coast.[72] In my experience, this replenishment frequently restores the shore to a condition materially identical to its pre-storm condition within a relatively short period of time—at most a few years, and sometimes as rapidly as a few months. Thus, the net effect of **natural** processes—periodic erosion counterbalanced by periodic accretion—is an essentially stable beach, and hence an essentially stable shoreline boundary.[73]

In many locations on the Texas coast, especially along the thousands of miles of Texas bay shore, this cycle of natural equilibrium is still working effectively; a bay shore temporarily eroded by a storm will soon be restored to its original location, and any dispute over the shore boundary's location will thus, as a practical matter, be rendered moot before it could possibly be litigated. On much of the Gulfward-facing coast and in some bay shore locations, however, three categories of human activities have interfered with the restorative forces that historically have been essential to this natural equilibrium. First, long government-built jetties into the Gulf have trapped millions of tons of sand, preventing that sand from reaching and replenishing Gulf beaches through the lateral motion that would otherwise occur.[74] Second, coastal sand dunes have been leveled or removed for the purposes of real estate development, and for years were also damaged by the public's use of recreational vehicles.[75] Third and finally, the many dams and reservoirs on Texas rivers—virtually all of them built by government entities for the important and laudable purposes of water supply and flood control—have trapped in inland reservoirs millions of tons of sand that otherwise, prior to the dams, would have traveled seaward and replenished the beaches.[76]

By disrupting the natural cycle of erosion and replenishment that until the twentieth century had historically kept the shoreline relatively stable, these human activities—the majority of them undertaken by government entities—have caused erosion's impact on shoreline boundaries to emerge as a critical issue of growing importance. They also raise the question of whether a landowner should be able to obtain monetary compensation when private property has been diminished or destroyed by erosion that, if not for the government's actions, would probably not have occurred. These questions are made more complicated by the fact that erosion is not the only physical phenomenon that can cause a surveyed mean high water line to move: the line's location may also be altered by accretion, subsidence, reliction, and other phenomena. Because some of the applicable rules become doubtful depending not only on which type of change has occurred but also on the way in which the change has occurred on particular facts, Texas law's efforts to grapple with them have led to confusing results, and some questions are not yet fully resolved.

Erosion and accretion are processes whereby particles of land on the shore are horizontally transported and moved from one location to another by the action of the water. *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976); *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 57 (Tex. App.—Corpus Christi 1993, writ denied). "Erosion" means the wearing

[72] *See*, *e.g.*, Mike Ratliff, Comment, *Public Access To Receding Beaches*, 13 Houston L. Rev. 984, 1002 nn.130-134 & accompanying text (1976) (hereinafter, "M. Ratliff 1976"); *see generally* Richard L. Watson, *Coastal Law & the Geology of a Changing Shoreline*, Texas Coastal Law Conference, May 19-20, 2005 (hereinafter, "Watson 2005").

[73] *E.g.*, M. Ratliff 1976 at 1002.

[74] *See* M. Ratliff 1976 at 1004 text accompanying nn.148-155; Watson 2005 at 3-4.

[75] M. Ratliff 1976 at 1003-04 text accompanying nn.143-147; Watson 2005 at 6.

[76] M. Ratliff 1976 at 1002-03 text accompanying nn.137-42; Watson 2005 at 4-5.

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away of the land at issue. *Natland*, 865 S.W.2d at 57. "Accretion" means the process of gradually enlarging the land by the arrival of new particles, and the newly arrived particles are referred to as "alluvion." *Id.*; *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 98-101 (1944). It is long settled that the littoral owner's rights in the event of erosion or accretion, though they relate to future contingencies, are nonetheless **vested rights** that are part of the littoral owner's original title to the property. *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438, 443-44 (1932). Thus, the precise contours of those rights in any given situation must, like other aspects of the grantee's bundle of property rights, be determined **according to the law that existed and governed at the time of the original grant.** *E.g.*, *Balli*, 190 S.W.2d at 98-99.

This holding might hypothetically have led to differing erosion and accretion rules for common law patents and civil law grants; but fortunately for practitioners, in the 1930's and 1940's the Texas Supreme Court decided that as to erosion and accretion, the common law of England and pre-1840 civil law of Spain and Mexico followed the same general rule. *Compare Manry*, 56 S.W.2d at 444-49 (comparing Mexican civil law with common law) *with Balli*, 190 S.W.2d at 98-101 (same). That general rule is that when land is transported gradually by water's action and either wears away (erodes) or builds up (accretes), the littoral owner's title boundary moves with the edge of the body of water. *Balli*, 190 S.W.2d at 98-101.[77] During this same time period, the Supreme Court also decided that although the ancient sources of that general erosion/accretion rule had focused on rivers, there was no reason to treat seashore boundaries differently and they should be governed by the same general rule. *Id.*; *see also Brainard v. State*, 12 S.W.3d 6, 22 (Tex. 1999).

Several different justifications for the erosion/accretion rule have been offered over the years. One traditionally popular justification is the idea that because the process is slow and occurs "little by little," the land being lost or gained cannot be identified. *Balli*, 190 S.W.2d at 99-100 (quoting Las Siete Partidas and Justinian's Institutes). In its most recent discussion of the issue, however, the Texas Supreme Court's main focus was not on such metaphysical questions but rather on a more practical concern: the idea that the land's adjacency to water, i.e. its quality as littoral or riparian land, is "a valuable asset" of independent worth that is entitled to protection. *Brainard*, 12 S.W.3d at 18.[78]

For years, Texas law was afflicted by controversy over whether the ordinary erosion/accretion rule should apply when it appeared that human activities had affected and altered the natural processes that would otherwise have been at work. Using the terms "natural" and "artificial" accretion, commentators in the 1960's and 1970's sometimes speculated that Texas law might require distinguishing or even apportioning ownership between them because if human forces influenced the movement of the land, then some justifications for the traditional erosion/accretion rule might not apply.[79] Their speculation was supported by a famous 1943 Texas Supreme Court decision that on its face appeared to establish exactly that distinction: in *Lorino v. Crawford Packing Co.*, the Supreme

[77] *See also*, *e.g.*, *City of Port Isabel v. Missouri Pac. R.R. Co.*, 729 S.W.2d 939, 943-44 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

[78] This recent discussion also reasoned that under most circumstances, "when a body of water is a boundary between landowners, that body should remain the legal boundary even though it has changed its location," a justification that seems driven by the desire to locate boundaries in places that are consistent with the grantor's original intent. *Compare Brainard*, 12 S.W.3d at 18 *with*, *e.g.*, *John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 282 n.38 & accompanying text (Tex. 2002) (citing *Woods v. Robinson*, 58 (Tex. 655, 660-61 (1883) and *Wheeler v. Stanolind Oil & Gas Co.*, 151 Tex. 418, 252 S.W.2d 149, 152 (1952)).

[79] *E.g.*, Dinkins 1972, 10 Houston L. Rev. at 46-49; Winters 1960, 38 Tex. L. Rev. at 532-35; Roberts 1960, 12 Baylor L. Rev. at 169.

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Court flatly stated that "[a]ccretions along the shores of the Gulf of Mexico and bays which have been added by artificial means do not belong to the upland owners, but remain the property of the State." 175 S.W.2d 410, 414 (Tex. 1943). But the specific facts of *Lorino* were extreme: there, it was essentially undisputed that the accretion had been caused directly and exclusively by the littoral owner's practice of depositing oyster shells in the water, which he had done continuously while operating his oysterhouse for roughly thirty-five years. Fifteen years later, the Supreme Court suggested that the question was not yet resolved. *Luttes*, 324 S.W.2d at 193 (expressly reserving question of "whether accretions resulting from human agency" may belong to the abutting littoral owner). Meanwhile, commentators criticized the idea of varying the rule depending on the cause of the accretion because it would lead to difficulties of proof and could protract litigation. *E.g.*, Winters 1960, 38 Tex. L. Rev. at 534 *and* Roberts 1960, 12 Baylor L. Rev. at 169-71.

As to accretion, the natural-vs.-artificial question was decided by the Corpus Christi Court of Appeals in a 1993 analysis that was subsequently adopted and approved by the Supreme Court. *Natland*, 865 S.W.2d at 57-58, *discussed with approval in Brainard*, 12 S.W.3d at 18-22. In *Natland*, the seashore owner's predecessor-in-title had given the U.S. Army Corps of Engineers an easement to deposit dredging spoil on its littoral land; the Corps had left large spoil piles there after the Intracoastal Waterway was dredged; and over the ensuing decades, natural forces had washed the spoil material down into the sea, creating 36 acres of brand-new fast land. *Natland*, 865 S.W.2d at 56-58. At trial the State contended that because the new land resulted from human activity, the ordinary erosion/accretion rule did not apply and the new land belonged to the State, but the trial and appellate courts both rejected its contention. *Id.* The appellate court reasoned that "[i]n the modern world, purely natural phenomena wholly uninfluenced by man and his works are rare if not non-existent." *Id.* It further reasoned that a general rule requiring "natural" influences to be disentangled from human-influenced ones would prove "unworkable" and futile with respect to accretion by the sea. *Id.* The court noted that several other states had rejected such a rule, and it distinguished *Lorino* as standing for nothing more than "the narrow rule that the upland owner may not acquire title through self-help by filling and raising the land level." *Id.* Ultimately, the court harmonized *Lorino* with its other concerns by ruling that the ordinary erosion/accretion rule **would** apply to "artificially-induced accretions" **except** where, as in *Lorino*, the littoral owner claiming title has "caused or directly participated in" the accretion-causing activities. *Id.* at 58. Applying that rule to the facts presented, the *Natland* court concluded that the owner's conduct—"[t]he mere granting of an easement" to the Corps of Engineers for disposal of spoil—"was not sufficient participation by the owner to require forfeiture of his right to the resulting accretion," and rejected the State's claim to the land. *Id.*

Six years later, in resolving the Canadian River litigation (arising from reliction caused by the government's completion and closing of a dam), the Supreme Court approved and quoted this portion of *Natland* at length. *Brainard*, 12 S.W.3d at 18-24. The high court observed that *Natland* followed the same rule adopted by the U.S. Supreme Court and many other states, and also comported with the "policy rationales" underlying the traditional erosion/accretion rule. *Id.* (quoting and discussing, *inter alia*, *Natland*, 865 S.W.2d at 58, and *County of St. Clair v. Lovingston*, 90 U.S. 46, 66 (1874)). Though *Brainard* itself involved a river and not the seashore, the court explained its reliance on *Natland* by reaffirming that seashore and river accretion are generally governed by the "same rules." *Id.* at 22 (citing *Balli*, 190 S.W.2d at 99-101).

Under *Brainard* and *Natland*, the question of "natural" versus "artificial" causation appears resolved as to accretion and reliction—but important questions remain unanswered.

First and most obviously, neither *Natland* nor *Brainard* offers much guidance as to what degree of participation by a littoral owner would constitute "sufficient participation" in the accretion to bar acquisition of title. *Lorino* illustrates that personally putting solid material directly into the sea **is** "sufficient participation" to bar title, while *Natland* illustrates that giving a **third party** permission to

pile spoil on land **adjacent** to the sea is **not**—but the exact tipping point between these two extremes remains undefined. It will need to be examined and developed case-by-case in future decisions.

Second, it is unclear whether, or how, the *Natland-Lorino-Brainard* analysis should be applied to erosion. Because erosion and accretion are, physically speaking, mirror-image phenomena, it seems natural to argue that erosion should be governed by a mirror-image rule. From an equitable standpoint, the mirror image of the *Natland-Lorino-Brainard* rule would be to exempt littoral owners from losing title by erosion if they could affirmatively prove that the erosion resulted "artificially" from direct action by **the State,** which is the beneficiary of the erosion in many fact situations. Such a rule has powerful equitable appeal because a growing quantity of scientific literature (some of it sponsored by the State of Texas) suggests that the occurrence on the Texas coast of net erosion without replenishment is largely unnatural and has substantially been brought about by the actions of government entities.[80] In the face of that growing scientific evidence, it is arguably unfair that individual littoral landowners should be compelled to bear the cost—by suffering land loss through erosion—of large-scale public works projects that government entities have intentionally undertaken to benefit the public at large.[81] It also can be argued that the erosion/accretion rule, which our law inherited from ancient sources, assumed as a predicate that all or most changes would result from acts of nature, and that when deliberate government action—not nature—is largely responsible for massive coastal erosion, then the policies usually cited to support the erosion/accretion rule become inapplicable and must necessarily yield to the principles of takings law.[82]

On the other hand, letting landowners assert a mirror-image *Natland-Lorino-Brainard* rule against the State in erosion cases would revive the same proof-of-causation problems that led commentators to attack the natural-vs.-artificial distinction in the first place. *See* note 79 above & accompanying text. In *Lorino*, the landowner's "participation" (dumping oyster shells into the bay) was obvious and its impact essentially undisputed, so the "participation" exception was relatively easy to apply on those facts. By contrast, analyzing the impact of the several forces—human-influenced and otherwise—that together have led to net erosion on the Texas coast is an immensely complex project that has already required decades of expert study and that is continuing to evolve. *See* note 80 above & accompanying text. Furthermore, the only colorably relevant published Texas decision (discussed at greater length below) has suggested in a different context that where several causal forces are commingled and cause erosion, the State—not the landowner—will receive the benefit of the doubt. *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 646 (Tex. App.—Austin 1981, writ ref'd n.r.e.). Holding otherwise could upset some longstanding presumptions and principles that historically have favored the State on some issues in coastal boundary disputes. *Compare id. with* note 5 above &

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[80] *See* notes 71-76 above; *see also*, *e.g.*, Watson 2005 at 16-17; Robert A. Morton, *Temporal & Spatial Variations in Shoreline Changes & Their Implications: Examples from the Texas Gulf Coast*, 49 J. of Sedimentary Petrology, 1101, 1108-09 (1979) (concluding in 1979 that human activities were major contributors of net erosion and were anticipated to become "even more important in the future"); William Newton Seelig & R.M. Sorenson, *Investigation of Shoreline Changes at Sargent Beach, Texas*, at 89-92 (Texas A&M Univ.—Dep't of Civil Engineering 1973) (concluding in 1973 that construction of the Freeport Jetties in the late 1800's and construction of dams in the 1940's were major forces contributing to net annual erosion in the Sargent Beach area of the Texas coast).

[81] *Compare Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[T]he question at bottom is **upon whom** the loss [i.e. the cost] of the changes desired should fall.") (emphasis added) *with*, *e.g.*, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 340 (2002) (noting that the takings clause exists partly to prevent individual landowners from being "singled out" to bear special burdens that should rightly be shared by the public as a whole).

[82] *Compare Tahoe-Sierra Preservation Council*, 535 U.S. at 340 *with*, *e.g.*, *Brainard*, 12 S.W.3d at 18 (reviewing philosophical justifications for the erosion/accretion rule).

accompanying text.

Although the existence of a landowner's right to recover is anything but clear, the equitable appeal of the landowners' position appears to have carried sufficient persuasive force on some facts that in some cases—such as the drastic erosion that occurred near Rollover Pass—the State has settled with plaintiff landowners asserting such theories in order to avoid the risk of judgment.[83] But I am also aware that in many cases the affected landowners have lacked the resources to pursue every conceivable avenue for relief, and their legal efforts to seek it have been exhausted by the State's superior access to litigation resources. Thus, it appears that this difficult question of government-caused erosion, to which there is no easy answer, may remain unresolved in Texas for years to come.

While the thorny problem of government-caused erosion will likely remain unresolved for some time, it has at least been decided that where government action results directly in a loss of private land's proximity to the sea, the landowner may obtain limited relief. *E.g.*, *City of Corpus Christi v. Davis*, 622 S.W.2d 640 (Tex. App.—Austin 1981, writ ref'd n.r.e.). In *Davis*, roughly four acres of an eighteen-acre private tract eroded away over several decades, allegedly (under the landowners' theory) due mainly to hurricanes. *Id.* at 642. In 1976, the State leased the by-then-submerged four acres to the City of Corpus Christi, and the City filled the area in and claimed it as a public park. *Id.* The result was that the landowners' remaining land no longer bordered the sea. *Id.* In their lawsuit against the State (in which the City intervened) over the disputed area, the landowners asserted two alternative theories: first, that they had never lost title to the disputed land because the loss of land resulted from sudden, rather than gradual, changes in the shoreline (i.e. "avulsion");[84] and second, that if they had lost title, then they should receive takings compensation for the City's destruction, via its reclamation project, of their remaining land's littoral status. *Id.* at 641-42.

The Austin Court of Appeals rejected the landowners avulsion theory on two grounds: first, it found that prior Texas cases had applied the distinction between gradual changes (erosion) and sudden changes (avulsion) only to river cases, and had never clearly applied it to any seashore dispute; and second, it found that since the landowners' evidence had failed to prove that the land loss resulted from sudden/avulsive changes rather than from gradual/erosive ones, it did not need to decide whether the erosion/avulsion distinction applied to the seashore at all. *Id.* at 642-46. Thus, the landowners had lost title to the four acres of fast land as the land disappeared, and the submerged area beneath them had become the property of the State.[85] The landowners' second theory, however, yielded some limited relief: the appellate court found them entitled under the takings clause to compensation for the amount by which their remaining land's market value had been diminished by the City's destruction of its littoral status, and remanded the case for a determination of that amount. *Id.* at 646-47.

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[83] *See* Watson 2005 at 17-23 (discussing background and history of *Steinhagen v. Gulf Coast Rod, Reel & Gun Club*, No. A156012 in the 58th Judicial District Court of Jefferson County, Texas); *see also Texas Dep't of Parks and Wildlife v. Steinhagen*, No. 09-99-568-CV, 2001 WL 47667 (Tex. App.—Beaumont 2001, no writ) (affirming trial court's denial of State's plea to the jurisdiction in same case).

[84] In disputes involving rivers, a general rule states that where a river changes course in a manner that is sufficiently "sudden" that it can be specifically observed by eyewitnesses, rather than being "gradual and imperceptible," then the change is called "avulsion" rather than "erosion," and the title boundary remains fixed at the river's former location rather than moving to its new one. *E.g.*, *Brainard*, 12 S.W.3d at 24-25.

[85] Having evidently banked on the avulsion theory, the landowners apparently did not contend that public works projects had causally contributed to the erosion or seek an exemption from the usual erosion rule on that basis, as has since been seen in other disputes. *See* note 83 above & accompanying text.

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It appears that no published opinion since *Davis* has considered whether the erosion-vs.-avulsion distinction could ever apply to coastal land on any facts and that the issue technically remains alive for debate. *Davis* strongly suggests, however, that even if the distinction applies at the seashore, proving entitlement to an avulsion-based exception to the ordinary erosion rule at the seashore may be impossibly difficult. The court found that changes caused by hurricanes were materially less "sudden" and "perceptible" than "the caving-in of river banks" (which it viewed as the paradigm of an "avulsive" change). *Id.* at 644-46. But more importantly it found that the hurricanes' effects were inextricably intertwined with non-storm winds and water action and that since the causes had not been reliably disentangled, that fact alone prevented the avulsion rule from being applied. *Id.* at 646. Since ordinary winds and water action are always present at the coast and are constantly exerting some erosive force, it is difficult to conceive of any sudden or severe events that could ever be sufficiently separable from those gradual forces to qualify for avulsion treatment under *Davis*, even if a subsequent court were to find that the avulsion exception could, in theory, be applied to the sea.

Though never clearly articulated by the court, another factor may also have lurked beneath the *Davis* holding as well: the extent to which an avulsion exception could unsettle the certainty-of-boundary principle that the *Rudder-Luttes-Kenedy* rule is intended to supply. *See* Sections V & VI above. After all, if one may inquire behind current tide-gauge readings and examine what factors have caused the line to move from a prior location, then the functionality of the *Rudder-Luttes-Kenedy* rule may be impaired.

This potential difficulty was raised but not resolved in a 1976 dispute involving the impact of subsidence: the gradual vertical sinking (rather than horizontal erosion) of land beneath the level of water. *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976) (affirming 520 S.W.2d 494 (Tex. App.—Houston [1st Dist.] 1975)). In *York*, it was undisputed that roughly 28 acres of privately owned land next to the Houston Ship Channel were gradually sinking beneath the channel's waters. 532 S.W.2d at 951. It was also undisputed that "removal of enormous amounts of underground water for purposes of industrial and municipal use" was the subsidence's principal cause. *Id.* The landowners' deed defined their seaward boundary through a call to "the south water's edge of the Houston Ship Channel." 520 S.W.2d at 496 (intermediate opinion). The water authority effectively conceded its role in causing the subsidence by suing to condemn the 25 acres that were still dry at the time of suit, and the landowners responded by bringing a separate action to obtain compensation for the 3 acres that had already sunk below the water. 532 S.W.2d at 951. The water authority contended that the rule for encroachment of water due to erosion should apply and that therefore no compensation was owed because as the water gradually encroached onto the 3 acres, the landowners gradually and automatically lost their title to the State. *Id.* at 951-52.

The Supreme Court rejected the water authority's argument. First, it noted as a threshold matter that under Texas law, there was nothing inherently wrong with a private owner holding title to submerged land. *Id.* at 953 (citing, *inter alia*, *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961) and *City of Galveston v. Menard*, 23 Tex. 349 (1859)). It then cited multiple cases—some involving tidal waters, and others involving nontidal inland waters—that had found the private owners' title to land unaffected and intact even after the land had become inundated by water. 532 S.W.2d at 953 (citing, *inter alia*, *Fisher v. Barber*, 21 S.W.2d 569, 570-71 (Tex. Civ. App.—Beaumont 1929, no writ) (gulf waters), *Fitzgerald v. Boyles*, 66 S.W.2d 347, 349 (Tex. Civ. App.—Galveston 1931, writ dism'd) (gulf waters), and *Diversion Lake Club v. Heath*, 86 S.W.2d 441, 442-47 (Tex. Comm'n App. 1935, opinion adopted) (stream waters)). Finally, it decided that since it was undisputed that no particles of land had become detached and traveled horizontally away from the landowners' land—i.e. the land had remained intact but had merely become submerged—the erosion/accretion rule was inapplicable and the water's encroachment had not caused the landowners' boundary to move. *Id.* at 953-54. Along the way to this outcome, the court also held that because the nature of subsidence differs from that of erosion—i.e. because it does not involve any horizontal "transportation of the land"—it made

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no difference whether the submergence had occurred "suddenly" or "gradually." *Id.* at 952-54.

The analysis and outcome of *York* would have established a clear rule for subsidence on the coast if not for one thing: in a footnote, the writing Justice (Justice Reavley) noted that the court was treating the water and land involved as being "nontidal," and expressly left open whether its holding should be generally applied to land on the coast. 532 S.W.2d at 951 n.1. This comment was remarkable since it contradicted an assumption expressly made by the intermediate court of appeals, whose assumption concerning this factual question (on which the record apparently contained conflicting evidence) should arguably have bound the higher court. *Compare id. with* 520 S.W.2d at 499 (assuming that the land was "within tidewater limits" and was "subject to the ebb and flow of the tides").[86] But in the concluding sentences of the footnote, Justice Reavley—purporting to "speak[] personally" rather than on behalf of the court—made his underlying concern clear: while he left open the possibility that the *York* holding **might** be applied to seashore boundaries on a case-by-case basis, he "warn[ed] against" applying it generally to all seashore subsidence because he feared it would upset the certainty of the tide-gauge-based boundary established by *Rudder* and *Luttes*. 532 S.W.2d at 951 n.1.[87] Unfortunately, his comment offered no guidance as to what circumstances he thought might qualify a particular seashore dispute for application of the *York* rule. Thanks to this footnote, the Supreme Court's *York* opinion left it unclear whether or not *York* had created an exception to the *Rudder-Luttes* rule that could be applied generally to coastal land.

The long-lingering question of *York*'s reach may be addressed soon in a pending appeal that as of this writing has just been commenced. *TH Investments, Inc. v. Kirby Inland Marine, L.P.*[88] involves roughly 27 acres north of the confluence of the Houston Ship Channel and the San Jacinto River. These 27 acres were once dry land but have now become generally submerged beneath the waters of Old River and the San Jacinto River. In this trespass to try title action, the record title owners of the land contend that the land's submergence has resulted mainly from subsidence caused by pumping of ground water, and that therefore—under the rule of *York* and the cases cited in it—their property's boundary has not moved but instead has remained fixed at its pre-submergence location. The Port of Houston Authority, as the owner of all the lands "lying and being situated under the waters of San Jacinto River [and] Old River" under a 1927 legislative grant, contends that because of *York*'s footnote disclaiming *York*'s application to tidally-influenced water, the Port owns the disputed land under the ordinary *Rudder* rule of mean high water. The district court, after a bench trial, entered final judgment for the Port Authority,[89] and the record title owners appealed. Coastal practitioners and landowners should keep their eyes out for the ultimate disposition of this fascinating case, which may

[86] *See* Tex. Const. art. V § 6(a) (providing that the intermediate courts' of appeals decisions are ordinarily "conclusive on all questions of fact"); Tex. Gov't Code § 22.225(a) (same).

[87] "The writer of this opinion, speaking personally, chooses to emphasize the narrowness of the holding and to warn against any misinterpretation of its effect upon the boundary of private ownership to lands within reach of the tide. There may be cases where the private development and use of land will require a holding that the ownership is not changed by submergence under tidewater due to subsidence. There may be cases where public rights are not prejudiced by permitting title to remain unchanged until the private owner has a reasonable opportunity to reclaim his land from the sea. However, the rule of *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958) stands. I doubt that a court would accept a rule that located the boundary of private ownership at the *Luttes* line as of the time when nonavulsive subsidence commenced. That rule would allow private owners generally to hold title to land under the sea, would restrict the enjoyment of public beaches, and would make the location of seaward boundaries an exercise of pure guesswork." 532 S.W.2d at 951 n.1.

[88] Appeal No. 14-05-00204-CV in the Fourteenth Court of Appeals, Houston (currently pending).

[89] *See* Final Judg'mt (filed on Feb. 2, 2005) and Findings of Fact & Conclusions of Law (filed on April 22, 2004) in Cause No. 2003-12846 in the 269th Judicial District Court of Harris County, Texas.

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require the Fourteenth Court to confront *York*'s idiosyncrasies and choose whether to recognize a coastally-applicable subsidence exception to the *Rudder-Luttes* rule.[90]

Another lurking question concerning *York* is the possibility that 1999's *Brainard* decision may arguably conflict with it in some respects—or at least may superficially so appear. As already mentioned, the Supreme Court's main stated rationale in *York* was that because there had been no "transportation of [particles of] land" from one horizontal location to another, the main justification for the erosion/accretion rule—the idea that water has physically "take[n]" land from some owners and "give[n]" it to others—was missing, so the original pre-subsidence boundary should remain. 532 S.W.2d at 954. In other words, *York* seemed to reason that where the water line has moved horizontally but the land beneath it has not, the boundary should not change. *Id.* Yet when presented in *Brainard* with the situation converse to *York*'s subsidence—that of reliction—the Supreme Court found that the "recession of a body of water" should be treated like accretion and erosion, not like subsidence, and that therefore where reliction occurs the boundary **does** move. *Brainard*, 12 S.W.3d at 17-24.[91] Superficially, this feature of *Brainard*'s reasoning also seems to contradict the multiple holdings (relied upon by *York*) that when land next to a body of water becomes newly submerged by the body of water's expansion but stays otherwise unchanged, the boundary does not move but remains fixed so long as the boundary's original, now-submerged location can still be identified with reasonable certainty. *E.g.*, *Diversion Lake Club*, 86 S.W.2d at 442-47; *Fitzgerald*, 66 S.W.2d at 349; *Fisher*, 21 S.W.2d at 570-71.[92]

On the other hand: while *Brainard* and *York* may seem to clash in their metaphysical views, they are absolutely consistent in terms of the rights and policies they protect. As the policy discussion in *Brainard* suggests (*see* text accompanying note 78 above), the private riparian owner's victory in *Brainard* arguably was not owed to any metaphysical theory concerning the physical nature of the change, but rather was owed mostly to the paramount importance of "preserv[ing] the riparian quality of the upland": that is, of protecting the land's proximity to water, which is in itself a valuable and vested right. *Brainard*, 12 S.W.3d at 18 (citing, *inter alia*, Robert E. Lundquist, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 Ariz. L. Rev. 315 (1972)). This principle had been illustrated years before by the Austin Court of Appeals' reaction to the four acres eroded away and then reclaimed in *Davis*: the littoral or riparian status of an owner's land is an independent right having quantifiable value, and the government may not destroy that status through deliberate actions without paying takings compensation for the destruction of that right. *Compare id.*

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[90] Interestingly, the land in *TH Investments* appears to be factually very similar to the land that was actually involved in *York*, which—notwithstanding Justice Reavley's disclaimer in the Supreme Court's opinion—was apparently influenced by the tide. *See* text accompanying notes 86 & 87 above. Thus, this appeal may require the Fourteenth Court to address the apparent conflict between the intermediate court's and Supreme Court's factual assumptions in *York*.

[91] Although *Brainard*'s lengthy discussion of *York* offers no hint as to how to harmonize the two holdings, *id.*, the opinion's choice of words implies tacit awareness of a potential conflict: when describing the scope of its holding, the opinion repeatedly recites the phrase "accretion, reliction and [or] erosion"—a list that conspicuously omits the fourth possible type of change, "subsidence." *Id.* at 10 text accompanying n.1 (one occurrence of phrase), 17 (same), 18 (same), 20 (same), 23-24 (two occurrences).

[92] If applied to the sea, *Brainard* also conflicts with dicta in one early Supreme Court opinion that expressly contemplated reliction. In an 1859 passage generally discussing the government's power to obtain title to property apparently abandoned by a private owner, the court wrote: "The only instance...in which land has been supposed to be acquired by government by dereliction, is the case of lands left by the sea. If the sea suddenly retires below the usual water mark, leaving *terra firma*, and making the dereliction sudden and considerable, it belongs to the king." *Dikes v. Miller*, 24 Tex. 417 (Tex. 1859). *Dikes* cited an English decision but no Texas precedent as authority for this contention.

with Davis, 622 S.W.2d at 646-47. By contrast, the government has no cognizable mirror-image interest in maintaining its submerged property's adjacency to dry land. Since the government and public often retain the right to navigate the surface of public water regardless of whether the bed is publicly or privately owned,[93] their ability to navigate to the shore is unlikely to be impaired by leaving title to the submerged bed in private hands; and since ownership of the submerged bed is not necessary to maintain the government's navigation interest, the government and public—on facts like *York*'s—suffer no injury that is comparable to the loss of riparian/littoral status that was threatened in *Davis* and *Brainard*.

This analysis is buttressed by the compelling equitable fact that in all three situations—*Davis*, *Brainard*, and *York* alike—the land's physical change in status resulted directly and undisputedly from governmental actions undertaken for public works. As previously raised in discussing *Lorino*'s applicability to erosion, leaving landowners without a remedy on such facts would seem to offend the core policy behind the takings clause on a level that transcends such metaphysical inquiries as whether a given change was "sudden" or "gradual," or whether particles of land ever horizontally moved. *Cf.* notes 80-82 above & accompanying text (discussing, *inter alia*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)). The underlying lesson, it appears, is that if the need to protect vested littoral/riparian rights clashes with metaphysical theories and distinctions that have traditionally been indulged, the metaphysical concepts will probably yield. Given the several presumptions and rules that favor the State against littoral landowners on other issues in seashore disputes,[94] this apparent trend is probably fair.

A final unresolved question concerning erosion and subsidence is how Texas seashore boundary law will view physical actions taken by littoral owners either (1) to prevent the erosion or subsidence from occurring or (2) to transform submerged property back into fast land after submergence has occurred. Significant dicta in important opinions have suggested that Texas law may give landowners the benefit of such efforts. In 1943, the Austin Court of Appeals stated that "[i]n appropriate circumstances, the riparian owner has the right to protect his land from depletion by erosive and avulsive action" and that the landowners "no doubt had the right...to take such action as would have preserved the banks and protected their property from encroachment by the river." *State v. R.E. Janes Gravel Co.*, 175 S.W.2d 739, 742, 744 (Tex. Civ. App.—Austin 1943), *aff'd in relevant part sub nom. Maufrais v. State*, 142 Tex. 559, 180 S.W.2d 144 (1944). In 1976, the Supreme Court stated in *York* that "it is consistent with the interests of all [i.e. private owners and the general public] to permit the riparian owner to protect his land—rather than to watch helplessly as his boundary retreats." *York*, 532 S.W.2d at 954. *York*'s important footnote also commented that "[t]here may be cases where public rights are not prejudiced by permitting title to remain unchanged until the private owner has a reasonable opportunity to reclaim his land from the sea." 532 S.W.2d at 951 n.1. Such efforts are arguably distinguishable from the "self-help" that was condemned in *Lorino*: there, the oyster-shucking landowner actively created and then claimed new land outside the bounds of his original grant, whereas combating erosion and subsidence involves preserving or restoring fast land within the grant's original bounds. To date, however, no published Texas opinion has yet directly

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[93] *E.g.*, *Diversion Lake Club*, 86 S.W.2d at 444; *see also Carrithers v. Terramar Beach Community Improvement Ass'n*, 645 S.W.2d 772, 774 (Tex. 1983), *cert. denied*, 464 U.S. 981 (1983) ("The exclusive right to control, impede or otherwise limit navigable waters in this State belongs to the governments of Texas and the United States.").

[94] *See*, *e.g.*, Section VII above and Section X below.

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tackled either preservation or reclamation, and the question remains subject to debate.[95]

IX. Defining The Reach Of *Rudder-Luttes*: Choosing Between The Tidal Ebb-And-Flow Test And The "Headland-To-Headland" Closing Line Rule

One of the most important apparently unresolved questions in Texas seashore boundary law is the reach and applicability of *Rudder-Luttes*. As of this writing, Texas decisions have not yet made clear exactly which bodies of water are governed by the *Rudder-Luttes* rule of mean high/higher high water, and which are governed by other rules.

Consider, for example, the riparian land upstream from mouths of the rivers emptying into bays that are in turn connected to the Gulf. Few would argue that such rivers constitute "arms of the Gulf" within the common-sense meaning of that phrase; and if considered ordinary river land rather than part of the seashore, then the boundary of a grant or patent that is defined by a call to the river's edge should be located using the complex "gradient boundary" surveying technique that Texas law has generally adopted for riverbed boundaries. *See*, *e.g.*, *Brainard v. State*, 12 S.W.3d 6, 15-17 (Tex. 1999) (discussing the "gradient boundary" surveying technique known as the "Stiles method").[96] But some parties have argued that because the level of water for substantial stretches in such rivers is affected each day by the ebb and flow of the tide, the boundaries in such locations should be governed by the tide-gauge-based *Rudder-Luttes* surveying method instead. *See* text accompanying note 89 above (discussing parties' respective contentions in the pending appeal, *TH Investments, Inc. v. Kirby Inland Marine, L.P.*). Since these two methods rely on different measurements and use completely different standards and tests, it seems inevitable that these methods will yield materially different results; yet to date, no published decision to my knowledge has directly tackled the question of where the *Rudder-Luttes* survey method ends and the *Brainard*-style survey method begins.[97]

The suggestion that the *Rudder-Luttes* rule should be extended as far inland as tidal influence can be measured has its origin in ancient English common law. The English common law used a tidal-influence test to distinguish riverbeds owned by private riparian landowners from riverbeds owned by the public domain: the beds of those portions of streams and rivers that were measurably influenced by the tide were owned by the King for the benefit of the public, while private riparian landowners owned the beds of those portions that were located sufficiently far inland that tidal influence could no longer be observed. *See*, *e.g.*, *The Propeller Genesee Chief*, 53 U.S. 443, 453-57 (1851) (discussing English common law rules); *see also generally Shively v. Bowlby*, 15 U.S. 1 (1894) (comprehensively reviewing the English "tidewater" rule as interpreted and applied by decisions of

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[95] The question of preventive self-help may arise in the currently pending appeal of *TH Investments, Inc. v. Kirby Inland Marine, L.P.* (discussed above at note 89). Based on disputed facts, the Port Authority may contend that the record title owners have used "self-help" to prevent disputed land from becoming submerged.

[96] For a compact and handy summary of the gradient boundary method, see Michael V. Powell, *Riparian Boundaries in Texas*, Texas Coastal Law Conference, May 19-20, 2005 (discussing, among other authorities, the influential law review article that has become the principle guidepost of "gradient boundary" survey technique: Arthur A. Stiles, *The Gradient Boundary—The Line Between Texas & Oklahoma Along the Red River*, 30 Tex. L. Rev. 305 (1952)).

[97] Although no legislative pronouncement could decide this question of vested common law and civil law boundary rights, *see* Section II above, it is nonetheless interesting to note that the Texas Legislature appears to have remained conspicuously silent on this subject. For example: despite the prevalent recurrence of the phrase "arm(s) of the Gulf of Mexico" throughout the Natural Resources Code, Water Code, and Government Code, the Legislature appears never to have tried to define precisely what that phrase means. *E.g.*, Tex. Nat. Res. Code § 11.012 (using phrase but without defining it); Tex. Water Code §§ 11.002(11) (same), 11.021(a) (same), 63.156(a) (same); Tex. Gov't Code §§ 1505.053(1) (same), 1505.102(1) (same).

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federal courts and various states). This English rule flowed from the notion that "[i]n so far as the tide ebbed and flowed, the rivers were regarded as arms of the sea"; hence, so far as a river was "within tidewater limits," its bed was controlled by the same property rules that governed the sea, including a presumption of public ownership. *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438, 445-46 (1932).

In the United States, federal law adopted the tidal-influence distinction for some purposes but not for others. The Supreme Court observed that this continent's physical circumstances differed from England's in that here, unlike in England, many navigable rivers extended so far inland that their waters appeared to escape the reach of the tide; and based on this theory, it was argued for many years that under federal law, "navigability" and not tidal influence should be the main test for determining what lands and waters are presumptively part of the public trust.[98] *Compare*, *e.g.*, *Shively*, 15 U.S. at 46-58 (ownership of navigable, tidally affected riverbed) *with Propeller Genesee Chief*, 53 U.S. at 453-57 (scope of federal admiralty jurisdiction); *see also Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Martin v. Waddell*, 41 U.S. 367 (1842).[99] When it finally faced the question squarely in 1988, however, the U.S. Supreme Court decided that under federal law, all land covered by tidally influenced water would be presumed publicly owned, regardless of whether it was navigable. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-81 (1988). Since the State of Mississippi (unlike Texas, *see* note 98 above) had inherited its title to the land from the federal government, the U.S. Supreme Court's decision to define title boundaries according to tidal influence directly affected Mississippi's own state law of property. *Id.*; *see also Cinque Bambini P'ship v. State*, 491 So. 2d 508, 511-21 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

The federal *Phillips Petroleum* decision would weigh in favor of applying *Rudder-Luttes* to Texas land covered by tidally influenced water if not for one crucial fact: unlike most other states' laws, this state's law of seashore and riparian boundaries is—due to this state's unique pre-statehood history as a sovereign republic rather than a colony or territory—**independent from and unaffected by federal law.** *See* Section II above. This is the reason why, contrary to predictions made by some observers whose analyses failed to take this state's unique history into account, the *Phillips Petroleum* decision has had **no** apparent impact on Texas seashore boundary law: its analysis has never been adopted by any Texas case.[100] Since *Phillips Petroleum* has no controlling effect in Texas, Texas law must look solely to its own precedent—not federal law—to decide whether tidal influence, or some other criterion, should determine where the *Rudder-Luttes* methodology (for the seashore) ends and the Stiles-*Brainard* "gradient boundary" methodology (for inland rivers) begins.

As no published Texas opinion has squarely tackled this question, it must be answered by

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[98] As raised much earlier and as will momentarily be discussed at greater length, this federal law debate was immaterial as to Texas land because unlike the public land of virtually every other state, the public land owned by the State of Texas at time of statehood was not received from the federal government but instead was acquired directly from Spain or Mexico through treaties. *See* Section II above.

[99] For a very helpful review of this confusing area of federal property law, see James R. Rasband, *The Disregarded Common Parentage of the Equal Footing & Public Trust Doctrines*, 32 Land & Water L. Rev. 1 (1997).

[100] *Compare* Harold R. Loftin, Jr., *Flood Warning: Title Wave Approaches Texas in Wake of Phillips Petroleum Co. v. Mississippi*, 41 Baylor L. Rev. 541 (1989) (erroneously predicting that *Phillips Petroleum* would cause vast amounts of nonnavigable-but-tidally-influenced Texas land to become vested in the State of Texas) *with John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002) (deciding that nonnavigable-but-tidally-influenced land was owned by private grantee, not the State of Texas, under the terms of the original grant as construed by Texas state law); *see also Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 58-60 (Tex. App.—Corpus Christi 1993, writ denied) (explaining that the federally-derived "public trust doctrine," which played an important role in *Phillips Petroleum*, has "not fared well" in Texas law).

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extending existing precedent through basic principles of logic. Applying those principles to precedent, I suggest that under Texas law, it is possible that the most useful and appropriate test for discerning between "seashore" governed by *Rudder-Luttes* and inland-water banks governed by Stiles-*Brainard* is not tidal influence, but a wholly unrelated concept known as the "headland-to-headland" or "closing line" rule. *See Giles v. Basore*, 154 Tex. 366, 278 S.W.2d 830, 836 (1955) (adopting rule of *Knight v. United Land Ass'n*, 142 U.S. 161 (1891)).

The "headland-to-headland" or "closing line" rule provides that when interpreting the meaning of a call to the seashore in a grant or patent of littoral land, cuts into the shore such as stream mouths, inlets, and similar indentations are **disregarded** if the cut is marked by identifiable "headlands" and if it reasonably appears to constitute a discrete body of water rather than part of the sea. *Id.* Rather than tracing the contour up into the cut, the shoreline instead follows an imaginary "closing line" that is surveyed across the cut's opening from the tip of one headland to the other. *Id.* (explaining that "in following the shoreline of a bay—as here called for—the survey, when it comes to a smaller body of water or a river entering the bay, should go **from headland to headland rather than up the river or smaller body of water to the limits of the tide.**") (emphasis added). The rationale of this rule—which Texas law imported by choice in 1955 from influential federal decisions—is that if the limits of the "sea" were deemed to follow the contours of every connected or inflowing body of water inland until the tide's influence could no longer be measured, then the resulting "shoreline" would be an absurd contour so drastically jagged that it would be unusable for any practical purpose. *Compare Giles*, 278 S.W. at 836 *with Knight*, 142 U.S. at 207-11 (Field, J., concurring) (describing headland-to-headland as a "universal rule" that "has always been accepted as controlling" in the United States and has rarely, if ever, been questioned); *Tripp v. Spring*, 24 F. Cas. 204, 205 (C.C.D. Cal. 1878) (earlier opinion by Justice Field applying same rule and criticizing the apparent alternative—that of following "the windings of [an entering] creek and its branches, wherever the tide waters of the bay may have flowed"—as leading to absurd and unworkable results).

Because of its practical usefulness, the headland-to-headland/closing line rule has become an essential bedrock principle that is used both when locating the offshore line between the states' submerged lands and federal territorial waters and also when determining the limits of different nations' territorial waters in international treaties and disputes. *See* Michael W. Reed, SHORE & SEA BOUNDARIES 223-310 (U.S. Dept. of Commerce 2000) (hereinafter, "Reed 2000") (comprehensively reviewing the "closing line" method of defining and locating the shoreline and distinguishing "inland waters" from open sea). Due to the rule's prevalence in such matters, an accepted surveying method has been developed that in most situations yields reasonably consistent and certain results.[101]

The *Knight* closing line rule seems especially appropriate for defining the line between the *Rudder-Luttes* (seashore) and Stiles-*Brainard* (river) methods of locating boundaries for at least four reasons.

First, it is logically consistent with other aspects of seashore law. If the "seashore" is located and defined by the closing line method for the purpose of making measurements **outward** to **offshore** boundaries, *see* Reed 2000 at 223-310, then it seems logical that the same method should also be used when measuring **inland** to determine which waters will be deemed part of "the sea."

[101] Under this method the dispositive inquiry is whether the enclosed, landlocked body's surface area is at least as great as that of a semicircle extending landward from the end of one headland to the end of the other. *See* Reed 2000 at 240-56 (discussing, with examples, how the "semicircle test" has been used to distinguish between recognized bays, for which a headland-to-headland "closing line" will be used, versus mere "indentations," for which the shoreline will follow the contour of the land).

Second, it is consistent with modern technological reality. As some scientists will testify, given sufficiently sensitive modern instruments the influence of astronomic forces on water can arguably be measured in **any** body of water, including a bucket or a glass of water, regardless of its proximity to or connection with the sea. That modern scientific reality, which was clearly not contemplated when ancient English common law adopted "ebb-and-flow of the tide" as a dispositive factor for some purposes, renders "tidal influence" a distinction merely of degree rather than of type. This development arguably diminishes the usefulness of "tidal influence" as a bright-line rule.

Third, in a closely related context, Texas law has **already** dispensed with using "ebb-and-flow" as a dispositive test. The Supreme Court took this step when it expressly decided in *Luttes* that in locating a mean high/higher high water line under civil or common law using tide-gauge readings, no effort should be made to distinguish astronomical (tidal) forces from atmospheric (nontidal) ones. *See* note 15 above & accompanying text. The majority in *Kenedy*, spurred by the dissent's objections on that very issue, reaffirmed that aspect of *Luttes* beyond any shadow of doubt. *See* text accompanying notes 26-31 above.

Fourth and finally: dispensing with "ebb-and-flow" as a dispositive test would highlight crucial differences that distinguish Texas seashore law from that of other states—differences that may lead to confusion if not clarified once and for all. For example: in deciding *Phillips Petroleum*, the Supreme Courts of both Mississippi and the United States specifically disregarded the fact that the disputed land, though it had become partially submerged, was located entirely **within the surveyed bounds of the pre-statehood Spanish land grants** from which the record title owners' rights were derived. *See Phillips Petroleum*, 484 U.S. at 472; *Cinque Bambini*, 491 So. 2d at 517-18, 520-21.[102] Similarly, both courts spent far more time analyzing the tidally-influenced nature of the water covering the disputed land and the public policy implications of their decision than they did interpreting the apparent intentions of the granting government from which the record title owners' claim stemmed. *See Phillips Petroleum*, 484 U.S. at 473-85 (focusing mainly on the scope and meaning of the "public trust doctrine"); *Cinque Bambini*, 491 So. 2d at 513-17 (same). Those analyses and results would likely be incorrect under Texas precedent, which has evolved independently from federal seashore law,[103] gives preeminence to the original granting government's intentions when locating boundaries,[104] has reaffirmed that private owners' vested rights were carried forward through each transition from one sovereign to the next,[105] and has specifically rejected the extreme incarnation of the "public trust doctrine" that played such a large role in *Phillips Petroleum*'s reasoning and result.[106]

Adopting a headland-to-headland/closing line rule rather than tidal influence as the dispositive distinction dividing seashore from inland waters could help resolve current disputes such as the one in *TH Investments* (*see* note 89 & accompanying text) and could add helpful certainty to Texas seashore boundary law. Perhaps the question will be raised and addressed during the appeal of that case.

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[102] The Mississippi Supreme Court specifically decided that the pre-statehood Spanish grants had no force or effect because the United States had already acquired title to the underwater portions of the land in question before the Spanish grant was ever made. *Cinque Bambini*, 491 So. 2d at 517-18, 520-21.

[103] *See* Section II above.

[104] *See* Sections II, III, IV, V, & VI above.

[105] *See* Section II above.

[106] *See* notes 8 & 9 above;

X. The Latest Tug-Of-War Between Branches: The Legislature's Effort To Unsettle The Supreme Court's Rejection Of Historical Survey Evidence

In 1958, the Texas Supreme Court decided *Luttes*; and in 1959, the Legislature responded with the Open Beaches Act, which was specifically directed toward unsettling *Luttes* in certain respects as to certain beaches. *See generally* Section VII above. This tug-of-war pattern was arguably repeated in 2003 when, at the urging of the General Land Office, the Legislature enacted a new statute directed toward unsettling an important feature of the Texas Supreme Court's 2002 decision in the *Kenedy Memorial Foundation* case. *Compare* Tex. Civ. Prac. & Rem. Code § 18.033 (effective September 1, 2003) *with John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 282-83 (Tex. 2002).

One of the most important facets of the *Kenedy* decision was the Supreme Court's conclusive rejection of the State's attempt to use historical maps and surveys to prove the boundary's location, several of which depicted the Laguna Madre as extending roughly to the "bluff line" boundary that the GLO preferred. *Kenedy Mem. Found.*, 90 S.W.3d at 282-83. Those historical maps and surveys were simply not probative of the boundary's location, the court held, because the meaning of the water's edge call in the grant was defined wholly by the granting government's intent, and the Supreme Court had in *Luttes* already construed that intent as meaning the average elevation of daily mean higher high water levels over 18.6 years. *Id.* Since that intent could not be altered by any subsequent "misunderstanding" by any grantee, surveyor, or other private person, the historical maps and surveys offered by the State were simply irrelevant to the question at hand. *Id.*

Displeased with this holding, the General Land Office launched a legislative attack in 2003. At the GLO's urging, the 2003 Legislature added the following new section to the Texas Civil Practice and Remedies Code:

> (a) In a dispute between the State of Texas and an upland owner of property fronting on the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries of the State of Texas, the maps, surveys, and property descriptions filed in the General Land Office in connection with any conveyance by the state or any predecessor government by patent, deed, lease, or other authorized forms of grant **shall be presumed** to accurately depict the boundary between adjacent upland owners and the state-owned submerged lands.
>
> (b) This presumption applies only to those surveys conducted by a surveyor duly appointed, elected, or licensed, and qualified.
>
> (c) This presumption may be overcome **only on a showing of clear and convincing evidence** that the boundary as described and depicted in the archives of the General Land Office is erroneous.

Tex. Civ. Prac. & Rem. Code § 18.033 (emphasis added). This new section tries to alter the playing field in future disputes resembling *Kenedy Memorial Foundation* by requiring courts to consider the universe of evidence—historical maps and surveys—that the Supreme Court specifically excluded from its consideration in *Kenedy*, and furthermore by elevating that excluded evidence to the level of a presumption that requires "clear and convincing" evidence to overcome. *Id.* It purports to govern all boundary lawsuits commenced on or after September 1, 2003.

Like the Open Beaches Act before it, new section 18.033 reflects the awkward underlying tension that exists between the judiciary on one hand and the legislative and executive branches on the

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other when it comes to defining the boundary of public property that is owned by the State. Tacitly recognizing that the legislative branch lacks power to overrule the Supreme Court's substantive decisions concerning the scope and definition of vested rights,[107] the GLO and Legislature have this time tried to work around that limitation by disguising their attack in the form of a rule designed to appear procedural rather than substantive.[108] As of this writing, no published opinion has enforced or examined new section 18.033,[109] and so its effectiveness and constitutionality have not yet come under scrutiny. But for the reason I have already disclosed (my role as landowners' counsel in *Kenedy Memorial Foundation*),[110] it will surely surprise no one that in my view, the statute is unconstitutional and should be given no effect. I believe that this is true for three related but discrete reasons.

First: despite being disguised as an "evidentiary" rule that purports to do no more than alter the relative status of evidence and alter the parties' burdens of proof, section 18.033 actually does something far more drastic. *Kenedy Memorial Foundation* did not find merely that the GLO's historical maps and surveys were **outweighed** by the landowners' tide-gauge-based evidence; it found, rather, that the GLO's historical maps and surveys were **irrelevant, immaterial, and incompetent** as to the question of locating the boundary, because the boundary had to be located according to the grantor's original intent (as construed by the Texas Supreme Court in *Luttes*) and no subsequent "private understanding" had any power to alter that intent or its meaning. *See* text accompanying notes 26-28 above (discussing *Kenedy Mem. Found.*, 90 S.W.3d at 281-83). In other words: under *Kenedy Memorial Foundation*, historical maps and surveys are not even **relevant** to the determination of a civil law seashore boundary and therefore should not even be **admissible** in future boundary disputes. *Compare id. with* Tex. R. Evid. 401, 402. By announcing that courts should, in deciding seashore boundary questions from this point forward, now consider a universe of evidence that *Kenedy Memorial Foundation* specifically decided was wholly immaterial to the decision, section 18.033 directly alters the definition of the substantive legal standard that is being used to determine the scope and meaning of rights that were vested long ago. I fail to see how the Legislature has power to make this plainly substantive change. *See* note 35 above & accompanying text.

Second: even if the statute could somehow be interpreted as merely altering burdens of proof rather than altering the universe of relevant evidence, it would still exceed the Legislature's power because—as I've already discussed—it is well established that burdens of proof and presumptions are **themselves** vested rights of which citizens may not constitutionally be deprived. *See* note 42 above (discussing, *inter alia*, *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 209-12 (1939) and *Langever v. Miller*, 76 S.W.2d 1025, 1030-32 (Tex. 1934)). In other words, burdens of proof and presumptions are part of a citizen's substantive property rights—they are not mere matters of "procedure" or "remedy." *Id.* It is axiomatic that citizens' rights under grants and patents are vested rights that must be measured and determined according to the substantive property law that was in force at the time the grant or patent was originally made. *See* Section II above (discussing, *inter alia*, *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 98-99 (1944) and *Manry v. Robison*, 122 Tex. 213, 56

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[107] *See* note 35 above & accompanying text.

[108] The Legislature has tried to bolster the superficial appearance that section 18.033 is a procedural and nonsubstantive enactment by placing it in the chapter entitled "Evidence" within the Civil Practice and Remedies Code instead of placing it in the Natural Resources Code or Property Code where a substantive enactment would ordinarily belong.

[109] The Supreme Court has mentioned the section once in passing, but only in the course of deciding wholly unrelated issues in a case having nothing to do with boundary adjudication. *Southwestern Bell Tel. Co. v. Garza*, ___ S.W.3d ___, 48 Tex. Sup. Ct. J. 226, 237 n.51 (Dec. 31, 2004) (citing section 18.033 as one among many examples of statutes that purport to impose heightened standards of proof on particular issues).

[110] *See* note 24 above.

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S.W.2d 438, 443-44 (1932)). I do not see how any modern legislation has power to alter those substantive rights by altering presumptions and burdens of proof as section 18.033 purports to do.

Third: even if section 18.033 **were** somehow deemed merely "procedural" or "remedial," it is still not clear that it could be given effect because some Texas cases strongly suggest that in ascertaining a Texas grantee's property rights, Texas law gives controlling force not only to the granting sovereign's **substantive** property law but also to the granting sovereign's legal **procedures** for perfecting and determining valid land title. *E.g.*, *Balli*, 190 S.W.2d at 84-94. For example: when deciding whether a Mexican land grant of seashore land was effective in spite of certain alleged procedural defects, the Texas Supreme Court specifically examined **whether the granting officials' actions had been "timely" and otherwise valid under the procedural laws of the granting Mexican state.** *Id.* (undertaking detailed historical review of multiple facets of the granting Mexican state's legal procedures). In other words, to determine whether a claimant's title "was good as against the Mexican government" as of December 19, 1936, *id.* at 88, both the substance **and the procedures** of that Mexican government's laws control over any subsequent laws, legislative or judicial, that were made after the date of the grant. *Id.* at 84-94.

But even setting these three fundamental, potentially unconstitutional defects aside, section 18.033 also suffers from other, more superficial flaws. For example, by limiting its applicability to property fronting on the Gulf of Mexico "and the arms of the Gulf of Mexico"—a phrase that I do not believe the Legislature has ever defined[111]—section 18.033 fails to define clearly the universe of waters and lands to which it is meant to apply. As previously discussed at length, drawing the line between an "arm of the Gulf" and an inland river or inlet is no self-explanatory task, and Texas law appears never yet to have chosen which paradigm it will adopt and use to do so. *See* Section IX above (contrasting the "tidal influence" model against the headland-to-headland/closing line rule). Similarly, in purporting to identify the surveys that will receive presumptive weight, section 18.033 leaves ambiguous what is meant by "a surveyor duly appointed, elected, or licensed, and qualified"; in many cases, as in *Kenedy* itself, the GLO's files will contain surveys and maps that were created by ancient Spanish or Mexican surveyors, and the section offers no guidance as to how the sufficiency of an ancient surveyor's "qualifi[cations]," "license," or "appoint[ment]" is to be evaluated. Another flaw is that the section fails to contemplate that in many circumstances, the "maps, surveys, and property descriptions filed in the General Land Office" concerning a particular piece of property will materially **conflict** with one another, and offers a court no direction concerning what should be done when such a conflict exists.[112] And finally, the section is arguably unfair to whole classes of claimants: by its terms, it applies only to "a dispute between **the State of Texas** and an upland owner." In so limiting itself, section 18.033 fails to contemplate disputes in which the non-upland claimant will not be the State itself but instead will be a successor-in-interest to the State's ownership of tideland, such as a water district, navigation district, or port authority.[113] I will be interested to see how these superficial flaws—along with the section's fundamental constitutional defects—may play into parties' efforts to use the section in future boundary disputes.

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[111] *See* note 97 above.

[112] This omission is striking given that several Natural Resources Code sections specifically contemplate the likelihood that filed surveys will frequently conflict, and instruct the General Land Office how to proceed—in the context of issuing patents—when conflicts among filed surveys arise. Tex. Nat. Res. Code § 51.249-253.

[113] *E.g.*, *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976); *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52 (Tex. App.—Corpus Christi 1993, writ denied).