"Shoreline Boundaries: Current Controversies Involving Erosion And Subsidence"

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I. Introduction

In our paper for last year's First Annual Conference on Texas Coastal Law, we strove to provide an overall survey of subjects that we thought would be of greatest interest to practitioners.[1] Our topics included the basis of land title in Texas; the State of Texas's power to convey underwater land to private owners; the method of boundary location for both civil law and common law grants; the doctrines of accretion, erosion, reliction, and subsidence; the doctrines used to distinguish ocean waters from and inland waters, along with that distinction's impact on boundary location; and some examples of legislative enactments that have affected many of these issues, such as the Open Beaches Act and section 18.033 of the Natural Resources Code.[2]

For this year's Second Annual Conference, our focus is narrower. This year's paper offers an update concerning two current controversies—each of which is live and ongoing as of the time of this writing—whose impending resolution may significantly affect the rights of certain littoral owners by the Texas seashore. The first is the 2005 Legislature's enactment of a new statute, section 33.613 of the Natural Resources Code, whose implementation has become stalled by a constitutional controversy. The second is a currently ongoing appeal in the case of *TH Investments, Inc. v. Kirby Inland Marine, L.P.*,[3] which involves subsidence near the Houston Ship Channel and which has been set for oral argument on June 6, 2006. Each of these current controversies addresses a different aspect of the same age-old question: under what circumstances does a private littoral owner retain title to an area along the Texas coastline that was dry at the time the owner took title but has since become inundated by waters of the sea?

This question's importance is growing. As other presentations at this conference will highlight, some in great detail, it has long been beyond dispute that the fast land of Texas is shrinking. The familiar phenomenon of coastal erosion is the most widespread and best-known, but other phenomena such as subsidence (the vertical sinking of land due to depletion of groundwater and minerals) also are having effects in certain areas. Furthermore, there is an ever-growing body of evidence that this trend is **not** a predominantly natural phenomenon, but instead is mostly caused by the works of human beings, including public works projects—some of which, ironically, were undertaken specifically for the purpose of combating, guarding against, or reversing this trend.

At their core, the current controversies over certain rules of Texas seashore boundaries all present different faces of one fundamental and rather philosophical question: as the fast land of Texas shrinks, who should

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[1] Shannon H. Ratliff with Richard A. Fordyce, *Shoreline Boundaries Part I: Legal Principles*, 1st Annual Texas Coastal Law Conf. (May 19-20, 2005) (course materials Tab D) (hereinafter, "Ratliff & Fordyce 2005").

[2] Copies of our 2005 paper are available to any interested 2006 conference participant upon request. We will have some printed copies on hand at this year's conference, and you also may obtain a PDF copy by e-mailing your request to rfordyce@ratlifflaw.com. For economy's sake, this year's paper assumes some familiarity with our 2005 paper and cross-references that prior paper freely throughout.

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

benefit and who should pay? Should the State of Texas always, in every circumstance, gain the benefit of every change at the private land owner's expense? Or should private land owners, in some circumstances, have rights to preserve, or even expand, their acreage at the shore?

It is perhaps remarkable that today, 170 years after the Republic of Texas declared independence from Mexico, such basic questions remain subjects of lively debate. Yet as the selected controversies that will shortly be discussed will illustrate, debates on certain fronts continue. Some of those debates are fueled by some basic but widely held misconceptions. Before turning to the ongoing controversies just mentioned, this paper will try to dispel some of those misconceptions by briefly reviewing some basic concepts that provide the foundations of Texas coastal shoreline law—some of which, very importantly, differ from the laws of other American jurisdictions in fundamental and material ways.

II. Outline Of Background Principles[4]

A. The Source Of Property Rights In Texas: The Terms Of The Governing Grant Or Patent, Construed According To Relevant Law.

- Private title to every square inch of real property in Texas is necessarily traceable to a grant from one of the four successive governments that have presided over this land: first Spain; then Mexico; then the Republic of Texas; and finally, the State of Texas.[5] A private owner's vested rights in his or her property today are defined by **the grantor's intent as expressed in the grant or patent.**[6] Since the conveying sovereign itself was the original "grantor" that made the grant to which each private owner's rights must be traced, the "grantor's intent" must be ascertained from the words of the patent or grant as construed by the laws that existed at the time that the land was first conveyed out of the public domain.[7]

- Once an owner's property rights have become vested, the Legislature generally lacks the power to alter those rights retroactively through new legislation. Such alterations are generally barred (and always restricted) by the takings clauses of the Texas and United States Constitutions, which prohibit vested rights from being divested without fair compensation being paid.[8]

- This means that although multiple statutes say that the beds and waters of the Gulf of Mexico and its "arms" are the property of the State of Texas, **the statutes themselves are not the source that makes that statement true.**[9] As to vast amounts of beds and waters, it happens to **be** true—but the reason it is true is that so many of the relevant grants or patents (by which the State or prior government conveyed the property out of the public domain and into private ownership long ago) defined each tract's boundary by a "call" to the "waters" or the "shore" of a body of water, and did not extend ownership **into** the Gulf, bay, or other arm.[10] Again: as with any other grant of real property, the tract's boundaries are determined according to **the**

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[4] Most of the principles in this section were previously discussed more extensively in our conference paper last year, to which the following discussion will refer freely.

[5] Ratliff & Fordyce 2005 at 2 (discussing *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404, 407-08 (1932)).

[6] *Id.* (discussing *John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 282-83 (Tex. 2002) and *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 98-99 (1944)).

[7] *Id.*

[8] Tex. Const. art. I, § 17 (Texas takings clause) *and* U.S. Const. amend. V cl. 4 (federal takings clause); *cf. also* Tex. Const. art. I, § 16 (prohibiting enactment of retroactive laws).

[9] Ratliff & Fordyce 2005 at 3-4 n.4 & accompanying text (discussing statutes' limited impact on vested rights).

[10] *Id.* at 7.

grantor's intent as expressed in the terms of the grant or patent.[11]

- It is true that a boundary's physical location can move due to a phenomenon such as erosion or accretion—but if the boundary moves, it does so because the "waters" or "shore" of the body of water that the grant or patent used to defined its edge are deemed **under the law by which the grant or patent is being construed** to have legally changed their location.[12] The modern statutes that assert ownership of the beds and waters of the Gulf and its arms are **not** part of this analysis because those statutes lack competence to alter the owner's vested rights.[13]

- Thus, when the Legislature dedicated the mineral estates beneath State-owned submerged lands to the Permanent School Fund in 1939 and then dedicated the surface estates of those submerged lands' beds to the Permanent School Fund in 1941, it dedicated **only** those estates that had not previously, before those dates, been already conveyed to private owners and out of the public domain.[14] Like any other owner of real property, the State had no power to "convey" (i.e. dedicate to the Permanent School Fund) any greater rights than it owned. By definition, the State could not dedicate the Permanent School Fund any property that it did not own at the time that the dedication occurred.[15]

- Unlike the situation that exists in every other state except for the original thirteen colonies, State-owned land in Texas was, as a general rule, not previously owned by the federal government.[16] This means that unlike the laws of the other non-thirteen-colony states, Texas rules of seashore boundaries are **not** directly affected by federal doctrines, but instead are based wholly on Texas law's own interpretation of the law that was in effect at the time the original grant was made.[17]

- One consequence of Texas's unique independence from federal law is that the oft-cited "public trust doctrine"—a doctrine derived from federal law that in many other states restricts the legislature's power to convey fee simple title of underwater land into private ownership—does **not** limit the Texas Legislature's power to convey good title to underwater land.[18] To be sure, there are restrictions on the Texas Legislature's powers to make or authorize such conveyances, but in Texas—unlike in other states—any restrictions are self-imposed; they must be found, if at all, in one or more provisions of the Texas Constitution.[19]

- Naturally, because of the enumerated nature of their powers, administrative agencies may alienate submerged land or tideland only in the limited ways that the Texas Legislature has

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[11] *See supra* note 6 & accompanying text.

[12] Ratliff & Fordyce 2005 at 2 (discussing *Kenedy Mem. Found.*, 90 S.W.3d at 282-83 and *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438, 443-44 (1932)), 26 (discussing *Manry*, 56 S.W.2d at 443-44 and *Balli*, 190 S.W.2d at 98-99).

[13] *See supra* note 8 & accompanying text.

[14] Ratliff & Fordyce 2005 at 5-6 (discussing relevant statutes and other authorities).

[15] *Id.*

[16] The reason is that all other states (except for the original thirteen colonies) began their existences as territories in which the federal government held title to all land not previously conveyed into private hands, whereas Texas was made a state through a treaty between two sovereign republics: the United States and the Republic of Texas. *See* Ratliff & Fordyce 2005 at 2-3 n.2 & accompanying text. Thus, whereas the governments of other states took title to land as successors-in-interest to the title previously held by the federal government, the State of Texas's predecessors-in-interest were Spain and Mexico. *Id.*

[17] Ratliff & Fordyce 2005 at 2-3 (citing authorities).

[18] *Id.* at 5-6 & n.8 (citing authorities).

[19] *Id.* (citing Op. Tex. Att'y Gen. No. H-881 (1976) *and* Op. Tex. Att'y Gen. No. Tex. Atty. Gen. Op. M-356 (1969)).

specifically authorized them to do.[20] However, there is no judicially-created "public trust" umbrella (limiting private ownership of submerged land or tideland) that extrinsically limits the agencies' powers; rather, agencies have whatever powers the relevant statutes define.[21]

- In sum: unlike the law of many other states, in Texas there is no policy-based prohibition against private ownership of underwater land; rather, 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.[22]

- Thus, while it is true that judicial decisions often mention a "presumption" that land located underneath navigable waters is owned by the State and was never granted or patented out of private ownership, Texas decisions leave no doubt whatsoever that **the presumption is rebuttable.** Admittedly, a private landowner must carry a heavy burden—a showing that the granting government had "a certain and specific intention" to include submerged land or tideland within the bounds of the grant or patent, expressed in clear and unequivocal words—to prove that land presently covered by navigable waters lies within the boundaries of his or her tract.[23] But the burden is far from impossible to carry, and has been satisfied many times.[24]

B. The Nature Of A Littoral Grant: A Call To The "Waters" Or "Shore."

- As with other real property, grants of littoral property can use four different descriptive tools to define its boundaries. Under Texas law, these four tools do not have equal weight.[25] Rather, when interpreting a grant, the four methods are given controlling effect in the following order of descending force. First, calls to natural objects (*e.g.*, "to the waters of the Laguna Madre" or "thence along the shore of San Antonio Bay") are given effect; then, calls to artificial objects (*e.g.*, "thence to a stake at corner"); then course (i.e. a compass heading); and finally, distance (i.e. a length in yards or other linear unit).[26] Since calls to natural objects take the highest priority and have been widely used in littoral grants for centuries, understanding the meaning of a call to the "waters" or "shore" (or similar term) of any body of water is very often the paramount task in interpreting a littoral owner's grant.[27] Since the State of Texas is often (though not without exception) the owner of the submerged land or tideland on the other side of the littoral tract's seaward boundary, the State is frequently the party who is opposing the littoral owner in disagreements over the shore's location.

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[20] *Id.* at 5; *see also*, *e.g.*, Op. Tex. Att'y Gen. No. JC-0069 (1999).

[21] Ratliff & Fordyce 2005 at 5-6 & n.8 (citing authorities).

[22] As a supplemental aid on this subject, attached to this paper as Appendix A is a list of selected Texas authorities (court decisions and attorney general opinions) that have held, acknowledged, or otherwise illustrated that under Texas law, unlike that of many other states, no public policy exists to prevent or restrict private ownership of land located under water that is either tidally influenced, navigable in fact, or both, so long as the sovereign's intention to include such lands within the bounds of the grant or patent is shown with the requisite certainty. The attached list is by no means exhaustive.

[23] Ratliff & Fordyce 2005 at 4 n.5 (citing, *inter alia*, *City of Galveston v. Menard*, 23 Tex. 349, 396-98 (1859) and *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413-15 (Tex. 1943)).

[24] *See* Appendix A (attached to this paper) (collecting authorities).

[25] *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)). Priority is called "dignity" in the parlance of grant interpretation. *Id.*

[26] *Id.*

[27] Ratliff & Fordyce 2005 at 7-8.

- In construing a call to the waters of the Gulf or its bays, Texas law defines the "shoreline" as the vertical elevation point at which an imaginary horizontal survey line, projected perpendicularly from a point offshore, intersects the land.[28] This horizontal line's elevation is a calculated 18.6-year average of daily high water levels measured offshore by so-called "tide gauges" (which, despite their name, actually measure high water elevations without distinguishing tidal influences from meteorological ones).[29]

- A crucial point that is sometimes overlooked is that title to the bed of any part of the Texas Gulf or any of its bays is in fact a **separable estate** from title to the water.[30] Whether water is "public" or "private" turns on whether the water is **navigable.**[31] If the water is navigable—that is, if it is a link in a chain or "highway" that is usable for transportation of goods or passengers—then under long established authorities, the water is publicly owned even if it flows over a privately owned bed.[32] Notwithstanding a popular myth—and contrary to some other jurisdictions' laws, which differ from that of our state—in Texas, the presence of publicly owned water over privately owned land does **not** alter ownership of the land beneath the water.[33] Furthermore, because navigable water over the land will be public even if the bed beneath it is privately owned, private ownership of the bed beneath does **not** impair or threaten the ability of the public (and the State) to use the waters for navigation or other purposes.[34]

C. The Phenomena Of Erosion, Accretion, And Subsidence.

- On the predominantly sandy Texas coast, the physical locations of many "shorelines" (as measured using the water elevation method just described) do not remain fixed but instead

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[28] This method differs from that used for inland bodies like rivers, for which a "gradient boundary" surveying technique known as the "Stiles method" is used. For a compact and handy summary of the gradient boundary method, see Michael V. Powell, *Riparian Boundaries in Texas*, 1st Annual Texas Coastal Law Conf. (May 19-20, 2005) (course materials Tab M).

[29] For decades it was argued that this water elevation method should be used only for patents made after January 20, 1840 (the day the Republic of Texas adopted the common law in place of civil law) and that any of several proposed different methods should be used when interpreting a pre-1840 grant governed by civil law derived from Spain or Mexico. But in 2002, the Texas Supreme Court reaffirmed its prior 1958 decision on that issue and held that all calls to a Texas coastal shoreline must be measured using the water-elevation method, regardless of whether governed by civil law or common law. *See generally John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002) (analyzing *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958)). Thus, the shoreline location method for a civil law grant differs from that of a common law patent only in one minor technical aspect—whether to include two tide gauge readings ("mean high water") or only one tide gauge reading ("mean **higher** high water") for each day being averaged over 18.6 years—and it appears that both methods will yield similar or identical outcomes at most places on the Texas coast. *See* Ratliff & Fordyce 2005 at 15 nn.30-31 & accompanying text (citing scientific sources). Our 2005 paper offers a detailed discussion of this issue's long and rather tangled history, which now appears finally resolved. *Id.* at 6-16 (Sections IV, V, & VI).

[30] *Compare City of Galveston v. Menard*, 23 Tex. 349 (1859) (explaining that title to land covered by navigable water "embraces several rights that may be separated"; "right to the soil" and "right to navigate the waters" are "divisible" interests that "may be acquired separately and exclusively from the proper granting power") *with*, *e.g.*, Op. Tex. Att'y Gen. No. GA-181 (2004) *and* Op. Tex. Att'y Gen. No. LO-97-079 (1997); *see also infra* Appendix A (collecting authorities).

[31] *E.g.*, *id.*; *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130-31 (Tex. Civ. App.—Waco 1935, writ dism'd); *N. Am. Dredging Co. v. Jennings*, 184 S.W. 287, 288 (Tex. Civ. App.—Galveston 1916, no writ); *Orange Lumber Co. v. Thompson*, 126 S.W. 604, 606 (Tex. Civ. App. 1910, no writ); *Jones v. Johnson*, 25 S.W. 650, 651 (Tex. Civ. App. 1894, writ ref'd).

[32] *Taylor Fishing Club*, 88 S.W.2d at 129-30; *see also*, *e.g.*, *State v. Bryan*, 210 S.W.2d 455, 461, 463 (Tex. Civ. App.—Austin 1948, writ ref'd n.r.e.) (disapproving flawed navigability analysis of *Welder v. State*, 196 S.W. 868, 873-74 (Tex. Civ. App.—Austin 1917, writ ref'd)).

[33] *E.g.*, *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441, 444-46 (Tex. Comm'n App. 1935, opinion adopted)

[34] *E.g.*, Op. Tex. Att'y Gen. No. GA-181 (2004) (collecting authorities).

"ambulate" (move) over time.[35] This motion can be either landward or seaward, and substantial scientific evidence suggests that if human beings had never come onto the scene, landward and seaward motion would alternate in equal parts, yielding equilibrium and a shoreline that would, for purposes of boundary location, remain essentially stable.[36] As is well known and as other conference presenters have emphasized, however, the actual trend in many places on the Texas coast is net erosion, and substantial scientific evidence suggests that this net erosion is mostly attributable to human activities such as jetty construction, the damming of rivers, and destruction of sand dunes.[37] In addition, the extraction of underground water and minerals by government and commercial entities has in many locations caused measurable subsidence (vertical sinking of land), which—just like erosion—moves the measured shoreline landward by causing the surveyed high-water line to rise.[38]

- As already mentioned, the grants or patents controlling most (or at least many) littoral owners' tracts define their seaward boundaries by a call to the "waters" or the "shore."[39] For tracts defined by such a call, the phenomena of erosion, accretion, and subsidence each raise two related questions. First, does the owner's boundary move when the measured shoreline migrates, or does it remain fixed at some prior location? Second, is every instance of each phenomenon governed by an invariable rule, or do exceptions exist on particular facts? The number of published decisions involving these questions has been relatively low, so answers have been slow to emerge, leaving some answers known and others still open for debate.

- The following rules concerning these phenomena now appear settled.

    - Erosion and accretion are considered incidents of the littoral owner's original title: as to both common law and civil law grants, a call to the "waters" or "shore" is viewed as inherently carrying both the risk to the owner that his parcel will shrink by erosion, and the corresponding risk to the State that the owner's parcel will grow by accretion.[40] With the original title mutually burdened by those risks, neither the State nor the owner can in the event of ordinary erosion or accretion be deemed to have suffered any legally cognizable harm or loss because although the upland's net **acreage** may have changed, the essential property right—property that is bounded by the "waters" or "shore"—has not.

    - As to accretion only, the foregoing rule has a narrow exception: if accretion appears to have resulted **principally** from the **direct actions** of the littoral

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[35] Ratliff & Fordyce 2005 at 25-26 (citing authorities).

[36] *Id.* at 25-26 text accompanying nn.72-73. We qualify this statement with the phrase "for purposes of boundary location" simply to acknowledge that although shorelines would, if left to natural processes, tend to remain "essentially stable" within the relatively short-term timeframe of human civilization and our systems of property rights, dramatic changes obviously can and do occur over the multimillion-year course of geologic time.

[37] *See*, *e.g.*, Richard L. Watson, *Shoreline Boundaries*, 2d Annual Texas Coastal Law Conf. (May 18-19, 2006) at 2-8 (course materials Tab G) (hereinafter "Watson 2006"); *see also* Ratliff & Fordyce 2005 at 26 text accompanying nn.74-76. Indeed: as a later section of this paper will discuss further, the Texas Legislature in 2005 made an express finding that "public works, such as dams and flood-control projects on inland waterways and jetties, seawalls, and dykes along the coast" are "significant causes" of the net erosion being experienced on the Texas coast. Act of May 30, 2005, 79th Leg., R.S., ch. 867, § 3 (also known as Senate Bill 1044); *see infra* Section III (discussing certain aspects of SB 1044 in detail).

[38] *E.g.*, Watson 2006 at 9; *see also* Ratliff & Fordyce 2005 at 30-32.

[39] *See supra* notes 25-27 & accompanying text.

[40] Ratliff & Fordyce 2005 at 2 (discussing *Kenedy Mem. Found.*, 90 S.W.3d at 282-83 and *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438, 443-44 (1932)), 26 (discussing *Manry*, 56 S.W.2d at 443-44 and *Balli*, 190 S.W.2d at 98-99).

landowner, then title to the newly formed land will vest in the State and not in the private owner.[41] If, however, the littoral owner's participation in the events that appear to have caused the accretion was not substantial and direct, or appears to have been significantly commingled with other forces, then the ordinary accretion rule will apply, and the new acreage's title will vest in the littoral owner rather than in the State.[42] In 1997, a statute purported to impose an additional requirement that the upland owner prove that he "is entitled to benefit from the change."[43] However: because Texas decisions construing the upland owner's vested right to accretion do **not** include this extra element,[44] this statute may not withstand constitutional scrutiny if it is ever carefully examined by a court.[45]

- This rule concerning deliberate build-up is **not** reciprocal: if a government entity (as opposed to a private upland owner) engages in reclamation that creates new upland seaward of a littoral owner's tract, causing the owner's land to lose its direct adjacency to the sea, then the government owns the newly created land even if that land sits in space that was once occupied by privately owned upland but that

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[41] Ratliff & Fordyce 2005 at 27-28 (discussing *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410 (Tex. 1943) and *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 57 (Tex. App.—Corpus Christi 1993, writ denied)).

[42] For years after 1943's famous *Lorino* decision, which involved new land formed by oysterhouse's continual depositing of oyster shells over thirty-five years, it was often contended that *Lorino* stood broadly for a general distinction between "natural" accretion (i.e. accretion having no obvious tie to human activities) and so-called "artificial" accretion (i.e. accretion in which activities by humans appear to have played a significant role). *E.g.*, *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167, 193 (1958) (expressly reserving question of "whether accretions resulting from human agency" may belong to the abutting littoral owner). In 1993, however, the Corpus Christi Court of Appeals rejected a general "natural-versus-artificial" distinction on the ground that wholly disentangling "natural" forces from "artificial" ones would be an impossibly unworkable task. *See* Ratliff & Fordyce 2005 at 27-28 (discussing *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 57 (Tex. App.—Corpus Christi 1993, writ denied)). Thus, where the littoral owner participated only **indirectly** and perhaps unwittingly in conduct that contributed to accretion (granting an easement for the Army Corps of Engineers to create spoil piles that eventually washed into the sea and formed new land), *Natland* found the new land's title had vested in the upland owner, not in the State, and interpreted *Lorino* as narrowly establishing only that upland owners do not obtain title when they engage in direct—and, it appears, deliberate—"self-help." *Natland*, 865 S.W.2d at 56-58. 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, observing that *Natland*'s limitation of *Lorino* was consistent with other states' rules and comported with the "policy rationales" underlying the traditional erosion/accretion rule. *Brainard v. State*, 12 S.W.3d 6, 18-24 (Tex. 1999). 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.

[43] Tex. Nat. Res. Code § 33.136(d)(3). Besides the "entitled to benefit" provision, section 33.136(d) also appears intended to overrule *Natland* in that it also purports to prevent an upland owner from taking title if the shoreline change appears to have been caused by conduct of "any grantee, assignee, licensee, or person authorized by the claimant [i.e. upland owner] to use the claimant's land." Tex. Nat. Res. Code § 33.136(d)(2).

[44] *Compare Lorino*, 175 S.W.2d at 413-15 *with Natland*, 865 S.W.2d at 56-60.

[45] As of this writing, section 33.136(d) appears never to have been cited by any published opinion, Attorney General opinion, nor even any law review article. The section's first constitutional defect is that since an owner's rights to accretion are vested parts of the owner's original land title, their scope may be construed only by courts and the Legislature lacks competence to alter them. *See supra* notes 5-11 & accompanying text. This in and of itself should prevent the most plainly *Natland*-directed portion of section 33.136(d)(2)—the provision addressing "person(s) authorized by the claimant to use the claimant's land"—from constitutionally being given effect. But going further, section 33.136(d) appears especially susceptible to a constitutional challenge since its final subsection—the one broadly requiring the claimant to show that he "is **entitled to benefit** from the change"—provides no guidance as to what tests or factors should govern the required determination of "entitle[ment]," and hence might well be held unconstitutionally vague. *Compare* Tex. Nat. Res. Code § 33.136(d)(3) (emphasis added) *with*, *e.g.*, *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437-41 (Tex. 1998).

subsequently eroded away.[46] However, the upland owner is entitled to monetary compensation for the amount by which the remaining land's market value has been diminished by the government's destruction of its littoral status.[47]

- Apart from the very specific rules just discussed that govern deliberate reclamation (*supra* notes 41-47 & accompanying text), Texas law is strongly trending **away** from trying to treat erosion/accretion that can be traced easily to human activities (sometimes called "artificial" erosion/accretion) from erosion/accretion that cannot be so traced (sometimes called "natural" erosion/accretion).[48] The Texas Supreme Court has specifically held that because human and non-human factors are inextricably intertwined in the modern world, trying to maintain a "natural-versus-artificial" distinction when applying erosion/accretion rules is simply "unworkable."[49] It also has specifically said that this rule applies identically to the seashore as it does to rivers and other inland waters.[50]

- In contrast with erosion and accretion, subsidence (i.e. vertical sinking of land due to factors such as removal of underground water or minerals) has been held **not** to be an incident of a littoral owner's title because unlike erosion and accretion, vertical sinking of land is "not an ordinary hazard of riparian ownership" and is not deemed to have been within the parties' contemplation at the time the upland owner's title was originally formed.[51] Relying partly on this rationale, the Texas Supreme Court—in a well-known 1976 decision involving land next to the Houston Ship Channel that had gradually sunk beneath the channel's waters—held

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[46] Ratliff & Fordyce 2005 at 29-30 (discussing *City of Corpus Christi v. Davis*, 622 S.W.2d 640 (Tex. App.—Austin 1981, writ ref'd n.r.e.)).

[47] *Id.* (discussing *Davis*, 622 S.W.2d at 646-47). In 1997, roughly fifteen years after *Davis*, the Legislature enacted subsection 33.136(e) of the Natural Resources Code, entitled "Preservation of Littoral Rights," which apparently seeks to relieve the government from its *Davis* obligation of monetary compensation by stating that the upland owner's "littoral rights" of "ingress, egress, boating, bathing, and fishing" are preserved notwithstanding the reclamation. Tex. Nat. Res. Code § 33.136(e). It appears that this provision's constitutionality in view of *Davis* has not yet been tested nor even analyzed: as of this writing, section 33.136(e) appears never to have been cited by any published opinion, Attorney General opinion, nor even any law review article. Though the Legislature doubtlessly meant well, this paper's authors are skeptical that merely "preserv[ing]" rights of "ingress, egress, boating, bathing, and fishing" on land that no longer adjoins the sea is sufficient to prevent substantial diminution of the formerly-but-no-longer littoral upland's market value. If litigation ever tests this subsection, we believe that while the limited rights "preserved" by section 33.136(e) may reduce the government's *Davis* liability in part, a court still should find some *Davis* compensation owed if the owner adduces sufficient evidence of the market value change. Presumably section 33.136(e)'s impact, if any, would be part of the owner's market value analysis.

[48] *Compare Natland*, 865 S.W.2d at 56-58 *with Brainard*, 12 S.W.3d at 18-24.

[49] *Brainard*, 12 S.W.3d at 22 (quoting and adopting reasoning of *Natland*, 865 S.W.2d at 58). As an ancillary basis for this holding, the Supreme Court has noted that in most cases, the **direct** cause of the accretion or erosion is "the natural forces of the waters and currents on sediments and soil," and any human activity's impact "merely facilitated the process of natural forces carrying soil to either build up or erode the land in question." *Id.* at 21-22 (quoting *Natland*). The court also noted in *Brainard* that this refusal to distinguish is consistent with the rule observed by federal law, as well as that of other states. *Id.* at 19 (quoting *County of St. Clair v. Lovingston*, 90 U.S. 46, 66 (1874), for idea that "the **proximate cause** [of the accretion] was the deposits made **by the water**" itself, and that "[t]he law looks no further" and does not inquire whether human activities played some indirect role) (emphasis added), 22 (again citing *Lovingston* and noting that "*Natland* is consistent with the approach of a number of other jurisdictions, as well as the United States Supreme Court, which places no significance on the distinction between naturally and artificially influenced gains and losses").

[50] *Brainard*, 12 S.W.3d at 22 (citing *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 99-101 (1944) for principle that "accretion by the sea [is] governed by the same rules as accretion by rivers").

[51] *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 954 (Tex. 1976).

that when land vertically sinks (as opposed to being carried away by erosion), a littoral owner's boundary does **not** move, but instead remains fixed at its pre-subsidence location.[52] Because no land had been horizontally "transport[ed]" beyond the owner's original boundary—and because the original boundaries still could be "reasonably identif[ied]," even though now underwater—there was no reason, in policy or law, to find that the owner's boundary had moved.[53]

- Unfortunately, these apparently settled points are only part of the story. In contrast to the foregoing list, the following questions concerning erosion, accretion, and subsidence all appear currently unanswered under the laws of our state.

    - Given that the weight of scientific analyses (and, of late, the Texas Legislature, *see supra* note 37) have now credited the prevalence of net erosion on the Texas coast largely to public works projects undertaken by the government, should littoral owners at the seashore have any recourse or protection against losing acreage as a result? The 2005 Texas Legislature appears to have tried to create such a mechanism, but the statute appears to have foundered—temporarily, at least—on the constitutional rocks that restrict the Legislature's powers to alienate Permanent School Fund land. *See infra* Section III.

    - Even though the Texas Supreme Court seemed to establish a clear rule to govern subsidence of coastal land with its 1976 holding in *York*, that opinion's force was clouded by the writing Justice's comment—which he stated was being made "personally," and not on behalf of the unanimous court for which he was otherwise writing—that the opinion, despite its holding, could potentially be limited to subsidence beneath **non**-tidal waters, and might **not** necessarily establish a rule for land sinking "within the reach of the tide."[54] This question of *York*'s applicability and scope is specifically at issue in a currently live case before the Fourteenth Court of Appeals, *TH Investments, Inc. v. Kirby Inland Marine, L.P.*, in which briefing was completed on April 3, 2006.[55] This appeal is set for oral argument on June 6, 2006 and is discussed further below. *See infra* Section IV.

    - Does the distinction between avulsion on one hand and erosion/accretion on the other apply to coastal boundaries, as it does to river boundaries, and if so, how is it defined? Though some opinions have contained language suggesting that the distinction does apply at the coast, others have treated the question as undecided and have declined to decide it.[56] Our limited research has identified no current

[52] *York*, 532 S.W.2d at 953-54.

[53] *Id.* This opinion, which contained one anomalous footnote that has since become the subject of intense debate, will be revisited later in detail. *See infra* Section IV.

[54] *York*, 532 S.W.2d at 951 n.1.

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

[56] *Compare York*, 532 S.W.2d at 952 *with Davis*, 622 S.W.2d at 643-44. We note that while the difference between accretion and avulsion is, in riparian contexts as well as at the seashore, most often described as a distinction between changes that are "gradual and imperceptible" (accretion) versus changes that are "sudden and perceptible" (avulsion), some discussions suggest that this may not be the true difference may lie elsewhere. We believe that if the bulk of decisions were fully examined with their factual details clearly in mind, a better way of harmonizing the decisions might instead be to ask whether the land's transportation occurs through its dissolution into particles that are then redeposited elsewhere in the form of new land, causing the land to lose its identifiable character and hence resulting in a change of title (accretion), or instead occurs through bulk movements in which the land's identifiable character—and therefore its original ownership—is retained (avulsion). *See*, *e.g.*, *Denny v. Cotton*, 3 Tex. Civ. App. 634, 641-42, 22 S.W. 122, 125 (1893, writ ref'd) (quoting *Nebraska v. Iowa*, 143 U.S. 359

(footnote continued on next page)

lawsuit or statutory debate in which this question is directly at issue, so this paper's discussion of that question will end here. Given the recent tragedies of Hurricanes Rita and Katrina, however, it seems conceivable that this question may well be brought to the surface as a subject of debate and decision sometime soon.

III. New Section 33.613 Of The Natural Resources Code: A Bold Step, A Constitutional Quandary.

Our 2005 paper asked whether, in light of the growing evidence that the phenomenon of net erosion at the Texas coast has been caused largely by public works projects, room might exist in Texas law for a "mirror-image *Natland-Lorino-Brainard* rule." Ratliff & Fordyce 2005 at 28-29. By this we meant the following: since a littoral owner like the *Lorino* oysterhouse owner does not gain title to newly accreted upland where the accretion resulted principally from the owner's own actions, fairness suggests that **the State** ought not gain title to land newly submerged by erosion (and the littoral owner ought not lose title) if it is shown that the erosion resulted principally from public works projects carried out or authorized by **the State.** *Id.* at 28. We acknowledged that such a rule could create difficulties of proof and other undesirable complexities, but also noted that the equitable appeal of this argument and its inherent connection to takings principles had apparently led the State to settle with landowners in certain extreme cases, such as the drastic erosion that occurred near Rollover Pass. *Id.* at 29.

It now appears that by sheer coincidence, the Texas Legislature was considering this very problem around the time of last year's conference. During May 2005, the Regular Session of 79th Texas Legislature considered, debated, and unanimously passed Senate Bill 1044, captioned "An Act Relating To Efforts To Mitigate Coastal Erosion And Improve Public Access To Public Beaches; Authorizing The Issuance Of Bonds By Coastal Counties." Act of May 30, 2005, 79th Leg., R.S., ch. 867, § 3 ("SB 1044"). SB 1044 opened by making the following eight legislative findings:

> (1) Texas has the third-longest coastline in the United States;
>
> (2) Texas beaches and bays are extremely popular as visitor destinations;
>
> (3) Improved public access to and use of the public beaches is needed to realize the full potential of these valued natural resources;
>
> (4) Texas must address long-term solutions to beachfront erosion along developed areas adjacent to beaches and inland bays of the Texas coast;
>
> (5) Texas beaches suffer from the highest rate of erosion in the country;
>
> (6) many structures in Galveston and Brazoria Counties are at risk due to erosion over the next 30 years;
>
> (7) public infrastructure as well as residential dwellings that generate significant portions of the local property tax base are threatened by erosion rates of up to 10 feet a year or greater; and
>
> (8) public works, such as dams and flood-control projects on inland waterways and jetties, sea walls, and dykes along the coast, and subsidence caused by the withdrawal of water are **significant causes of erosion, leading to the need for public assistance as an aid in mitigation.**

SB 1044 § 1 (emphasis added).

(1892)) (distinguishing between phenomena that transport "a solid and compact mass" or "solid body of earth" from one location to another, and those that "disintegrate[] and separate[] [the land] into particles of earth" that are then "borne onward" in solution and are eventually reconstituted elsewhere as new land that cannot, by any amount of "engineering skill," be reliably traced back to their former home). We leave the challenge of fully exploring this question for another day.

After making these findings, SB 1044 then proceeded to make two significant changes to the Natural Resources Code relating to coastal erosion. The bulk of SB 1044 was devoted to establishing a new "Coastal Protection and Improvement Fund" to help coastal counties undertake "coastal protection projects" to combat erosion: a new system for funding coastal protection projects, the details of which are beyond this paper's scope.[57] This paper is concerned with SB 1044's other important provision: new section 33.613 to the Natural Resources Code. Because of this new section's potential importance to many littoral landowners on the Texas coast, it is reproduced below in full (with explanatory footnotes added to identify two features of the new statute that on their face are rather confusing or unclear).

> **§ 33.613 Property Rights; Restoration By Beachfront Owner of Private Property Affected By Coastal Erosion.**
>
> (a) This section applies to land that:
>
> (1) on December 31, 1955, was privately owned and not submerged or owned by the School Land Board; and
>
> (2) fronts on a bay and not the Gulf of Mexico.
>
> (b) In accordance with land office rules, the owner of property immediately landward of a public beach or submerged land, including state mineral lands, that has been affected by coastal erosion **shall restore the affected land to its original boundaries** as evidenced in a residential subdivision plat for residential lots of one acre or less filed in the real property records of each county in which the affected land is located.[58] The owner shall use only private resources and money for restoration authorized by this section. **After restoration the owner owns the restored land in fee simple,** subject to:
>
> (1) the common law rights of the public in public beaches as affirmed by Subchapter B, Chapter 61;[59] and

[57] SB 1044 § 4 (adding new Subchapter I to Chapter 33 of the Texas Natural Resources Code, Tex. Nat. Res. Code § 33.651-.663).

[58] This sentence is arguably somewhat confusing. By referring here to "a residential subdivision plat for residential lots of one acre or less," the latter portion of this sentence seems intended to restrict this new section's applicability to only **certain types** of littoral owners: those owning "residential lots of one acre or less" that are reflected in a "residential subdivision plat" filed with the county. Before and immediately after the new section's enactment, the first state agencies to comment upon it presumed that the new section would indeed be so limited. *E.g.*, Fiscal Note, S.B. 1044, 79th Leg., R.S. (May 26, 2005); *see also* Letter from General Land Office to Tex. Att'y Gen. of August 26, 2005, Request for Opinion RQ-0388-GA (further discussed below). However, the sentence's first portion by its terms is directed to **every** "owner of property immediately landward of a public beach or submerged land" that "has been affected by coastal erosion.," and the sentence arguably does not ever tie its latter portion's more specific references ("residential," "subdivision," "one acre or less," etc.) back to the first portion as unambiguous restrictions of the initial and broader phrase. From extrinsic sources this paper's authors have gathered a strong impression that the new section was indeed drafted with the idea that it would apply only to residential lots of one acre or less located within platted subdivisions. We note, however, that the statute itself is arguably not perfectly clear on that issue. We further note that the Attorney General's March 2006 opinion concerning the statute (discussed extensively below) did not clearly identify this as a restriction on the statute's applicability, even though the request letter to which the opinion was issued in response had characterized the statute as containing this restriction. Op. Tex. Att'y Gen. No. GA-0407 (March 2, 2006) (responding to Request for Opinion RQ-0388-GA, cited immediately above).

[59] This subsection is confusing. By the terms of subsection (a)(2), set forth immediately above, section 33.613 applies only to shoreline property that "fronts on a bay and not the Gulf of Mexico." Yet subsection (b)(1) cross-references part of the Open Beaches Act, which although not perfectly clear is generally interpreted as applying only to beaches on the seaward shore of the Gulf. *Compare* Tex. Nat. Res. Code § 33.613(b)(2) (reproduced above) *with* Ratliff & Fordyce 2005 at 21 n.55 (discussing various sections within Chapter 61 of the Natural Resources Code, some located within Subchapter B, that together appear to limit that act's applicability to Gulfward facing beaches); *see also*, *e.g.*, Tex. Nat. Res. Code § 61.011(a).

(2) the rights of a public school land lessee holding a lease on the property on September 1, 2005.

(c) In accordance with land office rules, the owner shall build bulkheads on the restored land to prevent further erosion of the restored land.

(d) The land office shall adopt reasonable rules to govern the restoration of land under this section, including rules that:

(1) prescribe the type and quality of materials that may be used to backfill or build a bulkhead;

(2) require maintenance of backfill and bulkheads;

(3) authorize land office maintenance or removal of abandoned or dilapidated structures;

(4) require consideration of any adverse effects on adjacent property owners; and

(5) establish penalties for the violation of this section or rules adopted under this section.

(e) State money may not be used to restore land under this section.

SB 1044 § 3 (adding new Tex. Nat. Res. Code § 33.613) (footnotes added). SB 1044 then went on to give the following directive to the General Land Office: "Not later than December 1, 2005, the General Land Office shall adopt rules for the administration and regulation of the restoration of land affected by coastal erosion as authorized by Section 33.613, Natural Resources Code, as added by this act." SB 1044 § 6. Because SB 1044 passed both houses by a unanimous vote of all members present and voting, it took effect immediately upon being signed by the Governor on June 17, 2005.[60]

Section 33.613, which was added to SB 1044 in a House floor amendment on third reading,[61] is in essence a directive for privately funded reclamation of certain eroded coastal land: it appears to impose certain obligations on certain landowners while at the same time giving them some potentially important rights. Several features of the section are especially noteworthy. First, the section applies only to land that "fronts on a bay and not the Gulf of Mexico."[62] This means that although it does not apply to the 367 miles of Texas coast that face the open Gulf,[63] it does apply to the more than 3,300 miles of Texas coast[64] that do not.[65] Second, it applies only to land that "was privately owned and not submerged or owned by the School Land Board" as of December 31,

[60] *Compare* SB 1044 § 7 ("This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution.") *with* H.J. of Tex., 79th Leg., R.S. 4526-28 (May 25, 2005) (reflecting 141 Yeas, 0 Nays, 2 Present and not voting) *and* S.J. of Tex., 79th Leg., R.S. 4376-77 (May 27, 2005 (reflecting 29 Yeas and 0 Nays).

[61] *See* H.J. of Tex., 79th Leg., R.S. 4526 (May 25, 2005).

[62] Tex. Nat. Res. Code § 33.613(a)(2).

[63] *See* Texas General Land Office, Coastal Erosion Planning & Response Act (CEPRA) Report to the 79th Texas Legislature at 1 (April 2005) (the "2005 CEPRA Report").

[64] *See id.*

[65] Section 33.613's reason for exempting Gulf-facing beaches from its scope is not apparent on the face of the Act. One possibility is certainly that the Legislature did not wish to address potential complexities that might have arisen in the task of harmonizing the new section's process of directed private reclamation with the provisions of the Open Beaches Act. *Compare* Tex. Nat. Res. Code § 33.613(a)(2) *with* Tex. Nat. Res. Code § §§ 61.001-.026, 61.121-.131 (containing the Open Beaches Act as codified and amended). Having discussed the Open Beaches Act extensively in last year's paper, *see* Ratliff & Fordyce 2005 at 16-25 (Section VII), we will not comment further here.

1955.[66] Third, the section directs that every littoral owner of seashore property that fronts on a bay "**shall restore** the affected land to its original boundaries" (as those boundaries are "evidenced" in the residential subdivision plat on file with the real property records of the county in which the property sits),[67] and also "**shall build bulkheads** on the restored land to prevent further erosion of the restored land."[68] Fourth, the section provides that "[a]fter restoration the owner owns the restored land in fee simple," subject only to "the common law rights of the public in public beaches" as "affirmed" by the Open Beaches Act and "the rights of a public school land lessee" whose lease is in effect as of September 1, 2005.[69] Fifth, the section directs the General Land Office to "adopt reasonable rules to govern the restoration of land under this section," including rules to govern the construction and maintenance of bulkheads, any "adverse effects on adjacent property owners," and the creation of penalties for violations of the section or the rules created pursuant to its authority.[70] Sixth and finally, the section reaffirms that only **private** money—not State money—shall be used to carry out the section's directives, apparently confirming that the directed reclamation is to be funded wholly out of each landowner's own pocket.[71]

Section 33.613 clearly represents a new direction in the Legislature's response to chronic erosion of Texas coastal land. Whereas until now, legislated responses to erosion have been financed with public funds,[72] new section 33.613 gives littoral bayshore owners (but not Gulfshore owners, *supra* note 65) not merely the right but apparently the **obligation** (by repeatedly using the word "shall") to supplement the activities of the State and local government entities in combating erosion by investing **their own private resources** in coastal erosion response.[73] Section 33.613 then promises that in exchange for their compulsory investment, each landowner who completes a restoration project will thereafter be restored to his prior ownership of the newly restored land in fee simple.[74]

Given that it ostensibly not merely authorizes but **requires** bayshore landowners to supplement the State's ongoing battle against coastal erosion by investing their own private money in reclamation, one might

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66 Tex. Nat. Res. Code § 33.613(a)(1).

67 Tex. Nat. Res. Code § 33.613(b) (emphasis added).

68 Tex. Nat. Res. Code § 33.613(c) (emphasis added).

69 Tex. Nat. Res. Code § 33.613(b).

70 Tex. Nat. Res. Code § 33.613(d).

71 Tex. Nat. Res. Code § 33.613(e).

72 *See* Tex. Nat. Res. Code § 33.604-.606 (sections of Coastal Erosion Planning and Response Act of 1999 providing for appropriation and management of dedicated State funds for coastal erosion response activities); *see also* 2005 CEPRA Report at 47-48 ("Cycle 4 Needs Assessment") (discussing "unmet needs," limited participation of federal agencies, and "[t]he need to increase federal funding"); *cf. also id.* at App. J ("Federal Funding for Three Coastal Erosion Response Projects").

73 *Compare* Tex. Nat. Res. Code § 33.613(b) (instructing that bayshore owners "shall restore" land to "original" pre-erosion boundaries), (c) (instructing that bayshore owners "shall build bulkheads") *with* Tex. Gov't Code § 311.016(2) (Code Construction Act) ("'Shall' imposes a duty."); *Dallas County Community College Dist. v. Bolton*, 185 S.W.3d 868, 873-74 (Tex. 2005) (discussing Tex. Gov't Code § 311.016). We qualify our interpretation of the word "shall" with the word "apparently" in recognition of the fact that courts occasionally construe the word "shall" as being something less than mandatory if the statutory context surrounding the word "necessarily requires a different construction." *Compare* Tex. Gov't Code § 311.016 *with*, *e.g.*, *Robinson v. Budget Rent-A-Car Systems, Inc.*, 51 S.W.3d 425, 428-29 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) *and Texas Home Mgmt., Inc. v. Texas Dept. of Mental Health*, 953 S.W.2d 1, 7 (Tex. App.—Austin 1997, pet. denied). We also note, however, that when first introduced in the House of Representatives in February, 2005 (in a different bill), the proposed new section 33.613 originally used the word "may" rather than "shall" in each of the two phrases just identified. *See* Tex. H.B. 887, 79th Leg., R.S. (2005) (introduced version) (proposing an earlier version of § 33.613 that would have said, in subsections (b) and (c), that bayshore owners "may" restore land to pre-erosion boundaries and "may" build bulkheads). If considered by a court, this apparent midsession revision from "may" to "shall" could be viewed as strong evidence that the Legislature did indeed intend the word "shall" in its ordinary (i.e. mandatory) sense. *Compare id.* and Tex. Nat. Res. Code § 33.613 *with*, *e.g.*, *Texas Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593-94 (Tex. 2000) ("It is settled that every word in a statute is presumed to have been used for a purpose.") *and Zajac v. Penkava*, 924 S.W.2d 405, 409 (Tex. App.—San Antonio 1996, no writ) (applying rule in context of construing an amendment).

74 Tex. Nat. Res. Code § 33.613(b).

expect that the first controversy over the statute would have been initiated by cost-conscious landowners—but that is apparently not what happened. Instead, the first to initiate any formal protest of the Legislature's action was the executive branch of the State.

On August 26, 2005—roughly two months after section 33.613's June 17 effective date and three months before the GLO's December 1, 2005 deadline for adopting regulations as directed by SB 1044—the General Land Office delivered a letter to the Attorney General challenging the new section's constitutionality and requesting an Opinion Letter (the "Request").[75] In its Request, the GLO argued that because the end result of each application of section 33.613 would be to transform certain now-submerged acreage currently owned by the Permanent School Fund into new upland and transfer it into private ownership, the new section violated article VII of the Texas Constitution, sections 4 and 5.[76] Ignoring that the new section was not permissive but instead apparently **required** bayshore landowners to undertake reclamation at their own expense, the Request contended that the new law "allow[ed]" landowners to take fee simple title to newly created upland,[77] and challenged the new section as giving, in effect, "a **free** grant of state-owned, Submerged PSF [Permanent School Fund] land."[78] Citing a prior Attorney General Opinion, the Request contended that "reclamation of eroded lands through self-help does not change the [State-owned] character of the land," and argued because section 33.613 appeared to alter that general rule by authorizing private reclamation, it was inconsistent with preexisting law.[79] Quoting Black's Law Dictionary, the Request contended that the new section was inconsistent with the law's traditional definition of "accretion" as "the 'gradual accumulation of land by **natural** forces.'"[80] Finally, the Request in indirect language asked that the GLO be relieved—on the ground of the statute's alleged unconstitutionality—from having to fulfill the Legislature's directive that it adopt rules governing implementation of the new law.[81] It appears that after submitting its Request, the GLO then awaited the Attorney General's opinion letter in response and did not adopt rules by December 1, 2005 as the new section had directed.

On March 2, 2006, the Attorney General issued Opinion Letter GA-0407 in response to the GLO's Request (the "Opinion").[82] Though somewhat longer and more detailed than the GLO's Request, the Opinion in many ways adopted the reasoning that the Request had set forth. Though the Opinion implicitly rejected the GLO's broad contention that title-shifting "accretion" under modern Texas law is limited to accumulation of land by "natural forces," it agreed with the GLO's ultimate and narrower premise that under *Natland*, *Lorino*, and *Brainard*, title does not shift from the State to the littoral owner if the owner has affirmatively caused the accretion by filling in the land.[83] Turning then to the Permanent School Fund question, the Opinion then gave the following analysis.

> The statute purports to convey fee simple title to restored lands without providing for compensation to the Permanent School Fund. [Citation omitted.] Article VII, section 4's plain language, as well as judicial constructions and opinions of this office, direct that a

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[75] *See* Letter from General Land Office to Tex. Att'y Gen. of August 26, 2005, Request for Opinion RQ-0388-GA, *available at* http://www.oag.state.tx.us/opinopen/index_rq.shtml.

[76] *See id.* at 3 n.12 & accompanying text.

[77] *Compare id.* at 1 *with* Tex. Nat. Res. Code § 33.613(b), (c) (using the mandatory word "shall"); *see supra* note 73 & accompanying text.

[78] *Compare* Request at 3 (emphasis added) *with* Tex. Nat. Res. Code § 33.613(b) (directing that "[t]he owner shall use **only** private resources and money" in accomplishing the restoration required by the new section), (e) ("State money **may not be used** to restore land under this section.").

[79] *Id.* at 3 n.13 & accompanying text.

[80] *Id.* at 3 n.15 & accompanying text (quoting Black's Law Dictionary at 22 (8th ed. 2004) and adding emphasis).

[81] *Id.* at 1, 4.

[82] Op. Tex. Att'y Gen. No. GA-0407 (March 2, 2006), *available at* http://www.oag.state.tx.us/opinopen/opindex.shtml.

[83] *Id.* at 1-2 (quoting, *inter alia*, *Brainard v. State*, 12 S.W.3d 6, 17, 23 (Tex. 1999), *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 57 (Tex. App.—Corpus Christi 1993, writ denied), and *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943)).

> statute cannot convey fee simple title to Permanent School Fund land to littoral property owners without requiring compensation to the Fund. [Citation omitted.] Attorney General Opinion H-881, for example, considers the constitutionality of a statute "granting the City of Corpus Christi submerged lands in Corpus Christi Bay to use as a public beach without compensating" the Permanent School Fund. [Citing Op. Tex. Att'y Gen. No. H-881 (1976).] Under the statute [at issue in Opinion H-881], the legislature granted the City fee simple title to the submerged lands so long as the City used the land for a public beach. [Citation omitted.] Finding that the land had been dedicated to the Permanent School Fund, the opinion concluded that the legislature could not constitutionally grant the tract to the City "without requiring compensation to" the Fund. [Citation omitted.] Attorney General Opinion JC-0069 similarly construes a conveyance of submerged land pursuant to former article 6837, Revised Civil Statutes, which ceded "[t]he right to the use and control ...of so much of the land and sea bottom below high tide as" a county or municipality bordering on the Gulf of Mexico considers necessary to build seawalls, breakwaters, levees, and drainways. [Citing Op. Tex. Att'y Gen. No. JC-0069 (1999).] The opinion [No. JC-0069] concludes that, consistently with article VII, section 4, the land could not have been conveyed without compensation to the Permanent School Fund.

Op. at 4. Relying mainly on two prior Attorney General opinions—each of which had found invalid a statute that had attempted to grant Permanent School Fund land to a political subdivision without requiring any "compensation to" the Fund in exchange—the Opinion concluded that section 33.613 was invalid because it violated article VII, section 4 of the Texas Constitution. *Id.* Having found the section invalid under section 4 of article VII, the Opinion then declined to consider the GLO's contention that the section also violated section 5 of article VII. *Id.*

The Opinion then stated that since the subsection offering fee simple title to restoring landowners was invalid, the subsection requiring landowners to undertake the restoration was also invalid because the Legislature could not reasonably have "intended to require landowners to restore eroded land" using their own private funds "without the promise of regaining fee simple title." *Id.* Finally, the Opinion stated that because new section 33.613 was, in the Attorney General's view, inconsistent with the constitutional provisions governing the Permanent School Fund, the General Land Office was not required to adopt rules particularizing methods for carrying out section 33.613's broad restoration directive, and in fact had no power to do so. *Id.* at 4-5.

The Opinion's outcome and several aspects of its reasoning may well be technically correct. Wisely, the Opinion implicitly rejected the GLO's unsupported contention that only "natural" accretion can cause title to shift, which contravenes the modern trend in Texas law as I have already explained. By tying its reasoning to specific constitutional restrictions governing the Legislature's disposition of Permanent School Fund land, the Opinion implicitly acknowledged, correctly, that if those specific constitutional restrictions had been absent, the Legislature would have been fully free to authorize the restoration and convey formerly-submerged-but-newly-reclaimed land into private hands. By accurately acknowledging the new section's mandatory nature and by highlighting its requirement that landowners finance the reclamation out of their own pockets, the Opinion avoided the inaccuracies of the GLO's Request letter, which had confusingly characterized the statute as only "allow[ing]" (rather than requiring) littoral owners to engage in restoration, and as making a "free grant" of Permanent School Fund land into private hands. Finally, the Opinion accurately recognized that article VII, section 5 of the Texas Constitution does indeed—even as amended by a vote of the people on September 13, 2003—continue to prohibit the Legislature from "enact[ing] a law appropriating any part of the permanent school fund...to any other purpose" not related to support of this state's system of public free schools.[84]

[84] *Compare* Tex. Const. art. VII, § 5(c) *with* Op. at 2 ("With express narrow exceptions, article VII, section 5 forbids the legislature from enacting a law appropriating any part of the Permanent School Fund to any purpose other than the Fund.").

On the other hand, it can also be argued that the Opinion in some ways missed the forest for the trees.

For example, the Opinion gave no express consideration to very extreme factual circumstances that appear to have fueled the new section's enactment. Among other findings, the Legislature predicated new section 33.613 on the following: "public works, such as dams and flood-control projects on inland waterways and jetties, sea walls, and dykes along the coast, and subsidence caused by the withdrawal of water are **significant causes of [the] erosion**" being experienced by Texas landowners.[85] Through this finding, the Legislature expressly acknowledged that to the extent bayshore owners have lost acreage over past decades, those losses appear to be largely attributable to the deliberate conduct by the State and other government entities. In this sense, while our well-intentioned government entities have certainly never intended to cause erosion as a consequence, the government entities' actions are nonetheless analogous to that of the *Lorino* oysterhouse owner in that by undertaking deliberate activities, they have caused their own acreage to expand—a form of "self-help," however inadvertent.[86] As Texas judicial precedent currently stands, it appears to offer landowners little relief on these facts if any.[87] Presumably recognizing this apparent unfairness in the existing law,[88] the Legislature appears to have formulated section 33.613 as an innovative compromise designed to redress, in part, this apparent unfairness while also addressing the public policy problem created by this state's eroding bayshores at the minimum possible cost to the State. Whereas under existing law the littoral owner has essentially no recourse in the face of government-caused erosion,[89] section 33.613 attempts to implement a new rule: Texas bayshore owners within the section's definition not only may reclaim, but **must** reclaim, the land that has been lost to erosion—and they must do so at their own expense. Given that this state's coastal erosion response efforts are already costing hundreds of millions of dollars in public funds,[90] this compromise seems a reasonable way to address a complex matter of public importance at the minimum cost to the public treasury.[91]

The Opinion also appears not to have considered the comments in some preexisting Texas authorities that littoral landowners should perhaps, under some circumstances, have a reasonable opportunity to "reclaim [their land] by artificial means" even after it has been "lost to the sea."[92]

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[85] SB 1044 § 1(8) (emphasis added).

[86] *Compare id. with Lorino*, 175 S.W.2d at 412-15.

[87] *Compare City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643-47 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (holding that littoral owners lost title to acreage as it eroded in spite of evidence that public works projects had contributed unnaturally to the erosion by impairing the natural "regeneration process") *with Brainard v. State*, 12 S.W.3d 6, 21 (Tex. 1999) (observing about *Davis* that despite the government's interference with the regeneration process in that case, "unchecked erosion was unnaturally allowed to divest the upland owners of their property") (quoting *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 57-58 (Tex. App.—Corpus Christi 1993, writ denied)).

[88] *E.g.*, *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex.1999) (when interpreting a statute, it must be "presume[d] that the Legislature acted with knowledge of the common law and court decisions").

[89] Landowners' sole remedy, it appears, is that if a **government** entity engages in reclamation activities that cause the land to lose its littoral status by constructing new land between the water's edge and the landowner's post-erosion border, this state's takings precedent entitles the landowner to recover takings damages in the amount of the "depreciation thereby caused in the market value of such property."

[90] *E.g.*, 2005 CEPRA Report at 47-48 ("Cycle 4 Needs Assessment").

[91] In fact, if viewed solely from the affected landowners' standpoint, section 33.613 is arguably a less-than-ideal solution in at least two respects. First, by requiring affected landowners to fund the land's restoration, it is requiring them to pay a second time for upland that they previously owned but that was destroyed at least in part by government activities. Second, by its express terms section 33.613 requires **all** landowners within its definition to undertake restoration whether they wish to do so or not. By its terms, it requires that every bayshore owner within its definition invest in restoration: contrary to the GLO Request's contention, it provides "free grants" of land to no one, nor does it contain any opt-out provisions for those affected landowners who do not wish to make that investment.

[92] *Coastal Indus. Water Auth. v. York*, 520 S.W.2d 494, 502 (Tex. App.—Houston [1st Dist.] 1975), *aff'd*, 532 S.W.2d 949 (Tex. 1976) ("Neither do we think the interests of the State would be served by discouraging efforts of owners of land lost

(footnote continued on next page)

Along similar lines, it might also be argued that the Opinion's reasoning took a misstep when it refused to recognize the owner-funded restoration of the eroded acreage as a "sale" for purposes of its analysis under article VII, section 4. Section 4 of article VII does not explicitly define what types of transactions constitute a "sale" that will satisfy its requirements. As the Opinion openly acknowledged, the Attorney General was obligated to construe section 33.613 and article VII, section 4 as being consistent with one another if it could identify any conceivable route to that result.[93] Arguably, a method of harmonizing the new statute with section 4 existed that the Opinion did not explore. By requiring affecting landowners to pay for the restoration of eroded land, section 33.613 plainly extracts from the landowners a form of consideration—a feature that distinguishes the new statute from those addressed by the prior Attorney General Opinions on which the new Opinion relied.[94] It is true that section 33.613 does not cause any money to be paid **directly** to the State; the landowners would likely be paying fellow private citizens to carry out the activities necessary to accomplish the restoration required by the statute. But since helping the State address the public problem of coastal erosion is (according to SB 1044's findings made at the outset) one of section 33.613's apparent purposes, the landowner is apparently defraying costs that could otherwise be borne by the public. In other words, it might reasonably be argued that restoration as directed by section 33.613 constitutes in effect a "sale," not a "free grant," because the State is—in exchange for relinquishing title to the restored land—receiving an important benefit: assistance in its ongoing coastal erosion response efforts. Because section 33.613 in this broader sense extracts consideration from the affected landowners and confers a benefit on the State, the Opinion arguably did not go as far as it might have in considering whether the restoration transaction constituted a "sale" within the meaning of article VII, section 4.[95]

But at the end of the day, even though all potential arguments in defense of the statute were perhaps not fully explored,[96] the Opinion's result may well have been inevitable anyway. The statute might arguably have

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to the sea by gradual submergence to reclaim it by artificial means."); *Fitzgerald v. Boyles*, 66 S.W.2d 347, 349 (Tex. Civ. App.—Galveston 1931, writ dism'd) ("We do not think it can be doubted that, if the land in controversy was west of the shore line of Galveston Bay when the Hunter grant was originally surveyed and located, the grantee and those holding under him have not lost title to the land by the encroachment thereover of the waters of the bay, and whenever the land so submerged, either by natural causes or lawful artificial means, was restored to its original condition, the right to its possession and occupancy by the holders of the original title became paramount."); *see also Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952-53 (Tex. 1976) (reproducing the foregoing passage from *Fitzgerald* and also citing decisions from other jurisdictions recognizing that owners may sometimes have a right to restore).

[93] Op. at 3 ("We must presume that a statute is constitutional....We are enjoined to avoid constitutional problems if possible....Moreover, if a statute can be construed to be valid, a court has a duty to so construe it.") (internal quotations omitted) (citing *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004) and other authorities).

[94] *Compare* Op. at 4 (likening this statute to the statutes involved in Op. Tex. Att'y Gen. No. H-881(1976) and Op. Tex. Att'y Gen. No. JC-0069 (1999)) *with* Op. Tex. Att'y Gen. No. H-881 (1976) (holding that a legislative Act granting to the City of Corpus Christi a fee simple determinable in the surface estate of a section of State-owned tideland "so long as said land is used for a public beach," without requiring any investment by the City in exchange, violated article VII, sections 4 and 5 because it was a "free grant" of Permanent School Fund land) *and* Op. Tex. Att'y Gen. No. JC-0069 (1999) (holding that a "special award" issued to the City of Aransas Pass by the General Land Office in 1944 purporting to convey title to submerged land was invalid both because it was an impermissible free grant of Permanent School Fund land and also because it exceeded the General Land Office's limited authority to convey interests in submerged land).

[95] The Opinion also did not consider that when the Legislative Budget Board examined the potential fiscal impact of new section 33.613 before the new section was enacted, it expressly found that any impact on the Permanent School Fund would be strictly *de minimis* because the lands at issue—so long as they remain submerged—are of only "very little" value. *See* Fiscal Note, S.B. 1044, 79th Leg., R.S. (May 26, 2005) ("Although the agency [i.e. the General Land Office] indicates that the value of submerged lands and their corresponding mineral rights could be in the millions **after** the lands have been reclaimed [at the littoral owners' private expense], **currently** the GLO is receiving very little income from **submerged** lands and corresponding mineral rights and therefore for purposes of this fiscal note, it is assumed that any losses to the [Permanent School Fund] resulting from the passage of this legislation would be minimal.") (emphasis added).

[96] According to the Attorney General's Opinions Committee, only one document in opposition to the General Land Office's briefing was received. That document, from a coastal real estate broker who had testified in favor of section 33.613

(footnote continued on next page)

survived section 4 of article VII based on rationales like those just discussed, but it still might likely have fallen as conflicting with article VII's section 5. Section 5 was amended in the 2003 statewide election to render the Permanent School Fund more accessible for certain limited purposes, but it nonetheless continues to state that "[e]xcept as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose"; and the context surrounding this sentence leaves little doubt, if any, that "support of the public free schools" is the only "purpose" that qualifies.[97] Since the State's efforts to respond to coastal erosion are not among the "[e]xcept[ions]" enumerated by article VII, section 5, it seems unlikely that the exchange legislated by section 33.613—trading title to eroded bayshore in exchange for the affected landowners' direct participation and investment in the State's erosion response efforts—could pass muster under section 5 even if all available arguments had been explored.

Thus, as things now stand, section 33.613's future fate is unknown. On one hand, while Attorney General opinions interpreting statutes are given due consideration by courts, they are merely advisory writings that do not define property rights or resolve disputes on particular facts or between particular litigants.[98] Accordingly, it is at least theoretically conceivable that a bayshore landowner might undertake activities directed by section 33.613 and assert title to the newly restored upland in a court of law and potentially—assuming that his claim were contested by the State—obtain a judicial determination as to whether the Attorney General's Opinion reached the right result. Such an approach would be difficult as a practical matter, however, since the General Land Office—as advised by the Attorney General Opinion—has declined to promulgate the rules that the statute envisioned would be necessary to guide the restoration process.

Under the Attorney General's analysis, one possibility for reviving the statute in the next legislative session might be to add a requirement that bayshore owners make a payment in some amount to the Permanent School Fund in exchange for the title being granted to the restored land. By eliminating any doubt as to whether the transaction qualified as a "sale" under section 4 of article VII, this would eliminate the alleged section 4 deficiency on which the Attorney General's Opinion relied; and by qualifying each transaction as an unmistakable "sale," the transaction would no longer constitute an "appropriat[ion]" of Permanent School Fund land that would trigger the potential section 5 problem that the GLO's Request also asserted but that the Attorney General's Opinion declined to reach. Indeed, some having personal familiarity with section 33.613's history have suggested that in response to the Attorney General's Opinion, such an amendment may be sought.

Yet such a "solution" to the apparent constitutional quandary arguably seems unfair. The Legislature acknowledged in SB 1044 that public works projects sponsored or authorized by the State were "significant causes" of the erosion on the Texas coast; and it appeared to choose a careful compromise by giving title to bayshore owners in exchange for the bayshore owners' direct investment in repairing that harm. Since each piece of land being restored had already been once destroyed, apparently (at least in part) due to public works, it can be argued this solution was already somewhat less than fair, since it was in effect causing them to pay a second time for land that at one time, prior to the governmentally-caused erosion, had already been part of their vested property rights. If section 33.613 is now revised to require that each landowner make yet **another** payment before receiving title to the restored land—this payment going to the Permanent School Fund, in addition to the direct investment that the landowner is already making in the restoration itself—then it can be argued that the landowner has been compelled to pay not merely twice but now **three** times for the same piece of land (the original purchase, the restoration costs, and then the additional payment to the Permanent School Fund). We will be interested to see how this apparent constitutional quandary is resolved.

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during the 2005 session, only discussed the legislation's factual context—the economic impact of erosion on property values and local taxing authorities in certain coastal counties. It asserted no legal arguments *per se*.

[97] Tex. Const. art. VII, § 5(c) (as amended eff. Sept. 3, 2003).

[98] *E.g.*, *Cavender v. Houston Distrib. Co., Inc.*, 176 S.W.3d 71, 73 n.1 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (stating that although Attorney General opinions are entitled to due consideration, they are not binding on courts); *Taxpayers for Sensible Priorities v. City of Dallas*, 79 S.W.3d 670, 676 (Tex. App.—Dallas 2002, pet. denied) (same).

IV. The Case Of *TH Investments, Inc. v. Kirby Inland Marine, L.P.* (Current Appeal): Testing *York*.

In last year's paper we noted and briefly commented upon a fascinating case, *TH Investments, Inc. v. Kirby Inland Marine, L.P.*, in which an appeal in the Fourteenth Court of Appeals had at that time only recently been commenced.[99] Today, one year later, briefing in the case has recently been completed and it is now set for oral argument on June 6, 2006. In our view, the trial court's decision in this case appears to have been fueled by some basic misconceptions about the source and nature of littoral seashore owners' rights in Texas that, if perpetuated by affirming the trial court's decision on appeal, will inject significant confusion into this state's jurisprudence on those issues. With briefing now completed and the case soon to be poised for decision within the year, a more extensive discussion of this fascinating and important case is warranted.[100]

At issue in *TH Investments* is the reach and vitality of the Texas Supreme Court's decision in *Coastal Industrial Water Authority v. York*, 532 S.W.2d 949 (Tex. 1976). Accordingly, our discussion begins a brief summary of the facts and holding of *York*, modified only immaterially from the discussion in our paper last year.[101]

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.[102] 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

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[99] Ratliff & Fordyce 2005 at 32 (discussing *TH Investments, Inc. v. Kirby*, Appeal No. 14-05-00204-CV in the Fourteenth Court of Appeals, Houston (currently pending)).

[100] We note that counsel for the private landowners and appellants in this case, Michael V. Powell, has also addressed certain aspects of this potentially important dispute in his paper for this conference, and presumably may address it in his oral remarks. *See* Michael V. Powell, *The Takings Clauses: Limits On What The Government May Do On The Coast*, 2d Annual Texas Coastal Law Conf. (May 18-19, 2006) at 10-11 (course materials Tab K). In light of Mr. Powell's firsthand familiarity with this lawsuit's history and evidence, we naturally acknowledge his comments about the case and, to the extent they arise from his closer knowledge about the case, defer to them. The following discussion cites freely where appropriate to the appellate briefs filed by the parties in the case, which naturally are available from the Fourteenth Court of Appeals but which are also on file with the authors of this paper and may be provided upon request.

[101] Ratliff & Fordyce 2005 at 30-32.

[102] The three Texas cases the court cited were *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)). *Fisher*, *Fitzgerald*, and *Diversion Lake Club* each held that because there had been no essential change in the character of the land other than its merely having become covered by water, there was no sound basis on which to find that the record owners had been divested of title.

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 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").[103] 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*[104] and *Luttes*.[105] 532 S.W.2d at 951 n.1.[106] 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.

With respect to this subsidence question, the facts of *TH Investments* are materially similar to those that were presented by *York*. The appellant—TH Investments, Incorporated ("THI")—is a successor-in-interest to a patentee who received private title to one and one-half leagues of land in Harris County via a patent issued by the Republic of Texas in 1845 (the "1845 Patent"). Appellant's 11/18/05 Br. in *TH Investments* at 3.[107] Though the appeal also concerns a second tract involving different issues, the tract at issue for this paper's purposes is a 27-acre tract (referred to by the parties as "Tract 1") that was carved out of the larger patent in 1895, *id.* at 3-4, and that lies roughly 37 miles inland from the Gulf near the Houston Ship Channel at the confluence of Old River and San Jacinto River, *id.* at 5-6. The relevant boundary of Tract 1 is defined by a call to "the meanders of [O]ld [R]iver." *Id.* at 4. It is undisputed that THI holds record title to Tract 1 through an unbroken chain of title that traceable to the 1875 Patent. *Id.* at 5. It is likewise undisputed that at the time Tract 1 was first conveyed into private ownership by the Republic of Texas as part of the larger 1845 Patent, no portion of the land was submerged. *Id.* at 4. According to the trial evidence, Tract 1 was first noted as having become substantially inundated by water

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[103] *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).

[104] *Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736 (1956).

[105] *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958).

[106] "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.

[107] The following discussion cites freely where appropriate to the appellate briefs filed by the parties in the case, which—although naturally available from the Fourteenth Court of Appeals—are also on file with the authors of this paper and may be provided upon request.)

sometime around 1973, *id.*, and today it is—at most times, though not all—covered by a very shallow layer of water, *id.* at 6. Interestingly in light of Justice Reavley's "personal[]" footnote in *York* (*supra* note 106), the land at issue in this case lies further upriver—that is, further from the Gulf—than did the land near the San Jacinto Monument that *York* actually involved. *Id.*

One of the appellees, Kirby Inland Marine ("Kirby"), is successor-in-interest to a lease of Tract 1 that was made to it by THI's predecessor in interest in 1978. *Id.* at 5. In 2002, THI purchased Tract 1 from the owner who had previously leased it to Kirby's predecessor and took over as lessor. *Id.* Sometime thereafter, THI notified Kirby that THI would be terminating Kirby's month-to-month lease. *Id.* In response to THI's termination notice of termination, Kirby filed suit for an injunction against its eviction based on the simple contention that when Tract 1—even though undisputedly dry when patented out of the public domain—became substantially covered with water, title had automatically reverted out of THI's predecessor in interest and back to the State. *Id.* at 1, 13-14, 18.[108] THI brought a counterclaim against Kirby seeking to establish its ownership through declaratory relief and a trespass to try title claim, and also joined the Port of Houston Authority (the "Port")—which generally asserted ownership of submerged lands in the area under a 1927 Act of the Legislature—as a counterdefendant in THI's effort to confirm the validity of its record title. Port's 2/17/06 Br. at xiv-xv.[109]

THI introduced trial evidence showing that Tract 1's present submerged condition has resulted not from erosion (or any other horizontal transportation of land particles) but rather from subsidence: a vertical sinking of the land scientifically attributable to the withdrawal of water and minerals by government and private industrial entities. Appellant's 11/18/05 Br. at 7-8 (quoting expert testimony that the observed changes in the land's condition are "totally inconsistent with erosion"). THI's evidence showed that apart from the land's gradual sinking beneath the water and the concomitant changes in vegetation patterns, Tract 1 has not been altered from its condition when patented in any substantial way: for example, THI's experts were able to identify the very same channels in the land that were also shown in aerial photographs from 1930, and the Port's experts and surveyors agreed that subsidence had occurred. *Id.* at 9-10. THI's evidence also showed that any erosion had been more than counterbalanced by deposits of sediment, and that therefore, to the extent erosion and accretion had played any role in Tract 1's change of condition, their combined net impact had been a positive build-up of land. *Id.* THI also presented testimony from a licensed surveyor that Tract 1's original boundaries, notwithstanding their submergence, remained reasonably identifiable today and could be located effectively. *Id.* at 13-14.

The Port's expert agreed that the positive deposits on Tract 1 had exceeded the rate of erosion. *Id.* Nonetheless, however, Kirby and the Port contended that the evidence had not isolated subsidence as the **only** factor that had affected the land's condition, and argued that absent a conclusive **sole cause** showing by THI, the court should apply the rule that generally governs erosion and find that title had—upon Tract 1's substantial submergence beneath the surveyed elevation line of mean high water—reverted to the State. *See*, *e.g.*, Port's 2/17/06 Br. at 12-15, 28-30.

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[108] Though the Port and Kirby sometimes used the word "escheat" to describe their theory, their theory is more accurately referred to under Texas law by the real property concept of "reverter." *Compare* Appellant's 11/18/05 Br. at 1, 13-14, 18 *with*, *e.g.*, *Coastal Indus. Water Auth. v. York*, 520 S.W.2d 494, 499 (Tex. App.—Houston [1st Dist.] 1975), *aff'd*, 532 S.W.2d 949 (Tex. 1976) (framing subsidence question as whether the record title owner whose land has subsided beneath the line of mean high water "loses title **by reverter** to the State of Texas") (emphasis added). "Escheat" is a technical procedure through which title to abandoned real or personal property can be adjudicated as having been transferred to the state when a natural person has died intestate and without heirs (or, in the case of a corporation, when certain forms of dissolution occur). *See* Tex. Prop. Code § 71.001-.304 ("Escheat of Property"); *see also*, *e.g.*, *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 552 (Tex. 1981) (discussing applicability of "escheat" to a dissolved corporation). It is a purely statutory procedure that does not exist outside of legislative enactments. *Robinson v. State*, 87 S.W.2d 297, 298 (Tex. Civ. App.—El Paso 1935, writ dism'd); *cf. also Texas Mun. League Intergovt'l Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377, 382-83 (Tex. 2002).

[109] The State of Texas was initially also sued by THI, but the trial court dismissed the State after finding that the Port had succeeded to the State's title under the Legislature's valid 1927 conveyance. Port's 2/17/06 Br. at xv.

After a trial on the merits, the district court ruled that title had reverted to the Port, ruled that THI therefore lacked any right to evict Kirby from or otherwise exert any rights of ownership over Tract 1, and issued detailed findings of fact and conclusions of law. *See* 4/22/04 Findings of Fact & Conclusions of Law (the "4/22/04 FOF-COL").[110] Among other findings of fact, the court ruled that the "physical evolution" of Tract 1 had been caused by multiple physical phenomena, both "natural" and "man-made," and that it was not possible for the various forces to be segregated from one another. *Id.* at ¶ 11.[111] It also found that the water covering Tract 1 was "tidally influenced," *id.* at ¶ 6, and that because the Legislature's 1927 Act had conveyed all "tidal flats" in the area to the Port, *id.* at ¶¶ 34-35, THI's predecessors in interest had "lost ownership" to Tract 1 as Tract 1 "gradually became submerged beneath the line of mean high tide," *id.* at ¶ 37. The district court further justified its decision by contending that the "question of title" to Tract 1 was "an issue affecting the public interest in the use and enjoyment of tidally influenced, navigable waters." *Id.* at ¶ 39. The district court then held that the Supreme Court's 1976 decision in *York* did not "control the outcome of this action" for three reasons: first, because *York* "did not result in a private property owner obtaining fee simple title to submerged land, as is claimed by THI"; second, because *York* "does not apply to cases where, as here, the submerged land at issue lies under tidal waters"; and third, because "other factual and legal elements found in *York*"—which the court's written findings did not enumerate—were simply "not present in this case." *Id.* at ¶¶ 40-41.

We do not, in this paper or in our presentation, mean to suggest who should win *TH Investments, Inc. v. Kirby Inland Marine, L.P.* on appeal. That question lies in the hands of the Justices of the Fourteenth Court of Appeals, who we trust will subject the trial record in the case (to which this paper's authors have not sought access) to a painstaking examination. Given their impending decision's potential importance to future jurisprudence concerning certain coastal boundaries in this state, we merely offer some limited thoughts based on our limited familiarity with the case (review of the trial court's findings and conclusions and the parties' briefs on appeal).

First, we echo the appellant's concern in *TH Investments* that if the appellate court holds—as did the district court—that as a matter of law, *York* simply "does not control" this case's outcome,[112] then it is difficult to see what if any aspects of *York* will remain.

York did not come out of nowhere; on the contrary, it rested on basic principles and precedent that were well founded both in sound policy and in common sense. As the Supreme Court subsequently emphasized in *Brainard*, the general rule that boundaries move as a shoreline erodes or accretes is based largely in the idea that because the land itself is being dissolved and horizontally transported, it can no longer be identified because it no longer occupies the location that it once did.[113] *Brainard* commented that in *York*, the Supreme Court had "carefully distinguished" between the phenomena of erosion and accretion on one hand and subsidence, which—by contrast—"involves **no displacement of the submerged land** in relation to the bed[.]"[114] *York*, in turn, had relied on a string of prior decisions each holding that where there is no essential change in the character of the land other than its merely having become covered by water, there is no sound basis on which to find that the submergence has caused the record owners to be divested of their title. *See supra* note 102 & accompanying text (citing prior Texas authorities relied upon by *York*). *York* and the opinions it cited are corroborated by other judicial decisions and opinions by the Texas Attorney General likewise acknowledging that under Texas law, unlike that of some other

[110] The district court's written findings and conclusions, as well as its written final judgment, can be found behind Tab A of the Appendix filed on 11/18/05 by Appellant THI in the Fourteenth Court of Appeals.

[111] In full, this paragraph of the court's findings reads: "The physical evolution of the 27 Acre Tract over time [i.e. Tract 1] was caused by various natural and man-made forces, including subsidence, erosion, deposition, accretion, flooding, tidal inundation, sea level rise, dredging, dredge spoil dumping, boat wakes, storm surges, and the location of sunken barges and barge fleeting in The Big Empty. The effects of all these varied forces on the site cannot be separated, and the extent to which subsidence versus erosion contributed to the submergence cannot be determined." 4/22/04 FOF-COL at ¶ 11.

[112] 4/22/04 FOF-COL at ¶ 40.

[113] *Brainard v. State*, 12 S.W.3d 6, 20 (Tex. 1999) (discussing *York*, 532 S.W.2d at 952-54).

[114] *Id.* (quoting *York*) (emphasis added; internal quotations omitted).

states, mere submergence beneath tidal or navigable waters (as opposed to horizontal transportation of land particles) does **not** divest a record owner of title or cause any reversion of title to the state. *See* Appendix A (attached to this paper) (collecting authorities); *see also supra* note 22.

Second, as *York* specifically pointed out, the modern risk that land will **sink**—unlike the long-recognized risk that land will erode or accrete—is not an "ordinary hazard" that has historically been viewed as burdening title to land bounded by a water's edge.[115] Since subsidence, unlike accretion and erosion, cannot be easily presumed to have been contemplated by the granting sovereign as a restriction that burdened the private owner's title at the time it was originally granted, moving an owner's boundary due to subsidence-caused submergence is hard to justify, and conceivably may constitute an unconstitutional taking of a vested right.[116]

Third, we note that in view of the decisions *York* cited and the other likeminded authorities collected on the attached Appendix A, Justice Reavley's famous footnote 1 in *York*—which he expressly made "personally," i.e. without purporting to speak for the unanimous court for which he was otherwise writing[117]—should probably be viewed as carrying very little force, if any, given the considerations that now inform Texas seashore boundary law.

For example, Justice Reavley's comment that *York*'s holding might be appropriate to apply only when the record title owner's interest in "the private development and use of [tidally submerged] land" is not outweighed by "public rights" conflicts with subsequent decisions clearly explaining that Texas law—unlike some other American jurisdictions—does **not** recognize any sweeping "public trust doctrine" that restricts private ownership of underwater land. On the contrary: in 1993's *Natland*, the Corpus Christi Court of Appeals specifically considered the State's argument in a title dispute that the record owner's title to tidally submerged lands was "encumbered with an implied trust for the benefit of the public"—and unequivocally rejected it.[118] Carefully reviewing the leading "public trust" authorities from other jurisdictions asserted by the State, the well articulated opinion in *Natland*—which the Texas Supreme Court later approved in large part on other issues[119]—drew the following conclusion.

> Based on the discussion of public rights in [the leading federal "public trust" case], many states have developed their own versions of a "public trust doctrine" restriction that follows submerged lands conveyed into private hands by the state. [Citations omitted.] The United States Supreme Court later recognized that individual states may define the lands held in public trust and recognize private rights in such lands. [Citations omitted.] There is no universal, uniform law upon the subject, but each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy. [Citations omitted.] **This doctrine that the sovereign holds submerged lands in trust for the benefit and use of the public, thereby imposing on submerged lands granted by the State implied restrictions on their use and development, has not fared well in Texas jurisprudence.**

865 S.W.2d at 59-60 (citing, *inter alia*, *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892)) (emphasis added). It then cited venerable Texas Supreme Court decisions plainly acknowledging the State's power to convey valid title to underwater land, and held that contrary to the State's contention, "there were **no implied reservations for the benefit of the public**" in the patents of underwater land that it was being asked to construe; instead, the **only** "reservations for the public use and benefit" encumbering the patents were those that were "explicit in the grant." *Id.* at 60. In light of this recent, clearly articulated analysis (which, unlike Justice Reavley's personal comment on the subject, was essential to the holding of the court), Justice Reavley's apparent proposal that public interests

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[115] *York*, 532 S.W.2d at 954.

[116] *Compare id. with supra* note 8; *cf. also* Ratliff & Fordyce 2005 at 22-23 (discussing takings analysis).

[117] *See supra* note 106 (quoting relevant portion of Justice Reavley's famous footnote 1, 532 S.W.2d at 951 n.1).

[118] *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 58-60 (Tex. App.—Corpus Christi 1993, writ denied).

[119] *Brainard*, S.W.3d at 20-22 (approving other aspects of *Natland*, 865 S.W.2d at 57-58).

should be weighed against private ones on an *ad hoc*, case-by-case basis in deciding whether to apply the rule of *York* is simply not part of Texas law, nor does it appear that it ever has been so.[120] Similarly, *Natland*'s analysis and the authorities on which it relies likewise indicates that one of Judge Reavley's other stated concerns—his suggestion that Texas law somehow disfavors "allow[ing] private owners generally to hold title to land under the sea"—was not well founded, and in fact was directly contrary to long established Texas law.[121]

Furthermore, by attempting through rhetoric to limit *York*'s holding to the facts of the case presented and avoid creating any rule of general applicability, Justice Reavley's personal *dicta* interfere with the important principle of *stare decisis*, which—as the Supreme Court reiterated in 2002—"is never stronger than in protecting land titles."[122] The record title owner in *THI Investments* purchased Tract 1 in 2002, more than a quarter-century after the Supreme Court issued its *York* decision addressing the subsidence-caused submergence of materially similar land. The *stare decisis* doctrine, which favors certainty, stability, and the protection of reasonable expectations, arguably weighs quite heavily against denying that purchaser the benefit of precedent on which, basic fairness suggests (especially given the land's factual resemblance to that involved in *York*), the purchaser ought reasonably to have been entitled to rely. Indeed, recent decisions by the Texas Supreme Court have expressly reaffirmed that factually similar pieces of land ought to be treated similarly when locating shoreline boundaries.[123]

Likewise, Justice Reavley's concern that recognizing the record owner's title to subsided land would "make the location of seaward boundaries an exercise of pure guesswork" must be carefully viewed against the backdrop of Texas precedent. Arguably, his concern largely refuted by the survey evidence THI introduced at trial, which—although the district court was not persuaded by it—nonetheless illustrates that meaningfully identifying the boundaries of subsided land, notwithstanding their submergence, is far from an impossible task.[124] THI's survey evidence was consistent with *York* and other Texas cases stating that so long as the formerly above-water boundaries can still be identified with reasonable certainty, no sound reason exists for finding that the record owner has lost title.[125] If any aspect of *York*'s rule seems suitable for fresh analysis on case-by-case, fact-specific basis, it is arguably the question of whether now-submerged boundaries can still be "reasonably identified." Justice Reavley's *dicta* postulate that allowing a factual inquiry on this question would create an unacceptable risk of

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[120] Furthermore, as THI's counsel suggests in his paper submitted to this year's conference, the district court's apparent imposition of an *ad hoc*, case-by-case analysis onto the framework of submerged land title analysis threatens to create a new end-run around the takings clauses of the federal and Texas constitutions. Michael V. Powell, *The Takings Clauses: Limits On What The Government May Do On The Coast*, 2d Annual Texas Coastal Law Conf. (May 18-19, 2006) at 10-11 (course materials Tab K). Consistent with Mr. Powell's comments, we find it hard to see what policy justifies injecting a new and undefined public/private balancing test into this state's jurisprudence of property and governmental takings, which many would say is already complicated enough.

[121] *Compare York*, 532 S.W.2d at 951 n.1 *with Natland*, 865 S.W.2d at 58-60; *see also* Appendix A attached to this paper (collecting Texas authorities recognizing private ownership of underwater land). To any extent that Judge Reavley's concern may have been founded in an idea that private ownership of the beds of the Gulf or its arms would somehow impair the public's rights (as well as the rights of all relevant governments, including the United States) to use public navigable waters, if any, that might flow **over** the bed, that concern was likewise unwarranted. As previously mentioned, Texas law has long recognized that where navigable waters flow over privately owned land, the bed's privately owned character in no way impairs the public's right to use the water—nor, conversely, does the water's public character alter the privately owned nature of the bed. *See supra* notes 30-34 & accompanying text (citing authorities).

[122] *John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 281 n.36 & accompanying text (Tex. 2002) (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)).

[123] *See Kenedy Mem. Found.*, 90 S.W.3d at 283-84.

[124] *Compare* 532 S.W.2d at 951 n.1 *with* Appellant's 11/18/05 Br. in *TH Investments* at 13-14 (summarizing surveyor's testimony).

[125] *E.g.*, *York*, 532 S.W.2d at 953 (quoting *State v. West Tennessee Land Co.*, 127 Tenn. 575, 158 S.W. 746, 752 (1913) for rule that title to land should be "unaffected" by submergence "as long as [the record owners] can reasonably identify it and fix its boundaries").

"guesswork" and that courts therefore could properly exclude evidence of a subsided boundary's location as a matter of law. But such a proposition is directly contrary to what the unanimous court's opinion in *York* actually **held.** *See supra* note 125 (quoting *York*). At minimum, if Justice Reavley's comment about potential "guesswork" is considered at all, it should be weighed very carefully against important principles, such as the takings jurisprudence of this nation and this state, that can reasonably be viewed as counterbalancing it.[126]

Finally, Judge Reavley's concern that permitting private ownership of subsided shorelines might "restrict the enjoyment of public beaches"[127] is less than compelling since with respect to the Gulf-facing beaches that the term "public beach" is typically deemed to connote, the Legislature has, via the Open Beaches Act, given the State's agents remarkable powers to prevent harmful "restrict[ion]" from taking place.[128] And with respect to land such as that actually involved in *TH Investments*, Justice Reavley's concern seems misplaced, as the area at issue—having been deemed private property since 1845, and having now served as an industrial site for decades—hardly fits any conventional conception of a "public beach."

Leaving the district court's apparent policy-based reasons for resisting *York* temporarily aside, one must acknowledge at least one hurdle facing THI in this case that the record title owner in *York* did not have to face: a theory of commingled physical factors. Whereas the governmental unit in *York*, by itself initiating suit to condemn a large portion of the same land, conceded that the submergence had resulted from subsidence, the Port in *TH Investments* contends that the submergence has not resulted from subsidence alone but instead has been caused by a combination of factors, including erosion.[129] Among its other findings and conclusions, the district court specifically found that the impact of subsidence was entangled with, and could not be "separated" from, the impact of other forces including erosion;[130] and it is admittedly true that in prior cases involving evidence of commingled forces, some decisions have given the benefit of the doubt to the State.[131] Accordingly, it is conceivable that even if

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[126] Since one of this paper's authors was counsel for the landowners in *John G. & Marie Stella Kenedy Memorial Foundation v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002), we naturally are sensitive to the concern Justice Reavley expressed that inquiring into the cause of land's submergence could complicate the application of the settled water-elevation rule that generally governs shoreline boundaries at the coast. *Compare York*, 532 S.W.2d at 951 n.1 (citing *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958)) *with* Ratliff & Fordyce 2005 at 6-16 (discussing *Luttes*, *Kenedy Mem. Found.*, and *Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736 (1956)). We note only that *Kenedy Memorial Foundation* did not involve subsidence nor any other change in the land's physical condition and thus did not involve—nor did it even gesture towards—theories like the one asserted against the record title owner in *TH Investments* and *York*. *See Kenedy Mem. Found.*, 90 S.W.3d at 271, 289 (noting that the land had apparently "remained the same" for two hundred years, and that no party was contending otherwise). While we obviously believe that the *Rudder-Luttes* rule's mathematical certainty is good policy, we do not agree that it should be permitted to run roughshod over unusual physical changes, such as subsidence, that unlike erosion and accretion are not among the ordinary risks and hazards of shoreline ownership and hence are not inherent aspects of the record owner's title. *Compare id. with York*, 532 S.W.2d at 954; *see also supra* text accompanying notes 115-116.

[127] *York*, 532 S.W.2d at 951 n.1.

[128] Indeed, as this paper's authors and others have argued, the Open Beaches Act—especially as construed by Texas courts in the decades that have now passed since *York*—may now have traveled **too** far in the name of preventing such "restrict[ion]," and has sometimes been used to impair vested property rights in ways that might well be deemed unconstitutional if the statute's constitutionality were freshly and aggressively challenged today. *See*, *e.g.*, Ratliff & Fordyce 2005 at 16-25 (Section VII).

[129] *Compare York*, 532 S.W.2d at 951 (stating that "[t]he material facts are not in dispute" and then going on to describe the undisputed facts concerning both the subsidence itself and its underlying cause) *with* Port's 2/17/06 Br. in *TH Investments* at 12-15, 28-30 (contending that in this case, unlike in *York*, "erosion was a material cause of the submergence," and identifying record evidence in alleged support of Port's contention).

[130] *See supra* note 111 & accompanying text (quoting 4/22/04 FOF-COL at ¶ 11).

[131] *E.g.*, *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 646 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (finding for purposes of an erosion-vs.-avulsion analysis that hurricanes' impact had been commingled with other factors such as "summertime night winds and quick water action," and then relying partly on commingling to hold that the littoral owners had not carried their burden of "overcom[ing] the presumption" that title to underwater acreage lay with the State).

the court of appeals disagrees with the district court's presumption that *York* does not **legally** control this dispute, it might nonetheless affirm the trial court outcome on the ground that as a purely evidentiary matter, the evidence favoring THI's theory of causation was insufficiently strong—under the standard of review that a court of appeals must apply, which as to factual findings is highly deferential—to warrant disturbing the district court's finding of fact.

Such a holding should surely not be reached lightly, however. THI contends that the evidence conclusively negated all chance that **any** part of Tract 1's submergence could reasonably be attributed to erosion, and it was undisputed that some substantial amount of subsidence had occurred. In the almost incomparably complex world of oceanic and fluvial forces and their interactions, requiring littoral or riparian owners aggrieved by government-caused subsidence to prove that subsidence was the "sole cause" of their land's submergence might prove an impossible burden to carry. Furthermore, imposing such a burden would arguably conflict with the analysis that at least one recent Texas Supreme Court decision has, in a somewhat controversial takings case, recently used.[132]

It is beyond dispute that subsidence has played a very substantial role in causing once-dry land to become newly submerged in many areas at or near the Texas coast. Given the phenomenon's widespread impact—and, as a consequence, the *TH Investments* appeal's potential to set precedent that may affect countless property owners' rights—we hope that the Fourteenth Court of Appeals gives all due consideration to every argument asserted by either side in this case.

[132] *See Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 551-54 (Tex. 2004) (holding a water district liable under the Texas Constitution's takings clause despite overwhelming evidence that the district's dam operations—if they played any role whatsoever in damaging the plaintiffs' ranch—was commingled with other factors). Having participated as counsel for the government entity ultimately held liable in *Gragg*, this paper's authors acknowledge openly that cause-in-fact standards in Texas takings decisions are currently anything but clear.

APPENDIX A

Supplemental Authorities List
(Nonexhaustive)

- *Baylor v. Tillebach*, 49 S.W. 720 (Tex. Civ. App. 1899, no writ). Record title owners brought trespass to try title claim against defendant who asserted adverse possession and ownership of 200 underwater acres in Offat's Bayou on Galveston Island. Plaintiff was record title holder under an 1840 patent issued by the Republic of Texas. The defendant claimed that the patent was invalid merely because the land was located underneath "navigable waters," but the court of appeals citing a venerable treatise held that "there [was] nothing in this contention, for it [was] well established that a state may grant to individuals or corporations the soil of [i.e. the soil beneath] public navigable waters."

- *North American Dredging Co. v. Jennings*, 184 S.W. 287 (Tex. Civ. App.—Galveston 1916, no writ). Record title owners sued trespassers to enjoin their removal of oysters from beds on private lands covered by Offat's Bayou on Galveston Island. The court of appeals' analysis presumed that the land beneath the waters was privately owned and that the land's submergence beneath navigable public waters did not impair that right in any way.

- *Chouke v. Filipas*, 10 S.W.2d 807 (Tex. Civ. App.—Galveston 1928) *aff'd on other grounds*, 120 Tex. 508, 40 S.W.2d 38 (1931). Record title owner of navigable underwater land in Sydnor's Bayou on Galveston Island built fence to prevent neighbor from navigating over and damaging his oyster bed, and neighbor sued for fence removal. Finding in owner's favor, the court of appeals held that the owner's "property right in his oysters" was "inherent in his title to the land on which the oysters were planted" and that the owner was "entitled to full protection [of] such right." In reaching this conclusion it noted that the State's "authority...[to] dispose of its lands which form the beds of navigable streams or are covered by navigable tide-waters" had been "uniformly recognized" in Texas law.[†]

- *Fisher v. Barber*, 21 S.W.2d 569 (Tex. Civ. App.—Beaumont 1929, no writ). Record title owner of lake within boundaries of patent sued a trespasser who both asserted a right to hunt and fish on the water and also contended that the underwater land itself was publicly owned. The lake had once been landlocked but had subsequently become connected to Trinity Bay through the digging of a navigable channel. (The opinion never identifies by whom the channel was dug.) Relying mainly on a 1913 Tennessee decision, the court of appeals held that the lake's connection to the bay had **no impact** on the land's ownership; it had little difficulty finding that because the grantor's apparent intent continued to control, the plaintiff "remained the legal owner and holder of all the land" to the "utmost extent" of the boundaries indicated in the grants and patents—regardless of the character of the water covering the land. As long as record title owners "can reasonably identify and fix [their land's] boundaries" as set forth in the language of those grants and patents, the court held, the land's submergence beneath navigable waters "does not deprive the owners of title."

[†] The Supreme Court affirmed the court of appeals' holding based on a statute granting specific protections to oyster bed operators regardless of land ownership, and hence did not reach the land ownership aspect of the case.

- *Fitzgerald v. Boyles*, 66 S.W.2d 347 (Tex. Civ. App.—Galveston 1931, writ dism'd). Certain land bordering Galveston Bay had been submerged for a while due to action of storms, but was subsequently reclaimed by deposits from the government's dredging of the Houston Ship Channel. The record title owner's grant was bounded by a call to the edge of the bay. A would-be buyer sued the record title owner alleging that the land's temporary submergence had rendered it a public school land "vacancy" subject to sale by the State. Affirming a directed verdict for the record owner, the court of appeals held that "the grantee and those holding under him have not lost title to the land by the encroachment thereover of the waters of the bay."

- *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (Tex. Comm'n App. 1935, opinion adopted). A fishing club's patents were bounded by a call "to the banks of the Medina River," which was a navigable waterway. The club's predecessor-in-interest built a dam that caused the river to overflow its natural banks, creating a reservoir, and the club sued trespassers to enjoin the public from fishing in the resulting lake. The Supreme Court stated that although the original riverbed itself remained public property under the terms of the patents, the land newly covered by the reservoir remained privately owned. It also held that because the lakebed remained privately owned, the public had no easement to use the banks of the reservoir; the public's sole right would have been to use the banks of the original river itself, which was irrelevant because the original riverbanks were now submerged.

- *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Civ. App.—Waco 1935, writ dism'd). The record owner's patent called to the east margin of the lake "and thence a given number of varas **across the lake** to the west margin thereof." The owner built a fence across the lake to prevent his neighbor from boating and fishing on the part of the lake within his survey lines, and sued to enjoin the neighbor's trespass. The court of appeals held that since the field notes to the patents "show an unmistakable intention to convey the bed [of the lake], the plaintiff "is the owner of all of that part of the bed of the lake within its enclosure." In other words, the grantor's intent determined title, and the land's submergence was irrelevant.

- *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 414-15 (Tex. 1943). "Although the strip of land involved may not be sold or granted by an executive officer of the State, in the absence of a statute empowering him to do so, the Legislature has the power to make or authorize the making of such sale or grant....'If the government could not exercise this right, in severing this common property, and appropriating portions of it to private use, it would not only curtail the ordinary powers, which every nation has for self-development, but it would presuppose a deficiency, in the sovereign power, to control or dispose of what belongs to it.'" [Quoting *City of Galveston v. Menard*, 23 Tex. 349 (1859).]

- *State of Texas v. Chouke*, 154 F.2d 1 (5th Cir. 1946), *cert. denied*, 329 U.S. 714 (1946). Follow-up case involving same land as *Chouke v. Filipas* discussed above: Sydnor's Bayou on Galveston Island. In an eminent domain suit brought by the United States to condemn the bayou land for federal use, the State contended that it, not the record title owners, should receive the takings compensation because the land's submergence rendered the record owners' patents void. The Fifth Circuit rejected the State's contention and awarded compensation to the private owners because *Baylor v. Tillebach*, *North American Dredging v. Jennings*, and the prior *Chouke* decision (all discussed above) showed that Texas law neither prohibited nor limited private ownership of land beneath tidal waters, so the terms of the patents controlled.

- *State v. Bryan*, 210 S.W.2d 455 (Tex. Civ. App.—Austin 1948, writ ref'd n.r.e.). After quieting its title to a lakebed via prior litigation in 1917, the State sold it to private owners through conveyances made in 1918 and 1928. Changing course in the 1940's, however, the State thereafter sued the private owner to have its own 1918 and 1928 conveyances invalidated on the ground that because the bed had been deemed covered by navigable waters, it was not lawfully "subject to sale" by the State. The court of appeals rejected the State's argument and held for the record title owner, implicitly confirming that no public policy prohibits private ownership of navigable underwater land.

- Op. Tex. Att'y Gen. No. H-68 (1973). District attorney wrote Attorney General asking "whether it [would be] trespass for a boat, floating in tidal water, to occupy a position over private, submerged property." Citing *Diversion Lake v. Heath* (discussed above), the Attorney General commented that "[w]here private property is submerged...it remains such."

- *Port Acres Sportsman's Club v. Mann*, 541 S.W.2d 847 (Tex. App.—Beaumont 1976, writ ref'd n.r.e.). Fishing club owned property that, although apparently not covered by navigable waters when patented in 1875, had since become submerged beneath navigable waters of Big Hill Bayou. Fishing club erected a fence across waters to keep public from boating and fishing and sued for injunction against trespassers, and trespassers countersued for an injunction requiring removal of the fence. Citing *Coastal Industrial Water Authority v. York*, *Fitzgerald v. Boyles*, *Fisher v. Barber*, and *Diversion Lake Club v. Heath*, the court of appeals held that "the title to the land ha[d] not been changed by its [becoming] submerged" and that the survey lines in the patent continued to control.

- *City of Port Isabel v. Missouri Pac. R.R. Co.*, 729 S.W.2d 939 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.). City held a 1931 patent from the State conveying to it 1172 acres of land submerged under the waters of the Laguna Madre and bounded by a seaward call to the "shoreline of the Laguna," and Missouri Pacific Railroad held a grant bounded by a landward call "going to the Laguna Madre." After noting that the State's conveyance of submerged land to the City was fully valid, the court of appeals held that the City owned the disputed land according to the express terms of the competing grants. Public policy arguments were not raised and played no role in its analysis.

- Op. Tex. Att'y Gen. No. JM-1123 (1989). "**Except where valid grants have been made**, the State of Texas has title to all submerged lands of all bays, inlets, and other waters along the Gulf of Mexico." [Emphasis added.]

- *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52 (Tex. App.—Corpus Christi 1993, writ denied). [Substantially discussed in foregoing paper. *See supra* text accompanying notes 118-121.]

- Op. Tex. Att'y Gen. No. LO-97-079 (1997). The Executive Director of the Texas Parks and Wildlife Department wrote the Attorney General asking whether boaters violate the criminal trespass statute when, in boating on public waters flowing over private land, they (1) beach the crafts on the banks (but do not step out of them), (2) anchor the crafts to the bottom, or (3) tie the boats to duck blinds. The Attorney General opined that none of the three circumstances met the criminal trespass statute's requirement that a person's "entire body" must enter the private property; it analogized each of the three circumstances to merely probing with a stick through a fence, which does not constitute a violation. In reaching this conclusion, however, the opinion specifically noted that if the person stepped out of the boat and set foot on the banks, a criminal trespass would occur. The opinion

openly presumed that private ownership of land submerged beneath navigable waters is commonplace and proper.

- Op. Tex. Att'y Gen. No. GA-181 (2004). The Executive Director of the Texas Parks and Wildlife Department wrote the Attorney General asking whether a crab fisherman "must obtain permission from the owner of submerged land in order to place crab traps at that location." The requestor expressly assumed that it was absolutely commonplace for private land to lie beneath public water, and the Attorney General did not question that assumption. Then, relying mainly on *North American Dredging Company v. Jennings*, *Diversion Lake Club v. Heath*, and *Port Acres Sportsman's Club v. Mann*, the Attorney General opined that crabbing was materially similar to other types of fishing in public waters and that the private grantee's ownership of the bed was "subject to the piscatory [i.e. fishing] rights of the public." It concluded based on this reasoning that although the private owner's title to the sea-covered land was perfectly sound (and evidently unquestioned by the requestor), the owner could not prohibit or limit the public's crabbing activities in the public water flowing over the land.