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The Texas Courts' Adventures in Locating Texas Coastal Boundaries: Redrawing a Line in the Sand: Kenedy Memorial Foundation v. Dewhurst Defining an Exception to Luttes v. State.

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THE TEXAS COURTS' ADVENTURES IN LOCATING TEXAS COASTAL BOUNDARIES: REDRAWING A LINE IN THE SAND: *KENEDY MEMORIAL FOUNDATION v. DEWHURST* DEFINING AN EXCEPTION TO *LUTTES v. STATE*

THOMAS M. MURRAY

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I. INTRODUCTION

Lines in the sand cause many images to come to mind. For many people, thoughts immediately turn to children playing on the beach as the tide quickly erases carefully constructed lines not long after they are drawn. For many Texans, the image of a line in the sand often evokes the legend of the Alamo where Colonel William B. Travis, challenging those wishing to stay and fight, drew a line in the sand of the fortress floor. Years after this historical battle, another high-stakes battle recently has

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raged over the drawing of lines in the sand, or actually lines in the mud, along the Texas Gulf Coast.[1]

In *Kenedy Memorial Foundation v. Dewhurst*,[2] the Texas Supreme Court recently settled a boundary dispute between the claimants of land along the coast of Texas in an area of the Laguna Madre. The case pitted a diverse array of private interests against the State of Texas. Ultimately, the question became where to place the exact boundary line in an area where a water boundary could not be defined during a large portion of the year, which is important because the placement of the boundary dic-

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1. Determining the exact location of Texas's boundaries has been fraught with political intrigue and dispute for many years. Virtually all of Texas's boundaries have come under close scrutiny at some time or another. *See, e.g.*, Shapleigh v. Mier, 299 U.S. 468, 469-72 (1937) (discussing the controversy over title to the 337-acre tract of Texas land known as "El Guayco Banco No. 319"); State of Oklahoma v. Texas, 260 U.S. 606, 640 (1923) (requiring action by the Supreme Court of the United States to resolve a boundary dispute with the State of Oklahoma and the appointment of commissioners to address the boundary conflict); Kenedy Pasture Co. v. State, 111 Tex. 200, 224-25, 231 S.W. 683, 689-90 (1921) (summarizing the dispute between Mexico and Texas over the land between the Rio Grande and the Nueces River and the resolution of the dispute by the Treaty of Guadalupe Hidalgo in 1848); Strong v. Delhi-Taylor Oil Corp., 405 S.W.2d 351, 370 n.18 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.) (discussing the resolution of the problem of "bancos," areas of land cut off from one country and given to another by the changing channel of the Rio Grande, along the Texas-Mexico border and purportedly resolved under the Convention for the Elimination of Bancos in 1905); JOHN FRANCIS BANNON, THE SPANISH BORDERLANDS FRONTIER 1513-1822, at 210 (Univ. of N.M. Press, 1974) (1963) (discussing the American claim of the Rio Grande as the border with Mexico following the Louisiana Purchase and the disputing of that claim by the Spanish government); ROBERT A. CALVERT & ARNOLDO DE LEON, THE HISTORY OF TEXAS 48 (1990) (suggesting that confusion existed over the exact location of the American–Spanish boundary during the early 1800s); Thomas M. Murray, A Study of the Texas-New Mexico Boundary Conflict: The Compromise of 1850 (1995) (unpublished Master's Thesis, Baylor University) (analyzing the history of the Texas–New Mexico boundary and its final resolution in the Compromise of 1850) (on file with the Texas Collection, Baylor University).

2. 90 S.W.3d 268 (Tex. 2002). The John G. and Marie Stella Kenedy Memorial Foundation was founded in 1960 and began operations in 1984. *See* TEX. STATE HISTORICAL ASS'N, 2 THE NEW HANDBOOK OF TEXAS 757-58 (Ron Tyler ed., 1996) (discussing the problems associated with the founding of the Foundation). According to its charter, the Foundation provides ten percent of its income to the Corpus Christi diocese, and the remainder of the funds are divided among religious activities and secular agencies. *See id.* (discussing the purpose of the Foundation and its scope of giving). It should be noted that the Sarita Kenedy East Law Library at St. Mary's University School of Law was given to the university by a $7.5 million gift from the Kenedy Memorial Foundation. *See* The Sarita Kenedy East Law Library, *at* http://www.stmarytx.edu/law/index.php?group=library&page=library.php (last visited Oct. 28, 2003) (indicating that the law library at St. Mary's University was a gift from the Kenedy Memorial Foundation). David Dewhurst replaced Gary Mauro in all litigation involving the Texas General Land Office in 1998 following his election as Commissioner of the Office of General Land Office. *See* TEX. R. APP. P. 7.2(a) (allowing for the replacement of parties following an election to office).

tates ownership.[3] If the land in question is considered submerged, then the title to the land would vest in the State of Texas. However, if the land is considered unsubmerged, then the title to the land would vest in the private landholder. These questions are further complicated by an almost fifty-year-old undefined exception regarding the placement of shoreline boundaries.

The purpose of this Comment is threefold. First, to discuss the historical basis of Texas's coastal boundaries. Second, to focus on recent court decisions that directly impact the location of coastal boundaries in Texas. Third, to explore the possibility that there is a yet undefined exception to the general rule used to locate boundaries along the Texas coast.

While these recent decisions purport to focus on ethereal arguments over theoretical lines in the sand, the reader should not be confused about the real issue at stake in *Kenedy Memorial Foundation*: the oil and gas leasing rights which accompany these thousands of acres of land.[4] Thus, the underlying motivation of all parties in *Kenedy Memorial Foundation* is to own the oil and gas rights to this otherwise worthless area consisting of approximately 35,000 acres.[5] Moreover, because the basis of this litigation involves oil and gas leasing rights claimed by the State that benefit the permanent school fund, intermixed is the additional political dynamic concerning financing of Texas's public schools.[6]

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3. *See generally Case Summaries: Texas Supreme Court*, TEX. LAW., Jan. 8, 2001, *available at* WESTLAW 1/8/2001 TEXLAW CS1179 (stating a brief history of the fight over the boundary location).

4. Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 271 (Tex. 2002); *see also High Court Gives Land to Charitable Foundation*, HOUS. CHRON., Aug. 31, 2002, 2002 WL 23220394 (referring to then-Texas Land Commissioner David Dewhurst's comments that the Supreme Court's decision deprives the state of valuable oil and gas rights and thus takes away needed funding for the state's public schools).

5. *Kenedy Mem'l Found.*, 90 S.W.3d at 271.

6. *See* Garry Mauro, Editorial, *Ruling Endangers Public School Fund*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 2002, at 7B (indicating the condemnation of the recent Supreme Court decision concerning ownership of property along the Texas coast by a former Texas Land Commissioner and former Democratic gubernatorial candidate because the decision takes money from the Permanent School Fund). Texas public schools are financed in large part from lands held in trust for the state, and the revenues from these lands are dedicated to providing free public school education to all children. *See* Allen E. Parker, Jr., *Public Free Schools: A Constitutional Right to Educational Choice in Texas*, 45 Sw. L.J. 825, 865-68 (1991) (providing a historical backdrop for the right to a free public education and the means chosen to finance free public schools in Texas). Since the inception of the litigation over the disputed lands in 1995, more than $1.5 million has been deposited in an escrow account pending the outcome of the case. Steve Taylor, *Texas Supreme Court Rules in Favor of Kenedy Foundation*, THE MONITOR, Aug. 29, 2002, http://themonitor.com/NewsPub/News/Stories/2002/08/29/103068341528.shtml. In addition to the political school financing problem, the equally sensitive issue of private property rights also crept into the debate over the supreme court's resolution of the disputed lands. *See* Marc Cisneros,

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This suit began as an interpleader action filed by the mineral lessees requesting a court determination as to whom they should pay mineral royalties.[7] Yet, as noted by the vigorous and voluminous litigation, the parties themselves clearly have great interest in the outcome.[8]

Mauro is Wrong on Mudflat Decision, CORPUS CHRISTI CALLER TIMES, Sept. 30, 2002, http://www.caller.com/ccct/contributors/article/0,1641,CCCT_879_1449138,00.html (arguing that the Texas Supreme Court decision is based on property rights, since for more than forty years coastal landowners had relied on a prior definition of the coastal boundary, and that a change in the location of the coastal boundary would create havoc for coastal property owners and lead to an increase in unnecessary litigation).

7. Kenedy Mem'l Found. v. Dewhurst, 994 S.W.2d 285, 292 (Tex. App.—Austin 1999), *rev'd on reh'g*, 90 S.W.3d 268 (Tex. 2002); *see also* Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268, 270, 2000 WL 1862934 (Tex. Dec. 21, 2000), *rev'd on reh'g*, 90 S.W.3d 268 (Tex. 2002) (second motion for reh'g granted) (explaining that the State had leased the oil and gas rights to the land in question in the early 1990s following a claim made by the Kenedy Memorial Foundation, and soon thereafter the Foundation also leased the land and assigned the royalty interest to a third party, thus leading to the confusion as to whom to pay the royalties). Despite contentions that the disputed land belonged to the Kenedy Memorial Foundation, the General Land Office entered into oil and gas leases on parts of the mudflats in dispute. *See* Sixth Amended Answer and Fifth Amended Cross-Claim of the John G. and Marie Stella Kenedy Memorial Foundation at 14, Bright & Co. v. Mauro (200th Dist. Ct., Travis County, Tex. 1995) (No. 93-05265) (indicating that the General Land Office entered into leases with full knowledge that their claims to the land were susceptible) (on file with the *St. Mary's Law Journal*). In 1991, three years later, the Kenedy Memorial Foundation entered into oil and gas leases with Bright & Co. and Exxon for land within the disputed area. *Id.* at 2-3. Following the Texas Supreme Court's decision on second rehearing awarding the disputed property to the Kenedy Memorial Foundation, the previous leases of the State are now in question and the lessees may be forced to renegotiate the leases with the Kenedy Memorial Foundation in order to protect their interests. *See* Steve Taylor, *Texas Supreme Court Rules in Favor of Kenedy Foundation*, THE MONITOR, Aug. 29, 2002, http://themonitor.com/NewsPub/News/Stories/2002/08/29/103068 341528.shtml (postulating that current lessees will be forced to take out protection leases in order to continue oil and gas operations in the mudflats). The political dynamics surrounding the case only continue to get more complicated. Following the November elections, David Dewhurst was succeeded by Commissioner-Elect Jerry Patterson. *See* Letter from Jerry Patterson, Commissioner-Elect, Texas General Land Office, to John T. Adams, Clerk, Supreme Court of Texas (Nov. 25, 2002) (stating his intent to continue pursuing the case and alleging the Aug. 29, 2002 opinion on rehearing will have a detrimental affect on the Permanent School Fund due to the State's loss of revenue producing lands) (on file with the *St. Mary's Law Journal*). To further complicate the political landscape surrounding the litigation, former Texas Supreme Court Justice Greg Abbott, a participating member of the original decision in December 2000, has been elected to be the Texas Attorney General whose office oversees all litigation involving the State. *See* Press Release, Texas Attorney General, Greg Abbott Sworn in as Texas' 50th Attorney General (Dec. 2, 2002), *at* http://www.oag.state.tx.us/newspubs/releases/2002/20021202newattorneygeneral.shtml (announcing the swearing in of Greg Abbott as Attorney General) (on file with the *St. Mary's Law Journal*).

8. *See, e.g.*, Kenedy Mem'l Found. v. Mauro, 21 F.3d 667, 667 (5th Cir. 1994) (seeking declaratory and injunctive relief against the State to determine the boundary of disputed

Murray: The Texas Courts' Adventures in Locating Texas Coastal Boundaries

II. BACKGROUND

A. *Locating Tidal Boundaries*

To understand the methodology used in determining how coastal boundaries are located in general, one must note "that [in terms of] tide terminology[,] the words 'water' and 'tide' are synonymous."[9] Therefore, the simplest way of determining the extent of a tide is to measure the water at regular intervals at some fixed point.[10] Because of the logistical difficulty in maintaining a watch on these measurements, automatic tide gauges are used to determine the height of the water at any given time.[11] Generally, the National Oceanic and Atmospheric Administration's (NOAA) tide gauges are the governing authority for delineating the extent of tides in a given area.[12]

Because wind and other external meteorological forces play a significant role in determining the highest point a tide may reach, these external forces must be distinguished when determining the height of a tide on the tide gauges.[13] Having determined that a measurement of the fullest reach of the tides is inappropriate, the United States Supreme Court, in *Borax Consolidated v. City of Los Angeles*,[14] determined that the tidal boundary in common law states is the "line of high water as determined by the course of the tides."[15] In making a similar distinction, the United States Fifth Circuit Court of Appeals noted in *Humble Oil & Refining Co. v. Sun Refining Co.*[16] that

> [t]here would be no certainty as to the upland boundary of the shore if we took into consideration points to which sea water is driven by

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land); *Kenedy Mem'l Found.*, 90 S.W.3d at 268 (reversing on rehearing the State's claim to disputed lands and vesting title in the Foundation); *Kenedy Mem'l Found.*, 44 Tex. Sup. Ct. J. at 268 (affirming the State's claim to disputed lands); *Kenedy Mem'l Found.*, 994 S.W.2d at 285 (finding in favor of the State in disputed lands); Kenedy Mem'l Found. v. Mauro, 921 S.W.2d 278, 278 (Tex. App.—Corpus Christi 1995, writ denied) (asserting a takings claim against the State and seeking a declaratory judgment to determine the boundary to disputed lands).

9. Kenneth Roberts, *The Luttes Case – Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141, 151 (1960).

10. *Id.* at 145.

11. *Id.*

12. *See* Borax Consol. v. City of Los Angeles, 296 U.S. 10, 26-27 (1935) (citing the United States Coast and Geodetic Survey's destination of mean high water). Prior to NOAA's administering of tidal gauges, the duties fell to its precursor agency, the United States Coast and Geodetic Survey. *Id.* at 26-27.

13. Kenneth Roberts, *The Luttes Case – Locating the Boundary of the Seashore*, BAYLOR L. REV. 141, 147 (1960).

14. 296 U.S. 10 (1935).

15. *Borax*, 296 U.S. at 22.

16. 190 F.2d 191 (5th Cir. 1951).

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> the wind . . . Meteorological influences may be inextricably involved with the rise and fall of the true astronomical tide, but we should distinguish them as meteorological tides.[17]

In light of these decisions, the point of the high tide is determined by the vertical rise of the water at the point where it reaches the shore without being affected by meteorological forces.[18] The Fifth Circuit defines "shore" as the area in which water flows upon the land in continuous motion with the flow of the tides.[19] The Texas Supreme Court spoke approvingly of this definition in determining that "all that ground is designated [as] the shore of the sea which is covered with the water of the latter at high tide, during the whole year, whether in winter or in summer."[20] Thus, placement of the shoreline is critical to determining the location of a coastal boundary.

As is commonly known, tides are cyclical in nature and are governed primarily by astronomical forces. These cycles are a product of the dynamic relationship between the sun and the moon to the earth.[21] Because these cycles recur on a regular basis, they can be predicted with mathematical precision to determine the exact location of the tidal boundary.[22]

In order to gather sufficient data to determine the baseline for tidal boundaries, it is necessary to average the tidal flows over a long period of time.[23] To establish this average, the United States Supreme Court, in

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17. Humble Oil & Ref. Co. v. Sun Oil Co., 190 F.2d 191, 195 (5th Cir. 1951); *see also* National Hurricane Center Advisories, Bulletin, Hurricane Lili Advisory Number 46, *at* http://vortex.plymouth.edu/hur_dir/hur_advnt3.html (last visited Oct. 2, 2002) (indicating the possibility that the storm surge from Hurricane Lili could extend as much as twenty-five miles inland in low-lying areas along the coast) (on file with the *St. Mary's Law Journal*).

18. Kenneth Roberts, *The Luttes Case – Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141, 148 (1960).

19. *Humble Oil*, 190 F.2d at 194. The Fifth Circuit's definition of shore as applied to the common law definition was the area between the mean low tide and the mean high tide and is generally accepted. However, the Fifth Circuit's definition of the shoreline as the area within reach of the highest tide in the winter has since been rejected by the Texas Supreme Court in *Luttes v. State*. Luttes v. State, 159 Tex. 500, 529, 324 S.W.2d 167, 185-86 (1958). The definition of the shoreline remains consistent with general concept of the shoreline as understood today. *See* BLACK'S LAW DICTIONARY 1384 (7th ed. 1999) (stating that the general definition of shoreline is consistent with the Fifth Circuit's definition).

20. *See* State v. Balli, 144 Tex. 195, 250, 190 S.W.2d 71, 100 (1945) (discussing the proper seaward boundary for property affected by accession of the land below the sea and addition to private land through accretion).

21. Kenneth Roberts, *The Luttes Case – Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141, 148 (1960).

22. *Id.* at 149.

23. *Id.* at 151.

Borax, adopted an 18.6 year baseline for calculating an average of the daily tides in order to establish a definitive tidal boundary for land under the common law.[24] Although this methodology is used to determine the coastal boundaries under the common law involving federal matters, *Borax* also has proved influential in state court decisions.[25] Based on one writer's research, all states had followed the Supreme Court's reasoning in *Borax* and adopted an averaging of tides over a long period of time.[26] In 1956, Texas adopted the *Borax* methodology in *Rudder v. Ponder*,[27] where the court accepted the mean high tide as the proper coastal boundary in areas governed by the common law, which will be discussed in more detail below.[28] Although *Borax's* reliance on the use of tide gauges is controlling when applying the common law, the Texas Supreme Court specifically rejected the use of tide gauges as the *only* determining factor in locating a coastal boundary under the civil law.[29] Nevertheless, the averaging of the tides over a long period has been sustained by Texas courts.[30]

B. *Civil Law*

In determining land boundaries, the applicable law at the time of a particular land grant is considered the controlling authority.[31] During the Spanish and Mexican colonial eras, Texas was governed by the civil law system introduced by Spain.[32] Therefore, for lands patented during these

24. Borax Consol. v. City of Los Angeles, 296 U.S. 10, 27 (1935).

25. Kenneth Roberts, *The Luttes Case – Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141, 167 (1960).

26. *Id.*

27. 156 Tex. 185, 293 S.W.2d 736 (1956).

28. Rudder v. Ponder, 156 Tex. 185, 193, 293 S.W.2d 736, 741 (1956).

29. Luttes v. State, 159 Tex. 500, 324 S.W.2d 167, 196 (1958).

30. *Id.* at 187.

31. *Id.* at 176; *Rudder*, 293 S.W.2d at 744; Giles v. Basore, 154 Tex. 366, 374, 278 S.W.2d 830, 833-35 (1955); State v. Balli, 144 Tex. 195, 246-48, 190 S.W.2d 71, 98-100 (1945).

32. *See* Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 270 (Tex. 2002) (indicating that land grants in Texas were subject to both Spanish and Mexican disposition and control.); *see also* Hans Baade, *Reflections on the Reception (or Renaissance) of Civil Law in Texas*, 55 SMU L. REV. 59, 60 (2002) (commenting that, in the modern era, Texas operates under a mixture of both Spanish and Mexican civil law and the common law, and theorizing that the civil law has survived in Texas because Texans prefer the effects of the civil law to those of the common law). Though Texas is predominantly a common law state, it is nonetheless bound by the civil law, which preceded the existence of the State of Texas and is therefore bound by the valid land grants of its predecessor government. *See* State v. Valmont Plantations, 346 S.W.2d 853, 855 (Tex. Civ. App.—San Antonio 1961) (stipulating that Texas is bound by the Treaty of Guadalupe Hidalgo to honor all land titles granted by a prior sovereign), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962); Harris v. O'Connor, 185

years, courts must apply the applicable Spanish or Mexican civil law whenever a boundary dispute arises.[33] To resolve these disputes, modern courts must determine the intent of seventeenth, eighteenth, and nineteenth century Spanish and Mexican civil law as it was in force at the time of a particular land grant.[34] A further problem hindering courts in determining the governing authority at the appropriate time focuses on the interpretation of the Spanish or Mexican law and which of these is the most appropriate translation.[35]

Once a court determines which law applies to a particular land grant, the methodology of determining the civil law coastal boundary is relatively confusing.[36] The origin of the civil law's definition of "coastal boundaries" can be traced back to the Roman Institutes of Justinian.[37] Yet, despite this apparent stability, it is not certain that the Roman law is applicable under the Spanish or Mexican civil law.[38] In reliance on the long-held tradition of the civil law, the United States Fifth Circuit Court of Appeals, in *Humble Oil*, held that the appropriate location of the shoreline in Texas was at the reach of the highest tide during the winter.[39]

S.W.2d 993, 997 (Tex. Civ. App.—El Paso 1944, writ ref'd w.o.m.) (requiring the State of Texas to recognize valid land grants from its predecessor government of the Mexican State of Coahuila and Texas).

33. *See Kenedy Mem'l Found.*, 90 S.W.3d at 282 (stating that the court must determine the intent of the Spanish and Mexican governments in granting the land by referring to their policies and laws at that time); *Balli*, 190 S.W.2d at 86 (requiring courts to determine the intent of the applicable law at the time of the land grants); Manry v. Robison, 122 Tex. 213, 224, 56 S.W.2d 438, 443-44 (1932) (recognizing that the rights of landowners under Mexican land grants were preserved under the Constitution of the Republic of Texas and subsequently protected under the Treaty of Guadalupe Hidalgo).

34. *Kenedy Mem'l Found.*, 90 S.W.3d at 280; *see also Luttes*, 324 S.W.2d at 177 (acknowledging the difficulty in determining the intent of the civil law as written in the middle ages when applying it to modern circumstances).

35. *See Luttes*, 324 S.W.2d at 177 (admitting that reliance on non-Spanish interpretations of the civil law may be inadequate to show the exact intent of the law at the time of its enactment, and indicating that a translator's own prejudice may surface within the language of the interpretation, further complicating the finding of a concrete understanding of the law's application).

36. *See id.* at 182 (commenting on the confusing nature of applying the civil law).

37. *See id.* (finding the shoreline is fixed at the point of the highest winter wave under the Roman law).

38. *Id.* at 181-82.

39. Humble Oil & Ref. Co. v. Sun Oil Co., 190 F.2d 191, 195 (5th Cir. 1951); *see also* Galveston City Surf Bathing Co. v. Heidenheimer, 63 Tex. 559, 562-63 (1885) (differentiating the civil law seashore from the common law definition and finding the civil law definition to be the reach of the highest tide in the winter); City of Galveston v. Menard, 23 Tex. 349, 359 (1859) (defining the seashore under the civil law as the furthest reach of the tides in the winter and concluding that the public has title to the reach of the highest tide); Barbara Slotnik, *Boundary of Private Grants Fronting on Gulf of Mexico*, 73 TEX. JUR. 3D *Water* § 237 (1990) (demonstrating that early court decisions in Texas located the coastal

The reference to the highest point in the winter appears to have been stricken from the definition of the shoreline under the Spanish civil law in favor of a more general definition of the area continually covered and uncovered by the sea.[40] But where exactly is this undefined area, and how should it be marked?

C. *Common Law*

The Republic of Texas adopted the common law on January 20, 1840,[41] and in so doing, adopted the point of the mean high tide as the seaward boundary of the shoreline.[42] Because this adoption of the common law represents a dramatic departure from the civil law,[43] it is important to understand the distinction between the common law "mean high tide" and the "average of the higher tides" under the civil law as discussed above.

The common law rule concerning the location of tidal boundaries, as announced by the United States Supreme Court in *Borax*, "is [the area] confined to the flux and reflux of the sea at ordinary tides."[44] Thus, from this common law definition, it has been determined that whenever "the sea, or a bay, is named as a boundary, the line of the ordinary high water mark is always intended where the common law prevails."[45] The Supreme Court rejected the idea that only certain tides, specifically the "spring tides" and "neap tides," should be used as the proper measuring of the seashore for determining the common law tidal boundary.[46] Thus, the average of all daily tides should be used when placing the common law boundary.[47] In announcing this rule, the Supreme Court treated the

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boundary at the highest tide in the winter, thus allowing for inconsistencies in locating a seashore boundary under the civil law).

40. *Luttes*, 324 S.W.2d at 183.

41. *See* Act adopted Jan. 20, 1840, 4th Cong., 1840 Repub. Tex. Laws, *reprinted in* 2 H.P.N GAMMEL, THE LAWS OF TEXAS 1822-1897, at 177-80 (Austin, Gammel Book Co. 1898), *available at* http://texinfo.library.unt.edu/lawsoftexas/pdf/law02003.pdf (last visited Dec. 12, 2002) (adopting the common law of England to replace the civil law in Texas).

42. Rudder v. Ponder, 156 Tex. 185, 193, 293 S.W.2d 736, 741 (1956).

43. *Id.* at 741.

44. Borax Consol. v. City of Los Angeles, 296 U.S. 10, 22-23 (1935).

45. United States v. Pacheco, 2 U.S. 587, 590 (1864).

46. *Borax*, 296 U.S. at 23-25. Spring tides occur when the water "rises higher and low water falls lower than usual." *Id.* at 23. Neap tides occur when tides do not rise and fall according to their ordinary averages. *Id.* Based on these definitions, the Supreme Court found it improbable to exclude from the shore land which was not actually covered by the tides for a majority of the time. *Id.* at 26.

47. Kenneth Roberts, *The Luttes Case – Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141, 155 (1960).

terms "high water mark" and "ordinary high tide" as synonymous with the term "mean high tide."[48]

As applied to Texas coastal boundaries subject to the common law, there is little doubt as to the appropriate means of locating tidal boundaries.[49] The Texas Supreme Court accepted this rationale in *Rudder* to determine that the common law boundary, as defined in *Borax*, is applicable to areas governed by the common law in Texas.[50] Two years after *Rudder*, in the 1958 case of *Luttes v. State*,[51] the Texas Supreme Court further recognized the mean high tide rule when attempting to clarify tidal boundaries under the civil law rule.[52]

D. *Nature of the Laguna Madre*

The Laguna Madre is a shallow strip of water, ranging between three and five miles in width, running between the Texas mainland and Padre Island, and is bisected by the intracoastal waterway.[53] The difficulty in determining the tidal boundaries within the confines of the Laguna Madre occurs because the normal astronomical cycles which govern tides are not controlling, but rather the tides are more susceptible to meteorological forces.[54] In fact, the waters of the Laguna Madre are so controlled by external forces that they have been known to blow uphill at times so that the water is deeper at higher places than lower ones.[55] In other words, the waters in the Laguna Madre do not rise and fall daily according to the general theory of tides.[56]

Many areas of the Laguna Madre have sufficient depth to accommodate navigation, while conversely, other areas may normally have only a few inches of water; in fact, portions of the Laguna Madre may only be covered "infrequently" by water for only a few "days, weeks, or months a year."[57] When not covered by water, these infrequently covered areas are reduced to mud-flats and are devoid of any life, with the exception of

48. *Id.* at 156.

49. *Id.*

50. *See* Rudder v. Ponder, 156 Tex. 185, 193, 293 S.W.2d 736, 741 (1956) (applying the mean high tide as the appropriate boundary, but without mention to *Borax*).

51. 159 Tex. 500, 324 S.W.2d 167 (1958).

52. *See* Luttes v. State, 159 Tex. 500, 515, 324 S.W.2d 167, 177 (1958) (comparing the effects of applying the common law boundary to the effects of applying the civil law boundary in a dispute over the boundary of the Laguna Madre).

53. Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 271 (Tex. 2002); *see also* TEX. STATE HISTORICAL ASS'N, 4 THE NEW HANDBOOK OF TEXAS 10 (Ron Tyler ed., 1996) (giving a brief description and area of the Laguna Madre).

54. *Kenedy Mem'l Found.*, 90 S.W.3d at 271.

55. *Id.*

56. *Id.*

57. *Id.*

algae.[58] When uncovered by water for long periods of time, the area is accessible by motor vehicle traffic, yet water can be found just a few feet beneath the surface, and there are always remnants of sea life from when the area was covered by water.[59] In light of these characteristics, there is a visible distinction between the "seaward" boundary of the mud-flats, which can be recognized by a slight rise in elevation followed by a sandy area, then followed by grass and other vegetation.[60]

Given the aforementioned peculiarities of the Laguna Madre, it is easy to see why finding any boundary, much less an exact boundary, is a difficult task. Yet, it is within this unique area that the Texas courts have struggled to locate a precise boundary.[61] However, as with all property, it must have boundaries and must belong to someone, whether in the hands of a private individual or within the public domain.

E. Luttes v. State

In 1958, the Texas Supreme Court first attempted to establish a boundary along the Laguna Madre in an area controlled by the civil law.[62] The land in question in *Luttes* was comprised of approximately 3,400 acres adjacent to the Laguna Madre, consisting of a series of mudflats that were characteristic of this portion of the Laguna Madre, and were only sporadically covered by water.[63] At one time, the area had been totally submerged and had been considered the property of the state; however, as time passed, the mud flats had risen to approximately .25 to 1 foot above the sea level.[64] Thus, the court was called upon to determine title to the

58. *Id.*

59. Luttes v. State, 159 Tex. 500, 507, 324 S.W.2d 167, 171 (1958).

60. *Id.* at 171.

61. *See* Kenedy Mem'l Found. v. Dewhurst, 994 S.W.2d 285, 286 (Tex. App.—Austin 1999) (discussing the difficulty of trying to locate a boundary in the disputed area), *rev'd on reh'g*, 90 S.W.3d 268 (Tex. 2002).

62. *Luttes*, 324 S.W.2d at 168-69.

63. *Id.* at 168.

64. *Id.* at 169. Had the case been brought previously, there is little doubt that the State would have ultimately prevailed in *Luttes* because it is a well settled proposition that submerged land belongs to the State. *See* State v. Bradford, 121 Tex. 515, 528, 50 S.W.2d 1065, 1069 (1932) (recognizing that the State has title to all lands beneath "lakes, bays, inlets, and other areas within tidewater limits within its borders"); Butler v. Sadler, 399 S.W.2d 411, 414-16 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.) (acknowledging the State's claim of title to all submerged lands covered by the water of the Gulf of Mexico, tracing that claim to the Treaty of Guadalupe Hidalgo wherein the boundary between the Mexico and the United States was extended into the Gulf of Mexico for three leagues, and providing that offshore land would not be considered unsurveyed land and therefore subject to the Vacancy Act); Port Isabel v. Mo. Pac. R.R., 729 S.W.2d 939, 942 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (indicating that a grantee does not take title to submerged land adjacent to the grant but that the State retains title).

land which had risen above the sea level through a gradual process of accretion.[65]

The plaintiff, Luttes, claimed title to the mud flats by accretion to his mainland property and contended that the land was now above the shoreline, as defined by civil law as the mean higher tide.[66] Conversely, the State, as defendant, argued for a much more advantageous definition of the shore and sought its placement at the furthest inland reach of the tides, excluding storm waters, which could be averaged over an extended period of time.[67]

In *Luttes*, the Texas Supreme Court reversed course and rejected the holding of *Humble Oil*, which had relied on the winter tides for the basis of determining the location of tidal boundaries under the civil law in Texas.[68] Instead, the *Luttes* court based its conclusion upon its own interpretation of the applicable Spanish and Mexican civil law.[69] The *Luttes* court determined that the controlling law at the time of the land grants in question was *Las Siete Partidas*.[70] The shoreline, as defined by the *Partidas*, is "all that place [that] is called shore of the sea insomuch as it is covered by the water of the latter, however most [of] it grows in all the year, be it in time of winter or of summer."[71] Thus, in rejecting the holding of *Humble Oil* and applying the *Partidas*, the Texas Supreme Court adopted a different definition of the seashore for the purpose of locating

65. *Luttes*, 324 S.W.2d at 168. Accretion is the gradual process of accumulating land through natural forces. BLACK'S LAW DICTIONARY 1384 (7th ed. 1999). Though a detailed discussion of accretion will not be included here, a preliminary understanding is necessary to understand how land may be acquired even though not thought to be a part of the original land grant. In *State v. Balli*, the Texas Supreme Court recognized that accretions of land previously beneath the sea belong to the upland owner, rather than the government; however, the court found that the positioning of the correct boundary would remain a question to be determined by the evidence in individual cases. *See* State v. Balli, 144 Tex. 195, 252, 190 S.W.2d 71, 101 (1945) (finding accretions by the sea to belong to the upland owner rather than the government and reserving the question of the location of the boundary because that was a question to be dictated by the governing facts).

66. *Luttes*, 324 S.W.2d at 169.

67. *Id.* at 169.

68. *See id.* at 185-86 (indicating that the holding in *Humble Oil* was only dicta as it concerned the definition of the shore in Texas under Mexican civil law and thus was not binding on the Texas Supreme Court).

69. *See id.* at 186-87 (emphasizing the interpretations of Mexican (Spanish) law).

70. *Id.* at 178-79. *Las Siete Partidas* was the Spanish law, originally written in the thirteenth century, which controlled at the time the land grant was made by the Spanish government to Luttes' predecessors in interest. *See id.* at 177-79 (discussing the background and applicability of *Las Siete Partidas* to the land).

71. *Luttes*, 324 S.W.2d at 177.

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seaward boundaries,[72] and instead defined the boundary at the mean high tide, without regard to either a summer or winter tide.[73]

In applying the mean higher tide rule announced in *Luttes*, the court addressed the difficulty of determining the reach of the tides since there previously had been no reliable means of measuring the reach of tides in the disputed area.[74] However, the court reasoned that the sea level for the land in controversy could be extrapolated from the nearest tide gauges in order to give an accurate correlation of the level in the mud flats.[75] But, as the court explained, it would not be possible for the tidal gauges to determine whether the changing water levels were caused by the astronomical forces governing tides or by extraneous meteorological forces.[76]

Although the supreme court spoke approvingly of the use of tidal gauges as the means by which to measure tidal boundaries,[77] the Texas Supreme Court acknowledged that it was not specifically bound by the United States Supreme Court's adoption of tidal gauges in *Borax*, since that case involved a common law question in federal court.[78] On rehearing, in acknowledging the possibility that tidal gauges could not be used to determine the extent of the tides, the Texas Supreme Court left open the possibility that some other means of establishing a tidal boundary would be permissible, so long as the boundary could be "determined with reasonable accuracy otherwise than by exclusive resort to tide gauges."[79] Although leaving the possibility open for some future undefined alternative, the court concluded that it would be "much less reasonable" to fix the boundary line at the vegetative line than at the mean of the higher tides as determined by the tidal gauges.[80]

Following the *Luttes* decision, it appeared that it should be relatively easy to establish coastal boundaries in Texas. However, as demonstrated

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72. *See* FRED A. LANGE ET AL., 3 TEX. PRAC., LAND TITLES AND TITLE EXAMINATION § 177 (2d ed. Supp. 2002) (clarifying in *Luttes* that a more reliable way for determining the shoreline under applicable Spanish and Mexican civil law is the mean of the higher tides).

73. *Luttes*, 324 S.W.2d at 181.

74. *See id.* at 173 (illustrating the difficulty in measuring the tides from tidal gauges no nearer in proximity than fifteen miles from the disputed land).

75. *Id.* at 174.

76. *See id.* at 173 (reflecting the difficulty in construing the cause of water level variations).

77. *See id.* at 192 (indicating that no other jurisdiction in applying either the civil law or the common law had specifically rejected the use of the tidal gauges, but that the Supreme Court's opinion "strongly suggests" relying on tidal gauges).

78. *Luttes*, 324 S.W.2d at 192.

79. *Id.* at 192.

80. *Id.*

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below, the appearance of ease is vastly overstated. Based on the rehearing language in *Luttes*, which provides for a yet undefined exception to the general rule that the mean high tide governs lands controlled by the civil law,[81] the question evolved as to the proper placement of the tidal boundary in areas where the tide gauges cannot be used to accurately measure the tides.[82]

III. The Recent Texas Judicial Adventures in Locating Tidal Boundaries in the Laguna Madre: *Kenedy Memorial Foundation v. Dewhurst*

A. Kenedy Memorial Foundation I

The dispute in *Kenedy Memorial Foundation v. Dewhurst* stems from two land grants, the "Big Barreta" grant from Spain in 1804 and the "Little Barreta" grant from the Republic of Mexico in 1834.[83] In 1907, the State of Texas recognized the validity of both of the land grants and placed their seaward boundaries at the edge of the Laguna Madre.[84] From the time the lands were granted by Spain and Mexico, it was not disputed that the government claimed the mud flats in question because it considered them to be submerged land, and thus they were reserved to the sovereign.[85] Ultimately, the Kenedy Memorial Foundation (Foundation), as successor in interest of the original grantees, challenged the State's claim to the mud flats, setting up the fight over the proper placement of the boundary along the Laguna Madre shoreline.[86]

Because the basis for the decision of the boundary depended on the location of the shoreline, both the Foundation and the State took differing positions.[87] The Foundation contended that the shoreline should be determined by application of the *Luttes* rule, which placed the boundary at the mean of the higher tides.[88] Conversely, the State urged that the tidal gauges are inappropriate to locate the shoreline under the civil law

81. *Id.*

82. *Id.*

83. Kenedy Mem'l Found. v. Dewhurst, 994 S.W.2d 285, 291 (Tex. App.—Austin 1999), *rev'd on reh'g*, 90 S.W.3d 268 (Tex. 2002).

84. *Id.*; *see also* State v. Spohn, 83 S.W. 1135, 1135 (Tex. Civ. App.—Austin 1904, writ ref'd) (indicating that although the grant had been lost, the grant was a valid grant from Spain and would be recognized by Texas).

85. *Kenedy Mem'l Found.*, 994 S.W.2d at 292.

86. *See* Steve Taylor, *The Texas Supreme Court Rules in Favor of Kenedy Foundation*, The Monitor, Aug. 29, 2002, http://themonitor.com/NewsPub/News/Stories/2002/08/29/10306834152.shtml (indicating the Foundation has been seeking to gain control of the disputed mudflats from the State since 1995).

87. *Kenedy Mem'l Found.*, 994 S.W.2d at 293.

88. *Id.*

and that mudflats are submerged property, making them property of the State.[89] Under the Foundation's application of *Luttes*, the eastern boundary of the property extended to the western edge of the intracoastal waterway because the elevation was approximately one foot above sea level.[90] Alternatively, the State claimed that the proper boundary was a vegetated bluff line approximately six miles west of the western edge of the intracoastal waterway.[91]

At trial, the jury found that the use of the *Luttes* rule of the mean higher high tide was not appropriate for locating the boundary of the grants and that the boundary claimed by the Foundation could not, with "reasonable accuracy," be used to determine the location of the shoreline.[92] The jury went on to find that the vegetative line claimed by the State more reasonably determined the location of the shoreline.[93] Based on these jury findings, the trial court found in favor of the State.[94]

On appeal, the Third District Court of Appeals at Austin addressed whether the trial court correctly applied the *Luttes* rule.[95] While recognizing that *Luttes* gave great deference to the mean of the higher high tides (MHHT), the court of appeals found that *Luttes* did not specifically require an application of the MHHT in areas in which tidal gauges could not be used accurately.[96] The court of appeals concluded that the methodology applied by the State, using a vegetative line based on prior surveys, fell within the latitude of the exception announced in *Luttes*.[97] Thus, the court of appeals first defined the scope of the potential exception to the *Luttes* rule.

As support for its conclusion that the vegetative line was appropriate, the trial court claimed that it was correctly applying the undefined exception to the *Luttes* rule.[98] However, the court of appeals differentiated the facts in *Kenedy Memorial Foundation* from those in *Luttes* and acknowl-

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89. *Id.*

90. *Id.* at 294. Interestingly, by claiming to the western edge of the intercoastal waterway, the Foundation attempted to locate the boundary on the basis of something which had not yet been built at the time of the grants. *See id.* at 291 (indicating that the intercoastal waterway was built during the 1940s to provide a protected navigation channel along the Gulf Coast).

91. *See id.* at 294 (basing its claim to the vegetative line based on prior surveys).

92. *Kenedy Mem'l Found.*, 994 S.W.2d at 294-295.

93. *Id.* at 295.

94. *Id.*

95. *Id.*

96. *Id.*; *see also* Luttes v. State, 159 Tex. 500, 539, 324 S.W.2d 167, 192 (1958) (indicating that some other means might be necessary when tide gauges could not accurately measure the tides).

97. *Kenedy Mem'l Found.*, 994 S.W.2d at 296.

98. *Id.*

edged that, while the *Luttes* court found that a vegetative line was not appropriate based on the facts presented in *Luttes*, such a line was appropriate in the present case.[99] The court of appeals pointed out that the *Luttes* court did not foreclose the possibility that a vegetative line may not be appropriate when combined with other evidence which would indicate that a vegetative line was the boundary of the shoreline.[100] The *Luttes* rule only required that any alternate method other than tide gauges be able to determine with reasonable accuracy the placement of the shoreline.[101]

The court of appeals reasoned that the facts of *Luttes* differed from those in the present case which allowed for a different outcome. Principally, the court of appeals noted that the land in question in *Kenedy Memorial Foundation* had not constantly been covered with water at the time of the grant, as had been the case in *Luttes*, and as such, this was not a case involving accretion.[102] Furthermore, because the land had remained unchanged for the preceding 150 years since the grants, the historical evidence and prior surveys indicated that the land below the vegetative line was never considered a part of the grant.[103]

As indicated, historical evidence played a key role in the court's finding in *Kenedy Memorial Foundation*.[104] Early depictions of the Big Barreta grant showed that it was bordered by "brackish" water which was joined to the Laguna Madre by the continuous movement of the tides.[105] Based on the description of the grant, the Spanish government considered the neighboring land inaccessible except by the contiguous grantee and awarded the grantee title to the land.[106] However, in granting the title to the land, the court found that the Spanish government did not confer title to the land now in question because the amount awarded in the subsequent grant was considerably less than the claimed area, and its eastern boundary was somewhere to the west of the boundary claimed by the Foundation.[107] Similarly, the Mexican government added land to the north of the Little Barreta grant to make up the difference where the

99. *Id.*
100. *Id.*
101. *Id.*
102. *Kenedy Mem'l Found.*, 994 S.W.2d at 300.
103. *Id.*
104. *See id.* at 302-05 (discussing the relevant historical evidence used in finding the shoreline based on the intent of the grantors).
105. *Id.* at 302.
106. *Id.*
107. *Kenedy Mem'l Found.*, 994 S.W.2d at 302. The subsequent grant was entitled the "Mesquite Rincon" and based on its name it suggests the land was a "corner" because "rincon" is Spanish for corner. *Id.* at 302 n.1. Thus, had the original grant covered the disputed area, "the Mesquite Rincon would not have been a corner at all." *Id.*

Laguna Madre protruded into the grant so as to give the grantee his full allotment of land.[108] Had the disputed area been included in the original grant, it would have been larger than the called-for amount and there would have been no need to award the additional land.[109]

In addition to the historical evidence, the court of appeals relied heavily on former surveys to locate the historical shoreline.[110] Relying on two prior surveys, the court concluded that the boundaries of the original grants lie somewhere to the west of the area in dispute.[111] As such, the court concluded:

> [D]escriptions in the granting documents and supporting Spanish and Mexican surveys consistently describe a line similar to that found by [the State]. Intervening surveys hewed to the view that the vegetation or bluff line essentially defined the edge of the Laguna Madre, and thus the property line. . . . No . . . evidence other than [that advocated by the Foundation] hinted that the original grants extended east. . . .[112]

Thus, the court found that the State's position was consistent with the intent of the Spanish and Mexican grantors.[113] Furthermore, the court concluded that both original grantors and grantees had treated the bluff line as the proper shore boundary.[114]

Finally, the court of appeals rejected the Foundation's claim that recognizing an exception to the *Luttes* MHHT rule would jeopardize the boundaries of other private landowners along the gulf coast since it would create a "haphazard" determination of seaward boundaries.[115] As discussed below, this rejection of the Foundation's claim becomes fundamental in later decisions.

B. Kenedy Memorial Foundation II

On appeal, the Texas Supreme Court decided whether the trial court and the court of appeals had correctly located the shoreline by some

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108. *Id.* at 302-03.

109. *Id.* at 303.

110. *See id.* at 304 (indicating that previous surveyors and mapmakers had used the vegetative line for determining the shoreline).

111. *Id.*

112. *Kenedy Mem'l Found.*, 994 S.W.2d at 305.

113. *Id.* at 306.

114. *Id.*

115. *See id.* (discussing and rejecting the Foundation's claims that not following *Luttes* would cause havoc to property rights and create confusion among land owners as to their seaward boundaries).

other means than the *Luttes* MHHT rule.[116] The court recognized that the unique characteristics of the area prevented the use of tidal gauges and that under the Foundation's claim, the boundary of the grants would be located somewhere in the middle of the Laguna Madre.[117] According to the court, because the State's proposed methodology more likely established the reasonable accuracy of the intended boundary, the supreme court affirmed the decision of the court of appeals.[118]

In deciding what the appropriate shoreline boundary should be, the court determined that the grants were "littoral," which required placing the boundary at the shoreline.[119] However, such a finding by the court would generally entitle the Foundation to unfettered access to the shore.[120] Having concluded that the land was indeed bordered by the shore at some point, the court needed to determine where the shoreline should be located.[121] As discussed previously, the shore is defined as that area in which the land is continuously covered and uncovered with water.[122] However, in light of the varying reach of the tide, this determination becomes difficult.[123]

A fundamental element of the State's claim was that the unique characteristics of the area in question made it impossible to determine the shoreline based on the MHHT as required under *Luttes*, and thus, some other alternative was necessary.[124] In relying on this argument, the State focused on the fact that the NOAA had concluded that the tides were not measurable in the portion of the Laguna Madre in question.[125] At any given point, water levels at the tide gauges would not correspond to the

116. Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268, 269, 2000 WL 1862934 (Tex. Dec. 21, 2000), *rev'd on reh'g*, 90 S.W.3d 268 (Tex. 2002).

117. *Id.*

118. *Id.*

119. *Id.* at 272-73. Littoral means that the property abuts the water. *See* TEX. NAT. RES CODE ANN. § 61.001(6) (Vernon 2001) (defining littoral lands as those adjacent to the shore).

120. *See* City of Corpus Christi v. Davis, 622 S.W.2d 640, 646 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) (acknowledging that littoral land owners must be given access to the sea since littoral rights are appurtenant to land bordering the sea).

121. *Kenedy Mem'l Found.*, 44 Tex. Sup. Ct. J. at 272-73.

122. *Id.* at 274; Luttes v. State, 159 Tex. 500, 539, 324 S.W.2d 167, 192 (1958).

123. *See Kenedy Mem'l Found.*, 44 Tex. Sup. Ct. J. at 274-275 (discussing the need to locate the reach of the tide in order to determine the shoreline).

124. *Id.* at 275.

125. *Id.* at 275-76; *see also* STEPHEN K. GILL ET. AL., NAT'L OCEANIC AND ATMOSPHERIC ADMIN., TIDAL CHARACTERISTICS AND DATUMS OF LAGUNA MADRE, TEXAS 49 (1995) (indicating that the use of tidal gauges in the Laguna Madre produces inconsistent and unreliable information concerning the daily tidal flows).

water levels in the disputed area, making a determination between the reach and extent of the tides impossible.[126]

The Foundation recognized that the tidal flows were unpredictable and used an alternative method, one different from the NOAA tide gauges and that had never before been used to establish the MHHT.[127] Under this method, the Foundation used an estimated level above the MHHT to establish its reasonable boundary of the shoreline.[128] Based on the Foundation's claim, the shore boundary would lie somewhere between the western edge of the intracoastal waterway and east of the mainland; however, for purposes of its argument, the Foundation claimed only to the edge of the Laguna Madre.[129] Because of the inconsistencies with the Foundation's claimed boundary, the supreme court rejected its arguments,[130] opening the door to validation of the State's claim under the potential exception announced in *Luttes*.[131]

As justification for its argued exception to *Luttes*, the State's focus turned to the historical evidence, since water levels could not be used to calculate the boundary of the shoreline. The court accepted the State's reasoning that historical evidence was an appropriate means for determining the intent of the grantor for purposes of locating the shoreline.[132]

In examining the historical evidence, the court differentiated the area under dispute from that in *Luttes* by finding that the area in question had not changed significantly since the grants.[133] The court also noted that the area had never been permanently submerged, with waters reaching

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126. *See Kenedy Mem'l Found.*, 44 Tex. Sup. Ct. J. at 276 (discussing that basing tidal measurements in the disputed areas is unlikely to have accurate results because of the fluctuations in the water levels between the tide gauges and the water covering the mud flats).

127. *Id.*

128. *Id.*

129. *Id.* at 276-77. If the Foundation's argument was to be accepted in full, the boundary would be based on a man-made waterway constructed some 115 years following the grant. *Id.* at 277. Furthermore, the Foundation's claimed boundary as the western edge of the intracoastal waterway would be contrary to the generally accepted definition of the shoreline since it would place the boundary somewhere in the middle of the Laguna Madre. *See id.* (pointing out weaknesses in the Foundation's claimed boundary).

130. *See id.* at 277 (rejecting the Foundation's claimed boundary).

131. *See Kenedy Mem'l Found.*, 44 Tex. Sup. Ct. J. at 277-78 (discussing the possibility that an exception to *Luttes* may exist based on language derived from the Texas Supreme Court's opinion on rehearing).

132. *Id.* at 278. Although recognizing that the use of historical evidence alone might lead to an uncertain determination of the tidal boundaries, the court indicated its preference for litigating boundary questions rather than blindly adopting a rule without an adequate justification. *See id.* at 278-79 (accepting the State's reasoning that historical evidence was sufficient to indicate boundaries by establishing the grantor's intent).

133. *Id.* at 279.

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the boundary claimed by the State at least several times per year.[134] Additional evidence showed that maps completed by the Foundation's predecessor in interest indicated that the area in dispute was in fact considered a part of the Laguna Madre.[135] Finally, in considering the evidence of prior survey lines, the court concluded that neither the Big Barreta nor the Little Barreta grant encompassed the area in dispute.[136] In relying on the evidence of prior surveys, the supreme court found that

> [e]very survey of the disputed area referred to in the record, except for the Foundation's survey, has located the seashore boundary at or near the line argued by the State. . . . Moreover, the Foundation's surveyors acknowledge that the [State's] line is consistent with the line on the ground the original surveyors located and admit that the Foundation's line is not the original grants' boundary as located by the original surveyors.[137]

Based on this historical evidence, the supreme court affirmed the decision of the court of appeals, finding that the grantors had not intended to include the disputed area in the original grants.[138] The court also determined that it was unnecessary to apply the *Luttes* MHHT rule in this case because it was appropriate to locate the shoreline by using historical evidence to determine the grantor's intent.[139] However, aware that it was on unsteady ground, the court specifically sought to limit its holding to the specific facts in the present case, thereby effectively negating the precedential value of its holding and casting some doubt as to the usefulness of the newly-defined exception to the *Luttes* rule.[140]

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134. *Id.*

135. *Id.* This evidence is buttressed by the fact that neither the Foundation nor its predecessors in interest paid property taxes on the area in dispute until 1987. *Id.* at 304 n.11.

136. *See Kenedy Mem'l Found.*, 44 Tex. Sup. Ct. J. at 280 (relying on surveys conducted in the early 1900s showing that the disputed area was not within the Big Barreta grant or the Little Barreta grant). *But see* Brief of Petitioner Most Reverend Roberto O. Gonzalez, Apostolic Administrator of the Diocese of Corpus Christi at 17-18, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (citing an affidavit from 1934 which indicates that the Kenedy family had always claimed and asserted title to the full extent of the boundaries contained in the land grants which indicates a longstanding claim to the disputed area) (on file with the *St. Mary's Law Journal*).

137. *Kenedy Mem'l Found.*, 44 Tex. Sup. Ct. J. at 280.

138. *Id.* at 281.

139. *Id.*

140. *Id.*

C. Kenedy Memorial Foundation III

Following its December 2000 ruling, the Texas Supreme Court granted rehearing on *Kenedy Memorial Foundation v. Dewhurst* on March 1, 2001.[141] On rehearing, the supreme court made a stunning reversal, and in a 6-3 split decision, found in favor of the Foundation, awarding it title to the lands in dispute.[142]

In reversing the prior decision, a majority of the court, led by Justice Hecht, concluded that, based on *Luttes*,

> [a] shoreline boundary cannot be determined without water level measurements, even if no tidal gauges have historically been placed adjacent the property, and even if those measurements are made for no reason but to determine a boundary over as short a time as a year. An historic bluff line does not mark a civil law boundary.[143]

This conclusion was a common thread throughout the decision, resulting in a finding in favor of the Foundation.[144]

The majority, although accepting all of the State's arguments involving the potential interpretations of the civil law, refused to alter the court's prior application of the civil law as announced in *Luttes*.[145] The court focused its refusal to alter *Luttes* on the fact that the rule had provided a recognizable boundary for almost a half century, and to alter the rule would cause land titles to become unstable.[146] The court concluded that

> *stare decisis* is never stronger than in protecting land titles, as to which there is great virtue in certainty. We would be very reluctant to discard a rule determining seashore boundaries that has served as long and satisfactorily as the rule in *Luttes*, thereby upsetting long-settled expectations, and we could not do so absent far more compelling evidence than can be offered here.[147]

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141. *See* The Supreme Court of Texas, Orders Pronounced on Causes March 1, 2001 *available at* http://www.supreme.court.state.tx.us/cgi-bin.as_web.exe?set_01.ask‡+1368330 (granting rehearing and setting the case for oral argument).

142. *See generally* Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268 (Tex. 2002) (withdrawing an earlier opinion and judgment and substituting the a new opinion); Garry Mauro, Editorial, *Ruling Endangers Public School Fund*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 2002, at 7B (pointing out that the prior opinion written by then Justice Gonzalez had been a unanimous opinion and that the current split-decision was a "terrible legal precedent").

143. *Kenedy Mem'l Found.*, 90 S.W.3d at 280.

144. *Id.* at 291.

145. *See id.* at 280 (emphasizing the decision reached in *Luttes*).

146. *See id.* at 281 (mentioning the importance of protecting land titles).

147. *Id.* Recall that in its original appeal, the Foundation raised the specter of confusion in land titles, which was dismissed by the court of appeals as an irrelevant argument and therefore inapplicable to the case. *See id.* at 306 (dismissing the Foundation's argu-

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Upon concluding that the *Luttes* rule was applicable to the present case, the majority turned to and rejected the State's claim that a finding in favor of the Foundation and setting the boundary at the seashore would violate the original grantor's intent in making the land grants.[148] To ascertain the intent of the grantors, the majority focused on the language contained in the land grants, which called for the eastern boundary of the grants to be placed at the "waters of the Laguna Madre."[149] Thus, despite the subsequent understanding of both the owners and surveyors of the land, the boundary could not be placed at another point other than that defined in the language of the original land grant.[150] The majority further rejected the State's argument that the land could not have been in the original grants due to the historical record indicating the purpose of the land grants.[151] The majority concluded that once the applicable law had been established, the historical record could neither increase nor decrease the extent of the land grant.[152]

In answering the State's contention that it was not feasible to apply the *Luttes* MHHT rule to the land in question due to geographic and tidal conditions, the majority found the land in *Luttes* to be remarkably similar to that claimed by the Foundation.[153] The court recognized the difficulty in making boundary determinations based on water level, but also faulted the sole reliance on surveyors' speculative observations, especially when *Luttes* provided a firm rule.[154]

The court found it implausible to determine a shoreline solely through the use of tidal gauges, as contended by the State, since the use of tidal gauges post-dated the application of the civil law.[155] Although recognizing that the use of tidal gauges to measure water in the disputed area of the Laguna Madre was improbable, the court concluded that the water levels could be measured within the Laguna Madre; it simply required

ment that failure to adhere to the rule in *Luttes* would cause confusion and threaten land titles along the Gulf Coast).

148. *Kenedy Mem'l Found.*, 90 S.W.3d at 282.

149. *Id.*

150. *Id.*

151. *See id.* at 283 (finding the historical purpose of the land grants ambiguous and rendering speculative any argument that additional requests for land were intended to show a limitation on the original land grant).

152. *Id.*

153. *See Kenedy Mem'l Found.*, 90 S.W.3d at 283-84 (finding that the only "appreciable difference" between the land in *Luttes* and that claimed by the Foundation was that in *Luttes* the land was "'always'" covered while the disputed land was frequently uncovered by water and that water reached the claimed bluff line as frequently as that in *Luttes*).

154. *Id.* at 284.

155. *See id.* (noting that the *Luttes* role is independent of tidal gauges).

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some method other than tidal gauges.[156] Thus, because the Foundation used a method focused on measuring water levels rather than a subjective survey, the court determined that its methodology was more favorable and adhered more closely to the intent of the civil law.[157]

After dismissing the arguments of the State, the court turned its attention to the rehearing language found in *Luttes*, which purports to announce an undefined exception to the general rule in areas where it might not be possible to determine the shore boundary.[158] The majority rejected the State's argument that an exception had been created in *Luttes* to allow the shoreline to be established through something other than water measurements, which would allow for a much broader basis for defining the shoreline so that any other method would be permissible as well.[159] Had the *Luttes* court intended to create such a broad exception, the *Kenedy Memorial Foundation* court reasoned, it would have allowed the State's argument that the vegetative line was sufficient to create a boundary, which the *Luttes* court clearly rejected.[160] Thus, as in *Luttes*, the majority again rejected the use of the vegetative line as an alternative to locating a shoreline.[161]

In a sharp dissent led by Justice Craig Enoch, the dissenters focused on the difference between measuring daily tidal levels in the Laguna Madre, as propounded in *Luttes*, versus simply measuring water levels.[162] The dissent claimed that *Luttes* required an assumption that tide levels could be measured, but as shown in the present case, the tides could not be measured in this portion of the Laguna Madre, thus casting doubt as to the validity of the majority's claim that tide levels and water levels are synonymous.[163] The dissent contended that the majority's adherence to the Foundation's claim of a line based on the National Geodetic Vertical Datum plane is insufficient to establish a boundary based on water levels.[164] However, reliance on this arbitrary line does not reflect the *Luttes* MHHT rule's requirement that the boundary be measured by tidal movements.[165]

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156. *Id.*

157. *See id.* (finding that measurements of water level more closely reflect the application of the civil law because the mean high water level must be upland, or to the west of Padre Island, and thus must be east of the mainland).

158. *Kenedy Mem'l Found.*, 90 S.W.3d at 285.

159. *Id.* at 285-86.

160. *Id.* at 286.

161. *Id.*

162. *Id.* at 291 (Enoch, J., dissenting).

163. *Kenedy Mem'l Found.*, 90 S.W.3d at 292 (Enoch, J., dissenting).

164. *Id.* at 268.

165. *See id.* at 292 (noting that the judgment is based on a survey line, not a tidal line).

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The dissent's argument pointed out that water levels must be differentiated from tidal levels, as predicated by *Luttes*.[166] This differentiation is further underscored by the fact that the *Luttes* court relied on a definition of "tide" to be "the regular and predictable perpendicular daily rise (or rises) and fall (or falls) of the waters as a result of astronomical forces . . . ."[167] From this definition, the dissent contended that there must be a tide for the *Luttes* MHHT rule to apply.[168] However, since NOAA has determined tidal levels in the Laguna Madre to be insufficient for determining tidal boundaries, *Luttes* cannot apply.[169] According to the dissent, the Foundation's claimed boundary cannot be based on *Luttes* because there is no mean high tide, and as such, it is incorrect to substitute any other water level.[170]

In attempting to locate the boundary, the dissent placed greater emphasis on the use of historical evidence to indicate the intent of the original grantors.[171] In support of its heavy reliance on historical evidence, the dissent quoted *Cavazos v. Trevino*,[172] which stated that "[i]n construing such a grant, the circumstances attendant, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the papers, which

166. *Id.* at 293.

167. *Id.* (quoting Luttes v. State, 159 Tex. 500, 509, 324 S.W.2d 167, 173 (1958)).

168. *Kenedy Mem'l Found.*, 90 S.W.3d at 293 (Enoch, J., dissenting) (relying on the finding in *Borax Consol. v. City of Los Angeles* that tidal boundaries must be based on an average over a long period of time and use the tidal gauges as a means for determining the shoreline).

169. *See id.* at 293-94 (concluding that since the tides cannot be measured under *Borax*, *Luttes* is inapplicable). *But see* Harold Loftin, Jr., Note, *Flood Warning: Title Wave Approaches Texas in Wake of* Phillips Petroleum Co. v. Mississippi, 41 BAYLOR L. REV. 541, 558-59 (1989) (criticizing a literal reading of the "ebb and flow" test as over-simplistic because it would always lead to the vesting of title to any lands influenced by the tide in the state and would lead to an explosion of litigation since every case would necessarily be fact dependent). *Phillips Petroleum Co. v. Mississippi* allows the State to claim an interest in submerged lands as long as the land is affected by tides. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988). This interpretation, though applied to the common law in Mississippi, as advocated by the dissent in *Kenedy Memorial Foundation*, could lead to the State placing a legitimate claim to any lands remotely affected by the tides so long as it is covered by a portion of the Gulf of Mexico, since the Texas Legislature has given explicit ownership of all lands covered by the Gulf of Mexico. *See* Harold Loftin, Jr., Note, *Flood Warning: Title Wave Approaches Texas in Wake of* Phillips Petroleum v. Mississippi, 41 BAYLOR L. REV. 541, 556 n.92 (1989) (demonstrating the potential effect on Texas coastal boundaries by *Phillips Petroleum Co. v. Mississippi*, which gives a state ownership of submerged lands so long as the land is affected by the ebb and flow of the tides).

170. *Kenedy Mem'l Found.*, 90 S.W.3d at 293 (Enoch, J., dissenting).

171. *Id.* at 296.

172. 35 Tex. 133 (1871).

were possessed by the actors themselves."[173] Thus, in conjunction with both the historical evidence and the physical evidence, the dissent concluded that the State's evidence supports the reasonable alternative suggested in the *Luttes* rehearing language.[174]

Responding to the stinging criticism of the dissent, the majority specifically pointed out that the supposed scientific evidence relied upon by the minority is the inability of the federal government to accurately calculate the tides in the area based on a report which focuses on the navigability of the Laguna Madre, rather than the determination of land titles.[175] The majority criticized the reasoning of the dissent as follows:

> The dissent's position is that early nineteenth century Spanish and Mexican civil law and Texas land titles along the seashore fluctuate depending on NOAA's evolving understanding of tidal characteristics in the region. Because '[t]he federal government has declared as a matter of law that the tide cannot be measured,'. . . the civil law regarding shorelines applied to these land grants from 1804 to 1995 and then stopped, shifting 35,000 acres from the Foundation to the State. With great respect for the power of the federal government, we do not agree that an agency's understanding of nature can alter history.[176]

Stated differently, simply because NOAA refuses to recognize the flow of water over the contested land as "tidal," that does not alter the civil law location of the Foundation's boundary.[177]

Finally, the majority pointed out the following flaw of the dissent's argument: that the line advocated by the State is waterlogged "at most

173. *Kenedy Mem'l Found.*, 90 S.W.3d at 296 (Enoch, J., dissenting) (quoting Cavazos v. Trevino, 35 Tex. 133, 162 (1871) and citing Cavazos v. Trevino, 73 U.S. 773, 784-86 (1867) as precedent for the use of historical evidence in determining the intent of a grantor). In *State v. Balli*, then-Justice Sharp argued that title to land should not be granted to the claimant because it would violate the intent of the grantor, and noted in his dissenting opinion that reliance on *Cavazos* is at best tenuous since the decision in *Cavazos* was rendered by the Reconstruction Court and had not been cited with approval by the Supreme Court. State v. Balli, 144 Tex. 195, 260-61, 190 S.W.2d 71, 105-06 (1944). It seems odd that the dissent would not rely on *Cavazos* to support giving title to land to the State when this same reasoning was rejected some fifty-seven years earlier.

174. *See Kenedy Mem'l Found.*, 90 S.W.3d at 291-93 (Enoch, J., dissenting) (finding ample historical and physical evidence to support the State's position irrespective of *Luttes*).

175. *See id.* at 272-73 (noting that the Texas General Land Office, a party in the present case, assisted in creating the navigational information relied upon by the dissent to help establish land titles and that the report relied upon had been commenced after the litigation had begun).

176. *Id.* at 290.

177. *Id.*

once or twice a year."[178] The majority concluded its critique of the dissent by asserting that it would seem wrong to define the shoreline in a place where it is almost always dry.[179] In the eyes of the majority, it was inconceivable that the State could claim land as "submerged" which was so rarely underwater. Having established that the boundary could be determined as a matter of law under the application of *Luttes*, the majority of the court concluded that the jury's findings in favor of the State were not relevant and should not be considered.[180]

Ultimately, after several iterations and many years of litigation, it appears the civil law definition remains unchanged from its original application in *Luttes*. But, can it survive? This question remains uncertain as the supreme court has yet to fully define the exception to the *Luttes* rule.

D. *The Ramifications of* Kenedy Memorial Foundation v. Dewhurst

Despite the apparent finality of the Texas Supreme Court's August 29, 2002 opinion on rehearing, the final acts of this story were yet to be played out. Following the controversial reversal of the original opinion, the State filed a second motion for rehearing on September 13, 2002.[181] Despite granting the motion for rehearing, the Texas Supreme Court ultimately denied the State's motion for rehearing on December 31, 2002, and the case was remanded to the district court for the entry of judgment.[182] By ruling in favor of the Kenedy Memorial Foundation, the Texas Supreme Court determined that: (1) ensuring stability in Texas land titles controls this boundary dispute; (2) courts should not have the power to read unspecified intent into the plain meaning of documents;

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178. *Id.* at 291. Interestingly, neither the parties' briefs on appeal nor any of the courts' decisions address the Clean Water Act's regulations indicating that "mudflats" may be considered waters of the United States. 33 C.F.R. § 328.3(a)(3) (2003) (defining "mudflats" as waters of the United States under Army Corps of Engineers regulations); 40 C.F.R. § 230.3(s)(3) (2003) (defining "mudflats" as waters of the United States under Environmental Protection Agency regulations).

179. *Kenedy Mem'l Found.*, 90 S.W.3d at 291.

180. *Id.* at 270.

181. *Id.* at 268.

182. *Id.* Even though the Texas Supreme Court's ruling appears to foreclose any argument in support of the State's position, it appears the State has not yet given up the fight. On April 11, 2003, the State Board of Education voted to request the Texas Attorney General to represent it in the remedy phase of the case before district court. *Summary, State Board of Education Actions, Consideration of Possible Request for Attorney General Representation (April 11, 2003)*, *available at* http://www.tea.state.tx.us/sboe.summary/sboesummary/2003/sum04-11.html (on file with the *St. Mary's Law Journal*). The State Board of Education's request is predicated on the fear that a remedy may be harmful to the Permanent School Fund, which provides the monies to support state education efforts. *See id.* (indicating that the State Board of Education believes it needs to seek the Attorney General's representation to protect the Permanent School Fund).

and (3) the boundary line sought by the State does not fall within the undefined exception contained in *Luttes*.[183]

1. Stability of Land Titles

One of the major premises for the majority's reversal of the prior decision was the adherence to the principle that there must be stability in land titles for land to retain value.[184] The Texas Supreme Court had previously stated in *Wessely Energy Corp. v. Jennings*[185] that it was ever "mindful of the necessity that property rights must remain stable and free from changing doctrine."[186] In light of this principle, the majority felt "very reluctant" to abandon the firmly established rule of property announced in *Luttes* of locating the boundary of the seashore at the mean high water level.[187]

The State, however, contended that the characteristics of the land are unique within the disputed area and thus justify an exception to *Luttes* and measuring the boundary by some alternative means other than the MHHT.[188] Yet the uniqueness of the land in question is strongly dis-

183. *See generally* Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 281-91 (Tex. 2002) (discussing the rationale of the court's decision).

184. *See id.* at 281, 288 (indicating that stare decisis is never more important than in protecting land titles); Justice Bill Vance, *The Clear and Convincing Evidence Standard in Texas: A Critique*, 48 BAYLOR L. REV. 391, 393 (1996) (discussing the importance of stability of land titles and the need for a heightened standard of review when land titles are in dispute).

185. 736 S.W.2d 624 (Tex. 1987).

186. Wessely Energy Corp. v. Jennings, 736 S.W.2d 624, 628 (Tex. 1987); *see also* Friendswood Dev. Co. v. Smith-Southwest Indus., Inc., 576 S.W.2d 21, 30-31 (Tex. 1978) (underscoring the importance of precedent in the realm of property law); Peralta v. United States, 70 U.S. 434, 439 (1865) (indicating that property rights rest on the security and stability of judicial decisions concerning land titles).

187. *Kenedy Mem'l Found.*, 90 S.W.3d at 281. The Supreme Court has been criticized that while attempting to uphold the civil law definition of the seashore found in *Luttes* in the name of stability in land titles, it also has succeeded in destroying the doctrine of accretion in Texas, causing even greater confusion. *See* Letter from Jerry Patterson, Commissioner-elect, Texas General Land Office, to John T. Adams, Clerk, The Supreme Court of Texas 1 (Nov. 25, 2002) (criticizing the Texas Supreme Court for its erroneous decision in *Kenedy Memorial Foundation* and alleging the decision abolishes the doctrine of accretion in Texas) (on file with the *St. Mary's Law Journal*). This assertion seems out of context considering that the Kenedy Memorial Foundation has never made accretion an issue in the case and the courts have routinely found that accretion is not at issue in the present case. Letter from Marc Knisely, McGinnis, Lochridge & Kilgore, Attorney Representing the Kenedy Memorial Foundation, to Andrew Weber, Clerk, Supreme Court of Texas 2 (Nov. 27, 2002) (responding to Patterson's letter claiming that he was unaware his arguments were not followed by this court) (on file with the *St. Mary's Law Journal*).

188. *See* Motion for Rehearing of David Dewhurst, Commissioner of the General Land Office and the State of Texas at 5, Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268

puted. According to the Foundation and other surrounding ranches, there are over 350 square miles along the Laguna Madre that fit the description of the tidal mud flats in question.[189] Therefore, the State's contention of uniqueness is questionable, and adhering to the *Luttes* decision would provide a consistent method for locating boundaries for this large stretch of land.

The court's goal of asserting stability of land titles permeates court decisions deciding the real concern in *Kenedy Memorial Foundation*: ownership of minerals beneath the surface estate. Although often overlooked in the text of the courts' opinions, oil and gas, not a desire for beach property, fueled this controversy.[190] In countless oil and gas title opinions, the Texas Supreme Court has consistently constructed rules designed to promote stability in land titles.[191] The court has not limited its

(Tex. 2002) (No. 99-0667) (comparing the land in the disputed area to that of an extraterrestrial landscape in making its argument that the land has unique characteristics unlike that of other land along the Texas coast) (on file with the *St. Mary's Law Journal*).

189. *See* Brief of Petitioner John G. and Marie Stella Kenedy Memorial Foundation's Response to the State's Motion for Rehearing at 9, Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268 (Tex. 2002) (No. 99-0667) (making reference to other lands which would be affected if the State's proposed boundary were adopted) (on file with the *St. Mary's Law Journal*); *see also* Brief of Amicus Curiae for King Ranch, Inc. in Support of Rehearing, at 1-2, Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268 (Tex. 2002) (No. 99-0667) (indicating the impact of the Supreme Court's decision in *Kenedy Memorial Foundation* and its potential impact on the littoral lands of the King Ranch, which abut the disputed lands in *Kenedy Memorial Foundation*) (on file with the *St. Mary's Law Journal*).

190. *See Kenedy Mem'l Found.*, 90 S.W.3d at 270-71 (acknowledging that the possessor would be entitled to the oil and gas production from within the disputed area); Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268, 271, 2000 WL 1862934 (Tex. Dec. 21, 2000) (showing that the cause of action accrued by way of interpleader when mineral lessees sought to determine to whom they owed oil and gas royalties), *rev'd on reh'g*, 90 S.W.3d 268 (Tex. 2002); Kenedy Mem'l Found. v. Dewhurst, 994 S.W.2d 285, 289 (Tex. App.—Austin 1999) (illustrating that the case revolved around the mineral rights beneath the disputed lands), *rev'd on reh'g*, 90 S.W.3d 268 (Tex. 2002).

191. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1982) (opining that there must be a better means to determine ownership of other minerals not named in a lease because the current test had led to uncertainty in land titles); Reed v. Wylie, 597 S.W.2d 743, 750 (Tex. 1980) (Spears, J., concurring) (arguing the necessity for stability of land titles exists in order to allow for development of oil and gas reserves without being impeded by a lack of certainty in ownership); Luttes v. State, 159 Tex. 500, 531, 324 S.W.2d 167, 187 (1958) (theorizing that uncertainty in boundary locations in tidal areas may lead to complex boundary litigation and thwart the leasing of State-owned tidal lands containing mineral deposits); *see also* Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 81 n.43 (1993) (referencing Dean Eugene Kuntz's belief that stability in land titles is essential in matters involving oil and gas due to the capital intensive nature of exploration, development, and production (citing Eugene Kuntz, *The Law Relating to Oil and Gas in Wyoming*, 3 WYO. L.J. 107, 114 (1949))); David A. Scott, Comment, *Determining Mineral Ownership In Texas After* Moser

focus to maintaining stability in land titles only when oil and gas are involved, but has extended this principle into other areas of the law as well.[192]

2. Importance of Divining Intent

When interpreting any grant, ascertaining the actual intent of the grantors is key to establishing the boundaries.[193] Once this intent is determined, all other outstanding interests must bow to it.[194] As previously indicated, the intent of the grantors must be determined according to the controlling law at the time that the grants were made.[195] Thus, the Texas Supreme Court must interpret the controlling Spanish and Mexican law at the time the grants were made in order to accurately determine the intent of these sovereigns in making the land grants.[196] The task is further complicated because the court must consider how the grantees considered the laws of the time to apply to the grants in question.[197]

In determining the intent of the grantors, the courts may be guided by both the actual language of the grant (the so-called four corners rule) and by outside evidence.[198] Where the facts are undisputed, the location of a boundary is a question of law for the court, but the court must still divine the intent of the parties.[199] When a document is unambiguous, the court must construe the document within the parameters of the document itself

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v. United States Steel Corp.—*The Surface Destruction Nightmare Continues*, 17 ST. MARY'S L.J. 185, 213-14 (1985) (indicating land title stability benefits by adherence to property law precedents).

192. *See* Hereford Land Co. v. Globe Indus. Inc., 387 S.W.2d 771, 776 (Tex. Civ. App.—Tyler, 1965) (accepting a prior holding that it was the public policy of the state that the importance of stability in land titles outweighed an inconvenience to creditors during the sale of property to satisfy a judgment creditor (citing Weast v. Mahone, 176 S.W.2d 197, 202 (Tex. Civ. App.—Galveston 1943, no writ))).

193. *Kenedy Mem'l Found.*, 90 S.W.3d at 282; *see also* Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 669-70 (1997) (illustrating that contracts are not to be read in part but that intent is to be determined from a reading of the entire contract as a whole).

194. Woods v. Robinson, 58 Tex. 655, 661 (1883).

195. *Kenedy Mem'l Found.*, 90 S.W.3d at 282.

196. *Id.*

197. *Id.*

198. *See* Sun Oil Co. v. Madeley, 626 S.W.2d 726, 730-31 (Tex. 1982) (explaining that when construing a contract, a court will consider surrounding circumstances of execution as well as the instrument to give effect to the parties intent).

199. *See* Ulbricht v. Friedsam, 159 Tex. 607, 612, 325 S.W.2d 669, 672 (1959) (declaring that determination of a boundary line is a question of law).

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to determine the intent of the grantor.[200] The question of ambiguity is a question of law for the courts to decide by looking at the entire document and considering all circumstances at the time of the document's creation.[201] In interpreting the language of the document to divine intent, the court should give the words of the document their "usual and normal meaning" given to them "by ordinary persons in the same or a similar situation."[202] However, parol evidence may be reviewed in order to locate and identify the monuments described by the language of the document.[203] This parol evidence is admissible even if there is no ambiguity in the language of the grant because it is only through parol evidence that the description of the monuments can be placed on the ground.[204]

When applying the four corners rule, one of the strongest guiding factors in determining a grantor's intent are the "calls" a grantor used in describing the property.[205] However, courts cannot add calls to a prop-

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200. *See* Allen v. Morales, 665 S.W.2d 851, 854 (Tex. App.—Fort Worth 1984, no writ); *cf.* William R. Van Wagner et al., *Annual Survey of Texas Law, Part II: Real Property*, 46 SMU L. REV. 1707, 1707 (1993) (indicating that the trend during the early 1990s in most contract interpretation cases is to follow the four-corners rule in divining intent from an unambiguous document).

201. Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 700 (1997).

202. *Allen*, 665 S.W.2d at 854; *see also* Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 671 (1997) (discussing that courts should give words in contracts their plain meaning); *cf.* Laura H. Burney, "*Oil, Gas, and Other Minerals" Clauses in Texas: Who's on First?*, 41 Sw. L.J. 695, 709-10 (1987) (likening the need for stability in land titles to the need for a certainty for understanding in oil and gas concerning the approach taken in defining "other minerals" in oil and gas deeds).

203. Floyd v. Day, 50 S.W.2d 371, 372 (Tex. Civ. App.—Eastland 1932, writ dism'd w.o.j.); *see also Sun Oil Co.*, 626 S.W.2d at 730 (finding that consideration of the surrounding facts and circumstances is an appropriate aid in construing the construction of a contract).

204. *Floyd*, 50 S.W.2d at 372.

205. *See* City of Webster v. City of Houston, 855 S.W.2d 176, 178 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (indicating that calls are used in describing "property unless there are conflicts or inconsistencies" but that the calls should be taken as a whole whenever possible); Harris v. O'Connor, 185 S.W.2d 993, 1008 (Tex. Civ. App.—El Paso 1944, writ ref'd w.o.m.) (recognizing that calls contained in grants from a prior government can be used in establishing the location of property); *see also* Gandy v. Pemberton, 389 S.W.2d 612, 613-14 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.) (demonstrating that describing property by a metes and bounds description is sufficient to accurately identify property under the Texas Rules of Civil Procedure in actions of trespass to try title). Calls are designated landmarks chosen by a surveyor or grantor and are used in describing property so that it may be located on the ground. BLACK'S LAW DICTIONARY 196 (7th ed. 1999). In order to give certainty to the construction of grants and surveys, calls have been prioritized according to: (1) natural objects; (2) artificial monuments; (3) other identifiable

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erty description in order to solidify the intent of a grantor.[206] In applying the four corners rule to the grant in question, the specific language of the grant reflects the grantor's intent.[207] In *Kenedy Memorial Foundation*, the grant includes a call to an immovable natural monument: the "waters of the Laguna Madre."[208] Thus, this call to the Laguna Madre will control over a surveyor's subsequent determinations[209] and calls to course and distance.[210]

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lands; (4) course and distance; and (5) specific acreage. *See* Davis v. Baylor, 19 S.W. 523, 524-25 (Tex. 1892) (indicating that a call to a known survey will control over a call to course and distance); Stafford v. King, 30 Tex. 257, 257 (1867) (providing the general rules concerning the priority of calls and why preference is given to natural calls over course and distance); *see also* Amerman v. Martin, 83 S.W.3d 858, 863 (Tex. App.—Texarkana 2002, pet. granted) (demonstrating the historic acceptance of prioritized calls); State v. Brazos River Harbor Nav. Dist., 831 S.W.2d 539, 542 (Tex. App.—Corpus Christi 1992, writ denied) (stating that where a natural object is referred to in a grant, calls to course and distance will be found to be meander lines, and the natural object will control).

206. *City of Webster*, 855 S.W.2d at 178.

207. *See* Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 282 (Tex. 2002) (finding that the law, as determined by the court, defines and locates a monument without concern for private understanding). An interesting parallel to locating a shoreline boundary can be drawn from efforts to locate a riparian boundary when surveys differ from the language actually contained in a grant. *See* Allen v. Morales, 665 S.W.2d 851, 852-53 (Tex. App.—Fort Worth 1984, no writ) (finding that a call to the bank of a river in a deed means the natural course of the river in spite of a survey indicating a different boundary location); Stover v. Gilbert, 112 Tex. 429, 434, 247 S.W. 841, 843 (1923) (outlining the general rule that the meander lines of a surveyor on land adjacent to a watercourse are not controlling, but that the general course of the waterway will serve as the controlling boundary).

208. *Kenedy Mem'l Found.*, 90 S.W.3d at 282. *But see* State v. Brazos River Harbor Nav. Dist., 831 S.W.2d 539, 543-44 (Tex. App.—Corpus Christi 1992, writ denied) (rejecting a specific call to "on the Gulf Coast" as too general and finding the call to be a general geographic location rather than a specific intent to locate a boundary). There is a further public policy rationale served in locating boundaries between adjacent owners at the water level in order to create stability even though land may be subject to subtle changes over time. *See* Brainard v. State, 12 S.W.3d 6, 18 (Tex. 1999) (discussing several public policy reasons for allowing for a non-static boundary along riparian watercourses so as to take into account gradual changes in the watercourse and its effects on adjacent lands). This concept is virtually the same when applied to seaward boundaries affected by accretion and reliction. *See* State v. Balli, 144 Tex. 195, 252, 190 S.W.2d 71, 101 (1945) (allowing for accretion and reliction on coastal property due to changes in the sea to be determined by a factual basis on a case-by-case analysis).

209. *Kenedy Mem'l Found.*, 90 S.W.3d at 282.

210. *See* Howland v. Hough, 570 S.W.2d 876, 882 (Tex. 1978) (recognizing that natural and artificial monuments will control over calls to course and distance and that, when possible, the "footsteps of the surveyor shall, if possible, be followed" in locating the calls); City of Port Isabel v. Mo. Pac. R.R., 729 S.W.2d 939, 942 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (recognizing a specific call to the "meanders of the Laguna Madre" as the boundary of land grant); *see also* Luttes v. State, 159 Tex. 500, 520, 324 S.W.2d 167, 180 (1958) (theorizing that the grantors would not have used the a reference to a shoreline which was different from that which was commonly understood at the time of the grant).

In *Kenedy Memorial Foundation*, the question then becomes where and how to locate the waters of the Laguna Madre. The *Luttes* court gave one important clue as to how to find the shoreline when it indicated that the shore is generally understood to be at the water's edge instead of "land which is only occasionally and irregularly inundated" with water.[211] The *Luttes* court found it difficult to believe that the sovereigns of the times would use a call to the "shore" that was different from its commonly understood meaning at the time of making the grant.[212] Therefore, a call to the shore, when governed by the civil law, must mean "the area in which land is regularly covered and uncovered" by the movements of the tides at the time.[213]

Because of the inherent possibility of the ambiguities involved in divining the intent of the grantors,[214] it is at this point that the *Kenedy Memorial Foundation* court focused on the extrinsic evidence to determine where the shoreline of the Laguna Madre lies. In examining the extrinsic evidence to find the intent of the grantors, the Texas Supreme Court examined both the historical record[215] and the topographical features, as well as how they comport to modern scientific data as determined by tidal gauges.[216]

The historical record indicates that the primary purpose of land grants during the time of the grants in question was for the purpose of grazing.[217] Although the intention of granting land for the purposes of grazing was controlling at the time of the grants, the shore boundary cannot be derived solely from an expression of grazing rights.[218] The purpose of surveys in grants under the civil law was for determining the amount of money due to the sovereign for grazing rights, not for locating a boundary

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In borrowing from the language in *Howland v. Hough* regarding the retracing of the footsteps of the surveyor, it is acknowledged that it is not possible to follow the footsteps of the surveyor along the tide line on the seashore. *Brazos River Harbor Nav. Dist.*, 831 S.W.2d at 542.

211. *Luttes*, 324 S.W.2d at 180.

212. *Id.*

213. *Id.* at 192.

214. *See Kenedy Mem'l Found.*, 90 S.W.3d at 281 (noting the inherent difficulties a modern court faces in determining how eighteenth-century sovereigns would have applied thirteenth-century law in determining the location of the shoreline in the Laguna Madre).

215. *Id.* at 283.

216. *Id.* at 284.

217. *Id.* at 283; State v. Balli, 144 Tex. 195, 244, 190 S.W.2d 71, 97 (1945).

218. *See Kenedy Mem'l Found.*, 90 S.W.3d at 283 (implying that grazing rights, though important, could not define the shore boundary in contradiction to the civil law at the time of the grants).

on the ground.[219] Therefore, in applying the civil law, the call to the Laguna Madre would control over the surveys indicating the scope of the pasture land.[220] Subsequent evidence also showed that the grantees believed the water of the Laguna Madre was indicative of their understanding of the extent of the grant at the time it was given.[221] Thus, a series of deeds to and by the Kenedy family ranging from 1881 to 1889 involving the lands in question, purporting to place the eastern boundary at the Laguna Madre, give additional understanding as to the nature and extent of the grants.[222]

Although courts are generally bound by the intent of the grantor at the time of the grant under the rules of document interpretation, another doctrine can apply to boundary disputes: the doctrine of acquiescence. Under that doctrine, in *Great Plains Oil & Gas Co. v. Foundation Oil Co.*,[223] the Texas Supreme Court adopted the position that parties can consent to a boundary, other than the specified boundary, when there is other evidence to support a boundary by acquiescence.[224]

Further historical evidence that the Laguna Madre was intended to serve as the eastern boundary of the land grants in question can be found

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219. *See* Brief on the Merits of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation at 27, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (maintaining it was not the custom under the civil law to survey grants to water boundaries because the focus was on determining the extent of valuable grazing lands contained in the grant) (on file with the *St. Mary's Law Journal*).

220. *Kenedy Mem'l Found.*, 90 S.W.3d at 282-83; Brief on the Merits of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation at 28, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (on file with the *St. Mary's Law Journal*).

221. *See Kenedy Mem'l Found.*, 90 S.W.3d at 282 (reasoning that the understanding of the civil law by the grantees at the time of the grant is indicative of the scope of the grants).

222. *See* Brief of Petitioner Most Reverend Roberto O. Gonzalez, Apostolic Administrator of the Diocese of Corpus Christi at 4, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0067) (demonstrating that land titles have long held the waters of the Laguna Madre to be the eastern boundary of the lands in question) (on file with the *St. Mary's Law Journal*). These deeds, long recognized by the State, bring into question whether the State has acquiesced to the boundary being located at the Laguna Madre. *See* Harris v. O'Connor, 185 S.W.2d 993, 1015-16 (Tex. Civ. App.—El Paso 1944, writ ref'd w.o.m.) (allowing that even though a boundary may not be conclusively established between the State and the grantee, it can be established by continuous acquiescence).

223. 137 Tex. 324, 153 S.W.2d 452 (1941).

224. *See* Great Plains Oil & Gas Co. v. Found. Oil Co., 137 Tex. 324, 335, 153 S.W.2d 452, 458 (1941) (indicating that it is possible for a boundary to be located by the consent of the parties when it is supported by other evidence that the boundary has been acquiesced to).

in *Walker v. Kenedy*.[225] In *Walker*, the plaintiff sued the Foundation's predecessors in interest, seeking the ability to survey lands between the Kenedy ranch and the Laguna Madre he believed to be vacant.[226] The Texas Commission of Appeals found in favor of the Foundation's predecessors by ruling that the land was not vacant and that the title was not vested in the State.[227] In light of that decision, the land could not be viewed as being owned by the Foundation's predecessors in 1923 and then eighty years later find the title vested in the State.[228] Thus, *Walker* demonstrates the historical interest claimed by the Foundation's predecessors and their intent to vigorously defend their claims to their land.[229] Finally, in the 1980s, the Texas General Land Office, the same office now seeking title to the land in question, determined that the boundary to the land in question lies at the Laguna Madre.[230]

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225. *See* Walker v. Kenedy, 133 Tex. 193, 195-96, 127 S.W.2d 163, 164 (1938) (giving a history of prior litigation involving title to the land in question in *Kenedy Memorial Foundation v. Dewhurst*).

226. *Walker*, 127 S.W.2d at 164.

227. *Id.*; Brief of Petitioner The John G. and Marie Stella Kenedy Foundation's Second Response Concerning State's Motion for Rehearing at 5 n.4, Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268 (Tex. 2002) (No. 99-0667) (on file with the *St. Mary's Law Journal*).

228. *See Walker*, 127 S.W.2d at 164 (reasoning that the land was not vacant, not unappropriated school lands, nor did it belong to the public domain). It was essential to the Foundation's claim to title that it unequivocally show a continuous interest in the land since the grant was made under the civil law, which allowed for the abandonment of real property. *See* State v. Superior Oil Co., 526 S.W.2d 581, 590-91 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (surmising that the *Las Siete Partidas* allowed an individual to abandon property when he or she relinquishes use with the intent to abandon the land). However, simple abandonment would not automatically provide for an escheat to the State, but rather to the first party to take possession following abandonment. *Id.* at 591. However, by continuing to show interest in the property throughout the year, the Foundation was able to defeat any potential claim of abandonment. *See id.* (applying the principles of abandonment under the civil law).

229. Brief of Petitioner Most Reverend Roberto O. Gonzalez, Apostolic Administrator of the Diocese of Corpus Christi at 18, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (on file with the *St. Mary's Law Journal*). It has been argued that the Kenedy family has never owned the land in question and that the land has been merely leased to the Kenedys beginning in the 1860s and continuing to the present by way of three successive leases. *See* Jeremy Schwartz, *Balli Heirs Claim Kenedy Foundation Land Was on Lease*, CORPUS CHRISTI CALLER TIMES, July 16, 2000, http://caller2.com/2000/july/16/today/local_ne/4919.html (indicating a claim to more than 363,000 acres of land within the La Barreta and Little Barreta grants and seeking reimbursement for prior oil and gas revenues).

230. Brief of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation's Response to the State's Motion for Rehearing at 3, Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268 (Tex. 2002) (No. 99-0667) (on file with the *St. Mary's Law Journal*).

From this historical evidence, the court properly concluded that the understanding of neither the grantor nor the grantee could enlarge or reduce the scope of the grants. Rather, the civil law controlled, regardless of the understanding of the parties involved.[231] Had the supreme court not concluded that the civil law controlled under the acquiescence test adopted in *Great Plains Oil & Gas*, it would have been possible to adduce that the parties had long accepted the Laguna Madre as the boundary of the land grants.[232]

Turning to the topographical features of the disputed area, the court focused on whether the tidal boundary could be marked with reasonable accuracy.[233] The court was able to draw a distinction between the physical characteristics of the land in *Luttes* and those in the present case by determining that land in *Luttes* had been completely covered by water, while the land in dispute had been infrequently covered by water.[234] But, other than the frequency, or infrequency depending on the perspective, of the water in covering the land, there was no significant difference between the geography of the land in dispute.[235] Therefore, as a matter of law, the boundary can be placed at the mean of the higher tides in both places.[236]

In arriving at its conclusion that the boundary existed at the mean of the higher tides, the court was required to examine once again the State's contention that the boundary was at some vegetation or bluff line rather than the shoreline.[237] In *Luttes*, the supreme court rejected the State's contention that a vegetative line served as a boundary for the mean high tide, finding such a line less accurate than relying on tidal measurements.[238] Yet, when presented with facts virtually identical to *Luttes*, the State disregarded the finding in *Luttes* and argued precisely what the court had previously rejected.[239] Interestingly, it was not until after the

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231. Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 282 (Tex. 2002).

232. *See* Great Plains Oil & Gas Co. v. Found. Oil Co., 137 Tex. 324, 335, 153 S.W.2d 452, 458 (1941) (setting out the acquiescence test).

233. *Kenedy Mem'l Found.*, 90 S.W.3d at 283.

234. *Id.* at 283-84.

235. *Id.* at 284.

236. *Id.*

237. *Id.*; *see also* Luttes v. State, 159 Tex. 500, 539, 324 S.W.2d 167, 192 (1958) (dismissing the State's contention that a vegetation line could serve as a proper boundary).

238. *Luttes*, 324 S.W.2d 192; *see also* Rudder v. Ponder, 156 Tex. 185, 195, 293 S.W.2d 736, 742 (1956) (refusing to recognize a bluff as a proper littoral boundary under the civil law).

239. *See Kenedy Mem'l Found.*, 90 S.W.3d at 284 (drawing a remarkable comparison to the facts set forth in *Luttes* and indicating the repetitive nature of the State's argument); *see also* Brief on the Merits of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation at 5, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21,

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State authorized its completed survey according to the vegetation line that the State altered its requirements that surveys be done according to tidal measurements.[240]

In addition to the historical evidence, there are other reasons the supreme court rejected the State's argument. If the State's proposal for a vegetative line was to be adopted, it would destroy the littoral value of the land in question because it would sever the mainland from the shoreline.[241] The right of a littoral property owner's access to the water is an undisputed right recognized by both the civil and common law.[242] This

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2000) (No. 99-0667) (indicating that the State had commissioned a survey in 1993 that comports with the vegetative line rather than the mean of the higher tide) (on file with the *St. Mary's Law Journal*).

240. *Kenedy Mem'l Found.*, 90 S.W.3d at 273; Brief on the Merits of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation at 5-6, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (on file with the *St. Mary's Law Journal*); *see also* Sixth Amended Answer and Fifth Amended Cross-Claim of the John G. and Marie Stella Kenedy Memorial Foundation at 9-11, Bright & Co. v. Mauro (200th Dist. Ct., Travis County, Tex. 1995) (No. 93-5265) (alleging the State's survey was done illegally and that the State was forced to amend its survey regulations to comport with the survey) (on file with the *St. Mary's Law Journal*); 20 Tex. Reg. 3320-3321 (1995) (to be codified as an amendment to 31 TEX. ADMIN. CODE § 7.2) (proposing a change in survey guidelines different from those outlined in *Luttes* to allow for surveying by a means other than the mean high tide line); 20 Tex. Reg. 4349 (1995) (to be codified as an amendment to 31 TEX. ADMIN. CODE § 7.2) (adopting a surveying methodology inconsistent with *Luttes* and allowing State to survey according to the vegetative line rather than the mean high tide line). The surveyor chosen by the State to survey the disputed lands in *Kenedy Memorial Foundation* was the same surveyor chosen by the State to survey a disputed boundary along the Canadian River in the Panhandle. Brief of Amicus Curiae of King Ranch, Inc. in Support of Rehearing at 6 n.4, Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268 (Tex. 2002) (No. 99-0667). In that disputed riparian boundary, the surveyor sought to include within the confines of the Canadian River thousands of acres of dry land simply because water had at one time flowed over the area. *Id.* The Supreme Court rejected this methodology in locating inland riparian boundaries. *See id.* (drawing a comparison to the methodology used in the Canadian River survey and the methodology used by the State in *Kenedy Memorial Foundation*). Thus, by analogy to the Texas Supreme Court's finding of riparian boundaries, the State cannot include in its definition of a seashore boundary all area covered by water at some point. *See* Brainard v. State, 12 S.W.3d 6, 16 (1999) (analogizing the application of the methodology used to locate inland riparian boundaries to the land in dispute in *Kenedy Memorial Foundation*).

241. *See* Brief on the Merits of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation at 9, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (revealing that the proposed boundary of the State is at time miles from the normal water's edge, thus destroying the littoral nature of the land) (on file with the *St. Mary's Law Journal*).

242. Manry v. Robison, 122 Tex. 213, 221-29, 56 S.W.2d 438, 442-45 (1932); Brief on the Merits for Petitioner John G. and Marie Stella Kenedy Memorial Foundation at 22, Kenedy Mem'l Found. v. Dewhurst, 45 Tex. Sup. Ct. J. 1148 (Tex. 2002) (No. 99-0667) (on file with the *St. Mary's Law Journal*).

finding does not foreclose the possibility that land once a part of the mainland will become submerged, thus becoming property of the State.[243] However, this process of accretion or reliction must be done through a natural evolution of the land rather than some arbitrary decision imposed upon a private landowner by the government.[244]

Also, if the State's proposed boundary was adopted, it would be erratic and subject to geographical change, potentially subjecting a land owner to unanticipated changes in land boundaries.[245] Such unpredictability would force the consideration of boundary disputes to be determined on a case-by-case basis, rather than as a question of law. In contrast to the State's position, the rule of law determined in *Luttes* and re-affirmed by the Hecht majority opinion removes the risks that accompany locating boundaries according to arbitrary surveys and provides necessary stability in locating land boundaries.[246]

3. Exploring an Alternative to *Luttes*

In *Kenedy Memorial Foundation*, the Texas Supreme Court closely examined the extent of the potential exception outlined during rehearing in *Luttes*.[247] On rehearing, the *Luttes* court concluded that it might not always be possible to determine the mean high tide line based on tide gauges, but that some other method which could locate the shoreline within "reasonable accuracy" might be allowable.[248] The Texas Supreme Court disagreed with the State's assertion that the exception contained in *Luttes* would allow for the shoreline to be determined by some "other means" than the mean high tide line, by reasoning that the *Luttes* court would not have found the mean high tide line to be the proper boundary

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243. *See* Brief on the Merits of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation at 33-34, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (citing precedent that the present location of the tide determines the location of boundaries and that it is possible that land may slip below the surface of the water and become publicly owned) (on file with the *St. Mary's Law Journal*).

244. *See id.* at 33 (concluding that the movement of tidal boundaries is at times beneficial to the State and at other times beneficial to the private landowner, but that it is the tides which control the location of boundaries rather than government decisions).

245. *See id.* at 22 (indicating the State's proposed boundary was ambiguous and a compilation of several factors and it was not inconceivable that it be subject to changes).

246. *See* Kenedy Mem'l Found. v. Dewhurst, 90 S.W.3d 268, 181 (Tex. 2002) (indicating the necessity for stability in land titles); Brief on the Merits of Petitioner The John G. and Marie Stella Kenedy Memorial Foundation at 23, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (arguing that stability of land titles is necessary in Texas) (on file with the *St. Mary's Law Journal*).

247. *See Kenedy Mem'l Found.*, 90 S.W.3d at 285-86 (questioning whether a proper alternative to *Luttes* could be applied to the land in dispute).

248. *Kenedy Mem'l Found.*, 90 S.W.3d at 285; Luttes v. State, 159 Tex. 500, 539, 324 S.W.2d 167, 192 (1958).

as a matter of law, and then create an exception which would swallow the rule it had just announced.[249]

Luttes itself foreclosed the possibility of placing a tidal boundary at some place other than the mean high tide line.[250] Furthermore, as discussed above, the *Luttes* court specifically rejected the contention that a vegetation or bluff line could serve as a reasonable alternative to the mean high tide line.[251] Instead, according to the Hecht majority, the only possible means of locating a coastal boundary is based solely on daily water level measurements.[252] The majority took issue with the dissent's claim that the water levels in the disputed area could not be measured, forcing some alternative to *Luttes* to apply.[253] The majority concluded that there is a "regular" water flow in the area which could be measured, but that the water flow was different from the standard concept of tidal movements.[254]

Though not based on tidal gauges, the boundary line proposed by the Foundation was based on some other water measurements, thus complying with the mean high tide standard required by *Luttes*.[255] The State previously recognized that although a possibility existed of determining a shoreline boundary based on a method other than the tidal gauges, the mean high tide line controlled.[256] In *Kenedy Memorial Foundation*, the Foundation's surveyors had utilized tidal gauges and extrapolated the measurements at the tide gauges to find the mean high tide line in the disputed area.[257] The State's position was further weakened by the ad-

249. *Kenedy Mem'l Found.*, 90 S.W.3d at 285-86.

250. *Luttes*, 324 S.W.2d at 192.

251. *See id.* (finding a vegetation line or bluff line to be less accurate than the mean high tide line and thus unreasonable).

252. *Kenedy Mem'l Found.*, 90 S.W.3d at 286.

253. *See id.* at 289-91 (rejecting the dissent's contention that an alternative to *Luttes* must apply in the disputed area because water levels could not be measured according to tidal gauges).

254. *See id.* at 290 (concluding there was a regular flow of water in the disputed area).

255. *See id.* (accepting the Foundation's methodology of measuring the mean high tide line though different from the typical use of tidal gauges); *see also* Kenneth Roberts, *The Luttes Case – Locating the Boundary of the Seashore*, 12 BAYLOR L. REV. 141, 163 (1960) (discussing the possibility of some other means of measuring the mean high tide line other than tidal gauges).

256. *See* Brief on the Merits of The Petitioner John G. and Marie Stella Kenedy Memorial Foundation at 19, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (demonstrating the inconsistency of the State's argument by showing the State had recognized previously the importance of the mean high tide line at all times) (on file with the *St. Mary's Law Journal*).

257. Brief of Petitioner Most Reverend Roberto O. Gonzalez, Apostolic Administrator of the Diocese of Corpus Christi at 10-11, Kenedy Mem'l Found. v. Dewhurst, 44 Tex. Sup. Ct. J. 268 (Tex. Dec. 21, 2000) (No. 99-0667) (on file with the *St. Mary's Law Journal*).

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mission of its own surveyor that he failed to utilize any water measurements in locating the State's boundary, and no witness for the State would testify to the fact that water regularly reached the line proposed by the State.[258] Therefore, because the mean high tide line can be located according to the mean high tide, the boundary can be located as a matter of law.[259]

IV. CONCLUSION

The importance of the Texas Supreme Court's decision concerning boundary location in *Kenedy Memorial Foundation* has broader implications beyond simply determining the boundary on a single piece of property. It is well-settled that courts apply the law as it existed at the time a land grant is made, even though, as in the case at hand, it may require a twenty-first century court to apply the ancient law governing at the time of the grant. But, the difficulties involved in defining the law should not lead to the adoption of shortcuts at the expense of precedent.

In *Kenedy Memorial Foundation*, the supreme court reaffirmed a long-held and time-tested rule of property law. In rejecting the State's claimed boundary, the court acknowledged the importance of maintaining stability of land titles despite a politically popular cause. As indicated, a boundary must be determined by the courts as a matter of law, but those courts may utilize extrinsic evidence to divine the intent of the grantor when there is ambiguity in the grant. However, in no circumstances should the court abdicate its responsibility in questions of law to the jury. Had the trial court in *Kenedy Memorial Foundation* correctly determined the boundary in question as a matter of law, the Texas courts' adventures in finding the shoreline boundary may have been averted.

With the Texas Supreme Court's decision in *Kenedy Memorial Foundation*, it now appears that the long and tortured odyssey of finding and locating the boundary of the Texas seashore has come to a close thanks to a narrowing of the scope of the exception found in *Luttes*. However, despite the apparent finality of the court's opinion, the court has yet to fully define the scope of the exception announced in *Luttes*, since *Kenedy Memorial Foundation* only narrowed the possible scope of the exception. Thus, as long as the scope of the exception remains fully undefined, the potential for future assaults on landowners along the coast remains a constant possibility, so long as the stakes remain high and the State seeks to exploit the court's failure to fully define the scope of *Luttes*.

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258. *Id.* at 12.
259. *Kenedy Mem'l Found.*, 90 S.W.3d at 286, 290.

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