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Sovereign Immunity: The Texas Department of Transportation's Duty to Maintain Roadways Ravaged by the Eagle Ford Shale Boom.

Lasca A. Arnold

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COMMENT

SOVEREIGN IMMUNITY: THE TEXAS DEPARTMENT OF TRANSPORTATION'S DUTY TO MAINTAIN ROADWAYS RAVAGED BY THE EAGLE FORD SHALE BOOM

LASCA A. ARNOLD*

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I. INTRODUCTION

Driving in the flourishing land of the Eagle Ford Shale,¹ an unknowing onlooker might think he is in a very rich and thriving region of Texas,² with oil and gas wells populating nearly every forty acres.³ However, the roads are a direct dichotomy to this perception due to the lack of monies coming from the Texas Department of Transportation (TxDOT)—the entity charged with maintaining and repairing roads in these affected counties.⁴ The road damage is so severe and extensive that TxDOT

1. See, e.g., *Eagle Ford Shale Information*, R.R. COMM'N OF TEX., <http://www.rrc.state.tx.us/oil-gas/major-oil-gas-formations/eagle-ford-shale/> (last updated Nov. 7, 2014) (defining “Eagle Ford Shale” as the geographical area included in a specific shale region of South Texas defined as the Eagle Ford, and explaining the term “shale rock” and how the area is special from an oil and gas producing standard). The Eagle Ford Shale region comprises an area approximately fifty miles wide running from the Mexican border to central East Texas. Jennifer Hiller, *Drillers Targeting Rocks Near Eagle Ford*, SAN ANTONIO EXPRESS-NEWS, Sept. 22, 2013, at C1. There are many productive rock formations within the Eagle Ford Shale region, but the shale of the Eagle Ford formation is considered the largest and most lucrative of these formations. See Mike Fisher, *South Texas' Stacked Oil and Gas Formations*, SAN ANTONIO EXPRESS-NEWS, Sept. 22, 2013, at C3 (depicting the Eagle Ford Shale). Oil and gas companies implement directional horizontal drilling which employs a process wherein a well is traditionally drilled vertically and then, as the drill stem approaches the zone of the desired formation, it is turned at a right angle to run horizontally through the rock formation. See JOSEPH SHADE & RONNIE BLACKWELL, PRIMER ON THE TEXAS LAW OF OIL & GAS 108 (5th ed. 2013) (describing how horizontal drilling achieves its goal of obtaining oil and gas from a larger area of the formation). Horizontal drilling has increased the efficiency and economic benefits of oil and gas production in highly fractured or tight rock formations, like shale. See *id.* (summarizing the benefits of horizontal drilling, such as efficiency and elimination of wasteful drilling).

2. *Compare Texas Counties: Per Capita Income*, TEX. ASS'N OF CNTYS. (2012), available at <http://www.txcip.org/tac/census/morecountyinfo.php?MORE=1011> (showing the rise in per capita income of the Eagle Ford Shale counties in Texas), with *Texas Per Capita Personal Income Levels by County: Selected Years*, TEX. HEALTH & HUMAN SERVS. COMM'N, <http://www.hhsc.state.tx.us/research/dssi/ESI/PerCapInc.html> (last updated July 2004) (contending that before the Eagle Ford Shale boom, the affected counties were not among the wealthiest in Texas).

3. See 16 TEX. ADMIN. CODE § 3.37(b) (2013) (Tex. R.R. Comm'n, Statewide Spacing Rule) (indicating the allowable spacing of oil wells as directed by the Railroad Commission of Texas (RRC)). Unlike the Statewide Spacing Rule, which establishes the minimum allowable distance between a well and either another well on the same lease or the boundary line of an adjacent tract, “Rule 38” requires, for density purposes, a minimum of forty acres between drilling units for the issuance of permits. See *id.* § 3.38 (regulating density); see also JOSEPH SHADE & RONNIE BLACKWELL, PRIMER ON THE TEXAS LAW OF OIL & GAS 123 (5th ed. 2013) (explaining the minimum standard density requirement set forth by the RRC that must be observed with the well spacing requirement to drill an oil or gas well).

4. *Compare Economically Disadvantaged County Program*, TEX. DEPT OF TRANSP., <http://www.txdot.gov/government/programs/disadvantaged-county.html> (last visited Nov. 16, 2014) (noting the Eagle Ford Shale counties were historically considered disadvantaged based on below average income, taxable property values, and above average unemployment per capita), with James L. Randall, *Exhibit A Economically Disadvantaged Counties FY 2011*, TEX. TRANSP. COMM'N (2010), available at http://ftp.dot.state.tx.us/pub/txdot-info/library/pubs/gov/tpp/eligible_counties_2011.pdf (recognizing the counties' disadvantaged status in the early days of the Eagle Ford

proposed converting certain paved roads to gravel.⁵ The counties most damaged by drilling operations in the booming Eagle Ford Shale play⁶ include: Karnes, Dimmit, and LaSalle.⁷ However, there are fourteen

Shale exploration in 2011), and Marc Williams, *Exhibit A Economically Disadvantaged County Program FY 2014*, TEX. TRANSP. COMM'N (2013), available at http://ftp.dot.state.tx.us/pub/txdot-info/adm/2013/documents/minute_orders/0926/14e.pdf (illustrating the projected change for 2014 in the disadvantaged status of the counties most affected by the Eagle Ford Shale as determined by TxDOT). Six rural counties in Texas, with more working drilling rigs than almost every other state in the country, are facing the possibility of their paved roads turned to gravel on the justification that TxDOT cannot afford to maintain the roadways. Jennifer Hiller, *Gravel Roads Meet Drilling, Production*, SAN ANTONIO EXPRESS-NEWS, Sept. 22, 2013, at C3.

5. See Carlos Uresti, *Gravel Road Conversions Offer Wakeup Call on Transportation Needs*, EAGLE PASS BUS. J. (Aug. 9, 2013), <http://www.epbusinessjournal.com/2013/08/gravel-road-conversions-offer-wakeup-call-on-transportation-needs/> (accusing TxDOT of marginalizing the road situation in its attempt to bypass legislators and constituents in its unilateral decision to convert damaged, paved roads to gravel); see also News Release, Office of State Sen. Judith Zaffirini, Eagle Ford Shale Legislative Caucus to Host Regional Meeting Regarding TxDOT Proposal to Convert Roads to Gravel (Sept. 3, 2013), <http://www.zaffirini.senate.state.tx.us/pr13/p090313a.htm> (establishing TxDOT's position to convert the roads to gravel without input from constituents). See generally Aman Batheja & Alexa Ura, *Lawmakers Pass Roads Cash Plan, Adjourn Special Session*, TEX. TRIB. (Aug. 5, 2013), <http://www.texastribune.org/2013/08/05/lawmakers-pass-roads-cash-plan-adjourn-special-ses/> (advancing Senator Uresti's proposal to discourage TxDOT's pavement to gravel conversion of the Eagle Ford Shale-impacted roads). TxDOT agreed not to convert any pavement to gravel until after January 2014 unless the road was too unsafe for public travel, but even so, a public hearing would be convened before taking action. See Ryan Poppe, *Possible Solution to TxDOT's South Texas Gravel Road Proposal*, TEX. PUB. RADIO (Oct. 10, 2013, 12:59 PM), <http://tpr.org/post/possible-solution-tdots-south-texas-gravel-road-proposal> (stating the latest news in the paved road to gravel conversion debate).

6. See JOSEPH SHADE & RONNIE BLACKWELL, PRIMER ON THE TEXAS LAW OF OIL & GAS 157 (5th ed. 2013) (defining "shale plays" as a subsurface shale rock formation having a finely stratified structure). Shale formations require hydraulic fracturing to provide increased permeability, thereby increasing the chances of producing in paying quantities. See *What Is Shale Gas?*, GEOLOGY.COM, <http://geology.com/energy/shale-gas/> (last visited Nov. 16, 2014) (supporting the need for hydraulic fracturing in the Eagle Ford Shale region). Modern advancements in the technology of hydraulic fracturing help create extensive and large artificial fractures which have provoked the rapid growth of the oil and gas industry that was previously not as commercially lucrative. See *id.* ("Shale gas is found in shale 'plays,' which are shale formations containing significant accumulations of natural gas and which share similar geologic and geographic properties."); see also James Caputo, *Shale Plays: Basic Geologic and Engineering Concepts*, 57 AAPL ANN. MEETING 1, 6 (2011), available at http://www.landman.org/docs/white-papers/03-caputo_aapl_shale_play_seminar_part1_final.pdf (describing a shale play as "[a] defined geographic area containing an organic-rich fine-grained sedimentary rock with the following characteristics: clay to silt sized particles, high percentage of silica (and sometimes carbonates), thermally mature, hydrocarbon-filled porosity, low permeability, large areal distribution, and fracture stimulation for economic production"); Play Definition, SCHLUMBERGER OILFIELD GLOSSARY, <http://www.glossary.oilfield.slb.com/en/Terms/p/play.aspx> (last visited Nov. 16, 2014) (defining a "shale gas play" as an area where a certain type of hydrocarbons accumulate or are likely to be found).

7. See THOMAS TUNSTALL ET AL., ECONOMIC IMPACT OF EAGLE FORD SHALE 34 (Ctr. for Cmty. & Bus. Research: Univ. of Tex. at San Antonio Inst. for Econ. Dev. ed., 2013), available at <http://ccbr.iedtexas.org/index.php/Impact-Reports/View-category/Page-1.html> (illustrating the

active, oil and gas producing counties in the Eagle Ford area experiencing rapidly deteriorating roads and skyrocketing traffic accident rates.⁸ While the shale boom has brought many positive aspects such as economic growth and new jobs to the region,⁹ the resulting ravaged roadways must be addressed.

The demands for equipment and manpower created by oil and gas exploration are extensive.¹⁰ Regrettably, the majority of this pressure is exerted “in rural areas where most of the roads and bridges [are] designed for lower volumes of traffic.”¹¹ Heavy traffic brought on by the boom has become problematic with regard to vehicular collisions and highway damage.¹² In addition to the increased volume of traffic, vehicles carrying

rapid and large-scale increase in sales tax revenues for the counties affected by the oil and gas boom).

8. *See id.* (detailing the severity of the impact on economics, population growth, and damage occurring in the Eagle Ford Shale counties); *see also* Jennifer Hiller, *More Money Pegged for Roads in Shale Area*, SAN ANTONIO EXPRESS-NEWS, Oct. 20, 2013, at C3 (establishing the areas most affected by road damage and the magnitude of the road damage).

9. *See* THOMAS TUNSTALL ET AL., ECONOMIC IMPACT OF EAGLE FORD SHALE 38 (Ctr. for Cmty. & Bus. Research: Univ. of Tex. at San Antonio Inst. for Econ. Dev. ed., 2013), *available at* <http://ccbr.iedtexas.org/index.php/Impact-Reports/View-category/Page-1.html> (reporting the beneficial aspects the boom and its substantial activity have brought to the area); *see also* Jennifer Hiller, *More Money Pegged for Roads in Shale Area*, SAN ANTONIO EXPRESS-NEWS, Oct. 20, 2013, at C3 (acknowledging the positive aspect of the oil boom—the increase of jobs in the area); Jennifer Hiller, *TxDOT Rolls Out 'Be Safe' Campaign*, SAN ANTONIO EXPRESS-NEWS, Aug. 3, 2014, at C3 (explaining how drivers must swerve to miss potholes and chunks of highway that crumble and break); Jose G. Landa, *Eagle Ford Shale: The Good, Bad, and Ugly—Traffic Accidents Increase Significantly*, EAGLE PASS BUS. J. (Oct. 6, 2012), <http://www.epbusinessjournal.com/2012/10/eagle-ford-shale-the-good-bad-and-ugly-traffic-accidents-increase-significantly/> (pointing to the positive facets of the oil boom). *See generally* Aman Batheja, *Oil Boom Windfall for Windshield Business*, SAN ANTONIO EXPRESS-NEWS, Dec. 24, 2013, at B6 (noting how entrepreneurs and job seekers can find opportunities for work in the booming Eagle Ford Shale region).

10. *See* TASK FORCE ON TEX. ENERGY SECTOR ROADWAY NEEDS, TEX. DEP'T OF TRANSP., TEXAS' ENERGY SECTOR ROADWAY NEEDS REPORT 2 (2012), *available at* http://ftp.dot.state.tx.us/pub/txdot-info/energy/final_report.pdf (explaining the large amount of heavily loaded trucks required to set up and maintain an oil or gas well).

11. *See id.* (describing why the impact of the Eagle Ford Shale boom is so burdensome on the roads and bridges in the area).

12. *See* TEX. DEP'T OF PUB. SAFETY, TEXAS PUBLIC SAFETY THREAT OVERVIEW 2013, at 43 (2013), *available at* http://www.dps.texas.gov/director_staff/media_and_communications/threatOverview.pdf (outlining the multitude of problem areas for the over-stressed region); *see also* Joe Baker, *TxDOT Approves \$26M in Area Highway Projects*, MYSOUTEX.COM, http://mysoutex.com/view/full_story/23585857/article-TxDOT-approves-%2426M-in-area-highway-projects? (last visited Nov. 16, 2014) (identifying slated projects for construction and rehabilitation in a few of the affected Eagle Ford counties); Aman Batheja, *Oil Boom Windfall for Windshield Business*, SAN ANTONIO EXPRESS-NEWS, Dec. 24, 2013, at B6 (finding a dramatic increase in traffic following the drilling of hundreds of wells, causing severe damage to the rural roads and creating numerous challenges for maintaining safe conditions); Jose G. Landa, *Eagle Ford Shale: The Good, Bad, and Ugly—Traffic Accidents Increase Significantly*, EAGLE PASS BUS. J. (Oct. 6, 2012), <http://www.epbusinessjournal.com/>

oversized and overweight loads add to the severity of damage to roadways and dangerous driving conditions.¹³ The bottom line is, “We’re on small roads with more traffic.”¹⁴ The affected roads that once carried roughly 200 vehicles per day currently carry an estimated 2,400 vehicles per day with many of these vehicles weighing 80,000 pounds or more.¹⁵

A legal issue underlies the mounting, unrepaired road damage¹⁶ stemming from TxDOT’s limited response and handling of the damage.¹⁷ Is TxDOT liable for the traffic accidents occurring on its unrepaired roadways?¹⁸ Sovereign immunity may exempt TxDOT from civil suit.¹⁹

2012/10/eagle-ford-shale-the-good-bad-and-ugly-traffic-accidents-increase-significantly/ (noting the growing problem of traffic safety). “In 2013, in a list of potential threats to the state of Texas the Department of Public Safety pinpointed traffic accidents in the Eagle Ford Shale region in a list that included drug cartels, human trafficking and natural disasters.” *E.g.*, Jennifer Hiller, *TxDOT Rolls Out Be Safe’ Campaign*, SAN ANTONIO EXPRESS-NEWS, Aug. 3, 2014, at C3.

13. *See Oil Boom’s Gloom: Rough Roads, Traffic Encircle Eagle Ford Shale*, KENS 5, <http://www.kens5.com/news/Oil-booms-gloom-Rough-roads-traffic-encircle-Eagle-Ford-Shale-149755085.html> (last updated May 2, 2012) (recognizing the extent of damage and danger involved in driving in the Eagle Ford Shale region); *see also* Jennifer Hiller, *Oil, Gas Boom Make Roads More Dangerous*, HOUS. CHRON. (Mar. 15, 2013), <http://www.chron.com/news/houston-texas/houston/article/Oil-gas-boom-make-roads-more-dangerous-4359120.php> (emphasizing the severity of the damage to the roadways in the shale zone); Jose G. Landa, *Eagle Ford Shale: The Good, Bad, and Ugly—Traffic Accidents Increase Significantly*, EAGLE PASS BUS J. (Oct. 6, 2012), <http://www.epbusinessjournal.com/2012/10/eagle-ford-shale-the-good-bad-and-ugly-traffic-accidents-increase-ignificantly/> (illustrating the growing problem of heavy traffic flow on roads connecting small towns within the shale region and the resulting increase in traffic accidents).

14. *See* Jennifer Hiller, *Oil, Gas Boom Make Roads More Dangerous*, HOUS. CHRON. (Mar. 15, 2013), <http://www.chron.com/news/houston-texas/houston/article/Oil-gas-boom-make-roads-more-dangerous-4359120.php> (reporting Traffic Operations Division Director Carol Rawson’s view of the problem in the Eagle Ford Shale region).

15. *Cf. id.* (expounding on the reason for the rapid deterioration of the roads).

16. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022 (West 2011) (referring to the legal issue of highway damage as a premise or special defect under the Texas Tort Claims Act).

17. *See* Carlos Uresti, *Gravel Road Conversions Offer Wakeup Call on Transportation Needs*, EAGLE PASS BUS J. (Aug. 9, 2013), <http://www.epbusinessjournal.com/2013/08/gravel-road-conversions-offer-wakeup-call-on-transportation-needs/> (criticizing TxDOT’s plan to unilaterally convert paved roads to gravel without taxpayer or legislative knowledge because it cannot afford to repair them); *see also* Aman Batheja, *A New Boom for Oil, but a Bust for State’s Rural Roads*, TEX. TRIB. (Sept. 13, 2013), <http://www.texastribune.org/2013/09/13/new-boom-oil-bust-states-rural-roads/> (suggesting TxDOT looked into the matter, but only after it attempted to convert paved roads to gravel without legislative or community input); Joe Baker, *TxDOT Approves \$26M in Area Highway Projects*, MYSOUTEX.COM, http://mysoutex.com/view/full_story/23585857/article-TxDOT-approves-%2426M-in-area-highway-projects? (last visited Nov. 16, 2014) (identifying slated projects for construction and rehabilitation in a few of the affected Eagle Ford counties).

18. *See* *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 553–54, 559 (Tex. 2002) (supporting a premise or special defect liability theory against TxDOT on property it owns or controls because harm is foreseeable and a duty to maintain is required).

19. TEX. GOV’T CODE ANN. § 311.034 (West 2013) (explaining when sovereign immunity may be waived in Texas and under what conditions); CIV. PRAC. & REM. § 101.021 (West 2011)

However, under the Texas Tort Claims Act (TTCA)²⁰ sovereign immunity is waived when “property damage, personal injury[,] and death proximately caused by the wrongful act or omission . . . caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.”²¹ Such a waiver occurs in situations concerning premise defects and special defects.

This Comment addresses the current conditions of roadways in the Eagle Ford Shale region and examines whether the road conditions constitute a premise defect²² or special defect²³ under the TTCA, thus waiving the state’s sovereign immunity.²⁴ The Supreme Court of Texas’s opinions in *County of Cameron v. Brown*²⁵ and *County of Harris v. Eaton*²⁶ are discussed to define premise defects, special defects, and the necessary elements to prove each cause of action.²⁷ This Comment also reviews how the state and its agencies generally enjoy sovereign immunity unless tort liability has been waived by statute.²⁸ The government has failed to adequately maintain the roads, which may be a breach of its duty to maintain,²⁹ thereby constituting a premise defect or a special defect in the

(explaining the areas where the government is unprotected from its shield of sovereign immunity).

20. CIV. PRAC. & REM. § 101.022 (referencing the Texas Tort Claims Act and the provisions for which sovereign immunity may be waived).

21. *See id.* § 101.021(1)–(2) (stating the three areas sovereign immunity is waived under the Texas Tort Claims Act thus exposing a governmental entity to the same liability as if it were acting as a private individual).

22. *See id.* § 101.022(a) (providing that a premise defect under the Texas Tort Claims Act requires a governmental entity to owe an injured party the same limited duty a private individual owes a licensee when the individual is on private property, unless the individual has paid to be on the premises or paid for its use).

23. *See id.* § 101.022(b) (asserting a special defect under the Texas Tort Claims Act creates a greater duty to warn the individual of special defects—such as obstructions or excavations on the highway, street, or road—when the entity knows or should reasonably know of the danger).

24. *See id.* § 101.021 (extending the Texas Tort Claims Act and the exposures of liability for TxDOT or any governmental entity; the entity is liable for personal injury, property damage, or death caused in such a way as to be liable if it were a private person).

25. *Cnty. of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002).

26. *Cnty. of Harris v. Eaton*, 573 S.W.2d 177 (Tex. 1978).

27. *See Brown*, 80 S.W.3d at 554 (addressing the issue of a governmental unit’s failure to maintain its property and its premise defect liability as reviewed by the Supreme Court of Texas); *Eaton*, 573 S.W.2d at 180 (proposing when the danger rises to the level of special defect, the governmental entity has a duty to treat an individual as an invitee; therefore, the government must warn of hazards it knows of or of which it should have reasonable knowledge).

28. *See William V. Dorsaneo, III, Commentary, An Unlighted Causeway May Be a Premises Defect*, 8 TEX. TORTS UPDATE 256, 257 (2002) (commenting on how the state and its agencies rarely are deprived of the protection of sovereign immunity).

29. *See TEX. TRANSP. CODE ANN. § 224.031* (emphasizing TxDOT’s exclusive control of the state highway system and the duty owed by the department because of this control).

instance of “excavations or obstructions on highways, roads[,] or streets.”³⁰ The issues addressed concern whether the government’s failure to maintain safe roadways constitutes a waiver of the state’s sovereign immunity for the accidents occurring in the Eagle Ford Shale region and whether potential plaintiffs will be able to bring a successful special defect or premise defect claim.³¹

II. THE CONDITION OF THE EAGLE FORD SHALE REGION

“The increased volume of heavy vehicles on aging Texas roads is causing stress on our infrastructure, which over time, can result in unsafe conditions.”³² Traffic accidents have increased in highly productive oil

30. See David J. LaBrec, *Overview of Legislative and Judicial Development of the Texas Tort Claims Act*, in 1 SUING AND DEFENDING GOVERNMENTAL ENTITIES AND OFFICIALS B-1-15 (1990) (reiterating the reasons for waiving sovereign immunity under the Texas Tort Claims Act); see also George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 29–30 (outlining the language used in defining special defect liability through statutory examples, not precise words).

31. See David J. LaBrec, *Overview of Legislative and Judicial Development of the Texas Tort Claims Act*, in 1 SUING AND DEFENDING GOVERNMENTAL ENTITIES AND OFFICIALS B-1-15 (1990) (addressing the waiver of sovereign immunity under the Texas Tort Claims Act in February 1990); see also George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 29–30 (asserting a greater duty is owed—the duty owed to an invitee—under special defect liability).

32. See Press Release, Tex. Dep’t of Transp., New Funds Approved for Critical Repairs to Damaged Roads in Booming Energy Areas Experiencing Unprecedented Growth (Dec. 19, 2013), <https://www.txdot.gov/inside-txdot/media-center/statewide-news/2013-archive/033-2013.html>. (quoting Texas Transportation Commissioner Fred Underwood, concerning his opinion of the seriousness of roadway conditions in the Eagle Ford Shale region); see also Ryan Poppe, *Lawmakers Not Happy with TxDOT’s Gravel Road Conversion Plan*, TEX. PUB. RADIO (Aug. 30, 2013, 1:10 PM), <http://tpr.org/post/lawmakers-not-happy-txdots-gravel-road-conversion-plan> (echoing TxDOT’s chief engineer about one of the causes for the rapidly deteriorating roads in the shale play). Many heavy trucks are used for the hydraulic fracturing that is required to complete an oil and gas well in a tight shale formation. See, e.g., DAVID PORTER, R.R. COMM’N OF TEX., EAGLE FORD SHALE TASK FORCE REPORT 24 (2013), available at http://www.rrc.state.tx.us/media/8051/eagle_ford_task_force_report-0313.pdf (“The traffic and specialized equipment associated with drilling and production puts a strain on local roads that leads to premature asphalt wear and tear, ripples, potholes, and torn shoulders.”). Hydraulic fracturing or “fracking” is a method used by the driller to create perforations in the horizontal zone of the wellbore; fracturing fluids are pumped into the drill pipe at high pressure to penetrate and enlarge the fissures in the rock formation. See JOSEPH SHADE & RONNIE BLACKWELL, PRIMER ON THE TEXAS LAW OF OIL & GAS 110 (5th ed. 2013) (describing the process of hydraulic fracturing to explain its importance in the development of shale formations previously considered uneconomical to produce). Fracturing fluids consist of proppants such as sand, chemical additives, and large amounts of water. See *id.* (detailing the types of substances pumped into the wellbore to create cracks in the rock). The pressure forces open the subsurface cracks and the proppants keep the cracks open so oil and gas may flow more freely from rock formations previously considered uneconomical or unattainable. See *id.* (justifying the use of hydraulic fracturing in areas such as the Barnett Shale where known quantities of natural gas have

and gas counties—as much as 1,440% in Karnes County and 1,050% in McMullen County from 2008 to 2011³³—with many of these accidents attributed specifically to road damage.³⁴ Although state revenues increased more than \$1.2 billion in 2012 due to the oil and gas exploration in the Eagle Ford Shale, TxDOT has been unable to repair the roads at a sufficient rate.³⁵

The Texas Transportation Institute's Task Force (TTI) reports a large volume of heavy and overweight or oversized loads are necessary to complete a producing oil or gas well.³⁶ Those numerous loads must be hauled on small, rural Texas roads—the farm-to-market or ranch-to-market system.³⁷ TTI's study reports an estimated 1,184 loads³⁸ are

been previously unavailable for development). Heavy frack trucks, which are necessary to frack the wells and bring them into production, are causing the roads to break down much faster than usual. See generally Ryan Poppe, *Lawmakers Not Happy with TxDOT's Gravel Road Conversion Plan*, TEX. PUB. RADIO (Aug. 30, 2013, 1:10 PM), <http://tpr.org/post/lawmakers-not-happy-txdots-gravel-road-conversion-plan> (reporting TxDOT's chief engineer's reason for one of the causes of the rapidly deteriorating roads in the shale play).

33. See Jose G. Landa, *Eagle Ford Shale: The Good, Bad, and Ugly—Traffic Accidents Increase Significantly*, EAGLE PASS BUS. J. (Oct. 6, 2012), <http://www.epbusinessjournal.com/2012/10/eagle-ford-shale-the-good-bad-and-ugly-traffic-accidents-increase-significantly/> (contrasting the reasons for the damage by the Texas Transportation Commissioners and Texas Department of Public Safety Reports based on reports by the Texas Department of Public Safety in the Eagle Pass Business Journal).

34. See *id.* (attributing the increase in traffic accidents to potholes and highway damage).

35. See Sanford Nowlin, *TxDOT Finds \$250 Million to Fix Highways in the Eagle Ford and Elsewhere*, SAN ANTONIO BUS. J. (Oct. 17, 2013, 6:00 AM), <http://www.bizjournals.com/sanantonio/blog/eagle-ford-shale-insight/2013/10/txdot-finds-250-million-to-fix.html> (advancing Senator Zaffirini's comment about TxDOT's inability to keep pace with road damage created by the growth of the oil and gas exploration in the Eagle Ford Shale region despite the significant increase in state revenues); Jose G. Landa, *Eagle Ford Shale: The Good, Bad, and Ugly—Traffic Accidents Increase Significantly*, EAGLE PASS BUS. J. (Oct. 6, 2012), <http://www.epbusinessjournal.com/2012/10/eagle-ford-shale-the-good-bad-and-ugly-traffic-accidents-increase-significantly/> (acknowledging the road damage cannot be adequately repaired because the heavy truck traffic will continue as long as there is exploration).

36. See TASK FORCE ON TEX. ENERGY SECTOR ROADWAY NEEDS, TEX. DEP'T OF TRANSP., TEXAS' ENERGY SECTOR ROADWAY NEEDS REPORT 2 (2012), available at http://ftp.dot.state.tx.us/pub/txdot-info/energy/final_report.pdf (summarizing TTI's task force report concerning the scale of operations necessary for oil and gas development).

37. See *Highway Designations Glossary*, TEX. DEP'T OF TRANSP. (2014), <http://www.txdot.gov/inside-txdot/division/transportation-planning/highway-designation/glossary.html> (referring to TxDOT's designation of small roads typically found in rural areas of Texas as Farm to Market Road (FM) or Ranch to Market Road (RM)); see also *Eagle Ford Shale Information*, R.R. COMM'N OF TEX., <http://www.rrc.state.tx.us/oil-gas/major-oil-gas-formations/eagle-ford-shale> (last updated Nov. 7, 2014) (comparing the areas of authority for the RRC and TxDOT in the area of highway and traffic safety).

38. An extensive amount of heavily loaded trucks are required to bring an oil and gas well into production. See Aman Batheja, *Oil Boom Windfall for Windshield Business*, SAN ANTONIO EXPRESS-NEWS, Dec. 24, 2013, at B6 (describing how great the undertaking to bring an oil or gas well into

necessary to bring a well into production, with up to 353 loads required for maintenance annually, and 997 loads required for refracking the well every five years.³⁹ A large portion of the traveled roadways are load-zoned,⁴⁰ meaning that a permit must be obtained to legally haul a load that is above the posted weight rating for that segment of road.⁴¹

A. *TxDOT's Statutory Responsibility*

The executive director of TxDOT sets the maximum weight limit for vehicles and roads, authorizing when overweight or oversized loads may travel on load-zoned roads.⁴² Most of the oil and gas equipment required for drilling is heavier or larger than what a traditional overload permit⁴³ is intended for; so a special permit,⁴⁴ also authorized by the executive director, is required.⁴⁵ The maximum weight for loads and vehicles with a single axle, tandem axle, or gross weight that may travel over the state highway system is set by the executive director of TxDOT.⁴⁶ Engineering standards are used to determine an acceptable weight that will not allow

production).

39. See TASK FORCE ON TEX. ENERGY SECTOR ROADWAY NEEDS, TEX. DEP'T OF TRANSP., TEXAS' ENERGY SECTOR ROADWAY NEEDS REPORT 2 (2012), available at http://ftp.dot.state.tx.us/pub/txdot-info/energy/final_report.pdf (illustrating the enormity of the weight and stress put on the state highway system for one oil or gas well); see also DAVID PORTER, R.R. COMM'N OF TEX., EAGLE FORD SHALE TASK FORCE REPORT 24 (2013), available at http://www.rrc.state.tx.us/media/8051/eagle_ford_task_force_report-0313.pdf (joining the state organizations in their extensive study of how the highway system is burdened by the demands of the oil and gas industry to bring a well into production).

40. See *Introduction to Load Zoning*, TEX. DEP'T OF TRANSP. 2 (Jan. 2012), <http://ftp.dot.state.tx.us/pub/txdot-info/cst/loadzones/introduction.pdf> (describing over 16,600 miles of weight-restricted highways as those typically constructed before the late 1950s and originally intended to carry lighter weight vehicles and axle configurations); see also *Texas Load Zone*, TEX. DEP'T OF TRANSP., <http://www.txdot.gov/apps/gis/loadzone/> (last visited Nov. 16, 2014) (noting the load-zoned roads in the Eagle Ford counties; for instance, Karnes county has over twenty-five load-zoned segments that allow a maximum load of 58,420 pounds without an overload permit).

41. See 43 TEX. ADMIN. CODE § 28.22 (2013) (detailing the procedures and requirements for permit issuance); see also TEX. TRANSP. CODE ANN. § 623.142(a)–(b) (West Supp. 2014) (affirming that TxDOT may permit oversized or overweight loads for transporting oil well servicing equipment).

42. See TRANSP. § 621.102 (defining the scope and authority of the executive director of TxDOT).

43. See *id.* § 623.011 (referring to the standard maximum weight and size of permitted loads on state highways).

44. See *id.* § 623.071 (establishing that a permit for excessive loads may be obtained to carry 120,000 pounds on state roads legally).

45. See *id.* § 623.142(a)–(b) (detailing the excessive burden the oil and gas production equipment places on roadways while being transported to and from well sites).

46. See *id.* § 621.102(a) (discussing how the executive director determines maximum allowable weights when issuing overload permits).

rapid deterioration of roads or bridges.⁴⁷ The executive director makes these findings based on traffic investigations and engineering designs.⁴⁸ The executive director may also consider conditions of soil, road width, type of pavement, and any other circumstances for that section of the roadway.⁴⁹ The Texas Transportation Code⁵⁰ allows TxDOT to issue a permit upon application for a vehicle to move oil well drilling or servicing equipment so long as the vehicle does not materially damage the highway or cause great inconvenience to traffic flow.⁵¹ The state will issue and collect a permit fee for almost all special considerations of overweight or oversized loads traveling on Texas highways.⁵² In theory, the revenue is supposed to fund the maintenance of roads and bridges in the area where the load is permitted for transport.⁵³ In 2012, permit fees of overweight or oversized loads totaled approximately \$114 million, but the highway fund only received \$82 million.⁵⁴ The Texas State Comptroller distributes funding annually to counties “from the county and road district highway fund.”⁵⁵

This money [is] appropriated . . . as follows: (1) one-fifth according to area, determined by the ratio of the area of the county to the area of the state; (2) two-fifths according to rural population, determined by the ratio of the rural population of the county to the rural population of the state; and (3) two-fifths according to lateral road mileage, determined by the ratio of the mileage of lateral roads in the county to the mileage of lateral roads in the state as of January 1 of the year of the allocation as shown by the records of the State-Federal Highway Planning Survey and the department.⁵⁶

47. *See id.* (examining the authority to set weight limits for the highways).

48. *See id.* § 621.102(b) (explaining the methods the director uses in determining weight standards for the state highway system).

49. *See id.* (clarifying the reasoning and findings used by the executive director to set maximum weight limits for roadways).

50. *See id.* § 623.142(a)–(b) (referring to the code that establishes the regulations for transportation and permitting of oil well drilling and servicing equipment in the state of Texas).

51. *See id.* § 623.142(a)–(b) (extending the authority and allowances of TxDOT to permit overweight and oversized loads to service the oilfield).

52. *See Oil Boom's Gloom: Rough Roads, Traffic Encircle Eagle Ford Shale*, KENS 5, <http://www.kens5.com/news/Oil-booms-gloom-Rough-roads-traffic-encircle-Eagle-Ford-Shale-149755085.html> (last updated May 2, 2012) (implying funding from permit fees should be available for maintenance of the highways suffering from abuse under heavy commercial trucks).

53. *See id.* (inquiring why funding is insufficient for highway maintenance in the oil and gas producing counties).

54. *See id.* (questioning the appropriation of collected state funds earmarked for the state highway fund that pays for road maintenance).

55. *See* TRANSP. § 256.002 (identifying the fund and manner in which monies are provided to the counties from the state).

56. *See id.* § 256.002(b)(1)–(3) (detailing the method for allocating funds to counties and road

The Eagle Ford Shale counties are not heavily populated or widely traversed with roadways; hence, needed funding is not statutorily available when based on the legislated funding allotment to counties.⁵⁷

B. *The Costs of an Energy Boom*

The rapid growth of the oil and gas boom has created a number of by-products, such as a significant increase in vehicular crashes in the Eagle Ford Shale counties since 2009.⁵⁸ The increase of traffic accidents has spurred primarily from commercial vehicles in counties having the highest concentration of oil and gas production, namely Dimmit, Karnes, and LaSalle Counties.⁵⁹ Accidents involving commercial vehicles increased 470% compared to total crashes, which increased by 98%.⁶⁰

The Eagle Ford and Barnett Shale play regions are facing serious concerns in areas of transportation and safety.⁶¹ TxDOT informed elected officials and industry representatives that repairing roads damaged by the energy sector's activity would "'conservatively' cost [one] billion [dollars] for farm-to-market roads and another [one] billion [dollars] for local roads."⁶² Regular maintenance costs of the interstate and state

districts).

57. *See id.* (explaining the method by which funding is available to counties for maintenance of their roadways); *see also Drive Texas: TxDOT Highway Conditions*, TEX. DEP'T OF TRANSP., <http://www.drivetexas.org/#/7/32.340/-99.500> (last visited Nov. 20, 2014) (illustrating the more limited number of highway miles in the Eagle Ford Shale counties in comparison to other areas of the state); *2010 Census: Population of Texas Counties*, TEX. ST. LIBR. & ARCHIVES COMM'N, <https://www.tsl.state.tx.us/ref/abouttx/popcnty12010.html> (last updated May 21, 2013) (pointing to the smaller populations in the counties over the Eagle Ford Shale formation).

58. *See* TEX. DEP'T OF PUB. SAFETY, TEXAS PUBLIC SAFETY THREAT OVERVIEW 2013, at 43 (2013), *available at* http://www.dps.texas.gov/director_staff/media_and_communications/threatOverview.pdf (examining the rise in the number of traffic accidents in the Eagle Ford Shale region between 2009 and 2011).

59. *See id.* (detailing increases in traffic accidents involving commercial vehicles in the Eagle Ford Shale region between 2009 and 2011).

60. *See id.* (comparing traffic accident rates between commercial and non-commercial vehicles in the Eagle Ford Shale region between 2009 and 2011 to highlight the rise in commercial vehicle traffic that an oil and gas boom brings to a region).

61. News Release, Office of State Sen. Judith Zaffirini, Eagle Ford Shale Legislative Caucus to Host Regional Meeting Regarding TxDOT Proposal to Convert Roads to Gravel (Sept. 3, 2013), <http://www.zaffirini.senate.state.tx.us/pr13/p090313a.htm> (accepting Senator Kirk Watson's comments regarding the seriousness of the highway conditions in two of the Texas shale play regions).

62. *See* Barry Shlachter, *Drilling Trucks Have Caused an Estimated \$2 Billion in Damage to Texas Roads*, FORT WORTH STAR-TELEGRAM (July 3, 2012), <http://www.star-telegram.com/2012/07/02/v-print/4075195/drilling-trucks-have-caused-an.html?rh=1> (noting the severity of the highway damage in the multiple energy producing regions of Texas).

highway systems are not included in this estimate.⁶³ The exploration and production of oil and gas primarily occur in rural areas where roads and bridges are not designed to carry the volume of traffic or the heavy loads required to service the oil and gas industry.⁶⁴ The consensus at a town hall-style meeting in Cotulla, Texas addressing concerned citizens in the Eagle Ford region⁶⁵ was, “We have to maintain these roadways to an acceptable standard.”⁶⁶ Additionally, TTI estimated fuel consumption and deterioration of vehicles costs the energy sector approximately \$1 billion annually due to highway damage.⁶⁷

C. *The State's Response: Good and Bad*

TxDOT believes its plan to convert eighty-three miles of heavily damaged roads in South and West Texas to gravel is a safe and practical solution under current financial circumstances.⁶⁸ Under this plan, drop-off and sheared shoulders, broken pavement, and potholes will be replaced with a “high-end” gravel road that is wider, smoother, and safer than the current roadways.⁶⁹ The new gravel roads will also have reduced maximum speed ratings.⁷⁰ TxDOT initially refused to discuss its plan to

63. *See id.* (acknowledging the burdensome impact on TxDOT's budget to meet the demands brought by the thriving energy sector).

64. *See* TASK FORCE ON TEX. ENERGY SECTOR ROADWAY NEEDS, TEX. DEP'T OF TRANSP., TEXAS' ENERGY SECTOR ROADWAY NEEDS REPORT 2 (2012), available at http://ftp.dot.state.tx.us/pub/txdot-info/energy/final_report.pdf (reasoning why damage to the roadways in the Eagle Ford Shale region is so severe and unexpected).

65. *See id.* (reporting the problem-solving suggestions and concerned sentiments of TxDOT officials and citizens of the affected counties).

66. *See* Aman Batheja, *A New Boom for Oil, but a Bust for State's Rural Roads*, TEX. TRIB. (Sept. 13, 2013), <http://www.texastribune.org/2013/09/13/new-boom-oil-bust-states-rural-roads/> (quoting executive deputy director of TxDOT, Joe Barton, in Cotulla, Texas in an address to concerned citizens about the pavement to gravel conversion proposed by TxDOT in the Eagle Ford region).

67. *See* TASK FORCE ON TEX. ENERGY SECTOR ROADWAY NEEDS, TEX. DEP'T OF TRANSP., TEXAS' ENERGY SECTOR ROADWAY NEEDS REPORT 2 (2012), available at http://ftp.dot.state.tx.us/pub/txdot-info/energy/final_report.pdf (recognizing that TxDOT, as well as the energy sector, is bearing the financial burden).

68. *See* Ed Sterling, *TxDOT to Get Input on Road Repair Plans*, BLANCO COUNTY NEWS, <http://www.blanconews.com/news/112085/> (last updated Sept. 5, 2013) (reporting TxDOT Executive Director Phil Wilson's proposal of an unpopular plan to solve the road damage in the area).

69. *See* Press Release, Texas Dep't of Transp., TxDOT Works with Counties Offering 60-Day Notice on Road Conversions in Energy Sectors (Aug. 28, 2013), <http://www.txdot.gov/inside-txdot/media-room/news/statewide/041-2013.html> (promoting the new policy reasons for implementing the conversion from pavement to gravel of eighty-three miles of energy sector highways).

70. *See id.* (proposing some of the safety improvements of the new gravel roads will come in large part to the reduced speed zones).

convert approximately eighty-three miles of farm-to-market roads⁷¹ to gravel with state legislators and community leaders; instead, it planned to impose a unilateral decision on these communities with no notice or opportunity to seek alternative options.⁷² The unilateral conversion of roads from pavement to gravel, once discovered, was met with such outcry that a sixty-day moratorium was imposed to give lawmakers and community leaders an opportunity to look for a better solution.⁷³

Legislation sponsored and authored by Senator Carlos Uresti and passed by the Eighty-Third Legislature⁷⁴ provided \$225 million to TxDOT in the form of a grant program for transportation infrastructure projects in areas impacted by oil and gas production,⁷⁵ designated as “County Energy Transportation Reinvestment Zones.”⁷⁶ Senate Bill 1747⁷⁷ established

71. See *Highway Designations Glossary*, TEX. DEP'T OF TRANSP. (2014) <http://www.txdot.gov/inside-txdot/division/transportation-planning/highway-designation/glossary.html> (defining the term “farm-to-market” or “ranch-to-market” under TxDOT’s roadway designation system as a road commonly found in rural areas).

72. See Carlos Uresti, *Gravel Road Conversions Offer Wakeup Call on Transportation Needs*, EAGLE PASS BUS. J. (Aug. 9, 2013), <http://www.epbusinessjournal.com/2013/08/gravel-road-conversions-offer-wakeup-call-on-transportation-needs/> (reporting the authoritarian way TxDOT planned to handle the deteriorating highways in the oil producing counties).

73. See News Release, Office of State Sen. Judith Zaffirini, Eagle Ford Shale Legislative Caucus to Host Regional Meeting Regarding TxDOT Proposal to Convert Roads to Gravel (Sept. 3, 2013), <http://www.zaffirini.senate.state.tx.us/pr13/p090313a.htm> (expressing the community outcry caused by the plan to convert paved roads to gravel within the Eagle Ford Shale region); see also Carlos Uresti, *Gravel Road Conversions Offer Wakeup Call on Transportation Needs*, EAGLE PASS BUS. J. (Aug. 9, 2013), <http://www.epbusinessjournal.com/2013/08/gravel-road-conversions-offer-wakeup-call-on-transportation-needs/> (stressing how TxDOT’s handling of the state’s infrastructure needs should issue a wake-up call to every constituent in the Eagle Ford Shale region). The gravel road conversion plan has since been abandoned. Aman Batheja, *TxDOT Ends Program That Converts Paved Roads to Gravel*, TEX. TRIB., (Oct. 24, 2014), <http://www.texastribune.org/2014/10/24/txdot-ends-plan-convert-paved-roads-gravel/>. The program met with public outcry and brought national attention to the state’s transportation funding shortfall. TxDOT has instead “requested \$402 million in additional funding from the state highway fund for the current fiscal year” with plans for some of the monies to repair roads in the energy sector. *Id.*

74. See TEX. TRANSP. CODE ANN. § 256.103 (West Supp. 2014) (establishing a grant program for the distribution of \$225 million dollars to be used to repair the damaged roads in “county energy transportation reinvestment zone[s]” (CERTZ)); see also Carlos Uresti, *Gravel Road Conversions Offer Wakeup Call on Transportation Needs*, EAGLE PASS BUS. J. (Aug. 9, 2013), <http://www.epbusinessjournal.com/2013/08/gravel-road-conversions-offer-wakeup-call-on-transportation-needs/> (informing the public of the recently created grant program that provides assistance to counties to maintain their roads).

75. See *TxDOT Hosts First Transportation Infrastructure Fund Planning Meeting*, TEX. ASS’N OF CNTYS. (2014), <http://www.county.org/member-services/legislative-updates/news/Pages/TxDOT-Hosts-First-Transportation-Infrastructure-Fund-Planning-Meeting.aspx> (last visited Nov. 16, 2014) (recognizing the hard work of Senator Carlos Uresti in his efforts to bring aid to his constituents whose highways have been damaged in the oil and gas producing counties).

76. See TRANSP. §§ 222.1071–.1072 (adopting the guidelines of the grant program’s area of

zones within the counties impacted by oilfield traffic; through the grant program, these counties can use their increased property and sales tax revenues to maintain and repair roads battered by the energy producing activities.⁷⁸ Concerns regarding funding for the damaged roads in shale regions of South and West Texas continued through three sessions of the Eighty-Third Texas Legislature.⁷⁹ An additional \$250 million from vehicle registration fees was discovered after the legislative session closed, which was approved for state maintenance projects expenditures, some of which are in the energy regions.⁸⁰

However, counties are having such a difficult time getting the necessary funds for highway maintenance from TxDOT that they are resorting to asking for help from the oil companies working in their counties.⁸¹ One such instance is occurring in DeWitt County, which is not only an Eagle Ford county but also provides access to the refineries on the Texas coast from the other major oil and gas producing counties, therefore increasing the amount of heavy truck traffic in the county.⁸²

eligibility).

77. *See id.* § 256.103 (identifying the senate bill from the Eighty-Third Legislative Session establishing a transportation infrastructure fund); *see also id.* §§ 222.1071–.1072 (detailing the areas eligible for infrastructure fund monies under the CERTZ program).

78. *See* Press Release, Carlos Uresti, Bills Authored and Sponsored by Sen. Uresti that Passed Both Houses (May 31, 2013), <http://www.carlosuresti.com/pressreleases/bills-authored-and-sponsored-sen-uresti-passed-both-houses> (clarifying the scope and monetary assistance provided by Senate Bill 1747).

79. *See* Ed Sterling, *TxDOT to Get Input on Road Repair Plans*, BLANCO COUNTY NEWS, <http://www.blanconews.com/news/112085/> (last updated Sept. 5, 2013) (acknowledging the length of time the state legislature sought a solution to the highway issue); *see also* Terrence Henry, *Lawmakers Propose Fixes for Roads Damaged by Drilling*, STATEIMPACT TEX. (Feb. 27, 2013, 6:45 AM), <http://stateimpact.npr.org/texas/2013/02/27/lawmakers-propose-fixes-for-roads-damaged-by-drilling/> (recognizing Texas Senator Carlos Uresti, who represents a large segment of South Texas covering the Eagle Ford region, has authored a bill in the Eighty-Third Legislature to address the financial problems associated with repairing the roads damaged in the shale region).

80. *See* Sanford Nowlin, *TxDOT Finds \$250 Million to Fix Highways in the Eagle Ford and Elsewhere*, SAN ANTONIO BUS. J. (Oct. 17, 2013, 6:00 AM), <http://www.bizjournals.com/sanantonio/blog/eagle-ford-shale-insight/2013/10/txdot-finds-250-million-to-fix.html> (identifying an additional source of funding to be used for some needed highway projects throughout the state).

81. *See* THOMAS TUNSTALL ET AL., ECONOMIC IMPACT OF EAGLE FORD SHALE 37 (Ctr. for Cmty. & Bus. Research: Univ. of Tex. at San Antonio Inst. for Econ. Dev. ed., 2013), *available at* <http://ccbr.iedtexas.org/index.php/Impact-Reports/View-category/Page-1.html> (acknowledging the extensive measures counties are resorting to in order to pay for road repairs not provided by TxDOT); *see also* *Oil Boom's Gloom: Rough Roads, Traffic Encircle Eagle Ford Shale*, KENS 5, <http://www.kens5.com/home/Oil-booms-gloom-Rough-roads-traffic-encircle-Eagle-Ford-Shale-149755085.html> (last updated May 2, 2012) (establishing how counties are having to seek aid on their own instead of obtaining help from TxDOT for the damage to their highways, such as securing up to \$8,000 per well site directly from two oil companies working in the county to offset road repairs).

82. *See* THOMAS TUNSTALL ET AL., ECONOMIC IMPACT OF EAGLE FORD SHALE 37 (Ctr. for

III. TEXAS TORT CLAIMS ACT: THE ACT AND ITS EXCEPTIONS

“The [TTCA] expressly waives sovereign immunity in three areas: ‘use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property.’”⁸³ In conjunction, a “governmental unit” is one that is liable for “personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.”⁸⁴ The TTCA creates a restricted duty for governmental units concerning ordinary premises defects and special defects.⁸⁵ In terms of duty owed, Section 101.022 of the Texas Civil Practice and Remedies Code provides:

- (a) Except as provided in Subsection (c), if a *claim* arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
- (b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as required by Section 101.060.
- (c) If a *claim* arises from a premise defect on a toll highway, road, or street, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property.⁸⁶

Section 101.021(2) encompasses governmental liability for a condition or use of real or tangible personal property if the government acts in the same manner as a private person.⁸⁷ This subsection goes beyond the

Cnty. & Bus. Research: Univ. of Tex. at San Antonio Inst. for Econ. Dev. ed., 2013), *available at* <http://ccbr.iedtexas.org/index.php/Impact-Reports/View-category/Page-1.html> (showing the excessive burdens imposed on the county’s infrastructure).

83. *See* Tex. Dep’t of Parks & Wild. v. Miranda, 133 S.W.3d 217, 225 (Tex. 2004) (“[U]se of publicly owned automobiles, premise defects, and injuries arising out of conditions or use of property.” (citing Cnty. of Cameron v. Brown, 80 S.W.3d 549, 554 (Tex. 2002))); Tex. Dep’t of Transp. v. Able, 35 S.W.3d 608, 611 (Tex. 2000) (listing three expressly stated areas where Texas waives sovereign immunity).

84. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (West 2011) (clarifying that governmental units are liable to the same standard as a private person if the private person would be liable for the death and personal injury caused by the use of or a condition of real or tangible personal property).

85. *See* Michael Shaunessy, *Sovereign Immunity and the Extent of the Waiver of Immunity Created by the Texas Tort Claims Act*, 53 BAYLOR L. REV. 87, 153 (2001) (acknowledging one of the areas of limitation on the government’s sovereign immunity).

86. *See* CIV. PRAC. & REM. § 101.022 (emphasis added) (defining premise and special defects under the duty owed section of the Texas Tort Claims Act).

87. *See id.* § 101.021(2) (defining the increased duty of a private citizen or where the

“principles of respondeat superior [and] includes governmental liability for premise defects.”⁸⁸

A. *Discretionary Acts: When They Become a Mandatory Duty*

“An act is a ‘discretionary act,’ for purposes of sovereign immunity analysis, if it involves personal deliberation, decision, and judgment.”⁸⁹ Discretionary acts are excluded from liability when it is the government’s decision whether to act in the matter rather than when the act is mandated.⁹⁰ It is common for courts considering discretionary matters to view TxDOT as a non-insurer of accidents and view sovereign immunity in the most restrictive light.⁹¹

County of Cameron v. Brown is a wrongful death case in which a motorist was killed after his vehicle overturned on the Queen Isabella Causeway, the only bridge connecting the Texas mainland to South Padre Island.⁹² The State owned the causeway, but Cameron County assumed its maintenance functions, including its streetlight system.⁹³ Brown’s truck struck the median and overturned; he then followed his passenger out of the truck and as he was exiting, was hit by an oncoming car.⁹⁴ The accident occurred in an area of the causeway where the road curves, rises eighty-five feet above the water, the shoulders are narrow, and, at the time,

governmental unit is in the same position as an ordinary private citizen); *see also Able*, 35 S.W.3d at 612 (acknowledging the expanded scope of subsection 2 of the TTCA).

88. *See Able*, 35 S.W.3d at 612 (outlining how subsection 2 broadens the government’s area of liability to include “a condition of real property or tangible personal property” (quoting *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995))).

89. *State Dep’t of Highways & Pub. Transp. v. Gonzalez*, 24 S.W.3d 533, 538 (Tex. App.—Corpus Christi 2000), *rev’d*, 82 S.W.3d 322 (Tex. 2000).

90. *See CIV. PRAC. & REM. § 101.056* (defining the areas of discretionary powers that do not waive sovereign immunity); *State v. Day*, No. 09-02-177 CV, 2002 WL 31525359, at *1 (Tex. App.—Beaumont Nov. 14, 2002, no pet.) (per curiam) (not designated for publication) (explaining that “immunity is not waived if the action for which the State or its agency is sued falls within the State’s discretionary policy function”); *Norton v. Brazos Cnty.*, 640 S.W.2d 690, 693 (Tex. App.—Houston [14th Dist.] 1982, no writ) (distinguishing why some acts have liability exposure and others that are discretionary in nature are exempt from liability).

91. *See JOHN C. GLENNON & PAUL F. HILL, ROADWAY SAFETY AND TORT LIABILITY* 24 (2d ed. 2004) (supporting the idea that sovereign immunity for state agencies is viewed narrowly by the courts in areas where TxDOT is a third-party participant).

92. *See Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 552–53 (Tex. 2002) (pointing out the deceased only had access to South Padre Island through this route).

93. *See id.* at 553 (emphasizing the lighting system on the causeway and bringing attention to the reported problems with the system’s maintenance). Correspondence between Cameron County and TxDOT is documented as “a problem since at least 1995.” *Id.* Additional letters in April 1996 and in August 1996 address more than thirty streetlight failures. *Id.*

94. *See id.* (describing the horrific accident that took Brown’s life as he attempted to climb out of the sunroof of his overturned truck).

the streetlights were not working.⁹⁵ *Brown* brings together a perfect storm of statutes where a governmental unit committed a discretionary act by first installing artificial lighting, thereby creating a premise defect on the causeway once the lighting was not properly maintained, and ultimately leading to a waiver of sovereign immunity.⁹⁶ The plaintiffs acknowledged the state had no duty to light the causeway, but once the decision was made by the state to install lighting, the maintenance of the lighting became nondiscretionary.⁹⁷ Once a governmental entity decides to partake in what would otherwise be a discretionary act, they cannot withdraw from the new responsibilities they have chosen to undertake.⁹⁸

In *Norton v. Brazos County*,⁹⁹ a county jail inmate severely injured his hand while using poorly maintained kitchen equipment.¹⁰⁰ *Norton* established that once a decision has been made to provide a nonessential, discretionary item—even if the decision is incidental to government policy—the item is no longer covered by the exceptions of the TTCA.¹⁰¹ The *Norton* appellant did not question the County's decision to provide a kitchen, only the manner in which the kitchen was maintained once it was no longer a discretionary item.¹⁰² “The operation and maintenance of a jail is an act each county is required to do by law.”¹⁰³ State law explicitly instructs counties to provide suitable and safe jails and to insure food is

95. *See id.* (reporting the road conditions leading to the accident).

96. *See id.* at 554–55 (summarizing the elements of several statutes that merge together to define where a premise defect may occur under the TTCA).

97. *See* William V. Dorsaneo, III, Commentary, *An Unlighted Causeway May Be a Premises Defect*, 8 TEX. TORTS UPDATE 256, 257 (2002) (contrasting the burden of liability between discretionary and nondiscretionary acts).

98. *See Sipes v. Tex. Dep't of Transp.*, 949 S.W.2d 516, 522 (Tex. App.—Texarkana 1997, writ denied) (asserting “there is no question that the State Highway Department's mandatory duty under TEX. REV. CIV. STAT. ANN., art. 6674q-4 to provide for the efficient maintenance of the highways is a governmental function”). The statute mentioned in *Sipes* is now found in the Texas Transportation Code. TEX. TRANSP. CODE ANN. §§ 224.031–.032 (West 2011).

99. *Norton v. Brazos Cnty.*, 640 S.W.2d 690 (Tex. App.—Houston [14th Dist.] 1982, no writ).

100. *Id.* at 691.

101. *See id.* at 693 (recognizing the reason immunity was waived once the county decided to install the non-essential kitchen). Activities of maintenance at an operational level are not viewed as discretionary and, therefore, are not free from liability under the TTCA. *See* Univ. of Tex. at San Antonio v. Trevino, 153 S.W.3d 58, 62 (Tex. App.—San Antonio 2002, no pet.) (acknowledging operational level maintenance activities are not optional functions and are not exempt from liability (citing *City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985))); *see also Sipes*, 949 S.W.2d at 522 (recognizing the provision of maintenance of highways as a mandatory duty of governmental function in the state statute).

102. *See Norton*, 640 S.W.2d at 693 (asserting the differences between discretionary acts and negligence in the manner the act is performed).

103. *Id.*

made and provided in a clean and palatable manner;¹⁰⁴ counties must provide suitable food for the inmates but are not required to provide operative kitchens in jails. The choice whether to have food catered or prepared in-house is a discretionary decision of the county. However, once it is decided to provide a kitchen—that choice being incidental to the policy—the maintenance and daily function of the kitchen equipment “cannot be seen as immune under the exemptions of the Act.”¹⁰⁵

In *Texas Department of Transportation v. Pate*,¹⁰⁶ three people died after a truck hit Pate’s vehicle as it pulled onto the highway after stopping at an intersection.¹⁰⁷ Overgrown vegetation in the highway right-of-way created an obstruction that blocked the driver’s view of the oncoming truck.¹⁰⁸ The *Pate* court determined that “the Department is given ‘exclusive and direct control of all improvement of the state highway system,’ which . . . is to be provided ‘efficient maintenance.’”¹⁰⁹ Similar to *Brown*, the court recognized that the State has control over its roadways to the degree of liability for unreasonably dangerous conditions on its property if it meets the standard of “‘assumed control over and responsibility for the premises,’ even if it did not own or physically occupy the property.”¹¹⁰

Based on the reasoning in *Brown*, *Norton*, and *Pate*, it is logical to infer that once TxDOT builds roads, it can no longer claim that it has no responsibility for the reasonable maintenance of its premises.¹¹¹ Further, based on the Transportation Code, TxDOT cannot claim it has no duty to maintain the premises or warn of the dangers.¹¹² Louis XIV’s famous

104. *Id.*

105. *Id.*

106. *Tex. Dep’t of Transp. v. Pate*, 170 S.W.3d 840 (Tex. App.—Texarkana 2005, pet. denied).

107. *Id.* at 843.

108. *Id.*

109. *See id.* at 845 (Tex. App.—Texarkana 2005, pet. denied) (implying the department must provide for all maintenance and improvements through its exclusive power and control granted by the Texas Transportation Code).

110. William V. Dorsaneo, III, Commentary, *An Unlighted Causeway May Be a Premises Defect*, 8 TEX. TORTS UPDATE 256, 258 (2002) (defining how the state is responsible for its premises or property).

111. *See* TEX. TRANSP. CODE ANN. § 224.031(a) (West 2011) (“The department has exclusive and direct control of all improvement of the state highway system.”); *id.* § 224.032(a)(1) (affirming the commission must provide “efficient maintenance of the system” during development and upkeep of the highways).

112. *Contra id.* § 224.031(b) (“The department shall prepare and pay for surveys, plans, specifications, and estimates for all construction and improvement of the state highway system.”). *See generally* *Tex. Dep’t of Transp. v. Pate*, 170 S.W.3d 840, 845 (Tex. App.—Texarkana 2005, pet. denied) (extending the duties of the department to the state highway system).

utterance, “*l'état, c'est moi*,”¹¹³ may be the operational motto of those in charge of the planning, construction, and maintenance of modern structures and roads.¹¹⁴ There is not only a well-established rule that the government will maintain the roads in a safe manner,¹¹⁵ but it can also be held liable for its negligence in failing to perform this duty.¹¹⁶

B. *Premise Defects: The Duty Owed to a Mere Licensee*

For a plaintiff to prevail under a premise defect of the TTCA, the plaintiff must prove (1) the governmental entity had actual knowledge of the condition;¹¹⁷ (2) the condition created an unreasonable danger;¹¹⁸ (3) ordinary care was not exercised by the governmental unit to protect the licensee from the harmful condition;¹¹⁹ (4) the government's failure was the proximate cause of harm to the licensee;¹²⁰ and (5) the licensee had no prior knowledge of the hazardous condition.¹²¹

113. See W. & A. DURANT, *THE AGE OF LOUIS XIV* 15 (1963) (translating to “I am the State,” an opinion generally restricted to dead kings).

114. See *id.* (alleging that through sovereign immunity, the state sometimes becomes too self-important and shirks its duties to its citizens); see also Carlos Uresti, *Gravel Road Conversions Offer Wakeup Call on Transportation Needs*, *EAGLE PASS BUS. J.* (Aug. 9, 2013), <http://www.epbusinessjournal.com/2013/08/gravel-road-conversions-offer-wakeup-call-on-transportation-needs/> (comparing TxDOT's attempt at unilateral actions to impose gravel conversions on Texas taxpayers in the road ravaged Eagle Ford Shale counties to egotistical dead kings).

115. See *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992) (highlighting the duties owed to drivers).

116. See TEX. TRANSP. CODE ANN. §§ 224.031–.032 (West 2011) (confirming the stated duty TxDOT assumes); see also *Jezeq v. City of Midland*, 605 S.W.2d 544, 546 (Tex. 1980) (outlining the government's duties and responsibilities that come from its governmental function).

117. See *Payne*, 838 S.W.2d at 237 (establishing the governmental unit must have actual knowledge of the dangerous condition to be liable to the licensee; mere negligence with respect to such knowledge will not establish liability); *State v. Tennison*, 509 S.W.2d 560, 561 (Tex. 1974) (finding the building maintenance crew should have known or did know of the unreasonably dangerous condition).

118. See *Payne*, 838 S.W.2d at 237 (defining the condition as unreasonably dangerous, not as a licensee would typically encounter the condition); *Tennison*, 509 S.W.2d at 561 (finding the hazardous condition was dangerously and unreasonably slick, not typical of a public building's floor surface).

119. See *Payne*, 838 S.W.2d at 237 (asserting under premise defect liability, the owner must only exercise reasonable care to guard the licensee from the hazardous condition); *Tennison*, 509 S.W.2d at 561 (contending the government neither warned Mrs. Tennison of the danger nor remedied the hazardous condition).

120. See *Payne*, 838 S.W.2d at 237 (establishing a principal element that the harm to the licensee must have been proximately caused by the governmental unit); *Tennison*, 509 S.W.2d at 561 (claiming Mrs. Tennison's fall was proximately caused by the unreasonably slick condition of the floor).

121. See *Payne*, 838 S.W.2d at 237 (referring to a difficult element for the plaintiff to prove—the injured party had no prior knowledge of the danger); *Tennison*, 509 S.W.2d at 561 (holding Mrs. Tennison did not have reason to know or did not know of the dangerously slick floor); see also *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 557–58 (Tex. 2002) (comparing a situation in which a licensee

*State Department of Highways & Public Transportation v. Payne*¹²² focuses on a premise defect where the state owed the injured party the same duty an individual landowner would owe a licensee.¹²³ This degree of duty requires an individual landowner to not injure the licensee by wanton, willful, or grossly negligent actions, and to use reasonable care to alert or make reasonably safe the dangerous condition of which the landowner—and not the licensee—is aware.¹²⁴ Payne was walking across a two-lane road toward a deer blind near his home before sunrise when he stepped off a culvert running under the roadway and fell twelve feet.¹²⁵ He landed in a drainage ditch where he sustained injuries.¹²⁶ The Supreme Court of Texas reversed a lower court decision which held “that Payne’s injuries were caused 60% by the negligence of the State.”¹²⁷ The Court did not find the culvert was a premise or special defect as Payne alleged; therefore, there was no duty to Payne to protect him from injury when he fell from the culvert.¹²⁸

Payne is distinguishable from *Brown* because in *Brown* the estate was partially successful on its claim against the State’s sovereign immunity and

may have reasonable knowledge of the hazardous condition; he is required to look out for himself and is not owed any duty by the owner to protect or warn him of the dangerous premise defect).

122. *State Dep’t of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992).

123. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022 (West 2011) (summarizing the government’s liability standard under a premise defect claim); *see also Payne*, 838 S.W.2d at 237 (defining the state’s duty under a premise defect claim (citing *Tennison*, 509 S.W.2d at 562)); *Corbin v. City of Keller*, 1 S.W.3d 743, 746 (Tex. App.—Fort Worth 1999, pet. denied) (echoing that the duty of care owed by the governmental entity, under a premise defect, is that of a private person to a licensee).

124. *See Payne*, 838 S.W.2d at 237 (citing RESTATEMENT (SECOND) OF TORTS § 342 (1965)) (describing the level of obligation to a mere licensee). A governmental unit is obligated to warn of the condition or work to make the situation as safe as possible when the unit has reason to know of the dangerous condition or, through the exercise of due diligence should be aware of a hazardous condition. *See Corbin*, 1 S.W.3d at 748 (declining to extend the higher, invitee standard of care where the defect is not a special defect). However, if the condition is a special defect, the state owes an individual a higher degree of care—the duty owed to an invitee. *See Payne*, 838 S.W.2d at 237 (supporting that a higher level of care is owed to someone who is classified as an invitee). Such a duty obligates an owner to exercise ordinary, reasonable care to not allow harm to come to an invitee from a dangerous situation or condition that the owner should be aware of or is reasonably aware of. *See id.* (exerting the duty to use ordinary care to protect an invitee from conditions the owner is or should reasonably be aware); *Corbin*, 1 S.W.3d at 747 (implying the government’s increased responsibility to an invitee).

125. *See Payne*, 838 S.W.2d at 236 (describing the background surrounding Payne’s accident, lawsuit, and injuries).

126. *Id.*

127. *See id.* (justifying the court’s ruling in overturning the lower court because the State’s duty was the lesser duty owed to a licensee, not an invitee).

128. *See id.* at 237 (showing the court’s proper analysis that there was no special duty to Payne, or there was at least no failure of the duties on the part of the State to protect a mere licensee).

failure to maintain premises defect claims.¹²⁹ Unfortunately, the Browns were unable to prove their deceased family member was unaware of the dangerous, unlighted condition—an essential element of a premise defect claim.¹³⁰ The burden of proof was on the Brown estate to prove that the decedent had no actual knowledge of the defective lights.¹³¹ The court determined the accident was foreseeable by the County,¹³² but Brown, as a “mere licensee, . . . must prove he had no actual knowledge of the condition.”¹³³ *Brown* also recognized that where the State knows of the dangerous condition, courts have held an exact sequence of events is not required to meet the foreseeability standard, only that an overall danger could occur.¹³⁴

TxDOT has admitted to knowledge of dangerous road conditions in the Eagle Ford region; therefore, it can be construed that TxDOT is reasonably aware that increased accidents are foreseeable.¹³⁵

129. *See* Cnty. of Cameron v. Brown, 80 S.W.3d 549, 558–59 (Tex. 2002) (affirming the ruling of the appellate court and remanding the case to trial in order to allow the plaintiffs to amend their pleadings).

130. *See id.* at 558 (citing *Payne*, 838 S.W.2d at 237) (concluding where evidence is available that a driver is new or unfamiliar with the hazardous roadways in the Eagle Ford Shale region, TxDOT could be facing a tremendous amount of liability exposure).

131. *See id.* (citing *Payne*, 838 S.W.2d at 237) (corroborating how a licensee can establish premise defect liability by proving they had no actual knowledge of the hazard).

132. *See id.* at 557 (stating, based on the pleaded facts and evidence in the record, the court could not conclude the events were not foreseeable).

133. *See Payne*, 838 S.W.2d at 237 (“(2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition . . .”).

134. *See Brown*, 80 S.W.3d at 556 (clarifying an exact sequence of events is not required to meet the foreseeability prong of proximate cause); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996) (recognizing a precise series of events that produced the harm is not required, but only that the overall danger was foreseeable); *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 387 (Tex. 1989) (holding only the overall hazard had to be foreseeable, not the specific manner or exact chain of events that caused the pickup truck to be in the highway); *Tex. Dep’t of Transp. v. Pate*, 170 S.W.3d 840, 848 (Tex. App.—Texarkana 2005, pet. denied) (supporting anticipation of the exact sequences are not required to meet the foreseeability element “only that the general danger be foreseeable”); *see also* William V. Dorsaneo, III, Commentary, *An Unlighted Causeway May Be a Premises Defect*, 8 TEX. TORTS UPDATE 256, 258 (2002) (recognizing the Supreme Court of Texas has already held that foreseeability does not have to follow a precise sequence of events in each instance).

135. *See Pate*, 170 S.W.3d at 848 (stressing anticipation of the dangerous condition is essential in showing foreseeability). *Compare* William V. Dorsaneo, III, Commentary, *An Unlighted Causeway May Be a Premises Defect*, 8 TEX. TORTS UPDATE 256, 257 (2002) (showing TxDOT cannot argue accidents are unforeseeable), *with* News Release, Office of State Sen. Judith Zaffirini, Eagle Ford Shale Legislative Caucus to Host Regional Meeting Regarding TxDOT Proposal to Convert Roads to Gravel (Sept. 3, 2013), <http://www.zaffirini.senate.state.tx.us/pr13/p090313a.htm> (identifying Senator Kirk Watson’s concerns and acknowledging the traffic and safety situation in the shale play regions).

C. *Special Defects: Shielding the Invitee from Harm*

Alternatively, the dangerous road conditions in the Eagle Ford region may constitute a special defect.¹³⁶ Both special defects and premise defects often involve a hazardous condition, but there is a legal distinction in the duty the state owes the injured party as a result of the particular hazardous condition.¹³⁷ Under a premise defect, the government owes only the duty of an individual to a licensee, but a special defect elevates the government's duty to that owed to an invitee.¹³⁸ For a special defect, the state must act with ordinary care to warn an individual or make a dangerous situation reasonably safe and use ordinary care to reduce or eliminate the hazardous condition.¹³⁹ Additionally, the state must act to eliminate the danger in situations where it has knowledge or should reasonably be aware of the hazardous condition; in the case of a premise defect, the state is required to be aware, and the individual unaware, of the dangerous condition.¹⁴⁰

The statutory definition of a special defect is a defect, such as an

136. Compare *Cnty. of Harris v. Eaton*, 573 S.W.2d 177, 177 (Tex. 1978) (holding that an unusually large hole in the roadway was within the meaning of a "special defect" under the TTCA), and *Morse v. State*, 905 S.W.2d 470, 475 (Tex. App.—Beaumont 1995, writ denied) (establishing a severe shoulder drop-off of a maximum of ten to twelve inches constituted a special defect), with Jose G. Landa, *Eagle Ford Shale: The Good, Bad, and Ugly—Traffic Accidents Increase Significantly*, EAGLE PASS BUS. J. (Oct. 6, 2012), <http://www.epbusinessjournal.com/2012/10/eagle-ford-shale-the-good-bad-and-ugly-traffic-accidents-increase-significantly/> (illustrating the road damage is so severe with extreme drop-off edges and large potholes that accidents and fatalities are becoming a common by-product of the booming Eagle Ford Shale), and Press Release, Tex. Dep't of Transp., New Funds Approved for Critical Repairs to Damaged Roads in Booming Energy Areas Experiencing Unprecedented Growth (Dec. 19, 2013), <http://www.txdot.gov/inside-txdot/media-center/statewide-news/2013-archive/073-2013.html> (contending where road damage is so severe as to rise to a fatally dangerous level—as seen in a number of damaged roadways across the Eagle Ford Shale counties—TxDOT has an increased level of responsibility to drivers).

137. See *Roberts v. City of Grapevine*, 923 S.W.2d 169, 171 (Tex. App.—Fort Worth 1996) (analyzing the similarities of how both premises and special defects are viewed as dangerous conditions, but the distinguishing legal factor is the level of duty owed to an injured party), writ denied *per curiam*, 946 S.W.2d 841 (Tex. 1997); *Morse*, 905 S.W.2d at 474 (comparing the similar nature of a premises and special defect and contrasting the differences).

138. See *Eaton*, 573 S.W.2d at 179 (noting the limited duty owed by the government in cases of premise defect); see also *Morse*, 905 S.W.2d at 474 (explaining the different levels of duty the state owes an individual concerning sovereign immunity liability).

139. See *Morse*, 905 S.W.2d at 474 (clarifying the increased actions required by the state to avoid liability); see also *Roberts*, 923 S.W.2d at 171–72 (comparing the levels of duty the government owes from the position of a duty to warn, reduce, or completely eliminate the hazardous condition).

140. See *Morse*, 905 S.W.2d at 474 (advancing the differing levels of notice required to establish state liability); see also *Roberts*, 923 S.W.2d at 171–72 (distinguishing the duties owed to an invitee and a licensee and how the government entity must only have reasonable opportunity to be aware of the situation instead of possessing actual knowledge of the hazardous condition).

obstruction or excavation on streets, highways, or roadways that presents an unusual or unexpected condition for the typical highway driver.¹⁴¹ Four questions must be affirmatively answered to find negligence in a special defect case, the first being, “Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?”¹⁴² To establish special defect liability, affirmative answers must also be found to the following questions: (1) whether the governmental entity knew or reasonably should have known of the hazardous condition,¹⁴³ (2) whether the condition presented an unreasonable risk of danger,¹⁴⁴ and (3) whether the owner or governmental entity failed to use a normal standard of care to guard an invitee from the hazard, by either failing to competently caution the invitee of the dangerous situation or failing to make the situation adequately safe.¹⁴⁵ Thus, the distinct difference between premise defects and special defects is the degree of knowledge required of the state to meet each standard.¹⁴⁶

141. See *Reyes v. City of Laredo*, 335 S.W.3d 605, 607 (2010) (per curiam) (explaining whether a dangerous situation is a special defect or premise defect is a question of duty that is not specifically defined by the statute); *Morse*, 905 S.W.2d at 474 (explaining the statutory definition of a special defect goes beyond ordinary potholes; instead, such a defect must be a completely unusual condition in or near the highway entirely without warning to the driver); see also *Tex. Dep’t of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009) (acknowledging that special defects are not specifically defined as obstructions or excavations, but are likened to those types of defects); *Eaton*, 573 S.W.2d at 179 (reiterating dangerous conditions are expressly designated “as excavations or roadway obstructions”); *Roberts*, 923 S.W.2d at 172 (noting the types of special defects specifically listed in the Texas statute).

142. See Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.4 (2012) (indicating that in premises liability situations where the plaintiff is an invitee, only four specific questions must be answered to find liability).

143. See *Morse*, 905 S.W.2d at 476 (distinguishing a special defect and a premise defect); see also Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.4 (2012) (establishing the notice element requires only that the responsible party reasonably could have known or had actual knowledge of the hazardous situation).

144. See *Morse*, 905 S.W.2d at 475 (concluding a special defect must be more threatening and dangerous than what a normal user expects from road conditions); see also Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.4 (2012) (including that the condition must present an unreasonable opportunity for harm as an element of special defect liability).

145. See *Morse*, 905 S.W.2d at 474 (asserting the governmental unit could limit its liability if it either warns the invitee of the danger or makes the condition reasonably safe); see also Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.4 (2012) (identifying the third question that must be positively answered to find a governmental entity negligent in situations where the plaintiff is an invitee).

146. See *Morse*, 905 S.W.2d at 475–76 (contending there are different levels of awareness required to meet the burden of proof for premise and special defects); George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 29–30 (indicating there is a lower threshold of knowledge required

Special defect liability may also arise when the governmental unit fails to eliminate the hazard or reduce its unreasonable potential to cause harm to an invitee.¹⁴⁷ Courts often view the unreasonable risk of danger differently under a special defects analysis in that the court may require more than just a warning; the court may require an attempt to diminish or eliminate an unreasonable risk of harm.¹⁴⁸

In order to establish liability under a special defects claim, the condition must have either presented an unreasonable chance of harm or the size of the hazardous condition must have been greater than one would normally expect.¹⁴⁹ Based on the *ejusdem generis* rule,¹⁵⁰ the examples set forth in

before a governmental entity must act for the benefit of an entrant onto its property); *see also* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992) (contrasting the differences between premise defects and special defects); *Eaton*, 573 S.W.2d at 179–80 (emphasizing since the governmental entity was more than a mere licensor it was negligent because “it should have known”). Constructive knowledge of a dangerous condition or any special defect that could be discovered with a moderately thorough inspection would be enough to hold the governmental entity liable under a special defect theory. *See* George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 29–30 (restating the lower threshold of notice for a special defect under the TTCA).

147. *See* *Roberts v. City of Grapevine*, 923 S.W.2d 169, 172 (Tex. App.—Fort Worth 1996) (proposing the duty of ordinary care involves not just a warning, but an effort to minimize or eliminate an unreasonable risk of danger), *writ denied per curiam*, 946 S.W.2d 841 (Tex. 1997); *Morse v. State*, 905 S.W.2d 470, 474 (Tex. App.—Beaumont 1995, *writ denied*) (distinguishing between premise defect liability, where the owner should use reasonable care to caution or make the hazardous condition safe in situations where the owner knows of the condition and the licensee does not, and special defect liability, where the owner must use reasonable care to lessen or eliminate an unreasonable possibility of danger, not just warn a licensee).

148. *See* *Roberts*, 923 S.W.2d at 172 (showing the limited options available to reduce a government entity's liability); *see also* George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 30 (suggesting governmental entities must do more than just warn, but may be required to take affirmative action). *See generally* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.4 (2012) (outlining the standard necessary to meet a plaintiff's burden of proof in a special defect liability case).

149. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.4 (2012) (defining necessary elements under a special defect liability claim where the plaintiff is an invitee); *see also* *Eaton*, 573 S.W.2d at 179 (establishing a factor used to determine whether a condition rises to the level of special defect requiring a greater duty by the governmental entity); *Morse*, 905 S.W.2d at 475 (supporting the need to evaluate the size of the defect when considering obstructions and excavations in roadways).

150. *Ejusdem generis* is a rule of construction meaning of the same class, nature, or kind. BLACK'S LAW DICTIONARY 613 (104th ed. 2014). The definition states that when general or common words follow a list of individuals or objects by words of a precise and particular meaning, the general words should not be interpreted in their broadest meaning, but should be applied only to the individuals or objects of the similar nature or kind as those precisely stated. *Id.* at 614; *see* *Stanford v. Butler*, 142 Tex. 692, 181 S.W.2d 269, 272 (1944) (“[W]here specific and particular enumerations of persons or things in a statute are followed by general words, the general words are not to be construed in their widest meaning . . . but . . . treated as limited and applying only to

the statute, obstructions and excavations, as well as items of the same class or nature should be considered when evaluating a potential special defects claim.¹⁵¹ Some helpful characteristics were evaluated in *City of Denton v. Paper*¹⁵² to determine whether a specific hazard was similar to an excavation or obstruction.¹⁵³ The court considered the following:

(1) the size of the condition; (2) whether the condition unexpectedly and physically impairs an ordinary user's ability to travel on the road; (3) whether the condition presents some unusual quality apart from the ordinary course of events; and (4) whether the condition presents an unexpected and unusual danger.¹⁵⁴

In *Eaton*, Doris Eaton was driving along the highway at thirty-five miles per hour, hit a hole in her driving lane, and flipped her car into the ditch.¹⁵⁵ The court held an abnormally large hole in the highway met the standard of a special defect requiring the County to warn drivers of the hazard as if the drivers were invitees on the property.¹⁵⁶ The *Morse* court held a six-inch drop-off was a special defect because of its significant size; in fact, the size compounded by an unexpected or unusual danger to the normal traveler was held to be a determinative factor.¹⁵⁷ Laurice Morse was killed when “the left tires of the [her] car went over a large drop-off

persons or things of the same kind or class as those expressly mentioned.’); *Farmers’ & Mechs.’ Nat’l Bank v. Hanks*, 104 Tex. 320, 137 S.W. 1120, 1123–24 (1911) (applying the rule to a statute such that a right or benefit may be conferred on one person or group of individuals thereby imposing a liability on a different group of persons).

151. See *Eaton*, 573 S.W.2d at 179 (paraphrasing where the rule was used to consider a dangerous condition; size of the defect was one characteristic); *Stanford*, 181 S.W.2d at 272 (echoing the universally recognized rule of construction—where general words follow specific words or particular categories the general words must be restricted to a similar meaning); *Hanks*, 137 S.W. at 1124 (remarking that general words are to be interpreted with similar application to the specific words used, unless a contrary notion has been clearly manifested); *Morse*, 905 S.W.2d at 475 (recommending the statute not be read so narrowly as to limit the class or category to only the few examples described within the statute).

152. *City of Denton v. Paper*, 376 S.W.3d 762 (Tex. 2012) (per curiam).

153. *Id.* at 765.

154. *Id.*

155. See *Eaton*, 573 S.W.2d at 178 (explaining the circumstances that brought about the lawsuit).

156. See *id.* at 180 (holding the county to a higher standard of care in safeguarding individuals from hazardous conditions). The “abnormally large hole” was described as varying in depth from six to ten inches, oval shaped, and extending across 90% of the roadway width. See *id.* at 178 (detailing the severity of an obstruction held to be a special defect). The hole was so large that a driver could not stay on the paved portion of the roadway without driving through the hole. *Id.* at 180 (considering the size of the hazard when determining a special defect).

157. See *Morse*, 905 S.W.2d at 475 (hearing from various TxDOT witnesses about the depth, severity, “critical condition,” and unexpected nature; the court reached the decision the drop-off rose to the level of special defect).

between the traffic lane and the shoulder causing her to lose control of the vehicle, cross the access road, flip over, and crash into a tree.”¹⁵⁸ The large drop-off that claimed Morse’s life was as deep as ten to twelve inches in some places, being “considered a ‘critical condition’ and should [have been] repaired as soon as possible.”¹⁵⁹ In other words, to be considered a special defect, the defect should be so large a motorist cannot drive down the road without encountering the hazard.¹⁶⁰

The Supreme Court of Texas held an abnormally large pothole in the roadway constituted a special defect under the standards of the TTCA and gave rise to a duty to warn.¹⁶¹ However, a “hazardous condition” is undefined by the TTCA, and there is no distinct bright-line rule to determine a special defect; thus, decisions must be made on a case-by-case basis.¹⁶²

IV. DUTY TO MAINTAIN

The Restatement (Second) of Torts implies there is a duty to maintain the highway.¹⁶³ The government has a duty to provide the opportunity for safe travel, and if there are conditions that make travel unsafe, the government owes a duty to warn of such hazards.¹⁶⁴ TxDOT has a duty to operate and maintain roadways in a safe manner and to eliminate

158. *Id.* at 472.

159. *Id.*

160. See George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 30 (explaining size and unavoidability are elements used by the courts to determine whether a dangerous condition rises to the level of special defect under the TTCA).

161. See *Eaton*, 573 S.W.2d at 177, 180 (establishing characteristics of a special defect in one case before the Supreme Court of Texas). In both *Roberts* and *Morse*, damaged sidewalk steps and a six to twelve inch drop-off on the shoulder of the highway constituted special defects which increased the government’s duty of care toward a private person to that of an invitee. See *Roberts v. City of Grapevine*, 923 S.W.2d 169, 173 (Tex. App.—Fort Worth 1996) (holding broken sidewalk steps rose to the level of a special defect), *writ denied per curiam*, 946 S.W.2d 841 (Tex. 1997); *Morse*, 905 S.W.2d at 475 (concluding an unexpected drop-off of at least six inches was of the same nature as an obstruction or excavation).

162. See George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 30 (acknowledging sovereign immunity waivers may be hard to obtain because there is no specific standard).

163. See RESTATEMENT (SECOND) OF TORTS § 342 (1965) (establishing the level of liability a possessor of land owes others in an effort to maintain safe travel on the highways).

164. See *Vasocu v. Acme Cement Prods., Inc.*, 610 So. 2d 258, 263 (La. Ct. App. 1992) (attributing fault to DOTC for allowing the hazardous condition under its control to exist). The Louisiana State Department of Transportation was held liable for failing to inspect the roadway when it had notice of a cement company washing out its trucks on or near a roadway leaving up to 6,000 pounds of concrete to accumulate and create a hazard for motorists. See *id.* at 262 (holding there was no error in finding the DOTC liable where it had knowledge of a potentially hazardous condition).

hazardous conditions, or at least warn motorists of dangerous situations.¹⁶⁵ Drivers are accustomed to certain standards of construction or consistency on roadways; when those standards are not met, a driver's expectation is violated.¹⁶⁶ Consistencies in roadway conditions help meet driver expectations and thus, limit accidents. When road conditions deteriorate below drivers' expectations, TxDOT has a duty to warn drivers of these differing conditions, thereby limiting accidents due to sudden changes in driving conditions.¹⁶⁷ The court in *Pate* held a statutory responsibility of maintenance and upkeep includes acts which are "necessary to 'preserve the highway as it was originally designed and constructed.'"¹⁶⁸ This duty is present because "the Department is given 'exclusive and direct control of all improvement of the state highway system,' [which is] to be provided 'efficient maintenance.'"¹⁶⁹ TxDOT is afforded the same consideration as others charged with a negligent act: It must have reasonable notice of the defect and a sufficient opportunity to repair the condition or warn motorists of the hazard.¹⁷⁰

Nevertheless, "sudden and unexpected change[s] in driving conditions" were held to be a premise defect under the TTCA that waived

165. See JOHN C. GLENNON & PAUL F. HILL, ROADWAY SAFETY AND TORT LIABILITY 21 (2d ed. 2004) (asserting TxDOT's responsibility to motorists to exercise reasonable care in situations of design, construction and maintenance); see also *Morse*, 905 S.W.2d at 474 (noting the state must use ordinary care to warn or make reasonably safe).

166. See JOHN C. GLENNON & PAUL F. HILL, ROADWAY SAFETY AND TORT LIABILITY 16–17 (2d ed. 2004) (proposing the need for consistent highway conditions to limit sudden changes in driving conditions which result in accidents caused by drivers' slow reaction times).

167. See *id.* (asserting TxDOT's failure to maintain consistent highway standards or warn of unsafe or irregular driving conditions creates an area of danger); see also TEX. CIV. PRAC. & REM. CODE ANN. § 101.022 (West 2011) (providing that, for premises defect claims, the government owes a duty to warn licensees, but only to the level of care a private individual would owe a licensee on their own property).

168. See *Tex. Dep't of Transp. v. Pate*, 170 S.W.3d 840, 844 (Tex. App.—Texarkana 2005, pet. denied) (quoting *Shives v. State*, 743 S.W.2d 714, 716 (Tex. App.—El Paso 1987, writ denied) (restating the department's responsibility of maintenance and upkeep of the state highway system); *Villarreal v. State*, 810 S.W.2d 419, 421 (Tex. App.—Dallas 1991, writ denied) (defining the State's duty to maintain the properties it originally designed and constructed); see also TEX. TRANSP. CODE ANN. § 224.032 (West 2011) (establishing the duties of the commission involved "[in] the development and maintenance of the state highway system").

169. See TRANSP. §§ 224.031–.032 (identifying the department's exclusive rights and duties); see also *Pate*, 170 S.W.3d at 845 (citing the department's exclusive rights and duties under the Texas Transportation Code).

170. See JOHN C. GLENNON & PAUL F. HILL, ROADWAY SAFETY AND TORT LIABILITY 23 (2d ed. 2004) (stating in a negligence claim, TxDOT is given the same standards as any other party; they must be given the opportunity to know of the condition and have an opportunity to repair it or warn others of the condition); see also RESTATEMENT (SECOND) OF TORTS § 342 (1965) (listing the elements required for a possessor of land to be held liable for harm caused to a licensee on the land).

governmental immunity in *Brown*.¹⁷¹ While there was no initial duty for the defendants to light the causeway, the plaintiffs alleged “a nondiscretionary duty to maintain” the streetlights once they were installed.¹⁷² The court held the government’s sovereign immunity was not waived because it failed to install lighting or failed to maintain the lighting that had been installed, but for the unreasonably dangerous condition created by the failure to maintain the lighting.¹⁷³

TxDOT has built highways and maintained them in their system for years; now, when the roads are more difficult to maintain due to the excessive breakdown under the overweight and oversized permitted oilfield loads, TxDOT should be held responsible for maintaining the roads at a reasonable standard or to warn drivers of the unsafe conditions.¹⁷⁴

V. CONCLUSION

To recover under a premise defect claim of the TTCA, a plaintiff must show TxDOT possessed (i.e., owned, occupied, or controlled) the premises where the injury occurred.¹⁷⁵ To succeed under a premises liability theory, a jury would have to determine if four elements had been

171. See *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 554, 557 (Tex. 2002) (outlining conditions meeting the premise defect standard under the Texas Tort Claims Act).

172. See William V. Dorsaneo, III, Commentary, *An Unlighted Causeway May Be a Premises Defect*, 8 TEX. TORTS UPDATE 256, 257 (2002) (explaining the reason for the waiver of sovereign immunity in *Brown*); George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 29–30 (stating dangerous conditions must arise from a governmental action not a discretionary or proprietary function).

173. See *Brown*, 80 S.W.3d at 557 (clarifying the parameters of governmental immunity).

174. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.022 (West 2011) (providing the obligations of a governmental entity are the same as a private person to a licensee); TRANSP. § 224.031 (establishing TxDOT’s exclusive control over the highway system); *id.* § 224.032 (reiterating the commission’s duty of maintenance of the state highway system); see also *Brown*, 80 S.W.3d at 554 (noting a premise owner must either make conditions reasonably safe or warn licensees of a dangerous situation that the owner is aware of and it would be difficult for licensee to know of the condition); *Wilson v. Tex. Parks & Wild. Dep’t*, 8 S.W.3d 634, 635 (Tex. 1999) (*per curiam*) (acknowledging when a party does not occupy, control, or own the premise, they may still owe a duty of care where they have previously undertaken to keep the premise safe); *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997) (referring to the duty owed to make a premise safe for others); *Pate*, 170 S.W.3d at 845 (applying the department’s duty of direct and exclusive control over a system that demands “efficient maintenance”); *Roberts v. City of Grapevine*, 923 S.W.2d 169, 173 (Tex. App.—Fort Worth 1996) (contending the TTCA requires governmental entities to maintain highways and sidewalks in a reasonably safe condition and when they fail to do so it may be held as a special defect invoking the higher duty of care), *writ denied per curiam*, 946 S.W.2d 841 (Tex. 1997).

175. See *Brown*, 80 S.W.3d at 554 (establishing the level of control by the defendant required for a plaintiff to recover under a premise defect claim (citing *Wilson*, 8 S.W.3d at 635)).

met: (1) that dangerous road conditions posed a risk of harm that was unreasonable,¹⁷⁶ (2) that TxDOT had actual knowledge of the dangerous road conditions,¹⁷⁷ (3) that the driver sustaining an injury did not know of the dangerous road conditions,¹⁷⁸ and (4) that TxDOT failed to exercise reasonable care to protect drivers from dangerous road conditions by failing to make the roads safe for travel or failing to provide adequate warning of the dangerous conditions.¹⁷⁹ In addition, the fundamental element that TxDOT's failure was the proximate cause of the accident must be established.¹⁸⁰ In contrast, if claiming a special defect, TxDOT is not required to have actual knowledge; it is only required that TxDOT knew or should have known of the hazard, and the injured party is not required to show they were unaware of the danger.¹⁸¹ In *Brown*, the plaintiff established all of the elements, save one, that the deceased had no actual knowledge of the dangerous, darkened condition.¹⁸² Proving the injured party had no actual knowledge will be a difficult bar for plaintiffs asserting claims against TxDOT to reach in premise defect cases arising out of the ravaged roads in the Eagle Ford Shale.

“Because the [c]ourt’s opinion does not identify any limiting principle, accidents on roads . . . will be sure to inspire litigation in which [*Brown*] will become the standard rebuttal to jurisdictional pleas.”¹⁸³ Then-Justice

176. See Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.5 (2012) (clarifying the condition is not what one reasonably expects to encounter).

177. See *id.* (advancing the premise defect standard that TxDOT must have actual knowledge of the condition).

178. See *id.* (applying the premise defect standard where the licensee cannot have any prior knowledge of the hazardous condition).

179. See *id.* (citing elements of the burden of proof necessary for a plaintiff to prove premise defect liability under the TTCA); see also State Dep’t of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992) (establishing the elements of liability that a licensee must prove under a premise defect claim). See generally George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 30 (adopting the lesser burden for the government when the injured party is a licensee).

180. See Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Premises Liability—Plaintiff Is Invitee* PJC 66.5 (2012) (asserting the proximate cause of the accident must be established before any other elements of fault need be proven).

181. See *id.* at 66.4 (contrasting the elements of the burden of proof between ordinary premise defect and special defect liability); see also George C. Hanks, Jr., *When Sovereign Immunity Is Not Enough: The Rise of Premises Liability Litigation Against Governmental Entities*, HOUS. LAW., Oct. 1998, at 27, 29 (conferring the elevated status of an invitee raises the burden on the government from actual knowledge to a known or should have reasonably known status).

182. See *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 559 (Tex. 2002) (holding the *Brown* case as very strong in its attempt to establish liability for TxDOT’s failure to maintain the safe driving condition on the lighted causeway).

183. See *id.* at 560 (Jefferson & Owen, JJ., concurring) (expressing concerns of increased

Nathan Hecht's dissent agreed that a governmental entity in Texas can be liable for situations in the roadway that are unreasonably dangerous, so long as either the plaintiff was unaware of the hazardous condition¹⁸⁴ or that the condition met the definition of a "special defect,"¹⁸⁵ and so long as the condition is not darkness.¹⁸⁶ The standard advocated by Justice Hecht may be easily identifiable in the Eagle Ford, just as it was in *Eaton*,¹⁸⁷ because the potholes are so large that TxDOT wishes to convert the damaged pavement to gravel rather than undertake an ordinary asphalt repair.¹⁸⁸

TxDOT has established a roadway system through state taxpayer funding and federal monies.¹⁸⁹ TxDOT has issued permits for overweight and oversized loads to allow the oilfield service vehicles access to load-limit roads, therefore authorizing the heavy burden on the state's highways.¹⁹⁰ TxDOT is accepting applications and permit fees which

litigation against TxDOT for failing to maintain its premises).

184. *See id.* at 563 (Hecht, J., dissenting) (acknowledging situations where the government may still be held liable).

185. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(b) (West 2011) (defining special defects as a class of things such as obstructions on the roadway or excavations within or near the roadway); *see also* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 238 (Tex. 1992) (exploring the boundaries of a special defect designation).

186. *See Brown*, 80 S.W.3d at 563 (Hecht, J., dissenting) (explaining the limits of a governmental entity's liability for an unreasonably hazardous condition). Justice Hecht dissented but acknowledged that the government could be liable for road conditions that are unreasonably hazardous when there is proof that the plaintiff was unaware of the condition or that it was a special defect. *See* William V. Dorsaneo, III, Commentary, *An Unlighted Causeway May Be a Premises Defect*, 8 TEX. TORTS UPDATE 256, 257 (2002) (implying when all the elements are met and conditions are of a similar class as an obstruction or excavation the government is not immune from its responsibilities).

187. *See* Cnty. of Harris v. Eaton, 573 S.W.2d 177, 178 (Tex. 1978) (finding special defects in conditions such as potholes over nine feet in width and more than six inches deep).

188. *See Brown*, 80 S.W.3d at 563 (Hecht, J., dissenting) (suggesting that where there is a special defect the governmental entity waives its sovereign immunity and is liable for its conditions); *see also* Austin Brown III, *Lack of Action Could Leave Rural Texas in the Dust*, BEEVILLE BEE-PICAYUNE, Oct. 12, 2013, at 5A (concluding where *Eaton* met the standard of special defect liability with its abnormally large hole, the severely damaged roads of the Eagle Ford Shale could be the liability problem that Justice Hecht fears because TxDOT should be held to be reasonably aware of the situation). *See generally Eaton*, 573 S.W.2d at 178 (describing the parameters set by one court to determine a special defect in the highway as one that is so large it cannot be missed unless the driver leaves the roadway).

189. *See* STATE OF TEX. LEGIS. BUDGET BD., TEXAS HIGHWAY FUNDING 1–2 (2d ed. 2011), available at <http://www.lbb.state.tx.us/Document/teams/Transportation/Highway%20Funding%20Primer%20312012.pdf> (outlining the sources of state highway transportation funding).

190. *See* TEX. TRANSP. CODE ANN. § 623.142 (West Supp. 2014) (referring to the transportation code's allowance of movement on the state highway system of oilfield related machinery when a special permit is obtained); *see also id.* § 621.102(a)–(b) (advancing the culpability of the executive director of TxDOT for setting maximum weight standards and issuing permits that overburden the roadways).

allow oilfield equipment to be transported on state highways and farm-to-market roads that were not designed for these heavy loads.¹⁹¹ TxDOT cannot abandon its taxpayers and citizens to face dangerous highway conditions as if the maintenance of severely damaged roads is a discretionary act.¹⁹² TxDOT has a duty to maintain its property through a reasonable and safe means.¹⁹³ Under the standards set forth, some of the damaged roadways may only meet a premise defect level of duty, but many other areas of the Eagle Ford Shale region have such severe damage as to meet conditions¹⁹⁴ like those found in *Eaton*, thereby constituting a special defect.¹⁹⁵ TxDOT could be facing an increased number of special defect claims¹⁹⁶ if it does not take the necessary and corrective action to repair and maintain the state highway system.¹⁹⁷ The Eagle Ford Shale oil and gas boom has brought many positive and negative consequences,¹⁹⁸ and the government cannot take the increased revenues¹⁹⁹ without

191. See TASK FORCE ON TEX. ENERGY SECTOR ROADWAY NEEDS, TEX. DEP'T OF TRANSP., TEXAS' ENERGY SECTOR ROADWAY NEEDS REPORT 2 (2012), available at http://ftp.dot.state.tx.us/pub/txdot-info/energy/final_report.pdf (implying the reason for the rapid deterioration of the roads in the Eagle Ford Shale region).

192. See TRANSP. § 224.031 (West 2011) (defining the department's direct and exclusive control); *id.* § 224.032 (asserting the department's stated requirement to provide maintenance); see also *Brown*, 80 S.W.3d at 557 (acknowledging a governmental entity's sovereign immunity will not be waived for nondiscretionary acts); *Tex. Dep't of Transp. v. Pate*, 170 S.W.3d 840, 844 (Tex. App.—Texarkana 2005, pet. denied) (explaining how the TTCA waives sovereign immunity for non-discretionary acts).

193. See TRANSP. § 224.032 (establishing the commission's duty to "provide for the: (1) efficient maintenance of the system"); see also *Pate*, 170 S.W.3d at 844 (arguing the department's duty to maintain the "highway as it was originally designed and constructed"); *Villarreal v. State*, 810 S.W.2d 419, 421 (Tex. App.—Dallas 1991, writ denied) (forwarding the premise of the government's duty to maintain the highways it originally constructed).

194. See Austin Brown III, *Lack of Action Could Leave Rural Texas in the Dust*, BEEVILLE BEE-PICAYUNE, Oct. 12, 2013, at 5A (illustrating the severity of the road damage in the Eagle Ford Shale region); see also THOMAS TUNSTALL ET AL., ECONOMIC IMPACT OF EAGLE FORD SHALE 37 (Ctr. for Cmty. & Bus. Research: Univ. of Tex. at San Antonio Inst. for Econ. Dev. ed., 2013), available at <http://ccbr.iedtexas.org/index.php/Impact-Reports/View-category/Page-1.html> (reporting how the increased heavy traffic has broken down and caused rapid deterioration to the roads in the region).

195. See *Cnty. of Harris v. Eaton*, 573 S.W.2d 177, 180 (Tex. 1978) (explaining how the size of the hole in the highway was a determinative factor in holding that the case rose to the level of special defect instead of the lower standard of premise defect).

196. See *id.* at 179–80 (suggesting the seriousness of TxDOT's liability if the damaged road conditions rise to the level of special defects).

197. See TRANSP. § 224.032 (recognizing the responsibility the state set forth in the law to provide for the continued and effective maintenance of the state highway system).

198. See Nolan Hicks, *Downtown Disputes, Eagle Ford in Spotlight*, SAN ANTONIO EXPRESS-NEWS, Dec. 29, 2013, at C1 (reviewing the highlights and burdens of the biggest economic event in South Texas in recent years with more growth predicted).

199. See News Release, Office of State Sen. Judith Zaffirini, Senator Zaffirini: Additional \$250 Million Proposed for Texas Highways in Energy-Producing Regions (Oct. 15, 2013),

reinvesting in the source of that income, specifically where it has a statutory duty to do so.²⁰⁰

<http://www.zaffirini.senate.state.tx.us/pr13/p101513a.htm> (reporting how the Eagle Ford Shale boom has increased state revenues by more than \$1 billion in 2012 alone); *see also* Christi Fish, *Eagle Ford Shale Generated More Than \$25B in Revenue for South Texas in 2011*, UTSA TODAY (May 9, 2012), <http://utsa.edu/today/2012/05/shalestudy.html> (promulgating the large increases in state coffers and an economic infusion into the region because of the Eagle Ford Shale boom). After the November 2014 elections, Proposition 1 was passed, which amends the Texas Constitution to allow the oil and gas severance tax funds to be divided between the Rainy Day fund and transportation fund. Jennifer Hiller, *Better Roads, More Pipelines on Agenda*, SAN ANTONIO EXPRESS-NEWS, Nov. 9, 2014, at C3. This will bring an estimated \$1.4 billion to TxDOT, which does not have a list of projects at this time. *Id.*

200. *See* TRANSP. § 224.031 (directing the reader to TxDOT's exclusive control over the state highway system); *id.* § 224.032 (highlighting TxDOT's duty to develop and maintain the state highway system).