ORAL ARGUMENT – 3/22/00
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KENNEDY AND CORPUS CHRISTI DIOCESE V. DEWHURST

RATLIFF: The case we present today is a case of whether a rule of property law on which many boundaries in South Texas, along the Gulf Coast have been set, will be set aside and held for naught. I have a hard time with the CA's opinion, because I believe it contains several over-arching errors.

HANKINSON: How much of the coast line has been established using the text that you say the court should be following in this case?

RATLIFF: It is hard for me to give you a percentage. But many of the large tracks on the southern Laguna Madre, in fact, have had their boundaries determined either by under agreed judgments with the General Land Office, or under adjudications based upon the use of tide gauges and the use of mean higher high water. As you move up the coast you run into more common law grants. But again, common law grants are just as impacted by the holding below as a civil law grant, because again the common law grant has been based on mean high water.

GONZALES: Are there any cases in which the sea shore boundary has been determined other than by mean higher high tide, or mean high tide?

RATLIFF: There are some that were determined early at a time - for example: *Galveston v. Menard* dealt with a title grant in Gavleston. In that one they utilized the highest tide in the winter, which was I think a rule that many lawyers believed was the law until *Luttes* came in 1958.

GONZALES: Since *Luttes?*

RATLIFF: Since *Luttes*, I am not aware of a single determination.

GONZALES: How about outside Texas?

RATLIFF: As I recall there are 18 states that use a version of mean high water principally by tide gauge. I cannot vouch for every state. There are another 6 mostly in the New England states that use mean low water, but again, determined in the way that Noah determines those title datums and that's by the use of tide gauges.

GONZALES: Have there been any cases where the boundary has been determined by vegetation line or bluff line?

RATLIFF: There have been some cases certainly in Texas dealing with the Open Beaches law that have been determined, but that really deals with the extent of the public easement. But it

does affect title as you know. But under the Open Beaches Act vegetation line is in fact a marker.

HANKINSON: Is it a marker for the easement or is it a marker for the shoreline?

RATLIFF: As I'm afraid some people found out on Galveston Island and some other places, if their home extended over it, I suppose what they were doing, the base fee remains as is, but the right of the public to access and to not have that access impeded by a structure is in fact controlled by the vegetation line. Of course, that Act was enacted because of the concerns expressed on the motion for rehearing by Alec Pope out of Ft. Worth on behalf of Brazoria County in which they raised the question as to whether mean high or high water would not mean that people would be totally excluded from the public beach. The legislature acted in the next session to secure that easement along the beach front on the Gulf side. But I am not aware of any state that utilizes the vegetation line as the determiner on the question of boundary.

What we have here is that the CA created what I believe to be a very limited reservation in the motion for rehearing in *Luttes*, and turned it into an alternative method of establishing mean high water.

After the original *Luttes* opinion had come down, as I indicated Alex Pope filed a motion and said that he was very concerned particularly on the Gulf side because he was not convinced, in fact he remained unconvinced, that where you measured the height of a tidal datum, mean high or high water by tide gauge out here, he did not believe that that necessarily would translate on a horizontal plane on the ground to a point where it would be coincident with the lateral reach of the water on the shore. And he argued very strongly that the court should not foreclose the possibility of showing that the lateral reach of the water was greater than would be indicated by the tidal datum.

In response to that, the SC said that while they were not aware of any science that would allow that, that they were not going to foreclose it. But it is very clear that in the motion for rehearing they were still dealing with mean high or high water as the tidal datum which sets the boundary and they simply were saying if somebody comes up with scientific devices that would allow you to show that the run-up on the shore was either higher or lower than that indicated by simply translating the vertical datum line to the shore, we're not going to foreclose it.

The fact of the matter is, in this case as the trial judge said, he said let's be intellectually honest here. The state has not established it. Even if that were an exception, the state has not established it in this case. Their surveyor said he was unaware of any scientific basis upon which you could make that kind of determination over a 1-year period where you could then relate it to the 18.6 year tidal epic(?), which is the basis of *Luttes*. Also, Mr. Shine, the state surveyor in this case, said, "I didn't locate my line in relation to any water level. I simply went to where I believed historically the line had always been." What Mr. Shine's testimony did was attempt to convert what was clearly a call for the Laguna Madre into a call for a fixed line. And to justify that

position, he took surveys done long after the fact and said, well they located them here and that's where I see it on the ground, and that's where I think the line should be. Everything he looked at were the exact indicia that the SC rejected in *Luttes*. Because they found that they were to transitory, there was too much room for disagreement and who can stand out on the property for 365 days so that you can relate what you are observing to a tidal epic(?) where you get the stability that is provided by the method...

HANKINSON: Isn't the state's position is that looking at this land grant from the time that it was granted historically, that in fact, regardless of the language of the grant, that the call was the Laguna Madre, that in fact what was intended would be the edge of the mud flats? I mean that's the state's argument as I understand it.

RATLIFF: I think that is exactly right.

HANKINSON: The intent at that time was even though they used that terminology what they really meant was the edge of the mud flats?

RATLIFF: You're exactly right. The only problem that we've got there is, is that what the boundary law says is that the intent is controlled by the call, and the call in this case was for a natural monument.

HANKINSON: Is there evidence though that the predecessors in the chain of title for your client's treated it as being a boundary on the edge of the mud flats?

RATLIFF: No. As a matter of fact the state tries to argue that, but the fact of the matter is in 1904 in *State v. Spohn* there was litigation between the predecessors entitled to the Kenedy Memorial Foundation and the state in which the state tried to establish its ownership of the big Baretta. The TC in that case, and it was later appealed and affirmed, called for the meanders of the said west margin or shore of said Laguna Madre. That is the way it was described. And then there was a confirmation survey. You heard about the Mattox survey. That was a confirmation survey based on *State v. Spohn*. Then again, in 1938 there was *Walker v. Kenedy*, cited in our brief, in which a person came in and sought to claim a vacancy between the big and the little Bareta and also to the East of these two grants. The TC held that there was no vacant land between the eastern boundary of the big and little Bareta, and the Laguna Madre.

GONZALES: The state argues that the actions by Jose _____, the predecessor in interest to the foundation petitioning for the Mesquite Rincon indicates that initially the boundary was at the mud flat. How do you respond to that?

RATLIFF: You've got to go back I think to what we said in our brief, and that is, when you deal with Spanish and Mexican grants, the purpose of a survey there was to determine the quantity so that (Tape goes bad for a few seconds)...for land that was not usable as pasture land to

not be included in the computation. But the fact of the matter is, is one of the reasons that the call for a natural monument such as a river, or a lake, or like the Laguna Madre is given the supreme dignity among calls is, is because a surveyor there on any given time is recording a transitory event. It is his opinion about where the meanders are. The meanders don't constitute the boundary. The natural monument does.

PHILLIPS: Isn't it at all significant that you and your predecessors didn't pay taxes on this land until the last two decades?

RATLIFF: I don't think it's significant in light of what I thought I remembered the TC's ruling as being that he kept that out, but he may not have. But I don't believe that ought to control on the question of title. The fact of the matter is, that might be important if we were trying to claim it by adverse possession, but that wouldn't work very well against the state anyway. What we are saying is, is the call was to the Laguna Madre, it's to the Laguna Madre where you find it today.

ENOCH: What is all of the discussion about the mean higher high tide and the Shine survey if what your argument is, is that this is just a monument's case and the Laguna Madre is the monument?

RATLIFF: Because a call for the Laguna Madre under *Luttes* is a call for that point of intersection on the shore between the vertical datum, mean high or high water as established by a tide gauge, and where it intersects with the surface of the land.

ENOCH: But your argument says that if we accept your mean higher high tide watermark it puts you under water on the East side of the intracoastal waterway.

RATLIFF: No that's not our argument.

ENOCH: But your only requesting the land up to the West side?

RATLIFF; What we said is, is that we made no attempt to determine the line of mean high or high water as it might have applied in its original condition. What we did, we voluntarily restricted our claim to the west bank of the intracoastal. And we believe that was entirely consistent because it maintained the _____ or literal nature of the track. Now the state has tried to make a big deal out of it.

ENOCH: You're saying the Laguna Madre as it originally existed when this grant occurred was not west of the intracoastal waterway. It was not as far West as it now is?

RATLIFF: The honest truth is, I don't know that anybody knows where it was. You certainly have historical documents that say that there was water there. As a matter of fact, Defendants Ex. 3, that's relied upon by the state, one of the surveyors talks about water of the

Laguna Madre adjacent to Mesquite Rincon. So the fact of the matter is, the state has introduced a whole lot of speculation about what the condition was out there before the intracoastal waterway was cut. But we believe that simply because the federal government and the state have come in and cut a line through the property should not deprive us of the right perian(?) nature of the track. And we believe the call was clearly for a right _____ track.

HANKINSON: If we agree with you that mean higher high tide is what must be applied to determine the boundary of these two land grants, does the jury's answer to question no. 2 support judgment in favor of the foundation, or would the case need to be remanded?

RATLIFF: I think it would support judgment of the foundation and the reason is because there would have been a determination that the land west of that line - in fact, it was admitted by the state surveyor. It's all above the line that was placed on the western bank of the intracoastal waterway. That was not even contested, and as a matter of fact, the trial judge said "if you're right on what you say, then we don't even need to have a trial." Everybody concedes it's above 1 foot, and therefore, we do believe it would support judgment.

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RESPONDENTS

MCKETTA: There are four facts that I think are important for all of us to understand, and that very much help on understanding of the unique nature of the disputed area. The first is, that even the testimony by the Foundation's witnesses established that there has been no material change in the 200 years...

HANKINSON: Isn't the question here how we interpret the land grant?

MCKETTA: It would be...

HANKINSON: And what test are we to apply to interpret these land grants?

MCKETTA: I think the most helpful test would be to look for the intent of the sovereign that granted when there is undisputed evidence that let's you find that intent, as here. The question that Justice Gonzales asked earlier are very helpful questions to guide us. Justice Gonzales asked us whether surveyor _____, and original grantee Jose Fernando _____, didn't show us something about the original intent. And they did. I would ask you to refer to Tab 1. Tab 1 shows a jut-out area...

HANKINSON: Before you get to that, if a court is faced with a land grant in a dispute over what the grant is, what is a court required to look at and what is it precluded from looking at to determine where the boundaries of the land grant are?

MCKETTA: Every time this court has addressed that question it has said that finding the intent of the grantor is the _____ star that is looked for. And *Luttes* said nothing different. *Luttes* said in a circumstance where it was undisputed that there was change water previously had been present on a daily basis all the way to the ranch land. It was no longer. That was the finding in the TC. The CA said nobody disputed that finding, and the SC, this court, took that as a given. Where it had changed, but was a literal boundary determined by a daily water boundary, *Luttes* looked for where is that boundary today and how do we determine that.

HANKINSON: But *Luttes* also looked to how we were to interpret a land grant under the civil law before Texas adopted the common law. And so it actually looked to how we should interpret the language, and in this instance, what the language in the grant is at the boundary of the Laguna Madre. Something to that effect.

MCKETTA: No. In that case it was _____, the shoreline of the sea. In this case it is _____ Laguna Madre, the margin or edge of the Laguna Madre. It is a natural monument. It is a different horse(?).

HANKINSON: And that's what I understand the Foundation is asking us to look to, is that in fact the grant does have a call, that is the monument which is the edge of the Laguna Madre, that that is what the grant was and we should look no further.

MCKETTA: That's what they say and as Mr. Ratliff talked, he said the call was to the Laguna Madre, and that is not correct. The call was to Laporia(?), the margin or edge and that word "margin" was used consistently even in the title to _____ Kenedy, then by him to his son, John Kenedy in instruments that make unambiguous that they believed the southeast corner of their land was underneath the _____ leading to the...

HANKINSON: But wouldn't the use of the word "margin" have a legal meaning in terms of _____ and looking at the grant rather than looking to the kinds of historical evidence about the party's conduct that you're asking us to look at?

MCKETTA: A word can easily have a legal meaning.

HANKINSON: And why shouldn't that control in interpreting the land grant?

MCKETTA: Suppose that undisputable evidence shows how the parties used that word. Suppose that's so.

GONZALES: Do we have that here?

MCKETTA: We have it here completely. We have it from _____, we have it at the little Bareta, from De La Fuenta, and we have it in each of the instruments that I was mentioning earlier.

This 55 square miles inside of the intracoastal waterway is the area disputed. The jutting out areas called Mesquite Rincon, as the court now notes, and there is a little ismus leading to it. When Conno was surveying big Bareta, by Balli he said, in addition to the big Bareta, which was granted to him by separate instrument, I would also like the Mesquite Rincon. Do you see your honor that if the Mesquite Rincon was already included in the grant, then there would be meaningless gesture to grant and pay for an additional 4 sitios of land that was called the Mesquite Rincon, and that was ranch land. It jutted out into what is the called the disputed area and would not have needed a grant if the margin here really had been somewhere else as the Kenedy Foundation says. What about the little Bareta? The little Bareta had a most unusual geographic triangulation. And at Tab 5, we see a portion of the Spanish and then we see an English translation on the second page. But if the court looked carefully, there is a rectangle that was granted or was intended to be granted of 5 sitios. But the surveyor, De La Fuenta with the grantee Salinas, expressly made a change so that it was not rectangular. The surveyor, in the translation one can find it, the surveyor staked out from point A down to point B and said at point F we crossed the margin of the Laguna Madre. And that's where everybody since has found the margin of the Laguna Madre except surveyor Claunch. And what did the surveyor then say? Because that was useless it - the translation by the Foundation says excluded, our translation says minus, it was not part of the grant, and instead, an equal area triangle was extended out here. It would not have happened if the grant included an area beyond the margin. The grant expressly excluded the mud flats that were beyond the margin.

GONZALES: If the call says one thing, and the parties act in a matter that's contrary to the call, what should a court do?

MCKETTA: There are mistaken call cases that deal with that. Here there is no mistaken call at the time of the grant and at the time of the instruments by which the Kenedys acquired this property and maintained it. There never has been any mistake. They have called the margin. They have known where the margin is and have known that it is inside the Mesquite Rincon area. If we look at the partition at Tab 6, by which Mithlen Kenedy acquired title by partition deed with Mr. Dirtz(?). At Tab 6, the language shows us this. Referring back to the master math at Tab 1, they found a point on the margin that would be the southeast corner of the partitioned land and said in the instrument, Tab 6, It is south of the ismus of the Mesquite Rincon. That can't be over here.

HANKINSON: What is the legal definition of a margin?

MCKETTA: There are dictionary definitions that are given. What Gregoria Lopez said is, it is where the further reach of the sea is is the _____ seashore. Margin was always thought of to be the edge or the rim of the rabera(?). It is a physical feature that has been created, measured by the waters. But it is a physical feature that can be identified, has been identified by the original grantors, by every surveyor, every map maker, every atlas, every geologist, every court ever looking at this area until surveyor Claunch found a different line, 6 miles away, and couldn't find that line.

HANKINSON: What authority would we look to for this legal definition of margin?

MCKETTA: We have discussed in our briefing the word "margin", including the Spanish. I will ask that we send a prompt letter citing the pages in our brief dealing with that. What I believe the cases of this court and every civil and common law court say when you're looking for the line that the grantor gave, especially a sovereign where every indulgence is in favor of the sovereign, if you can find clear evidence of what was intended, that controls over everything else. *Luttes* was a case involving change, unlike this case, that said where there has been change, we must now find where is the equivalent, where is the moved boundary, here there's been no move.

HANKINSON: *Luttes* doesn't just say if there has been changed. *Luttes* would also apply if the boundary had never been determined before.

MCKETTA: It could be.

HANKINSON: Hasn't *Luttes* been applied to make these boundary determinations uniformly along Texas coastal lines since it was decided, regardless of whether or not someone was claiming a change, and in fact, attempting to determine the boundary or the shoreline if that's what was the appropriate determination?

MCKETTA: I think it would be an overstatement to say regardless. If the court recalls, Mr. Luttes, who purportedly won the *Luttes* case does not own those mud flats. He was unable to prove that the change was in his favor instead of the state's favor.

HANKINSON: That's because there was accretion involved in that particular case, and this case does not.

MCKETTA: We say that it does not because there have been no changes. But look at Tab 17. Tab 17 shows a most unusual feature of what Mr. Claunch's line would do. In the original adjudication that the court has read about, the *Humble Oil v. Sun* case, the orange tracks were in dispute. Does one see a green island? It's called the Toral(?) island. Toral island was conceded and the 5th circuit points that out to be state property. And in addition, the court found that it believed there had been no change. The boundary was where it always had been. But if there had been any accretion the court said the land has accreted in favor of the state. Your honor, Claunch by drawing a line artificially and showing nothing else but an artificial line that he can't really place, he puts into a ditch that never existed before, Claunch now has taken Toral island and any accretions that existed for Toral island away from the permanent school fund to the Kenedy Foundation without showing anything in its favor. This is an area if any where accretion is important, because there is undisputed and adjudicative state land, adjudicated as well as having been conceded by predecessors in title, which now would change willy nilly with no logic, with no change in circumstances.

The features that are most pressing about this case and that distinguish it I think from so many cases are the unusual typography.

GONZALES: If we disagree with you that the boundary has not been established, or we can't establish the boundary, then does *Luttes* apply and then does the state lose, because in *Luttes* we rejected establishing a boundary using vegetation line or bluff line?

MCKETTA: That's of course the way that Mr. Ratliff consistently has briefed it and said it today, but that's not what the *Luttes* court said. It rejected a bluff line or vegetation line marking where the waters at some undisclosed period in the past evidently did reach. Here, the evidence is that regularly year-end, year-out, every year, the waters of the Laguna Madre bathed all the way up to the bluff line that exists now, and the bluff line prevents it from going further.

HANKINSON: How often does that happen a year?

MCKETTA: It depends on what part you're looking at. At Tab 14, we show one area that in ½ year's time more than 2/3rds of the days they were inundated. Other areas are inundated less frequently, but there are some areas of these mud flats that are wet more days than they are dry. There are others that are inundated much less frequently...

HANKINSON: Are there roads through these mud flats and vehicles drive through them?

MCKETTA: Oh, no. In fact the testimony was it would be a foolish person to go out in a pickup truck. And we asked why? Occasionally dunebuggies are used in areas close to Mesquite Rincon, but this is an area where one can find wrecked ships coming right up to the margin that I've referred to.

HANKINSON: There is no authority though that uses a bluff line or vegetation line for determining a shoreline?

MCKETTA: Let me give you three examples. First, in the Florida cases according to the testimony of the record in this case, that is how things are determined where there is not a daily title influence as there's not here. In Texas, the *Luttes* property is still owned by the state up to the bluff line or the vegetation line. And the *Humble Oil v. Sun* case indicated, although Mr. Ratliff quotes it a little differently, the 5th circuit says that the TC found the lines, found them at the margin, and that those were inconsistent with claims by the _____ owner further out to the East. But the court is correct that since the 1958 *Luttes* decision, the rare occasion when this has been litigated has used the mean higher or high water tide on the gulf side. That depicts pretty well where the water goes. There is a daily tide. In fact, there are charts here that show the difference between the types of tidal influences that exist one place and another. .

HANKINSON: What specific task did the state ask Mr. Shine to perform?

MCKETTA: Mr. Shine was asked to find the boundary based on the grants, and Mr. Shine looked at the historic evidence, looked at all of the historic maps and surveys thereafter, and

determined a boundary by meander, surveying meander points with more frequency, but still establishing that the same physical natural monument could be located as the margin and track the very footsteps of the original surveyors. The reason that a water measurement did not make sense, and the reason the foundation has so much trouble locating where is its boundary if it did not generously give a lot of area up is that there is no boundary. And that's because if you look at Tab 13, in the profile of the Laguna Madre, down through Port Isabel, up towards Corpus Christi and beyond, there is a single area where all elevations are above sea level. These mud flats uniquely - *Luttes* is not that way, the King Ranch that has an amicus brief is not that way, they have always had reaching East from their ranch a daily water presence that could be seen and observed everyday at whatever level it was, these flats have regular inundation but not on a daily basis. And importantly, when the water goes up it doesn't recede willy nilly like a high wave might. The water maps that were exhibited a 100 at trial, and here we've got samples of them in Tab 2, the water maps show that when the water goes up to the high levels as it does every Spring and every Autumn, it covers these areas much more frequently...

HANKINSON: If Mr. Shine went out and did his survey by a meander going from monument to monument, that's not consistent with the grant.

MCKETTA: Oh, it is. It is the margin. It is the very margin that was the natural monument _____ and mentioned in the grant, and it's the same monument that Conno(?) found, De La Fuente found, Cock found, Mattox found, every surveyor in every adjudication has found until Mr. Claunch found a different line.

HANKINSON: That seems to me that that takes us back to what the definition of a margin is.

MCKETTA: It either does that or it takes up back to finding what it is that the grantor, as well as the grantees and their successors have consistently believed to be their boundary, because the feature and the word were identical, the margin and the feature could easily be found. There was no daily water presence. Why was there not? If you go eastward from the ranch and look at contours, do you remember that they say it's point .5 ft. above sea level at one tide gauge, .7 at another, and they said we'll just settle for 1 ft. above sea level. If you go eastward, you never find anything as low as 1 ft above sea level. Everything is above that unless you stop in the channel, which you could do since 1949. Or before 1949 where would you go to look for that daily water average measurement? You would have to keep going, keep going, keep going up Padre Island, across to the gulf is the first time that you would ever find a measurable average daily water basis. This is a unique area. It never had the _____ rights Mr. Ratliff talks about. They never had a daily access to any saltwater on a regular basis. The inundation that flowed regularly covering and uncovering in 1809 and still does today without change gives them on those occasions saltwater to their upland, but not on a daily basis.

HECHT: Is it the uniqueness of this property that is your answer to the argument that

your theory presupposes a very subjective process that an expert thinks this is the history or this is the marker, or this is the meander line, but another expert sees it differently that is far more subjective than a tidal kind of measurement?

MCKETTA: The court accurately says, there is precision available from Mr. Claunch's method. It is precise but wilfully inaccurate. It measures something 6 miles from any perceptible shoreline. For 3,000 years surveyors have used surveying methods. At this very location the nature that the court is asking about does not result in different findings. That is, every surveyor has been able to find this margin. Different surveyors use different numbers of meander points that they state. So if you drew lines between meander points, you may have differences, but everyone can find where it is, everyone can stake points on it, and it's 6 miles from where the Foundation now claims, and the 55 square miles that always have been east of any meander line of the margin have always belonged to the state.

HECHT: What is your answer to the argument that your position creates a great deal of uncertainty in Gulf land titles?

MCKETTA: My beginning point would be this. *Luttes* which left a boundary at a bluff line because accretion hadn't been shown, is just as much disjointed from potentially other boundaries as this would be. But the important point about this feature is uniquely this area never had water on a daily presence to the east. And therefore, there never could have been a line to the east that purported to be measurable by daily water or averaging of daily water. And that was what makes this unique. We have urged the court to reexamine the Spanish and the Latin, but it is not necessary to do in this case. We've urged that because we think that is proper scholarship. But this case says that where there's been no change in conditions, there should be no change in boundary. And it says that where there is no daily water that ever was present to the East, the eastern boundary should not be measured by a daily water averaging.

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REBUTTAL

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