

**ORAL ARGUMENT – 04/11/01**

**99-0667**

**KENEDY MEM. FOUNDATION & CORPUS CHRISTI DIOCESE V.  
DEWHURST**

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RATLIFF: As I see what the court's opinion did, it seems to me that while there are many points at which I might have some disagreement, the nub of the issue is whether the court's opinion properly takes into account the requirements of *Luttes v. State* in determining the title of boundary to a Spanish or Mexican law grant. In that regard, I believe that the court has misconstrued and misapplied *Luttes*. There are statements in the court's opinion in which it says that we cannot utilize that procedure, because the National Oceanic and Atmospheric Administration will no longer certify to the title(?) of values in the Laguna Madre. At least in certain portions of Laguna Madre, including this portion.

In fact, the question of whether they certify, I will submit under the earlier opinion in *Luttes v. State*, is beside the point.

O'NEILL: The reason they won't certify is the point isn't it? They won't certify because it doesn't measure tide, and tide is what mean high or high tide is supposed to represent.

RATLIFF: I believe with all due respect, I think that is exactly the nub of the problem. If you look at *Luttes*, and if you will count the references that *Luttes* makes any number of times in the majority opinion, it talks in terms of the readings of the highest water in the day. Now Noah has never said, and they do not say today, that a tide gauge located in this area, or in any other area in the Laguna Madre will not accurately measure the height or vertical height of the water.

O'NEILL: Are you now saying that we are not governed by mean high or high tide?

RATLIFF: No. What I'm saying is, is that mean high or high tide, as the court said in *Luttes* when it was dealing with this, it says the terms last mentioned, and they are referring to mean high tide and mean high water are employed by the court and is universally understood mean every of all of a daily highest readings over a long period. And then they go on to talk about the 19 year tidal cycle.

ENOCH: So it's your position that *Luttes* doesn't use the mean high or high tide?

RATLIFF: It is my position they use mean high tide as defined by them from that quote I just gave you. And I think - I did this because...

ENOCH: Was that your argument to this court before the motion for hearing, that *Luttes* did not require a mean high or high tide, and that in fact your clients were not required to use mean high or high tide but some other high tide?

RATLIFF: No. I think, as a matter of fact, I've gone back and looked at the briefs and what I said at that time is, and we quoted as a matter of fact from one of the state's witnesses, that what our witness did was to take the average of the highest recorded water in each day, and average it. And as we quoted Dr. Mike Speed, who was presented by the state, he said that is what Dr. Flick did, and that is what was called for by Luttes.

And so I don't think this is a change of position. What I just read to you, the court says as we use that term it means an average of all of the daily highest readings over a long period. They say in other places that a tide gauge does not record the difference between an astronomic tide and a tide caused by meteorological conditions. It simply records the vertical elevation of the water.

ENOCH: Let's go back. Luttes does say you use the mean high or high tide. Your argument is well they really didn't mean mean high or high tide as defined by Noah. They just meant the high level of the water on any given day.

RATLIFF: I think that's right. I don't believe that's just me saying it. I think the quote I just read from Luttes, the court says as we employ that term.

ENOCH: Now let's assume that you can't measure the mean high or high tide even as Luttes defines it. You say they define it, but the truth is it requires a periodic rising and falling of the water, which doesn't occur in the Laguna Madre. Even as you explain it what evidence do you have that you've located a boundary line based on a mean high or high tide or any other tide?

RATLIFF: The evidence we have is that the line that was employed by our surveyors is above the line of mean high or high water as determined by Dr. Flick, and as had been determined at anytime in any place in the Laguna Madre.

ENOCH: So even if Luttes applies, even if you say Luttes applies, you do not have any evidence what that line is?

RATLIFF: Yes, I do.

ENOCH: No, you have a line that's one foot above that, but you don't have a line that's based on mean high or high tide.

RATLIFF: I apologize and I'm not arguing with the court, but the line that our surveyors used in an attempt to be ultimately fair, I believe, they established a line at one foot, not one foot above mean high water, but at one foot, and that exceeded the readings...

ENOCH: I don't understand. It's one foot above the mean high or high tide wasn't it?

RATLIFF: No. I'm sorry. It's not. It is one foot above the 1929 tidal datum plain, which in mean high water I believe the values were reported at around .46 above that same datum.

O'NEILL: Isn't it critical to your position that we find mean high or high water and mean high or high tide to be synonymous?

RATLIFF: I don't - I'm not sure I understand the question. I don't believe so. I think what's critical to my position is, is that if you go through Luttet it is clear that what they were looking for, as they said, where you've got a great number of measurements over a time period in order to give you a stable boundary.

O'NEILL: But one defines(?) a \_\_\_\_\_, and one is independent \_\_\_\_\_?

RATLIFF: No, that's not true.

O'NEILL: Isn't that why Noah started not certifying these results...

RATLIFF: No. The reason Noah stopped certifying is because they said that the influence of the tide it is there. But the influence of the tide is depressed in this area to an extent that they are unsure of whether they are picking what they call a tidal high. But Noah will tell you they will certify a mean high water level, meaning the water level, the place where you will find water the great majority of the time.

O'NEILL: Again, it seems to me that the focus has been whether the high water is influenced by tide or not. And I guess the critical question is, we have to determine whether that \_\_\_\_\_ with the Luttet's analysis.

RATLIFF: You're saying my focus has been on that?

O'NEILL: It appeared to me that a major part of the Luttet's decision was that mean high or high tide had a tidal element to it. And your mean high/high water doesn't have a tidal element here.

RATLIFF: It does. You cannot record a high water in the Laguna Madre, and even the state's witnesses could not say that there was no tidal constituent in those highest water levels. What they said was, we can't separate out the astronomic influence from the meteorological.

O'NEILL: Why would anybody want to separate that out?

RATLIFF: I don't think the Luttet court did. What the Luttet court said on several occasions is that what we're interested in is the level of the water regardless of whether it is caused by meteorological or astronomic. That wasn't an issue that was introduced by us in this trial or in

this appeal. The state has argued the position that you must determine these astronomic constituents in order to apply Luttet. I simply have to invite the court's attention to the repeated references in Luttet to the fact that on the Luttet property itself there is little, if any, true tidal influence. And they refer at one time to tide as that term - I think they say is technically used.

ENOCH: I'm confused again. It's hard for me to understand the argument that Luttet somehow applies here, because it says the way you set the shoreline is by measuring tides. But it seems to me the problem with the Laguna Madre is not influenced by tides. It has a rise and fall of the water that's not daily, that's not even periodic, but it's irregular, and it covers any number of days at any give time for more water or less water. And then I just thought I heard you say that really there is not a tide influence here. But if Luttet is predicated on tide, mean high or high tide, why does Luttet even apply?

RATLIFF: Luttet applies, I would submit to you, because it was the method for determining a civil law boundary established for a tract of land located in the Laguna Madre. That tract of land in Luttet is behind Padre Island, on the mainland. If there is no tidal influence in the Laguna Madre, that same thing would have applied to Luttet. But I don't believe this record will support that there is no tidal influence in the Laguna Madre including in this disputed area. What it says is...

ENOCH: But suppose it's accepted that the water line has changed. Let's suppose that the parties agree that a circumstance occurred over the years and so the historical data is no longer accurate because the boundary line has changed. Then what would you say is the rule for determining what the new boundary line is in the Laguna Madre based on Luttet?

RATLIFF: I think the rule is the same as it was in Luttet. And that is, you basically follow the water and determine where the interface is between the water and the land, and you make that determination of the interface between the water and the land by determining what are the average of the highest waters over a period of time, and you compare that to a primary gauge that has been run for 19 years. In Luttet itself on page 180 it says, obviously the greater number of highest water readings averaged, the nearer we come to a figure or level which applied to the ground as a line will reflect a more regular and permanent shore characteristic than any other. And they go on to say in other places one thinks of shore more in terms of the water's edge.

All I'm trying to say is astronomic tides don't tell you where the water's edge is. What tells you where the water's edge is on most occasions is what is the actual elevation of the water at that location.

HECHT: A problem that we have with your position is that if it weren't for the intracoastal waterway, you would claim all the way to Padre Island.

RATLIFF: No. I think that's inaccurate. I understand that that has been a concern of the

court. The fact of the matter is, based on exhibits introduced by the state in this case, and based upon the observation of the only human being that we know of that was on both sides of the Laguna Madre at the time these grants were given, there was water in the Laguna Madre. How much there was and where it was located, I don't know that anyone can know. And I think it is a very poor means to determine that, to try to piece it together. But what we do know is, is that De la Fuente, who surveyed all of Padre Island, and who treated it as an island completely surrounded by water, was the guy that also surveyed one of the tracts we are involved with here when he called for that self(?) same body of water, the Laguna Madre.

What I'm saying is, that we can't tell you where that line would be today, because the situation is not as it was at the grant we suppose, because there is now a channel through there.

HECHT: Although there are arguments made that nothing has changed.

RATLIFF: I understand that. But one of the exhibits the state introduced was both a report and a map of then. Lt. Lee in 1845 and 1846 when for the US army he was surveying the Laguna Madre. He reports water. He reports the existence of this large mass of ground. But he reports, as I read the report, there is water present. We know from the state's own exhibits here that there are times when there is water present. We know that as a matter of fact on the South part of this property, in the so called hook, there is always water present. So I think what the state has done is to say to this court, you need to speculate with us that as a matter of fact there was no water there when it was surveyed by Conno(?)

ENOCH: Your brief at page 32 before you motion for rehearing said the present location of mean high or high tide establishes the boundary.

RATLIFF: That's true.

ENOCH: That's what your brief says. But your argument on rehearing is, well it's not really the mean high or high tide. It's some high level of water. Isn't that correct?

RATLIFF: No.

ENOCH: You're arguing Luttet, to say that Luttet permits a different high tide.

RATLIFF: When I said mean high or high tide in the brief, I was using it as I think the court said it was using it in Luttet. And I just gave it to your honor. It means the average of all of the daily highest readings.

ENOCH: Well let's go to the next point. You said you cannot establish the boundary based on mean high or high tide. We have no idea where that boundary is.

RATLIFF: Not today. Today I certainly can establish it.

ENOCH: Well your evidence establishes one foot. But in your brief you say the court says that you have a boundary that could be east of the intracoastal waterway. And you say you never said that. And that's not your point. I understood at the argument in San Antonio, that if you followed strictly Luttés, it could put a boundary east of the intracoastal waterway, but your surveyors to make sure that there was no issue about it established a boundary line at 1 foot. Now I don't know what one foot now means. But by doing this one foot, it brings the boundary to the west side of the intracoastal waterway. Isn't that correct?

RATLIFF: No. First of all let's go to the one foot. The one foot utilized by the surveyors for the Kenedy Memorial Foundation is one foot off of a uniform datum that is constructed on a theoretical model inside the earth. It allows you to reference tidal measurements to a common datum. Normally referred to as the 1929 datum plain. So the one foot would be that measurement, not one foot above mean high water. Other measurements, both here and in other parts of the Laguna Madre when Luttés mentions a .46 or a .42, that is a level above this theoretical sphere inside the earth called the 1929 datum. It is the way that surveyors know they are referring to - that they've got everything on a common base.

In San Antonio, I thought the question asked me was, well if we disregard the intracoastal waterway, then didn't one of your surveyors or something say you would have to go all the way to Padre Island. Well first of all, I don't think under this court's previous decisions, but certainly under Brainard, I don't think you can disregard the fact that there is a body of water there that contains waters of the Laguna Madre. They have been contained now by a government project, but the waters of the Laguna Madre are there and their rise and fall, not totally astronomic, only a small portion of astronomic, but their rise and fall can be recorded by the tide gauges that Noah in cooperation with the State of Texas could in \_\_\_\_\_ in dispute. If you go back to what Luttés said, you go to the water, you follow the water, there is water there that can be followed and it maintains the riparian nature of the tract or the liberal nature of the tract, which everyone seems to agree it was intended to be.

ENOCH: So we're incorrect in concluding that your boundary line puts you in the middle of the Laguna Madre. Your boundary line is somewhere to the West of the edge of the Laguna Madre?

RATLIFF: A tidal boundary, with all deference tidal boundary based upon mean high or high water by definition cannot be in the middle of the Laguna Madre. Because mean high or high water defines the intersection of the edge of the Laguna Madre...

ENOCH: I'm accepting that. I'm asking about your evidence. I'm trying to determine whether you have any evidence of a boundary line that's to the West side of the water of the Laguna Madre. Your evidence seems to put the boundary, however you calculate it, at some point in the

Laguna Madre. Where is the line that's West of that water?

RATLIFF: I'm afraid I misunderstand. The evidence we have in the record is, is if you take the averages of the water levels, as we say Luttes says we need to do and you average them, you will come up with a datum plain, that if you place it against the bank of the intracoastal on the west side it will fall slightly below the one foot elevation that was used by the foundation's surveyors.

There is evidence that there is a line, and the state doesn't even contend that you cannot determine the average height of the water in the Laguna Madre and in the channel. And so there is a line that is on the West side, and it is below the line that the Memorial Foundation's surveyors chose to utilize because it is on a bank. You would kind of be quivering over something that makes no difference.

OWEN: I want to make sure we clearly understand exactly what the record shows. You say in your brief that you can follow Luttes, that you can take the measurements and use the daily tidal gauge numbers and come out with an average. Was that done or not?

RATLIFF: Yes. Dr. Flick did it, and he verified that the line utilized by KMS Surveyors was actually above the value of mean high or high water measured in an area...

OWEN: Why wouldn't you take the line that is actually determined by mean high water?

RATLIFF: For two reasons. One, the surveyors in the testimony is, is that they adopted that line because they believed it was in fact conservative based on everything they knew, not only about the tide levels in this area but throughout the Laguna Madre.

PHILLIPS: But if you weren't conservative, and you took the actual line that Luttes called for, where would the boundary be?

RATLIFF: It would still be on the West bank of the intracoastal waterway at this time.

OWEN: So why didn't you choose that line, the actually Luttes line?

RATLIFF: I suppose now in view of the questions, I wished we had. We thought we were being conservative as far as the state was concerned. And the honest truth is, on a bank with this much clearance on the water, the movement of two or three inches doesn't affect anything. Where it does have an impact, but where we took the more conservative approach, is down in what's called the hole on the South end of the tract where you don't have that deep cut. You then have the more gradual shoreline. But we thought we were doing something that was fair.

OWEN: How much land is at stake here? If you choose the actual Luttes line verses

your so called line, how much surface land does that...

RATLIFF: It wouldn't affect it all. I haven't ever calculated it down in the hook area, but it would be minimal.

OWEN: Are we talking acres, miles?

RATLIFF: Acres would be my judgment.

OWEN: How many?

RATLIFF: I don't really know, because we never tried to gauge what's the difference between a line that the surveyors and I believed should be run with the actual determination based upon the average of the daily high waters.

OWEN: In your brief at page 2, the very bottom, you say the state's witnesses admitted that the Shine line was not determined in accordance with the Luttes \_\_\_\_\_?

RATLIFF: Yes.

OWEN: Can you give us a record cite for that?

RATLIFF: We will file a letter. But I think the state has always conceded that's not a water boundary. It is a line that he based upon a historical reconstruction that the water may get to one or two times a year. But we will give you those record cites.

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RESPONDENT

O'NEILL: Are the terms 'mean high or high tide and mean high water' synonymous?

MCKETTA: If properly used they are. As used by Dr. Flick they are not. In the Luttes case the phrase - now it didn't have higher in it for this part I'm quoting - mean high tide or mean high water were used interchangeably, but never the way that Dr. Flick used them. That is, he is not simply using a different term. He is using a different methodology. In the Luttes case, I believe at page 180, there is a reference to a Noah report of 1951. A necessary part of the Luttes analysis was to compare your readings that are local to the tract with some gauge that has had a tidal epic, an 18.6 year set of readings. That's a necessary step that the Luttes court includes. And it cites the 1951 report. That's not mentioned in the opinion as the Marmer(?) report, but we all know as the Marmer(?) report of 1951. It is the same report that was discussed in the trial and appears in the trial record. It's the same report that appears in the Noah report that is much criticized as being a change of position, but it's no change of position. The Noah report in 1995 applies the 1951 Marmer



methodology. It says in order to do that, one must have sufficient stability of measurement in order to make that epic comparison. Dr. Flick did an arithmetic calculation that is a meaningless calculation. It doesn't reflect the regular flow of water. It doesn't reflect a regular perceptible tide. It's not measured even with the proper length of a tidal day. It is an averaging of some numbers, never correlated to an 18.6 year epic, never correlated to a Noah methodology.

OWEN: Did you all do that?

MCKETTA: We tried, and we determined, and there's testimony from our surveyor and our scientist, that the no mean higher high water could be determined after that evidence had been given by deposition. At trial, they gave the same evidence, and the Noah report which had come out in 1995 gave the same report.

This is an area that reminds us of the difficulty of artificial precision that is measurable and precise. But that tells us nothing.

OWEN: Here's my problem. The land at issue in Luttes seems to be identical to this land. Is there any difference at all?

MCKETTA: Two differences. And there are many, and we've briefed many, but two differences that are very important. One is, the Luttes tract is south of Aurora Colorado, and south of Port Mansfield. It is south of the corridor of four gauges that Noah has said cannot support these measurements. It is south of there. A second distinction that I think is much more important, although I don't think it's pertinent to the area you were asking about, in Luttes the record was clear and the fact findings were so, that the patterns of regular covering and uncovering that existed at the time of the grant no longer existed. There had been change and substantially so. So Luttes did not have the benefit which exists in the very detailed factual record of this court of showing the following, which is just manifest and not controvertible. At the time of the grants, this record shows De la Fuente standing and writing. We've got the triangle that he wrote of showing I'm not going to include these mud flats in the grant, and instead at the grantee's request, at Salinas' request, I will give a different triangle of pasture land because to draw a rectangular would give unusable mud flats. Cono(?) that was for the Little Barreta in 1834, we have in this record Cono, the surveyor, talking to Bie(?). Bie(?) saying, Now I have La Barreta grant, a big grant, standing over the mud flats saying, Can I have that umbrella of islands there. In this record we know it as the Mesquite Rincon. A request that would not be pertinent if it had already been granted to him. So we have a record that shows a grant. We have a record that shows less than 20 year intervals. In 1846 and in the 1857 frequent mapping and surveying, always able to find identical features. And then we have testimony from petitioner's experts and from respondent's experts that there has been no change...

OWEN: So you're saying that Luttes only applies when there is no historical data?

MCKETTA: I'm saying that at least Luttes only applies when there is change. There is

another feature of Luttés that is most ironic because it is never mentioned by petitioner. Understandably so. But an important holding, it is the holding of Luttés, and the reason Mr. Luttés never extended the boundary eastward (the state owned the property before that lawsuit and owns it today) the holding is even where there is change it is presumed to be changed in favor of the state unless the landowner shows accretion towards the upland up towards the islands or the other areas that favor the state.

HECHT: This argument seems to be that the boundary is not littoral, that it was just a different boundary?

MCKETTA: You've put your finger on the oddest pun that exists in this case. And it again is a pun - mean high or high water verses mean high or high tide are synonymous if properly defined, but a pun when misused. Literal is a most intriguing problem. If literal means that the upper boundary is measured by some natural feature that is regularly covered and uncovered by the waters of the sea, or it can be freshwater if it's a river, if that's what literal means which I think it is what it means, this is literal.

HECHT: But the regularness of it is so infrequent that it's hard to say it's regular.

MCKETTA: I'm going to come right back to that. The infrequency that they suggest is unfair and not true to this record. But I want to come back to that in a moment.

If literal means what petitioner says, I have daily and continuous access to the water from my upland to water my cattle, to do whatever, the grant was not literal in 1834 for Little Barreta, 1804 for Barreta, 1809 for Mesquite Rincon. It was not literal at anytime ever. And for them to say, Well that's the definition of literal and this is a literal tract and, therefore, where is my water? The only closest water is at the intracoastal canal. Give me that water, is to change the nature of access they had. They had access with such frequency as the water came up and receded and not otherwise. And they had that today in exactly the same regularity.

In the flip book that the court saw last March, the only difference in this today is that down here it says April 2001 instead of March 2000, at Tab 2 is a water map. This is not a hurricane water map. This is in May 1995. Petitioners and both amici would say, This water only reaches the Shine line once or twice a year during extreme storm or hurricane weather. And that's false, and that's not what the record shows. That is false. And the record shows in May 1995, (and there are many other examples at defendant's exhibit 100 in the record) look at the next day. The water doesn't rush up like a tide and rush back. The water comes up and stays and stays and stays. And this is not a hurricane bringing a short sweep of water. This is something that has happened regularly according to their own expert, a long time observer. It happens regularly. It regularly covers and uncovers the mud flats with the water of the sea, but not on a daily basis.

HECHT: How regularly?

MCKETTA: Fortnightly, monthly, semi-annual and annual tidal constituents are detectable in large amounts, and have big impact. And the variations that I think are helpful to look at in this flip book are at Tab 10. At Tab 10, do you see a red line that shows regularity of ups and downs, and it does year after year? It did in the litigation of Humble v. Sun in 1950 after the intracoastal waterway had been dug. It had the same kind of frequency. It's not daily. Look at the daily. The blue line is what Dr. Flick says is the tidal movement. Well that's not right. That's averaging in some fashion some set of numbers that almost never gives any guidance of where the water really is. It is precise because he did arithmetic, but it's inaccurate. It tells us nothing about where the water is. The green line is Noah's predictor of if you only look at tidal measurements it would have the ups and downs on a regular basis. And what this showed was that the Noah predictor could show about 60% of the water movement, but not all. But the water comes back and forth, year after year, not every month, but regularly. Not once a year. Not twice a year.

HECHT: Where on here is your line?

MCKETTA: Our line is what Mr. Ratliff said, Where does the water impact the land? And that was surveyed by looking with feet in the water and tools in the air, and pictures replete show the surveyors at work as they marked meanders. Now meander is not the boundary. A meander is a depiction of the boundary. Mr. Shine marked more meanders than anybody else ever has. And your honor get this: they are substantially the same depiction as the meanders of every surveyor, map maker, and judge before him. And get this: no expert witness at trial, none, criticized his placement of any single meander. Not a single one was criticized by any expert at trial. He used techniques that did not have arithmetic artificial precision. He looked at the intersection of the water regular over and over, and the land.

HECHT: Here's one problem we have and that is, that it's not Luttet. That's not very scientific.

MCKETTA: It's neither Luttet nor is it precision arithmetic scientific. But there is in the record - the phrase had 4 words - "multiple, logistic, regression analysis" demonstrating in all scientific probability that this inundation repeated throughout the boundary of the Shine line with regularity year after year.

Let me show you one thing that I think is lost sometimes in the rhetoric and the shortcutting that happens in briefing. Some parts of this 55 square miles is inundated more often than not. Other parts are not inundated as often as they are inundated. But the line by Claunch/Lothrop, the petitioner's line, would say that even tract 304, if you look at Tab 14, tract 304 has many, many days of observation - 72 days flowing it is inundated, 12 it is not. This was only done in a 6 month period and there were days not flowing. Pretend everyday was dry if not flowing, and there's no evidence saying that's so. But suppose so, it is inundated more often than not, and it's measured not on storm days or hurricane days as is sometimes suggested in rhetoric. The last three pages show the days that have no storm and no hurricane impact anywhere in the gulf. And



MCKETTA: I'm not. In this case, it is not necessary and I think it would be dictum for the court in a case that doesn't require it.

HECHT: I'm not familiar with the ownership of this coastal area, but the next place south of here will have the same problem that this case in Luttés has.

MCKETTA: That's what they say. That's the King ranch. And if one looks at Tab 13, the King Ranch may well have a problem. Luttés has been around 57 years, before that the King Ranch, or its predecessors, had been around for 150 years. And before we decide do they have problems, let's see what do their deeds say, what litigation history is there, what patents have been done and accepted, has there been change, have a factual record to develop, but it won't be this factual record. Because if you look at a profile of the Laguna Madre, on the left is South, on the right is North. Do you see there is one area and only one area that is a level that is above any standing daily presence water. The King Ranch is down here with great depth of where the bottom of the permanent water is, and I do not know the factual record that would develop if after 200 years there needed to be title(?) controversy as to that, which I am unaware has yet existed.

And so, I go back to saying the court has a responsibility that's broader than the responsibility I come to the court with. Do you write an opinion that presumes a rule for the King Ranch when you haven't seen the King Ranch record? The record here is that a tidal datum does nothing to tell you about what the court in Luttés wanted to show. At page 180, it wanted to show a line at which the physical features commonly associated with the upper line of the shore most conspicuously appear. That's what it was looking for. It missed by 6 miles for this unique tract.

HECHT: I guess one thing that troubles us also is if this case is unique because of the words of the grant, that's one thing, or some other indication contemporaneous with the grant that this was what was being conveyed. But if it's unique because all land is unique and all coast line is different, then it would worry us that it would be chaotic to have no rules.

MCKETTA: That's a very fair question. That's part of your responsibility that we're talking about. If the rules fit and reach the goal that the court had of determining in some way that is replicable, it's not cheap, it's not cheap to do even what Dr. Flick did in California to do all of the measurements and all that, but if that allows different parties without coming to court to get somewhere, it appears to my client that on the gulf coast, that rule has not resulted in controversy that required lots of litigation. And the court's not seen lots of litigation.

On the Laguna Madre side, this is the first lawsuit that's come to this court's attention since 1957, and not initiated by the state, not initiated because of worries about stability or uncertainty. This, if anything, ought to be stable and certain. It's a prior adjudication after which there are no changes. The waterway was built. There was a lawsuit and an adjudication, no changes afterwards, that should be stable and certain. And, yet, the Kenedys say we would like to relitigate. The state did not initiate this. There may be fights at which the rule from Luttés does not fit. This

court doesn't have a record telling us about that for anywhere except this tract. If that happens, is it better that the court have a bright line rule that misses the mark by 6 miles. Or, is it better as in the Luttes case to say, we can imagine there may be times when some other method will be better at ascertaining the upper reach of the water because our goal is to locate where does the water of the sea regularly cover and uncover and go to the upper mark of that regular covering and uncovering. And a bright line rule always should include some provision as the Luttes rehearing said, that if something else is a better indicator and doesn't miss the mark by 6 miles, we don't mean that this rule be blindly applied when it makes no sense. And, yet, the whole model of this case by the Kenedy Foundation was to blindly apply a rule that made no sense, that changed a line by 6 miles despite prior adjudication, despite 200 years of maps, photographers, courts and surveyors that all could depict and find just what Shine found. Even their surveyor, Mr. Potch(?), who had high regard for Mr. Shine, Mr. Shine is president of Texas Surveyors Assn, they've had high regard for one another, he said, Shine found wealth if that is what we're looking for. And nobody criticized Shine's meanders to apply a rule that makes no sense, itself makes no sense, and the questions that were asked earlier by this court in rebuttal perhaps asks a little gloss on those. If this was literal in the sense of you had a boundary going to a daily presence of water, where Mr. Ratliff was that boundary prior to 1948 when the water way was dredged? Find that line for us because there was none. That you had to go to the Gulf of Mexico. Their boundary never had such a line.

HECHT: To water?

MCKETTA: To permanent daily water. It had coming right to its shores where the Shine line is today water coming up and back regularly, year after year, but not on a daily basis.

OWEN: You're saying the Laguna Madre at times was dry prior to the dredging of intracoastal canals?

MCKETTA: Absolutely, not the whole up and down north to south. But this area that I've shown you on Tab 13, there were times you could walk your cattle across and there were times that your cattle would get stuck and drown if you tried to do that.

OWEN: That's true of a lot of the coast though.

MCKETTA: All I know from this record is that it's true of this area.

OWEN: Coming back to littoral, that concerns me too. You mentioned that if this were freshwater and someone wanted a littoral right to go up to the edge of the water, to water their stock for example, you couldn't use this piece of land for that. This would not be a littoral tract under your surveyor's line. When you were talking a minute ago you said, well if littoral means you want to water your stock if this were freshwater, well what if this were freshwater and you wanted a littoral tract and the call was to the edge of the Lagune Madre assuming it was freshwater body so that you could water your stock. Here, you could not use this property to water your stock, because most of

the time they would be dehydrated, they couldn't get to the water under your survey.

MCKETTA: I'm not trying to avoid and let me try to respond what I'm hearing. In 1834, at the time of the Little Barreta and 1804 and 1809 for the Big Barreta and the Mesquite Rincon, no cattle went beyond the area that is the Shine line...

OWEN: I'm talking about in the abstract. Hypothetically, I'm trying to apply your rule and say, Well it's littoral but it's not really because you don't have access a huge percentage of the time to the edge of the water. And that concerns me.

MCKETTA: What I have said was, there is pun in the word littoral. If it means that it is bounded by a natural feature that has a regular covering and uncovering, then this tract is literal.

OWEN: So if you wanted to sell lots, for example, and the call was to the edge of the Laguna Madre, and you wanted to sell them for recreation purposes, they wouldn't be very valuable for that because most of the time you would not be able to use them. And that concerns me, because the call is to the edge of the Laguna Madre.

MCKETTA: Well but it shouldn't concern you. They would get exactly the same frontage and access that they would have had in 1834 when they bought it, that they had when they deeded it into themselves and out from themselves. When the deeds happened at Tabs - they never had beach front property.

OWEN: But you're basing on historical data, not in terms of - now you're going back to historical data as opposed to regularly covered and uncovered by water. And I'm trying to get at regularly covered and uncovered. If that's what littoral means, then these tracts are not truly littoral if you bought it for recreational purposes, for example, for fishing, you couldn't get your fishing boat, you couldn't fish most of the time.

MCKETTA: Correct. You couldn't fish except when the water did regularly...

OWEN: Which is very few times out of the year.

MCKETTA: At some places it's more times than not, and in other places it's not. But it's exactly as much as it has ever been. And why would a court say that you should have more beach usage than you bought or that you've ever had.

ENOCH: Let's assume that this is a littoral tract, but let's also assume there have been no changes over 200 years as to the movement of this water. Is the historical data regarding the boundary more reliable for the boundary or, are tide gauges? I guess I'm asking, does Luttet have any application here where you have no change in - you have historical data is where the boundary was planted, and you have no change in the water flow, would Luttet have any application?

MCKETTA: Our consistent briefing has been that the Luttet case only applies where there is a change, and that there's no suggestion by this court in Luttet that it meant to move established and previously adjudicated boundaries where there had been no change. No hint of that. It was addressing a problem where the record said there has been a substantial change and we now are looking to try to find out what did the sovereign mean, the Spanish or the Mexican sovereign when they talked about the shoreline, a call to the margin.

ENOCH: If there has not been a change factually in the movement of the water or the flow of the water, would the court necessarily apply some sort of rule of boundary establishment that would trump the historical data?

MCKETTA: What this court has said in its many decisions is that your prime purpose is to find the intent of the grantor, whether it be a sovereign or not, but especially in the sovereign cases. And even the Luttet case at least used the language that its effort was to replicate what was meant. And we fault it's meaning of the \_\_\_\_\_. But let's assume that it's exactly right. It was not saying we're going to change what they got. We're trying to construe exactly what they got. Here we know in the facts of this case what was purchased in 1804, 1809 and 1834. We know exactly. We know that the mud flats went beyond and were excluded.

ENOCH: From the historical data, we know that mud flats were excluded. If you could go out and measure the movement of the water up and down over the course of the year and that movement indicated a different boundary, would that trump the historical data?

MCKETTA: I think not.

ENOCH: And why would that not trump the historical data?

MCKETTA: Let's premise whether there is change or not change. If there is change, then the historic data may not give you guidance and you may need to look for other things. But if the historic data coupled with no change gives clear evidence of what was granted, and there's been no change, then it's hard for me to understand why a court would say we will change that despite the intent and the lack of change to move in this case 55 square miles in ownership. It's hard for me to understand why the court would look for a rule that would change a clearly established intent where no conditions had changed from the clearly established intent.

HECHT: Do you agree with the petitioner that if the mean higher water level had been used rather than a foot above the datum, that it would have resulted in a line west of the intracoastal waterway?

MCKETTA: It would have been inside the intracoastal waterway towards the top. I do agree, that it would have been substantially the same place, which proves to my belief that a line that misses by 6 miles where the prior adjudication, where all the prior surveyors and where the grant intended, can't be the right boundary for this.



OWEN: Do you agree that Luttes, what they were measuring by tidal gauge was not true lunar tides, but mostly atmospheric high water changes?

MCKETTA: The combination of the two as Noah does - yes, I agree that they were measuring what Noah uses when they calibrate the tidal epic under the 1951 \_\_\_\_\_ report.

OWEN: Luttes seems to recognize that there was very little true tide affect in this area of the Laguna Madre, and they were measuring atmospheric water changes.

MCKETTA: They were directed that it be used but with the same measurement of what you're measuring. That is, suppose water is rising over a 3-day period. Noah says take the count only when it's reached a top, otherwise it's not a high tide. It's rising water. Dr. Flick said, well let's count it everywhere we find it, and that dilutes or narrows down the...

OWEN: I'm just talking about Luttes. The methodology in Luttes was to take an average of the high water even though that high water mark may have been caused by atmospheric conditions as opposed to true tides.

MCKETTA: Yes, coupled with do that under the Noah standards. It cited Noah for its method for doing that. It's not just to take measurements at random. It's take those measurements that were consistent with the 1951...

OWEN: Those measurements consistent with the 1951 were mostly atmospheric not true tidal measurements.

MCKETTA: The Luttes court didn't know it, but those were mostly governed by semi-annual, annual, monthly and fortnightly tidal elements. And the Luttes court just didn't have a record to tell it that. They had great tidal influences...

OWEN: What we're getting at with the opinion it says, is they are measuring atmospheric high water primary with these gauges.

MCKETTA: They did say take into account the meteorologic as well as tidal influences that occur, and apply Noah, 1951 \_\_\_\_\_ Report.

OWEN: It's also your position that the dredging in the intracoastal waterway didn't change anything?

MCKETTA: Not just my position. It is the record that is consistent with both sides's experts and mathematical calculations by George Ward that showed the actual volume of water and how much could be drained by the channel. And, importantly, after it was dredged and used in the later 1940's, there was litigation after that.

ENOCH: The court in its opinion makes reference to the fact that the boundary urged by the Kenedy Foundation did not make sense, because it would place the line somewhere in the intracoastal waterway. The argument's been made that that's a misunderstanding of what the testimony was. If you drop by one foot the line that the experts or the Kenedy Foundation sat as a conservative line, do you agree with their statement that that still places their boundary line to the westside of the water?

MCKETTA: It does. I'm not going to bicker with Mr. Ratliff's position. The court was correct, because the point that the court as I read the opinion made, the court properly made the point that there was no boundary prior to the dredging. The dredging itself did not cause some change in conditions. If the channels were filled up tomorrow, if a new one were cut closer to their land, would they lose their claim if it were cut closer. If there are no changes to the conditions of the water flow, the bottom of the Laguna Madre is the same. So, I agree with Mr. Ratliff's statement that putting it one place or another would make no perceptible difference along the waterway.

We briefed six different positions that they have expressed in the TC, and one of the most influential documents I hope the court might reread are two opinions written by the trial judge after 17 days of evidence talking about the reason that there is so many inconsistent and difficult positions of where to put it, is because they proved too much. It could not have been literal before the waterway. The waterway is 6 miles from where their boundary is. The waterway didn't change the nature of water between them and that location. How could it become a boundary 6 miles over? So I don't think that's a mistake in the court's opinion.

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#### REBUTTAL

RATLIFF: First, I would like to address what I was asked in the original and what Justice Owen was just pursuing. I would invite the court's attention to page 180 of Luttess. What page 180 of Luttess say is, actually so far as real "tide" goes, that is the situation of the Laguna since as the TC found any astronomically inspired changes in levels are insignificant, and the variations are due to meteorological forces.

The court in Luttess clearly recognized that they were dealing with water levels that were not the result of tidal forces. And if you look at what the court's reasoning was it made little difference to them. Because they wanted the largest number of daily readings in order to establish the most stable line. And Mr. McKetta just said if you follow the Noah procedure, you throw out high water. Because if they don't meet the highest water immediately prior to a fall, Noah doesn't count it. If you look in Luttess it says, average the highest level of the water for 365 days. Under what Mr. McKetta said was the Noah procedure, you would not have 365 days of readings, because they would have dropped some.

O'NEILL: Do you agree with Mr. McKetta that there has been no change shown here?

RATLIFF: No, I don't agree with that. It changed in...

O'NEILL: He said that in Luttet there was change, and that's a critical element of the opinion. And that here, there had been no real change.

RATLIFF: I don't agree with that and I don't see how Mr. McKetta says that since he said there were times when there was no water that would have been present adjacent to this grant. And now he said, of course there is the intracoastal waterway, where there is water present at all times. And the fact of the matter is, there was evidence from their witnesses, Dr. Bob Morton and others.

When Mr. McKetta says Luttet only applies in a case where there is change, I would invite the court's attention to the question of why the court granted writ in Luttet. It said, we granted writ in Luttet because of uncertainty over where the location of the line is under civil law grants. And they spent a great deal of time talking about what this court had ruled in the Bie(?) case dealing with Padre Island, immediately across from the area we're talking about. They spent a great deal of time talking about Galveston v. Menard and others dealing with, what I think a lot of practitioners thought, that the civil law line was this so-called "highest reach of the water in winter."

ENOCH: You would say that Luttet applies assuming there's a change in the water course?

RATLIFF: I would say clearly there. I don't limit it to that.

ENOCH: If there's no change, then you would say that Luttet would override the historical boundary?

RATLIFF: Yes. If you go to Luttet and look again on page 80 they say, one thinks of shore (and remember that's what they're defining under civil law grant is shore) more in terms of the water's edge than in terms of land which is only occasionally and irregularly inundated. What they were trying to find is that place where the water level was the most stable and where you would be most likely to find it. And the state's witnesses agreed that if you walked out onto this tract on a day after day basis and you wanted to find the water, where would you go? You would go to the intracoastal waterway. Because that's where you are going to find it the bulk of the time.

The state places great import on the fact that why look here, Mr. Shine found these meanders. I simply would submit to the court if you read every opinion of this court that has ever been written on natural monuments verses meanders, this court has always held the meanders do not set a boundary. The meanders are not anything. They are not even evidence of the boundary. The boundary is the natural monument call for. And the natural monument, I think everyone agrees in this case, call for is the Laguna Madre. And the question that we are facing here is, okay, how do we define where the shore belonging to the State of Texas stops in the Laguna Madre, and where the

upland begins?

ENOCH: Don't you have to define it based on the way the granting parties defined it?

RATLIFF: You have to define it on the basis of the way the granting parties defined it using the rules that this court has always used. Remember, the call here is no different than the calls on Padre Island, the Luttes tract, and the calls on many others where the call is for the Laguna Madre or the Gulf of Mexico. And so the historical evidence here is, is that the King of Spain and the estate of Bie(?) intended to grant to Bie(?), I'm using Bie(?) for both, the land to the Laguna Madre. Because if you will remember when these guys are up doing what they say is the meanders, they are making a call that says, fenced with the Laguna Madre. And this court, I believe, without exception, has always held if its fenced with the river, fenced with the lake, fenced with the Laguna Madre, you are talking about the boundary between that natural monument, regardless of where that surveyor is. If you will remember in Rudder v. Ponder, which is the common law case was also done by tide gauges.

ENOCH: So there was extra land that was conveyed that was irrelevant. They didn't need to do that. They were just being extra careful. That triangular piece of land that they argue about would have been, otherwise, in what you say is the boundary.

RATLIFF: We've got to go back again to what the uniform holdings of this court have been on the purpose of a survey in Spanish and Mexican law. It was not to set the boundary in the sense of this is the boundary. It was to determine the quantity of usable land for agriculture, either farming or in this instance for animal units, so that an amount could be paid to the king. If you look at what this court wrote in Bie(?) when you're dealing with - there was a case where as I recall it was supposed to be 11-1/2 leagues(?), and it turns out this court said, Yeah, but they granted them Padre Island. And I believe that was 17-1/2 leagues. And what the court said is, you've got to keep in mind what's going on at this time. These surveys are not for the purpose of laying out the exact boundaries of the tract. It is to determine the amount of usable ranch land, in this case, for which the sovereign is due a payment.

I would invite the court's attention if we want to look at what Mr. Condom(?) said, go see what he said at the time of the Mesquite Rancon grant. In the Mesquite Rancon grant he says, that tract of land adjacent to that previously granted was surrounded by water. He didn't even say it was a part of this. Well obviously if there was an intervening shore, \_\_\_\_\_ Laguna Madre in that instance would not have included Mesquite Rancon.

ENOCH: But the argument would have been the same because if you're talking about just land mass for the animals, if your boundary was correct to begin with that land mass would have already been included in the other one.

RATLIFF: No, because it was land that I believe under Conno(?) was detached. That's

