Tidal Highs & Laws
Coastal Property Rights

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George Strait had a tongue-in-cheek number-one hit with "Ocean Front Property" in 1986. Unlike Arizona, Texas has oceanfront property in abundance. Miles and miles of Texas—367 to be exact—border the Gulf of Mexico, making it the sixth-longest coastline in the U.S.

An earlier *TG* article, "Moving Water: Boundary Changes and Property Rights" (use QR code to download), discussed the effects of erosion, accretion, avulsion, and subsidence on the boundaries of land where water forms the boundary.

This article addresses two matters that affect owners of property on the seashore: the location of the boundaries, and the public's right to access beaches and navigable waters.

First, a Little History

All real estate in Texas was originally owned by Spain (1690-1821), Mexico (1821-36), or the Republic/State of Texas (1836-present). The original grants or patents of land all came from one of those sovereigns.

Takeaway

Shoreline property boundaries are determined by the law of the granting sovereign at the time of the original grant. For common law grants, the boundary is the mean high tide; for civil law grants, the line is the mean higher high tide. For some properties, the public may have the right to access even privately owned dry beach, but Texas does not recognize an easement that rolls with the shoreline.

Unlike most other states, the land was never owned and conveyed by the United States federal government. For this reason, Texas property boundaries are determined by Texas courts, applying the law of the granting sovereign at the time the grant was made**.** Federal law has little or no effect on these matters.

The land seaward of the line of mean low tide is considered to be permanently covered by the water. This submerged land is owned by the state unless the state has intentionally conveyed that land to another owner, which the legislature may do if it so wishes.

The waters covering submerged land are considered navigable waters and may be used by the public for trade, navigation, and recreation. Upland or "fast land" is above the high-water line (more on this later) and is owned by the private landowner. The area between the high-water line and the extreme seaward line of vegetation, which spreads continuously inland, is referred to as the "dry beach."

Between the state-owned submerged land and the upland is the tideland or "wet beach," which is the land that is covered and uncovered by the water as a result of the tides. The wet beach is also owned by the state.

Where is the Boundary?

As stated in "Moving Water," a simplified definition of the shoreline as a boundary is the average daily high-water level. It's actually a bit more complicated than that.

In disputes over seashore boundaries, as with all boundary and title disputes, courts attempt to determine the intent of the grantor. In determining the grantor's intent, the court attempts to interpret the language of the original grant or patent as determined by the law in effect at the time of the grant. Prior to Texas' independence, it was under the civil law of Mexico, and before that, Spain. These systems of law trace their origin as far back as ancient Rome. When Texas became an independent state, it began blending the civil law system of Mexico with elements of other legal systems, including the French civil law system in use in neighboring Louisiana and the English common law system in use in the United States. As to land, the civil law system prevailed until Jan. 20, 1840, when the Texas Congress provided that the rule of decision for the courts of the Republic should be the common law of England as far as it could be applied consistently with the Constitution of the Republic.

Accordingly, if the grant was made by Spain or Mexico, it will be determined by the civil law of Spain or Mexico, respectively, which was in effect at that time. A grant made by the Republic prior to Jan. 20, 1840, is governed by the civil law of Texas on the date of the grant, whereas a grant made on or after that date is governed by Texas common law in effect at the time of the grant.

For common law grants, the seashore boundary is the ordinary high-water mark. Texas courts have held this to be the line of "mean high tide." *Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736 (1956). For civil law grants, the boundary is "mean higher high tide." *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958). So what's the difference?

Mean high tide is determined by finding the mean of all of the daily high tides over a period of 18.6 years, which is the length of the periodic astronomical cycle that affects the tides. For days with more than one high tide, each high tide is a data point.

Mean higher high tide is determined by finding the mean of all of the *highest* daily high tides over the same period. For days with more than one high tide, only the highest high tide is included in the calculation.

The measurements are made by offshore tide gauges. An excellent discussion of the methodology is found in *Luttes.* The measurements are made over an 18.6-year astronomical cycle, where data are available. Where data are not available for the entire cycle, the available data are adjusted by reference to other tide gauges.

The water levels are affected by astronomical forces (tides) as well as non-tidal forces (atmospheric conditions such as wind and weather). Because the gauges measure the level of the water as affected by *all* forces, the rule actually seems to be based on a calculation of mean high *water* as measured by tide gauges. Either way, as the court states in *Luttes*, the Spanish (Mexican) law concept of the shore is the area in which land is regularly covered and uncovered by the sea over a long period. *Luttes*, 324 S.W.2d at 192. This allows the rule to be applied in areas where water levels fluctuate more due to atmospheric conditions as opposed to tidal flows, such as the Laguna Madre.

Can a Landowner Exclude the Public?

According to these rules, a landowner owns the beachfront to the line of mean high tide or mean higher high tide, depending on whether the original grant was a common law grant or a civil law grant. The state, then, owns the submerged land and the wet beach. The dry beach, from the applicable high-water line to the line of vegetation, is owned by the upland landowner.

What about the public's right to access the beach? Soon after the decision in *Luttes*, the Texas Legislature enacted the Open Beaches Act as a means of enforcing the rights of the public (where and if they existed) to access and use Texas Gulf beaches, even where they were privately owned. The act, as amended, declares that Texas' public policy is that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches

bordering on the seaward shore of the Gulf of Mexico. It also declares that if the public has acquired a right of use or easement to or over an area by prescription or dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the entire beach, including the privately owned dry beach.

The act empowers the commissioner of the General Land Office, along with the attorney general and district and county attorneys, to enforce prohibitions against encroachments on and interferences with the "public beach easement." A person may not construct any obstruction, barrier, or restraint that will interfere with the rights of the public on a public beach. The public beach, for this purpose, does not include a beach that is not accessible by a public road or public ferry. Likewise, a person may not display a sign, marker, or warning that the public beach is private property or that the public does not have a right of access.

The public beach includes the area from mean low tide to the line of vegetation. If there is no such line, or if the line is more than 200 feet inland from the line of mean low tide, the line is set at 200 feet inland from the line of mean low tide. If the line of vegetation is obliterated as a result of a meteorological event such as a hurricane or tropical storm, the land commissioner may suspend action on determining a line of vegetation for up to three years, during which time the public beach extends 200 feet inland from the line of mean low tide. In some cases, encroachments on a public beach may be enjoined or removed, and landowners may be subject to civil penalties of up to $2,000 per day.

Littoral landowners must submit development plans of proposed construction on land adjacent to the public beach.

The constitutionality of the Open Beaches Act has been questioned. It appears the legislature was careful in its drafting of the act and its amendments. The act purports to be only a means of enforcing the public's rights to beaches where it has acquired rights in the beach by dedication, implied dedication, or prescription. Whether the public has acquired such rights is a fact question that must be proven. The act was amended in 1991 to provide that there is a presumption that the public has such an easement, and that the landowner does not have the right to exclude the public from using the area for ingress and egress to the sea. The constitutionality of this presumption is open for debate. *Severance v. Patterson*, 370 S.W.3d 705, 715, n. 9 (Tex. 2012).

Severance also decided a certified question regarding the theory of a "rolling easement" encumbering Texas beachfront property. The rolling easement theory basically was that when the public has an easement encumbering the dry beach, if the sea moves landward, the easement moves landward with it. The Texas Supreme Court was presented with a certified question by the federal Fifth Circuit Court of Appeals. The court held that for the public to have a right to use the beaches, it must prove such a right by proving an easement for use of the dry beach under the common law or by other means set forth in the Open Beaches Act.

The court further held that if such an easement is proven, it does not "roll" or move when the location of the dry beach moves landward. If the easement exists and if the dry beach burdened by it is diminished or eliminated by naturally caused changes in the location of the vegetation line, then the easement does not move; rather, it is diminished or eliminated as well.

Addendum for Coastal Property

Section 61.025 of the Texas Natural Resources Code requires a statutory disclosure to be provided to purchasers of land located seaward of the Gulf Intracoastal Waterway. The disclosure notifies the buyer of certain risks involved in purchasing real property near a beach.

While this notice is still required, and while it does provide important warnings, it should be noted that the disclosure does not create any rights, and that some of the statements may be incorrect based on specific facts and subject to court decisions.

Texas has its share of oceanfront property with its undeniable allure. After all, "from the front porch you can see the sea." The nature of its boundaries, however, and the potential rights of the public, offer specific risks and questions of law that should be considered.

Nothing in *TG* should be considered legal advice. For advice on a specific situation, consult an attorney.

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