No. 09-0387

In the Supreme Court of Texas

CAROL SEVERANCE,
Plaintiff-Appellant,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE;
GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; and
KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS,
Defendants-Appellees.

On Certified Questions from the
United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF TEXAS LANDOWNERS COUNCIL SUPPORTING APPELLANT CAROL SEVERANCE

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ATTORNEY FOR *AMICUS CURIAE* TEXAS LANDOWNERS COUNCIL

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INTEREST OF THE *AMICUS CURIAE*

Texas Landowners Council ("Council"), formed in 1990, is a statewide non-profit organization headquartered in Austin that works through education and advocacy to protect private property rights according to the United States and Texas Constitutions. The Council believes that if private property rights are violated anywhere in the State of Texas, all landowners in the State can be subjected to the same abuse.

Mr. James R. Gaines of Dripping Springs, Texas is president of the Council. The Council's Board of Directors is composed of citizens from various towns and cities in Texas. The Council has over 230 members who live throughout Texas. Members of the Council own land in 109 Texas counties. More information about the Council is available on its website at: http://www.texaslandownerscouncil.com.

In compliance with Tex. R. App. P. 11(c), the Council advises the Court that the attorney who prepared this *amicus curiae* brief, did so without charge. Neither he nor his law firm received a fee from anyone for preparing the brief.

AMICUS CURIAE **BRIEF OF TEXAS LANDOWNERS COUNCIL SUPPORTING APPELLANT MS. SEVERANCE**

Texas Landowners Council ("Council") writes as *amicus curiae* to assist the Court with assessing the theory of Appellees Jerry Patterson, Greg Abbott, and Kurt Sistrunk (the "State Officials") that there exists within "the background principles of Texas common law" the concept of a dominant "rolling easement" over servient, privately-owned beachfront land that "migrates with its natural boundaries, *in exactly the same way that all other rights with natural boundaries also shift over time*." State Officials' Br. 14 (emphasis added).

Although the State Officials' brief is remarkably devoid of any attempt to analyze or explain the "way that all other rights with natural boundaries … shift over time," the State Officials apparently seek to rely on the common law rules of erosion and accretion. *See* State Officials' Br. 17-19 (citing cases that discuss the effect of erosion and accretion on water boundaries). But the State Officials seek to have the Court apply these common law rules of erosion and accretion to the *dry*, *upland* boundary of an alleged "rolling easement," which they argue lies along a line of vegetation—a boundary unknown to the common law. This alleged *upland* boundary of the alleged "rolling easement" is the one the State Officials seek to have "roll" inland over Appellant Carol Severance's houses and thereby confer on the State Officials some right to destroy Ms. Severance's houses for a public purpose without paying compensation.

The State Officials' line of vegetation boundary lies on the dry beach, divorced from any ordinary tidal action of Gulf waters. The State Officials assert the line of

vegetation is relocated inward from the shore when hurricanes, tropical storms, and storm surges uproot and destroy old vegetation lines lying seaward. That is precisely what happened on Ms. Severance's properties. The Fifth Circuit's opinion states: "It is undisputed that … Hurricane Rita in September 2005 shifted the vegetation line farther landward, causing a large segment of Severance's properties, including both homes, to be located on the dry beach." *Severance v. Patterson*, 566 F.3d 490, 494 (5th Cir. 2009).[1]

The Council strongly disagrees with the State Officials' theories on these points. The State Officials' theories have no grounding in the common law. They are, if anything, figments of the Open Beaches Act. Yet, the State Officials plainly disclaim reliance on the Open Beaches Act for their theories. They write:

> The OBA itself plainly does not create the "rolling easement" or redefine anyone's property interests. The statute textually restricts statutory enforcement to recognized rights …. The statute accordingly is not a rights-creating document, but a mechanism for enforcing property rights that the State has previously and independently obtained.

State Officials' Br. 20.

The novel theories the State Officials advance in this appeal are nothing more than attempts to take substantial rights from private littoral property owners without compensation, in violation of the United States and Texas Constitutions.

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[1] For other examples where a specific violent storm destroyed vegetation seaward and landward of a private property owner's structure, leaving the structure seaward of the vegetation line, see, e.g., *Mikeska v. City of Galveston*, 451 F.3d 376, 378 (5th Cir. 2006) (before "Tropical Storm Frances hit the coast of Texas …, these homes were landward of the public beach"); *Arrington v. Mattox*, 767 S.W.2d 957, 957 (Tex. App.—Austin 1989, writ denied) ("Hurricane Alicia struck the Texas coast and moved the vegetation line to a point landward of appellants' property); *Matcha v. Mattox*, 711 S.W.2d 95, 96 (Tex. App.—Austin 1986, writ ref'd n.r.e.) ("On that day a violent hurricane nearly destroyed the house …. After the storm, the remains of the dwelling were located entirely seaward of the natural line of vegetation on the beach.").

I. There is No "Rolling" Beach Easement Within This State's Background Principles of Property Law

To demonstrate that a "rolling easement" doctrine exists within "the background principles of Texas common law," the State Officials must show the Court that a "rolling easement" existed within the common law *before* the Legislature enacted the Open Beaches Act in 1959, which they plainly cannot do.[2]

That there are no ancient—or even any old—common law authorities supporting the State Officials' "rolling easement" claim is painfully apparent from the State Officials' brief. Each Texas Court of Appeals opinion cited in the State Officials so-called "long and unbroken line of cases" that allegedly recognize a "rolling easement" post-dates the enactment of the Open Beaches Act and deals with an action brought under the Act. *See* State Officials' Br. 15-16.[3] Thus, the supposed "background principles" of Texas property law that the State Officials rely on (if they exist at all) did not develop, and could not have developed, until *after* the Open Beaches Act was enacted since each

[2] The State Officials improperly try to divert attention from their own inability to provide any common law authority to support their "rolling easement" theory by trying to flip that burden to Appellant. They write: "Yet Plaintiff is still unable to cite a *single* relevant case rejecting the application of the bedrock doctrine of migratory boundaries to this situation." State Officials' Br. 21. However, the State Officials are the ones asserting the right to appropriate Ms. Severance's private property without compensation, and they have not cited "a single relevant case" decided before the Open Beaches Act that applies the rules of erosion or accretion to a dry, upland boundary marked by a "line of vegetation."

[3] The Council will not burden the Court with another analysis of the confusing decisions of the Texas Courts of Appeals that post-date the Open Beaches Act. That task has been done in the excerpts from Shannon H. Ratliff's excellent paper, *Shoreline Boundaries, Part I: Legal Principles*, that Appellant has included in the Appendix to her brief in this Court. *See* Appellant's Appendix at 41-43. The Fifth Circuit majority opinion also correctly described the intermediate court opinions attempting to deal with the Open Beaches Act as creating only uncertainty and ambiguity in Texas law. *Severance*, 566 F.3d at 498-500 & n.8.

case that the State Officials cite to post-dated the Act and was a result of an action brought under the Act. As the United States Supreme Court has observed: "A law does not become a background principle for subsequent owners by enactment itself." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001).

It seems utterly condemning of the State Officials' claims that they are unable to point to any common or civil law decisions from England,[4] the Republic of Texas, or the first 140 years of Texas statehood that even foreshadows their claims to a "rolling easement" with an upland boundary marked by a "line of vegetation." Moreover, the State Officials cite to *no* opinions of the Supreme Court of Texas as authority for such a claim.

When the State Officials refer in their brief to "a doctrine with historical underpinnings in multiple jurisdictions dating back centuries," they are referring only to the common law rules of erosion and accretion in the abstract, rather than to the concept of a "rolling easement" with its upland boundaries marked by a vegetation line. State Officials' Br. 12. No doubt the rules of erosion and accretion have ancient origins, *see, e.g.*, *State v. Balli*, 190 S.W.2d 71, 98-99 (Tex. 1944), but the rules of erosion and accretion, standing alone, do not create, acknowledge, or support the existence of the State Officials' supposed "rolling easement." The two concepts—"rolling easement" and "rules of erosion and accretion"—are entirely different. The State Officials' attempt to blend them into a single theory is meritless.

[4] *See* TEX. CIV. PRAC. & REM. CODE § 5.001.

The State Officials seek to incorporate the common law rules of erosion and accretion into their "rolling easement" theory and thus try to give the "rolling easement" theory some age. But they are trying to put square pegs in round holes. The State Officials seek to misapply the rules of erosion and accretion to suggest how the dry, inland boundary of their theoretical "rolling easement" relocates upland during major storm events. Such proposed use of the common law rules of erosion and accretion is unprecedented and clearly wrong. For reasons the Council will explain, this aspect of the State Officials' "rolling easement" theory has no merit and should be rejected.

II. Common Law Rules of Erosion and Accretion Do Not Mark Dry Boundaries Along Upland Vegetation Lines That Are Moved by Storms or Storm Surges

The common law has developed four related concepts that generally apply to boundary lines of title ownership between riparian and littoral property on one hand, and bodies of water on the other, as the action of the water impacts the topography of a river bank or shoreline. This Court comprehensively explained the four concepts—erosion, accretion, reliction, and avulsion—in *Brainard v. State*, 12 S.W.3d 6, 17-18 (Tex. 1999), an opinion of this Court the State Officials failed to cite. As this Court explained in *Brainard*:

- "Erosion is the process of wearing away the land" and "is effected gradually and imperceptibly." *Id.* at 17 (internal citations and quotation marks omitted).
- Accretion is "the process of increasing real estate by the gradual and imperceptible disposition by water of solid material, through the operation of natural

causes so as to cause that to become dry land that was once before covered by water." *Id.* (internal citations and quotation marks omitted).

- "Reliction is the uncovering of previously submerged land by a permanent recession of a body of water, rather than a mere temporary or seasonal exposure of the land." *Id.* (internal citation omitted).

- Avulsion, in contrast to erosion, accretion, and reliction, is a removal or deposit of land that occurs "suddenly and perceptibly." *Id.* For example, a "sudden abandonment by a stream of its old channel and the creation of a new one" is an avulsion. *Id.* "Gains to or losses from land abutting a stream that take place by avulsion do not effect a change in ownership." *Id.*; *accord Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976).[5]

Ordinarily, these common law rules of erosion, accretion, reliction and avulsion apply along boundaries of land patents or other similar grants marked by a natural monument that is a body of water, for examples, calls "to the Gulf," "to the sea," or "to the River." *See, e.g., John G. and Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 282-283 (Tex. 2002). In *Kenedy Foundation*, this Court held that a boundary call in a civil law grant to "the waters of the Laguna Madre" was marked by the line of mean higher high tide as measured over an 18.6 year tidal epoch. *Id.* at 281

[5] This Court's description of the rules of erosion, accretion, reliction, and avulsion is consistent with that of the United States Supreme Court. *See, e.g., Georgia v. South Carolina*, 497 U.S. 376, 403-04 (1990); *Arkansas v. Tennessee*, 246 U.S. 158, 173-75 (1918); *Nebraska v. Iowa*, 143 U.S. 359, 360-61 (1892). But none of these United States Supreme Court decisions applied the rules to a dry, upland boundary marked by anything like a line of vegetation. Instead, the United States Supreme Court has applied the rules to riparian or littoral boundaries along bodies of water. *See generally* 9 POWELL ON REAL PROPERTY §§ 66.01 *et seq.* (Wolf ed. 2000).

(*reaffirming Luttes v. State*, 324 S.W.2d 167, 191 (Tex. 1958)). In *Rudder v. Ponder*, 293 S.W.2d 736, 737, 741 (Tex. 1956), the Court held the boundary of a civil law grant "fronted on the bay" is the line of mean high tide, also averaged over a tidal epoch.[6] And in *Brainard*, the Court reaffirmed that the boundaries of grants running to the river or to the meanders of the river are marked by the gradient boundary of that river. *Brainard*, 12 S.W.3d at 15-16. The common law rules of erosion, accretion, and reliction thus apply when the waters of the sea, bays, or rivers, in usual and normal conditions, gradually and imperceptibly change the topology of the land.

Although State Officials frequently have *contended* that the common or civil law marked boundaries along such upland features as old flood banks, bluff lines, and vegetation lines, this Court has consistently rejected those efforts. Most recently in *Kenedy Foundation*, this Court explained the positions and actions which the Commissioner of the General Land Office took along the Laguna Madre as follows:

> [T]he Commissioner … hired Darrell Shine to survey the eastern boundary of the Foundation's property based on ground conditions, not water levels. … Shine located the boundary where he found the terrain to change in elevation and condition. *After the survey was completed, the Commissioner changed state surveying regulations to allow shoreline boundaries to be placed at vegetation lines rather than mean higher high water levels.* This litigation began about the same time.

[6] In *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935), the United States Supreme Court described the common law rule fixing the upland boundary of the shore. In *Borax*'s extensive description of the English and early American authorities, there is no mention of any publicly-owned upland "rolling easement" over private landowners' property. Instead, Chief Justice Hughes' opinion states: "But by the common law, the shore 'is confined to the flux and reflux of the sea at ordinary tides.' It is the land 'between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails.'" *Id.* at 22-23.

90 S.W.3d at 273 (emphasis added). This Court rejected the Land Commissioner's effort to extend State ownership to a purported vegetation or bluff line inland from the Laguna Madre.

The State made the same effort in *Luttes* to extend State control to the vegetation line. On rehearing in *Luttes*, the State sought to have the Court move the boundary line inland from the mean higher high tide line to the bluff or vegetation line.[7] *Amici curiae* supporting the State argued that this Court's decision in *Luttes* would cause "the shore at Surfside Beach in Brazoria County and various other Gulf beaches commonly used for public recreation [to] be much narrowed (from seaward to landward) and thus undesirably limited in usage …." *Luttes*, 324 S.W.2d at 191. But this Court denied rehearing, rejecting the State's claim that a "bluff line" or "vegetation line" should be used, rather than tidal gauges, to locate the boundary between private and State-owned land on the ground. *Id.* at 192-93. Judge Smith dissented, arguing for the use of the "high water mark, the vegetation line," as the line between State-owned and private land. *Id.* at 198 (Smith, J., dissenting). Judge Smith lamented the plight of a person wishing to spend the day or night at the beach who he thought "would have to stay in the water at high tide or be a trespasser." *Id.*

There was *no mention* in either *Kenedy Foundation* or *Luttes* of the claim the State Officials now make in this appeal—that *under the common law*, the State has *always*

[7] *See* Louis Newman, *The State's View of Public Rights to the Beache*s, January 15, 1972, reproduced in Appellant's Appendix. Assistant Attorney General Newman agreed that "[i]n *Luttes*, the State contended the line of vegetation divided State and private ownership" and "that such a holding would preserve for the public the ownership of the beaches, which they had used since time immemorial." Appellant's Appendix at 29-30.

owned a "rolling easement" that gets it what it wanted but did not win in either *Kennedy Foundation* or *Luttes—i.e.*, dominion over the beach inward to the vegetation line. Cynics could reasonably characterize this action as another attempt by the State to extend its dominion over the beach inward to the line of vegetation by relying this time on an alleged common law right that would, of necessity, have to have been in existence at the times of *Luttes* and *Kenedy Foundation*, but which the State did not mention in either of those cases.

The State made a similar claim regarding river boundaries in *Brainard*. The State claimed that the boundary between the State's riverbed and riparian private owners' lands lay along dry, "old flood banks." *Brainard*, 12 S.W.3d at 25. The State's geomorphologist also conceded that the State's proposed banks would "hold the Canadian River 'at flood stage.'" *Id.* The State attempted to establish the boundaries of the State's riverbed by tracing a survey line along dry bluffs, rises, and changes in vegetation patterns far removed from where the River's water had been flowing for years. *Id.* This Court rejected the State's effort, holding that the boundary must be marked along "the 'water-washed' bank that 'serves to confine the waters within the bed' at the 'average' and 'mean' level attained by the waters 'when they reach and wash the bank without overflowing it.'" *Id.* at 26.

The Council respectfully suggests that the following conclusions may be drawn from well-established definitions of erosion, accretion, reliction, and avulsion, and this Court's decisions in *Kenedy Foundation*, *Brainard*, and *Luttes*.

(1) The common law rules of erosion, accretion, reliction, and avulsion to which the State Officials refer operate along *water* boundaries, not along inland bluff lines, vegetation lines, or flood banks. There is no authority for the State Officials' contention that such rules apply to move upland vegetation lines, high water marks left on the ground, flood banks, or similar features on land that is dry except during storm surges or floods. "It is axiomatic that accretion, reliction, and erosion can only affect water boundaries to lands that are contiguous to a body of water." 9 POWELL ON REAL PROPERTY § 66.02[2] (Wolf ed. 2000).

(2) Texas common law, as determined by this Court, has never attached any significance to lines of vegetation, bluff lines, flood banks, or similar upland features divorced from the water along beaches or rivers when determining boundary locations. Although State Officials tried to convince this Court to confer legal significance on such features in *Kenedy Foundation*, *Brainard*, and *Luttes*, the Court declined to do so. The only source for a legal concept of some boundary lying along a "line of vegetation" is the Open Beaches Act itself. TEX. NAT. RES. CODE § 61.001(5). Tellingly, since the "line of vegetation" was unknown to the common law, the Legislature and Land Commissioner have found it necessary to take pains to define how to find it. *Id.* at 61.016 & 61.017 (Vernon Supp. 2009). Thus, the "line of vegetation" as a boundary to property rights is a creature of statute, not the common law.[8]

[8] The General Land Office apparently plans to publish a proposed change to 31 TEX. ADMIN. CODE § 15.3(b) in the TEXAS REGISTER on October 30, 2009, stating that if there are no "clearly marked lines of vegetation," the legally-assumed "line of vegetation" shall not extend inland further than 200 feet from the seaward line of *mean low tide*. This measurement—200 feet from

(3) The common law rules of erosion, accretion, and reliction pertain to changes in the physical location of bodies of water that are "gradual and imperceptible." *See, e.g.*, *Brainard*, 12 S.W.3d at 17-18. But the State Officials are asking this Court to apply such concepts, not to erosion, accretion, or reliction, but to avulsion, specifically the rapid and perceptible destruction of beaches and beach vegetation brought about by hurricanes and tropical storms hitting the Texas coast. In this case, it is undisputed that the so-called "line of vegetation" moved upland of Ms. Severance's houses by a single, dramatic storm event—Hurricane Rita. *Severance*, 566 F.3d at 494. The vegetation that existed seaward of Ms. Severance's houses before Rita was uprooted and destroyed by a violent storm over a very short period of time. By no stretch of one's imagination could this be a "gradual and imperceptible" change like that required for the rules of erosion and accretion to apply and for boundaries to shift under the common law. *See Brainard*, 12 S.W.3d at 18. Consequently, even if the common law rules were to have any application to a "line of vegetation," under the circumstances presented in this case, the rule of avulsion, not the rule of erosion or accretion would apply. Under the common law, boundaries do not change because of avulsion.[9] *See, e.g.*, *Brainard*, 12 S.W.3d at 17 ("Gains to or loss from land … that take place by avulsion do not effect a change in

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the seaward line of *mean low tide*—is not rooted in the common law or this Court's precedents, but instead is a measure the Legislature created in the Open Beaches Act. TEX. NAT. RES. CODE § 61.017(b) (Vernon Supp. 2009). Contrary to statements in the State Officials' brief, this is not a "natural boundary" or a "natural migratory boundary." *See* State Officials' Br. 12. It is, instead, an artificial legal construct.

[9] The fact that the rule of avulsion does not change boundaries is so engrained in common law that it is part of the very definition of avulsion. *See* BLACK'S LAW DICTIONARY 147 (8th ed. 2004) ("Land removed by avulsion remains the property of the original owner").

ownership."); *York*, 532 S.W.2d at 952 ("It is often held that title does not pass by avulsion.").[10] Thus, the boundary that existed *before* the avulsion remains.[11]

(4) Finally if common law water boundary principles had any application to the State Officials' proposed upland "line of vegetation" boundary to their claimed "rolling easement," this Court has always ruled out the effects of major storm events, such as Hurricane Rita, in determining boundaries. In *Brainard*, this Court held that the gradient boundary cannot be marked during or by flood stages on the river. 12 S.W.3d at 26. When marking both common and civil law littoral boundaries, the Court has, since *Luttes*, always required an averaging of tidal measurements taken over a considerable period of time, specifically the 18.6 year tidal epoch. Averaging for such a period

[10] The common law principle that avulsion does not change boundaries is further supported by authorities in this State concerning the effect on boundaries when a river suddenly and perceptibly changes its course. In such cases, the old and new beds change ownership, but the upland between the old and new courses does not. *See, e.g.*, *Maufrais v. State*, 180 S.W.2d 144, 148-49 (Tex. 1944); *Manry v. Robison*, 56 S.W.2d 660 (Tex. 1932); *Denny v. Cotton*, 22 S.W. 122, 124 (Tex. Civ. App.—El Paso 1893, writ ref'd).

[11] The rule of avulsion is also well-settled in other jurisdictions and consistently recognized by respected commentators. *See, e.g.*, *In re City of New York*, 176 N.E. 171, 172 (N.Y. 1931) (littoral owners retained title to land torn away by violent storms and submerged under Atlantic Ocean for 30 years); *In re City of Buffalo*, 99 N.E. 850, 852 (N.Y. 1912) ("[W]here the loss of the land occurs by avulsion, … the boundaries do not change."); *City of Chicago v. Ward*, 48 N.E. 927, 931-32 (Ill. 1897) (littoral owners retained title to land destroyed by storms, submerged by Lake Michigan, and later reclaimed); *Trepanier v. County of Volusia*, 965 So.2d 276, 291-93 (Fla. Dist. Ct. App. 2007) (landward boundary of public's right of use easement on beachfront property did not shift with changes to the shoreline caused by hurricanes); *Siesta Properties, Inc. v. Hart*, 122 So.2d 218, 223-24 (Fla. Dist. Ct. App. 1960) (boundary between adjacent riparian tracts did not change when a hurricane deposited land from one tract onto the other); *Schwartzstein v. B. B. Bathing Park, Inc.*, 203 A.D. 700, 702-03, 197 N.Y.S. 490, 492-93 (N.Y. App. Div. 1922) (change to shoreline by violent storms did not cause boundary to change); 9 POWELL ON REAL PROPERTY § 66.01[2] (Wolf ed. 2000); 5A THOMPSON ON REAL PROPERTY § 2561 (Grimes ed. 1978); 4 TIFFANY ON REAL PROPERTY § 1222 (3d ed. 1975).

eliminates the effects on boundaries by storm surges resulting from hurricanes or tropical storms.

For each of these reasons, the State Officials' contention that "the uniform fabric of the background common law governing all other migratory boundaries" (by which the State Officials must mean the common law rules of erosion, accretion, reliction, and avulsion) applies to move the upland boundary of the alleged "rolling easement" simply does not work. *See* State Officials' Br. 17-19. The common law rules of erosion, accretion, reliction, and avulsion have never been applied, and do not apply, to supposed boundaries marked along upland features such as vegetation lines, bluff lines, flood boundaries, or other high water marks. Even if the Court were to consider applying such concepts, the concepts would not support the State Officials' actions in this case because the violent uprooting of the vegetation seaward of Ms. Severance's houses was not gradual or imperceptible. Instead, it was brought about by a single, major storm event—Hurricane Rita.

CONCLUSION

The Texas Landowners Council respectfully suggests that the answers to the Fifth Circuit's certified questions are that Texas does not recognize a "rolling easement" such as that described in the Fifth Circuit's Question 1. There is no such concept in the common law, as the Fifth Circuit has asked in Question 2. The concept of the boundary of an easement lying along a "line of vegetation" is a creature only of the Open Beaches Act, not the common law. Finally, the answer to the Fifth Circuit's Question 3 is that the

private landowner would be entitled to receive compensation to the full extent required by the Takings Clauses of the United States and Texas Constitutions.

Respectfully submitted,

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