No. 07-0111

IN THE SUPREME COURT OF TEXAS

T H INVESTMENTS, INC.,

Petitioner,

v.

KIRBY INLAND MARINE, L.P. AND PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS,

Respondents.

On Petition for Review
to the Court of Appeals for the Fourteenth District of Texas,
Court of Appeals No. 14-05-00204-CV

THI'S REPLY TO PORT OF HOUSTON AUTHORITY'S RESPONSE TO THI'S PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Port Authority's Response to THI's Petition for Review (the "Response") is little more than an abbreviated brief on the merits of this appeal, as Respondents seek to characterize the merits. From the nature of the Response, it appears the Port agrees with THI's request for the Court to allow full briefing. THI would like to reply to the numerous misstatements in the Response, but it will wait to do so until the Court allows briefing on the merits.

THI has represented that its Petition for Review presents questions this Honorable Court should decide. The Response does not detract from that representation.

►**The Court of Appeals Has Abolished the Concept of Title in Fee Simple Absolute for Most Private Property in Texas.** The Port does not deny the Court of Appeals announced a dramatic new rule of Texas property law as it wrote: "Property conveyed by the State to an individual can remain privately owned even if it is submerged under tide waters—*but only under very special circumstances in which the State manifested its intent that the private landowner continue to own the property even if submerged*." Slip Op. at 11 (Tab A to Pet. for Rev., emphasis added). The Court of Appeals applied its new rule by examining the 1845 patent by which the Republic of Texas conveyed this land into the private domain and concluding that patent "did not reflect an intent that [Tract 1] remain in private ownership if it became submerged." Slip Op. at 12-13. Accordingly, the Court of Appeals held that title to this land reverted to the State as the land became submerged.

The same will be true of virtually all Texas land patents. The usual forms of land patents issued by the Republic of Texas and State of Texas do not contain language addressing what happens if the land conveyed into the private domain later becomes submerged. (*See* the usual forms of patents at Appendices A & B hereto).[1] Virtually all Texas land titles start with a patent from the State, the Republic, or an earlier Sovereign. Consequently, the effect of the Court of Appeals' holding is that most, if not all, Texas land patents did not convey an estate in fee simple absolute, as has previously been thought, but instead conveyed merely a conditional fee subject to reverter if the patented land becomes submerged any time in the future beneath State-owned water.

The Port tries to mask the unprecedented nature of the Court of Appeals' new rule by arguing "only an act of the Texas Legislature specifically conveying submerged lands can alter [the] presumption of State ownership of lands under tidal waters." (Response pp. 9-10). The Port Authority continues by claiming "a patent issued by the General Land Office cannot be construed to convey lands under tidal waters." *Id.*

But the Port's argument misses the point of this case, and it does not address the issue the Court of Appeals has decided. THI's land at issue here was *not* submerged land in 1845 when the Republic of Texas patented that land, as dry land, into the private domain, or, indeed, at anytime for more than a century thereafter. Rather, this case

[1]The usual forms are copied from A. Leopold, LAND TITLES AND TITLE EXAMINATION §§ 5.22 & 5.23 (3 Texas Practice Series 2005). THI cited these forms in its Petition for Review at p. 6, n. 10, but reproduces them here for the Court's convenience. Contrary to the Court of Appeals' holding, both forms of patent transfer "all the right and title in and to said land heretofore held and possessed by the government of said Republic [or by the said State]" (emphasis added).

presents the same question this Court formulated in *Coastal Ind. Water Auth. v. York*: "Our immediate question is not whether a riparian owner may acquire ownership of additional land but whether the submergence of land to which he has title necessarily divests him of that title." 532 S.W.2d 949, 953 (Tex. 1976) (Tab C to Pet. for Rev.) (emphasis added).[2] In *York*, this Court answered that question "no." But in this case, the Court of Appeals has answered that same question "yes," not only for this case but for all other cases, absent some expression of intent to the contrary in the original patent from the Sovereign. That expression of intent will rarely, if ever, appear.

The Court of Appeals' decision directly conflicts with *York*, and there is no principled reason why this case should be governed by different, changed rules of property law from those this Court announced and applied in *York*.

Furthermore, the Court of Appeals expressly acknowledged that it "choose[s] not to follow whatever rule or exception is created by" four other cases THI presented that held submergence of privately-owned land beneath State-owned waters did not result in reversion of title to the State. Slip Op. at 27. Those cases were *Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935); *Fitzgerald v. Boyles*, 66 S.W.2d 347 (Tex. Civ. App.—Galveston 1931, writ dism'd); *Fisher v. Barber*, 21 S.W.2d 569 (Tex. Civ. App.—Beaumont 1929, no writ), and *Port Acre Sportsman's Club v. Mann*, 541 S.W.2d 847 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.). The Court of Appeals thought it

[2]The parties stipulated that THI holds record title to Tract 1 in an unbroken chain back to the Republic's conveyance of the land into the public domain.

significant that three of those cases were decided before the *Luttes* line of cases.[3] Slip Op. at 26. But it is even more significant that this Court discussed each of those three "old" cases with approval in *York*. *See* 532 S.W.2d at 953. *York* was decided in 1976, years after *Luttes* and *Ponder*. If this Court thought the *Luttes* cases had overruled the three "old" cases holding that submergence does not destroy private title, the Court would have said so in *York*.

►**The Meaning and Continued Effect of this Court's Decision in *York*.** The Port does not deny this Court's decision in *York* is critical to proper decision of this case. Yet, the Port joins the Court of Appeals in consigning *York* to the dustbin of history without further consideration by this Court. The Port announces that *York* is not really a "landmark" decision of this Court (Response p. 8), meaning, apparently in the Port's view, that it was permissible for the Court of Appeals to attempt to distinguish *York* into oblivion, as it did.

THI respectfully disagrees. Except for the opinion below, *York* is the *only* opinion from this Court (or any other Texas appellate court) that addresses the effect on riparian land ownership of the massive land subsidence that has afflicted coastal Texas during the past century. The *York* opinion stated and applied two fundamental rules of Texas property law that remain important to private property owners today:

[3] *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958); *Rudder v. Ponder*, 293 S.W.2d 736 (Tex. 1956), and *Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002).

(1) "Submergence does not necessarily destroy the title of the owner . . . there must be a transportation of the land beyond the owner's boundary to effect that result," and

(2) Unlike erosion and accretion, subsidence "is not an ordinary hazard of riparian ownership." 532 S.W.2d at 954.

This Court reaffirmed these holdings of *York* only eight years ago in *Brainard v. State*, 12 S.W.2d 6, 20 (Tex. 1999). There is no principled reason why those rules of property law should now be different for Citizen THI than they were for Citizen York.

Perhaps the Port reveals its own misgivings about the Court of Appeals' treatment of *York* as the Port proposes that "*York*'s statement that 'submergence does not necessarily destroy the title of the owner' *is at most possible only* in non-tidal freshwater environments and is not a rule that ever has been or could be a part of Texas coastal boundary law." (Response pp. 12-13 (emphasis added)). *York* does not state the "freshwater, non-tidal" limitation the Port proposes. Generally, this Court holds that historic rules governing boundaries along State-owned waters operate in the same way along river and seashore boundaries. *See State v. Balli,* 190 S.W.2d 71, 99-101 (Tex. 1944) (accretion by the sea is governed by the same rules as accretion by rivers).

The Court also should reject the Port's proposed "freshwater, non-tidal" limitation the Port proposes for at least three additional reasons: (1) there is no scientific basis for treating the effects of manmade land subsidence of land abutting non-tidal rivers differently from subsidence along tidally-influenced rivers; (2) there is no principled legal basis for treating private landowners whose property lies adjacent to non-tidal rivers

differently from landowners owning property along tidally-influenced rivers and to do so would raise serious Constitutional questions; and (3) it is common knowledge that the Houston Ship Channel, which was the waterway bordering the land at issue in *York*, is not part of a "non-tidal freshwater environment." Indeed, Mr. York's land was closer to the Gulf of Mexico than the THI land at issue here, and the rivers at issue here lie inland from the Ship Channel.

In any event, only this Court should decide the continued effect and meaning of *York*. If, as the Port apparently contends, this case presents a conflict between *York* and this Court's *Luttes* line of cases, this Court should resolve that conflict.

►**The Lower Courts' Unrealistic Burden of Proof on Private Landowners, Upon Pain of Forfeiting Private Property to the State.** The Port also does not deny the courts below held THI to the unrealistic burden of proving that erosion and accretion have had no effect over nearly a century on the shape and appearance of Tract 1. Indeed, the Port's Response features the Port's oft-repeated "rabbit's head" argument. An artist's depiction of the topography in 1916 of this general area shows the outline of Tract 1 in the form of a "rabbit's head." (*See* Response, facing p. 2). The Port's witness, Sherman, reasoned, erroneously, that "if subsidence were the only force of change at this site, we would still see that rabbit's head preserved. It would just be deeper." (Response p. 4). And based in part on this claim, the courts below have decreed that THI forfeited its land to the State because THI failed to prove that erosion and accretion had no effect on the shape or appearance of this land, in this fluvial environment, since 1916.

In *York*, this Court described the degree of erosion that results in a landowner's loss of title—"there must be a transportation of the land beyond the owner's boundary to effect that result." 532 S.W.2d at 954. The soil must have been "washed by the current of the water until the soil eroded and passed away so as to leave this . . . area indistinct from the bed of the ship channel." *Id.* at 951-52. That clearly has not happened here. It is true that the shape and appearance of Tract 1 have changed since 1914, but the body of land constituting Tract 1 remains on the earth's surface, right where it has been. The land is plainly visible. *See* the photographs at Tabs D, E and F to THI's Petition for Review. There is no basis for the lower courts' decreeing that title to that land reverted to the State.

The Port accuses THI of asking the Court to create a "subsidence exception." But the Port misunderstands the law. The rule, established by our fundamental law, is that the State may not take private property without adequate compensation. There exists an ancient exception to that rule along waterfront boundaries for property lost to erosion by the force of the water. But in *York*, this Court held—and correctly so—that subsidence "is not an ordinary hazard of riparian ownership; it is not the result of the force of the waters which takes from some owners and gives to others." 532 S.W.2d at 954. Thus, subsidence is not within an exception to the rule we adopted in our Constitutions, and subsidence may not result in the State's taking of private property from its private owners without compensation, in THI's case or other cases to come.

THI repeats the Prayer for Relief on page 15 of its Petition for Review.

Respectfully submitted,

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