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**OVERVIEW OF LAWS REGARDING
THE NAVIGATION OF TEXAS STREAMS,
WITH SELECTED REFERENCES TO STATUTES, CASES,
AND OTHER MATERIALS**

**PRESENTED TO THE TEXAS RIVERS CONSERVATION ADVISORY BOARD
OF THE TEXAS PARKS AND WILDLIFE DEPARTMENT
APRIL 18, 1997**

[CITATIONS AND STATUTES UPDATED TO JANUARY 2004]

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**OPINIONS EXPRESSED IN THIS PAPER DO NOT NECESSARILY REFLECT
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**OVERVIEW OF LAWS REGARDING
THE NAVIGATION OF TEXAS STREAMS,
WITH SELECTED REFERENCES TO STATUTES, CASES,
AND OTHER MATERIALS
APRIL 1997 [UPDATED TO JANUARY 2004]**

THE NAVIGATION RIGHT

The navigation right encompasses a right of free passage along a river or stream. Long ago the Texas Supreme Court stated:

[It has been] the settled policy and cherished object of the state to guard its navigable streams from obstruction and to secure and improve them as common highways of trade and travel for such of its citizens as might wish to use them for this purpose.

Selman v. Wolfe, 27 Tex. 68, 71 (1863).

The navigation of Texas's inland and coastal waters is one of several "public rights and duties" specifically recognized by the Texas Constitution. A form of the right to travel, the navigation right is part of the liberty and the freedom of movement enjoyed by our society. Texas's laws on navigation have evolved under different governments during Texas's history. The laws are a blend of the civil law (the law of Spain and Mexico and the early Republic of Texas, which still applies to old land grants), the common law (court rulings), and statutes (acts of the Texas Legislature or the Congress of the Republic of Texas).

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CIVIL LAW--from the Partidas (title 28 of third Partida), as translated in Hall, The Laws of Mexico (1885) pp. 447-449:

Law 3. What are the Things Which Belong in Common to All Creatures Living.--The things which belong in common to all the living creatures of the world are the air, rain, water, the sea, and its shores; for every living creature may use them, according to his wants. ...

Law 6. That Every One may Make Use of Ports, Rivers, and Public Roads.--Rivers, ports, and public roads belong to all men in common; so that strangers coming from foreign countries may make use of them, in the same manner as the inhabitants of the place where they are. And though the dominion or property (senorio) of the banks of rivers belongs to the owner of the adjoining estate, nevertheless, every man may make use of them to fasten his vessel to the trees that grow there, or to refit his vessel, or to put his sails or merchandise there. So fishermen may put and expose their fish for sale there, and dry their nets, or make use of the banks for all like purposes, which appertain to the art or trade by which they live.

Law 8. That No One has a Right to Build a Mill or Other Edifice on a River, by Which the Navigation of Vessels may be Obstructed.--No man has a right to dig a new canal, construct a new mill, house, tower, cabin, or any other building whatever, in rivers which are navigated by

vessels, nor upon their banks, by which the common use of them may be obstructed. And if he does, whether the canal or edifice be newly or anciently made, if it interfere with such common use, it ought to be destroyed. For it is not just that the common good of all men generally should be sacrificed to the interest of some persons only.

Concerning the civil law, Joaquin Escriche, Diccionario Razonado de Legislacion y Jurisprudencia (1831), as translated in Hall, The Laws of Mexico (1885) pp. 411, 416-417, states:

Public Waters.--Waters which are not nor can not be private property belong to the public. Such are the waters of the rivers which by themselves or by accession with others follow their course to the sea. These may be navigable or not navigable. If they are navigable, nobody can avail himself of them so as to hinder or embarrass navigation ... .

River, What is--Uses thereof--Their banks.--A river is a mass of water united between two banks, which run perpetually from time immemorial. It differs from a torrent in that this is the effect of the abundant rains or extraordinary meltings of snow, so that it runs only a certain time and leaves its bed dry the greater part of the year. Rivers, as law 6, title 28, partidas 3, says, belong to all men generally so that even those who are of other foreign lands may use them as the natives and residents of the territory which they bathe. ... [A]nd when a river which is not navigable becomes so after uniting with another, use of its waters must be made so that then there shall be no lack thereof for navigation.

TEXAS CONSTITUTION, Art. XVI, § 59 (“The Conservation Amendment”)

(a) The conservation and development of all of the natural resources of this State ... , the conservation and development of its forests, water and hydro-electric power, **the navigation of its inland and coastal waters**, and the preservation and conservation of all such natural resources of the State **are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.**

#### FURTHER REFERENCES

General discussions, with citations to many cases about navigable streams, are found in the following legal treatises:

Texas Jurisprudence, Third Edition, Volume 73, Water (2003), esp. §§ 204-245.  
Hutchins, The Texas Law of Water Rights (1961).

Regarding the civil law, see also Dobkins, The Spanish Element in Texas Water Law (1959).

Regarding freedom of movement, see Chafee, Three Human Rights in the Constitution of 1787 (1956).

## NAVIGABILITY

In Texas a stream is navigable if it is either “navigable in fact” or “navigable by statute.” These tests are explained below. Simply put, a non-navigable stream is a stream which is neither navigable in fact nor navigable by statute. Along a navigable stream, the public may boat, fish, swim, camp, and in general carry on any legal activity. Public use must be confined to the stream bed and, to a limited extent, the banks.

Along a non-navigable stream, the public generally has no right of use, and a private landowner may forbid public entry upon or along the waterway. However, there are some instances in which a perennial stream, even though it is not navigable in fact or navigable by statute, is nevertheless open to public use because the land bordering it was granted (prior to December 14, 1837) under the civil law, which reserved ownership of beds of perennial streams to the sovereign.

### NAVIGABLE IN FACT

A number of criteria have been suggested for whether a stream is navigable in fact. Some relate to passage by boats, others to the ability to float logs, and still others to its usefulness in commerce. Various courts, both state and federal, have recognized different tests. Texas courts have acknowledged a wide range of uses in support of navigability in fact.

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### TESTS FOR NAVIGABILITY IN FACT

Texas courts have sometimes found navigability as a result of capacity for commercial use. See, e.g., Jones v. Johnson, 25 S.W. 650, 651 (Tex.Civ.App. 1894, writ ref'd) and Orange Lumber Co. v. Thompson, 126 S.W. 604, 606 (Tex.Civ.App. 1910, no writ). The Texas Supreme Court in Selman v. Wolfe, 27 Tex. 68, 71 (1863) has recognized a broad concept for navigable streams--that of “common highways of trade and travel.”

The case of Welder v. State, 196 S.W. 868, 873 (Tex.Civ.App.--Austin 1917, writ ref'd) has discussed the concept underlying the “navigable in fact” tests:

Behind all definitions of navigable waters lies the idea of public utility. Waters, which in their natural state are useful to the public for a considerable portion of the year are navigable. Boats are mentioned in the decisions because boats are the usual means by which waters are utilized by the public, and commerce is usually mentioned because carrying produce and merchandise is the usual public demand for such waters. But floating logs has frequently been held to be navigation, and hunting and fishing, and even pleasure boating, ha[ve] been held to be proper public uses.

See also 73 Tex.Jur.3d Water §§ 208-210 (2003).

The federal power over navigable streams derives from the federal government's powers over interstate commerce set out in the U.S. Constitution. Thus, the federal test of navigability in fact relates to use as highways for commerce. States are free to adopt, and most have adopted,

broader concepts of navigability for the purposes of state regulation. (Of course, state control of waters is subject to federal jurisdiction for interstate commerce and navigation.) These matters are beyond the scope of this overview.

### NAVIGABLE BY STATUTE

Under a law dating from 1837, a stream is navigable so far as it retains an average width of 30 feet from its mouth up. The width measured is the distance between the fast (or firmly fixed) land banks. A stream satisfying the 30-foot rule is sometimes referred to as “statutorily navigable” or “navigable by statute.” Under a court decision, the public has rights along a stream navigable by statute just as if the stream were navigable in fact.

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ORIGINAL STATUTORY PROVISION (effective December 14, 1837)

That all streams of the average width of 30 feet shall be considered navigable streams within the meaning of this act, so far up as they retain that average width, and that they shall not be crossed by the lines of a survey.

1 Sayles' Early Laws of Texas, p. 271, quoted at 286 S.W. 466.

CURRENT STATUTES

NATURAL RESOURCES CODE § 21.001. Definitions.

In this chapter ...

(3) “Navigable stream” means a stream which retains an average width of 30 feet from the mouth up.

NATURAL RESOURCES CODE § 21.012. Surveys on Navigable Streams.

(a) If the circumstances of the lines previously surveyed under the law will permit, land surveyed for individuals, lying on a navigable stream, shall front one-half of the square on the stream with the line running at right angles with the general course of the stream.

(b) A navigable stream may not be crossed by the lines of a survey.

Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 445 (1935):

Thus it is apparent that statutory navigable streams in Texas are public streams, and that their beds and waters are owned by the state in trust for the benefit and best interests of all the people, and subject to use by the public for navigation, fishing, and other lawful purposes, as fully and to the same extent that the beds and waters of streams navigable in fact are so owned and so held in trust and subject to such use.

MEASUREMENT OF STREAM WIDTH FOR NAVIGABILITY BY STATUTE

The entire bed is to be included in the width, not just the area covered by flowing water. The

bed extends all the way between the fast land banks. These are the banks which separate the stream bed from the adjacent upland (whether valley or hill) and confine the waters to a definite channel. Further, stream segments having a width of less than 30 feet do not defeat the stream's navigability by statute, so long as the stream's width maintains an average of 30 feet or more.

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In Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 467 (1926), the Texas Supreme Court explained what a stream consists of:

A water course, river, or stream consists of a bed, banks, and a stream of water. ... The bed of a stream is that portion of its soil which is alternatively covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during an entire year, without reference to the extra freshets of the winter or spring or the extreme drouths of the summer or autumn. ... The banks of a stream or river are the water-washed and relatively permanent elevations or acclivities at the outer lines of the river bed which separate the bed from the adjacent upland, whether valley or hill, and served to confine the waters within the bed and preserve the course of the river when they rise to the highest point at which they are still confined to a definite channel.

Since the stream is a navigable one, the elevations of land adjacent to its bed, which hold its navigable waters in place, and to which boats might be tied or anchored, and wharves or other instrumentalities of navigation attached, are its banks

The court went on to explain the stream bed measurement:

[T]he bed of the stream defined by the statute is that portion of the terrain between its fast land banks. So when the statute says that the average width shall be 30 feet between the banks, it does not mean the space covered by the water at low tide or flow, but the entire bed of the stream as above defined.

In this case the court held that the creek involved was navigable by statute. It stated, "The bed of the creek has an average width of more than 30 feet, although the waters flow in an ordinary season over less than 30 feet of this width." The court went on to note:

The fact that at times and places there may be some distance between the bordering banks which limit the survey lines, and the water does not militate against the right of the riparian owner to have access to the water.

Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 468 (1926).

In a case involving the North and South Forks of the Guadalupe River, a question was raised because the streams were measured to be less than 30 feet wide for short reaches just above their mouths before they became substantially wider farther upstream. The court stated:

Several witnesses testified as to the width of the river and the general import of their testimony is that the width of the river substantially exceeds thirty feet. Appellants' main complaint is with the method of measurement used. The statute provides no precise method

of measurement for determining if a stream maintains an average width of thirty feet from the mouth up. We have found no case which absolutely mandates any certain method be used. We have concluded that the testimony in the record sufficiently supports the trial court's finding as to navigability.

Adjudication of Upper Guadalupe Segment of Guadalupe River Basin, 625 S.W.2d 353, 362-3 (Tex.Civ.App. -- San Antonio 1981), aff'd, 642 S.W.2d 438 (1982).

The question of navigability of a stream is ultimately to be decided by the courts. See State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065, 1070 (1932).

NAVIGABILITY OF LAKES

There are very few natural lakes in Texas. Some of the small natural ones have been held to be non-navigable and therefore subject to private ownership and control. The typical Texas lake, on the other hand, has been created by building a dam on a navigable stream and then impounding water behind the dam. Damming a navigable stream does not destroy the public's navigation right along it. The Texas Supreme Court has held that persons may boat and fish on all the lake's waters, not just on the portion directly above the navigable stream. Therefore, a property owner may not fence off any portion of such a lake. The court also held that the public does not have a right to fish from the privately-owned shores of an impoundment on a navigable stream. When a lake has been created by damming a non-navigable stream, the private landowner may (unless he holds under a civil law grant adjoining a perennial stream) prohibit public use of the lake--including boating and fishing.

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The effects upon public rights of damming a navigable stream were considered in a case involving the Medina River. In discussing the dam owner's permit, the Supreme Court stated:

It gave no title to the water, but only the right to divert and use so much of the water appropriated as might be necessarily required when beneficially used for the purpose for which it was appropriated. ... It gave no title to the fish in the water of the lake, no exclusive right to take the fish from the lake, and no right to interfere with the public in their use of the river and its water for navigation, fishing, and other lawful purposes further than interference necessarily result[ing] from the construction and maintenance of the dams and lakes in such manner as reasonably to accomplish the purpose of the appropriation.

Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 446 (1935).

The court held that persons may boat and fish on all the lake's waters, not just on the portion directly above the navigable stream. As to fishing from the lake's shores, the court stated:

We find no authority for holding that the public have as an incident to the right to fish in Diversion Lake a right to use the banks of the lake, and it is our opinion that they have no such right.

Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 447 (1935).

For a discussion of the private property rights associated with a non-navigable lake, see

Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex.Civ.App.--Waco 1935, writ dismissed).

### PUBLIC ACCESS TO NAVIGABLE STREAMS

Access must usually be obtained through the use of public property. The typical access may be from the right-of-way of a public road that crosses the stream, through a publicly-owned boat launch area, or from some other public land (a park, for example) adjacent to the stream. There is no general right to cross private property to get to a navigable stream. There are a number of privately-owned parks or campgrounds where members of the public may have access to a navigable stream by paying a small fee to the landowner. If the private landowner forbids access, an attempt to use the private land would be a trespass.

State law prohibits parking on a highway bridge and generally forbids (with certain exceptions) parking in the main traveled part of a highway.

Within a public road's right-of-way, private fencing that restricts public passage to the stream is illegal.

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ACCESS VIA PUBLIC ROAD CROSSING

Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 442 (1935), explicitly recognized the legality of entering navigable waters from a public road:

Defendants ... entered the waters of Diversion Lake and fished in it by placing their boats into the water from the low bridge on which the public road crosses the river and the lake near the upper end of the lake. Thus they were able to obtain access to the waters of the lake without trespassing upon the property of plaintiff

Regarding parking, see the Texas Transportation Code, §§ 545.301-545.308.

RECOGNITION OF PUBLIC ACCESS RIGHTS BY RECENT LEGISLATION

In an Act passed in 2003 generally prohibiting the operation of wheeled or tracked motor vehicles in the beds of streams navigable by statute, the Texas Legislature stated:

- (a) The legislature recognizes that the beds, bottoms, and banks of navigable rivers and navigable streams are precious and irreplaceable state resources that deserve protection.
- (b) The legislature also recognizes that public access to navigable rivers, navigable streams, and the beds, bottoms, and banks of navigable rivers and streams is: (1) a right granted to individuals under the Texas Constitution; and (2) an important economic and recreational resource for the people of this state.
- (c) The protection of public access to the beds, bottoms, and banks of navigable rivers and navigable streams, therefore, should not come at the cost of uncontrolled damage to the beds, bottoms, and banks of navigable rivers and streams or at the cost of infringing on private property rights.

Acts 2003, 78th Leg., Regular Session, ch. 800, § 1, eff. Sept. 1, 2003.

PRIVATE OBSTRUCTIONS IN A PUBLIC ROAD'S RIGHT-OF-WAY

In Cornelison v. State, 40 Tex. Crim. 159, 49 S.W. 384 (1899), a private party owned land on both sides of a 30-foot wide roadway. A 14-foot wide bridge spanned a creek. The landowner ran fences to the bridge corners, obstructing 8 feet of right-of-way on each side of the bridge. The court upheld a criminal conviction of the landowner for obstructing a public road.

Today obstructing a highway or other passageway is a misdemeanor under Texas Penal Code § 42.03 (see section on OBSTRUCTIONS).

REGULATION OF WATER SAFETY

After recognizing the navigation of Texas's inland and coastal waters to be a public right and duty, the Texas Constitution provides that the Texas Legislature "shall pass all such laws as may be appropriate thereto." The legislature has declared a policy of promoting the uniformity of laws relating to water safety. A number of such laws are contained in the Water Safety Act, Chapter 31 of the Texas Parks and Wildlife Code. The Water Safety Act applies to all public water of the state and to all watercraft navigated or moving on the public water. The basic authority for the enactment of boating regulations is reserved to the state; limited local regulations consistent with the Water Safety Act are permitted under Parks and Wildlife Code § 31.092. By special statute the legislature may also grant regulatory powers to a specific authority.

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### STATE REGULATIONS

Chapter 31 of the Texas Parks and Wildlife Code has subchapters addressing general provisions, identification and numbering of vessels, titles for boats and motors, required equipment, boating regulations, enforcement and penalties, and boat ramps and buoys. Some provisions of note are:

PARKS & WILDLIFE CODE § 31.002. State Policy.

It is the duty of this state to promote recreational water safety for persons and property in and connected with the use of all recreational water facilities in the state, to promote safety in the operation and equipment of facilities, and to promote uniformity of laws relating to water safety.

PARKS & WILDLIFE CODE § 31.022(c).

All canoes, punts, rowboats, sailboats, and rubber rafts when paddled, poled, oared, or windblown are exempt from the numbering provisions of this chapter.

PARKS & WILDLIFE CODE § 31.073(a).

All canoes, punts, rowboats, sailboats, and rubber rafts when paddled, poled, oared, or windblown are exempt from all safety equipment requirements except the following:

- (1) one Coast Guard approved lifesaving device for each person aboard; and

(2) the lights prescribed by the commandant of the Coast Guard for class A vessels and required under Section 31.064.

PARKS & WILDLIFE CODE § 31.091. Uniformity of Boating Regulations.

In the interest of uniformity, it is the policy of the State of Texas that the basic authority for the enactment of boating regulations is reserved to the state.

PARKS & WILDLIFE CODE § 31.093. Rules of the Road.

The United States Coast Guard Inland Rules apply to all public water of this state to the extent they are applicable.

PARKS & WILDLIFE CODE § 31.096. Reckless Operation and Excessive Speed.

No person may operate a vessel or manipulate water skis, an aquaplane, or a similar device on the water of this state in wilful or wanton disregard of the rights or safety of others or without due caution or circumspection, and at a speed or in a manner that endangers, or is likely to endanger, a person or property.

PARKS & WILDLIFE CODE § 31.101. Obstructing Passage.

- (a) No person may anchor a boat in the traveled portion of a river or channel so as to prevent, impede, or interfere with the safe passage of any other boat through the same area.
- (b) No person may anchor a vessel near a state-owned boat ramp so as to prevent, impede, or interfere with the use of the boat ramp.

PARKS & WILDLIFE CODE § 31.102. Operating Boats in Restricted Areas.

No person may operate a boat within a water area that has been clearly marked, by buoys or some other distinguishing device, as a bathing, fishing, swimming, or otherwise restricted area by the department or by a political subdivision of the state. This section does not apply to a patrol or rescue craft or in the case of an emergency.

LOCAL REGULATIONS

PARKS & WILDLIFE CODE § 31.092. Local Regulations.

- (a) The governing body of an incorporated city or town, with respect to public water within its corporate limits and all lakes owned by it, may designate by ordinance certain areas as bathing, fishing, swimming, or otherwise restricted areas and may make rules and regulations relating to the operation and equipment of boats which it deems necessary for the public safety. The rules and regulations shall be consistent with the provisions of this chapter.
- (b) The commissioners court of a county, with respect to public water within the territorial limits of the county that is outside of the limits of an incorporated city or town or a political subdivision designated in Subsection (c) of this section and that are not lakes owned by an incorporated city

or town, may enter an order on its books designating certain areas as bathing, fishing, swimming, or otherwise restricted areas and may make rules and regulations relating to the operation and equipment of boats which it deems necessary for the public safety. The rules and regulations shall be consistent with the provisions of this chapter.

(c) The governing board of a political subdivision of the state created pursuant to Article XVI, Section 59, of the Texas Constitution, for the purpose of conserving and developing the public water of the state, with respect to public water impounded within lakes and reservoirs owned or operated by the political subdivision, may designate by resolution or other appropriate order certain areas as bathing, fishing, swimming, or otherwise restricted areas and may make rules and regulations relating to the operation and equipment of boats which it deems necessary for the public safety. The rules and regulations shall be consistent with the provisions of this chapter.

(d) A copy of all rules and regulations adopted under this section shall be summarily filed with the department.

(e) No city, town, village, special district, or other political subdivision of the state may impose or collect a fee for the registration or inspection of vessels to be used on public water against the owner or operator of a vessel used on public water. This section does not apply to Chapter 321, Tax Code, nor to any launch fees, docking fees, entry fees, or other recreational fees which may be imposed or collected by any political subdivision of the State of Texas for the use of the facilities afforded by any such district to the public.

The Water Oriented Recreation District of Comal County functions under Chapter 324 of the Texas Local Government Code. Section 324.066(a) provides in part:

- (a) The board [of the district] may adopt reasonable rules and ordinances applicable to: ...
- (2) littering and litter abatement on the public water in the district, including the possession and disposition of glass containers;
  - (3) activities that endanger the health and safety of persons or property on public water in the district, subject to the public's paramount right to navigate inland water ... .

### **LAWFUL ACTIVITIES ALONG NAVIGABLE STREAMS**

Texas courts have recognized that a member of the public may engage in a variety of lawful activities along a navigable stream. Besides boating, persons may swim, float, walk, wade, picnic, camp, and (with a license) fish. Public use must be confined to the stream bed and, to a limited extent, the banks. Hunting is permitted in some situations. However, a hunter should always check first with local law enforcement officials because of numerous local restrictions and exceptions. A law called the Sportsman's Rights Act prohibits intentional interference with or disruption of lawful hunting or fishing.

In general, any unlawful activity is also unlawful along a river. The disorderly conduct provision of the Texas Penal Code forbids such activities as fighting, being unreasonably noisy, displaying a firearm in a manner calculated to alarm, discharging a firearm, and using abusive or profane language that tends to incite an immediate breach of peace. Damaging or destroying property is punished as criminal mischief. Under another law punishment for littering can range up to a fine of \$4,000 and a year in jail, depending upon the amount of litter and any previous

convictions.

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LAWFUL ACTIVITIES

The case of Dincans v. Keeran, 192 S.W. 603 (Tex.Civ.App.--San Antonio 1917, no writ) recognized a public right to use the waters and shore line. In overturning the lower court's decree for being too restrictive, the court stated:

[T]he trial court's decree was too comprehensive [in that it] restrained appellants from the enjoyment of their lawful right to use the shore line of the navigable waters, which formed the western boundary of appellees' land. ... Hunting, camping, and fishing are reasonable uses of the navigable waters and shore line.

Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 445 (1935), stated:

Thus it is apparent that statutory navigable streams in Texas are public streams, and that their beds and waters are owned by the state in trust for the benefit and best interests of all the people, and subject to use by the public for navigation, fishing, and other lawful purposes, as fully and to the same extent that the beds and waters of streams navigable in fact are so owned and so held in trust and subject to such use.

Texas Attorney General's Opinion S-208 (1956) concluded that the general public is authorized to walk down the dry or submerged bed of a navigable stream--even if its bed is privately owned by virtue of the Small Bill (Article 5414a, R.C.S.)--for the purpose of seining and fishing in water holes in the bed of the river. Such conduct was not a criminal trespass under the definition of the crime then in effect.

THE SPORTSMAN'S RIGHTS ACT

PARKS AND WILDLIFE CODE § 62.0125. Harassment of Hunters, Trappers, and Fishermen.

- (a) This section may be cited as the Sportsman's Rights Act.
- (b) In this section:
 - (1) "Wildlife" means all species of wild mammals, birds, fish, reptiles, or amphibians.
 - (2) "Process of hunting or catching" means any act directed at the lawful hunting or catching of wildlife, including camping or other acts preparatory to hunting or catching of wildlife that occur on land or water on which the affected person has the right or privilege of hunting or catching that wildlife.
- (c) No person may intentionally interfere with another person lawfully engaged in the process of hunting or catching wildlife.
- (d) No person may intentionally harass, drive, or disturb any wildlife for the purpose of disrupting a person lawfully engaged in the process of hunting or catching wildlife.
- (e) No person may enter or remain on public land or enter or remain on private land without the landowner's or his agent's consent if the person intends to disrupt another person lawfully

engaged in the process of hunting or catching wildlife.

(f) This section does not apply to a peace officer of this state, a law enforcement officer of the United States, a member of the armed forces of the United States or of this state, or employees of the department or other state or federal agencies having statutory responsibility to manage wildlife or land during the time that the officer is in the actual discharge of official duties.

(g) A person who violates this section commits an offense. An offense under this section is a Class B misdemeanor.

(h) It is an affirmative defense to prosecution that the defendant's conduct is protected by the right to freedom of speech under the constitution of this state or the United States.

UNLAWFUL CONDUCT

See such laws as:

Texas Penal Code § 42.01, Disorderly Conduct.

Texas Penal Code § 49.02, Public Intoxication.

Texas Penal Code § 49.06, Boating While Intoxicated.

Texas Penal Code § 28.03, Criminal Mischief.

Texas Penal Code § 22.07, Terroristic Threat.

Texas Health and Safety Code, Chapter 365, Texas Litter Abatement Act.

Texas Parks & Wildlife Code, Chapters 61, 62, and 82, regarding fishing, hunting, and preserves.

PROHIBITION OF WHEELED OR TRACKED MOTOR VEHICLES IN STREAM BEDS

Chapter 90 of the Texas Parks & Wildlife Code contains a new prohibition against the operation of a wheeled or tracked motor vehicle in the "protected freshwater area" (the bed, bottom, and banks up to the gradient boundary) of a stream navigable by statute. The prohibition does not apply within the right-of-way of a state, county, or municipal road, or to an already-established private road crossing. There are numerous exemptions, including for emergencies, agricultural activities, utilities, sand and gravel extraction (under TPWD permit), pipelines, and camps and retreats. A person operating under an exemption is to minimize harming or disturbing vegetation, wildlife, and wildlife habitat, and must cross by the most direct feasible route. A county, a city, or a river authority may adopt a written "Local River Access Plan" allowing motor vehicle use in a stream bed within its jurisdiction. Such a local plan takes effect only if the Texas Parks and Wildlife Department approves it under criteria set out in the statute. The Canadian River is not governed by this law, under an exception for a river with headwaters in a state other than Texas and a confluence in another state.

Some key provisions are set out below. Under § 90.011, a violation is a Class C misdemeanor (with a fine up to \$500), increasing to a Class B misdemeanor upon a person's third or subsequent offense.

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## PARKS & WILDLIFE CODE § 90.001. Definitions.

In this chapter:

(1) "Emergency" means a condition or circumstance in which a person reasonably believes that

an individual has sustained serious bodily injury or is in imminent danger of serious bodily injury or that property has sustained significant damage or destruction or is in imminent danger of significant damage or destruction.

(2) "Motor vehicle" means any wheeled or tracked vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used to transport a person or thing.

(3) "Navigable river or stream" means a river or stream that retains an average width of 30 or more feet from the mouth or confluence up.

(4) "Protected freshwater area" means that portion of the bed, bottom, or bank of any navigable river or stream that lies at or below the gradient boundary of the river or stream. The term does not include that portion of a bed, bottom, or bank that lies below tidewater limits.

#### PARKS & WILDLIFE CODE § 90.002. Operation of Motor Vehicle in Protected Freshwater Area Prohibited.

Except as provided by Section 90.003 or 90.004, a person may not operate a motor vehicle in or on a protected freshwater area on or after January 1, 2004.

#### PARKS & WILDLIFE CODE § 90.003. Exemptions.

(a) Section 90.002 does not apply to:

(1) a state, county, or municipal road right-of-way;

(2) a private road crossing established on or before December 31, 2003; or

(3) operation of a motor vehicle by:

(A) a federal, state, or local government employee if operation of a motor vehicle is necessary for conducting official business;

(B) a person if operation of a motor vehicle is necessary for reasonable purposes related to usual and customary agricultural activities;

(C) a person if operation of a motor vehicle is necessary to and is authorized by a mineral lease;

(D) a person if operation of a motor vehicle is necessary to and authorized by a crossing easement granted by the General Land Office under the Natural Resources Code;

(E) a person if operation of a motor vehicle is necessary to an activity authorized by Chapter 86;

(F) a person in response to an emergency;

(G) a person if operation of a motor vehicle is necessary for the lawful construction, operation, or maintenance of equipment, facilities, or structures used for:

(i) the production, transportation, transmission, or distribution of electric power;

(ii) the provision of telecommunications services or other services delivered through a cable system;

(iii) the transportation of aggregates, oil, natural gas, coal, or any product of oil, natural gas, or coal;

(iv) the production, treatment, or transportation of water or wastewater; or

(v) dredge material disposal placement;

(H) an owner of the uplands adjacent to a protected freshwater area, the owner's agent, lessee, sublessee, or the lessee or sublessee's agent, representative, licensee, invitee, or guest for reasonable purposes related to usual and customary operation of:

(i) a camp regulated under Chapter 141, Health and Safety Code; or

- (ii) a retreat facility owned and operated by a nonprofit corporation chartered under the laws of this state before January 1, 1970; or
  - (I) an owner of the adjacent uplands on both sides of a protected freshwater area and the owner's agents, employees, representatives, and lessees only for the purpose of accessing the owner's property on the opposite side of the protected freshwater area when no reasonable alternate access is available.
- (b) This chapter does not apply to any river with headwaters in a state other than Texas and a mouth or confluence in a state other than Texas.
- (c) A person exempt under this section who operates a motor vehicle in or on a protected freshwater area shall do so in a manner that avoids, to the extent reasonably possible, harming or disturbing vegetation, wildlife, or wildlife habitat within the protected freshwater area. A person exempt under this section who is crossing a protected freshwater area shall cross by the most direct feasible route.

PARKS & WILDLIFE CODE § 90.004. Local River Access Plan.

- (a) A county, municipality, or river authority may adopt a written local plan to provide access to a protected freshwater area located within the county's geographical boundaries or the river authority's or municipality's jurisdiction.
- (b) A local plan adopted under Subsection (a) may:
- (1) notwithstanding Section 90.002, allow limited motor vehicle use in a protected freshwater area;
  - (2) provide for the county, municipality, or river authority to collect a fee from a person accessing a protected freshwater area, the amount of which may not exceed the estimated cost that the county, municipality, or river authority incurs by allowing the limited use of motorized vehicles in protected freshwater areas within its jurisdiction; or
  - (3) establish other measures consistent with the policy and purposes of this chapter.
- (c) Before a local plan adopted under Subsection (a) may take effect, a county, municipality, or river authority must file the plan with the department. A local plan does not take effect until the plan is approved in writing by the department.
- (d) The department may approve, disapprove, or modify a local plan filed under Subsection (c). In determining whether to approve, disapprove, or modify a local plan, the department shall consider whether the plan:
- (1) protects fish, wildlife, water quality, and other natural resources;
  - (2) protects public safety;
  - (3) provides for adequate enforcement;
  - (4) coordinates with adjacent and overlapping jurisdictions;
  - (5) provides for and publicizes adequate public access to a protected freshwater area;
  - (6) provides for adequate public services relating to access to a protected freshwater area; and
  - (7) protects private property rights.
- (e) The department by rule may adopt additional criteria or procedures to govern approval of local plans. Lack of rules adopted under this section alone is not a sufficient basis for rejecting a local plan.
- (f) The department may conduct periodic reviews of a local plan filed under Subsection (c) to monitor the effectiveness of the plan.
- (g) A person who has reason to believe that a local plan filed under Subsection (c) does not comply with this section may file a petition for revocation of the plan with the department.

(h) The department shall revoke approval of a local plan if the department finds, as a result of a periodic review conducted under Subsection (f) or a petition for revocation filed under Subsection (g), that the plan as implemented fails to meet any of the criteria for approval established by Subsection (d).

(i) The department may adopt rules necessary to implement this section and Section 90.002, including rules relating to locations from which a person may launch or retrieve a vessel by trailer from the banks of a protected freshwater area. For purposes of this subsection, "vessel" has the meaning assigned by Section 12.101.

PARKS & WILDLIFE CODE § 90.010. Enforcement.

All peace officers of this state shall enforce the provisions of this chapter.

### **PRIVATE USES, OBSTRUCTIONS, BRIDGES, AND DAMS**

Since the days of the civil law of Spain and Mexico, obstructions of navigable streams have been forbidden. Nowadays the Texas Penal Code, the Texas Water Code, and the Texas Parks and Wildlife Code contain prohibitions against obstructing navigable streams, and the Texas Natural Resources Code forbids unauthorized private structures. State officials may take actions to remove them. An obstruction may also be unlawful as a purpresture (a legal term for an encroachment upon public rights and easements or the appropriation to private use of that which belongs to the public). Likewise, an obstruction may be subject to removal as a public nuisance.

State laws do allow state officials to permit, under certain circumstances, private uses and bridges and dams. A permit is generally required from the Parks and Wildlife Commission for any disturbance or taking of marl, sand, gravel, shell, or mudshell. The Commissioner of the General Land Office has some authority to grant easements for rights of way across navigable or state-owned stream beds for such purposes as powerlines, pipelines, and roads. A permit from the Texas Natural Resource Conservation Commission is required before anyone may build a dam or otherwise store, take, or divert state water from a navigable stream. Even on a non-navigable stream, a permit is required for a dam impounding more than 200 acre-feet of water.

### **OBSTRUCTIONS**

CIVIL LAW (from Title 28 of the third Partida)

Law 8. That No One has a Right to Build a Mill or Other Edifice on a River, by Which the Navigation of Vessels may be Obstructed.--No man has a right to dig a new canal, construct a new mill, house, tower, cabin, or any other building whatever, in rivers which are navigated by vessels, nor upon their banks, by which the common use of them may be obstructed. And if he does, whether the canal or edifice be newly or anciently made, if it interfere with such common use, it ought to be destroyed. For it is not just that the common good of all men generally should be sacrificed to the interest of some persons only.

WATER CODE § 11.096. Obstruction of Navigable Streams.

No person may obstruct the navigation of any stream which can be navigated by steamboats,

keelboats, or flatboats by cutting and felling trees or by building on or across the stream any dike, milldam, bridge, or other obstruction.

#### PENAL CODE § 42.03. Obstructing Highway or Other Passageway.

(a) A person commits an offense if, without legal privilege or authority, he intentionally, knowingly, or recklessly ... obstructs a highway, street, sidewalk, railway, waterway, elevator, aisle, hallway, entrance, or exit to which the public or a substantial group of the public has access, or any other place used for the passage of persons, vehicles, or conveyances, regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone or from his acts and the acts of others ... .

(b) For the purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

(c) An offense under this section is a Class B misdemeanor.

#### PARKS & WILDLIFE CODE § 90.008. Public Access.

(a) Except as otherwise allowed by law, a person may not restrict, obstruct, interfere with, or limit public recreational use of a protected freshwater area.

(b) This section does not allow the public to gain access to a protected freshwater area without permission of the landowner.

The "protected freshwater area" referred to above is defined in § 90.001 to be the portion of the bed, bottom, or bank of a stream navigable by statute up to the gradient boundary.

#### PURPRESTURE

Purprestures were discussed in Trice v. State, 712 S.W.2d 842 (Tex.App. -- Waco 1986, writ ref'd n.r.e.), a case concerning a private bridge across the Brazos River. The court noted (at p. 849) that a purpresture "would be subject to be removed at the instance of the State, whether the same should tend to obstruct navigation or otherwise." The court, concluding that the private bridge was a purpresture because it encroached upon the state's land without its permission, ordered that the bridge be removed.

#### NUISANCE

For an early case recognizing a private right to remove, as a nuisance, an unlawful obstruction to navigation, see Selman v. Wolfe, 27 Tex. 68 (1863).

#### OBSTRUCTION BY FENCING

Texas Attorney General Opinion S-107 (1953) addressed fishing rights of the public along a stretch of the Trinity River bordered by Mexican land grants made under the civil law in 1835. The summary of the opinion stated:

The public may use the bed and banks of the Trinity River up to the gradient boundary for fishing and may make certain uses of its banks above that line if they are held under civil law

grants. The riparian owners cannot prevent the public from gaining access to the river by means of a highway right of way by erection of a fence thereon and cannot prevent the public from going up and down the river in boats and fishing in its waters by the erection of fences across the river.

#### AUTHORITY OF COMMISSIONER OF GENERAL LAND OFFICE

#### NATURAL RESOURCES CODE § 51.291. Grants of Easements.

(a) Except as provided by Subsection (b) of this section, the commissioner [of the General Land Office] may execute grants of easements for rights-of-way across, through, and under unsold public school land, the portion of the Gulf of Mexico within the jurisdiction of the state, the state-owned riverbeds and beds of navigable streams in the public domain, and all islands, saltwater lakes, bays, inlets, marshes, and reefs owned by the state within tidewater limits for:

- (1) telephone, telegraph, electric transmission, and powerlines;
- (2) oil pipelines, including pipelines connecting the onshore storage facilities of a deepwater port ..., gas pipelines, sulphur pipelines, and other electric lines and pipelines of any nature;
- (3) irrigation canals, laterals, and water pipelines;
- (4) roads; and
- (5) any other purpose the commissioner considers to be in the best interest of the state.

(b) Consent to conduct an activity that would disturb or remove marl, sand, gravel, shell, or mudshell on or near the surface of a state-owned riverbed or the bed of a navigable stream in the public domain may be granted only under Chapter 86, Parks and Wildlife Code.

(c) Money received by the land office for the grants of easements through and under the state-owned riverbeds and beds of navigable streams in the public domain shall be deposited in a special fund account in the state treasury to be used for the removal or improvement of unauthorized structures on permanent school fund land. This fund does not impose a duty or obligation on the state to accept ownership of, remove, or improve unauthorized structures on permanent school fund land.

#### NATURAL RESOURCES CODE § 51.302. Prohibition and Penalty.

(a) No person may construct or maintain any structure or facility on land owned by the state, nor may any person who has not acquired a proper easement, lease, permit, or other instrument from the state as required by this chapter or Chapter 33 of this code and who owns or possesses a facility or structure that is now located on or across state land continue in possession of the land unless he obtains from the commissioner, the board, or the board of regents an easement, lease, permit, or other instrument required by this chapter or Chapter 33 of this code for the land on which the facility or structure is to be constructed or is located.

(b) A person who constructs, maintains, owns, or possesses a facility or structure on state land without a proper easement or lease from the state under this chapter or under Chapter 33 of this code is liable for a penalty of not less than \$50 or more than \$1,000 a day for each day that a violation occurs. The penalty shall be recovered by the commissioner under Section 51.3021 of this code or in a civil action by the attorney general.

(c) A person who owns, maintains, or possesses an unauthorized facility or structure is, for purposes of this section, the person who last owned, maintained, or possessed the facility or structure.

(d) The commissioner or attorney general may also recover from a person who constructs, maintains, owns, or possesses a facility or structure on state land without the proper easement the costs to the state of removing that facility or structure under Section 51.3021 of this code.

(e) Penalties and costs recovered under this section shall be deposited in the special fund established under Sections 52.297 and 53.155 of this code.

(f) This section is cumulative of all other applicable penalties or enforcement provisions of this code.

(g) In lieu of seeking administrative penalties or removal of the facility or structure under Section 51.3021 of this code, the commissioner may elect to accept ownership of the facility or structure as a fixture and may exercise the state's rights as owner of the facility or structure by filing notice of such ownership in the real property records of the county in which the facility or structure is located. For facilities or structures located on coastal public land and connected with the ownership of adjacent littoral property, notice of ownership shall be filed in the county in which the adjacent littoral property is located.

#### NATURAL RESOURCES CODE § 51.3021. Removal of Facility or Structure by Commissioner.

(a) The commissioner may remove and dispose of a facility or structure on land owned by the state if the commissioner finds the facility or structure to be:

(1) without the proper easement or lease from the state under Chapter 33 or 51 of this code; or

(2) an imminent and unreasonable threat to public health, safety, or welfare.

(b)-(g) [procedures for removal].

#### AUTHORITY OF GOVERNOR

#### NATURAL RESOURCES CODE § 11.076(a).

If the governor is credibly informed that any portion of the public land or the land which belongs to any of the special funds has been enclosed or that fences have been erected on the land in violation of law, he may direct the attorney general to institute suit in the name of the state for the recovery of the land, damages, and fees.

#### AUTHORITY OF ATTORNEY GENERAL

#### NATURAL RESOURCES CODE §11.077. Suit Against Adverse Claimant.

If any public land is held, occupied, or claimed adversely to the state or to any fund of the state by any person or if land is forfeited to the state for any reason, the attorney general shall file suit for the land, for rent on the land, and to recover damages to the land.

#### PERMIT FOR DISTURBING OR TAKING OF MARL, SAND, GRAVEL, ETC.

#### PARKS & WILDLIFE CODE § 86.001. Management and Protection.

The [Parks and Wildlife] commission shall manage, control, and protect marl and sand of commercial value and all gravel, shell, and mudshell located within the tidewater limits of the

state, and on islands within those limits, and within the freshwater areas of the state not embraced by a survey of private land, and on islands within those areas.

PARKS & WILDLIFE CODE § 86.002(a).

No person may disturb or take marl, sand, gravel, shell, or mudshell under the management and protection of the commission or operate in or disturb any oyster bed or fishing water for any purpose other than that necessary or incidental to navigation or dredging under state or federal authority without first having acquired from the commission a permit authorizing the activity.

PERMITTING OF BRIDGES

Trice v. State, 712 S.W.2d 842 (Tex.App. -- Waco 1986, writ ref'd n.r.e.) discussed who was allowed to bridge Texas streams under the laws then in effect. The court noted (at p. 847):

The State, through legislative action, has also authorized certain entities to erect bridges over the navigable waters within its boundaries. [citing statutes pertaining to counties, municipalities, railroads, and toll road corporations] However, except for its tidal waters, the State has not authorized an individual to construct a bridge over its navigable waters. Furthermore, the State has not created an agency or designated any public official to regulate bridge construction over its navigable waters.

Under a change in law in 1993, the Commissioner of the General Land Office was granted limited permitting power to allow private road crossings over public streams. See Natural Resources Code § 51.291 (quoted in section on OBSTRUCTIONS).

PERMITTING OF DAMS  
BY TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

WATER CODE § 11.121. Permit Required.

Except as provided in Sections 11.142, 11.1421, and 11.1422 of this code, no person may appropriate any state water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from the commission to make the appropriation.

WATER CODE § 11.142. Permit Exemptions.

(a) Without obtaining a permit, a person may construct on the person's own property a dam or reservoir with normal storage of not more than 200 acre-feet of water for domestic and livestock purposes. A person who temporarily stores more than 200 acre-feet of water in a dam or reservoir described by this subsection is not required to obtain a permit for the dam or reservoir if the person can demonstrate that the person has not stored in the dam or reservoir more than 200 acre-feet of water on average in any 12-month period. This exemption does not apply to a commercial operation.

[*text of subsection (b) as added by HB 247, Chapter 1427, Acts of the 77th Legislature, 2001:*]

(b) Without obtaining a permit, a person may construct on the person's property in an

unincorporated area a dam or reservoir with normal storage of not more than 200 acre-feet of water for commercial or noncommercial wildlife management, including fishing but not including fish farming.

[text of subsection (b) as added by SB 2, Chapter 966, Acts of the 77th Legislature, 2001:]

(b) Without obtaining a permit, a person may construct on the person's property a dam or reservoir with normal storage of not more than 200 acre-feet of water for fish and wildlife purposes if the property on which the dam or reservoir will be constructed is qualified open-space land, as defined by Section 23.51, Tax Code. This exemption does not apply to a commercial operation.

(c) Without obtaining a permit, a person who is drilling and producing petroleum and conducting operations associated with drilling and producing petroleum may take for those purposes state water from the Gulf of Mexico and adjacent bays and arms of the Gulf of Mexico in an amount not to exceed one acre-foot during each 24-hour period.

(d) Without obtaining a permit, a person may construct or maintain a reservoir for the sole purpose of sediment control as part of a surface coal mining operation under the Texas Surface Coal Mining and Reclamation Act (Article 5920-11, Vernon's Texas Civil Statutes).

WATER CODE § 11.1421. Permit Exemption for Mariculture Activities [Using Brackish or Marine Water].

WATER CODE § 11.1422. Permit Exemption for Historic Cemeteries.

### OWNERSHIP OF BEDS OF NAVIGABLE STREAMS

The beds of navigable streams are generally owned by the state, in trust for the public. Most of the land alongside navigable streams is privately owned. The beds of non-navigable streams are usually privately owned, and public use of the stream may be forbidden by the private landowner. However, the state owns the beds of perennial streams, regardless of navigability, where the original land grant was made under the civil law prior to December 14, 1837.

Under a 1929 law popularly known as the "Small Bill," the state in some situations has relinquished to the adjoining landowner certain property rights in the bed of a navigable stream. However, the public may still use these navigable streams. The law's major effect was to give some adjoining landowners the royalties from oil and gas under the stream bed. Significantly, the Small Bill declared that it did not impair the rights of the general public and the State in the waters of streams. Thus, along a navigable stream, even if the landowner's deed includes the bed, and taxes are being paid on the bed, the public retains its right to use it as a navigable stream. The Small Bill also retained the state's sand and gravel interests.

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STATE OWNERSHIP IN TRUST FOR THE PUBLIC

[O]ur decisions are unanimous in the declaration that by the principles of the civil and common law soil under navigable waters was treated as held by the state or nation in trust for the whole people.

State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065, 1076 (1932)

The waters of public navigable streams are held by the State in trust for the public, primarily for navigation purposes.

Carrithers v. Terramar Beach Com. Imp. Ass'n, 645 S.W.2d 772, 774 (Tex. 1983)

[T]itle to [a navigable stream's] waters is in the state in trust for the public. ... The waters are in trust for the public: First, for navigation purposes, which concerns all the public and is ordinarily regarded as a superior right

Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 468 (1926)

STATE OWNERSHIP OF PERENNIAL STREAMS UNDER THE CIVIL LAW

Manry v. Robison, 122 Tex. 213, 231; 56 S.W.2d 438, 446 (1932) states:

The status of the law in Texas when we adopted the common law as the rule of decision in 1840 was as follows: Texas owned the beds of all *perennial streams, regardless of navigability*, whether grants of land adjacent were made by Spain and Mexico prior to March 2, 1836, or by the Republic of Texas prior to the Act of [December 14,] 1837, *by virtue of the civil law of Mexico*. ... The Republic also owned the beds of all streams touching grants made subsequent to that date and prior to the Act of 1840, *whether perennial or not*, where the beds were as wide as 30 feet, under the Mexican civil law as modified by the Act of 1837.

For an example of a stream found to be perennial, see Heard v. Town of Refugio, 103 S.W.2d 728, 729-30 (Tex. 1937).

THE SMALL BILL

The Small Bill is codified as Article 5414a of the Revised Civil Statutes of Texas. It allows, under certain circumstances, a landowner with insufficient upland acreage in a land grant to make up the difference by claiming acreage from the stream bed.

One provision of the Small Bill states:

[N]othing in this Act contained shall impair the rights of the general public and the State in the waters of streams

In a 1932 case which addressed the nature of the private ownership granted by the Small Bill, the Texas Supreme Court noted:

The reservation to the state and the public of the waters of streams would, under well-established rules of construction, carry with the reservation all things necessary to the practicable and substantial use of and enjoyment of the things reserved.

State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065, 1077 (1932).

Texas Attorney General's Opinion S-208 (1956) concluded that the general public is authorized to walk down the dry or submerged bed of a navigable stream--even if its bed is privately owned by virtue of the Small Bill (Article 5414a, R.C.S.)--for the purpose of seining and fishing in water holes in the bed of the river. Such conduct was not a criminal trespass under

the definition of the crime then in effect.

DAMS AND THE SMALL BILL

See Garrison v. Bexar-Medina-Atascosa Counties W. I. D., 404 S.W.2d 376 (Tex.Civ. App.--Austin 1966), holding approved and writ ref'd, n.r.e., 407 S.W.2d 771 (Tex. 1966). The headnotes to the opinions summarize the case as follows:

The Small Bill which confirmed patents and awards to beds of water courses and navigable streams did not vest patentees and their assignees with such title as would constitute beds of navigable streams their "own property" within meaning of statute permitting construction of dam or reservoir on their own property without a permit.

Statute permitting landowners to construct dam on their own property without permit has no application to a stream which is navigable as defined by statute relating to navigable streams which shall not be crossed by the lines on a survey.

See Water Code § 11.142 (formerly in Art. 7500a) and Natural Resources Code § 21.001 (formerly in Art. 5302).

NAVIGATION RIGHTS IRRESPECTIVE OF OWNERSHIP

A lawsuit was brought by some landowners who claimed ownership of the bed of the Upper Guadalupe. They contended that their titles were impaired when the Texas Water Rights Commission found (and the trial court affirmed) that the stream is navigable by statute. The appeals court rejected the landowners' contention, stating:

The title of owners of beds of streams by the State or landowners does not determine property rights in the water. Assuming that the property owners here involved owned the stream beds, this does not deprive the State from reasonable regulations and control of navigable streams. A property owner, including holders of riparian rights, cannot unreasonably impair the public's rights of navigation and access to and enjoyment of a navigable water course. Adjudication of Upper Guadalupe Segment of Guadalupe River Basin, 625 S.W.2d 353, 362 (Tex.Civ.App. -- San Antonio 1981), aff'd, 642 S.W.2d 438 (1982).

THE GRADIENT BOUNDARY

Texas courts have adopted the "gradient boundary" as the usual dividing line between public ownership of a stream's bed and lower bank area, and private ownership of the higher bank area and the uplands beyond. Thus, there is generally no question as to the public's right to use the bank area up to the gradient boundary. Sometimes called the "mean" gradient boundary, it is located midway between the lower level of the flowing water that just reaches the so-called "cut bank," and the higher level of the flowing water that just does not overtop the cut bank. The cut bank is located at the outer edge of a stream's bed, separating the bed from the adjacent upland and confining the waters to a definite channel. Surveying the gradient boundary is a complex task performable only by specially trained persons.

JUDICIAL DESCRIPTION OF THE GRADIENT BOUNDARY

The gradient boundary concept was developed in a U.S. Supreme Court case involving the boundary between Oklahoma and Texas along the south bank of the Red River. After considering the terms of an 1819 treaty between the United States and Spain, the Supreme Court concluded:

Upon the authority of these cases, and upon principle as well, we hold that the bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it. When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys, which have the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

The conclusion that the boundary intended is on and along the bank and not at low-water mark or any other point within the river bed has full confirmation in available historical data respecting the negotiations which attended the framing and signing of the treaty. Oklahoma v. Texas, 260 U.S. 606, 631-32, 43 S.Ct. 221, 225, 67 L.Ed.428 (1923).

In Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, 467 (1926), the Texas Supreme Court used language much like that used by the U.S. Supreme Court to describe the bed and the bank of a stream:

A water course, river, or stream consists of a bed, banks, and a stream of water. ... The bed of a stream is that portion of its soil which is alternatively covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during an entire year, without reference to the extra freshets of the winter or spring or the extreme drouths of the summer or autumn. ... The banks of a stream or river are the water-washed and relatively permanent elevations or acclivities at the outer lines of the river bed which separate the bed from the adjacent upland, whether valley or hill, and served to confine the waters within the bed and preserve the course of the river when they rise to the highest point at which they are still confined to a definite channel.

In a 1935 case, the Texas Supreme Court endorsed the gradient boundary concept, stating:

The boundary line is a gradient of the flowing water in the river. It is located midway between the lower level of the flowing water that just reaches the cut bank, and the higher level of it that just does not overtop the cut bank. Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 447 (1935).

CRIMINAL TRESPASS

As part of the navigation right, one may use the bed and, to a limited degree, the banks of a navigable stream. However, the use of the private property adjacent to a stream can be a criminal trespass.

Under Texas Penal Code § 30.05 (see below), the definition of criminal trespass is more complex than the simple notion of being on someone else's land. One way to commit the offense is to enter upon another's property even though one has notice that the entry is forbidden. Another way is to remain on another's property, refusing to leave after receiving notice to depart.

Notice can be given in any one of five forms. First, it can be an oral or written communication by the owner or someone acting for the owner. Second, it can be a fence or other enclosure obviously designed to exclude intruders or to contain livestock. Third, notice can be in the form of sign(s) posted on the property or at the entrance to the building, reasonably likely to be noticed, indicating that entry is forbidden. Fourth, notice can be in the form of readily visible purple paint marks of proper size and placement on trees or posts spaced no more than 100 feet apart on forest land or 1,000 feet apart on non-forest land. Fifth, notice can be the visible presence on the property of a crop grown for human consumption that is under cultivation, in the process of being harvested, or marketable if harvested at the time of entry.

Criminal trespass is normally a Class B misdemeanor with a fine up to \$2,000 and a jail term up to 180 days. If the trespass is on agricultural land, and the trespasser is apprehended within 100 feet of the boundary of the land, the offense is a Class C misdemeanor with a fine up to \$500. Agricultural land is broadly defined and includes land suitable for growing plants (for food, feed, fiber, seed, etc.) or trees or for keeping farm or ranch animals. However, under certain conditions--including if one has a deadly weapon on or about one's person--the offense is a Class A misdemeanor with a fine up to \$4,000 and a jail term up to one year.

PENAL CODE § 30.05. Criminal Trespass.

(a) A person commits an offense if he enters or remains on or in property, including an aircraft or other vehicle, of another without effective consent or he enters or remains in a building of another without effective consent and he:

- (1) had notice that the entry was forbidden; or
- (2) received notice to depart but failed to do so.

(b) For purposes of this section:

- (1) "Entry" means the intrusion of the entire body.
- (2) "Notice" means:

- (A) oral or written communication by the owner or someone with apparent authority to act for the owner;
- (B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock;
- (C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden;
- (D) the placement of identifying purple paint marks on trees or posts on the property, provided that the marks are:
 - (i) vertical lines of not less than eight inches in length and not less than one inch in width;
 - (ii) placed so that the bottom of the mark is not less than three feet from the

- ground or more than five feet from the ground; and
- (iii) placed at locations that are readily visible to any person approaching the property and no more than:
 - (a) 100 feet apart on forest land; or
 - (b) 1,000 feet apart on land other than forest land; or
- (E) the visible presence on the property of a crop grown for human consumption that is under cultivation, in the process of being harvested, or marketable if harvested at the time of entry.
- (3) "Shelter center" has the meaning assigned by Section 51.002, Human Resources Code.
- (4) "Forest land" means land on which the trees are potentially valuable for timber products.
- (5) "Agricultural land" has the meaning assigned by Section 75.001, Civil Practice and Remedies Code.
- (6) "Superfund site" means a facility that:
 - (A) is on the National Priorities List established under Section 105 of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. Section 9605); or
 - (B) is listed on the state registry established under Section 361.181, Health and Safety Code.
- (c) It is a defense to prosecution under this section that the actor at the time of the offense was a fire fighter or emergency medical services personnel, as that term is defined by Section 773.003, Health and Safety Code, acting in the lawful discharge of an official duty under exigent circumstances.
- (d) An offense under Subsection (e) is a Class C misdemeanor unless it is committed in a habitation or unless the actor carries a deadly weapon on or about the actor's person during the commission of the offense, in which event it is a Class A misdemeanor. An offense under Subsection (a) is a Class B misdemeanor, except that the offense is a Class A misdemeanor if:
 - (1) the offense is committed:
 - (A) in a habitation or a shelter center; or
 - (B) on a Superfund site; or
 - (2) the actor carries a deadly weapon on or about his person during the commission of the offense.
- (e) A person commits an offense if without express consent or if without authorization provided by any law, whether in writing or other form, the person:
 - (1) enters or remains on agricultural land of another;
 - (2) is on the agricultural land and within 100 feet of the boundary of the land when apprehended; and
 - (3) had notice that the entry was forbidden or received notice to depart but failed to do so.
- (f) It is a defense to prosecution under this section that:
 - (1) the basis on which entry on the property or land or in the building was forbidden is that entry with a handgun was forbidden; and
 - (2) the person was carrying a concealed handgun and a license issued under Subchapter H, Chapter 411, Government Code, to carry a concealed handgun of the same category the person was carrying.

USE OF STREAM BANK TO SCOUT AND PORTAGE HAZARDS

Historically, the law of Texas, both in statute and in common law, has protected public rights relating to navigable streams. Although until recently there appeared to be no Texas statute or case specifically dealing with scouting or portaging, several aspects of Texas law seem to support the proposition that a portage right is a necessary corollary to the fundamental right of navigation. The authorities set out below support the principle that when a person floating a navigable stream encounters an obstruction like a log jam or a dam, or some other potential safety hazard, the navigator has a limited privilege to go onto adjoining private land to scout and if necessary make a safe, reasonable portage. The intrusion on private land should be minimized. Other states that have addressed the issue concur in recognizing a portage right. Of course, as is sometimes the case, particular or peculiar fact situations may alter the application of general concepts in specific instances. A recent Texas statute acknowledges that stream users do portage over or around barriers and scout obstructions, and it precludes such use from creating a prescriptive easement over the private property.

There is a fundamental distinction between using private land to portage around an obstacle and using private land as a short cut to get to or from a river. In Texas one has no right in general to cut through private land simply for convenient access to or from a stream.

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## PORTAGING OBSTRUCTIONS AS A TRADITIONAL PART OF NAVIGATION

Obstructions have always been a natural part of streams. As the waters flow through the land, streams become obstructed by fallen trees, log jams, rapids, sand bars, shoals, etc. Historical accounts of navigating streams often mention the hazards and portages encountered. See, for example, Kenneth G. Roberts and Philip Shackleton, The Canoe, a History of the Craft from Panama to the Arctic (1983). Thus, portaging has always been a part of navigation.

The U.S. Supreme Court has explained that under the federal test of navigability (involving capacity for use in interstate commerce) the presence of a portage does not defeat navigability:

Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.

Economy Light & Power Co. v. United States, 256 U.S. 113, 122, 41 S.Ct. 409, 412 (1921).

As discussed elsewhere, Texas law has long recognized the public's navigation right, a right of free passage along navigable streams. Texas law disfavors obstructions to navigation. The right to navigate would be meaningless if the presence of a single hazard--a fallen tree, for example--could legally "cut off" navigability.

## ADVICE TO SCOUT AND PORTAGE CONTAINED IN NATIONAL PUBLICATIONS

The American Red Cross, Canoeing and Kayaking (1981) pp. 5.12-5.15.

Dave Harrison, Sports Illustrated Canoeing (1981) pp. 154-155.

William "Bill" Hillcourt, Official Boy Scout Handbook (1979) p. 161.

## ADVICE TO SCOUT AND PORTAGE CONTAINED IN LOCAL PUBLICATIONS

Texas Rivers and Rapids, a commercial guide describing commonly used waterways, has been through several editions over the past three decades. It advises a number of portages on various streams. Volume II, published in 1973, includes this advice in a discussion of river currents: "Never run a dam or drop unless absolutely necessary." The book cautions, for example, of a portage along the Clear Fork of the Trinity River near Fort Worth:

Roll's Dam is approximately ten feet high and should not be run. It is an easy portage on the right bank adjacent to the dam at low water levels.

At high levels, the portage is longer and must be started on the left bank quite a way upstream from the dam. Use the left bank portage only when necessary because you will have to travel on private property behind a house.

Volume VI of Texas Rivers and Rapids, published in 1983, warns of particular hazards potentially requiring portage on a number of rivers, including the Brazos, the Colorado, the Frio, the Guadalupe, the Leon, the Neches, the Pecos, the Rio Grande, the San Marcos, and the Trinity. It also cautions of log jams on several streams.

The Big Bend Natural History Association in cooperation with the National Park Service publishes guides to floating the Rio Grande, not only within Big Bend National Park but also downstream along the "Lower Canyons." The Lower Canyons guide advises boaters of several locations where challenging rapids should be scouted or portaged, including using private land along the Texas side of the river.

The Lower Colorado River Authority has published a guide to the Lower Colorado, from Austin to the Gulf of Mexico. In its discussion of public and private river rights, the guide contains the following passage (p. 13):

Along the Colorado River, almost all the land outside of the riverbed is privately owned. However, if a boater encounters a hazard like a log jam, low-water dam or some other obstruction, the boater may get out and scout to see whether there is a safe route through and portage if boating would be dangerous. The intrusion on private land should at all times be minimized.

The Greater New Braunfels Chamber of Commerce distributes the "Guadalupe River Scenic Area Information Map and Pamphlet." It highlights the time-honored advice, "WHEN IN DOUBT STOP AND SCOUT." The map of the Lower Guadalupe marks the locations of dangerous falls, rapids, and dams, as well as the low bridge at Gruene. It also states, "DO NOT RUN HORSE SHOE FALLS."

The City of New Braunfels has posted maps of the popular Comal River at several public access points. Those maps note two spots where "Safe By-Pass Steps" are available to allow passage around rapids. One spot is just above the tube chute, and the other is just above the old Camp Warnecke dam (now adjacent to the Schlitterbahn water park).

## USE OF STREAM BANKS UNDER CIVIL LAW

The civil law (the law of Spain and Mexico, and the early days of the Republic of Texas) recognized the right of a navigator to use the banks, even though privately owned, for various purposes associated with navigation. The civil law still applies to particular land grants. The permitted activities set out in law 6 of title 28 of the third Partida (quoted below) amount to what might be considered today as fairly substantial uses. It is difficult to imagine that a generally less intrusive use involved in a portage would be forbidden.

Law 6. That Every One may Make Use of Ports, Rivers, and Public Roads.--Rivers, ports, and public roads belong to all men in common; so that strangers coming from foreign countries may make use of them, in the same manner as the inhabitants of the place where they are. And though the dominion or property (senorio) of the banks of rivers belongs to the owner of the adjoining estate, nevertheless, every man may make use of them to fasten his vessel to the trees that grow there, or to refit his vessel, or to put his sails or merchandise there. So fishermen may put and expose their fish for sale there, and dry their nets, or make use of the banks for all like purposes, which appertain to the art or trade by which they live.

## STATUTORY ACKNOWLEDGMENT OF PORTAGING AND SCOUTING

PARKS & WILDLIFE CODE § 90.007. Landowner Rights.

- (a) A prescriptive easement over private property cannot be created by recreational use of a protected freshwater area, including by portage over or around barriers, scouting of obstructions, or crossing of private property to or from a protected freshwater area.
- (b) Nothing in this section shall limit the right of a person to navigate in, on, or around a protected freshwater area.

## THE COMMON LAW

Since January 20, 1840, the common law has been included as part of the rule of decision for Texas courts. The pertinent statute now reads:

The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state.  
Texas Civil Practice and Remedies Code § 5.001.

As explained by the Texas Supreme Court, this statute is not an adoption of the common law as it was in force in England in 1840, but rather of the common law as declared by the courts of the different states of the United States. See Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913).

## RECOGNITION BY OTHER STATES

A right to portage has been explicitly recognized in a number of states in a variety of contexts. For example:

Montana. The Supreme Court of Montana in construing Montana law has stated:

Therefore, we hold that the public has a right to use state-owned waters to the point of the high-water mark except to the extent of barriers in the waters. In the case of barriers, the public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights. ... [T]he right to portage must be accomplished in the least intrusive manner possible.

Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 172 (Mont. 1984).

Ohio. The Ohio Attorney General has concluded:

The reasonably necessary entry of a boater upon land adjacent to a dam obstructing a navigable watercourse in order to portage his boat around the dam by the nearest practical route and in a reasonable manner constitutes a privileged intrusion on the property of the landowner.

Op. Ohio Att'y Gen. No. 80-094 (1980).

Nebraska. A Nebraska statute allows an affirmative defense to a criminal trespass charge if:

The actor was in the process of navigating or attempting to navigate with a nonpowered vessel any stream or river in this state and found it necessary to portage or otherwise transport the vessel around any fence or obstructions in such stream or river.

Neb. Rev. Stat. § 28-522.

New York. Under New York law, the beds of most navigable streams are privately held, subject to the public's rights. A recent court opinion rejected a plaintiff landowner's attempt to obtain a summary judgment for trespass against boaters who had scouted and portaged in the bed of a stream considered navigable by the court:

Pursuant to the public trust doctrine, the public right of navigation in navigable waters supersedes plaintiff's private right in the land under the water. ... Plaintiff contends that the public right of navigation is limited to riding in boats and does not include the right to get out of a canoe and walk in the bed of the river to guide the canoe through shallow water, avoid rocks or portage around rapids. According to plaintiff, the absence of any case law specifically including such activities in the public right of navigation establishes that no such right exists. Defendants contend that the public right of navigation includes the right to engage in reasonable activities that are incidental to and necessary for navigating the river. The absence of case law, according to defendants, is the result of no one ever having previously claimed that the public right of navigation did not include the use of the river bed to portage or engage in other activities incidental to and necessary for navigation. We agree with defendants.

Adirondack League Club Inc. v. Sierra Club, 615 N.Y.S.2d 788, 792 (A.D. 3 Dept. 1994).

On appeal to New York's highest court, the Court of Appeals stated:

[T]he existence of occasional natural obstructions do not destroy the navigability of a river ... . Following naturally from this proposition is that in order to circumvent these occasional obstacles, the right to navigate carries with it the incidental privilege to make use, when absolutely necessary, of the bed and banks, including the right to portage on riparian lands ...

. Adirondack League Club Inc. v. Sierra Club, 684 N.Y.S.2d 168, 173 (Ct.App. 1998).

## TEXTS SUMMARIZING THE COMMON LAW

Legal texts summarizing the common law typically contain statements of legal principles supporting portaging. For example, the American Law Institute has recognized a limited privilege by a navigator to enter the otherwise private land next to a river:

... The privilege of navigation carries with it the ancillary privilege to enter on riparian land to the extent that this is necessary for the accomplishment of the purpose of the principal privilege.

Restatement (Second) of Torts § 193, Comment d (1965).

The portage right is a specific application of this privilege. Of course, a navigator's right does not extend to a general sort of wandering or sightseeing upon a pasture near the river, because such wandering or sightseeing on private land is not necessary to carry out the navigation right.

## A RIPARIAN OR DAM BUILDER'S PERMIT DOES NOT PRECLUDE NAVIGATION

A Texas case has explained that the state's grant of permission to dam a navigable stream does not include permission to preclude navigation:

It gave no title to the water, but only the right to divert and use so much of the water appropriated as might be necessarily required when beneficially used for the purpose for which it was appropriated. ... It gave no title to the fish in the water of the lake, no exclusive right to take the fish from the lake, and no right to interfere with the public in their use of the river and its water for navigation, fishing, and other lawful purposes further than interference necessarily result[ing] from the construction and maintenance of the dams and lakes in such manner as reasonably to accomplish the purpose of the appropriation.

Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 446 (1935).

As to private impairment of navigation, a recent Texas case stated:

The title of owners of beds of streams by the State or landowners does not determine property rights in the water. Assuming that the property owners here involved owned the stream beds, this does not deprive the State from reasonable regulations and control of navigable streams.

A property owner, including holders of riparian rights, cannot unreasonably impair the public's rights of navigation and access to and enjoyment of a navigable water course.

Adjudication of Upper Guadalupe Segment of Guadalupe River Basin, 625 S.W.2d 353, 362 (Tex.Civ.App. -- San Antonio 1981), aff'd, 642 S.W.2d 438 (1982).

## THE CRIMINAL LAW

There seems to be no reported case in Texas involving a prosecution for trespass for a navigator's portage. The "necessity defense" could be asserted by a navigator charged with criminal trespass during a portage. Texas Penal Code § 9.22 (see below) allows conduct which would otherwise be a crime to be considered justified if three conditions are met. Note that this

defense requires a weighing of harms. Assuming there is no special harm to the private property, going onto private land for a reasonable portage would fall within this defense.

PENAL CODE § 9.22. Necessity.

Conduct is justified if:

- (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prescribing the conduct; and
- (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

PENAL CODE § 1.07(a)(25):

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

#### CONSIDERATION OF THE NAVIGATION RIGHT AS AN EASEMENT

In various jurisdictions the navigation right has sometimes been compared to or referred to as an easement. A Texas legal text has stated the following about easements in general:

Every easement carries with it the right to do such things as are reasonably necessary for the full enjoyment of the easement, and the extent to which incidental rights may be exercised depends on the object and purpose of the grant and whether such rights are limited by the terms of the grant. However, the exercise of the right must be such as will not injuriously increase the burden on the servient owner, and there may be no use that will interfere with the servient owner's free enjoyment of that part of the property not affected by the easement. The owner of an easement and the possessor of the servient estate are to exercise their respective rights and privileges in a spirit of mutual accommodation.  
31A Tex.Jur.3d Easements & Licenses in Real Property § 64 (1994).

#### COMMON LAW AS THE PERFECTION OF REASON

It has been asserted that the common law is “the perfection of reason.” See Welder v. State, 196 S.W. 868, 870 (Tex.Civ.App.--Austin 1917, writ ref'd). In light of the fundamental right of public navigation, it is not reasonable to expect a navigator to risk life, limb, or property by attempting to navigate through a hazard. Past and present Texans have used their common sense to scout and if necessary portage obstructions along Texas rivers.

# The Texas Constitution

## ARTICLE I, SECTION 13

### EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

## ARTICLE XVI, SECTION 59(a)

### CONSERVATION AND DEVELOPMENT OF NATURAL RESOURCES AND PARKS AND RECREATIONAL FACILITIES; CONSERVATION AND RECLAMATION DISTRICTS

(a) The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semiarid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, **the navigation of its inland and coastal waters**, and the preservation and conservation of all such natural resources of the State **are each and all hereby declared public rights** and duties; and the Legislature shall pass all such laws as may be appropriate thereto. (emphasis added)

## NATURAL RESOURCES CODE

### § 51.071. FORFEITURE OF LAND.

(a) If principal and interest on a sale of land is not paid when due, the land is subject to forfeiture by the commissioner by entry on the wrapper containing the papers "Land Forfeited" or similar words, the date of the forfeiture, and the official signature of the commissioner.

(b) After the entry is made on the wrapper, the land and all payments that have been made for it are forfeited to the state, and the land may be offered for sale on a subsequent sale date.

### § 51.172. DEFINITIONS. In this subchapter:

...  
(6) "Vacancy" means an area of unsurveyed public school land that:

(A) is not in conflict on the ground with land previously titled, awarded, or sold;

(B) has not been listed on the records of the land office as public school land; and

(C) was not, on the application commencement date:

(i) subject to an earlier subsisting application;

(ii) subject to a vacancy application denied with prejudice;

(iii) the subject of pending litigation relating to state ownership or possession of the land;

or

(iv) subject to a previous vacancy application that has been finally adjudicated by the commissioner or a court of this state or the United States.

### § 51.246. ACQUISITION OF DEED OF ACQUITTANCE TO EXCESS ACREAGE.

(a) If the area of a tract of land that is titled or patented exceeds the quantity provided in the title or patent and if under the existing law the title to all or a part of the tract may be affected by the existence of the excess acreage, the person who owns the survey or portion of the survey or has an interest in it may pay for the total excess acreage in the survey or the total excess in a given tract out of the patented or titled survey at the price fixed by the board.

(b) Any person who owns an interest in a titled or patented survey or any portion of a titled or patented survey in which excess acreage is located and who desires to pay for the excess acreage shall file with the commissioner a request for a determination of Market value by an appraiser with corrected field notes in the form provided by law, together with a sworn statement of facts relating to his right to purchase and other evidence of his right to purchase which may be required by the commissioner. The corrected field notes shall describe the patented tract, and if purchasing excess in a portion of a tract, shall include a description of the portion in which the applicant is making application to purchase excess.

(c) If it appears that excess acreage actually exists and that the applicant is entitled to obtain it under the law, the commissioner shall execute a deed of acquittance covering the land in the name of the original patentee or his assignees with a mineral reservation or with no mineral reservation accordingly as may have been the case when the survey was titled or patented.

(d) The transfer shall inure distributively to the benefit of the lawful owners of the land in proportion to their holdings.

TEXAS RULES OF EVIDENCE

ARTICLE II. JUDICIAL NOTICE

TRE 106 - 201



of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvii). Source: FRE 106. This rule is the same as FRE 106, with one modification. Under FRE 106, a party may require its opponent to introduce evidence contrary to the latter's own case. The Committee believed it was better to permit the party to introduce such evidence contemporaneously with the introduction of the incomplete evidence. TRCE 106 does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of his own case. Cf. Tex. Code Crim.P. art. 38.24. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirement.

*Jones v. Colley*, 820 S.W.2d 863, 866 (Tex.App.—Texarkana 1991, writ denied). TRE 106, the rule of optional completeness, "is not enforced by excluding the partial statement, but by allowing the opposing party to contemporaneously introduce any other part of the statement that should be considered with the portion introduced by the proponent."

TRE 107. RULE OF OPTIONAL COMPLETENESS

When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given. "Writing or recorded statement" includes depositions.

Comment to 1998 change: This rule is the former Criminal Rule 107 except that the example regarding "when a letter is read" has been relocated in the rule so as to more accurately indicate the provision it explains. While this rule appeared only in the prior criminal rules, it is made applicable to civil cases because it accurately reflects the common law rule of optional completeness in civil cases.

See Cochran, *Texas Rules of Evidence Handbook*, p. 123 (2003).

History of TRE 107 (criminal): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxiv). Adopted eff. Sept. 1, 1986 by order of Dec. 18, 1985 (701-02 S.W.2d [Tex.Cases] xxxiv).

ARTICLE II. JUDICIAL NOTICE

TRE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing Jury.** In civil cases, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In criminal cases, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

See CPRC §38.004; *Commentaries*, "Motion for Judicial Notice," ch. 5-L; Cochran, *Texas Rules of Evidence Handbook*, p. 130 (2003).

History of TRE 201 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] xxxv). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] xxxvii). Source: FRE 201.

*Office of Pub. Util. Counsel v. PUC*, 878 S.W.2d 598, 600 (Tex.1994). "To be the proper subject of judicial notice, a fact must be 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Judicial notice is mandatory if 'requested by a party and [the court is] supplied with the necessary information.' A court of appeals has the power to take judicial notice for the first time on appeal. ... The authenticity and contents of the PUC ratemaking order are capable of accurate and ready determination...."

*Higginbotham v. General Life & Acc. Ins. Co.*, 796 S.W.2d 695, 696 (Tex.1990). "The trial court could properly take judicial notice that ... March 18, 1986 ... was not a statutory holiday."

*Coward v. Gateway Nat'l Bank*, 525 S.W.2d 857, 859 (Tex.1975). CPRC chapter 38 "applies only in suits on one or more of the claims described in [CPRC §38.001]. [¶] [T]he Legislature authorized the court, in non-jury cases, to take judicial notice of [attorney fees]. [T]he court may examine the case file and is to make a determination of the amount of attorney's fees even if no other evidence is offered. This responsibility may be discharged by the trial judge in his role of trier of fact in the conventional trial of a non-jury case but not in passing on a motion for summary judgment."

**TEXAS RULES OF EVIDENCE**  
**ARTICLE VII. OPINIONS & EXPERT TESTIMONY**  
**TRE 615 - 702**



(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Comment to 1998 change: This is prior Rule of Criminal Evidence 614.

See Cochran, *Texas Rules of Evidence Handbook*, p. 657 (2003).

History of TRE 615 (criminal): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lviii). Adopted eff. Sept. 1, 1986 by order of Dec. 18, 1985 (701-02 S.W.2d [Tex.Cases] l).

**ARTICLE VII. OPINIONS & EXPERT TESTIMONY**

**TRE 701. OPINION TESTIMONY BY LAY WITNESSES**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

See Cochran, *Texas Rules of Evidence Handbook*, p. 668 (2003).

History of TRE 701 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 701.

*Porras v. Craig*, 675 S.W.2d 503, 505 (Tex.1984). "[F]or a property owner to qualify as a witness to the damages to his property, his testimony must show that it refers to market, rather than intrinsic or some other value of the property. This requirement is usually met by asking the witness if he is familiar with the market value of his property."

*Texas DPS v. Struve*, 79 S.W.3d 796, 803 (Tex. App.—Corpus Christi 2002, pet. denied). "A police officer does not need to be an expert to express an opinion as to whether a person he observed is intoxicated. However, if the officer bases his opinion not only on observations, but also on his training and experience, then his qualifications must be established under rule 702."

*Whalen v. Condominium Consulting & Mgmt. Servs.*, 13 S.W.3d 444, 448 (Tex.App.—Corpus Christi 2000, pet. denied). "Lay opinion is adequate to prove causation where general experience and common sense enables a laymen to determine, with reasonable probability, the causal relationship between the event and the condition."

*Coker v. Burghardt*, 833 S.W.2d 306, 309 (Tex. App.—Dallas 1992, writ denied). "A witness who familiarizes himself with the reasonable car repair costs in a given county can give his opinion about what those costs might be."

*City of San Antonio v. Vela*, 762 S.W.2d 314, 321 (Tex.App.—San Antonio 1988, writ denied). "In general, a witness need not be an expert in medical matters to state an opinion as to his own physical health."

**TRE 702. TESTIMONY BY EXPERTS**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

See *Commentaries*, "Motion to Exclude Expert," ch. 5-M; "Introducing Evidence," ch. 8-C; "Objecting to Evidence," ch. 8-D; Cochran, *Texas Rules of Evidence Handbook*, p. 682 (2003).

History of TRE 702 (civil): Amended eff. Mar. 1, 1998, by order of Feb. 25, 1998 (960 S.W.2d [Tex.Cases] lix). Adopted eff. Sept. 1, 1983, by order of Nov. 23, 1982 (641-42 S.W.2d [Tex.Cases] lv). Source: FRE 702.

*Qualification of Expert*

*Broders v. Heise*, 924 S.W.2d 148, 152 (Tex.1996). "[E]very licensed medical doctor [is not] automatically qualified to testify as an expert on every medical question. At 153: [T]he offering party [must] establish that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." See also *Roberts v. Williamson*, 111 S.W.3d 113, 121 (Tex.2003).

*Havner v. E-Z Mart Stores*, 825 S.W.2d 456, 460 n.4 (Tex.1992). "An investigating officer may properly testify as to causation."

*Schindler Elevator Corp. v. Anderson*, 78 S.W.3d 392, 402 (Tex.App.—Houston [14th Dist.] 2001, pet. granted w.r.m.). "[A] witness need not have a college degree to qualify as an expert. Nor is it a prerequisite that an expert witness be an escalator designer to testify about escalator safety and foot entrapment."

*Gainsco Cty. Mut. Ins. Co. v. Martinez*, 27 S.W.3d 97, 104 (Tex.App.—San Antonio 2000, pet. granted w.r.m.). "Generally, a law enforcement officer is not qualified to render an expert opinion regarding an accident simply by virtue of his position. However, an officer may offer expert testimony in accident cases if the