

No. 10-05-00214-CV

**In the Court of Appeals
Tenth District of Texas
Sitting in Waco, Texas**

William J. Hix, Appellant,

v.

**William Carroll Robertson and
Lester Eugene Robertson, Appellees.**

**Appealed from the 52nd Judicial District Court
of Coryell County, Texas**

**Brief of Texas Rivers Protection Association,
Amicus Curiae**

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¹TRPA's purposes include (but are not limited to):

- protecting the flow, water quality and natural beauty of the rivers of Texas;
- promoting the safe and wise use of Texas rivers;
- developing an awareness of the rights of the public to use navigable rivers in the state of Texas and an awareness of the rights of riparian landowners to be protected from trespass and other intrusions;
- fostering an awareness and respect for the diverse natural waterway environments of Texas;
- promoting a mutual respect between river users and landowners for each other's legal rights; and
- educating its members and the public concerning conservation and preservation of Texas rivers and streams.

Its board of directors and members include persons from throughout Texas who boat and fish along the navigable streams of the state. Some own riparian property. TRPA has participated in administrative and judicial proceedings involving such matters as a wastewater discharge permit, a water rights application, and a bed and banks permit. As a plaintiff, TRPA successfully overcame a challenge to its standing in *Texas Rivers Protection Association v. TNRCC & UGRA*, 910 S.W.2d 147 (Tex.App.—Austin, 1995, writ dismissed).

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ISSUES PRESENTED

1. Hix claims that the 1846 patent conveyed full ownership of the bed of Hog Creek. He says that any attempt to assert that Hog Creek is navigable is an unlawful attack on his title under his patent. Is Hix correct on these major points of law?
2. Hix says that the lake along Hog Creek is just like the one in *Taylor Fishing Club v. Hammett*, so he can keep others out of "his" part of the lake. Robertson cites instead *Diversion Lake Club v. Heath*. What case law really applies?
3. Hix says that the Judgment incorrectly held that the lake is statutorily navigable. Is he right?
4. Hix closed off Robertson's access to a navigable stream and directed him to stay away. Must Robertson wait for the Attorney General to vindicate his right of access or may he assert the right himself?
 - A. Members of the public have the statutory right to use navigable streams. Do individuals excluded from navigable streams meet ordinary standing requirements to assert their navigation right?
 - B. The Attorney General has the statutory duty to seek ouster of those claiming public land adversely to the state. Assertions of navigability typically call for no ouster from land. Does the legislature's imposition of this duty on the Attorney General prevent the public from vindicating its own right to navigation?
5. Texas streams 30 feet or wider are navigable under an 1837 statute. Typically beds of navigable streams are owned by the State, including nowadays the state's Permanent School Fund. However, by means of the Small Bill, the Legislature has transferred ownership rights (but not full ownership) along navigable streams to patentees whose original surveys included the stream. Did that accommodation of patentees also destroy the navigability of the affected streams?
6. Summary judgment evidence shows Hog Creek is navigable today. Having failed to present counter evidence, Hix argues we can't look at navigability now but only at the time of patent. Does the public's right of navigation depend upon a stream's status at the time of the patent or its status at the time of the dispute?
7. The affidavits supporting Robertson's motion for summary judgment contained various statements about (1) the creek's width at seven particular locations, (2) the creek's average width, and (3) the creek's statutory navigability under § 21.001, along with a photograph of the creek and maps showing the locations of the measurements. In Issue 5 Hix complains about the affiants for what they supposedly did not do or say. Several of these complaints

are off-base because they relate to Hix's mistaken view that his title is being taken away. The real question is, Were the affidavits sufficient evidence to support the trial court's judgment that Hog Creek is navigable by statute?

SUMMARY OF ARGUMENT

Issue 1: Hix claims that the 1846 patent conveyed full ownership of the bed of Hog Creek. He says that any attempt to assert that Hog Creek is navigable is an unlawful attack on his title under his patent. Is Hix correct on these major points of law that underlie his brief?

No, he's wrong on both. A recent Texas Supreme Court case cites with approval earlier cases that describe the limited nature of private property rights in the beds of navigable streams in Texas. Statutory navigability (pursuant to an 1837 law) is based on the average width of a stream, not on who might own the bed.

Issue 2: Hix says that the lake along Hog Creek is just like the one in *Taylor Fishing Club v. Hammett*, so he can keep others out of "his" part of the lake. Robertson cites instead *Diversion Lake Club v. Heath*. What case law really applies?

Taylor Fishing Club does not apply, because it involved a freestanding lake. Rather, because the lake in question here was created by damming a navigable stream, *Diversion Lake Club*. Both these cases recognize the public's right to boat and fish throughout the lake.

Issue 3: Hix says that the Judgment incorrectly held that the lake is statutorily navigable. Is he right?

Hix misquotes the Judgment. However, the Judgment is a bit ambiguous and could be reformed slightly to make it clearer.

Issue 4: Hix closed off Robertson's access to a navigable stream and directed him to stay away. Must Robertson wait for the Attorney General to vindicate his right of access or may he assert his access right himself?

Individuals have standing to assert navigability, because they meet ordinary principles of standing and because having standing is essential to the existence of the right. Had

individuals to wait for Attorney General action, they would soon be unable to boat and fish many navigable streams, as people like Hix could fence off streams quicker than the state could or would act.

Nat. Res. Code § 11.077 is not germane to assertions of navigability. That section authorizes the Attorney General to oust those claiming public land adversely to the state. Neither this case nor most navigability cases involve assertions of title to public land. Assertions of navigability don't require ouster from land, public or otherwise. Thus, the statute is irrelevant to navigation cases and does not impair Robertson's standing.

Issue 5: Texas streams 30 feet or wider are navigable under an 1837 statute. Typically beds of navigable streams are owned by the State, including nowadays the state's Permanent School Fund. However, by means of the Small Bill, the Legislature has transferred ownership rights (but not full ownership) along navigable streams to patentees whose original surveys included the stream. Did that accommodation of patentees also destroy the navigability of the affected streams?

Hix wrongly argues navigability is determined by ownership of the bed. Navigability is determined by stream width. Conversely, navigability determines bed ownership, except for Small Bill streams. Private landowners own most of the property rights in the beds of Small Bill streams. But the Small Bill did not narrow streams. Neither did the Small Bill purport to affect navigability. Instead, it expressly reserved to the public and the State rights in the water. Incidentally, it also expressly reserved the State's interests in the sand and gravel.

Issue 6: Summary judgment evidence shows Hog Creek is navigable today. Having failed to present counter evidence, Hix argues we can't look at navigability now but only at the time of patent. Does the public's right of navigation

depend upon a stream's status at the time of the patent or its status at the time of the dispute?

Case law, including recent Supreme Court precedent, supports measuring navigability at the time a dispute arises. Common sense does as well. If we were left to the incomplete records remaining from the 19th Century, the public right of navigation would be impaired.

Issue 7: The affidavits supporting Robertson's motion for summary judgment contained various statements about (1) the creek's width at seven particular locations, (2) the creek's average width, and (3) the creek's statutory navigability under § 21.001, along with a photograph of the creek and maps showing the locations of the measurements. In Issue 5 Hix complains about the affiants for what they supposedly did not do or say. Several of these complaints are off-base because they relate to Hix's mistaken view that his title is being taken away. The real question is, Were the affidavits sufficient evidence to support the trial court's judgment that Hog Creek is navigable by statute?

The only factor involved in determining statutory navigability is the average width of a stream, and the sole factual matter is whether that average width is 30 feet or more. The affidavits contained clear, positive, and direct evidence that the average width of Hog Creek far exceeds 30 feet. Particularly given this excessive width, a gradient boundary survey simply is unnecessary. In a 1934 case, the Texas Supreme Court found two creeks to be statutorily navigable based on less evidence than in Robertson's motion for summary judgment.

Hix could have readily controverted Robertson's proof simply by offering an affidavit that included measurements at places where Hog Creek is less than 30 feet wide, or other proof of its average width. No such proof was offered. As a matter of summary judgment law, there is no genuine issue as to the controlling fact: Hog Creek's average width is 30 feet

or more. Therefore, as a matter of law Hog Creek is statutorily navigable. The provision in the Judgment recognizing that Robertson and the public are entitled to use the entire lake for fishing, boating, and recreational purposes directly follows from settled Texas case law.

ARGUMENT

INTRODUCTION

The Court has requested amicus briefing on Issues 1 and 5 in Appellant Hix's brief. As explained in detail below, Amicus TRPA believes that Texas law sides with Appellee Robertson on these issues, and that the trial court acted properly. While agreeing with much of Appellee's brief, TRPA writes to amplify and clarify several points for this Court.

Some serious misconceptions of law underlie Hix's arguments, not only under issues 1 and 5 but also under his issues 2, 3, and 4. The result is that Hix has tried to make this case into something it is not.

This case is not about someone trying to take away the property rights that Hix actually has. Rather, it is about recognizing the well-established rights of the public to use Texas waterways whose beds average 30 feet wide or more. These are referred to as streams navigable by statute, the original statute having been adopted by the Congress of the Republic of Texas in 1837.

This case is also about understanding the nature of the property rights granted by the State of Texas under a 1929 law, the Small Bill, which applies to land grants along navigable streams where the streams were (typically by innocent mistake) included in the original surveys for the patents.

Instead of discussing the two identified issues independently, this amicus brief addresses underlying legal propositions as it focuses on seven issues involved in the two matters that the Court requested briefing on (standing, and the Court's ultimate judgment

regarding statutory navigability and injunctive relief). These issues relate to: (1) the appropriate case law applying to land grants along navigable streams, (2) the case law applicable to the lake in question, (3) clarification of the Judgment regarding the navigable status of the lake, (4) standing of Robertson to assert navigability of a stream, (5) proper application of the Small Bill, (6) the timing of when navigability is determined, and (7) sufficiency of the affidavits in support of motion for summary judgment regarding statutory navigability.

OVERVIEW OF NAVIGABILITY LAW

To put these matters into a broader context, Amicus TRPA directs the Court to Appendix A. This is a paper (updated to January 2004) entitled "Overview of Laws Regarding the Navigation of Texas Streams."² It was presented to a Texas Parks and Wildlife advisory group in 1997 by one of the authors of this brief, Joe Riddell, prior to his retirement from the Texas Attorney General's Office. The Court will find particularly relevant the sections on Navigable by Statute (p. 4), Measurement of Stream Width for Navigability by Statute (pp. 4-6), Navigability of Lakes (pp. 6-7), and Ownership of Beds of Navigable Streams (pp. 20-22). Note that, as discussed in the Overview (p. 3), besides streams navigable by statute (i.e., averaging 30-foot wide or more), streams in Texas may be subject to public rights because they are navigable in fact, or because they were perennial

²It is currently found on the Texas Parks and Wildlife Department's website at http://www.tpwd.state.tx.us/publications/nonpwdpubs/water_issues/rivers/navigation/riddell/index.phtml. However, it can also be found simply by going to TPWD's home page at www.tpwd.state.tx.us, and then entering Navigation and Riddell in the search box near the upper right-hand corner of the home page.

and the lands along them were granted before December 14, 1837. Because Hog Creek does not apparently fit into either such category, the discussion below in this brief makes no further attempt to address these aspects of Texas law.

ISSUE 1. Hix claims that the 1846 patent conveyed full ownership of the bed of Hog Creek. He says that any attempt to assert that Hog Creek is navigable is an unlawful attack on his title under his patent. Is Hix correct on these major points of law?

Ownership of Stream Bed versus Question of Statutory Navigability

Hix's Two Contentions/Misconceptions

Much of the verbiage in Hix's brief is based on misconceptions about the nature and extent of private property rights along navigable streams in Texas. His position is basically:

Observation (correct): The original survey for the 1846 patent includes Hog Creek, implying that the surveyor thought that Hog Creek was not navigable.

Contention (misconception) 1: The 1846 patent conveyed full ownership of the bed of Hog Creek.

Contention (misconception) 2: Any attempt to assert that Hog Creek is navigable is an unlawful attack on Hix's title under his patent.

Aspects of very similar contentions have been raised and rejected in several Texas cases in the past century.

Why Contentions 1 and 2 Are Wrong

Without saying so, Hix must realize that Hog Creek is today and most likely was at the time of 1846 patent wide enough to be a statutorily navigable stream (that is, one averaging 30 feet or more in width). Therefore, his brief begins by claiming that the patent was valid and fully effective even if the survey lines crossed and included a navigable stream, in contravention of Section 42 of the 1837 law, which he quotes. (Hix Brief at 6.)

As authority, he says that the "30-foot rule"... "early in the history of Texas, has been held by the courts of this State to be merely directory to the surveyors and locators, so that a survey which does not conform, is not treated as invalid." The early case he then cites, *Horton v. Pace*, 9 Tex. 81, 84 (1852), actually held nothing of the sort, but rather in dictum said, "It is true that the **21st section** of the law above referenced is directory, and **probably** would not injuriously affect a survey that did not strictly pursue its directions" [emphasis added here] This was dictum because the holding of the case was that mandamus did not lie to compel the Commissioner of the General Land Office to issue a patent based on a survey that had more than half its frontage on the Guadalupe River. But, more significantly, the 21st section of the law (also quoted in Hix Brief at 6) is actually the part of the 1837 law that said that "all lands surveyed, for individuals lying on navigable water courses shall front one-half of the square on the water course, and the lines running at right angles with the general course of the stream, if circumstances of lines previously surveyed under the laws will permit" This law is now Natural Resources Code § 21.012(a). Thus, even the dictum in *Horton v. Pace* does not support Hix's claims (1) that the prohibition – in Section 42 – forbidding surveys from crossing navigable streams was merely directory, and (2) that patents based on surveys crossing navigable streams were effective to convey the stream bed.

Over the years, there did develop a line of Texas cases that said that when a survey incorrectly crossed and included a navigable stream, the patent was not void in toto, but was simply ineffective in conveying the stream bed to the patentee. Amicus TRPA readily acknowledges the cases Hix cites that prohibit a stranger or third party from asserting

ownership of the stream bed purportedly owned by a patentee under a survey run contrary to the 1837 law. But these cases did not and do not prevent the State of Texas from asserting its retained ownership rights in the bed, and they did not hold that the patent destroys the navigability of the stream. This matter is set out in detail in *State v. Bradford*, 50 S.W.2d 1065 (Tex. 1932), the landmark case upholding the Small Bill. The excerpts below from the *State v. Bradford* opinion show that it is simply not the law that the "determinations" of non-navigability implicitly made by surveyors when they crossed navigable streams with their survey lines, or the acceptance of the surveys and issuance of the patents by the land commissioner, settle the question of statutory navigability. This major thesis of Hix's brief is simply wrong.

The *Bradford* court begins by setting out the substance of the contention made by some the litigants therein, the same basic contention as Hix makes:

It is further contended that a legal inference of the nonnavigability of this river arises from the action of the surveying officers, who, when surveying the lands in that region, ran the survey lines across the river, and that, in the absence of fraud or collusion, these officers, in the exercise of their discretion and honest judgment, found the stream to be nonnavigable, and made the surveys, locations, and awards and issued the patents in question, including therein the river bed as a part of the land sold; also that a like inference can be drawn from the fact that the authors of article 5302 had in mind the rivers and streams with which they were acquainted, and that, on account of the sparsely settled condition of that part of the state and lack of information with respect to the general condition of this stream and the land through which it flows, the judgment and discretion of the surveying officers in running the survey lines across the North fork of the Red river should be accepted as binding upon the state in the sale of the land underlying the river bed.

50 S.W.2d at 1068. After reciting the substance of the 1837 surveying law, the court states the general rule:

The rule long has been established in this state that the state is the owner of the soil underlying the navigable waters, such as navigable streams, as defined by statute, lakes, bays, inlets, and other areas within tidewater limits within its borders. If that section of the river where these surveys in controversy were made be navigable, its bed undoubtedly is the property of the state under that rule. In a long line of decisions the courts of this state have consistently held that the public policy and laws of this state prohibit surveys to be made across navigable streams so as to include the soil under the bed thereof.

50 S.W.2d at 1069. The court then explains the ownership consequence of patenting under a survey (one free from fraud or collusion, etc.) that included a stream bed:

However, where the state owns land on both sides of a stream, like the one involved here, where the issue of its navigability is presented, as shown by the pleadings filed by the state, and the surveying officers who made the surveys in the exercise of their discretion and honest judgment ran their survey lines and locations across the stream, as was done here, and the land commissioner approved them and made the awards and issued the patents therefor, in the absence of fraud or collusion or abuse of honest judgment on the part of the officers in making said surveys or locations, and in the issuance of the patents or awards, **said surveys will not be declared void in toto, but the purchaser or purchasers will take the land embraced within the patents or awards, except that part of the land which underlies the river bed, which will be expressly reserved to the state.** (emphasis added)

50 S.W.2d at 1069. But for the passage of the Small Bill, this is the ownership situation Hix is in, with Robertson's pleadings presenting the issue of navigability. After touching on some of the conditions that prevailed when the surveys at issue were made, the Court explains the basis of what it has just stated:

The rule is also firmly established that land under navigable waters passes by grant or sale only when so expressly provided for by the sovereign authority, and there is no presumption that there has been any act of the government which could have the effect of passing away its title. No power under the law is given the surveyor or the land commissioner to grant soil under navigable waters, and no subsequent recognition or confirmation by the land commissioner of a survey made to pass soil under such waters will be presumed.

50 S.W.2d at 1069-70. The court then concludes that statutory navigability is determined by the measure of the stream's width under the statute, and it not a matter to be finally determined by ministerial officers (like the surveyor or the land commissioner), but a court must decide.

We find nothing in any of the matters relied upon which would take the question of the navigability or nonnavigability of this stream out of the rule stated in article 5302. This is an important and valuable right. The public policy of this state with respect to navigable streams long has been established and enforced, and it is not a question left to the discretion and judgment of ministerial officers. Under the law, those officers were and are not clothed with the power to settle questions of navigability of streams, but, in view of the very nature and importance of the matter, for obvious reasons, it is a question for judicial determination.

50 S.W.2d at 1070. The parties are now, appropriately, before the court, seeking a judicial determination of navigability.

Before leaving the *Bradford* decision, it should be pointed out that the court went on to uphold the constitutionality of the Small Bill. That 1929 law (Art. 5414a) conveyed certain property rights in the streambed to the holders of patents that had mistakenly included the stream bed. Most significantly, under specified conditions, it conveyed all the beds and minerals therein of navigable streams to those patentees. However, it contained some important provisos, including the following:

provided that nothing in this Act contained shall impair the rights of the general public and the State in the waters of streams

Art. 5414a, Sec 2. The court rejected a challenge to the Small Bill based on the claim that it would interfere with the public rights and duties in Article XVI, Sec. 59(a) of the Texas Constitution, which include the public's navigation rights, holding:

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, 50 S.W.2d 1065, 1077 (1932). For further discussion of the Small Bill, see Appendix A, pages 20-23, and Issues 5 and 7 below.

The Bradford court's exposition of the nature of streambed ownership and of statutory navigability has stood the test of time. In a slightly (but immaterially) different context (namely, a finding of statutory navigability by the Texas Water Commission during its adjudication of water rights), the Texas Supreme Court directly addressed and rejected Hix's main argument by saying:

The riparians also urge that the Commission had no authority to declare the North and South Forks of the Guadalupe River statutory navigable streams, and that in doing so, the Commission made an unauthorized decision affecting the title to their lands. The riparians reason that they hold patents from the state, which include the bed of the stream, that the surveys for their lands crossed the streams instead of fronting one-half of the square on the river and the line running at right angles with the general course of the stream.³ They argue that the General Land Office made its determination of non-navigability at the time of the original surveys and the patents. They argue further that the decision by the Commission was a judgment concerning their title to the stream bed which cannot now be divested by an administrative decision.

Title to the bed of the stream is not here in issue.⁴ The issue before us is navigability and the water rights associated with that decision. In our opinion, these matters are settled by *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (1935), and *Port Acres Sportsman's Club v. Mann*, 541 S.W.2d 847 (Tex.Civ.App.---Beaumont 1976, writ ref'd n.r.e.).

³Footnote 7 sets out former Art. 5302. Surveys on Navigable Streams, the predecessor of Natural Resources Code §§ 21.001(3), 21.012, and 21.013.

⁴Footnote 8 states: For a discussion concerning title to the bed of streams see *State v. Bradford*, 121 Tex. 515, 50 S.W.2d 1065 (1932).

Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin, 642 S.W.2d 438, 446 (Tex. 1982) Note the Supreme Court's endorsement, in its footnote 8, of *State v. Bradford* concerning title to the bed of streams. Under Issue 2, we will discuss the *Diversion Lake Club* and *Port Acres Sportsman's Club* cases that the Supreme Court said settle the issue of navigability.

There is one basic reason why Hix's claim to fully own the stream bed is wrong. Hix says he stands on the 1846 patent and the subsequent deeds. (Brief at 15) He even cites *Bradford* to say that the soil beneath navigable streams could be patented and granted by the State. (Brief at 11) Amicus agrees with this proposition, but the intention to so grant must be very clearly apparent.

It was within the power of the sovereign to grant to a town or to an individual the bed of public water. *City of Galveston v. Menard*, 23 Tex. 349, 391; *Knight v. United Land Association*, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974, 983. But it is well settled that a more certain and specific intention on the part of the government must appear to divest itself of title to land under water than is required for the passing of title to land not so covered. *City of Galveston v. Menard*, 23 Tex. 349, 397; *State v. Bradford*, 121 Tex. 515, 530, 543, 50 S.W. (2d) 1065, 1069; *Landry v. Robison*, 110 Tex. 295, 298, 219 S.W. 819; *Rosborough v. Picton*, 12 Tex.Civ.App. 113, 34 S.W. 791, 792, 43 S.W. 1033 (approved in *Hynes v. Packard*, 92 Tex. 44, 49, 45 S.W. 562). In *State v. Bradford*, Associate Justice Sharp, writing as Commissioner the opinion of the court, said: 'The rule is also firmly established that land under navigable waters passes by grant or sale only when so expressly provided for by the sovereign authority, and there is no presumption that there has been any act of the government which could have the effect of passing away its title.' It is not to be presumed that the Mexican government intended to grant to the Town of Refugio the title to a part of the bed of Mission river, and we must conclude that the title to the river bed did not pass by the grant made in 1834 unless a certain and specific intention that it pass can be found in the documents or other evidence of the grant or in the statutory law in effect when the grant was made or in some settled rule or policy of the civil law then prevailing in Mexico.

Heard v. Town of Refugio, 103 S.W.2d 728, 732 (Tex. 1937) The 1846 patent does not include the required clarity of intent to overcome the general rule against granting the bed of a navigable stream.

ISSUE 2. Hix says that the lake along Hog Creek is just like the one in *Taylor Fishing Club v. Hammett*, so he can keep others out of "his" part of the lake. Robertson cites instead *Diversion Lake Club v. Heath*. What case law really applies?

The facts of this case closely parallel two other cases in which non-owners asserted lakes were navigable. The case that found lake navigability relied upon the underlying stream being navigable in law. The case that found no navigability relied upon the absence of a stream satisfying the navigability by statute test and the absence of facts suggesting navigability in fact.

Robertson asserts the navigability of a lake. In *Taylor Fishing Club v. Hammett*,⁵ Hammett asserted navigability of Stanmire Lake. In *Diversion Lake Club v. Heath*,⁶ Heath asserted navigability of a lake. Heath succeeded where Hammett failed. Why the difference? Because Diversion Lake overlies the Medina River, a navigable stream. No navigable stream underlies Stanmire Lake. Given no navigable stream, Stanmire Lake could not be navigable in law.

The *Hammett* court extensively explored and rejected scenarios under which Stanmire Lake might be navigable in fact, but that discussion would have been unnecessary had the lake been navigable in law, as Diversion Lake. Hammett would have achieved the same result as Heath had Stanmire Lake been created along a navigable stream.

⁵88 S.W.2d 127 (Tex. Civ. App.—Waco 1935, writ *dism'd*, w.o.j.).

⁶86 SW.2d 441 (Comm'n App. 1935, opin. adopted).

Note that Hix says that the *Hammett* case is “virtually identical” to his own case.⁷ Not really. As discussed below, Hog Creek is navigable. So the *Heath* case governs.

ISSUE 3: Hix says that the Judgment incorrectly held that the lake is statutorily navigable. Is he right?

Hix misquotes the Judgment. However, the Judgment is a bit ambiguous and could be reformed slightly to make it clearer. The third sentence of the Judgment reads in full:

The Court finds that even though Hog Creek and the lake in question is not navigable in fact, **it is a navigable stream as defined by Article 21.001, Natural Resources Code of the State of Texas, from its mouth up to the the low-water crossing in Coryell County, Texas, approximately 2.7 miles northwest of the intersection of County Road 224 and FM Road 217.** (emphasis added)

In his Brief (p. 38) Hix asserts:

The trial court held that "even though Hog Creek and the 'lake' in question is not navigable in fact, **they are navigable as defined by Article 21.001(3).**" (emphasis added)

Hix then says that the Judgment conflicts with *Taylor Fishing Club*, which he says held that Art 5203 (see now Section 21.001(3)) applies only to streams and not to lakes. Putting aside how Hix's misquote has helped create this conflict, Amicus concurs about what *Taylor Fishing Club* says. Therefore, to remove any ambiguity, Amicus suggests that this Court slightly reword the Judgment to read, for example:

The Court finds that even though neither Hog Creek nor the lake in question is navigable in fact, Hog Creek is a navigable stream as defined by Article 21.001, Natural Resources Code

⁷Brief for Appellant at 39.

ISSUE 4. Hix closed off Robertson’s access to a navigable stream and directed him to stay away. Must Robertson wait for the Attorney General to vindicate his right of access or may he assert the right himself?

Two issues underlie this point: (1) whether an individual can meet ordinary tests for standing and (2) whether Natural Resources Code § 11.077 undercuts ordinary standing rules, making the Attorney General’s right to act exclusive, and thus barring private action.

A. Members of the public have the statutory right to use navigable streams. Do individuals excluded from navigable streams meet ordinary standing requirements to assert their navigation right?

The Texas Constitution declares that the navigation of the state's inland and coastal waters is a public right.⁸ The classic test whether one may vindicate a public right is whether one has suffered a specific injury different from that suffered by members of the general public.⁹ Most members of the general public have not attempted to navigate Hog Creek. Those not making the attempt have suffered no injury different from that suffered by anyone else. But Robertson attempted to navigate that creek, and Hix denied him that right. Thus,

⁸Texas Constitution, Art. XVI, § 59(a)

⁹*Robinson v. Neeley*, 192 S.W.3d 904 (Tex. App.–Dallas 2006, *no writ*). At p. 907 the court observes:

Standing requirements weed out those lawsuits where the plaintiffs' interests and injuries are not particularized and distinct from those of the general public. See *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). A person has standing if: (1) he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the defendant's wrongful act; (2) he has a direct relationship between the alleged injury and the claim being adjudicated; (3) he has a personal stake in the controversy; (4) the challenged action has caused him some injury in fact, either economic, recreational, environmental, or otherwise; or (5) he is an appropriate party to assert the public's interest in the matter, as well as his own. *Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 249 (Tex.App.-Dallas 2005, *no pet.*).

Robertson has suffered a specific injury different from that suffered by those not attempting to navigate the creek. Further, through his agents, Hix has even threatened to physically remove Robertson if he comes onto the part of the lake claimed by Hix.

The Texas Supreme Court discussed standing in *Texas Workers' Compensation Commission v. Garcia*.¹⁰ Workers and unions sought a declaratory judgment that the then new workers' compensation statute denied Texas workers constitutionally protected rights. TWCC challenged the standing of all plaintiffs. In addressing the challenge, the Supreme Court noted:

[T]o challenge a statute, a plaintiff must first suffer some actual or threatened restriction under that statute. Second, the plaintiff must contend that the statute unconstitutionally restricts *plaintiff's* rights, not somebody else's." (Emphasis in original.)¹¹

In applying the quoted standards, the court looked at each plaintiff individually. As to the Texas AFL-CIO, the court set out three tests, each of which must be met: (1) that the union's members otherwise have standing to sue in their own right, (2) that the interests the union seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members.¹²

To satisfy the first prong (that the union's members could sue in their own right), the court said it could fairly assume that some members of the union had suffered a compensable

¹⁰893 S.W.2d 504 (Tex. 1995).

¹¹893 S.W.2d at 518.

¹²893 S.W.2d at 518.

injury since the new law went into effect.¹³ Thus, an injury covered by workers' compensation conferred standing to challenge the act.

That conclusion is buttressed by the court's treatment of named plaintiff Hector Garcia. Garcia had not suffered a compensable injury. Although the Court of Appeals had held Garcia had standing, the Supreme Court expressly declined to comment. Doing so was unnecessary since the court had at least one plaintiff before it with standing, the AFL-CIO.¹⁴

Workers not having suffered a compensable injury had no specific injury different from that suffered by members of the general public. Such workers were in a position analogous to that of those members of the public who have not attempted to navigate Hog Creek. But workers with a compensable injury had a specific injury distinguishing them from members of the general public, just as Robertson does in having tried and been expressly denied the right to navigate the creek. That Hix excluded Robertson from Hog Creek is uncontested. Thus, Robertson meets the test for standing set down by the Supreme Court in *Garcia*.

In *Texas Rivers Protection Association v. TNRCC and UGRA*,¹⁵ TRPA and individual riparian owners were found sufficiently aggrieved to support standing. The case concerned the issuance of a water permit, which the individual plaintiffs alleged would damage their aesthetic and recreational interests in the Guadalupe River. The court held that standing did

¹³893 S.W.2d at 518.

¹⁴893 S.W.2d at 519, n. 17.

¹⁵910 S.W.2d 147 (Tex. App.—Austin 1995, *writ dismissed*).

not require a vested property right. Harm to economic, recreational, or environmental interests suffices to sustain standing.¹⁶ Hix has damaged Robertson's recreational interest.

Numerous Texas cases concerning whether a stream is navigable have been between private parties, without joinder, much less preemption, of the Attorney General. For example, in a case cited by Hix (*Diversion Lake Club v. Heath*¹⁷), the owners of surrounding land sought to enjoin Heath from boating and fishing on Diversion Lake, an impoundment on the Medina River. Because the Medina is navigable and because Heath was able to access the lake from a bridge without trespassing, Heath prevailed – without joinder of the Attorney General.

In the following additional cases, navigability was in issue, but standing of private litigants was assumed: *Texas River Barges v. City of San Antonio*¹⁸ (declaratory judgment action challenging city's authority to regulate use of the San Antonio River); *Selkirk Island Corp. v. M.H. Standley*¹⁹ (trespass to try title action alleging ownership of bed of a portion of the Colorado River); and *Orange Lumber Co. v. Thompson*²⁰ (suit for damages for obstruction of navigable stream); *Taylor Fishing Club v. Hammett*²¹ (suit to exclude a fisherman from a lake on private land). Because standing is jurisdictional, it can be raised

¹⁶910 S.W.2d at 151-52.

¹⁷86 SW.2d 441 (Comm'n App. 1935, opin. adopted).

¹⁸21 S.W.3d 347 (Tex. App.–San Antonio 2000, *pet. den., reh. den.*).

¹⁹683 S.W.2d 793 (Tex. App.–Corpus Christi 1985, *writ ref'd, n.r.e.*).

²⁰126 S.W. 604 (Tex. Civ. App. 1910, *no writ*).

²¹88 S.W.2d 127 (Tex. Civ. App.–Waco 1935, *writ disp'd, w.o.j.*).

not just at trial but on appeal.²² Despite the numerous opportunities to raise standing in these cases, everyone seems to have conceded it.

Considering the diverse facts of these cases, it is inconceivable that the Attorney General could involve himself in every such case that might arise. Governments have limited resources and must choose how best to expend them. Vindication of the public right of access to navigable streams should not depend on how the Attorney General chooses to allocate its resources.

If other public rights could be vindicated only through governmental action, such rights would be less meaningful. Access to a public street or to a park could be blocked by someone with political connections sufficient to assure the responsible local government would not act. For what other class of rights are citizens necessarily dependent on the government for vindication? Since rights are properly understood to include freedom from the government, a right dependent on the government for vindication is hardly a right at all. Access to courts is guaranteed by the Open Courts provision of the Texas Constitution.²³

²²See *Texas Assoc. of Business v. Texas Air Control Brd.*, 852 S.W.2d 440 (Tex. 1993), in which the Court observes (at p. 443):

Before we reach the merits of this case, we first consider the matter of the trial court's jurisdiction, as well as our own; specifically we determine whether TAB has standing to challenge the statutes and regulations in question. Because TAB's standing to bring this action is not readily apparent, and because our jurisdiction as well as that of the trial court depends on this issue, we requested supplemental briefing on standing at the oral argument of this case. In response, the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal. We disagree.

²³ Article I, Sec. 13, provides in pertinent part: 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.

That citizens might be barred from vindicating rights in court would be undesirable and might cause some to seek extra-legal relief. Indeed, long ago the Texas Supreme Court recognized that obstructions to navigation are nuisances, and that individuals may abate them as such.²⁴ But rather than cutting Hix's fence, and creating a potentially serious confrontation, Robertson has sought appropriate relief through the Texas courts, and they should remain open to him and other like him.

B. The Attorney General has the statutory duty to seek ouster of those claiming public land adversely to the state. Assertions of navigability typically call for no ouster from land. Does the legislature's imposition of this duty on the Attorney General prevent the public from vindicating its own right to navigation?

No statute expressly makes action by the Attorney General exclusive of a citizen seeking to vindicate navigation rights, and implying such a result is improper. The suggestion of exclusivity is remarkable, and one would expect that the legislature would have made the result explicit if it were intended.

Texas Natural Resources Code § 11.077 provides that the Attorney General is to file suit if 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 key phrase is *public land*. The function of the portion of the Natural Resources Code in which the cited section appears is regulation of the public domain, that is, land not under valid patent or award.

²⁴*Selman v. Wolfe*, 27 Tex. 68, 73 (1863).

Aside from the tenor of all surrounding statutes, one clue to that is the reference to forfeiture of land to the state. Forfeiture occurs when a land claimant fails to pay for the awarded land. The awardee gets a patent only when the award is paid in full.²⁵

For example, the predecessor to § 11.077, Art. 5420, was cited in *Schneider v. Lipscomb County National Bank*.²⁶ A private grantee was asserting a breach of warranty claim against his private grantor based on the state's assertion of a vacancy, that is, unsurveyed public school land.²⁷ Public school land is, of course, sovereign or public land. In describing the role of the Attorney General, the court states:

[It is] the duty of the Attorney General to institute suit for recovery of any public lands that are held, occupied or claimed . . . adversely to the State The institution of suit in the name of the State and the recovery of final judgment in its favor for title and possession constitute the most authentic and effective assertion . . . of the State's title. Final judgment in such a suit is an *ouster*²⁸ (emphasis added)

The *Schneider* court focuses on public character of the land and the Attorney General's duty to recover title for the state. Title is not at issue between Hix and Robertson. Hix's title to the stream bed under the Small Bill is uncontested. What is contested is Hix's denial of navigation in a navigable stream.

²⁵Natural Resources Code § 51.071.

²⁶202 S.W.2d 832 (Tex. 1947).

²⁷Natural Resources Code § 51.172(6).

²⁸202 S.W.2d at 836.

Other cases showing that § 11.077 or its predecessor relates to sovereign land are: *Franks v. Krohn*²⁹ (Attorney General intervenes in pending vacancy proceeding to assert state's interest in vacant land); *Barrow v. Boyles*³⁰ (Attorney General has standing to assert state's interest in vacant land).

Interestingly, Hix asserts that the bed of Small Bill streams is not public domain.³¹ But that vitiates his own argument that the Attorney General alone should be the one to assert navigability in connection with this case.

The status of Small Bill land is shown by *Landry v. Robison*,³² a 1920 vacancy case arising before the Small Bill validated surveys crossing navigable streams. The stream bed was found to be public land such that an applicant to the Commissioner of the General Land Office could acquire rights in the minerals. Imagine the consternation of landowners having no more land that was patented by the state, but who find strangers entering their land to produce minerals the landowners had regarded as their own. This is the result the Small Bill, passed in 1929, was intended to change. It was not intended to surrender navigation rights, and it includes a specific provision that the rights of the general public and the State in the waters of streams are not impaired. (Art. 5414a, Sec. 2)

²⁹164 S.W.2d 529, 532 (Tex. Civ. App.—Beaumont 1942, *writ ref'd*).

³⁰21 S.W.2d 716, 718 (Tex. Civ. App.—Galveston 1929, *aff'd* 61 S.W.2d 783 (1933)).

³¹Brief for Appellant at 9.

³²219 S.W. 819 (Tex. 1920)

To support his claim that Natural Resources Code § 11.077 gives the Attorney General exclusive authority to assert navigability, Hix cites *Strayhorn v. Jones*.³³ But as Hix says on page 12 of his brief, the Attorney General intervened to reclaim “excess” lands. An excess arises when a patent or land award contains more land than intended, which means it contains more than was paid for by the recipient.³⁴ Thus the excess is still public domain and remains so until the state issues a deed of acquittance.

Many of the navigability cases on the books could not have gotten there if standing to assert navigability were limited to the Attorney General.

³³300 S.W.2d 623 (Tex. 1957).

³⁴Natural Resources Code § 51.246.

ISSUE 5. Texas streams 30 feet or wider are navigable under an 1837 statute. Typically beds of navigable streams are owned by the State, including nowadays the state's Permanent School Fund. However, by means of the Small Bill, the Legislature has transferred ownership rights (but not full ownership) along navigable streams to patentees whose original surveys included the stream. Did that accommodation of patentees also destroy the navigability of the affected streams?

Hix misapprehends the effect of the Small Bill.³⁵ He asserts that Hog Creek is not navigable because he owns the stream bed. But ownership of the bed does not determine navigability. Width determines navigability.³⁶ Conversely, navigability most often determines ownership of the bed, but not always. The Small Bill is the exception, but that the Small Bill applies to an otherwise navigable stream does not alter its navigable character. Again, navigability depends on width, and the Small Bill did not narrow streams. Further, as discussed under Issue 1, the Small Bill itself provides that it does not impair “the rights of the general public and the State in the waters of stream”³⁷ The right of navigation is a right in the water of navigable streams.³⁸

*Port Acres Sportsman's Club v. Mann*³⁹ shows navigability is not dependent on bed ownership. In that case, public waters rose and covered formerly dry, private land. The

³⁵Art. 5414a.

³⁶Natural Resources Code § 21.001(3).

³⁷Art. 5414a.

³⁸The 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*, 50 S.W.2d 1065, 1077 (1932).

³⁹541 S.W.2d 847 (Tex. Civ. App.—Beaumont 1976, *writ ref'd*).

court held that, because the waters were public, the public could navigate the waters even though the bed was private.

Hix points to no case denying navigability of a Small Bill stream. Instead, among other things, he cites authority that private litigants cannot challenge patents.⁴⁰ Putting aside what would happen if the state patented land to A already patented to B, asserting navigability is not a challenge to a patent. Navigation is a public right in all navigable streams, whether or not patented. Hix's reference to a patent is irrelevant.

Hix repeatedly asserts that the "30-foot" rule is merely directory. Not so. The "30-foot" rule is a principle defining navigability in law. What is directory is that surveyors ought not cross navigable streams with survey lines and ought to front half the square along the stream.⁴¹ This case shows how desirable that rule is, and it also shows that surveyors, as all humans, sometimes make mistakes. As discussed above, the inclusion of navigable streams within a survey created problems and questions about land ownership. Rather than holding the surveys completely invalid, Texas courts concluded that they were ineffective to convey property in the stream bed, which the State was judged to retain.⁴² The ultimate result was that the legislature passed the Small Bill. Even so, neither surveyors' mistakes nor the Small Bill made navigable streams non-navigable.

⁴⁰Brief for Appellant at 13.

⁴¹Natural Resources Code § 21.012.

⁴²*State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932). That case went on to uphold the 1929 Small Bill, and its conveyance to the landowners of most of the property rights in the beds of those navigable streams that had been erroneously encompassed within the surveys.

ISSUE 6. Summary judgment evidence shows Hog Creek is navigable today. Having failed to present counter evidence, Hix argues we can't look at navigability now but only at the time of patent. Does the public's right of navigation depend upon a stream's status at the time of the patent or its status at the time of the dispute?

Hix asserts that navigability must be determined, if at all, at the time of the original patent. That would take the public right of navigation out of the hands of the legislature and the courts and put it in the hands of a surveyor who, 150 or more years ago, may have been beleaguered by Comanches or other hardships and for whom determining navigability of each stream encountered may not have been a high priority.

In making this assertion, Hix cites no supporting authority and ignores contrary authority. In *Port Acres Sportsman's Club v. Mann*,⁴³ the sports club sought to enjoin use of public waters on the club's property. At the time of the patent, Big Hill Bayou was not a navigable stream, but it became one and so remained for many years before the suit was filed.⁴⁴ Over time, the club's formerly dry land became covered by prongs of Big Hill Bayou. Thus, although the club still owned the bed beneath the bayou, the Court held that club could not prevent others from using the waters and fishing in them over the club's privately owned lands.⁴⁵ Hix has a similar ownership of the bed of Hog Creek (subject to the Small Bill), and likewise he may not prevent others from using and fishing in the navigable waters over that

⁴³541 S.W.2d 847 (Tex. Civ. App.—Beaumont 1976, *writ ref'd*).

⁴⁴541 S.W.2d at 849.

⁴⁵541 S.W.2d at 850.

bed, nor, as held in *Diversion Lake*, in the dammed navigable waters that, with his consent, flood his upland property.

Even more compelling, the principle that navigability is based on current conditions can work in reverse to the detriment of the state. In *Brainard v. State*,⁴⁶ Panhandle landowners sued the state, alleging that the bed of the Canadian River had shrunk, and the gradient boundary had moved, because of reduced water flow. Sanford Dam, which creates Lake Meredith, caused the reduced flow. The state claimed that the bed's ownership should be based on pre-dam conditions, disregarding the "artificially" induced changes from the dam. The court held that, although the reduced flows originated from an artificial cause, the stream's bed and its gradient boundaries must be based on the current river flows.⁴⁷ The state accordingly lost a significant portion of the former river bed as well as the attendant oil and gas revenues.⁴⁸

Presumably if Stanford Dam were removed or the water flow otherwise increased, the state would gain riverbed and the surrounding land owners would lose land proportionately. Rivers are dynamic, and no one should be surprised that boundaries determined by rivers are dynamic as well. That riparian owners can gain through accretion and lose through erosion has been ensconced in the law at least since the Justinian Code.⁴⁹ That Hog Creek may have

⁴⁶12 S.W.3d 6 (Tex. 2000).

⁴⁷12 S.W.3d at 23.

⁴⁸The width was narrowed from about 3400 feet to about 20 to 50 feet. 12 S.W.3d at 12.

⁴⁹*Balli v. State*, 190 S.W. 2d 71, 112 (Tex. 1945) (Sharp, J., dissenting)

greater or lesser flows or a different width than it did when the original survey was made for the patent is a risk Hix shares with all other riparian owners.

ISSUE 7. The affidavits supporting Robertson's motion for summary judgment contained various statements about (1) the creek's width at seven particular locations, (2) the creek's average width, and (3) the creek's statutory navigability under § 21.001, along with a photograph of the creek and maps showing the locations of the measurements. Through Issue 5 Hix complains about the affiants for what they supposedly did not do or say. Several of these complaints are off-base because they relate to Him's mistaken view that his title is being taken away. The real question is, Were the affidavits sufficient evidence to support the trial court's judgment that Hog Creek is navigable by statute?

The only factor involved in determining statutory navigability is the average width of a stream, and the only factual question is whether that average width is 30 feet or more.

The definition of a statutorily navigable stream in Natural Resources Code § 21.001(3) is straightforward: "a stream which retains an average width of 30 feet from the mouth up." The only issue is the average width of the stream.⁵⁰

The affidavits⁵¹ contained clear, positive, and direct evidence that the average width of Hog Creek far exceeds 30 feet.

The most detailed evidence is in the Jones affidavit. He personally measured the stream's width at seven locations. These locations, shown on county road maps, are scattered from the low water crossing just upstream from the parties' properties downstream to the

⁵⁰See, for example, *American Liberty Oil Co. v. State*, 125 S.W.2d 1107, 1109 (Tex.Civ.App.—Texarkana, 1939, ref n.r.e.), and *Adjudication of the Upper Guadalupe River Segment of the Guadalupe River Basin*, 625 S.W.2d 353, 361 (Tex. App.—San Antonio 1981) error granted, aff'd 642 S.W.2d 438.

⁵¹See Affidavits of Robertson (CR 47-50), Wallace (CR 51-52), and Jones (CR 53-58).

creek's mouth at Lake Waco. The measured widths range from 56 feet to 100 feet.⁵² They alone provide ample support for his statement, "I know and state that Hog Creek retains an average width of in excess of 70 feet from its mouth at Lake Waco upstream to the low water crossing in Coryell County described above." Further, Robertson's affidavit says that, based on his personal knowledge, from examination and measurements, the average width of Hog Creek is in excess of 60 feet from its mouth to the low water crossing upstream of the lake in controversy.

Him argues at great length that survey technician Jones and professional engineer/surveyor Wallace failed to show the proper expertise and satisfy the proper predicates for admission of their testimony under Texas Rule of Evidence 702. However, these arguments are beside the point, because their testimony may be accepted as that of a lay witness under Evidence Rule 701.⁵³

Surveying expertise is not necessary to measure stream width, but it may add to the credibility of the witness. While someone's experience may add weight to an affidavit,

⁵²The seven measurements, proceeding downstream, were: 60, 79, 56, 70, 90, 100, and 97 feet.

⁵³In *Harnett v. State*, 38 S.W.3d 650 (Tex.App.—Austin 2000, pet. ref'd) the appellants complained (at p. 650) that the "trial court erred in allowing an untrained and noncertified social worker to testify to matters which are the subject of expertise required by a licensed professional counselor in violation of Rule 702 of the Rules of Evidence." After discussing various factors that would make her testimony admissible under Rule 702, the Court noted, (at p. 659) "A witness may qualify to give testimony under both Rule 702 governing expert witnesses and Rule 701 permitting a lay or non-expert witness to offer opinions or inferences if the witness's testimony is based on first-hand knowledge. [citing four cases]"

demonstrating special expertise is not necessary to an affidavit here, as the width of Hog Creek is something that can be perceived and measured by an ordinary person.⁵⁴

Particularly given this excessive width, a gradient boundary survey simply is unnecessary.

The law defining a stream that is navigable by statute dates from 1837. It was applied (and sometimes misapplied) by surveyors all during the 1800's as the public domain (first of the Republic and then of the State) was carved up for settlers, railroads, schools, etc. The gradient boundary concept was not even invented until the early 1920's, when Texas and Oklahoma were disputing where a treaty line along the south bank of the Red River was located.

Hix cites language in *Brainard v. State* that says, "If the gradient boundary is marked properly along both sides of the river, then the land between the gradient boundary lines constitutes the river's 'bed.'" 12 S.W.3d at 16. But note that this does not say that a gradient boundary must be performed before one can determine the width of a stream for navigability purposes.⁵⁵ The *Brainard* Court in fact proceeds to quote approvingly from the description of the stream and its bed in *Mott v. Boyd* and *Oklahoma v. Texas*, saying:

⁵⁴ In *State v. Brainard*, 968 S.W.2d 403 (Tex.App.—Amarillo 1998), aff'd in part, rev'd in part on other grounds, 12 S.W.3d 6 (Tex.1999), the court at p. 412 explained the application of Rule 701:

A lay witness may give testimony in the form of an opinion which is rationally based on the perception of the witness and helpful to a clear understanding of the testimony or the determination of a fact in issue. Tex.R. Civ. Evid. 701.

The perception underlying the lay witness's testimony may be what was seen, heard, smelled, tasted, touched or felt. Hulen D. Wendorf, et al., *Texas Rules of Evidence Manual VII--5* (3d ed.1991).

⁵⁵ Taking Hix's arguments to their logical conclusion, the original survey for the patent would be thrown into question, for the original surveyor doubtless did not do a gradient boundary survey.

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. 286 S.W. at 467 (citing *Oklahoma v. Texas*, 260 U.S. at 631, 43 S.Ct. 221); accord *Maufrais*, 180 S.W.2d at 147; *State v. Bradford*, 121 Tex. 515, 50 S.W.2d 1065, 1069 (1932). The Supreme Court's definition of a river's "bed" in *Oklahoma v. Texas* contains additional language that does not appear in *Mott*:

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. 260 U.S. at 632, 43 S.Ct. 221.

12 S.W.3d at 16-17. The Texas Supreme Court in *Mott v Boyd* (286 S.W. at 467) also provided this description of a stream's banks:

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.

Finally, the *Mott* Court explained the concepts in relation to the 30-foot rule:

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; in other words, the 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. 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.

Mott v. Boyd, 286 S.W. 458, 467-8 (1926).

An person of ordinary intelligence can read the case law quoted above, get a long tape measure, stretch it across the stream bed at a number of points,⁵⁶ and get a good measure of its average width.

The gradient boundary methodology is a way of drawing a fine line along the banks, and its expense is rarely justified (typically only when mineral interests are at stake). This Court, taking judicial knowledge of Texas geography,⁵⁷ may note that many streams in Texas have beds far wider than 30 feet. It would be absurd to claim, for example, that a gradient boundary survey of miles and miles of the Brazos is needed for one to conclude that it is statutorily navigable in McLennan County.

Indeed, a Texas court has recognized that no particular methodology is mandated in making the measurements to determine statutory navigability.

Appellants also urge that the evidence is insufficient to support the finding of navigability. A navigable stream is one that maintains an average width of thirty feet from the mouth up. The trial court found that both the north and south forks of the Guadalupe River are of an average width of substantially greater than thirty feet from the mouth up to the area of any claim asserted in this adjudication. The trial court also found that the north fork and the south fork of the Guadalupe River are navigable water sources from the mouth up to the area of any claim asserted in this adjudication. 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 measurements used. The statute provides no precise method of measurement for determining if a stream maintains an

⁵⁶How many measurements are needed, to get a meaningful average, would depend upon how consistent the stream's width is and how close to 30 feet those measurements are. For a stream whose width is observed to be consistently much wider than 30 feet, fewer measurements are needed.

⁵⁷See Evidence Rule 201, and for example, *State v. Bradford*, 50 S.W.2d 1065, 1068 (Tex. 1932), stating: "The rule is now well settled that courts may take judicial notice, as a matter of common knowledge, of the natural features of the state, including the general locations of its mountains and the courses of its rivers and their general history."

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. [emphasis added]

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).

In a 1934 case, the Texas Supreme Court found two creeks to be statutorily navigable based on less evidence than in Robertson's motion for summary judgment.

Robertson's summary judgment evidence regarding statutory navigability appears sufficient in light of the Texas Supreme Court's holding in a 1934 case.⁵⁸ In that case, the Court reviewed evidence related to Hunt's and Jasper Creeks and in particular whether they fell within two statutes. The first statute, Art. 6320, regulated a railroad's right to construct its roads across, along, or upon any stream of water or water course. The second statute was Art. 5302, the 1837 navigability law as codified in the Revised Statutes of 1925. There was evidence from a map of the lengths and locations of the streams. There was testimony (from someone who had observed them about 15 times in four and one-half years) about the "drainage area, size, and habits" of the creeks. Significantly, the evidence recited as to their widths (including both the width of the flowing water and the width of the channel) was merely the following:

"At all times I have observed living water in these streams. I have observed them at very low stage—it being possible to 'hop' or 'jump by pole.' I have seen both of the above streams at flood stage, out of banks, and overflowing the adjacent bottom valley to a depth of several feet.

⁵⁸*Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1*, 73 S.W.2d 55 (Tex. 1934), certified question answered 76 S.W.2d. 147, error refused, certiorari denied 55 S.Ct. 921, 295 U.S. 762, 79 L.Ed. 1704.

"Jasper and Hunt's Creek have well defined banks and channels. Hunt's Creek channel averages about 70 feet in width and 15 feet in depth. Jasper Creek channel averages 50 feet in width and 12 feet in depth."

73 S.W.2d at 62. After reviewing the evidence, the court first held that they were "streams of water" and "water courses" within the meaning of Art. 6320. Then the court held:

The evidence quoted above also clearly shows that the streams named are navigable in law under a statute which has existed in this state since it was an independent republic. Rev. St. art. 5302; *Motl v. Boyd*, 116 Tex. 82, 286 S.W. 458.

73 S.W.2d at 62.

Note that the evidence in the summary judgment affidavits regarding the width of Hog Creek is more detailed than what the Supreme Court found sufficient in this 1934 case. As pointed out above, Jones's own measurements of the stream's width at seven scattered locations, shown on maps, provide a clear basis for his statement that the average width exceeds 70 feet. The evidence includes two other statements about Hog Creek's average width (Robertson saying "in excess of 60 feet" and Wallace and Jones saying "in excess of 70 feet"). Robertson includes a photograph of the creek upstream of the lake, where he states the measured width is 60 feet. That photo shows a well-defined channel and includes a person, revealing the perspective and scale of the photo.⁵⁹ The *Chicago* case sets a precedential threshold for a finding of statutory navigability, and the summary judgment proof here exceeds it.

⁵⁹The original photo in the court's record probably shows more details of the character of Hog Creek than the photocopy Amicus possesses.

Hix could have readily controverted Robertson's proof simply by offering an affidavit that included measurements at places where Hog Creek is less than 30 feet wide, or other proof of its average width. As a matter of summary judgment law, there is no genuine issue as to the controlling fact: Hog Creek's average width is 30 feet or more. As a matter of law it is statutorily navigable.

Texas Civil Procedure Rule 166a(c) provides in pertinent part:

The [summary] judgment sought shall be rendered forthwith if ... the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records ... show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out A summary judgment may be based on uncontroverted testimonial evidence of an interested witness ... if the evidence is clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

As discussed above, Robertson's summary judgment evidence met the threshold for establishing navigability by statute. Hix failed to offer counter proof as to the width of Hog Creek. He could have personally gone out or had someone go out and make measurements of the creek's width to dispute Robertson's evidence. He did not. Hix has offered no excuse for this, instead relying on his incorrect theory of the law and his irrelevant objections to the affidavits. Once the statutory navigability of Hog Creek was established, the relief granted in the Judgment was appropriate and justified under settled case law, including the *State v. Bradford*, *Diversion Lake Club v. Heath*, and *Port Acres Sportsman's Club v. Mann* cases discussed above. Hix failed to meet his burdens, and his appeal should be denied.

PRAAYER

For the reasons discussed above, Amicus Texas Rivers Protection Association requests the Court to clarify the Judgment of the Trial Court along the lines suggested in Issue 3 (p. 24) and as so clarified, to affirm that Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I, Joe Riddell, certify that today, August 28, 2006, I am sending by US Postal Service first-class or priority first-class or express mail a copy of this Brief with its separately-bound Appendices to each of the following attorneys of record:

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Joe Riddell

JOE RIDDELL

LIST OF APPENDICES
(Appendices are separately bound.)

Appendices do not contain materials already in Appendices to other parties' briefs.

A. "Overview of Laws Regarding the Navigation of Texas Streams," by Joe Riddell

B. Texas Constitution:

Article I, Sec. 13

Article XVI, Sec. 59(a)

C. Texas Statutes:

Natural Resources Code § 51.071

Natural Resources Code § 51.172(6)

Natural Resources Code § 51.246

D. Texas Rules of Evidence:

Rule 201

Rule 701

Rule 702