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RECREATIONAL USE OF TEXAS RIVERS— RECOMMENDATIONS FOR ADOPTION OF THE TEXAS PUBLIC RIVERS ACT

SUSAN B. BIGGS

Texas has one of the largest river systems in this country—over 80,000 miles of waterways varying from swampy, slow-moving currents in the east to shallow, rocky streams in the west.¹ Over the years this natural resource has become a significant recreational facility for fishermen and canoeists.² The public use of these rivers, however, is often subject to the conflicting private interests of the riparian landowner.³ The problem is compounded by the relatively few miles of public riverbanks upon which a boater may alight without fear of trespassing and by the lack of discernible demarcation between public and private lands.⁴

The conflict of interests between landowners and recreationists has produced violence and hostility resulting from misconceptions by both groups as to their respective legal rights.⁵ On the one hand, the landowner claims a

1. TEXAS PARKS & WILDLIFE DEP'T, AN ANALYSIS OF TEXAS WATERWAYS 7 (1973).

2. A survey conducted in 1969 by the Texas Parks & Wildlife Department estimates that in that year there were in total hours of activity, 8,647 days of rubber rafting, 305,872 days of canoeing, and a total of 606,523 days of boating on rural Texas rivers and streams. The department believes that river use has increased greatly since 1969. See TEXAS PARKS & WILDLIFE DEP'T, TEXAS WATERWAYS; A FEASIBILITY REPORT ON A SYSTEM OF WILD, SCENIC AND RECREATIONAL WATERWAYS IN TEXAS, at 19 (1973) [hereinafter cited as TEXAS WATERWAYS]. Two large manufacturers of aluminum canoes experienced increased canoe sales in Texas, 136% and 500% respectively, between 1966 and 1971. TEXAS PARKS & WILDLIFE DEP'T, PATHWAYS AND PADDLEWAYS; A TRAILS AND SCENIC WATERWAYS FEASIBILITY STUDY 6 (1971).

3. For example, ranchers whose property abuts well-traveled rivers have complained that recreationists have frightened their cattle or cut their fences, and "second-home" owners and ranchers alike have suffered from such problems as lack of privacy and litter. See Fritz, *Report on the Meeting at Junction; Property Rights and Invididual Rights*, at 3-4, April 1974 [hereinafter cited as Meeting at Junction] (meeting organized for the purpose of conducting an in-depth study of approaches, attitudes, and techniques toward improving human relations along boundaries between state-owned streambeds and abutting private lands in Texas). It has been said that, to these landowners, "canoeists represent just another intrusion, along with government officials and San Antonio real estate developers, who threaten to carve up the countryside and destroy the natural and scenic qualities of the river that has nurtured their families for over a century." Burton, *On the Waterfront*, TEXAS MONTHLY, Vol. 3, No. 4, Apr. 1975, at 33. Some 600 landowners in the hill-country region have organized the Guadalupe River Association. This group, represented by counsel, has opposed state river legislation.

4. TEXAS PARKS & WILDLIFE DEP'T, PATHWAYS AND PADDLEWAYS; A TRAILS AND SCENIC WATERWAYS FEASIBILITY STUDY 5 (1971).

5. See generally Boyd, *Guns Along the Guadalupe*, THE TEXAS OBSERVER, Vol. LXV, No. 18, Sept. 21, 1973, at 9; Burton, *On the Waterfront*, TEXAS MONTHLY, Vol. 3,

violation of his vested property rights, while on the other, the recreationist urges that he has been denied the right to use public facilities. Generally, this conflict has manifested itself in three major areas: obstructions across rivers, public use of riverbanks, and access to waterways. The scope of this comment will include a determination of the legal basis of this conflict and a proposition for resolving the conflict through statutory enactment.

PUBLIC RIGHTS IN RIVERS

There is a presumption that the control of navigable waters is an inherent power of the state.⁶ Under early common law, *jus publicum*, or the public right, was the royal prerogative by which the king held shores and navigable rivers for the common use and benefit of all his subjects who used those areas for trade.⁷ That right could not be transferred to an individual without legislative action.⁸

In Texas, by statute, the waters of every flowing river and natural stream, including all fish and marine life in those waters,⁹ are owned by the State.¹⁰ The title to these waters is held by the State in trust for the public for a number of purposes.¹¹ One of the basic purposes is that of navigation, or the right to pass over the water and to use the subadjacent land for anchoring, poling, or other incidents of navigation.¹² The Texas Supreme Court has

No. 4, Apr. 1975, at 32. Examples cited in these articles include a landowner's shooting 21 bullets into a canoe that had become lodged between boulders on the Guadalupe River and the arrest, for trespassing, of an entire Boy Scout troop which had stopped for a rest on a riverbank.

6. *United States v. Oregon*, 295 U.S. 1, 14 (1935).

7. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 90 (1851).

8. *Id.* at 90.

9. TEX. REV. CIV. STAT. ANN. art. 4026 (1966).

10. TEX. WATER CODE ANN. § 5.021 (1972). By contrast, private rights in water depend on whether the particular state follows the riparian or appropriation doctrines of water rights. *See* 1 R. CLARK, *WATER AND WATER RIGHTS* §§ 15-29, at 60-175 (1967); W. HUTCHINS, *THE TEXAS LAW OF WATER RIGHTS* chs. 6-8, at 101-409 (1961). *See generally* 1 W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 157-225 (1971). Texas law is a combination of both. *See* B. DOBKINS, *THE SPANISH ELEMENT IN TEXAS WATER LAW* 22-31 (1959); 1 W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 200-225 (1971); W. HUTCHINS, *THE TEXAS LAW OF WATER RIGHTS* 101-62 (1961).

11. *Diversion Lake Club v. Heath*, 126 Tex. 129, 138, 86 S.W.2d 441, 445 (1935); *Chicago, Rock I. & G. Ry. v. Tarrant County Water Control & Improvement District No. 1*, 123 Tex. 432, 446, 451-53, 73 S.W.2d 55, 63 (1934); *Motl v. Boyd*, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926).

12. *United States v. Willow River Power Co.*, 324 U.S. 499, 507 (1945) (all riparian interests are subject to a dominant public interest in navigation); *Penn Cent. Co. v. Buckley & Co.*, 415 F.2d 762, 763-64 (3d Cir. 1969) (navigation is paramount use of waterways and bridge tiers are permissible obstructions); *Motl v. Boyd*, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926) (regarded as a superior public right); *see* 1 R. CLARK, *WATER AND WATER RIGHTS* § 36.4(A), at 198 (1967). Other purposes are: the use for the benefit of the riparian lands, state control of non-riparian waters for the public benefit of non-riparian waters, and other lawful uses and benefits. *Motl v. Boyd*, 116

stated that the reservation of waters to the public implies all rights necessary for the full use and enjoyment of the rights reserved and that a liberal construction of this reservation is required.¹³ The court has further held that a grant of exclusive private privileges in Texas waters will not be upheld in the absence of strict legislative authority.¹⁴

Ownership of Riverbeds

The law in regard to ownership of the beds *under* these waters is somewhat more complex.¹⁵ The early common law held that only those streams which are affected by the ebb and flow of the tide are navigable waters.¹⁶ This doctrine was soon deemed unworkable in the United States and was replaced by a standard of "navigability in fact."¹⁷ Under this standard rivers which are navigable in fact are navigable in law, and they are public rivers whose beds are generally owned by the State.¹⁸ Based on their navigability and the State's ownership of their beds, they may be used by the public for navigation, fishing, and other lawful purposes.¹⁹ Most states have adopted the federal definition of navigable rivers;²⁰ however, Texas is

Tex. 82, 111, 286 S.W. 458, 468 (1926). *See also* W. HUTCHINS, *THE TEXAS LAW OF WATER RIGHTS* 8 (1961).

Fishing, hunting, picnicking, and bathing are also allowed the public in its use of the water, bed, and banks up to the line of private ownership. *See, e.g.*, *Brickell v. Trammell*, 82 So. 221, 226 (Fla. 1919); *Lamprey v. Metcalf*, 53 N.W. 1139, 1143-44 (Minn. 1893); *Diversion Lake Club v. Heath*, 126 Tex. 129, 138, 86 S.W.2d 441, 445 (1935).

13. *State v. Bradford*, 121 Tex. 515, 545-56, 50 S.W.2d 1065, 1077 (1932).

14. *Landry v. Robison*, 110 Tex. 295, 298, 219 S.W. 819, 820 (1920). In most jurisdictions, the various private owners share the use of the water in nonnavigable lakes and streams and may use the entire surface area for boating, fishing, and recreation. Texas law, however, maintains separate rights over each privately-owned section of water. *See, e.g.*, *Duval v. Thomas*, 114 So. 2d 791, 794 (Fla. 1959); *Swartz v. Sherston*, 300 N.W. 148, 150 (Mich. 1941); *Snively v. Jaber*, 296 P.2d 1015, 1019 (Wash. 1956). *See also* *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130 (Tex. Civ. App.—Waco 1935, writ dismissed) (landowner had exclusive fishing rights in area of lake directly above his land); *Fisher v. Barber*, 21 S.W.2d 569, 570 (Tex. Civ. App.—Beaumont 1929, no writ) (suit to enjoin members of the public from hunting and fishing on private land that was dry at time of grant, but subsequently flooded by waters of navigable stream).

15. For a thorough discussion of the historical aspects of bed ownership of Texas rivers and streams, see Roberts, *Title and Boundary Problems Relating to Riverbeds*, 36 *TEXAS L. REV.* 299, 299-308 (1958).

16. *See, e.g.*, *St. Louis I.M. & S. Ry. v. Ramsey*, 13 S.W. 931 (Ark. 1890); *Schulte v. Warren*, 75 N.E. 783, 785 (Ill. 1905) (ebb and flow test conclusive only to questions of boundary and ownership); *Miller v. State*, 137 S.W. 706, 761 (Tenn. 1911); *Griffith v. Holman*, 63 P. 239, 241 (Wash. 1900).

17. *See, e.g.*, *Utah v. United States*, 403 U.S. 9, 10-11 (1971); *The Daniel Ball*, 77 U.S. 557, 563 (1870); *Fairchild v. Kraemer*, 204 N.Y.S.2d 823, 825-26 (Sup. Ct. 1960). In England virtually all rivers which are navigable in fact are affected by the ebb and flow of the tide, but many American rivers are navigable for hundreds of miles above the limits of the tidewater. *Packer v. Bird*, 137 U.S. 661, 667 (1891).

18. *Packer v. Bird*, 137 U.S. 661, 667 (1891); *The Daniell Ball*, 77 U.S. 557, 563 (1870).

19. *Diversion Lake Club v. Heath*, 126 Tex. 129, 136, 86 S.W.2d 441, 444 (1935).

20. This federal standard was set forth by the United States Supreme Court as follows:

among the minority of jurisdictions which have enacted independent statutory standards for navigability.²¹

Since 1837 Texas courts have determined bed ownership by applying the "30-foot statute," which defines navigable streams as those retaining an average width of 30 feet from the mouth up.²² The courts have stated that the bed of any stream which is navigable by statute is publicly owned.²³ Since the statute governs surveys of lands abutting navigable streams, providing that those streams duly defined as "navigable" shall not be crossed by any survey lines,²⁴ private ownership of the streambed is precluded by ending the private property line at the river's edge.

This statute gave thousands of miles of riverbeds to the State which it would not have owned under common or civil law,²⁵ primarily because the statutory definition includes some waterways that may not be navigable in fact. Whether statutorily navigable or navigable in fact, these streams are owned by the public and consequently are subject to a public trust.²⁶

[T]hey are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water
The Daniel Ball, 77 U.S. 557, 563 (1870).

21. See TEX. REV. CIV. STAT. ANN. art. 5302 (1962). See also IOWA CODE § 106.2 (Supp. 1975) lakes and streams capable of supporting vessels carrying one or more persons for a total of 6 months in one year out of every 10; MISS. CODE ANN. tit. 51, § 51-1-1 (1973) (rivers at least 25 feet wide and capable of floating a steamboat having a carrying capacity of 200 bales of cotton); WIS. STAT. § 30.10 (1973) (all lakes and streams navigable in fact for any purpose whatsoever).

22. TEX. REV. CIV. STAT. ANN. art. 5302 (1962). Prior to 1837, bed ownership as determined by Texas courts looking to Spanish and Mexican civil law depended upon whether a stream was "perennial" or "torrential." Generally, the beds of perennial streams, those which flow most of the year except in times of drought, were publicly owned, whereas the beds of torrential streams, those which flow for only a short period after a heavy rainfall, were privately owned by the riparian landowners. *Heard v. Refugio*, 129 Tex. 349, 353, 103 S.W.2d 728, 730 (1937) (Mission River is perennial, although not navigable in fact); *Manry v. Robison*, 122 Tex. 213, 231, 56 S.W.2d 438, 446 (1932); *McCurdy v. Morgan*, 265 S.W.2d 269 (Tex. Civ. App.—San Antonio 1954, writ ref'd). For a discussion of this distinction see Hawkins, *Title to River Beds in Texas and Their Boundaries*, 7 TEXAS L. REV. 493, 509-12 (1929). Under this distinction, land grants made prior to 1837 carried private title to the center of torrential streams, but not of perennial streams. *State v. Grubstake Inv. Ass'n*, 117 Tex. 53, 57, 297 S.W. 202, 203 (1927).

23. See *Diversion Lake Club v. Heath*, 126 Tex. 129, 138, 86 S.W.2d 441, 445 (1935); *Chicago, R.I. & G. Ry. v. Tarrant County Water Control Improvement Dist. No. 1*, 123 Tex. 432, 446, 73 S.W.2d 55, 63 (1934); *Motl v. Boyd*, 116 Tex. 82, 110-11, 286 S.W. 458, 468 (1926); *Austin v. Hall*, 93 Tex. 591, 597, 57 S.W. 563, 564-65 (1900); *St. Paul Fire & Marine Ins. Co. v. Carroll*, 106 S.W.2d 757, 758 (Tex. Civ. App.—Fort Worth 1937, writ dism'd).

24. TEX. REV. CIV. STAT. ANN. art. 5302 (1962).

25. *Manry v. Robison*, 122 Tex. 213, 233, 56 S.W.2d 438, 448 (1932).

26. *Diversion Lake v. Heath*, 126 Tex. 129, 138, 86 S.W.2d 441, 445 (1935); see *Austin v. Hall*, 93 Tex. 591, 596, 57 S.W. 563, 564 (1900). See also *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

Although Texas adopted the common law in 1840, as to streams it has followed only those rules deemed harmonious with the basic principles of Texas water law.²⁷ Therefore, ownership of the beds of streams classified as navigable will, for the most part, remain in the State, giving the general public rights in their use.²⁸ It has been held that grants made after 1837, of those streams which are statutorily navigable, do not convey title in the bed to the riparian grantees.²⁹ Conversely, if a river is nonnavigable under the 30-foot test, title to the riverbed will pass to the landowner.³⁰

The anomaly in regard to public recreation is that private ownership of nonnavigable stream beds, although not determinative of the ownership of the waters themselves,³¹ will preclude public use of those waters.³² In *Taylor Fishing Club v. Hammett*,³³ the Waco Court of Civil Appeals found that a lake used for many years for fishing, camping, and boating, but not used for commercial navigation, was not navigable and therefore the bed was private-

27. *Diversion Lake Club v. Heath*, 126 Tex. 129, 135-36, 86 S.W.2d 441, 444 (1935) (Texas did not adopt the common law rule granting landowners an exclusive right to fish in all non-tidal waters); *Manry v. Robison*, 122 Tex. 213, 233, 56 S.W.2d 438, 447 (1932); see *Roberts, Title and Boundary Problems Relating to Riverbeds*, 36 TEXAS L. REV. 299, 301 (1958).

28. There are a few exceptions to this general rule. For example, under the Small Bill, the State relinquished, to the original grantees and their assigns, title to certain riverbeds crossed or partly crossed by original land grants and awards, but specifically provided that such grants shall not "impair the rights of the general public and the State in the waters or streams . . ." TEX. REV. CIV. STAT. ANN. art. 5414a (1962). A companion bill passed in 1955, relinquished title to grantees and their assigns under deeds of acquittance to streambeds lying within the boundaries of those deeds. TEX. REV. CIV. STAT. ANN. art. 5414a-1 (1962). Art. 7467a relinquished State-owned titles to beds lying within the corporate boundaries of cities having a population of 40,000 or more according to the 1920 census. TEX. REV. CIV. STAT. ANN. art. 7467a (1954). Since the State has retained power to grant the soil beneath navigable public waters, the title to riverbeds may be privately owned. *State v. Bradford*, 121 Tex. 515, 549, 50 S.W.2d 1065, 1078 (1932); *Moore v. Ashbrook*, 197 S.W.2d 516, 518 (Tex. Civ. App.—San Antonio 1946, writ ref'd). But this grant must be specific and under legislative authority. *National Resort Communities, Inc. v. Cain*, 479 S.W.2d 341, 349 (Tex. Civ. App.—Austin 1972), *aff'd on rehearing*, 512 S.W.2d 367 (Tex. Civ. App.—Austin 1974, writ granted).

29. *State v. Black Bros.*, 116 Tex. 615, 625, 297 S.W. 213, 217 (1927); *Austin v. Hall*, 93 Tex. 591, 597, 57 S.W. 563, 564-65 (1900).

30. Where land is bounded by a nonnavigable stream, the boundary is the center of that stream. *Lee v. Grupe*, 223 S.W.2d 548, 552 (Tex. Civ. App.—Texarkana 1949, no writ); *Dutton v. Vierling*, 152 S.W. 450, 452-53 (Tex. Civ. App.—Austin 1912, no writ).

31. Private ownership of the bed does not carry with it ownership of the waters flowing above that bed. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 424 (1940); *Niagra Mohawk Power Corp. v. FPC*, 202 F.2d 190, 198 (D.D.C. 1952), *aff'd*, 347 U.S. 239 (1954); *State Game & Fish Comm'n v. Louis Fritz Co.*, 193 So. 9, 11 (Miss. 1940); *Maples v. Henderson County*, 259 S.W.2d 264, 268 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.).

32. It has been stated that "[t]o whatever extent a state by statute or decision has handed over any type of stream or lake bed into unqualified private ownership, it has created an expensive barrier to future utilization of that resource for the public benefit." 1 R. POWELL, *THE LAW OF REAL PROPERTY* § 160, at 638-56 (1973).

33. 88 S.W.2d 127 (Tex. Civ. App.—Waco 1935, writ dism'd).

ly owned.³⁴ The court ruled that the private landowner had a right to control that part of the lake surface above his land, including fishing and boating rights, and that any interference with this right by another would be considered an infringement of his riparian rights.³⁵ The practical consequence of private ownership is that those waterways are not within the State's jurisdiction, and members of the public will have no rights in their use.

Suitability Test

The definition of navigability, therefore, is primarily determinative of bed ownership and secondarily determinative of public rights in the use of the waters above those beds. It has been argued that in view of the declining use of rivers for commercial navigation, a more reasonable standard for determining public rights would be that of *suitability* for any public use.³⁶ In an early case supporting that view, the Supreme Court of Minnesota stated that under present conditions, boating or sailing for pleasure or profit should be considered navigation, so as not to preclude public use of recreational facilities by restricting to private ownership those waterways which are not commercially navigable.³⁷ Many years later the Supreme Court of Wyoming held that the public has the right to use public waters of that state irrespective of bed ownership, and that right should not be interfered with or curtailed by any landowner.³⁸

TEXAS LEGISLATIVE HISTORY

In recent years the Texas Parks and Wildlife Department, the General Land Office, and individual legislators have proposed unsuccessful legislation pertaining to public use of Texas rivers.³⁹ Critics maintain that legislative

34. *Id.* at 130.

35. *Id.* at 130.

36. See, e.g., 1 R. CLARK, *WATERS AND WATER RIGHTS* 214-17 (1967); Frey, *The Public Trust in Public Waterways*, 7 URBAN L. ANN. 219, 231-34, 244-45 (1974); Comment, *The Vitality of the Navigability Criterion in the Era of Environmentalism*, 25 ARK. L. REV. 250 (1971); Note, *Public Fishing Rights*, 12 WYO. L.J. 167, 172 (1958).

37. *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893). The court stated that "[t]o hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot perhaps, be now even anticipated." *Id.* at 1143.

38. *Day v. Armstrong*, 362 P.2d 137, 147 (Wyo. 1961).

39. See generally *TEXAS WATERWAYS*, at 9; Burton, *On the Waterfront*, TEXAS MONTHLY, Vol. 3, No. 4, Apr. 1975, at 33-34; address by Dr. Terry Jordan, Dept. of Geography, N.T.S.U., Denton, Texas, summarized in *Meeting at Junction*, at 4-5. One bill attempting to create a scenic or natural waterways system for Texas was introduced into the 61st Legislature. TEX. S.B. 319, H.B. 682, 61st Leg. (1969). This system was to be composed of navigable rivers designated as natural river areas by subsequent legislative acts, to be administered by the Texas Parks and Wildlife Department. The proposed legislative policy would have been "to preserve, develop, reclaim, and make accessible for the benefit of all people selected parts of Texas' diminishing resource of free-flowing

efforts to provide for a recreational waterway system in Texas will continually fail until the public develops an awareness of public rights in navigable waters. Helpful legislation could be modeled after the Texas Open Beaches Act,⁴⁰ which affirmed the public's ownership of the Texas Gulf beaches. This act affirmatively declared that the public should have the right of access to and enjoyment of state-owned beaches and any larger area where its rights have been established through prescription or dedication.⁴¹ Texas was the first state in the nation to establish a state policy of preserving its beaches for public use and benefit.⁴² It is conceded that prescriptive use of Texas riverbanks and access points is not as settled as the public's use of Texas beaches, but the demand for river recreation is increasing, and a similar statute in regard to rivers should be enacted to supply the same guarantees.⁴³

ivers." Although the bill passed the Senate, it was never reported from the House committee.

The legislature, however, did appropriate funds for a two-year study to determine the feasibility of establishing a waterways system in Texas, assigning responsibility for the project to the Texas Parks and Wildlife Department. Tex. H.B. 2, 61st Leg. (1969). The results of this study, which was limited to a 22.5-mile stretch of the upper Guadalupe River, were presented in the comprehensive publication, TEX. PARKS & WILDLIFE DEPT., PATHWAYS AND PADDLEWAYS; A TRAILS & SCENIC WATERWAYS FEASIBILITY STUDY (1971), recommending establishment of a limited waterway park, to include the purchase and development of five river campsites and the acquisition of a protective scenic easement obtained through negotiations with riparian landowners. *Id.* at 9.

In 1971, the Texas Water Code was enacted as a comprehensive codification of Texas water law, but, except for a provision that State water may be appropriated, stored, or diverted for navigation, recreation, and public parks, there is no mention of public rights in regard to recreational use of the state's rivers. TEX. WATER CODE ANN. art. 5.023(a)(6), (7), (9) (1972). In view of increased public use of Texas rivers, this omission is noteworthy and indicates that the public has no single statutory source from which to determine their rights. The legislature, however, has established a Senate Interim Committee on Parks and Recreation, which has released a series of reports and recommendations for clarification of the law regarding public rights to rivers. TEX. S. RES. 235, 60th Leg. (1968); SENATE INTERIM COMMITTEE ON PARKS & RECREATION, THIS LAND IS OUR LAND (1969); SENATE INTERIM COMMITTEE ON PARKS & RECREATION, THIS LAND IS STILL OUR LAND (1973).

40. TEX. REV. CIV. STAT. ANN. art. 5415d (1962).

41. *Id.* at § 1.

42. TEXAS GENERAL LAND OFFICE, TEXAS COASTAL LEGISLATION 3 (1974). Oregon has subsequently adopted a similar statute. ORE. REV. STAT. § 390.610 (1974).

43. In support of the analogy between public use of beaches and riverbanks, Prof. Clark states:

The principle that the public has an interest in tidelands and banks of navigable waters and a right to use them for purposes for which there is a substantial public demand may be derived from the fact that the public won a right to passage over the shore for access to the sea for fishing when this was the area of substantial public demand. As time goes by, opportunities for much more extensive uses of these lands become available to the public. The assertion by the public of a right to enjoy additional uses is met by the assertion that the public right is defined and limited by precedent based upon the past uses and past demand. But such a limitation confuses the application of the principle under given circumstances with the principle itself.

1 R. CLARK, WATERS AND WATER RIGHTS 202 (1967).

A bill which would have accomplished this goal was introduced by Senator Ron Clower of Garland during the 63rd legislative session.⁴⁴ The Texas Public Rivers Act of 1973 proposed a codification of Texas water law concerning public rights of recreational use. As its declaration of policy, the bill confirmed the right of the public to the use and benefit of navigable inland waterways.⁴⁵ Although the bill was never reported from the Senate Committee on Natural Resources, it is urged that the bill can provide the legislation necessary to alleviate the present problems between recreationists and landowners. The following discussion of the law in regard to obstructions, riverbanks, and access will point out the need for statutory clarification by means of a Texas Public Rivers Act.

OBSTRUCTIONS

The Texas Constitution guarantees to the public the right to navigation on inland waters,⁴⁶ and it has long been state policy to guard navigable streams from obstruction in order that they might be used for trade and travel.⁴⁷ Therefore, waterways should be free from obstructions placed by individual landowners. Riparian landowners, however, sometimes have erected fences across rivers incidental to ranching activities.⁴⁸ Fences that may not seem reasonable to a recreationist using the river when the water level is normal or high may be necessary in order to prevent livestock from crossing or wandering along the river when the water level is down. The Attorney General of Texas has stated that a landowner may not erect a fence which prevents the public from floating or fishing along a river.⁴⁹

44. Tex. S.B. 533, 64th Leg. (1973).

45. The Act declared:

The law regarding the public use of property held in part for the benefit of the public must change as the public need changes.

It is hereby declared and affirmed to be the public policy of the State of Texas that the navigable inland waters within this state are reserved for the benefit and use of the public, individually and collectively; and that the state should guarantee the public's right to use these waters, provide the public the necessary facilities to enable them to use these waters, and provide whatever regulation is necessary for the protection of these waters and the adjacent lands and landowners.

Id. at § 3(a).

46. TEX. CONST. art. XVI, § 59(a).

47. *Selman v. Wolfe*, 27 Tex. 68, 71 (1863) (toll bridge across Angelina River must be built so as not to impede navigation); *accord*, *Gulf, C. & S.F. Ry. v. Meadows*, 120 S.W. 521, 522 (Tex. Civ. App.—1909, writ ref'd) (temporary bridge on Neches River erected as base from which to make repairs on railroad bridge prevented lawful passage of rafts of logs floating down to Beaumont); *see* *Hamilton v. Vicksburg, S. & Pac. R.R.*, 119 U.S. 280, 281 (1886) (construction work on railroad bridge obstructed commercial navigation). Railroads have the right to build bridges across streams, but must do so in a manner which does not infringe on the stream's usefulness to the public. TEX. REV. CIV. STAT. ANN. art. 6320 (1926).

48. Often a canoeist may find his passage blocked by these fences, or by lines or cables erected for no clear purpose, and passage around these obstructions may result in a charge of trespassing.

49. TEX. ATT'Y GEN. OP. NO. S-107 (1953). The opinion was directed towards a landowner who owned land on both sides of a highway right-of-way across the Trinity

The Texas Public Rivers Act would prohibit the erection of obstructions which may impede travel along a navigable river.⁵⁰ An exception would be granted to a landowner who, because of the particular nature of the waterway involved, found it reasonably necessary to place a fence across a river to contain his livestock.⁵¹ The determination of what constitutes a "reasonably necessary" livestock fence raises a fact issue which might lead to unnecessary litigation. The conflict between these two sections could be mitigated by means of administrative criteria for reasonableness. Factors in setting a reasonable standard should include a determination of low and high-water levels on the river involved and the use to which the riparian land is put.

Under the Texas Public Rivers Act, the Attorney General, or any County, District, or Criminal District Attorney, would be authorized to file actions seeking either temporary or permanent court orders or injunctions to remove unnecessary obstructions restricting the public right of navigation.⁵² In this manner, the public would be guaranteed the right of redress.

PUBLIC USE OF RIVERBANKS

The Boundary Line Between Public and Private Ownership

Before a right to or prohibition against the use of riverbanks can be considered, it is necessary to determine the line of demarcation between public and private ownership. Since the State retains title to most navigable streambeds, landowners have title only to the mean high-water line of these streams.⁵³ The water level may change frequently in proportion to the

River, and who had tied his fence to that right-of-way, effectively preventing the public from gaining access to the river. *Id.* at 2.

The San Antonio Court of Civil Appeals approved a landowner's proposal to build a fence along his property which would run *in and along* the channel of the stream. *Tyler v. Gonzales*, 189 S.W.2d 519, 522 (Tex. Civ. App.—San Antonio 1945, writ ref'd w.o.m.). The court felt that the fence as proposed would not constitute a nuisance or interference with the public rights in the stream, but declined to discuss the legal implications of a fence lying *across* the current of a stream. *Id.* at 522.

50. The Act provides:

It shall be an offense against the public policy of this state for any person to create, erect, construct, or maintain any obstruction, barrier, or restraint of any nature whatsoever which would interfere with the free and unrestricted right of the public, individually and collectively, to use and enjoy the navigable inland waters of this state. . . .

Tex. S.B. 533, § 3(b), 63rd Leg. (1973).

51. The Act provides:

Any riparian owner may place and maintain a livestock fence across navigable inland waters if the placement of the fence is reasonably necessary to restrain the movement of domestic livestock.

Id. § 5(a).

52. *Id.* § 7.

53. *State v. Black Bros.*, 116 Tex. 615, 625, 297 S.W. 213, 217 (1927); *Mott v. Boyd*, 116 Tex. 82, 111, 286 S.W. 458, 468 (1926); *Austin v. Hall*, 93 Tex. 591, 597, 57 S.W. 563, 564 (1900).

amount of rainfall;⁵⁴ consequently, it is often difficult for recreationists to determine true boundary lines. Boundary determination has been a constant source of litigation in Texas courts because each waterway must be evaluated individually to see if it is navigable according to the 30-foot standard.⁵⁵

The boundary line definition applied most frequently in Texas is that declared by the United States Supreme Court in *Oklahoma v. Texas*,⁵⁶ where the Court sought to apply the 30-foot statute in defining and marking the boundary line between Texas and Oklahoma. It was defined as the

gradient of the flowing water in the river . . . 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.⁵⁷

The difficulty of application is obvious. Neither landowners nor recreationists can be sure where their rights begin, and it is often safer for the public to remain in their boats than risk being charged with criminal trespass.⁵⁸ On the other hand, landowners should not be confronted with recreationists trespassing upon their lands.

Permitted Uses Under the Civil Law

Prior to 1837, when river navigation for commercial purposes was more prevalent and construction of Texas land grants was governed by the Spanish and Mexican civil law, private ownership of riverbanks was said to be burdened with certain servitudes, allowing any person to moor his boat to the trees along the shore, make repairs, or unload merchandise.⁵⁹ The Texas Supreme Court, in one case, considered these servitudes in holding that title to riparian land granted in 1835 by the government of Coahuila and Texas was burdened with these rights of public use.⁶⁰ The court stated that its decision should be governed by the law applicable at the time of the grant.⁶¹

54. Riverbed boundaries do not remain constant, and titles change from private to public ownership and vice versa in accordance with the common law doctrines of accretion, reliction, erosion, and avulsion. See *Maufrais v. State*, 142 Tex. 559, 567-70, 180 S.W.2d 144, 148-50 (1944); *Hancock v. Moore*, 135 Tex. 619, 623-24, 146 S.W.2d 369, 370-71 (1941); *Manry v. Robison*, 122 Tex. 213, 225, 56 S.W.2d 438, 443-44 (1932).

55. See generally *Hawkins, Title to River Beds in Texas and Their Boundaries*, 7 TEXAS L. REV. 493, 498, 507 (1929); *Roberts, Title and Boundary Problems Relating to Riverbeds*, 36 TEX. L. REV. 299, 308-18 (1958).

56. 265 U.S. 500 (1924).

57. *Id.* at 501.

58. For a report of incidents in recent years along the Guadalupe River where canoeists using riverbanks as picnic areas have been charged with trespassing see *Boyd, Guns Along the Guadalupe*, THE TEXAS OBSERVER, Vol. LXV, No. 18, Sept. 1973, at 9. The significance of these incidents is that they illustrate confusion as to property rights along rivers.

59. *Diversion Lake Club v. Heath*, 126 Tex. 129, 142, 86 S.W.2d 441, 447 (1935); *State v. Grubstake Inv. Ass'n*, 117 Tex. 53, 58, 297 S.W. 202, 203 (1927).

60. *State v. Grubstake Inv. Ass'n*, 117 Tex. 53, 57, 297 S.W. 202, 202-203 (1927). See also TEX. ATT'Y GEN. OP. NO. S-107 (1953).

61. *State v. Grubstake Inv. Ass'n*, 117 Tex. 53, 56-57, 297 S.W. 202 (1927).

This type of servitude has been recognized in other states.⁶² For example, in Louisiana the public is allowed to land their boats on the privately-owned banks of navigable rivers, secure their craft to the trees, and unload and deposit goods.⁶³ These uses, however, must relate to navigation and commerce, and although fishing is probably permissible, there is no corresponding right to hunt or trap on the banks.⁶⁴ In states following the civil law rule, the unreasonable use of riverbanks for purposes incident to navigation entitles the landowner to reasonable compensation for damages resulting from the excessive use.⁶⁵

The Supreme Court of Missouri in *Elder v. Delcour*⁶⁶ found that a reasonable use of riverbanks by recreationists was appropriate in that state. The case concerned a suit to enjoin a private landowner from preventing a canoeist from floating down and fishing in a river running through his property. The court determined that the river was nonnavigable and the bed privately-owned, but nonetheless held that the public had a right to fish in those waters.⁶⁷ The fact that the canoeist had taken his craft out of the water after encountering a log jam and portaged it across the privately-owned riverbank was not considered significant by the court. Such action, along with the right to wade the river was deemed a rightful incident to the use of a public highway for travel.⁶⁸

In *Day v. Armstrong*⁶⁹ the Wyoming Supreme Court refused to follow the Missouri court in permitting wading or walking upon the riverbed or use of its banks for recreational purposes. In determining the scope of public rights in regard to floating upon the waters of the North Platte River the court stated that any wading or walking in the riverbed which is more than incidental to the right to float down the river would be an unlawful trespass upon riparian lands.⁷⁰ The court upheld a public use in those waters for fishing, hunting, and pleasure, but required use of only the waters of the streams themselves with only minor and incidental use of the subadjacent lands.⁷¹

62. See, e.g., *Andrews v. King*, 129 A. 298, 299 (Me. 1925) (colonial ordinances have reserved to the public a right to use shore for purposes of navigation, including mooring vessels and taking on passengers); *O'Fallon v. Daggett*, 4 Mo. 209, 210 (1836) (for emergency repairs); LA. CIV. CODE ANN. art. 455 (West 1952).

63. LA. CIV. CODE ANN. art. 455 (West 1952).

64. Yiannopoulos, *The Public Use of the Banks of Navigable Rivers in Louisiana*, 31 LA. L. REV. 563, 571 (1971).

65. *Louisiana & Miss. R. Transfer Co. v. Long*, 131 So. 84, 87 (Miss. 1930) (boat moored on landowner's riverbank for an excessive length of time).

66. 269 S.W.2d 17 (Mo. 1954).

67. *Id.* at 26.

68. *Id.* at 26.

69. 362 P.2d 137 (Wyo. 1961).

70. *Id.* at 146.

71. *Id.* at 147.

The court based its conclusions upon Wyoming's constitutional declaration that all waters within its boundaries belong to the state.⁷² Thus, it distinguished its holding from that of *Elder* by observing that since Missouri did not have such a constitutional provision, that court may have based its holding on other considerations.⁷³ As previously noted, Texas has a similar statutory declaration,⁷⁴ and the courts of this state could prohibit a broad public use of riverbanks by following the Wyoming decision. Texas law, however, can be differentiated from that of Wyoming in that the former is based on Spanish and Mexican civil law, which permitted reasonable use of the banks.

Case Law in Texas

The Supreme Court of Texas has declined to decide whether or not the rights of the public to use streambanks bordered by grants made under the civil law differ from public rights construed under our present statutory conception of navigability.⁷⁵ The Attorney General, however, has stated that the public is authorized by virtue of express legislative grants⁷⁶ to traverse dry or submerged riverbeds which are privately owned. The Attorney General reasoned that the statutory provision declaring that the Act should not impair the rights of the public in the affected waters would reserve to the public a right to walk in the streambed for fishing purposes.⁷⁷

72. *Id.* at 146; WYO. CONST. art. VIII, § 1. For interpretation of a similar type of constitutional provision in New Mexico, see *State ex rel. Game Comm'n v. Red R. Valley Co.*, 182 P.2d 421, 430-32, 464 (N.M. 1945). But the Colorado Supreme Court rejected such an interpretation of a similar constitutional provision in that state. See *Hartman v. Tresise*, 84 P. 685, 686-87 (Colo. 1905).

73. *Day v. Armstrong*, 362 P.2d 137, 146 (Wyo. 1961).

74. The Texas statute declares that:

The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

TEX. WATER CODE ANN. § 5.021(a) (1972).

75. *Diversion Lake Club v. Heath*, 126 Tex. 129, 143, 86 S.W.2d 441, 445 (1935).

76. TEX. ATT'Y GEN. OP. No. S-208 (1956). The river in question was the Salt Fork of the Brazos, where virtually all of the beds had passed from state to private ownership under the Small Bill. TEX. REV. CIV. STAT. ANN. art. 5414a (1962).

77. TEX. ATT'Y GEN. OP. No. S-208 (1956). It is clear that as long as they remain below the high-water mark on the bank, recreationists may hunt, camp, or fish on those banks abutting grants made under the civil law. See *Dincans v. Keeran*, 192 S.W. 603, 604 (Tex. Civ. App.—San Antonio 1917, no writ). In *Dincans*, the San Antonio Court of Civil Appeals held that an injunction preventing recreationists from using a riparian landowner's "pasture inclosure" for these purposes was too comprehensive, because the inclosure in question included land between the low-and high water mark of the stream. *Id.* at 604. There is also dicta in that case to the effect that hunting, camping, and fishing are reasonable uses of the shorelines of navigable waters. In reviewing the validity of an injunction preventing recreationists from entering upon the landowner's pasture inclosure, the court found undisputed evidence that appellants had trespassed on appellee's land for the purpose of hunting, fishing, and camping thereon. In noting that the injunction covered too broad an area, however, the court stated that "[h]unting, camping, and fishing are reasonable uses of the navigable waters and shore line." *Id.* at

The Texas Supreme Court considered the question of public use of riverbanks in *Diversion Lake Club v. Heath*.⁷⁸ In that case the riparian landowners had created a "private" lake by buying up shoreline on the Medina River which was subsequently flooded by the lawful construction of a dam. The landowners, who had formed a corporation, claimed that the lake was private on the basis of the private ownership of the land beneath the flooded area, and sought to enjoin members of the public from launching their boats at an upstream highway right-of-way and floating downstream to fish in the lake. The court held that the river waters were public property regardless of bed ownership, and consequently the public had a right to fish there without the consent of the riparian landowner.⁷⁹ Unlike rights governed by the civil law grants, the public had no right under common law grants to go beyond the gradient boundary and use the banks for fishing, camping, and other recreational purposes.⁸⁰

Two opinions by the Attorney General issued subsequent to the decision in *Diversion Lake Club* imply that the public has the right to make broader use of the shore under the civil law than under the common law.⁸¹ In considering what rights the public had to use the banks and sand bars on a portion of the Trinity River lying between two grants made by Mexico in 1835, the Attorney General stated that the public may use the beds and banks up to the gradient boundary for fishing and, if those areas are held by virtue of civil law grants, the public may make certain uses of the banks above that line.⁸² The contrast between the uses permitted under civil law and common law is noteworthy. In effect, it means that public use of certain streambanks depends upon the date of the grant. Of course, the common law decisions would bear more weight than those made under civil law and opinions issued by the Attorney General, but recreational use of Texas rivers has increased to such a point that a limited public use commensurate with that allowed for navigation under the civil law would be desirable.

Solutions Promulgated by the Texas Public Rivers Act

The Texas Public Rivers Act would allow a reasonable use of riverbanks as an incident of recreational navigation, enabling recreationists to pass

604. The court made no mention of civil or common law, but it is presumed that the shoreline boundary would be determined by whatever law controlled at the time of grant. *Id.* at 604.

78. 126 Tex. 129, 86 S.W.2d 441 (1935).

79. *Id.* at 141, 86 S.W.2d at 447.

80. *Id.* at 141, 86 S.W.2d at 447. Such action under the common law would be deemed a trespass.

An unsettled question is whether the common law in Texas permits a navigator to use the shore in an emergency situation. *Diversion Lake Club* specifically left this question open. *Id.* at 143, 86 S.W.2d at 447. From a viewpoint of boater safety, emergency use of riverbanks to escape peril or to mend craft is essential.

81. TEX. ATT'Y GEN. OP. NOS. S-208 (1956), S-107 (1953).

82. TEX. ATT'Y GEN. OP. NO. S-107 (1953).

around obstructions in the river without fear of trespassing.⁸³ Support for this provision is found in the cases which recognize a privilege of entering upon private lands adjoining a public highway when that highway becomes temporarily impassable.⁸⁴ The Act, however, would not authorize a rest or picnic stop on privately-owned lands. Such use would be permissible only on the part of the bank which is public—land below the mean high-water mark. It is urged that in reintroducing the bill, a means for adequately determining the legal boundary line should be provided in order to eliminate misconceptions by recreationists.

The Act would also allow for emergency use of riverbanks.⁸⁵ Although tort law permits a reasonable trespass in an emergency situation,⁸⁶ it is questionable whether a landowner would consider a damaged boat or one lodged between obstacles in the river a sufficient emergency to justify entry upon his lands. River recreation offers a peculiar situation, however, in that access points are often many miles apart, an unreasonable distance to swim for aid. Sometimes a brief use of the bank for repairing a boat or retrieving lost equipment is all that is necessary, but other mishaps involving personal injury might require walking across privately-owned land to seek aid.⁸⁷

RIGHTS OF ACCESS

Although the public has a right to travel on any navigable river in Texas, rights of access to these waters are very limited. As a practical matter, one of the few places from which a person can lawfully launch or remove a boat is a highway right-of-way.⁸⁸ It has been held that the right to fish in public

83. The Act provides that:

[M]embers of the public may make such reasonable and limited use of the banks and shores as may be necessary to enable them to return to the navigable inland waters to which passage is obstructed by the livestock fence.

Tex. S.B. 533, § 5(b), 63rd Leg. (1973).

84. See *Hedgepeth v. Robertson*, 18 Tex. 858, 870-71 (1857); *Gulf Prod. Co. v. Gibson*, 234 S.W. 906, 908-909 (Tex. Civ. App.—Fort Worth 1921, no writ). See also *RESTATEMENT (SECOND) OF TORTS* § 195 (1965); H. TIFFANY, *THE LAW OF REAL PROPERTY* § 463, at 386 (3d ed. 1970).

85. The Act provides that any person who finds it reasonably necessary to make use of the shore during an emergency which threatens his life, safety, or health, shall incur no civil or criminal liability. Tex. S.B. 533, § 9, 63rd Leg. (1973).

86. See generally *RESTATEMENT (SECOND) OF TORTS* § 195 (1965). If necessary to the exercise of the privilege of deviation from a public highway, a person may break and enter a fenced enclosure. *Hedgepeth v. Robertson*, 18 Tex. 858, 870-71 (1857).

87. Similar to incidents involving livestock fences, the problem arises of defining reasonableness. Recreationists should not be permitted to abuse their privilege under this Act unless the situation is a true emergency. Additionally, the problem from the landowner's standpoint could be mitigated by the setting of an arbitrary distance from the water's edge, the area within which the public could use to avoid hazards or make repairs.

88. *Diversion Lake Club v. Heath*, 126 Tex. 129, 139, 86 S.W.2d 441, 445 (1935).

waters⁸⁹ does not give a corresponding right to access by trespassing across private land.⁹⁰

Other states have faced the same difficulty in resolving conflicts between landowner rights and public policy concerning access to rivers. Wisconsin is probably the forerunner in providing legislation for public enjoyment of its numerous water resources.⁹¹ A recent statute directs all new subdivisions abutting navigable lakes and streams in the state to provide public access to the low-water mark at intervals of not more than half a mile.⁹² Additionally in all sales of public lands there is to be a reservation of public access to those lands and to waters that are "navigable in fact for any purpose whatsoever."⁹³ The legislature in that state has also condoned zoning for scenic preservation purposes along shorelines as a valid exercise of a county's police power.⁹⁴ Such a guarantee of public access and scenic preservation is desirable in Texas in view of the diminishing natural river areas now being subdivided for homesites.⁹⁵

Public Access by Prescription, Dedication, and the Power of Eminent Domain

In the absence of constitutional or statutory provisions for public access to navigable rivers, a right-of-way of access by prescription may be acquired if the public has exhibited continuous use, openly and adversely to the landowner for the prescriptive period.⁹⁶ By analogy, such a prescriptive right

89. *Diversion Lake Club v. Heath*, 126 Tex. 129, 136, 86 S.W.2d 441, 444 (1935); *Galveston v. Menard*, 23 Tex. 349, 362 (1859); *Dincans v. Keeran*, 192 S.W. 603, 604 (Tex. Civ. App.—San Antonio 1917, no writ). This right is subject to obtaining a license as provided in TEX. REV. CIV. STAT. ANN. art. 4032b-1 (Supp. 1975).

90. *Diversion Lake Club v. Heath*, 126 Tex. 129, 138-39, 86 S.W.2d 441, 445 (1935); *accord*, *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130 (Tex. Civ. App.—Waco 1935, writ dismissed); *Smith v. Godart*, 295 S.W. 211, 212 (Tex. Civ. App.—Texarkana 1927, no writ) (the legislature has no power to give a member of the public the right to cross private land in order to fish in a land-locked lake).

91. For an extensive article proposing recommendations for a water recreation plan for Wisconsin see Waite, *The Dilemma of Water Recreation and a Suggested Solution*, 1958 WIS. L. REV. 542.

92. WIS. STAT. § 236.16(3) (Supp. 1975).

93. WIS. STAT. § 24.11(3) (1973).

94. WIS. STAT. § 59.97(1) (Supp. 1975).

95. Alaska is another state which has realized the importance of providing public access to waterways. The Alaska Constitution guarantees any United States citizen or resident of Alaska "free access to the navigable or public waters of the state." ALAS. CONST. art. VII, § 14 (1973). Courts in that jurisdiction have interpreted this guarantee as a property right, to be construed as giving the broadest possible access to and use of state waters by the general public. *See Ketchikan Spruce Mills v. Alaska Concrete Prod. Co.*, 113 F. Supp. 700, 701-702 (D. Alas. 1953).

96. *See*, *Dickson v. Dickson*, 24 So. 2d 419, 420 (Ala. 1946) (open and defined road became public highway by prescription); *Zetrouer v. Zetrouer*, 103 So. 625, 626-27 (Fla. 1925) (under common law, 20 years of continuous and uninterrupted use would render a road public by prescription); *Blake v. Hickey*, 41 A.2d 707, 708 (N.H. 1945)

authorizes public access to Texas beaches under the Texas Open Beaches Act.⁹⁷ The Act provides that in any suit brought where the land involved is between the mean low tide and the line of vegetation, a presumption arises that the area is imposed with a prescriptive right or easement in favor of the public for ingress and egress to the sea.⁹⁸ It is doubtful, however, whether prescriptive use of easements of access to Texas rivers equals that of beaches, and even those areas which might meet the criteria would not fully solve the river access problem in Texas.

Another means by which public access can be acquired is through dedication, or the donation of land or rights therein to the public.⁹⁹ Dedication requires only the landowner's intention to dedicate and acceptance by the public.¹⁰⁰ Continuous public use without objection and without permission for more than five years has also been deemed to be a dedication.¹⁰¹

A third means by which the public can gain access to public waters is through the state's power of eminent domain.¹⁰² One aspect of eminent domain is the acquisition of a scenic easement. Basically, an easement is an interest in land which gives rise to a property right entitling the holder to use the land of another for a special purpose.¹⁰³ For environmental purposes, a scenic easement is a negative right in the state to prevent certain uses of the land burdened with the servitude.¹⁰⁴

(20 years of continuous public use created public highway by prescription); *Kisner v. McCurry*, 163 P.2d 963, 964-65 (Okla. 1945) (public highway acquired by prescription); *Austin v. Hall*, 93 Tex. 591, 596, 57 S.W. 563, 564 (1900). See generally 7 R. POWELL, THE LAW OF REAL PROPERTY § 1026, at 762.12-762.14 (rev. ed. 1974); Annot., 58 A.L.R. 239, 246-49 (1929). The prescriptive period in Texas is 10 years. *Hollingsworth v. Williamson*, 300 S.W. 2d 194, 197 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.); *Maricle v. Hines*, 247 S.W.2d 611, 612 (Tex. Civ. App.—Fort Worth 1952, no writ).

97. TEX. REV. CIV. STAT. ANN. art. 5415d (1962).

98. *Id.* § 2.

99. See generally 11 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS ch. 33 (3d ed. 1964); 6 R. POWELL, THE LAW OF REAL PROPERTY §§ 934-36 (rev. ed. 1974); H. TIFFANY, THE LAW OF REAL PROPERTY ch. 22 (3d ed. 1970).

100. *Smith v. Krintz*, 20 Cal. Rptr. 471, 474 (Ct. App. 1962) (landowner's consent shown by his testimony and conduct); *Henry Walker Park Ass'n v. Mathews*, 91 N.W.2d 703, 708-10 (Iowa 1958) (street and parking lot providing access to cemetery was dedicated to public use and accepted by public); *Smith v. Shiebeck*, 24 A.2d 795, 800 (Md. 1942) (no particular form or ceremony is necessary); *Flynn v. Beisel*, 102 N.W.2d 284, 291 (Minn. 1960) (dedication rests upon intent rather than prescription).

101. *Smith v. Krintz*, 20 Cal. Rptr. 471, 474 (Ct. App. 1962).

102. *Austin v. Nalle*, 102 Tex. 536, 538, 120 S.W. 996 (1909); *Fort Worth & D.C.R.R. v. Ammons*, 215 S.W.2d 407, 409 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.); *Crawford v. Frio County*, 153 S.W. 388, 390 (Tex. Civ. App.—San Antonio 1913, no writ); *Byrd Irr. Co. v. Smythe*, 146 S.W. 1064, 1065 (Tex. Civ. App.—San Antonio 1912, no writ). The procedure for the exercise of the power of eminent domain in Texas is set out in TEX. REV. CIV. STAT. ANN. art. 3264 (1968).

103. See J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 335 (2d ed. 1975); 3 R. POWELL, THE LAW OF REAL PROPERTY § 405, at 386-402 (rev. ed. 1974); H. TIFFANY, THE LAW OF REAL PROPERTY § 392, at 320 (3d ed. 1970).

104. See ARK. STAT. ANN. § 76-1804(3) (1958); MO. ANN. STAT. § 226.280(3)

Although some states have allowed for such condemnation in their waterways legislation,¹⁰⁵ it is not considered appropriate for Texas at this time because it has become such a sensitive political issue.¹⁰⁶ Another practical consideration behind this policy is its economic infeasibility. Large-scale land acquisition on Texas' extensive river system would be prohibitively expensive in view of the high cost of riverside property.¹⁰⁷

Provision for Access Points in the Texas Public Rivers Act

The Texas Public Rivers Act provides for the acquisition of private lands for fishing and camping sites along the shores of navigable inland waters.¹⁰⁸ It is recommended, however, that only existing public lands be utilized. This is consistent with the current policy of the Texas Department of Parks and Wildlife.¹⁰⁹ The Act also provides for a study by the General Land Office to determine the extent and location of such public lands.¹¹⁰

Remedies for Abuse by the Public

The problem of abuse by recreationists arises with increased public access, and it becomes important to consider what action an affected landowner might take to eliminate the problem.¹¹¹ A Washington case concerned a state-built access from a highway to a lake.¹¹² In their use of the lake, some recreationists unlawfully hunted on the adjacent property, harassed the neighboring landowners, and littered the lakeshore with garbage and broken glass. The lakefront owners successfully brought an action to enjoin the state from maintaining its access area. The Washington Supreme Court held that the state was "entitled to all the rights of a riparian owner, but it should also accept the responsibility of a riparian owner for the conduct of its licen-

(1952). Both of these statutes provide for scenic easements in the creation of a Mississippi River Parkway.

Some of the restrictions imposed by a scenic easement are: (1) restrictions on new building and major alteration of existing buildings, (2) allowance of necessary utilities and roads, (3) prohibitions against the cutting of mature trees and shrubs, but allowance for normal maintenance, (4) prohibition against dumping, (5) prohibitions against advertising, and (6) maintenance of the general topography of the land in its existing state. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. L.J. 168, 171-72 (1968).

105. See, e.g., KY. REV. STAT. § 146.280 (Supp. 1974); ME. REV. STAT. ANN. tit. 12, ch. 206, § 667 (1974).

106. See TEXAS WATERWAYS, at 25-26. See also Burton, *On the Waterfront*, TEXAS MONTHLY, Vol. 3, No. 4, Apr. 1975, at 33.

107. TEXAS WATERWAYS, at 25.

108. Tex. S.B. 533, § 10, 63d Leg. (1973).

109. The department believes that "complete public ownership of land corridors along waterways is an unpopular alternative . . ." TEXAS WATERWAYS, at 25.

110. Tex. S.B. 533, § 11(a), 63d Leg. (1973).

111. See Teclaff & Teclaff, *Saving the Land-Water Edge from Recreation*, for Recreation, 14 ARIZ. L. REV. 39 (1972).

112. *Botton v. State*, 420 P.2d 352 (Wash. 1966).

sees."¹¹³ The injunction was to be continued only until the state game department presented a plan for the controlled operation of its property that, in the opinion of the court, would adequately safeguard the rights of the riparian owners.¹¹⁴ Although such an injunction seems extreme, it is imperative that the state regulate public use in areas particularly subject to abuse. A section in the Texas Public Rivers Act provides regulation of those areas to prevent damage to neighboring landowners.¹¹⁵

FEDERAL SCENIC WATERWAYS LEGISLATION

The United States Congress in 1968 enacted the Wild and Scenic Rivers Act, establishing a national system of wild and scenic rivers administered by the Secretary of the Interior.¹¹⁶ Although the Act began as a reaction to federal dam building, it has become "an effort to limit the development of certain rivers and their banks in the name of recreation."¹¹⁷ The Act designated eight rivers that automatically met the federal requirements of being in a wild and free-flowing state¹¹⁸ and designated a portion of the Rio Grande River in Texas as one of 27 rivers for potential addition to the national system.¹¹⁹ Inclusion of these rivers is contingent upon studies to determine whether they meet all requirements for national designation.¹²⁰

The Act encouraged states to include state and local stream preservation programs in their outdoor recreation plans.¹²¹ In all, a total of 40 states are

113. *Id.* at 356.

114. *Id.* at 356. There was a dissent to the effect that the landowners should treat the violations as criminal misdemeanors and complain to the authorities, rather than seek an injunction. *Id.* at 362-63.

115. The Act provides that the Department of Parks and Wildlife may promulgate rules and regulations to govern the administration, operation, and use of the lands, and may issue permits to and impose fees upon recreationists using them. Tex. S.B. 533, § 10(d), 63rd Leg. (1973).

It has been suggested by the Land Commissioner that the Department of Parks and Wildlife hire graduate students and station them at river crossings for the purpose of offering information on river characteristics, the penalties for trespass, and time and distance to the next point of egress, in addition to checking safety equipment and providing litter bags. See Burton, *On the Waterfront*, TEXAS MONTHLY, Vol. 3, No. 4, Apr. 1975, at 38-39.

116. 16 U.S.C. §§ 1271-87 (1970).

117. Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707 (1970).

118. These rivers are the Clearwater, Middle Fork, Idaho; the Eleven Point, Missouri; the Feather, California; the Rio Grande, New Mexico; the Rogue, Oregon; the St. Croix, Minnesota and Wisconsin; the Salmon, Middle Fork, Idaho; and the Wolf, Wisconsin. 16 U.S.C. § 1274(a) (1970).

119. 16 U.S.C. § 1276(a)(20) (1970). A segment of the Guadalupe River from its source to Canyon Reservoir was later named as a potential addition. Dep't of the Interior Press Release (Sept. 11, 1970), reprinted in TEXAS WATERWAYS, App. B, at 36. There has been no action to date on either of these rivers.

120. 16 U.S.C. § 1276(b) (1970).

121. The federal government also offers financial assistance to participating states. 16 U.S.C. § 1282 (1970).

moving toward some sort of protection for their waterways by acting on this congressional directive.¹²² Texas is included in the minority that has taken no action, although the Texas Department of Parks and Wildlife has found that such a state waterways system is feasible.¹²³ Results of field investigations conducted by the Department support the proposition that Texas waterways have the outstanding wild, scenic, and recreational qualities necessary for inclusion in the system.¹²⁴ A declaration of public policy in regard to the use of Texas rivers for recreational purposes could be the first step toward such a system and would at least bring Texas in line with federal policy.

CONCLUSION

Until the law is clarified and recreationists and landowners alike are aware of their rights and responsibilities, conflicts and misunderstandings between the two groups can be averted only through individual cooperation. Our present laws, which are a confusing combination of diverse, outdated, and sometimes conflicting laws, need to be clarified by legislative codification. It has been shown that although navigation is considered a superior public right, passage along public rivers is often denied by unnecessary obstructions. Recreationists and landowners alike are confused as to their rights because the legal boundary separating them is difficult to ascertain. Additionally, in order to enjoy full use of public rights in Texas rivers some provision must be made for necessary shore use and access. A law guaranteeing the right of the public to use navigable rivers and at the same time protecting riparian landowners from abuse of their vested rights would give both groups a single source to which they might look for information and redress.

122. *E.g.*, CAL. PUB. RES. CODE ch. 14, § 5093.50 (Deering Supp. 1974); GA. CODE ANN. chap. 17-9, §§ 17-901-905 (1971); KY. REV. STAT. § 146.200 (Supp. 1974); LA. REV. STAT. ANN. ch. 8, § 56.1841 (West Supp. 1975). For a summary of state actions to June 1973, see TEXAS WATERWAYS, App. C, at 37-40.

123. See TEXAS WATERWAYS, at 20. Most Texas waterways, because they are often criss-crossed by roads and their banks are rather developed, will not meet the criteria for inclusion in the federal program. *Id.* at 13.

124. *Id.* at 20-24. See generally TEXAS PARKS & WILDLIFE DEP'T, AN ANALYSIS OF TEXAS WATERWAYS (1973).