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River Rights

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Pity the canoeist who wants desperately to have his feet on solid ground-- if only for a few minutes. He might like to rearrange his gear, repair his canoe, or detour around a dangerous spot in the river. He might even need to camp overnight or seek help.

But where can he go ashore? "A canoeist needs a lawbook, a copy of the original land grant, a surveyor's instrument, and five justices from the Texas Supreme Court,"* according to one report, to determine if he has the legal right to use a Texas riverbank.

This is not far from fact, according to Otis Templer who has studied legal problems of public access on Texas lakes and streams. Templer is both a lawyer and a professor of geography at Texas Tech University. In his research, which was funded by the Texas Water Resources Institute, he found that the laws dealing with public access in Texas are complex and poorly understood.

Legal answers to public access questions become more important each year as more and more Texans discover the fun of floating a river. Canoe, kayak, raft, and tube trips are growing in popularity on many rivers in the state. River recreation appeals to today's back-to-nature, physically-fit, energy-short lifestyle. Texans have their choice of almost every type of waterway found in the nation. There are the slow-moving, jungle-like Sabine and Neches rivers of East Texas and the swiftly flowing Hill Country Pedernales and Guadalupe rivers. For those with travel money and experience, there are the wild and rugged West Texas rivers like the Rio Grande and Pecos.

An astounding number of people get into a canoe for the first time without any idea what gear they should have or how to guide a canoe through rough waters. Inexperienced canoeists also have little or no idea of how long it will take them to reach their destination. They know even less about their legal rights and duties on the river. Along with warnings about knowing the river and provisions one should take on a canoe trip, a

Texas Parks and Wildlife Department publication gives potential canoeists the following advice:

Land along public streambeds is most likely privately owned, and the canoeist who steps out onto this land may be guilty of TRESPASS. Therefore, on those waterways where there appears to be any doubt concerning public land ownership, canoeists planning to get out on the banks of the river should obtain permission from the landowner before starting their trip. Individuals who ignore this warning may find an angry landowner more than they can handle.

Problems of landowners along the rivers have increased with the expanding number of canoeists and other river recreationists. Each weekend for more than half the year landowners must endure loss of privacy, litter left by campers and picnickers, and even vandalism such as cut fences and disturbed livestock. Many living along the rivers are bothered repeatedly by canoeists requesting telephones, restrooms, or first aid. "Without doubt," according to Templer, "the unsettled legal picture of public access leads to many unnecessary conflicts between landowners along streams and members of the public."

Most recreational use studies have not addressed the legal issues of public access to water in the state. If they do mention public access, Templer points out, they "merely give a short disclaimer that the problem is too complex for discussion. Few areas of Texas water and property law are more poorly understood," according to the research by Templer, "than those which relate to the issue of public access."

Nowhere in the Texas Water Code, for instance, is there even any recognition of public rights in regard to the recreational use of public waters. The Code is a comprehensive compilation of Texas water law enacted in 1971. Except for a provision that state water may be appropriated, stored, or diverted for recreation, there is no mention of the public right to use the state's rivers for recreation.

There are, nevertheless, a substantial number of court cases dealing with various aspects of the public's right to travel on state-owned waters and the right to make use of the banks and shores of streams and lakes. These court opinions are not clearcut and are sometimes confusing. Most decisions were made over 20 years ago when courts were generally less protective of public rights and more supportive of private rights.

It is virtually impossible, according to Templer, to give simple rules for questions which recreationists ask about their rights on Texas streams. He identifies three areas of conflict which should be clarified for recreationists as well as for landowners: (1) rights to use rivers, (2) rights to use riverbanks, and (3) rights of public access to rivers.

Rights to Use Rivers

The lawful right of the public to travel along the navigable waters of the state, according to Templer, is settled beyond dispute. A much more difficult problem, however, is how to determine whether a stream is navigable or not.

There is no way to easily determine whether or not a particular stream is navigable and open to public use in Texas. Federal law identifies rivers which are navigable "in fact" as navigable "by law." Most states have adopted the federal definition of navigable rivers, but Texas has enacted an independent standard. The Texas legal definition has nothing to do with whether a boat can actually navigate the river.

A navigable stream in Texas is one with an average width of 30 feet from the mouth up. This means that streams which average 30 feet or more are owned by the State for the public use. Riverbeds or streams which do not average 30 feet from the mouth up are owned by the adjacent landowner. Even in these the water is owned by the state.

It has long been state policy to guard navigable streams from obstruction so as not to impede trade and travel. The Texas Supreme Court as early as 1863 ruled that: "Navigable streams exclusively within the state are beyond question the highways of the state."

Some Texas landowners continue, however, to maintain fences across streams. These fences are erected to keep livestock from wandering along the river when the water is low, but they make canoeing almost impossible along some sections. Low water bridges and irrigation dams also serve to keep canoeists from traveling "unimpeded," even though they, too, serve useful purposes for the landowners. The River Recreation Association of Texas has tried to summarize recreationists' rights to use rivers by explaining:

The laws of the state of Texas are vague concerning the rights of recreationists to use the rivers, streams, creeks, and bayous of Texas. Although the public's ownership of the water itself is never questioned, use of and access to that water may depend on whether the land under or around it is public or private. If it is public (generally speaking, the larger, navigable bodies of water), the public can use it. If it is private, legal authority says that the public cannot fish or boat there.

Rights to Use Riverbanks

The question of the public's right to use riverbanks is one of the most complex legal issues of river recreation. It is generally accepted that the public may use the beds of navigable streams and their banks up to the line which divides public ownership from that of the adjoining private land. It is also well established that the public has no legal right to go beyond that dividing line without the consent of the landowner.

The legal dividing line between public and private ownership of a stream is called the "gradient boundary." This is a line located midway between the lower level of the flowing water that just reaches the cut bank and the higher level, just to the top of the bank. Each section of a waterway must be surveyed to determine the line between public and private property.

A complicating factor in the public's right to use shoreline is the difference in law affecting land granted under Spanish or Mexican law and that land which was granted after Texas became a republic. Several court cases have considered this right under the original grant in determining right of the public to use certain riverbanks.

Since neither landowners nor recreationists can be sure where their rights begin, it is often safer for the recreationists to remain in their boats than risk being charged with criminal trespass.

One question which remains unsettled is how the common law rule which permits a reasonable trespass in an emergency situation applies to river recreationists. It has never been determined in court whether a damaged boat or one lodged between two obstacles in the river is a sufficient emergency to justify entry upon private lands. Certainly, river recreation offers a peculiar situation in that access points are often many miles apart and much too far to swim for aid in case of boat damage or personal injury.

Rights of Public Access to Rivers

Although the public has a right to travel on any navigable river in Texas, there is no express statutory authority which gives the public right of access. A court decision handed down in 1935, in fact, ruled that even though the public has the right to fish in public waters, it does not have a corresponding right to cross private land to get to the waters.

Public access problems are compounded by the fact that a very small percent of Texas riverbanks is public property where a boater may embark or alight without fear of trespassing. Highway right-of-ways are the most common areas from which boats can be launched. Other access points used by the public are public parks and private land commercially open to the public.

Demand for recreation on rivers and streams in Texas often remains unsatisfied, according to the Texas Parks and Wildlife Department, because of limited access.

Rights Guarantee

Several attempts at guaranteeing rights along Texas rivers and streams have failed in recent years.

The federal Wild and Scenic Rivers Act of 1968 established a legal method to preserve and protect rivers for public use. Although several popular canoeing rivers in Texas were considered, only the Rio Grande--and only a portion of that river--has come under the federal preservation program. The act encouraged states to include state and local stream preservation programs in their outdoor recreation plans. Forty states are moving toward some sort of protection for public use of their waterways, but Texas is one of the minority which has taken no action.

The Texas Legislature directed the Texas Parks and Wildlife in 1973 to inventory state waterways and determine feasibility of establishing a statewide system of waterways. The subsequent study determined that the purchase of extensive land corridors along waterways was out of the question economically. The enormous expense involved in obtaining land corridors along even a few waterways was considered prohibitive. The study did suggest an alternative plan for heavily-used rivers. The plan, as of yet not implemented, included: (1) adequate access points provided by the state, (2) small pocket campgrounds at strategic intervals, and (3) education of recreationists and landowners. The Texas Public Rivers Act was introduced unsuccessfully in the Texas Legislature session in 1973. This act would have guaranteed the public rights to use rivers for recreation. It proposed as state policy:

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.

The bill failed because of strong opposition from landowners along rivers. Had it become law, the legal rights of recreationists and landowners would now be much clearer. The rights of future generations to enjoy Texas rivers would also have been protected. Where does all of this leave the canoeist? Still in the river questioning his right to come ashore, according to Templer. The Texas Tech researcher recognizes that his study does not answer many of the public access questions of canoeists or landowners. He feels, however, that an awareness of the law--even though confusing and sometimes conflicting--will help alleviate some of the problems on the popular floating rivers in the state.

* Amon Burton. "On the Waterfront," Texas Monthly, III, No. 4 (April, 1975), p 39.