

WATERSHED WEEK IN REVIEW



Private/Public?

With the current Covid-19 situation, folks have been searching for more ways to recreate locally, especially along waterways.

This has created some tensions between landowners and recreationist regarding river access. What is private? What is public? What access is allowed?

This edition of the newsletter will attempt to shed some light on these questions.

The information provided here does not, and is not intended to constitute legal advice. Readers should contact an attorney for advice with respect to any particular legal matter.

Batten Down the Hatches

Heads Up Readers/Well Owners!

Hazardous Weather Outlook

Hazardous Weather Outlook
National Weather Service San Angelo TX
856 AM CDT Fri May 15 2020

.DAY ONE...Today and Tonight

A large band of thunderstorms is expected to move east across West Central Texas this late afternoon and evening. Large hail, and strong to intense damaging winds up to 75 mph are possible. Flooding is also possible as the storms produce quick but locally heavy rainfall amounts of 1 to 2 inches.

A strong line of storms is forecast to move across the watershed late tonight and early tomorrow morning. The National Weather Service is predicting the possibility of 75 mph winds associated with these storms.

Wind speeds of this magnitude can cause damage to trees and power lines. So besides securing loose items this evening, **if you are on a well, perhaps store some extra water in case power is out for some time.**

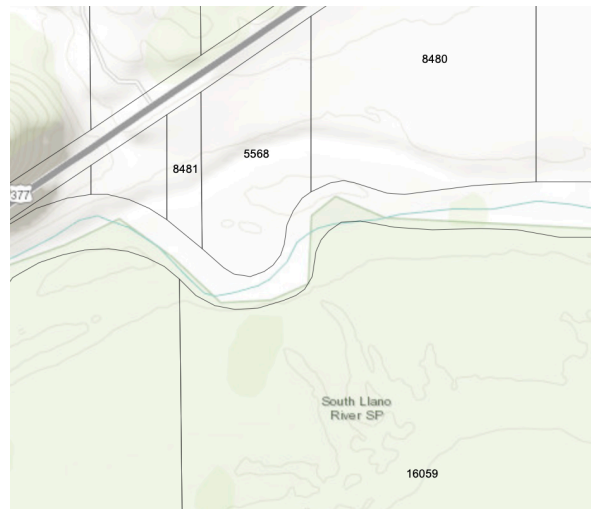
Stay Safe.

Navigable Streams

Determining the navigability of streams in Texas is very difficult. This article will try and distill the numerous issues surrounding navigability into some basic points. **The Alliance is simply providing this information to help reduce potential conflicts between landowners and river users.** As mentioned on page one, this information is not intended to constitute legal advice; that should be provided by a licensed attorney.

The navigation of Texas waters is specifically recognized in the Texas Constitution. “...*the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each declared public rights and duties...*”(Article XVI § 59).

In Texas Law, a stream is navigable if it is either “navigable in fact” or “navigable in statute”. Navigable in fact is generally pretty obvious and can be determined by looking at surveyed property lines. As shown on the Kimble County Appraisal District map of the South Llano River at the State Park (right), the property lines on the map stop before they get to the river at a point known as the Gradient Boundary (more on that next week).



The area between the lines depicting the gradient boundary belongs to the State of Texas and can be used by the public. Think of it as similar to the right-of-way shown around US 377 on the map, except of course you can't operate a motor vehicle in it. The South Llano and mainstream of the Llano are good examples.

So what is Navigable in Statute?

Here is where things become less obvious. Several years ago, we talked to the General Land Office to better understand Navigable in Statute. This is what

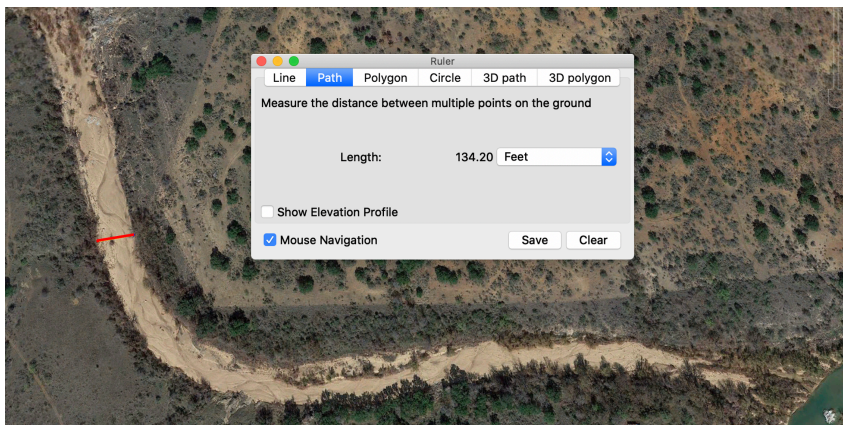
agency folks shared with us. This info can be found in the [James River Report](#) on our website.

Under Texas Law, a stream is considered public if it is navigable in fact or navigable by statute, the latter referring to any stream that retains an average width of 30 feet from the mouth up. As the entire streambed is considered in calculating width, there is no distinction made as to whether the stream is dry.

During the original survey of Texas in the 1840s, John Borden, the first commissioner of the Texas General Land Office, instructed surveyors to not extend survey lines across navigable waterways. As a result, in many rivers in the state, such as the Llano, the streambeds are owned by the state, in trust for the public. However, on many smaller waterways, including the James, survey lines were extended across the streambed.

In 1929, in an attempt to remedy some of the confusion resulting from survey lines crossing navigable waterways, the State passed the Small Bill that validated these surveys. However, the Small Bill noted that such validation did not impair the rights of the general public and the state in the waters of the streams. Such rights include navigation. So even if a landowner's deed includes the bed of a navigable stream, the public retains its right to use it as a navigable stream.

In addition, the state lays claim to any water within a defined watercourse. The Texas Administrative Code defines a watercourse as “a definite channel of a stream in which water flows within a defined bed and banks...” Waters of the state require a water rights permit from the Texas Commission on Environmental Quality. Under the Small Bill, the state also retains possession of the sand and gravel found in the streambeds. Consequently, the removal or disturbance of this material may require a permit issued by the Texas Parks and Wildlife Department.



So while the landowner does own the streambed of the navigable in statute stream (and pays taxes on it), the public has the right to access the stream. In the wide, sandy stream beds of the Llano watersheds, many of our streams meet the

legal definition for quite some distance, as shown in the example above.

[Urging Landowner Caution...](#)

The Alliance fully recognizes the delicate nature of this issue. This is why we offer this advice to landowners who call or email us about this issue: “Be Careful Not to Open a Can of Worms”.

As a local attorney recently noted in a Mason County community forum discussion on this issue, *“ordinarily, private property rights allow the owner the right to exclude, but this is one of those exceptional circumstances where a directly conflicting right (public access to navigable streams) has been deemed by law to outweigh the owner’s property rights...The State of Texas recognized that right in the 1830s, and it’s been the law of our state ever since.”*

What’s more, a landowner can actually be issued a citation if they restrict, obstruct, interfere with or limit public recreational use of a protected freshwater area (ie navigable waterway).

Does that mean one can’t build construct a fence across a stream? It is our understanding (recognizing the previously-stated legal caveats) that game wardens use this ‘general rule of thumb’: fences can be erected across the stream as long as they do not “obstruct” access, meaning to render impassable or to render passage unreasonably inconvenient or hazardous. On the James River several years ago, the owner of an 8-foot game fence across the river was required to provide an access gate.

There is an important caveat to all of this. While the public may use these navigable waterways, they must gain access without trespass. In other words, access generally has to be obtained through public property, such as a public road or park. If a person crosses private property without permission, or passes outside the gradient boundary of the streambed, they can be charged with Criminal Trespass.

Since our beginning in 2008, the Alliance has encouraged land owners and recreationist alike to appreciate the complex nature of Texas water law and use respect and knowledge of the laws to avoid confrontations or litigation. We hope this information helps with this effort.

For more information, please visit TPWD’s [Overview of Laws Regarding the Navigation of Texas Streams](#).