



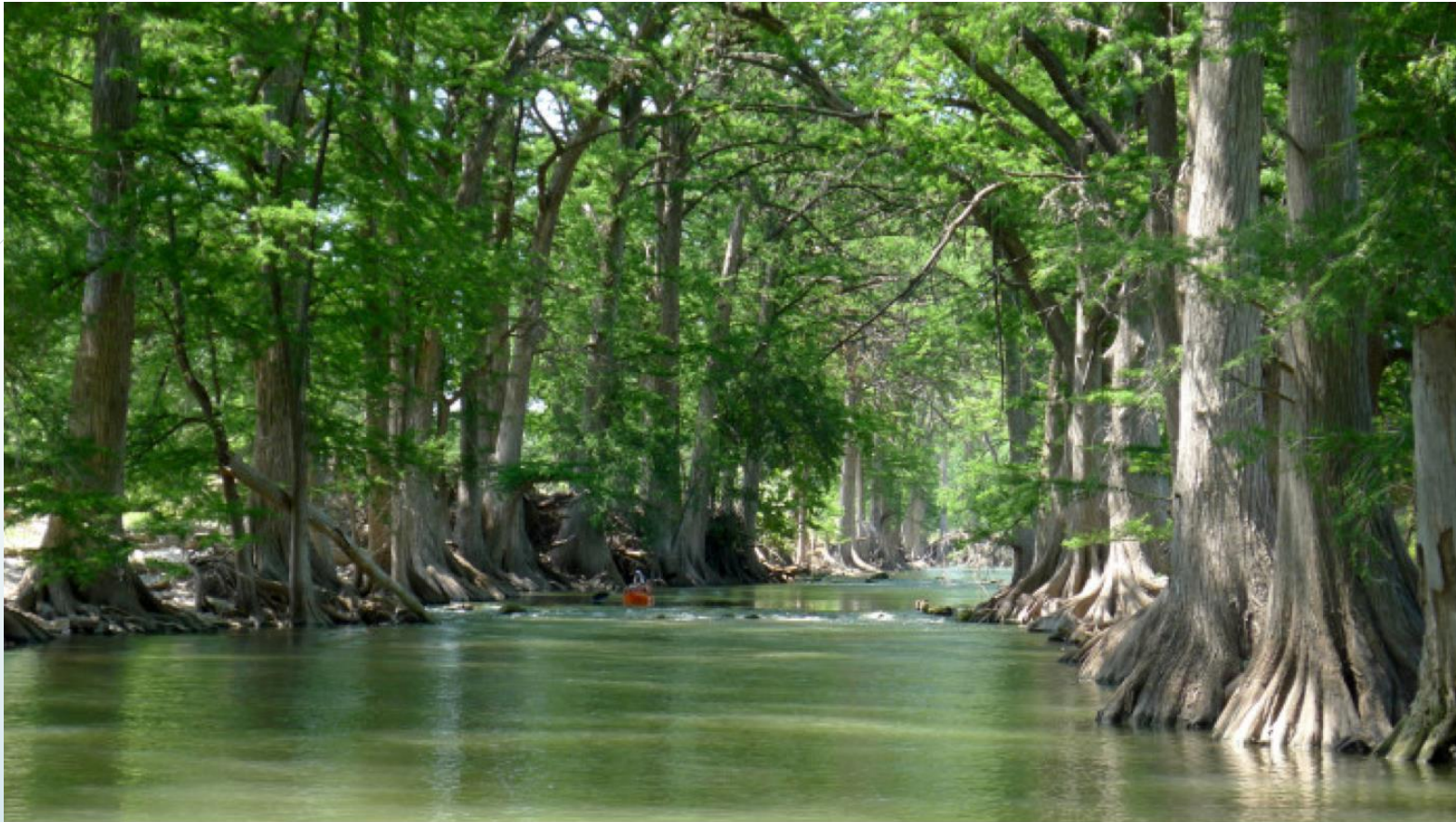
Key Issues for Texas Landowners

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Austin Area Ranchers Assembly

October 26, 2016

Austin, Texas



patrick lewis/flickr

Agriculture and Water Rights:

Coyote Lake Ranch v. Lubbock and the Accommodation Doctrine Applied to Groundwater



Coyote Lake Ranch

- **Should the Accommodation Doctrine be applied to a severed groundwater estate?**
- What is the accommodation doctrine?
 - **“Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.”**
 - Issue is whether the mineral estate surface usage is reasonably necessary



Coyote Lake Ranch

► Facts

- 26,000 acre ranch used primarily for cattle ranching and hunting
- 1953 prior landowners conveyed groundwater rights to City of Lubbock
 - Since 1953, Lubbock maintained small well field in NW corner of ranch
- 2012-2013, Lubbock proposed new well field plan that would involve 20-80 new wells
- Coyote lake ranch sought restraining order and injunction to stop Lubbock
- Trial court granted injunction
- Lubbock appealed



Coyote Lake Ranch

- ▶ Case of first impression for Court of Appeals
- ▶ Lubbock argued
 - ▶ Accommodation Doctrine should not apply because neither surface estate nor severed groundwater estate would be considered dominant (both are surface estates)
 - ▶ Terms of 1953 deed should control
- ▶ CLR argued
 - ▶ Accommodation Doctrine should apply and be expanded to encompass severed groundwater estates based on *EAA v. Day*
 - ▶ Same “due regard” standard should be applied to groundwater and mineral estates



Coyote Lake Ranch

- ▶ Court of Appeals Holding
 - ▶ Distinguished *EAA v. Day*
 - ▶ Declined to extend the Accommodation Doctrine to cover severed groundwater estates
 - ▶ Reversed trial court's injunction against Lubbock
- ▶ CLR filed Petition for Review before Texas Supreme Court
 - ▶ Alleged COA decision conflicts with decisions in *Day* and *Getty Oil*
 - ▶ Oral argument held on October 14, 2015
 - ▶ Supreme Court held on May 27, 2016 that the Accommodation Doctrine may apply between a severed groundwater estate and surface estate as to conflicts that are not controlled by the express terms of an agreement between the parties.

What about stock tanks?

- ▶ If filled with state water:
 - ▶ Limit of 200 acre-foot capacity on non-navigable stream;
 - ▶ Measured by 12 month average (so can be over sometimes);
 - ▶ Limited purposes: domestic, livestock, wildlife management, fishing (but not fish farming).
- ▶ If filled with diffused surface water:
 - ▶ No limitations—can be as big as you want and used for whatever you want.
 - ▶ BUT—be sure it is diffused and not state-owned water!
- ▶ If filled with groundwater:
 - ▶ Must comply with GCD requirements—if well filling the pond is an exempt livestock well, you are probably okay.



Daniel Ray Photography

www.danielrayphoto.com

Waters of the US

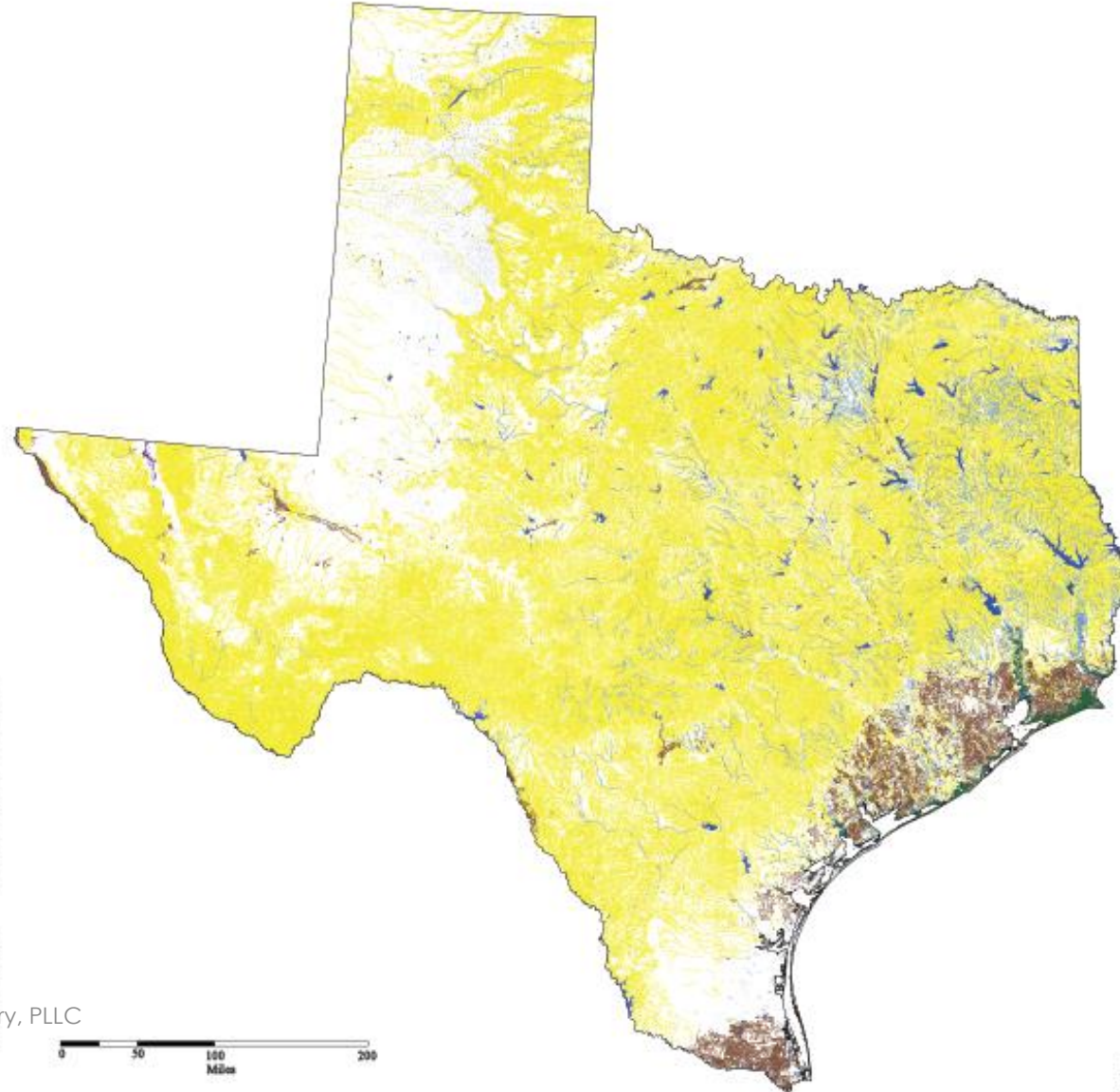
Concerns regarding “Waters of the U.S.”

- EPA and Army Corps have been using an ad hoc method of determining jurisdiction many times in the field for enforcement
- Jurisdiction is irrelevant unless you know the definition of discharge
- When CWA was originally passed, land use was critical concern and was left to states. The new rule erodes this protection, making it a State vs. Federal issue.
- Biggest factor in water quality is adjacent land use

EPA Map

STREAMS AND WATERBODIES IN TEXAS

The National Hydrography Dataset



This map displays the pattern of different surface water feature types across the state of Texas, including perennial, intermittent and ephemeral streams. Perennial streams generally contain water throughout the year, except for periods of extreme drought. Intermittent streams contain water for only part of the year, while ephemeral streams flow only in response to precipitation events. Although the intermittent and ephemeral stream classifications are distinguished from each other in the dataset, many ephemeral streams are included in the "intermittent" category. In addition, some ephemeral streams in the Southwest have been classified as washes. Only recently, and mainly on U.S. Forest Service land, have streams been added to the dataset under the "ephemeral" category, so very few streams are indicated as such. The map highlights the distribution of intermittent and ephemeral streams across the state. Of the 1,585,190 miles of in-stream features in Texas, 29 percent (454,453 miles) are intermittent or ephemeral. One percent of streams are ditches (20,703 miles), which are not classified by their flow duration in the dataset.

The water features on the map are from the National Hydrography Dataset (NHD) at high resolution (1:24,000 scale or higher) (data current as of October 2009). Many smaller waters are not included in the NHD because they could not be detected on the original aerial photos used to create the dataset or were excluded from the maps from which the dataset originates. The majority of perennial and most intermittent streams are captured at this resolution. However, most ephemeral streams are not captured unless they are in the arid west. Additional information on the NHD can be obtained from the NHD website at <http://nhd.usgs.gov>.

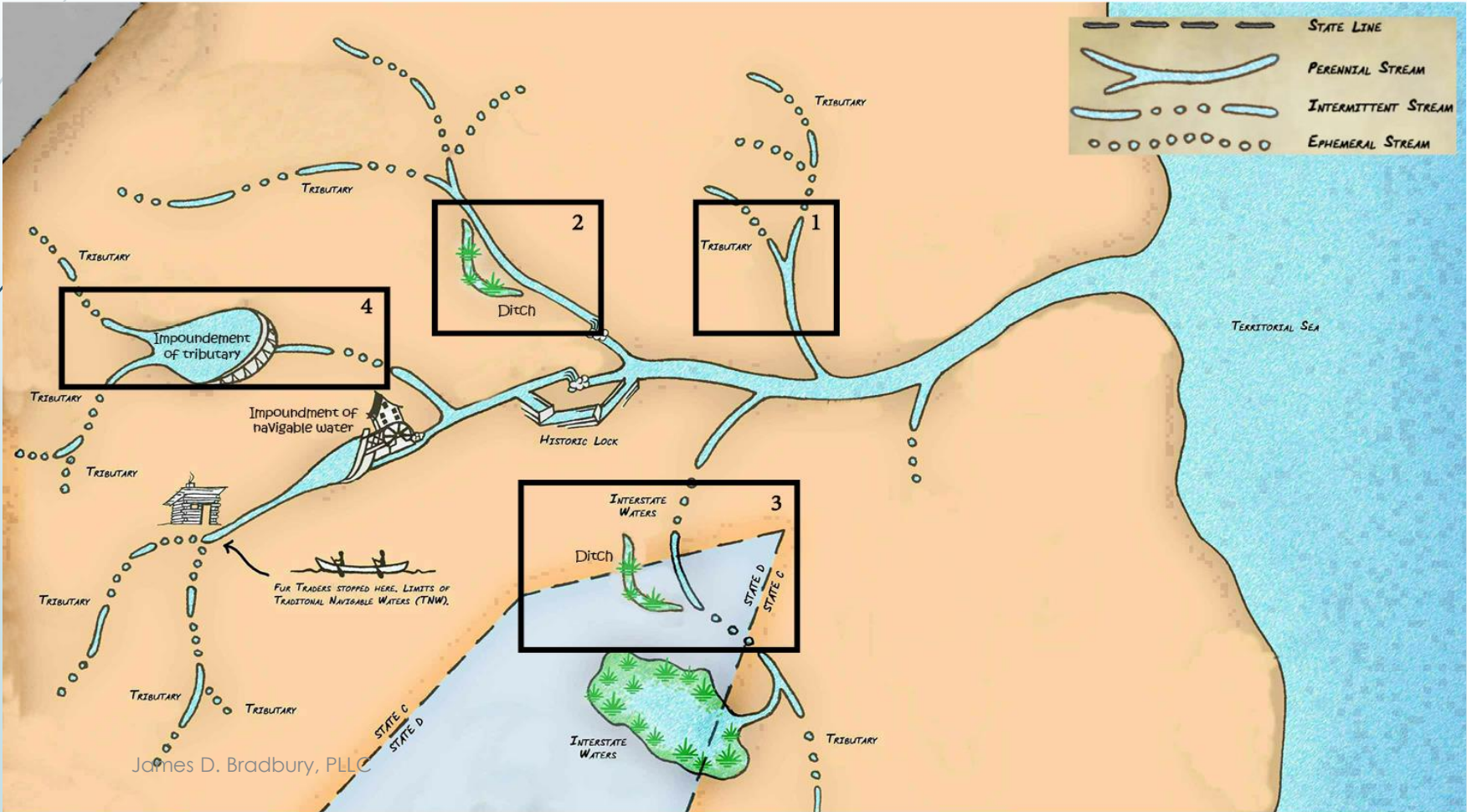
SURFACE WATER FEATURES

- STREAM/RIVER - PERENNIAL
- STREAM/RIVER - INTERMITTENT
- STREAM/RIVER - EPHEMERAL
- STREAM/RIVER - UNCLASSIFIED
- CANAL/DITCH
- LAKE/POND OR RESERVOIR
- SWAMP/MARSH
- PLAYA
- WASH
- STATE BOUNDARY



Prepared by INDUS Corporation under contract with
U.S. Environmental Protection Agency
Office of Water - Washington, DC
October 2013

Categorically WOTUS Under New Rule



Tributaries

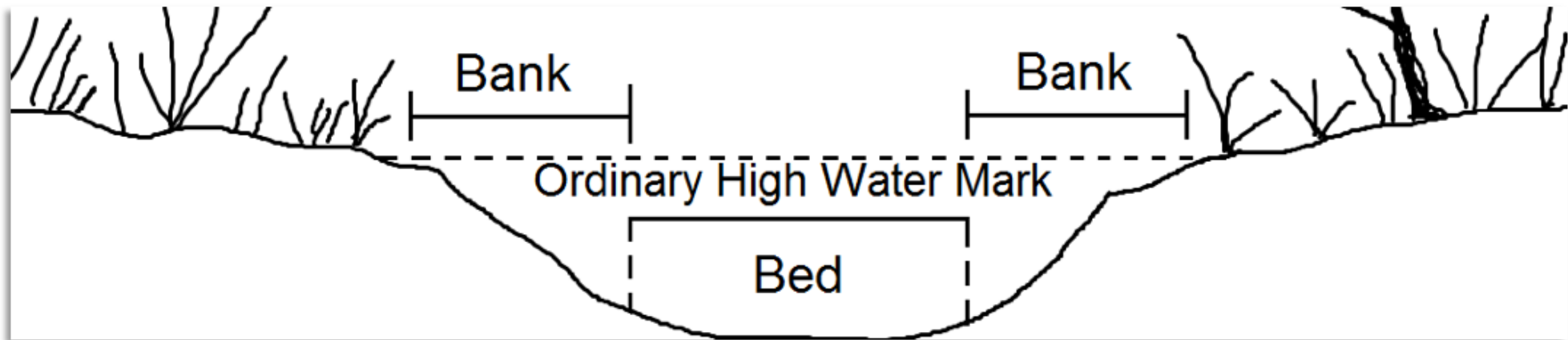


Figure 5. A bed, banks, and ordinary high water mark suggest the presence of a Tributary



Concerns regarding “Waters of the U.S.”

- ▶ Not well understood at all by any group
- ▶ Most land is agriculture
- ▶ Lacks clarity, which carries enormous risk of uncertainty
- ▶ Results in penalties daily, expensive to challenge, and criminal liability
- ▶ Unclear how it makes waters cleaner
- ▶ If producers cannot understand it on their property, it cannot be an effective rule
- ▶ Agriculture and landowners caught in a massive reach for jurisdiction and shift in water/land use policy by EPA



State Lawsuits to Stop Rule Implementation

- ▶ Texas, Louisiana, Mississippi and various Texas state agencies sued in both federal district court in Galveston and before the Fifth Circuit Court of Appeals
 - ▶ Did not seek injunctive relief until after rule became effective Aug. 28, 2015
- ▶ Other similar state lawsuits followed before both district courts and circuit courts

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Sixth Circuit Claims Jurisdiction

- ▶ April 21, 2016—Sixth Circuit denied petitions for En Banc review
- ▶ Briefing Commenced
- ▶ Nationwide Injunction staying Rule
- ▶ Will likely go to U.S. Supreme Court



Landowner Liability



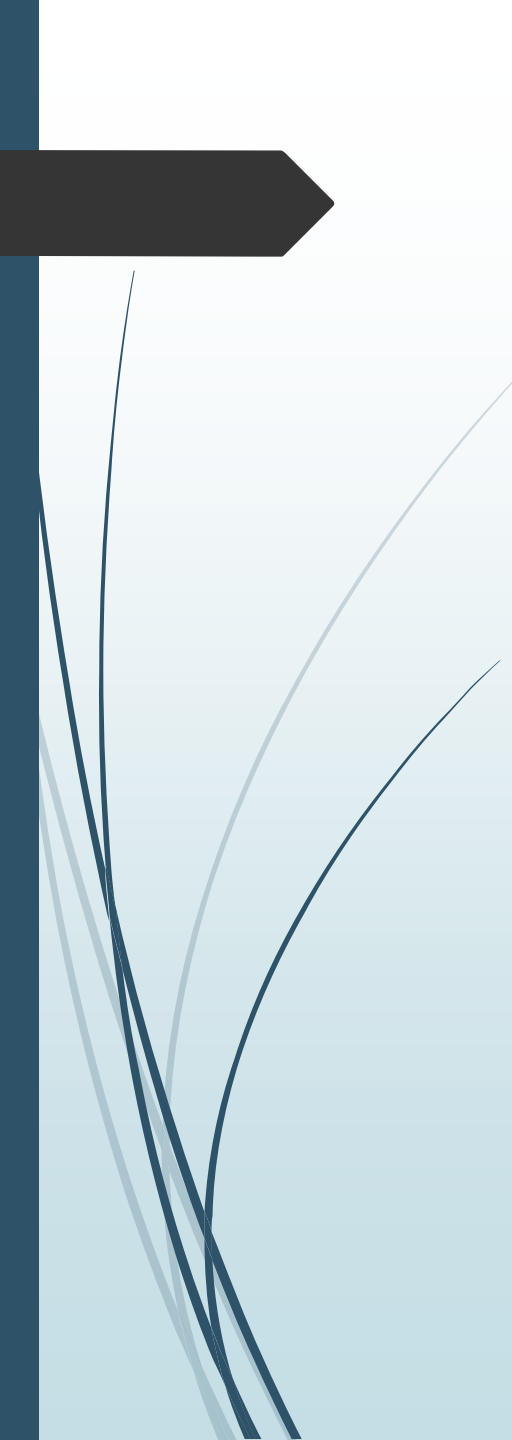
Landowner Liability

- ▶ Duty owed depends on the type of person on the property.
- ▶ Three categories:
 - ▶ Trespasser: Enters property without permission.
 - ▶ Duty: Cannot intentionally injure.
 - ▶ Licensee: Enters property for own benefit.
 - ▶ Duty: Cannot intentionally injure; must make aware or make safe dangerous conditions known to landowner that would not be known to the plaintiff.
 - ▶ Invitee: Enters property for mutual benefit with landowner.
 - ▶ Duty: Cannot intentionally injure; must make aware or make safe dangerous conditions known to landowner; must make aware of make safe dangerous conditions of which the landowner could have known with a reasonable inspection.



Law Enforcement, Peace Officers, and Firefighters

- ▶ Chapter 75 of Civil Practice and Remedies Code
- ▶ Addresses 3 situations:
 - ▶ damages arising from escaped livestock as a result of law enforcement or firefighter presence on the land;
 - ▶ damages arising from law enforcement or peace officers entering the property; and
 - ▶ damages arising from other individuals entering the property as a result of law enforcement activity.



Law Enforcement, Peace Officers, and Firefighters

- ▶ Landowner not liable for damages arising from injury caused by livestock due to an act or omission of firefighter or peace officer who enters property
- ▶ Landowner, lessee or occupant not liable for any damage to a person or property arising from actions of peace officer or federal law enforcement officer when officers enter or cause others to enter property
- ▶ Landowner, lessee, or occupant not liable for actions of individual, who because of actions of peace officer or law enforcement officer, enters or causes someone to enter agricultural land without permission except for gross negligence or wilful or wanton conduct of owner, lessee, or occupant

Recreational Use Statute

- ▶ Civil Practice and Remedies Code Chapter 75
- ▶ Provides lower level of responsibility for landowners who let people use land for recreational purposes.
- ▶ Landowner liable only for intentional acts or gross negligence if three major requirements:
 - ▶ Agricultural land* (“suitable for” test)
 - ▶ User enters for recreational purpose (hunting, fishing, hiking, etc)
 - ▶ One of three monetary requirements met
 - ▶ Landowner did not charge a fee
 - ▶ Fee charged by landowner did not exceed 20 times the amount of the landowner’s ad valorem taxes paid during the last calendar year.
 - ▶ Landowner maintains “adequate insurance” (at least \$500,000 for each person, \$1 million for each occurrence, and \$100,000 for each occurrence of property damage).



Texas Agritourism Act

- ▶ Texas Civil Practice & Remedies Code Chapter 75A
- ▶ “Agritourism Entity” is not liable to an “Agritourism Participant” for injury/damages if: (1) required signage is posted, or (2) written agreement containing required language is signed.
 - ▶ Applies to all activities on agricultural land for recreational or educational purpose regardless of amount charged.
 - ▶ Agricultural land--“suitable for” test
 - ▶ Recreational purpose – same as Recreational Use Statute.



Texas Agritourism Act

- ▶ Sign language:
 - ▶ “WARNING: UNDER TEXAS LAW (CHAPTER 75A, CIVIL PRACTICE AND REMEDIES CODE), AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AN AGRITOURISM ACTIVITY.
 - ▶ Clearly visible on or near premises where activity occurs.
- ▶ Release language:
 - ▶ AGREEMENT AND WARNING: I UNDERSTAND AND ACKNOWLEDGE THAT AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AGRITOURISM ACTIVITIES. I UNDERSTAND THAT I HAVE ACCEPTED ALL RISK OF INJURY, DEATH, PROPERTY DAMAGE, AND OTHER LOSS THAT MAY RESULT FROM AGRITOURISM ACTIVITIES.
 - ▶ Signed before activity, by participant or guardian, separate from any other agreement, at least 10 point bold type



Texas Agritourism Act

- ▶ Exceptions
 - ▶ Employees of entity are not covered.
 - ▶ Injury caused by entity's negligence evidencing a disregard for the safety of an agritourism participant.
 - ▶ Injury caused by dangerous condition of the land, facilities, or equipment of which the entity knew or should have known.
 - ▶ Injury caused by dangerous propensity of animal used in activity not disclosed to the participant if the entity had actual knowledge or should have known.
 - ▶ Injury caused by entity's failure to adequately train employee.
 - ▶ Intentional injuries.



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Fence Law

- ▶ Two approaches to fence law: Open range and closed range.
 - ▶ Open range: Landowner has no duty to fence animals or prevent them from running loose on roadway.
 - ▶ Closed range: Landowner has obligation not to permit animals to run at large.
- ▶ General rule (starting point): Texas is an open range state.
- ▶ But...major exceptions change this in a lot of places.
 - ▶ US or State Highways: Closed range. Cannot “knowingly permit” animals to run at large.
 - ▶ Local stock laws: Make all or parts of some counties closed range.



Boerjan et al v. Rodriguez et al

Case Background

- ▶ Family from Mexico hired driver “coyote” to transport them to Houston or New Orleans.
- ▶ Coyote trespassed on ranch during transport, fleeing at high speed after being stopped by ranch employee.
- ▶ Truck rolled on the ranch road and family was killed.
- ▶ Surviving family members brought suit against ranch, mine operators, and ranch employee for wrongful death, including negligence and gross negligence.



Boerjan et al v. Rodriguez et al Texas Supreme Court Opinion

- ▶ Under the standard proffered by Fourth Court of Appeals, landowners would have faced financial liability for taking steps to identify or deter intrusions by illegal organizations and individuals.
- ▶ Texas Supreme Court said “No” to Fourth Court of Appeals’ attempt to erode private landowner rights.
- ▶ Held that landowner or occupier owes only a duty to avoid injuring a trespasser willfully, wantonly, or through gross negligence.



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