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# Private Property: How Private Is It?

By Judon Fambrough

**O**wning real property in fee simple, sometimes referred to as fee simple absolute, confers the highest degree of ownership in Texas. Fee simple is the type of ownership generally received in real estate transactions.

Does someone who owns 20 acres outside of town or 20,000 acres in a rural area in fee simple have exclusive possession? Does fee simple bar unauthorized persons from entering the property?

Many people assume that ownership of land guarantees exclusivity. Not according to Texas law. Under certain circumstances, an uninvited civilian may legally enter private property. In addition to those specifically discussed here are law enforcement and administrative personnel who may enter within the scope of their authority. Also not mentioned are persons who have the right to enter via a formally granted easement and those who are attempting to collect unpaid debts.

**Mineral exploration and development.** Perhaps the most common entry involves mineral exploration and development. The Texas Supreme Court has ruled that the surface estate is servient to the mineral estate for the purposes of exploration and production. At present, the substances embraced by the term *minerals* includes oil, gas and uranium.

Consequently, if someone owns the surface but no minerals, and if the mineral owner signs an oil, gas or uranium lease, the mineral lessee may enter without the surface owner's consent for the purposes of exploration and development. Except

in limited circumstances, the mineral lessee does not have to pay surface damages or restore the surface when operations cease.

**Condemnation.** Condemnation is the process of taking private property for a public purpose. The procedure is based on the concept of public policy, i.e., public needs outweigh the needs of the landowner.

Legal constraints are placed on the condemnation process. Property can be taken only when the public receives a benefit. Only the amount of land reasonably needed for the project can be condemned. Just compensation must be paid to the landowner, and the landowner has the right to a hearing. This is sometimes referred to as *due process*.

**Navigable stream beds.** If the property has a navigable stream, the public has the right to travel up and down the stream bed.

The major issues surrounding streams are: When is a stream considered navigable? Where does the stream bed end and the bank begin? In other words, where does the public right in a stream bed give way to the private ownership?

Two types of navigable streams exist in Texas: navigable in law and navigable in fact. According to the Texas Natural Resources Code, a stream is considered navigable in law when it retains an average width of 30 feet from its mouth upward [Section 21.001(3)]. According to Texas case law, a stream is considered navigable in fact when it can be used for the customary modes of trade and travel.

The gradient boundary line determines where the stream bed ends and private ownership begins. Briefly

stated, the line is midway between the lower level of the water flow that just touches the cut bank and the higher level that just overtops the cut bank. The line is not apparent on most Texas streams.

**Freshwater lakes and streams.** Aside from the issue of navigable streams and gradient boundary lines, Texas statutes introduce another water rights issue. Texas Parks and Wildlife Code provides that "[a]ny freshwater lake, river, creek, or bayou in this state contained in any survey of private land may not be sold but shall remain open to the public" [Section 1.012].

The statute was enacted in 1975. No appellate cases have addressed the multitude of issues the statute poses.

In 1997, two years after the statute was enacted, Texas legislators added the word *public* to protect private landowners. The law now reads, "Any **public** freshwater lake, river, creek, or bayou in this state contained in any survey or private land may not be sold but shall remain open to the public." Now privately owned freshwater lakes, rivers, creeks and bayous are not subject to the statute.

**Easements by necessity.** A landlocked property owner — one without easement or public road frontage — may cross the neighboring property (be accorded an easement) if absolutely landlocked. Also, the neighbor's tract and the landowner's tract must have been owned by the same entity *after* being patented. According to a recent appellate case the owner of the servient estate (the one being crossed) has the right to designate the route of the easement

in a reasonable manner giving due regard for the rights and interests of the dominant estate.

**Texas Open Beaches Act.** If the property is located along the Texas Gulf Coast, the Texas Open Beaches Act declares that the public has a free and unrestricted easement from the mean low tide to the line of natural vegetation. Beach-front owners suddenly became aware of this law when their homes were thrust

within the parameters by Hurricane Alicia.

**Cemeteries.** If the property contains graves or cemeteries, Texas case law requires the landowner to allow the relatives visitation rights to decorate and protect the graves. (See *Gibson v. Berry Cemetery Assn.*, 250 S.W. 2d 600 [1952].)

**Emergency trespass rule.** Texas, like most other states, permits entry on private property for emergencies.

The doctrine began with sea-going vessels during storms and then spread to aviators for emergency landings. Canoeists during a thunderstorm or a hot air balloonist during a storm would be afforded similar privileges. However, the refugees are liable for any property damage. 🗝

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