

UGC

UNION GAS CORPORATION

File No. Sketch File 13

VICTORIA County

March 8, 2001

Navigability of Twelve mile or Cottonwood Cr.

Date Filed: March 14, 2001

Texas General Land Office
P. O. Box 12873
Austin, Texas 78711-2873
Attention: Mr. Ben Johnson

By David Dewhurst, Commissioner
Douglas Howard

Re: Oil and Gas Lease No. M-10132

Gentlemen:

Union Gas Corporation ("Union Gas") was the successful bidder in the lease sale conducted by the General Land Office with respect to Tract 1 of Twelve Mile Creek (also known as Cottonwood Creek). Union Gas paid \$47,642.50 in bonus and \$714.64 in Bid Fee to the General Land Office for lease of such tract. Union Gas was told at the time of the lease sale that if Union Gas determined that Twelve Mile Creek was not a navigable stream, such bonus would be refunded.

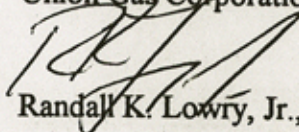
Union Gas engaged D. D. Shine, a licensed state land surveyor, to survey the tract in question to determine whether Twelve Mile Creek as it passed through the Milton Hardy Survey, A-174, the William J. Eaton Survey, A-164 and the C. W. Vickery Survey, A-342, Victoria County, Texas was a navigable stream and therefore titled in the State of Texas. Attached is a letter dated January 11, 2001, from Mr. Shine addressed to Union Gas Operating Company, in which Mr. Shine concludes that Twelve Mile Creek is not a navigable stream as it passes through these surveys.

Union Gas hereby requests that the General Land Office return to Union Gas the bonus paid for Oil and Gas Lease No. M-10132 in light of the fact that the tract leased is not a navigable stream and therefore the State of Texas does not have title to the creek bed leased by the General Land Office. Union Gas has not executed Oil and Gas Lease M-10132, and will release or return the lease upon return of the bonus payment.

We look forward to receiving refund of the bonus money. Should you have any questions regarding the foregoing, please contact the undersigned at (281)397-0091 or our counsel, Gary Alletag, at (713)754-6267.

Sincerely,

Union Gas Corporation



Randall K. Lowry, Jr., President

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RESOURCES

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Shine & Associates

REGISTERED SURVEYORS TEXAS AND LOUISIANA

D. D. SHINE, RPLS, LSLs, RLS

NEDRA J. FOSTER, RPLS, LSLs

January 11, 2001

Mr. Randy Lowry
Union Gas Operating Company
14511 Falling Creek, Suite 200
Houston, Texas 77014-1280

Re: Navigability of Cottonwood or Twelve Mile Creek
Victoria County, Texas

Dear Mr. Lowry:

Cottonwood Creek lies within three surveys in our area of interest: 1) Milton Hardy, A-174; 2) William J. Eaton, A-164; and 3) C. W. Vickery, A-342. These three surveys are all first class headright grants that were provided for in the first Constitution of the Republic of Texas in 1836. Texas declared her independence on November 14, 1835, at Washington-on-the-Brazos and independence was finalized by the Texas victory in the battle of San Jacinto on April 21, 1836. For the next couple of years the Republic of Texas was busy formulating laws for the structure of a new government. On December 14, 1837, by Acts of the Second Congress a land code was adopted. In this act the General Land Office was established and procedures adopted for the granting and surveying of the public lands. Section 21 of that act provided "that all lands surveyed for individuals lying on navigable watercourses, shall front one-half of the square on the watercourse and the line running at right angles with the general course of the stream, if circumstances of lines previously surveyed under the laws will permit, and all others not on navigable watercourses shall be square if previous lines will permit." Section 42 provided "that all streams of the average width of thirty feet shall be considered navigable streams within the meaning of this act, so far up as they retain that average width, and that they shall not be crossed by the lines of a survey."

All three of the above surveys were surveyed by Edward Linn with the Hardy being senior on April 14, 1838, followed by the Eaton Survey in August, 1838 and the Vickery Survey on April 6, 1849. As pointed out above, navigability of streams had to be determined at the time of the survey. The surveyors had instructions not to cross a stream thirty feet wide and if fronting on a thirty foot stream to make their surveys half square water frontage. There is no doubt that Surveyor Linn made this distinction when he

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surveyed the three surveys as well as the Oliver Strickland adjoining the Hardy Survey on the south and fronting on Coleta Creek. Not only did he determine that Coleta Creek was more than thirty feet wide and did not cross it with the lines of the Strickland, the Hardy and the Vickery Surveys, but at the same time, he determined that Cottonwood Creek was non-navigable (less than thirty feet wide) and included it within the Hardy, the Vickery, and the Eaton Surveys.

There have been at least three different methods or theories to determine whether a stream width averages thirty feet. One theory, which so far as I know has no case law support, would measure the width of the stream from its mouth to its source, and if the average were thirty feet, the entire stream would be considered navigable. The second method or theory is to measure the width of the stream from the mouth through the surveys in question. Although this method does have some case support found in *Diversion Lake Club v. Heath*, 58 SW2d 566, *Mott v. Boyd*, 286 SW 4568, *Tarrant County Water Control District Number One v. Fowler*, 175 SW2d 694, and *State v. Bradford*, 25 SW2d 706, this method has about as much merit as the first, for a survey located near its headwaters would require the same length of survey as that of the first method. The third method or theory would be to average that portion of the river that adjoins or is within the particular survey in question. Despite the case support for the second method, method three is the one that has been followed in most of the cases reaching the Texas courts. Cases supporting this method are *State v. Bradford*, 25 SW2d 706, *American Liberty Oil Company v. State*, 125 SW2d 1107, *Bunnell v. Sugg*, 135 SW 702.

This procedure was apparently derived from the Mexican colonization laws. Most of the "river front" of the major rivers was granted during this colonization period. With the exception of the first Act of February 18, 1823, under which Stephen F. Austin located the original 300 families, all succeeding acts concerning the colonization of Texas under the Mexican government included the half-square river frontage requirement. The surveyors locating grants under the authority of the Republic or the State of Texas were not required to survey all the rivers in Texas to determine navigability before constructing their surveys. They merely made the navigability determination at the time and place their survey intersected it.

Five months after the enactment of the "thirty-foot statute," John P. Borden, the first Commissioner of the General Land Office, wrote the following letter to H. Vessel concerning his inquiry as to what should be measured.

General Land Office
City of Houston
May 22, 1838
To H. Vessel, Esquire

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Sir:

In answer to your communication of 12th instant, would inform you that by 42nd Section of the Land Law, I understood that the water in the stream or river to be navigable must be at a common stage, but not at the lowest, on an average thirty feet wide, otherwise some very small streams or spring branches might be deemed navigable.

Respectfully,
John P. Borden
Commissioner of the
General Land Office

Commissioner Borden said the water in the stream must average thirty feet wide when the stream was flowing at a common stage. At common stage the edge of the water would be at the toe of slope or bottom of the bank. Commissioner Borden clearly indicates that "very small streams and spring branches" were not deemed navigable. If either method one or two were used, the headwaters (small streams and branches) less than thirty feet wide "might be deemed navigable."

Many of the cases cited above concerning the different theories were prior to the Oklahoma v. Texas case in which the gradient boundary theory was adopted. So far as I know there are no cases pointing out exactly what must be measured to determine whether a stream is thirty feet wide. However, since the Texas courts have uniformly adopted the gradient boundary theory, for a stream to be navigable it would almost be mandatory that it be measured between the gradient boundary points on either side of the river. Averaging thirty feet between the gradient boundaries would lengthen the extent of river length deemed to be navigable as opposed to averaging the water at its "common stage."

We have performed a gradient boundary survey of Cottonwood Creek from its mouth upward through the Vickery Survey, the Hardy Survey, and a portion of the Eaton Survey. This survey revealed that Cottonwood Creek is a natural stream ranging in width between the gradient boundaries from 3.56 feet to 53 feet. The creek from the mouth up on the Vickery Survey contains 0.685 acre and averages 27.61 feet wide, the widest point being 39.09 feet at the mouth and the narrowest point being 5.80 feet near where it leaves the Vickery Survey.

The creek through the Hardy Survey consists of three or four pools or lake-like places that are as wide as 53 feet between the gradient boundaries. These pools are connected by a very small stream, in some places only 3.5 feet wide. The area between the gradient boundaries of the creek on the Hardy Survey is 4.245 acres. The total length within the Hardy Survey is 5136 feet making the average width of the creek on the Hardy Survey 36.00 feet wide between the gradient boundaries. The area of the creek from the

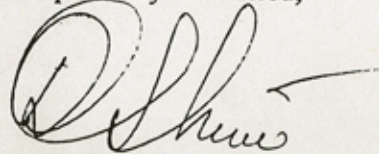
dividing line between the Hardy and Eaton Survey measuring northward 1850 feet on the Eaton Survey is 1.03 acres with an average width of 24.28 feet between the gradient boundaries. The smallest width being 8.4 feet and the widest 53 feet.

This creek was not considered navigable at the time the original surveys were made. It is my opinion that it should not be considered navigable today, even though that portion within the Hardy Survey is 36 feet wide, it does not retain an average width of thirty feet as provided in the statute. The portions of the creek on either side of the Hardy Survey are not 30 feet wide, and it would seem inconsistent to pick out a spot in the middle and call it navigable. In *Mott v. Boyd*, 286 SW 458, it is stated, "We are convinced that Congress, in passing the Act of 1837, was actuated by two motives: 1) a division of the waters by limiting the frontage on streams and 2) reservation of navigable rights on all streams which were capable of or thought to be capable of being made navigable by instrumentalities of navigation then in current use." At the time of the survey of these lands, Mr. Linn did not deem this watercourse to be navigable or capable of being made navigable.

The state's Oil and Gas Lease No. M-101312 states, "Tract 1 of Twelve Mile Creek, Victoria County, Texas, containing approximately 95 acres; Tract 1 is bound on the north by the north line of the W. J. Eaton Survey, A-164, and is bound on the south at its confluence with Coletto Creek." We did not survey the creek all the way to the north line of the Eaton Survey; however, it is my opinion the creek would contain no more than ten acres in stead of the 95 acres recited in the lease.

As stated above we measured the creek between the gradient boundary points, but the original locating surveyor was making his measurements before the gradient boundary was invented and by following the instructions as outlined in Commissioner Borden's letter, the creek as measured by Mr. Linn would have been considerably less in 1838 than we measure today by using the gradient boundary method. Therefore, to reiterate, it is my opinion that Cottonwood or Twelve Mile Creek is not navigable, and the state has no ownership in this creek bed.

Respectfully submitted,



D. D. Shine
Licensed State Land Surveyor

Cc: Ford Engineering

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