

Shine & Associates

REGISTERED SURVEYORS TEXAS AND LOUISIANA
D. D. SHINE, RPLS, LSLs, RLS
NEDRA J. FOSTER, RPLS

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GENERAL LAND OFFICE

March 25, 2002

Mr. Ben Thomson
Texas General Land Office
Stephen F. Austin Building
1700 N. Congress Ave.
Austin, Texas 78701-1495

Dear Ben:

At the request of Mr. Bruce Kostad of KCS Resources, Inc., I am sending you my survey of a portion of Coletto Creek in Victoria, Goliad, and DeWitt Counties. Attached is the accompanying report. This report addressed to C. H. Fenstermaker & Associates, Inc. dated 2/28/02 is referenced on the map as such.

If you need further information or clarification, please feel free to call.

Yours truly,

Nedra

Nedra J. Foster

Attachment

Cc w/o attachment:
Mr. Marshall Enquist
Mr. Bruce Kostad
Mr. John Benoit

File No. Sketch File No. 14
Victoria, Goliad, and DeWitt County
Sec & 1/4. SW. No 9 for plat
Date Filed: 04/18/2019
George P. Bush, Commissioner
By K. Schreiber

Federal Express # 831696364389

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REGISTERED SURVEYORS TEXAS AND LOUISIANA
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February 28, 2002

Mr. John Benoit
C. H. Fenstermaker & Associates, Inc.
P. O. Box 52106
Lafayette, La. 70505

Re: Coleta Creek – Victoria, Goliad, DeWitt Counties

Dear John:

At your request we have performed a gradient boundary survey on Coleta Creek which serves as the boundary between the above referenced counties, as well as the boundary of these surveys.

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 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."

The purpose of this act was to prevent monopolization of the waterways by any one settler and to protect public usage of the waterways. The surveyor had to make the determination of whether a stream was navigable or not when he was on the ground making his survey. If it was not navigable, he was required to make his surveys in the form of a square. If it was navigable, the surveyor fronted the survey on the stream with one-half water front, and he was not to cross the stream with his survey.

In our case all of the surveys in Goliad County were in the form of a square fronting on the stream with two exceptions, and these were small, fill-in surveys. On the Victoria County side, although the surveys fronting the creek were not in the form of a square, they did not conform to the half-square requirement as set out in the land code. All of the surveys in Victoria County and the small portion of DeWitt County used Coleta Creek for their southwestern boundary. Likewise, all of the surveys in Goliad County used Coleta Creek for their northeastern boundary. The original locating surveyors in these counties did

not consider Coletto Creek to be navigable under the 42nd Section of the land code of December 14, 1837.

In our survey of Coletto Creek, we also found the creek to be non-navigable both in law and in fact. Coletto Creek has an average width of less than thirty feet (24.69 feet) and therefore is non-navigable under Section 42 of the above cited Act. Throughout the six miles of the survey, we observed the nature of the stream and determined that it also would not meet the test of navigability as a matter of fact. This test would have been to find the stream useful as a highway for commerce, even though less than thirty feet wide. At the time of our survey, recent rainfalls had caused more than the average flow in the watercourse. In spite of this, the stream was shallow enough for continual, easy wading with only occasional holes that deepened. In my opinion this narrow, shallow stream is not useful as a highway for commerce or navigation, nor is it capable of being made useful for commerce. In *Mottl 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."

We performed a gradient boundary survey on both banks of Coletto Creek beginning near the east line of the Samuel A. C. Rogers Survey (Goliad County) and running 6.04 miles upstream. We determined the average width of the creek by calculating the area to the gradient boundary points and dividing this area by the length and found the entire 6.04 miles of creek we surveyed to have an average width of 24.69 feet. We also calculated the average width from the beginning of our survey in approximately one mile sections in order to determine if Section 42 was satisfied where it stated, "so far up as they retain that average width" (thirty feet). The following table reflects the retained average from the beginning of our survey (near the east line of the Samuel A. C. Rogers Survey in Goliad County) and running 6.04 miles upstream.

	Cumulative Width
Mile One	20.63 feet
Mile Two	20.36 feet
Mile Three	22.58 feet
Mile Four	26.80 feet
Mile Five	24.60 feet
Mile Six	24.69 feet

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
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 each 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."

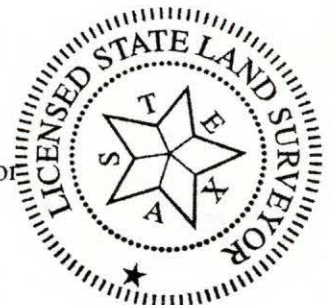
Looking only at the General Land Office maps of Victoria, Goliad, and DeWitt Counties in this area, Coleta Creek would fail the test of navigability simply because the surveys adjoining the creek in these three counties are a hodgepodge of different sizes. Many are square and certainly do not fulfill the requirement of one-half square waterfront. Also, examination of the original General Land Office field notes reveals that the original locating surveyor did not make his surveys one-half square fronting on the creek. The Act definitely points out that the surveys will be in the form of a square if not fronting on a navigable stream so long as the lines previously surveyed will permit. Considering the Samuel Rogers, the Edwin Turner, and the Robert Milby, all fronting on Coleta Creek, the original locating surveyor made the Rogers Labor 1000 varas square, the Turner practically square with its south line being 3097 varas (the square 1/3 of a league would have been 2887 varas), and the Milby also nearly square with its south line being 3175 varas. The locating surveyors (circa 1840) found Coleta Creek to be non-navigable and located their surveys thereon in accordance with the above Act and their instructions.

As pointed out above, I found this stream today to be non-navigable, averaging less than thirty feet in width. In fact for much of the length the creek is less than ten feet wide with occasional larger holes of water which increases the total average to the 24.69 feet. It is my professional opinion that this creek is non-navigable and the survey corners should be placed in the center of the creek. It is also my opinion that the state holds no ownership in this section of the creek bed because it is neither navigable in fact nor navigable by law.

Respectfully submitted,

Nedra J. Foster

Nedra J. Foster
Licensed State Land Surveyor



Cc: Mr. David Brennan