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## Hix v. Robertson, No. 10-05-00214-CV, 2006 Tex. App. LEXIS 10292 (Tex. App. Nov. 29, 2006)

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OWRB is then responsible for determining if the Attorney General's intervention in the suit would best serve the public interest; the Attorney General must intervene on behalf of the state when the OWRB decides that it would be in the public interest. The court held that the trial court erred when it proceeded to determine the rights of the parties without proof that the OWRB received notice of the pending suit and, thus, depriving the public from the Attorney General's representation.

On remand, both notification of the lawsuit to the OWRB and the Attorney General's opportunity to intervene must occur.

*Michael S. Samelson*

## TEXAS

**Hix v. Robertson, No. 10-05-00214-CV, 2006 Tex. App. LEXIS 10292 (Tex. App. Nov. 29, 2006)** (holding that the district court properly granted summary judgment and declared a creek to be statutory navigable water where the plaintiffs had standing to sue, the creek and lake at issue met the relevant statutory definitions, and the engineers measured the creek correctly).

William Hix and William and Lester Robertson own neighboring land in Texas, through which Hog Creek runs. After the government dammed the creek, a 100 acre lake formed, 90 acres of which lie on Hix's land and the remainder on the Robertsons' land. Hix blocked the Robertsons' use of the lake by constructing a fence across the lake. The Robertsons sued Hix for access, seeking a declaratory judgment that Hog Creek was a statutory navigable stream and, as such, the lake is owned by the State for the benefit of the public for fishing, boating, and recreational purposes. The 52<sup>nd</sup> District Court Coryell County, Texas granted the Robertsons' motion for summary judgment and enjoined Hix from interfering with the Robertsons' access, use, and enjoyment of the water on Hix's land. Hix appealed on five issues.

First, Hix argued that the Robertsons did not have standing to litigate whether Hog Creek is a statutory navigable stream. Hix traced his title to an 1837 Republic of Texas land patent and relied on *Bradford v. State* to argue that only the State has standing to litigate ownership of a streambed conveyed by patent. The Court of Appeals of Texas, Tenth Circuit, Waco disagreed and held that the Robertsons, regardless of title, had a right to use and enjoy the waters of a navigable stream. The court pointed to the "Small Bill" statute that granted title to beds of navigable streams to the riparian owner, but reserved the public's rights to the waters of navigable streams. As such, the Robertsons had standing to bring suit and have the part of Hog Creek at issue declared a statutory navigable stream.

Hix also appealed the trial court's ruling that the section of Hog Creek in question was a statutory navigable stream. The court struck

down Hix's assertion that the existence of survey lines in the original patent barred the stream from being navigable. The court held that the trial court did not err when it granted summary judgment for the Robertsons based on evidence that Hog Creek, at an average width of more than 30 feet from the mouth up, fell within the definition of a statutory navigable stream. The trial court properly held that the Robertsons and the public have a right to use and enjoy the waters of the lake formed by the damming of Hog Creek.

The three other issues upon which Hix appealed related to deficiencies in the affidavits that identified the width measurements of Hog Creek. Hix argued that the affidavits failed to show that the engineers used the appropriate methodology to measure the stream. The court, however, found that there was no specific method for measuring a stream's width for the purposes of determining its navigability. The court further looked at the nature of the affidavit testimony and found that it was appropriate lay witness opinion evidence. The court only addressed one of the affidavits in question because it alone supported the trial court's ruling of summary judgment.

Finally, the court modified the portion of the trial court's judgment that stated that both Hog Creek and the lake in question were navigable waters by finding that the governing statute applied only to streams. The court affirmed the modified judgment, upholding the summary judgment and overruling the five issues Hix raised.

*Emily Bright*

## UTAH

**Wayment v. Howard, 144 P.3d 1147 (Utah 2006)** (holding that a pumping and refilling cycle of a slough can be a protected method of appropriation for a water right and that a dike which obstructs or hinders that flow constitutes interference).

Glynn F. Wayment and Edward C. England (collectively "Wayment") were successors in a water right that allowed withdrawal of 0.5 cubic feet per second for irrigation from a slough which spanned both Wayment's and Lee R. Howard's ("Howard") adjacent property. The nature of the slough did not allow a consistent flow, so Wayment made used the water by damming the northern end of the slough and pumping water out when it filled. This method was consistent with the original 1914 Application to Appropriate Water.

Howard did not own a water right but rather owned shares in an irrigation company that built a dike on Howard's property across the southern end of the slough. The dike impeded the flow of water onto Wayment's property and delayed the slough refilling process. Howard installed two pipes in the dike at the request of the United States Army Corps of Engineers, but the dike still impeded the flow. Witnesses at trial testified that Howard intended to collect water on his property.