IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

KENNETH ADERHOLT et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT et al.,

Defendants.

Civ. No. 7:15-CV-000162-O

DEFENDANTS' MEMORANDUM IN SUPPORT OF RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' Motion for Partial Summary Judgment should be denied because – contrary to the Federal Rules of Civil Procedure and this Court's local rules – Plaintiffs fail to identify the specific claims or defenses for which they are seeking judgment. In fact, Plaintiffs never explain how their Motion relates to any claim or defense in this litigation.

Rather, Plaintiffs' Motion seeks to adjudicate the accuracy of three surveys and an informal planning map—but the accuracy of these documents is simply irrelevant. First, none of the claims in Plaintiffs' complaint challenge these discrete documents. Indeed, Plaintiffs have previously disavowed any challenge to the three surveys. *See* ECF No. 73 at 2. Second, Plaintiffs fail to demonstrate that the validity of the surveys and map are material because Defendants have made clear that they will not rely upon the surveys or map to address the location of any boundary between Plaintiffs' property and that of the United States. As Plaintiffs knew before they filed their Motion, BLM had concluded that the three surveys used an inappropriate methodology and that it planned to officially suspend them (which it now has done). ECF No. 168. And as Plaintiffs are aware, Defendants have *never* represented that the informal map provides an accurate determination of the location of the boundary of the federal public lands, and they certainly do not intend to do so in this litigation.

Had Plaintiffs properly identified the claims and/or defenses for which they seek summary judgment, they nonetheless would fail to meet the high burden for the issuance of summary judgment with respect to any of their claims. Plaintiffs have not pled a challenge to the validity of the surveys or map as would be cognizable under the Administrative Procedure Act ("APA"). And if they had, Plaintiffs present no support for their assertions regarding the surveys and map from the administrative record and do not provide an exception to rule limiting court

review to the administrative record. Moreover, with respect to the 2014 map, Plaintiffs fails to identify challengeable final agency action. And, with respect to the surveys, any claim is outside the applicable statute of limitation and, in any event, is now moot.

As to their claims under the Quiet Title Act ("QTA"), plaintiffs make clear they are not seeking summary judgment as to the ultimate issue in such claims: i.e., the location of the boundary between their lands and those of the United States. ECF No. 165 at 27. And their Motion cannot narrow the issues to be addressed in their QTA claims, because again, Defendants have made clear they do not intend to rely upon the surveys or the map to defend against Plaintiffs' QTA claims.

Finally, Plaintiffs provide no basis for their request that the Court should issue advisory rulings addressing three "legally erroneous theories" that Plaintiffs believe Defendants are pursuing. ECF No. 165 at 20. Not only do Plaintiffs misconstrue Defendants' positions on the relevant matters, but Plaintiffs also fail to demonstrate that resolution of these "theories" in the abstract is necessary or appropriate.

Ultimately, Plaintiffs' superfluous Motion makes arguments and seeks declarations that are not necessary or material to the ultimate resolution of this litigation. Plaintiffs fail to demonstrate that they are entitled to judgment as a matter of law on any material issue, and their Motion should be denied.[1]

[1] Plaintiffs filed this motion before the May 6, 2017 dispositive motion cut-off, and this response brief responds only to the arguments in Plaintiffs' Motion. Defendants will be filing a motion for summary judgment on or before the May 6, 2017 dispositive motions deadline, and this response should not be deemed as containing all of Defendants' defenses to Plaintiffs' claims.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS[2]

1. The individual Plaintiffs in this lawsuit own property along the Red River in Wichita, Wilbarger, and Clay Counties, Texas.

Disputed. Plaintiff Lalk's property does not abut the Red River. Defendants' Appendix ("Defs.' App.") 002-03 ¶ 3. Furthermore, in some instances, Plaintiffs have not provided any evidence to support the boundaries that they allege and, in others, the evidence provided by Plaintiffs is disputed. *Id.* ¶¶ 3-4; Defs.' App. 037-41; 048-51.

2. Pursuant to Texas law, the individual Plaintiffs also own the land that has built up due to accretion or reliction in between their deeded acreage and the flowing waters of the Red River.

Disputed. This is a legal statement, not a factual statement, and therefore it is not properly supported, because Plaintiffs provide only a legal citation to support their proposition. Furthermore in certain situations under Texas law, the doctrines of accretion and reliction are inapplicable. For instance, several plaintiffs appear to claim lands that have accreted past former islands. Defs.' App. 004 ¶ 6; *Turner v. Mullins*, 162 S.W.3d 356, 362, 363–64 (Tex. App. 2005) (holding that where an "island is later joined with the mainland through accretion, the owner of the mainland is not entitled to the island as an accretion because the island already existed as the property of another").

3. In 2003, BLM initiated the process of revising the Resource Management Plan, expanding the covered territory to now include a 116-mile stretch of the Red River in Wichita, Wilbarger, and Clay Counties, Texas.

[2] As discussed in more detail below, to the extent Plaintiffs' Motion is intended to address any claims other than their QTA claims, Plaintiffs were required to rely on the administrative record for their factual assertions consistent with the APA. Because they failed to do so, including in their statement of facts, Plaintiffs have not properly supported any arguments with respect to any such claims.

Disputed. Defendants' Answer, cited by Plaintiffs, does not admit that the process of revising the applicable resource management plan ("RMP") was initiated in 2003 or that it expanded the planning territory. Pls.' Am. Compl. ECF No. 40 ¶¶ 24, 61; Plaintiffs' Appendix ("Pls.' App.") 0098 ¶¶ 24, 61. In fact, BLM issued a notice of intent to prepare an RMP for the Oklahoma, Kanas, and Texas Planning Area and an Associated Environmental Impact Statement on July 26, 2013, not in 2003. Defs.' App. 054-56. And a prior RMP already encompassed the 116-mile stretch of the Red River abutting Wichita, Wilbarger, and Clay Counties. Defs.' App. 006-32; Defs.' App 081 at 25:13-20.

4. As part of the revision process, BLM conducted four surveys along the 116-mile stretch of the Red River.

Disputed. Plaintiffs' citation to the Federal Record notices, 74 Fed. Reg. 28061-62 (June 12, 2009); 75 Fed. Reg. 8738 (Feb. 25, 2010), does not support this statement. In fact, the surveys were conducted at the request of the Bureau of Indian Affairs to address allotment boundaries on the northern bank, not as part of any RMP planning exercise. Defs.' App. 004 ¶7; 061-69.

5. In 2007, BLM representatives entered Plaintiff Pat Canan's property and affixed BLM survey monuments onto his property.

Partially Disputed. Defendants admit that BLM affixed survey monuments onto lands that Mr. Canan claims as his own. However, Plaintiffs have not provided undisputed evidence of where Mr. Canan believes his boundary to be. Defs.' App. 003-4 ¶ 5; Defs.' App. 037-41; 048-51. Moreover, Mr. Canan acquired the western portion of the lands he is now claiming from third parties in October, 2007, after the BLM monuments were placed. Pls.' App. 0043-49.

6. BLM affixed survey monuments on properties owned by Plaintiffs Kevin Hunter, Ken and Barbara Patton, Patrick Canan, and Jimmy Smith.

Partially Disputed. This statement relies on a declaration from Plaintiffs' expert, Nedra Foster, which refers to and relies upon "Exhibits B1-B2," "Exhibit C," "Exhibit F," and "Exhibit G." First, Plaintiffs did not disclose these maps to Defendants until the filing of their motion. Second, Ms. Foster has not demonstrated that she has personal knowledge of the placement of survey monuments. *See* Pls.' App.0127-31. Defendants nonetheless admit that BLM affixed survey monuments onto lands now claimed by plaintiffs Hunter, the Pattons, Canan, and Smith, but dispute that Plaintiffs have provided undisputed evidence of the location of the boundary of their properties. Defs.' App. 003-04 ¶¶ 4-6; Defs.' App. 037-41; 048-51. Moreover, Hunter acquired the property on May 10, 2010, after any BLM monuments were placed. Pls.' App. 0050-54.

7. The various survey monuments purport to mark both the southern gradient boundary and the medial line of the Red River.

Partially Disputed. This statement relies on a declaration from Ms. Foster, which refers to and relies upon "Exhibits B1-B2," "Exhibit C," "Exhibit F," and "Exhibit G." First, Plaintiffs did not disclose these maps to Defendants until the filing of their motion. Second, Ms. Foster has not demonstrated that she has personal knowledge regarding what the monuments purport to mark—and to the extent she is relying upon what the monuments say, her statement is inadmissible hearsay. *See* Pls.' App.0127-31. Defendants nonetheless admit that certain survey monuments placed on lands claimed by plaintiffs Canan, Hunter, the Pattons, and Smith purported to mark either the medial line or the southern gradient boundary. None of the monuments purport to mark both.

8. In places, the survey monuments were set over one mile from the flowing water of the Red River.

Disputed. This statement cites to Ms. Foster's declaration, which at most indicates that for "some of the above-described properties," without indicating which, the monuments were over one mile from the flowing water—on whatever (unidentified) dates Ms. Foster was doing her "survey work." Pls.' App. 0129-30. Given the dynamic nature of the Red River, the location of the flowing water at any particular point in time varies. Defs.' App. 003-04 ¶ 5.

9. BLM published the surveys in the Federal Register, giving official and legal notice of its claim to property owned by the Plaintiffs.

Disputed. BLM published two notices in the Federal Register indicating that the following plats of survey were scheduled to be officially filed in the BLM New Mexico State Office, Santa Fe, New Mexico:

- dependent resurvey in Townships 5 and 6 South, Range 12 West of the Indian Meridian, Oklahoma, accepted May 8, 2009, for Group 85 OK;
- the dependent resurvey and survey in Township 5 South, Range 13 West, of the Indian Meridian, accepted September 24, 2009, for Group 80 OK; and
- the dependent resurvey and survey, in Township 5 South, Range 15 West, of the Indian Meridian, accepted September 24, 2009, for Group 82 OK. 74 Fed. Reg. 28061-62 (June 12, 2009). Defs.' App. 057-60.

The Federal Register notices did not include any surveys themselves, and did not purport to assert any claim of federally-owned property, particularly in relation to any lands claimed by the individual Plaintiffs. *Id*.

10. In 2014, BLM created and distributed a map identifying the land it claimed as public land along the 116-mile stretch of the Red River.

Disputed. The cited deposition testimony refers only to an unidentified map which was "like" a

map that BLM employee Steve Tryon "shared" at unidentified public meetings. Pls.' App. 023 at 18:1-24. Assuming that the map is that at Pls.' App. 007, by its terms, the map is an estimate, and it does not purport to identify lands BLM claims as federal public lands. Pls.' App. 007. Instead, this map was created only as an estimate of potential federal public lands for purposes of informing BLM's public process regarding a revised RMP, not for identifying the boundary of the federal public lands. Defs.' App. 077-79A at 10:4-13:18.

11. This map shows land owned by the Plaintiffs as estimated public land owned by the federal government. The map was distributed at public meetings.

Disputed. This map shows only an estimate, and does not identify the lands owned by Plaintiffs. Pls.' App. 007.

12. The BLM surveys described in ¶¶ 3-9 do not rely on any alleged, past avulsive event.

Undisputed. The referenced surveys did not base any boundary determination on the existence of an avulsive event.

13. The BLM surveys described in ¶¶ 3-9 above do not locate the southern gradient boundary on a bank that is water-washed.

Disputed. The cited deposition testimony does not support the statement. If anything, the testimony indicates only that Mr. Winter saw evidence of the relevant area being "water washed." Pls.' App. 0016 at 106:3-107:17. This statement relies on a declaration from Ms. Foster that refers to and relies upon "Exhibits B1-B2," "Exhibit C," "Exhibit F," and "Exhibit G." First, Plaintiffs did not disclose these maps to Defendants until the filing of their motion. Second, have Plaintiffs have not previously disclosed under Rule 26(a)(2) any opinion by their expert Ms. Foster addressing whether any boundary identified in the referenced surveys was "water washed." Pls.' App. 0173-79. Nonetheless, Defendants admit that the survey

methodology used by the surveyor was in error, and may have resulted in errors in identifying the location of the gradient boundary. ECF No. 168.

14. Vegetation grows on both sides along virtually the entire length of the boundary located in the BLM surveys described in ¶¶ 3-9.

Disputed. The cited declaration of Ms. Foster indicates only that "on the above-described properties," there is vegetation along both sides of virtually the entire length of the boundary identified by BLM. Ms. Foster provides no evidence that she has any personal knowledge regarding the physical appearance of the identified boundary outside of the specific Plaintiffs' properties. Pls.' App. 0127-31. In addition, for the Smith property, Plaintiffs' map appears to show areas where there is not vegetation on both sides of the boundary. Pls.' App. 0020.

15. The BLM surveys described in ¶¶ 3-9 above did not account for erosion and accretion.

Unsupported. The deposition testimony cited by Plaintiffs refers only to one of the three surveys. Pls.' App. 0014 at 72:2-12. Nonetheless, Defendants admit that the survey methodology for all three surveys was in error, and may have resulted in errors in identifying the location of the gradient boundary. ECF No. 168.

16. The BLM surveys described in ¶¶ 3-9 above were conducted by retracing the Kidder and Stiles monuments and by estimating the gradient boundary line with a protractor and scales where Kidder and Stiles monuments did not exist.

Disputed. The deposition testimony cited by Plaintiffs indicates that the BLM surveyor used the Map of Disposals (which was not created by Kidder and Stiles) as the starting point for identifying the southern gradient boundary. Pls.' App 011-12. Nonetheless, Defendants admit that the survey methodology was in error, and may have resulted in errors in identifying the location of the gradient boundary. ECF No. 168.

17. The BLM surveys described in ¶¶ 3-9 above were conducted with the assumption that the southern gradient boundary should be placed on the bluff banks.

Undisputed. The BLM surveyor, at least for one of the three surveys, assumed the southern gradient boundary should be placed on the bluff banks, which assumption was incorrect. Pls.' App. 0013 27:3-11; ECF No. 168.

18. The map of public lands along the Red River described in ¶¶ 10 and 11 above does not locate the southern gradient boundary on a bank that is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed.

Disputed. The statement relies on the declaration of Ms. Foster, who provides no foundation for any opinion that the estimated boundary on the map is not on a bank that is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed, and there is no indication that she ever observed the entirety (or even any substantial portion) of this stretch of the river. Pls.' App. 0127-31. Further, Plaintiffs have never disclosed any such opinion by Ms. Foster under Fed. R. Civ. P. 26(a)(2). *See* Pls.' App. 0173-78.

19. The map of public lands along the Red River described in ¶¶ 10 and 11 above does not locate the southern gradient boundary on a bank that separates the bed from the adjacent upland.

Disputed. The statement relies on the declaration of Ms. Foster, who provides no foundation for any opinion that that the estimated boundary on the map is not on a bank that that separates the bed from the adjacent upland and there is no indication that she ever observed the entirety (or even any substantial portion) of this stretch of the river. Pls.' App. 0127-31. Further, Plaintiffs have never disclosed any such opinion by Ms. Foster under Fed. R. Civ. P. 26(a)(2). *See* Pls.' App. 0173-78.

20. The map of public lands along the Red River described in ¶¶ 10 and 11 above does not

locate the southern gradient boundary on a bank that serves to confine the waters within the bed.

Disputed. The statement relies on the declaration of Ms. Foster, who provides no foundation for any opinion that that the estimated boundary on the map is not on a bank that serves to confine the waters within the bed and there is no indication that she ever observed the entirety (or even any substantial portion) of this stretch of the river. Pls.' App. 0130 at ¶ 15. Further, Plaintiffs have never disclosed any such opinion by Ms. Foster under Fed. R. Civ. P. 26(a)(2). *See* Pls.' App. 0173-78.

21. The map of public lands along the Red River described in ¶¶ 10 and 11 above does not locate the southern gradient boundary on a bank that preserves the course of the river.

Disputed. The statement relies on the declaration of Ms. Foster, who provides no foundation for any opinion that that the estimated boundary on the map is not on a bank that preserves the course of the river and there is no indication that she ever observed the entirety (or even any substantial portion) of this stretch of the river. Pls.' App. 0127-31. Further, Plaintiffs have never disclosed any such opinion by Ms. Foster under Fed. R. Civ. P. 26(a)(2). *See* Pls.' App. 0173-8.

22. The map of public lands along the Red River described in ¶¶ 10 and 11 above did not account for erosion and accretion.

Disputed. The statement relies on the declaration of Ms. Foster, who provides no foundation for any opinion that that the estimated boundary on the map is consistent with application of the principles of erosion and accretion and there is no indication that she ever observed the entirety (or even any substantial portion) of this stretch of the river. Pls.' App. 0127-31. Further, Plaintiffs have never disclosed any such opinion by Ms. Foster under Fed. R. Civ. P. 26(a)(2). *See* Pls.' App. 0173-78.

23. The map of public lands along the Red River described in ¶¶ 10 and 11 above was not

created via the gradient boundary survey method.

Disputed. The deposition testimony cited by Plaintiffs indicates that a variety of information was used to create an estimated boundary—including, among other things, prior surveys (including surveys by Kidder and Stiles) which would have comprised gradient boundary surveys. Pls.' App. 0026-27 at 41:8-25; 42:1-6. It is undisputed that the "estimated south gradient boundary" was not the result of gradient boundary surveys, as no such surveys have been performed for the entirety of the area depicted on the map. Defs. App. 005 ¶ 9.

24. The map described in ¶¶ 10 and 11 above located the southern gradient boundary by using data on transportation infrastructure, prior year survey boundaries, soils, satellite imagery, the public land survey system, and township boundaries.

Disputed. The deposition testimony cited by Plaintiffs indicates that the "estimates," not the southern gradient boundary, were informed by "transportation infrastructure, prior year survey boundaries, soils, satellite imagery, the public land survey system, and township boundaries, potentially quite a lot more data." Pls.' App. 0026-27 at 41:8-42:6.

25. The map described in ¶¶ 10 and 11 above does not rely on any avulsive event occurring after the Kidder and Stiles surveys.

Unsupported. Plaintiffs provide no citation for this statement.

DEFENDANTS' STATEMENT OF ADDITIONAL FACTS

1. BLM approved and accepted a plat, representing the dependent resurvey of a portion of the boundary line between the States of Texas and Oklahoma, a portion of the subdivisional lines, the partition lines, and a portion of the adjusted 1875 meanders of the left bank of the Red River, Townships 5 and 6 South, Range 12 West of the Indian Meridian, Oklahoma, on May 8, 2009, for Group 85 OK. Defs.' App. 057-58.

2. BLM approved and accepted a plat representing the dependent resurvey and survey in Township 5 South, Range 13 West, of the Indian Meridian, on September 24, 2009, for Group 80 OK. Defs.' App. 059-60.

3. BLM approved and accepted a plat representing the dependent resurvey and survey, in Township 5 South, Range 15 West, of the Indian Meridian, on September 24, 2009, for Group 82 OK. Defs.' App. 059-60.

4. BLM has suspended the surveys (hereinafter the "Suspended Surveys" or "surveys") associated with each of the plats referred to in Statement of Additional Facts Nos. 1, 2, and 3. ECF No. 168 at 2.

5. As part of this suspension, BLM has added a letter of suspension to the survey files for each of those three surveys. ECF No. 168 at 2.

6. BLM will be publishing a notice of suspension in local newspapers of general circulation and in the Federal Register. ECF No. 168 at 2.

7. BLM announced to Plaintiffs its intention to suspend these surveys prior to Plaintiffs filing their motion for partial summary judgment. Pls.' App. 138-39 at 71:4-10.

8. From roughly May 2014 to November 2014, BLM prepared several maps using Geographic Information Systems ("GIS") data to estimate potential federal ownership in a portion of the Red River to engage with the public in information gathering as part of its RMP planning exercise. Defs.' App. 077-79A at 10:4-13:18.

9. One of these maps is that attached to Plaintiffs' Appendix as Pls.' App. 007, with a date of June 2, 2014 (hereinafter "2014 map"). Defs.' App. 075-76 at 8:12-9:4; 80 at 16:11-12.

10. The map does not purport to determine any federal ownership of any property; it was prepared as an informal estimate of potential federal lands. Defs.' App. 077-79A at 10:4-

13:18.

11. The 2014 map was prepared only for purposes of informing conversations related to its public process for initiating a revised RMP, not for identifying the boundary of the federal public lands. *Id.*

12. Plaintiffs—comprising eight individuals, three Texas counties, and the sheriff of one of those counties—bring six claims[3] against the U.S. Bureau of Land Management ("BLM") and other federal Defendants. ECF No. 40.

13. They assert two claims under the QTA, whereby they seek an order adjudicating the boundary between the individual plaintiffs' properties and the federal public lands comprising the bed of the Red River. ECF No. 40, ¶¶ 131-173.

14. Plaintiffs also assert four overlapping claims (the "Non-QTA claims" or "APA claims") that generally challenge "(1) 'Defendants' failure to act by refusing to conduct surveys or to articulate a reasonably clear method to determine the boundary of federal property;' and (2) 'Defendants' actions in affirmatively adopting and applying survey standards that are contrary to Oklahoma.'" ECF No. 86 at 27; *see also, e.g.*, ECF No. 40 at 35, 37, 41.

STANDARD OF REVIEW

A. Summary Judgment Under the APA

Under the APA, courts must uphold an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Thus, the "APA prescribes a narrow and highly deferential standard." *Medina County Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010). Judicial review of agency

[3] Plaintiffs' Amended Complaint also included two claims that the Court has already dismissed, namely a QTA claim asserted by the County Plaintiffs, and a claim asserting a violation of the Fifth Amendment. *See* ECF No. 86.

action under the APA should generally be confined to "the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 9 (1977)). Summary judgment is the appropriate mechanism for review of agency decisions under the APA. *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 214 (5th Cir. 1996). Utilizing this mechanism, the Court's role is to "determin[e] whether the administrative action is consistent with the law—that and no more." *Id.* (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2733 (1983)).

B. Summary Judgment for QTA Claims

For claims not subject to the APA, summary judgment is proper when "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Bell v. Thornburg*, 743 F.3d 84, 87 (5th Cir. 2014) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A fact is material if the governing substantive law identifies it as having the potential to affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). When evaluating a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving parties. *Id*. at 255.

ARGUMENT

Plaintiffs' Motion fails to indicate which claims or defenses Plaintiffs are asking the Court to resolve under Rule 56. Furthermore, because the Motion addresses only the "validity" of documents that (1) Plaintiffs have not previously sought to challenge; and (2) are not relevant

to the resolution of its claims, Plaintiffs fail to demonstrate that they are entitled to summary judgment on any particular claim. Nor can they demonstrate that they are entitled to summary judgment on any discrete issue, whether with respect to APA claims or their QTA claims.

A. Plaintiffs' Motion Fails to Address any Claim or Defense, or any Specific Issue Material to Such Claim or Defense.

Contrary to the Federal Rules of Civil Procedure, Plaintiffs fail to seek resolution of any specific claim or defense, or any discrete issue that would advance the resolution of any claim or defense. Because of this failure to meet the standard imposed by Rule 56 and this Court's local rules, Plaintiffs' motion should be denied.

Rule 56 provides that a "party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Under LR 56.3(a)(1), a motion for summary judgment must "state concisely the elements of each claim or defense as to which summary judgment is sought." LR 56.3(a)(1). A party may comply with this rule by providing such information in their brief. LR 56.5(a).

Plaintiffs fail to comply with these rules. While their Motion represents that their "Memorandum concisely states the elements of each claim upon which summary judgment is sought," ECF No. 164, their Memorandum does no such thing. *See generally* ECF No. 165. Plaintiffs in fact never identify for which of their remaining six claims they seek summary judgment—and they similarly never identify the elements of any such claims (or any defenses allegedly asserted by Defendants). As a result, Plaintiffs fail to demonstrate that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c)(1). *See Anderson*, 477 U.S. at 248 (holding that summary judgment must have the potential to affect the outcome of the suit).

Plaintiffs may not skirt the rules' requirements by simply asserting that "[t]he critical issue in this case is whether the [BLM's] boundary surveys comply with *Oklahoma v. Texas.*"

See ECF No. 165 at 5. This statement does not substitute for compliance with the rules and, moreover, is simply not accurate for either Plaintiffs' QTA claims *or* their APA claims.

The validity of the Suspended Surveys was never the central issue in Plaintiffs' QTA claims, and under the current circumstances, it is not even relevant. With respect to the first point, Plaintiffs seek to quiet title to eight separate parcels. *See* ECF 40 ¶¶ 4-17, 153, 173. But the Suspended Surveys addressed lands that abut only three (and a portion of a fourth) of the Plaintiffs' properties. Defs.' App. 004 ¶ 8.[4] With respect to the second point, the Suspended Surveys are not relevant to Plaintiffs' QTA claims because they have been suspended, and Defendants do not intend to rely on them to address the boundaries of the federal estate abutting any parcel at issue in this litigation. ECF No. 168 at 2 (noting that BLM is suspending the surveys because "BLM believes the survey methodology used was in error"). And Plaintiffs knew before they filed their Motion that Defendants intended to suspend the three surveys based on Defendants' belief that the surveys did not comply with the requirements of *Oklahoma v. Texas*. ECF No. 155 at 20 n. 3. As a result, the validity of the Suspended Surveys are neither "critical" nor relevant, because the Suspended Surveys will not serve as part of any defense to Plaintiffs' QTA claims.

Nor is the "validity of the surveys" a material issue in Plaintiffs' APA claims. The Court has interpreted these claims as challenging: "(1) 'Defendants' failure to act by refusing to conduct surveys or to articulate a reasonably clear method to determine the boundary of federal property;' and (2) 'Defendants' actions in affirmatively adopting and applying survey standards that are contrary to *Oklahoma.*'" ECF No. 86 at 27. The validity of the Suspended Surveys

[4] The surveys also do not address lands abutting the parcel claimed by the General Land Office ("GLO"). Defs.' App. 004 ¶ 8.

obviously has no relevance to the first challenge, which asserts a *failure* to conduct surveys. With respect to the second challenge, BLM has already conceded that the Suspended Surveys incorrectly failed to comply with the methodology required by *Oklahoma v. Texas* (and has suspended them on that basis). The Suspended Surveys, therefore, cannot form the basis of a determination that BLM adopted a survey methodology inconsistent with the Supreme Court's guidance. To the contrary, BLM suspended these surveys *because* they are inconsistent with that guidance.

In summary, the Court's local rules on summary judgment force a party to ensure that it is asking the Court to address claims or defenses that are actually at issue. Plaintiffs ignored the requirements of LRs 56.3 and 56.5, and as a result, their Motion seeks rulings on issues that are not material to the disputed issues before the Court. Their Motion should be denied.

B. Plaintiffs Do Not Demonstrate that They Are Entitled to Judgment

Assuming, *arguendo*, that Plaintiffs had properly identified specific claims or defenses (or any material part of such claims or defenses), Plaintiffs' Motion should be denied because Plaintiffs fail to demonstrate that they are entitled to judgment as a matter of law for either their APA claims or their QTA claims.

1. Plaintiffs Cannot Demonstrate that They Are Entitled to Summary Judgment on APA Claims

Plaintiffs fail to demonstrate that they are entitled to judgment regarding the validity of the Suspended Surveys and the 2014 map under the APA. *See* ECF No. 164 (proposed order providing that "the Court GRANTS summary judgment that Mr. Winter's survey work and BLM's 2014 map of estimated maps [sic] are both invalid for failure to comply with *Oklahoma v. Texas*."). A claim seeking the invalidation of agency action is, of course, a proto-typical APA claim—and indeed, Plaintiffs have conceded that the APA provides the waiver of sovereign

immunity and private right of action for their Non-QTA claims. ECF No. 53 at 22 (asserting that "5 U.S.C. § 702 and 28 U.S.C. § 1331[5] provide vehicles for Plaintiffs' Non-QTA claims").

To the extent Plaintiffs' Motion seeks confirmation of their view that the Suspended Surveys and the 2014 map are invalid under the APA, Plaintiffs cannot demonstrate that they are entitled to summary judgment for a variety of reasons. First, Plaintiffs never pled a challenge to the validity of the surveys or map. Second, Plaintiffs present no support for their assertion from the administrative record and do not provide an exception to the maxim limiting court review to the administrative record. Third, with respect to the 2014 map, Plaintiffs fail to allege a final agency action. Fourth, with respect to the Suspended Surveys, any claim is outside the applicable statute of limitation and, in any event, is now moot.

First, Plaintiffs are seeking summary judgment on a claim or claims that they never pled. Nowhere in Plaintiffs' Amended Complaint do they allege that they are asserting a challenge to the discrete agency actions of the adoption of the three surveys or the issuance of the 2014 map. *See generally* ECF No. 40. In fact, when Defendants previously suggested that Plaintiffs might be asserting an APA challenge to the surveys, Plaintiffs quickly made clear that they were *not*. *See* ECF No. 73 at 2 (arguing that "Plaintiffs' Complaint does not assert and Plaintiffs do not argue, that the 2009 survey was the 'final agency action' giving rise to their claims"). *See also* June 26, 2016 Order, ECF 86 at 27 (quoting ECF No. 73) (referencing Plaintiffs' admission that they were not "challenging 'final agency action' in the form of the 2009 surveys"). As such, any challenges to the Suspended Surveys or the 2014 map are not properly before the Court. *Gomez v. LSI Integrated LP*, 246 F. App'x 852, 854 (5th Cir. 2007) (unpublished) (citing *Roeder v. Am.*

[5] 28 U.S.C. § 1331 is not itself a waiver of sovereign immunity. *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1385 (5th Cir. 1989).

Postal Workers Union, AFL–CIO, 180 F.3d 733, 737 n.4 (6th Cir. 1999) (holding that unpled claim raised in summary judgment briefing was not properly before the court)); *Sudduth v. Texas Health & Human Servs. Comm'n*, No. A-13-CA-918-SS, 2015 WL 12860407, at *5 (W.D. Tex. July 13, 2015) (same).[6]

Second, Plaintiffs present no administrative record support for their assertion that the surveys and maps are invalid and provide no exception to the rule limiting this court's review of APA claims to the administrative record. As such, Plaintiffs cannot show that they are entitled to judgment on the APA claims as a matter of law. Under the APA, Plaintiffs bear the burden of demonstrating that an agency's determination was arbitrary and capricious or otherwise unlawful. *Medina County Envtl. Action Ass'n*, 602 F.3d at 699.[7] And Plaintiffs must meet their burden, if at all, by citing to the administrative record. 5 U.S.C. § 706 (providing that court's resolution of the claims must be based upon its review of "the whole record or those parts of it

[6] To the extent Plaintiffs were to argue that these new claims are somehow subsumed within their previously pled Non-QTA claims, it would make no difference, because the Defendants' other arguments *infra* addressing the Suspended Surveys and 2014 map as discrete actions would apply. A plaintiff challenging government action must point to some "identifiable action or event." *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 490 (5th Cir. 2014) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 899 (1990)). The only possible "identifiable action[s] or event[s]" that Plaintiffs conceivably identify are the approvals of the Suspended Surveys or the creation of the 2014 map. They do not, for instance, allege or identify the adoption of some unlawful methodology to be used by BLM. Therefore, to challenge the Suspended Surveys and 2014 map, Plaintiffs must necessarily do so by addressing them as discrete actions.

[7] Any contention by Plaintiffs that Defendants bear the burden of demonstrating the lawfulness of their actions, including the accuracy of any surveys, is baseless. The "APA prescribes a narrow and highly deferential standard," and in fact, the presumption is that the agency's determination is lawful. *Medina County Envtl. Action Ass'n*, 602 F.3d at 699 ("Absent evidence to the contrary, we presume that an agency has acted in accordance with its regulations" (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1223 (11th Cir. 2002)). *See also U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("a presumption of regularity attaches to the actions of Government agencies").

cited by a party"). The "focal point for judicial review [of an agency decision] should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *see also Fla. Power & Light Co.*, 470 U.S. at 743. Supplementation of the administrative record is "not allowed unless the moving party demonstrates 'unusual circumstances justifying a departure' from the general presumption that review is limited to the record compiled by the agency." *Medina County Envtl. Action Ass'n*, 602 F.3d at 706 (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

Plaintiffs make no effort to support their arguments with citations to the administrative record, but rather, rely primarily on extra-record citations.[8] And Plaintiffs identify no unusual circumstances that would authorize supplementing the administrative record, and have not moved the Court to supplement the administrative record. As a result, all of their non-record citations should be disregarded. *See Medina County Envtl. Action Ass'n*, 602 F.3d at 706.[9]

Third, Plaintiffs' request for judgment regarding the validity of the 2014 map must be denied because Plaintiffs do not challenge a final agency action. Plaintiffs do not argue, and cannot demonstrate, that the 2014 map is final agency action subject to challenge under the APA.

[8] While Plaintiffs do not cite to any documents from the administrative record lodged with the Court, they do include in their supplement two sets of 2-3 page excerpts from field notes that were part of the administrative record (Pls.' App. 0001-0002 & 0236-39) and the Lane Bouman Report Pls.' App. 0135-0172). Review of these documents by the Court would be appropriate.

[9] Because Plaintiffs are challenging affirmative agency action, i.e., the approval of surveys and the issuance of the 2014 map, they cannot claim that their refusal to cite to the administrative record is somehow excused because they are asserting a failure to act claim. In any case, this Court has made clear that an administrative record is required for failure to act claims as well. *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 570 (N.D. Tex. 1997) (citing *Camp*, 411 U.S. at 142) ("[f]or either standard, judicial review must be based on the administrative record already in existence").

For agency action to be deemed final, it "must mark the consummation of the agency's decision-making process" and "must be [action] by which rights or obligations have been determined or from which legal consequences will flow." *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011). The 2014 map indisputably does not "mark[] the consummation" of some agency decision-making process. *See Qureshi*, 633 F.3d at 781. By its very terms, the map is an "estimate." Pls.' App. 007.[10] And its scale—1:286,000—conclusively demonstrates that BLM had no intention of using the Map to identify specific boundaries. *See id.* Furthermore, the 2014 map was prepared only for purposes of informing conversations related to its public process for initiating a revised RMP, not for identifying the boundary of the federal public lands. Defs.' App. 077-79A at 10:4-13:18. BLM has consistently maintained that any identification of the boundary of federal public lands requires preparation of a formal survey. *See, e.g.*, Defs.' App. 090-91 at 38:11-39:14; Defs.' App. 093-95 at 40:18-42:19; Defs.' App. 109-110 at. 61:11 to 62:1. Thus, for similar reasons, the map does not meet the requirement for final agency action, because it does not "determine any rights or obligations." *See Qureshi*, 633 F.3d at 781.[11]

Fourth, Plaintiffs' request for judgment regarding the validity of the surveys must be denied because any such claim is time barred and has now become moot. In general, "every civil action commenced against the United States shall be barred unless the complaint is filed within

[10] The 2014 map is not part of the administrative record lodged by Defendants. This is because Plaintiffs failed to plead a claim that they asserting a specific challenge to the 2014 map. Nonetheless, it is proper to review the 2014 map and other extra-record materials when addressing jurisdictional questions, such as whether Plaintiffs are challenging final agency action. *Colo. Envtl. Coal. v. Off. of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1202 (D. Colo. 2011) ("While a court's review of the merits in an APA case is generally limited to the administrative record, a court may consider extra-record materials for purposes of determining whether it has jurisdiction over the matter before it").

[11] That the Map was not final agency action should not be surprising given that it was only intended to be an educational tool that BLM used to *initiate* an administrative process.

six years after the right of action first accrues." 28 U.S.C. § 2401(a). *See also Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997). Each of the surveys was completed and accepted by BLM more than six years before Plaintiffs filed their complaint in November 2015. ECF No. 1. The survey plat for Townships 5 and 6 South, Range 12 West of the Indian Meridian, Oklahoma, for Group 85 OK was accepted and approved on May 8, 2009. 78 Fed. Reg. 28063-62 (June 12, 2009). The survey plats for the lands in Township 5 South, Range 13 West for Group 80 OK and the lands in Township 5 South, Range 15 West for Group OK 82 were accepted September 24, 2009. 75 Fed. Reg. 8738-39 (Feb. 25, 2010). And even if the approval of the surveys did not start the limitations period, publication of the notices in the Federal Register necessarily did, rendering at least the challenge to Group 85 OK time-barred. *See Donnelly v. United States*, 850 F.2d 1313, 1319 (9th Cir. 1988) (filing of a Plat of Survey (notice of which was published in the Federal Register) triggered statute of limitations for QTA claim against government).

In addition, any challenge to the Suspended Surveys, and the methodology used therein, is moot. BLM has already suspended the surveys based on its belief that "the survey methodology used was in error," because the surveyor failed to account for the doctrines of erosion, accretion, and avulsion. ECF No. 168 at 2. *See also* Pls.' App. at 0138-39 at 71:4-10. Indeed, Plaintiffs recognize BLM's agreement with them on the applicability of these doctrines, ECF No. 1165 at 16-17 (citing Doman deposition), and therefore, there is no live, actionable dispute on this point that the Court needs to address. *See Fontenot v. McCraw*, 777 F.3d 741, 747 (5th Cir. 2015) (case is moot where "there remains no live controversy between the parties" as to relevant issue).

Plaintiffs argue that the issue cannot be moot based on the "voluntary cessation"

exception to mootness. CCF No. 156 at 20 n.3. But as the Fifth Circuit has held:

> [While] a defendant has a heavy burden to prove that the challenged conduct will not recur once the suit is dismissed as moot, government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties. Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.

Sossamon v. Lone Star State of Texas, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd sub nom. Sossamon v. Texas*, 563 U.S. 277 (2011). BLM has made clear its position (consistent with that of Plaintiffs) that under *Oklahoma v. Texas*, any identification of the gradient boundary must necessarily account for the riparian doctrines of accretion, erosion, and avulsion. ECF No. 168 at 2. It has formally announced this position by filing its suspension letter with the Court and placing notices in local newspapers and the Federal Register. *Id.* Under these circumstances, the voluntary cessation doctrine does not apply, and Plaintiffs' Motion for Summary Judgment should be denied.[12]

2. Plaintiffs Cannot Demonstrate That They Are Entitled to Summary Judgment on their QTA Claims or any Part of their QTA Claims

To the extent Plaintiffs are seeking a ruling on their QTA claims, they fail to demonstrate that they are entitled to judgment as a matter of law on these claims as well. Plaintiffs make clear that they are "reserv[ing] requesting the Court to approve Plaintiffs' identified bank as the one on which the gradient boundary lay until trial," but still ask the Court to address the validity of the suspended surveys and 2014 map. ECF No. 165 at 27. As an initial matter, Plaintiffs improperly attempt to shift the burden of proof regarding the location of the property line to

[12] Plaintiffs note that BLM's representative testified that BLM would not remove survey markers on Plaintiffs' property "because of the litigation." ECF No. 165 at 20 n.3. But Plaintiffs have placed such markers (and their location) at issue in this litigation, and while BLM no longer believes the markers are relevant, BLM cannot unilaterally remove or alter them in light of obligations to preservation of potentially relevant evidence.

Defendants. Next, given the irrelevance of the suspended surveys and 2014 map, Plaintiffs' Motion does not seek a ruling that would narrow any disputed issue such that summary judgment would be appropriate.

The QTA provides a limited waiver of sovereign immunity allowing a plaintiff "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Even assuming Plaintiffs have met their obligation to allege a cognizable property dispute with the necessary particularity,[13] to prevail on the QTA claim, Plaintiffs still bear the burden of proving the location of the boundary between their lands and the federal public lands. *Younce v. United States*, 661 F. Supp. 482, 486 (W.D.N.C. 1987), *aff'd*, 856 F.2d 188 (4th Cir. 1988) (plaintiff in QTA case bears the burden of proof, as the "generally accepted proposition of law" is that "[i]n a quiet title action, or a proceeding to remove a cloud from title, the burden of proof rests with the complainant as to all issues which arise upon essential allegations of his complaint.") (quoting 65 Am. Jur. Quieting Title, Section 78). *See also Misczak v. Owen Loan Servicing LLC*, No. 4:15-CV-381-O, 2015 WL 11120524, at *3 (N.D. Tex. Sept. 2, 2015) (applying Texas law) (recognizing that plaintiff bears burden of proof under both suit to quiet title and trespass to title, and noting, for the latter, that "[t]he pleading rules are detailed and formal, and require a plaintiff to prevail on the superiority of his title, not on the weakness of a defendant's title") (quoting *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004)); *Wagner v. CitiMortgage, Inc.*, 995 F. Supp. 2d 621, 626 (N.D. Tex. 2014) (applying Texas law) ("The plaintiff must prove, as a matter of law, that he has a right of ownership and

[13] Defendants intend to address, among other things in their motion for summary judgment, whether in light of the facts adduced in discovery, Plaintiffs have met the jurisdictional prerequisites of showing a cognizable title dispute under the QTA.

that the adverse claim is a cloud on the title that equity will remove").

Plaintiffs appear to misunderstand this fundamental point, arguing that BLM bears the burden of demonstrating the location of the boundary. *See* ECF No. 165 at 13. This assertion is contradicted by the authorities set forth above—as well as the language of the QTA itself. The QTA requires that a plaintiff plead with particularity, and ultimately prove, "the nature of the right, title, or interest which the plaintiff claims in the real property, [and] *the circumstances under which it was acquired* . . . ." 28 U.S.C. § 2409a(d). *See also McMaster v. United States*, 731 F.3d 881, 898 (9th Cir. 2013) (holding that party had "failed to plead with particularity sufficient facts showing all of the circumstances under which his title to the structures was acquired, . . . , and has failed to satisfy his burden under the QTA") (citing 28 U.S.C. § 2409a(d)). So, for instance, Plaintiffs, who claim lands based at least in part on accretion, bear the burden of demonstrating how they acquired such property. This would be true even if the allocation of this burden were not expressly imposed under the QTA. *See Miss. Valley Timber Co. v. Mengel Co.*, 112 F.2d 947, 949 (5th Cir. 1940) (upholding trial court's determination that plaintiff failed to meet its burden of establishing that the land in question accreted to plaintiff's land). *See also State ex rel. Comm'rs of Land Office v. Seelke*, 568 P.2d 650, 654 (Okla. 1977) ("[O]ne who asserts title to land on the theory of accretion has the burden of proof as against the party in possession"). Moreover, the Supreme Court expressly recognized that the party asserting that the boundary has changed due to accretion has the burden of proving it. *Oklahoma v. Texas*, 260 U.S. 606, 637–38 (1923) (determining that "notwithstanding the rapidity of the changes in the course of the channel," the law of accretion applies, and in the very next paragraph, noting that "there probably have been changes in this stretch of the Red river since 1821," and the party asserting such changes "should carry the burden of proving them").

Given that Plaintiffs bear the burden of proving their QTA claims, Plaintiffs' Motion fails to advance any effort to meet that burden or narrow the issues to be addressed at trial. Plaintiffs' motion is directed specifically at the three surveys and the 2014 map. But any adjudication of the "validity" of these documents is needless, because as Plaintiffs know, Defendants do not intend to rely on either to defend against Plaintiffs' QTA claims.

As discussed above, before Plaintiffs filed their Motion, Defendants made clear that they would be suspending the three surveys due to concerns about their accuracy. Pls.' App. 0138-39; ECF No. 156 at 20 n.3. BLM has now formally suspended those surveys, ECF No. 168, and Defendants (as they have made clear in numerous instances) do not intend to rely on the surveys in this litigation or for any other purpose.

Nor can Plaintiffs argue that Defendants intend to rely on the 2014 map in any way relevant to the QTA claims. The map encompasses a 116-mile stretch of the Red River; it does not identify any of the Plaintiffs' properties; and is of a scale that it provides no useable information in terms of defining the boundary between federal public lands and other properties. Pls.' App. 007. Moreover, Defendants have consistently and unambiguously—since the beginning of this litigation—made clear to Plaintiffs and the Court that they do not believe the 2014 map accurately describes the boundary between the federal public lands and other properties. ECF No. 61 at 10; Defs.' App. 077-79A at 10:4-13:18. As a result, the "validity" of the 2014 map has no relevance to whether Plaintiffs can meet their burden in the QTA claims.

In sum, Plaintiffs have no basis for challenging the Suspended Surveys and the 2014 map, and this Court should reject Plaintiffs' request for an "advisory ruling" on the validity of these documents. *See Barroga v. Best Alpha, LLC*, No. Civ. H-10-1406, 2011 WL 1376693, at *1 (S.D. Tex. Apr. 12, 2011) (holding that plaintiff in summary judgment was not entitled to an

advisory ruling on an issue not in dispute in the case). The Motion for Partial Summary Judgment should be denied.

C. The Court Should Reject Plaintiffs' Request that it Rule in the Abstract on Claimed "Legally Erroneous Theories."

Plaintiffs argue that the Court should issue advisory rulings addressing three "legally erroneous theories" that Plaintiffs believe Defendants are pursuing. ECF No. 165 at 20. The Court should reject this request. First, Plaintiffs ask the Court to rule on these theories without the required factual underpinning. Second, Plaintiffs misconstrue Defendants' positions on each of the three issues. Third, Plaintiffs have failed to demonstrate that the legal questions presented are necessary for resolution of their Motion.

1. Relevance of Vegetation

Plaintiffs ask this Court to rule that, as a matter of law, "the descriptions of the river bed and 'adjacent upland' remain as true today as they did in 1923." ECF No. 165 at 21. Plaintiffs specifically ask the Court to reject Defendants' position that "vegetation can no longer play a significant role in locating the qualified bank." *Id.*

Plaintiffs, however, misconstrue Defendants' position on this issue. Plaintiffs do not reference important statements from a Rule 30(b)(6) deposition of BLM, regarding its position with respect to vegetation. At the deposition, BLM's representative made clear that BLM does not dispute that the river bed is generally kept "practically bare of vegetation." Defs.' App.096 at 49:5-18. But BLM's representative went on explain that the question is more nuanced than Plaintiffs would have it. First, there have been changes to the type of vegetation present on the river, including the introduction of invasive species such as Salt Cedar that have affected the appearance of the bed, including as a result of its tendency to survive in water-rich environment and its impact as a wind-block. Pls.' App 0160-61; Defs.' App.096-97 at 49:19-50:24. Second,

as the BLM witness explained:

> [E]ven during the Kidder and Stiles' days, [Kidder and Stiles] claimed that there was patches of vegetation in the riverbed, which included higher sandbars that would have been at an elevation that's higher than the normal average and mean flows. There were islands in the riverbed. So that vegetation, then and now, existed in the riverbed. They probably still exist today in those cases. So the vegetation -- it's not a conclusive piece of evidence in and of itself; that's what the BLM would say.

Defs.' App. 099-100 at 52:22-53:9.

Despite adducing this testimony at the Rule 30(b)(6) deposition, which contradicts Plaintiffs' attempt to make this a black and white issue, Plaintiffs instead cite solely to (1) two pages from a *1970* BLM investigative report; and (2) the deposition testimony of a *retired* BLM employee, whose views should not be attributed to BLM. *See* Pls.' App. 0153-71; Defs.' App. 116-17 at 110:23-111:8. In doing so, Plaintiffs misconstrue Defendants' actual position. As set forth in the Rule 30(b)(6) deposition, Defendants believe that the presence of vegetation is clearly relevant—but not conclusive. Plaintiffs provide no reason that the Court should address this issue in the abstract, nor a basis for the Court to find on summary judgment that Defendants' position is wrong as a matter of law.

2. Substantial Flow

Plaintiffs also ask the Court to reject what they claim are "BLM's attempts to re-define 'substantial volume' or 'substantial flow' as flood-stage waters." ECF No. 165. Initially, Plaintiffs fail to connect their desired legal conclusion to any facts on the ground or to any specific Plaintiffs' property. And, they again ask for an abstract advisory ruling that misreads Defendants' position.

In *Oklahoma v. Texas,* the Supreme Court noted that it was addressing an instance in which "the bank of a river, and not the river itself, has been made the boundary." 260 U.S. at

626. Thus, the Court made clear that the boundary on the southern bank was not "the edge of the water at that usual and ordinary stage in which it is found during most of the year." *Id.* at 625. Accordingly, the River's flows do not always "wash both banks"; rather, they only do so when at "substantial volume." *Id.* at 634. *See also Oklahoma v. Texas*, 258 U.S. 574, 594 (1922) (reasoning, for purposes of determining location of medial line of the Red River, that it was "the channel extending from one cutbank to the other, which carries the water in times of a substantial flow").

Defendants interpret this guidance from the Supreme Court as ensuring that the boundary bank not be determined using "the edge of the water at that usual and ordinary stage in which it is found during most of the year." *See Oklahoma*, 260 U.S. at 625. In their Rule 26(a)(2) disclosures, Defendants disclosed their experts' criticisms to certain surveys provided by Plaintiffs as not following this guidance because the surveys appear to identify the boundary as being on a bank at the edge of the low water channel. *See, e.g.,* Pls.' App at 0184. Plaintiffs have not provided a basis for the Court to rule as a matter of law that this position purports to "re-define" statements from the Supreme Court or that it should be rejected on summary judgment.

3. Application of the Doctrine of Reliction

Plaintiffs next argue that the Court should address whether "reliction" applies to the Red River. Again Plaintiffs do not attempt to tie their theories on reliction to any of Plaintiffs' specific properties. Instead, they again seek an advisory opinion on a question that is not at issue.

In *Oklahoma v. Texas,* the Supreme Court held that the gradient boundary was "subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening

changes." 260 U.S. at 636. It did not, however, mention the term "reliction." *See generally id.* Without providing anything from the decision supporting their argument, Plaintiffs argue that the Supreme Court intended to do so. ECF No. 165 at 26. This question, however, is immaterial to the claims being litigated. Neither of the parties' expert witnesses have disclosed any intention of discussing reliction as part of their expert testimony. *See, e.g.*, Pls.' App. 0173-78. Indeed, as Plaintiffs concede, BLM made clear at its Rule 30(b)(6) deposition that it does not know whether flows in the Red River are the same, greater, or lesser, than they were during the 1920s. ECF No. 165 at 25. *See also* Pls.' App 0137 at 66:9-16. Certainly no party has disclosed any quantitative evidence that the flows are, in fact, lower for the relevant stretches of the Red River than they were in 1923.[14] As a result, yet again, Plaintiffs are seeking an advisory ruling that does not have relevance to any of disputed issues.

CONCLUSION

Plaintiffs seek partial summary judgment, but not on any identified claim or defense. Instead, they ask the Court to rule upon the validity of three surveys that BLM has already suspended, and an informal map that cannot reasonably be interpreted as identifying where BLM believes the boundary of federal public lands to be. Plaintiffs' Motion seeks rulings on issues that are not necessary or relevant to the resolution of their claims, and it should be denied.

Respectfully submitted this 18th day of April, 2017,

JEFFREY H. WOOD
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[14] One of the witnesses that Plaintiffs deposed—a retired BLM Surveyor whom Defendants have never identified as one of their potential witnesses—speculated that flows in the Red River are less than they formerly were. Pls.' App. 0148-52. Defendants do not intend to make arguments based on such testimony.

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CERTIFICATE OF SERVICE

I, Romney S. Philpott, hereby certify that on April 18, 2017, I caused the foregoing to be served upon the following counsel of record through the Court's electronic service system:

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