

**IN THE UNITED STATES DISTRICT COURT
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

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'¹
MOTION FOR PARTIAL SUMMARY JUDGMENT**

¹ As used in this brief, "Plaintiffs" refers to Kenneth Aderholt, Patrick Canan, Kevin Hunter, Ronald Jackson, William Lalk, Kenneth Patton, Barbara Patton, and Jimmy Smith, individually, Kenneth Lemons Jr., in his official capacity as Clay County Sheriff, and Wichita, Clay, and Wilbarger Counties.

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TO THE HONORABLE REED O'CONNOR:

The critical issue in this case is whether the Bureau of Land Management's (BLM) boundary surveys comply with *Oklahoma v. Texas*, 260 U.S. 606 (1923). They do not. The Supreme Court set the boundary on the south bank of the Red River. *Id.* at 624. The BLM's bank—*i.e.*, the bank identified in the BLM surveys in dispute—is far from the bank and bed of the Red River in areas thick with grass and trees. This violates the plain language of *Oklahoma v. Texas*, where the Supreme Court held that the bank is “the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland . . . and serves to confine the waters within the bed and preserve the course of the river[.]” *See* 260 U.S. at 631-32. The BLM's bank is not at the outer line of the river bed. Instead, the BLM's bank is over one mile from the Red River in some instances. And the BLM's bank does not separate the bed of the Red River from the adjacent upland. There are grasses and trees on one side of the BLM's bank—and grasses and trees on the other.

These bizarre results are a direct consequence of grave errors that the BLM made in conducting its surveys. First, Mr. George Winter, the surveyor responsible for the disputed surveys in this case, assumed that the bluffs are the banks. Winter Field Notes, Appendix to Plaintiffs' Motion for Partial Summary Judgment (APP.) 0002. This was explicitly rejected in *Oklahoma v. Texas*: “This survey of the physical situation demonstrates that the banks of the river are neither the ranges of bluffs which mark the exterior limits of the valley, nor the low shifting elevations within the sand bed.” *See* 260 U.S. at 635. Second, Mr. Winter was instructed simply to retrace the 1920s Kidder and Stiles surveys. 3/2/2017 Depo. Tr. G. Winter, APP. 0010-11 at 17:16-18:1 and 19:9-20:4. In following those instructions, Mr. Winter admitted that he did not account for the erosion or accretion that has occurred since that time. *Id.*, APP. 0009 at 12:2-12. This, too, violates

Oklahoma v. Texas, which held that “when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream[.]” *See* 260 U.S. at 636. Third, Mr. Winter did not locate the current bank and the current gradient boundary according to the principles set out by the Supreme Court. Rather, he estimated the boundary in his office using a protractor and old maps. 3/2/2017 Depo. Tr. of G. Winter, APP. 0011-12 at 21:25-23:1 and 23:2-19. Simply put, neither the BLM’s survey methodology nor the results of its survey complies with *Oklahoma v. Texas*.

BLM then abandoned any effort in conducting an in-person review of the disputed area. In addition to the surveys published in the Federal Register, BLM created a map, dated June 2, 2014, and titled “Public Lands Surveyed and Estimated Acreage on the Red River,” (“2014 Map”), delineating alleged public lands along a 116-mile stretch of the Red River, as well as resurveyed Indian allotments. 2014 Map, APP. 0007. The 2014 Map— created to use as a reference in determining how to manage the public land identified—claims that the Federal Government owns 29,501 acres. *Id.*; 12/16/2016 Depo. Tr. of S. Tryon, APP. 0024 at 27:2-5. When the map was created, BLM had no intention of performing an actual, gradient boundary survey unless legally required to do so. *Id.*, APP. 0025 at 30:16-17. Instead, the map was created using previous data, like the 1923 Kidder and Stiles Boundary (the dashed navy blue line on the 2014 Map), and then, using the previous data as a starting point, a GIS specialist used satellite imagery to “hand draw where the gradient boundary appeared to occur from space, and he connected it to preexisting data points.” *Id.*, APP. 0027 at 42:12-20.

Compounding these errors, BLM has made clear in this litigation that, even if Mr. Winter’s surveys were incorrect in some respect, BLM nevertheless (incorrectly) believes that the current boundary must be somewhere on or near the historical boundary established by Arthur Kidder and

Arthur Stiles pursuant to the Supreme Court's decree in the *Oklahoma v. Texas* litigation. Upon inspection, however, this position rests on BLM creating new definitions of "river bed" and "substantial volume" that are in direct conflict to the terms as used by the Supreme Court in *Oklahoma v. Texas*, and an unjustified apparent refusal to adhere to the general riparian principle of accretion-by-reliction. While the Court should confirm the undisputed fact that Mr. Winter's survey work was erroneous, the Court should also reject these positions on which Mr. Winter's (and other's) survey work was based. Plaintiffs' motion for summary judgment should be granted.

I. LEGAL STANDARDS

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure just, speedy and inexpensive determination of every action.' *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1). Summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure is appropriate when there is no genuine issue as to any material fact in the case and the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322.

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Where the nonmovant bears the burden of proof on a claim upon which summary judgment is sought, the movant may also discharge its initial burden by showing that there is an absence of evidence to support the nonmoving party's case. *See Celotex*, 477 U.S. at 325. Once the movant has met his initial burden, the nonmovant must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. "The failure of the nonmovant to establish a genuine issue of material fact as to every essential element of [his] claim

mandates entry of summary judgment against [him] as to that claim.” *Bookman v. Shubzda*, 945 F.Supp. 999, 1004 (N.D. Tex. 1996) (Fitzwater, J.) (Citing *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 872 (5th Cir.1991)).

II. STATEMENT OF UNCONTESTED FACTS

1. The individual Plaintiffs in this lawsuit own property along the Red River in Wichita, Wilbarger, and Clay Counties, Texas. APP. 0030-0094.
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. *See Philadelphia Co. v. Stimson*, 223 U. S. 605, 624 (1912) (“It is the established rule that a riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold to the stream as his boundary; if his land is increased he is not accountable for the gain, and if it is diminished he has no recourse for the loss.”)
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. Defs’ Answer, APP. 0098 at ¶ 24, APP. 0103 at ¶ 61.
4. As part of the revision process, BLM conducted four surveys along the 116-mile stretch of the Red River. 74 Fed. Reg. 28061-62; 75 Fed. Reg. 8738.
5. In 2007, BLM representatives entered Plaintiff Pat Canan’s property and affixed BLM survey monuments onto his property. Defs.’ Answer, APP. 0103 at 62.
6. BLM affixed survey monuments on properties owned by Plaintiffs Kevin Hunter, Ken and Barbara Patton, Patrick Canan, and Jimmy Smith. Foster Aff., APP. 0128-29 at ¶¶ 6-9.

7. The various survey monuments purport to mark both the southern gradient boundary and the medial line of the Red River. *Id.*
8. In places, the survey monuments were set over one mile from the flowing water of the Red River. *Id.* at ¶ 10.
9. BLM published the surveys in the Federal Register, giving official and legal notice of its claim to property owned by the Plaintiffs. 74 Fed. Reg. 28061-62; 75 Fed. Reg. 8738.
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. 12/16/2016 Depo. Tr. of S. Tryon, APP. 0023 at 18:14-24.
11. This map shows land owned by the Plaintiffs as estimated public land owned by the federal government. APP. 0007. The map was distributed at public meetings. 12/16/2016 Depo. Tr. of S. Tryon, APP. 0023 at 18:14-24.
12. The BLM surveys described in ¶¶ 3-9 do not rely on any alleged, past avulsive event. 3/2/2017 Depo. Tr. of G. Winter, APP. 0014 at 71:11-18; 3/16/2017 Depo. Tr. of Robert Casias (rough), APP. 0133-34 at 48:13-49:22.
13. The BLM surveys described in ¶¶ 3-9 above do not locate the southern gradient boundary on a bank that is water-washed. 3/2/2017 Depo. Tr. of G. Winter, APP. 0016 at 106:3-107:17; Foster Aff., APP. 0130 at ¶ 11.
14. Vegetation grows on both sides along virtually the entire length of the boundary located in the BLM surveys described in ¶¶ 3-9. Foster Aff., APP. 0130 at ¶ 12.
15. The BLM surveys described in ¶¶ 3-9 above did not account for erosion and accretion. 3/2/2017 Depo. Tr. of G. Winter, APP. 0014 at 72:2-12.

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. *Id.*, APP. 0011-12 at 21:25-23:1 and 23:2-19.
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. Winter Field Notes, APP. 002; 3/2/2017 Depo. Tr. of G. Winter, APP. 0012-13 at 25:17-27:18.
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. Foster Aff., APP. 0130 at ¶13.
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. *Id.* at ¶ 14.
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. *Id.* at ¶ 15.
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. *Id.* at ¶16.
22. The map of public lands along the Red River described in ¶¶ 10 and 11 above did not account for erosion and accretion. *Id.* at ¶ 17.

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. 12/16/2016 Depo. Tr. of S. Tryon, APP. 0026-27 at 41:8-25, 42:1-6.
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. *Id.*, 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.

III. ARGUMENT

A. The *Oklahoma v. Texas* Line of Cases Defines the Boundary for Private Property Along the Red River Within the Disputed Area.

The south bank of the Red River marks the northern boundary of Texas along the Red River. In *Oklahoma v. Texas*, 260 U.S. 606 (1923), the Supreme Court resolved “the questions of what constitutes the south bank, and where along the same the boundary is [.]” *See* 260 U.S. at 625. Oklahoma and the United States had contended that the bank and the boundary should be interpreted as the foot of the bluffs, while Texas championed for the edge of the low-water mark of the river. *See id.* The Supreme Court rejected both positions. Instead, it held that the bank is “the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland . . . and serves to confine the waters within the bed and preserve the course of the river[.]” *See* 260 U.S. at 631-32. The Supreme Court also held that the boundary “is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it.” *See id.* at 632. The south bank and the boundary are “subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes.” *See id.* at 636. In other words, while the *definition* of

the boundary does not change, the Red River, itself, does. Absent intervening avulsions, locating the southern boundary is simply a matter of identifying the current south bank that meets the definitions of the Supreme Court.

According to the Supreme Court, locating the boundary bank should be a relatively simple matter.

“When the commissioners used the words ‘bank’ and ‘river,’ they did so in the popular sense of both. . . . *It requires no scientific exploration to find or mark it out.* The eye traces it in going either up or down a river, in any stage of water. With such an understanding of what a river is, as a whole, from its parts, there is no difficulty in fixing the boundary line in question.”

Oklahoma, 260 U.S. at 628-29 (quoting *Howard v. Ingersoll*, 54 U.S. 381 (1852) (emphasis added)).

In other words, the current boundary bank is the “the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland . . . and serves to confine the waters within the bed and preserve the course of the river[.]” See 260 U.S. at 631-32. The current boundary on that bank is “the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it.” See *id.* at 632. Accretion and erosion describe the gain or loss of land from the difference between where the bank is today versus where it was in the past.²

² To be sure, “if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel.” See *Oklahoma*, 260 U.S. at 636 (quoting *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918)). A party asserting a past, avulsive event would have the burden of proving as much. See *id.* at 638 (“The party asserting material changes should carry the burden of proving them, whether they be recent or old.”). In any event, the possibility that there might have been some past, avulsive events are irrelevant to this case as the BLM is not contending that any avulsive event have occurred. 3/2/2017 Depo. Tr. of G. Winter, APP. 0014 at 71:11-18; 3/16/2017 Depo. Tr. of Robert Casias (rough), APP. 0133-34 at 48:14-49:22.

B. BLM Bears the Burden of Proving That Its Surveys Comply with *Oklahoma v. Texas*.

The Supreme Court in *Oklahoma v. Texas* ruled that “[t]he party asserting material changes [to the Red River] should carry the burden of proving them, whether they be recent or old.” *See* 260 U.S. at 638. In this case, the Bureau of Land Management is the party whose surveys are in dispute. The BLM’s surveys are premised on the assumption that the boundary today is unchanged from when Kidder and Stiles performed their surveys in the 1920s. This could only be true in one of two scenarios: (1) if there were no erosion or accretion in the Red River since Kidder and Stiles performed their surveys in the 1920s; or (2) if there were a massive, avulsive event immediately after the Kidder and Stiles surveys that would have the legal effect of fixing the boundary where it was placed by Kidder and Stiles. *See Oklahoma*, 260 U.S. at 636. Either scenario would constitute a material change to the Red River. Specifically, the complete cessation of erosion and accretion would be a dramatic departure from the Supreme Court’s observation that “[t]he habit of the river is to erode the outer bank of a bend and to accrete to the opposite bank.” *See Oklahoma*, 260 U.S. at 638-39. And, a massive, avulsive event is explicitly contemplated in *Oklahoma v. Texas* as a “material” change requiring proof by the party claiming it. *See id.* at 640 (discussing whether an alleged avulsive event was sufficiently proven with evidence).

C. There is No Evidence That the BLM’s Surveys Comply with *Oklahoma v. Texas*.

The BLM has had ample opportunity to defend its surveys in this case, but tellingly, they have declined to do so. The BLM designated two expert witnesses, Messrs. Doman and Simmons, to offer opinions. Neither expert opined that the BLM’s challenged surveys comply with *Oklahoma v. Texas*:

Q. Do you understand that the BLM surveys that were conducted during the 2008 time frame are what's being challenged in this case?

A. Yes.

* * *

Q. In your report, did you discuss the BLM's 2008 surveys?

MR. PHILPOTT: Objection; mischaracterizes the document. You may answer.

A. I don't believe so.

2/16/17 Depo. Tr. of C. Doman, APP. 0134 at 34:17-20 and 35:16-21.

Q. Do you agree with me that the BLM surveys that are at issue in this lawsuit are the surveys that you have identified the areas for in Exhibit 3?

MR. HILL: Objection; vague.

A. My understanding that the three that are marked with a W, the Winter surveys, are the one in question.

* * *

Q. Okay. Do you believe that Mr. Winter did a gradient boundary survey on the Red River?

A. I don't know what George did.

Q. You don't know whether or not he did a gradient boundary survey?

A. I do not know that.

2/17/17 Depo. Tr. of H. Simmons, APP. 0198 at 72:7-13 and APP. 0199 at 238:17-22.

Ostensibly, the BLM *could* have conducted a gradient boundary survey on the properties in dispute to show that its challenged surveys do, in fact, comply with *Oklahoma v. Texas*. In fact, the Court gave the BLM access to Plaintiffs' properties. *See Order*, APP. 0201-0212. However, neither of BLM's experts used this opportunity to conduct a gradient boundary survey:

Q. And as part of this case, did you do a gradient boundary survey that complies with *Oklahoma v. Texas*?

A. No.

Q. As part of this case, did you do any type of gradient boundary survey?

A. No.

Q. In your report did you disclose anything about a gradient boundary survey that you conducted?

A. No.

* * *

Q. Did anyone tell you not to do a gradient boundary survey as part of this case?

A. No.

Q. Did anyone suggest that you not conduct a gradient boundary survey as part of this case?

A. No.

2/16/17 Depo. Tr. of C. Doman, APP. 0141 at 21:8-17 and APP. 0142 at 28:22-29:2.

Q. This lawsuit was filed approximately in November of 2015, I'll represent to you. Okay?

A. Okay.

Q. Since November of 2015 -- so as part of this case -- have you performed a gradient boundary survey that complies with *Oklahoma v. Texas*?

A. No.

* * *

Q. Did anyone tell you to do a gradient boundary survey as part of this case?

A. No.

Q. Did anyone suggest that you conduct a gradient boundary survey as part of this case?

A. No.

2/17/17 Depo. Tr. of H. Simmons, APP. 0196 at 55:22-56:3 and APP. 0197 at 62:3-8.

Having no expert to opine on the validity of the challenged BLM surveys, the BLM's only possible sources of evidence to survive summary judgment are the surveys themselves and the testimony of Mr. Winter. But as discussed below, this evidence does nothing to confirm that the BLM's surveys comply with *Oklahoma v. Texas*. In fact, the evidence affirmatively disproves it.

D. The BLM's Surveys and Map Violate *Oklahoma v. Texas*.

1. Mr. Winter's Surveys are Invalid.

In 2009 and 2010, BLM published four surveys in the Federal Register pertaining to property along a 116-mile stretch of the Red River between Texas and Oklahoma. 74 Fed. Reg. 28061-62; 75 Fed. Reg. 8738. These surveys do not place the southern gradient boundary on a bank that meets the criteria of *Oklahoma v. Texas*. Foster Aff., APP. 0130 at ¶¶ 11-17. The BLM's bank is not at the "outer line of the river bed" *see Oklahoma*, 260 U.S. at 631; it does not "separate[] the bed from the adjacent upland" *see id.* at 632; it does not "confine the waters within the bed"

see id.; it does not “preserve the course of the river” *see id.* Foster Aff., APP. 0130 at ¶¶11-17. In fact, the BLM’s surveys place the gradient boundary, in some places, more than a mile inland from the south cut bank of the Red River. *Id.* at ¶ 10.

The reality is that the BLM never set out to do a survey that complies with *Oklahoma v. Texas*. Instead, Mr. Winter simply “retrace[d] the Kidder and Stiles survey and treat[ed] it as fixed.” *See* 3/02/17 Depo. Tr. of G. Winter, APP. 009-0010 at 13:23-14:2. In doing so, Mr. Winter did not account for the erosion and accretion that has happened since the 1920s Kidder and Stiles surveys:

Q. And did your survey take accretion and erosion into account?

A. No.

Q. And that’s because you were just retracing the Kidder and Stiles line; right?

A. Yes.

Q. Do you think your work should have taken accretion and erosion into account?

A. No.

Q. Why not?

A. Because that’s what I was instructed to do.

* * *

Q. So based on your instructions, it’s your view that accretion and erosion don’t apply on the Red River?

A. Based on the instructions that I was given that was passed on down the line from Darrell Shine, yes.

3/02/17 Depo. Tr. of G. Winter, APP. 0014 at 72:2-12 and 73:25-74:5.

By not accounting for erosion and accretion and instead treating the boundary as fixed, the BLM’s surveys are invalid under *Oklahoma v. Texas*. *See* 260 U.S. at 636 (the bank and the boundary are “subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes.”). And although Mr. Doman offered no opinion defending Mr. Winter’s surveys in his report, his testimony cast serious doubt on the validity Mr. Winter’s work precisely because Mr. Winter failed to account for erosion and accretion:

Q. In terms of the survey conducted by Mr. Simmons in 2008, is it your opinion that it is BLM's position that that survey identifies the gradient boundary of the south bank at that location identified on the survey at that point in time in 2008?

MR. PHILPOTT: Foundation; vague.

A. Yes.

Q. And is it -- compare that, please, for me, then, with what your opinion is that the Winter survey work identifies and signifies.

A. *Mr. Winter's work, it was -- when we go back to look at Mr. Winter's work, we question the method that he used at that time.*

Q. Please explain.

A. *We aren't so sure that the -- using Kidder and Stiles' boundary was the correct way of handling that, and not accounting for the erosions and accretions, if possible.*

2/16/17 Depo. Tr. of C. Doman, APP. 0145 at 248:7-25 (emphasis added).

Moreover, following its 1923 opinion, the Supreme Court has repeatedly reaffirmed that the boundary is not fixed. *See Oklahoma v. Texas*, 265 U.S. 493, 499 (1924) (the "boundary between the two states is not an unswerving line, but a river bank, and where through the natural and gradual processes of erosion or accretion the bank is changed the boundary follows the change."); *Oklahoma v. Texas*, 268 U.S. 252, 256 (1925) ("These [disputed] changes all resulted from the natural and gradual processes of accretion and erosion, which are rather pronounced in Red River. . . . Where, as here, a boundary bank is changed by these processes the boundary, whether private or public, follows the change."); *Oklahoma v. Texas*, 269 U.S. 314, 315 (1926) (adopting the Kidder and Stiles surveys but again noting that the boundary was subject "to such changes as may *hereafter* be wrought by the natural and gradual processes known as erosion and accretion.").

The only possible way for Mr. Winter's survey to be valid would be if he could prove a massive, avulsive event that happened immediately after the Kidder and Stiles survey, which would have the legal effect of fixing the boundary to the Kidder and Stiles survey. *See Oklahoma*,

260 U.S. at 636. However, Mr. Winter disavowed any reliance on avulsion. *See* 3/02/17 Depo. Tr. of G. Winter, APP. 0014 at 71:11-18:

Q. And in the course of these three surveys, did you document or prove any avulsive movements? .

A. No.

Q. So the location -- the boundary surveyed in these three surveys, that doesn't depend at all on a conclusion that the river had avulsed at any point; right? .

A. Yes.”

In sum, Mr. Winter’s survey is untenable, and the Court should grant summary judgment finding it invalid.

2. The BLM’s 2014 Map Claiming Ownership of 29,501 Acres Is Invalid.

In addition to the surveys published in the Federal Register, BLM created a map, dated June 2, 2014, and titled “Public Lands Surveyed and Estimated Acreage on the Red River,” (“2014 Map”), delineating alleged public lands along a 116-mile stretch of the Red River, as well as resurveyed Indian allotments. APP. 0007. This map was made accessible to the public at BLM public meetings and shared with the public by BLM officials. 12/16/2016 Depo. Tr. of S. Tryon, APP. 0023 at 18:14-20. The areas of public land identified on the 2014 Map include property owned by the Plaintiffs. APP. 0007. Like the surveys discussed above, the 2014 Map does not place the southern gradient boundary on a bank that meets *Oklahoma v. Texas*. Foster Aff., APP. 0129 at ¶¶ 11-17.

The 2014 Map claims that the Federal Government owns 29,501 acres. APP. 0007. When the map was created, BLM had no intention of performing an actual, gradient boundary survey unless legally required to do so. 12/16/2016 Depo. Tr. of S. Tryon, APP. 0025 at 30:16-17. Instead, the map—like the faulty surveys discussed above—was created using previous data, like the 1923 Kidder and Stiles Boundary (the dashed navy blue line on the 2014 Map), and then, using the previous data as a starting point, a GIS specialist used satellite imagery to “hand draw where the

gradient boundary appeared to occur from space, and he connected it to preexisting data points.” *Id.*, APP. 0027 at 42:12-20. The GIS specialist who created the 2014 Map was not a trained surveyor and had no experience locating a gradient boundary. *Id.*, APP. 0026-27 at 39:16-18, 42:21-25, 43:1. The BLM official who supervised the map’s creation did not know whether the GIS specialist ever consulted with a surveyor to determine whether the boundary line he drew was correct. *Id.*, APP. 0027 at 44:9-13. It is also uncertain whether the GIS specialist was familiar with *Oklahoma v. Texas*, and the specialist may have used soil sample data to draw the southern gradient boundary line. *Id.*, APP. 0027-28 at 45:25-46:1.

BLM created the 2014 Map to use as a reference in determining how to manage the public land identified on the map. *Id.*, APP. 0024 at 27:2-5. This map was created with no apparent consideration of the requirements of the bank and the boundary set out in *Oklahoma v. Texas*. Notably, the 2014 Map was created without reference to the river’s current location. *Id.*, APP. 0026 at 40:25, 41:1-7. Instead, the map’s creator—a GIS specialist with no surveying training and no training in conducting a survey that complies with *Oklahoma v. Texas*, and without supervision from anyone with that experience—created the map using: (1) data from decades-old surveys; (2) data from the invalid 2009 and 2010 surveys published in the Federal Register discussed above; and (3) a mishmash of data that is simply irrelevant under *Oklahoma v. Texas*, such as satellite imagery and soil sampling. Simply put, the 2014 Map is just as indefensible as the Winter surveys, and the Court should grant summary judgment declaring it invalid.

E. The BLM’s Boundary Bank Theories Are Inconsistent With *Oklahoma v. Texas*.

As described above, the relevant survey work is plainly inconsistent with the instructions set forth in *Oklahoma v. Texas* and must be set aside. Indeed, recognizing the flaws, the BLM has already officially suspended the operation of those surveys (although summary judgment of their invalidity is nevertheless appropriate). 3/16/2017 Depo. Tr. of R. Casias (rough), APP. 0138-39

at 79:4-80:10. However, BLM has set forth a number of specious theories concerning *Oklahoma v. Texas* in a post-hoc attempt to defend the Winters work or otherwise defend boundaries located near or around the near century-old Kidder-Stiles line rather than boundaries that bear any resemblance to the one described by the Supreme Court. Although declaring the Winter surveys and BLM's estimated lands map invalid is important, these legally erroneous theories must be rejected to adequately remove the cloud of title on Plaintiffs' lands.³

1. The Court Should Reject BLM's Attempt to Re-Define the Bed of the River to Defend a Boundary on or Near the Kidder-Stiles Line.

As discussed, *Oklahoma v. Texas* establishes a test for locating the bed of the river and for distinguishing it from adjacent upland. The river bed is "composed of light, loose sand" and is "practically bare of vegetation." 260 U.S. at 632-34. Using this information, a surveyor can locate the lowest qualified bank on which the boundary lay—the "water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland." *Id.* at 632. Throughout this litigation, BLM has highlighted that it does not believe *Oklahoma v. Texas* defines the river bed. Instead, BLM maintains that the "River Bed" is no longer "relatively bare of vegetation" or the "sandy waste" it once was, and notwithstanding this part of the Supreme Court's defining test, vegetation can no longer play a significant role in locating the qualified bank. According to the BLM, grasses, shrubs, and trees can now grow in the "bed" because of the quick-growing nature of that vegetation. Bouman Report, APP. 0161-

³ The suspension of these surveys does not counsel against Plaintiffs' requested relief. For one, Mr. Casias, BLM's corporate representative, testified that the surveys would be suspended but not "cancelled." Further, because of this litigation, Mr. Casias indicated that BLM would not remove the survey markers on Plaintiffs' property. In any event, even if BLM would remove the Winter markers, relief would still be appropriate. It is well-settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).

62; 2/2/2017 Depo. Tr. of J. Innes, APP. 0149-50 at 52:13:-19 and 57:20-58:4 (“Q: So is it your view that when the Supreme Court describes the bed as kept practically bare of vegetation by the wash of the waters, that is not particularly helpful in locating the gradient boundary? A. In my opinion, that was valid when Kidder and Stiles were out there. Today, it is not the same river. It is not the same bed. The flow is not the same. The flow is greatly reduced.”). By rejecting *Oklahoma v. Texas*’s dichotomy between visually sandy bed and upland (as defined by the presence of grass, shrubs, and trees), BLM can assert ownership (or estimated ownership) that reaches all the way to the bluffs—a proposition expressly rejected by the Supreme Court. *Oklahoma v. Texas*, 260 U.S. at 635. The Court should reject this theory and reaffirm that the descriptions of the river bed and “adjacent upland” remain as true today as they did in 1923. The qualified bank is a “clearly defined water-worn bank,” where “[o]n the valley side of the bank is vegetation and on the river side bare sand.” *Oklahoma v. Texas*, 260 U.S. at 634.

2. The Court Should Reject BLM’s Attempt to Re-Define “Substantial Flow” to Defend a Boundary On or Near the Kidder-Stiles Line.

Similarly, BLM has argued or implied that a boundary on or around the Kidder-Stiles line might be appropriate because the Red River is not currently at “substantial flow.” 2/2/2017 Depo. Tr. of J. Innes, APP. 0150-51 at 57:20-58:4 (“. . . Today, it is not the same river. It is not the same bed. The flow is not the same. The flow is greatly reduced.”); 2/16/2017 Depo. Tr. of C. Doman, APP. 0144 at 107:18-24 (“A. What I’m saying is, if you’ve – if we have Kidder and Stiles, what they established in 1920 – in the 1920s as a qualified bank, you could start at that point and work back and see where the substantial flows are. . . .”). BLM has declined to present any position of what constitutes “substantial flow” of the river, but it has indicated that the river was not at “substantial flow” when Plaintiffs’ expert, Ms. Nedra Foster, identified the current qualified bank. (Compare Foster Report, APP. 0175 (“At the time of my survey, the river was running somewhat

high due to rains . . .”) *with* Doman Rebuttal Summary, APP. 0185 (describing Foster survey as locating active low water channel)).

BLM has at various times indicated that, although “substantial flow” might change over time, it must be more than the “ordinary high water mark” of the river. In other words, BLM posits that the Red River can go years without a “substantial flow.” Mr. Winter even concluded that a substantial flow occurred in the river only once every “12-15 years” which led him to the conclusion, expressly rejected by the *Oklahoma v. Texas* opinion, that the gradient boundary was the “bluff bank” of the river. Winter Field Notes, APP. 0002; *Oklahoma v. Texas*, 260 U.S. 635.

Like BLM’s vegetation theory, *Oklahoma v. Texas* rejects this theory of the Red River as well. First, the opinion never uses the term “substantial flow.” Instead, it merely describes that when the river is “in substantial volume,” it washes “both banks.” 260 U.S. at 634-35. And far from reaching substantial volume once every twelve to fifteen years, the Supreme Court reasoned that the river *floods* the qualified bank on which the boundary lies somewhere at least once every year and the flooding is so severe that it “reaches back to the bluffs” once every 12 to 15 years. *Id.* at 634. The Court should reject any theory of “substantial flow” or “substantial volume”—and its effect on identification of any qualified bank as the south bank of the Red River—which allows identification of a “water-washed” bank based on only flood-stage water volume. Indeed, the Court should reject any theory of substantial volume that requires more than the “ordinary high water” mark as used in common parlance.

The *Oklahoma v. Texas* Opinion makes clear that the Supreme Court contemplated a bank washed by “ordinary high water,” not floods. In that Opinion, the Supreme Court described a prior Supreme Court case, *Howard v. Ingersoll*, as setting forth the relevant precedent for locating a boundary where, like here, the treaty sets a bank as a boundary rather than a river. In describing

the situation between the “low water mark”—which was not the appropriate boundary—and the bank marking the boundary, the Supreme Court wrote:

At the *locus* there was an abrupt and high bank on the western, or Alabama, side which was washed by the river in periods of ordinary high water. In periods of low water, which comprised two-thirds of the year, a sloping strip of from thirty to sixty yards of dry land lay between the abrupt bank and the water. The flowing stream was about two hundred yards wide in periods of ordinary high water and about thirty yards in periods of low water. This Court, upon much consideration, held that the boundary was not at the line of ordinary low water, but along the water-washed [during ordinary high water] bank or elevation which bounds the river bed and confines the water within definite outer limits, save in the exceptional instances when it is so far at flood that it overflows its restraining banks and spreads over adjacent lands.

Oklahoma v. Texas, 260 U.S. at 628 (describing *Howard v. Ingersoll* 54 U.S. 381 (1852)) (emphasis added).

The Supreme Court continued, describing another bank-as-boundary case:

[T]he bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of summer or autumn.

Id. at 631 (quoting *Alabama v. Georgia*, 604 U.S. 505 (1859)). In reliance on these prior precedents, the Supreme Court then concluded that the Red River bank was a similar *water-washed* bank, by which it meant a bank washed during *ordinary* high water, not some twelve-to-fifteen-year flood. *See also United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 805 (1950) (“The ordinary high-water mark has been accepted as the limit of the bed of the stream.”)

Lest an ambiguity of “ordinary high water” result in further disputes along the Red River, the Supreme Court also makes clear that *ordinary* means high water within a year time frame. *See Oklahoma v. Texas*, 260 U.S. at 631 (quoting *Alabama v. Georgia*, 604 U.S. 505 (1859) and describing mark on the boundary bank as ordinary water “without reference to the extraordinary

freshets of the winter or spring, or the extreme droughts of summer and autumn"); *Id.* at 629 (quoting *Howard v. Ingersoll*, 54 U.S. 381 (1852) and describing the boundary bank as washed by "ordinary high water" and indicating that river was at ordinary high water stage for one-third of every year). Indeed, according to BLM's own survey guidance, this "ordinary" mark is determined on a yearly basis. *See* 1973 BLM Surveying Instructions, APP. 0235 ("Mean high-water elevation is found at the margin of the area occupied by the water for the greater portion of *each average year*."). At a minimum, ordinary high water requires sufficient washing to "deprive [the area] of vegetation." *Id.* at 93 ("High-water mark is the line which the *water impressed on the soil by covering it for sufficient periods to deprive it of vegetation.*"); Depo. Tr. of G. Winter, APP. 0017 at 147:15-16 ("An ordinary high water mark, below it, all vegetation is gone. All of it. Substantial flow is different by definition in this particular case.").

The Court should thus reject BLM's attempts to re-define "substantial volume" or "substantial flow" as flood-stage waters and re-affirm the express reasoning of *Oklahoma v. Texas*: the bank on which the gradient boundary lay must be "water-washed" by ordinary high water, which is merely the high-water mark of the river under ordinary (e.g., non-flood conditions) in a given year, which correspondingly keeps the area "practically bare of vegetation."

3. The Court Should Reject BLM's Attempt to Re-Define Legal Accretion to Exclude Accretion by Reliction.

At common law, a riparian owner of land is entitled to both accretions (land created by the deposit of alluvion) and relictions (land exposed based on gradual diminution of water volume). In other words, absent an avulsion, a riparian land owner is traditionally entitled to any increase in land between his historical property and the location of the flowing water.⁴

⁴ Although federal law likely applies to these issues because it deals with a riparian boundary affecting federal holdings, *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 283 (1982), the law of accretion and accretion-by-reliction are the same under both Federal

BLM recognizes that the amount of water in the river has decreased from the time of the Kidder-Stiles survey. 2/2/2017 Depo. Tr. of J. Innes, APP. 0150-51 at 57:20-58:4; 1/14/2005 Report on Boundary Issues Along the Red River, APP. 0213 (“Now the principal question may be how to determine substantial flow: the present diminished flow or the flow that existed in 1923?”), *id.* at 0221 (“[I]t is obvious that some reliction has occurred dropping the substantial flow below that at the time of the Supreme Court’s decision”).⁵ However, some BLM surveyors have taken the position that reliction does not apply to the Red River. Simmons Field Notes, APP. 0236-39. BLM’s corporate representative noted that reliction was not mentioned in the Supreme Court opinion, although he confusingly also indicated that reliction was a “riparian action” and that BLM “believed that all riparian actions apply to this river, like they do for all rivers.” 3/16/17 Depo. Tr. R. Casias (rough), APP. 0135-36 at 55:20-56:25. However, although BLM may pay some lip service to the doctrine, its positions assume the doctrine does not apply.

In various documentation and testimony, BLM employees assume that the only movement that could affect the gradient boundary is erosion and accretion *to the previously identified bank*. Simmons Field Notes, APP. 0237, 0239 (“Those courses are not utilized in the course of this survey, as reliction is not mentioned by the U.S. Supreme Court as a condition which causes movement of the boundary bank”). As a result of this type of thinking, it is irrelevant to the BLM if conditions have changed such that the Kidder-Stiles bank no longer meets the *Oklahoma v. Texas* guidance because the only relevant movement is that done to the previously identified bank.

and Texas law: land increases ordinarily belong to the riparian owner. *See Philadelphia Co.*, 223 U. S. at 624 (applying federal law of accretion); *Brainard v. State*, 12 S.W.3d 6, 18 (Tex. 1999), *disapproved of on other grounds by Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004).

⁵ Although BLM’s corporate representative indicated that he did not know whether there was more or less water in the river, 3/16/17 Depo. Tr. R. Casias (rough), APP. 0137 at 66:9-16, there is no contrary evidence that there is the same amount of water volume (or more) in the river today than there was in 1923.

This thinking is legally flawed because reliction does apply to the Red River. The Supreme Court clearly contemplated that all forms of accretion—including accretion by reliction—would apply. The terms reliction and accretion “are often used interchangeably, and law relating to accretions applies in all its features to relictions.” 3 American Law of Property § 15.26 at 855 (A.J. Casner ed. 1952). For example, in *Bonelli Cattle Co. v. Arizona*, the Supreme Court treated the doctrines interchangeably and, applying federal law, determined that plaintiff was entitled to relicted lands where the Army Corps of Engineers had rechanneled the river in question. 414 U.S. 313, 325-332 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Although the decision to apply federal law was later overruled, the case makes clear that the Supreme Court, applying federal law, believed reliction is part of the doctrine of accretion, which *Oklahoma v. Texas* expressly applied to the Red River. *See also Brainard*, 12 S.W.3d at 18 (“Accreted land is of two kinds, one by alluvion and one by reliction or, as it is sometimes called, dereliction”). In contrast, there was no indication that the Supreme Court intended to carve out a Red River-specific exception to general riparian principles; in fact, the Supreme Court expressly rejected an invitation from the United States to do that very thing. 260 U.S. at 636-37 (rejecting Oklahoma and United States argument that erosion and accretion should not apply to Red River). Thus, the Court should confirm that the doctrine of reliction applies to the Red River.

The effect of such a re-affirmation is similar to that of the Court’s clarification of the “substantial flow” language in *Oklahoma v. Texas*. If during ordinary conditions there is less water in the river today—and the only available evidence indicates this is so—Plaintiffs, as riparian landowners, are entitled to any newly uncovered land regardless of whether the bank previously identified by Kidder and Stiles has more or less dirt than it did in 1923. So long as there is a bank

north of the Kidder-Stiles line that is washed by the waters during an ordinary year and correspondingly the area is kept practically bare of vegetation, that is the bank on which the boundary lay. *See Oklahoma v. Texas*, 268 U.S. 252, 256 (1925) (“Where, as here, a boundary bank is changed by these processes [of accretion and erosion] the boundary, whether private or public, follows the change”). And if the flowing water of the Red River under ordinary conditions does not reach the elevation identified in the 1920s at any point during an ordinary year (and it does not), that cannot be the qualified bank on which the gradient boundary is located. The Court should reject BLM’s position to the contrary and affirm that reliction applies to the Red River.

IV. CONCLUSION

There are no factual disputes that can save Defendants from summary judgment. The content of the BLM’s surveys and the BLM’s 2014 Map—and where they place the southern gradient boundary—is not in dispute. Nor is the way in which they were created. And any defense of BLM’s survey work on the Red River depends only on various purely legal issues related to *Oklahoma v. Texas*. Although Plaintiffs reserve requesting the Court to approve Plaintiffs’ identified bank as the one on which the gradient boundary lay until trial, the Court should grant summary judgment that the BLM survey work and 2014 Map is incorrect. In doing so, the Court should reject BLM’s flawed legal theories designed to defend a bank at or near the historical Kidder-Stiles line, and affirm that, in accordance with *Oklahoma v. Texas*, the southern gradient boundary of the Red River may only be established by a survey that begins with the flowing water of the river. Plaintiffs’ motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above **Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment** was served via the CM/ECF electronic system to all parties of record on March 28, 2017.

/s/Robert Henneke
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