IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

KENNETH ADERHOLT et. al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	CIVIL ACTION NO. 7:15-cv-00162-O
BUREAU OF LAND MANAGEMENT, et. al.,	§	
	§	
Defendants.	§	
	§	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

BLM's response is remarkable for what it does not say. It does not dispute that Mr. Winter's survey work was badly flawed. It does not dispute that BLM's 2014 map estimating federal ownership depends on that badly flawed work and, indeed, the response even admits that the map is inaccurate. And rather than seriously dispute Plaintiffs' interpretation of critical methodological aspects of *Oklahoma v. Texas*, 260 U.S. 606 (1923) related to the correct identification of the boundary bank, BLM simply pleads with the Court not to resolve hotly disputed issues related to the appropriate methodology taught by the Supreme Court's opinion, baldly labeling Plaintiffs' request as "abstract" and advisory when in fact the disputes permeate throughout Plaintiffs' boundary claims and BLM's defense.

A key power of the judiciary in our constitutional system is to adjudicate the legality of actions of the executive and its sprawling administrative state. BLM's actions here were admittedly unlawful. And although BLM has taken great pains to find one, there is no procedural bar to confirming what both Plaintiffs and the Government already know: the identified gradient boundary is wrong, and the surveys and related map are invalid. Further, both because BLM's flawed defenses concerning the appropriate methodology for locating the gradient boundary defining the southern boundary of federal lands along the Red River constitutes an independent claim clouding title to Plaintiffs' property and because those issues are critical to Plaintiffs' request that the Court "determine the proper *method* for finding the riverbank," Dkt. No. 86 at 25, the Court can and should reject them. Summary judgment should be granted.

II. PLAINTIFFS' REPLY TO BLM'S REBUTTAL STATEMENT OF FACTS

While BLM's Response is written to give the appearance of material factual disputes, there are none. BLM presents no *contrary* evidence to any of the statements made, instead quibbling with minor details or complaining about disclosures or personal knowledge of a retained expert.

To the extent that BLM is requesting that the Court disregard any evidence offered in support of Plaintiffs' motion, the Court should reject that request. The Court can rely on Ms. Foster's maps comparing her survey work to BLM's survey work because Ms. Foster *did* disclose similar materials showing the discrepancy between her surveys and Mr. Winter's work. APP. 0003-0021. The affidavit itself also describes that this was work she had already done and disclosed. APP. 0127-0129 ¶¶ 4-9. Ms. Foster also did disclose an opinion on whether the area surrounding BLM's boundary bank was water-washed when recognizing that BLM's boundary was "for the most part remote from the river." APP. 0177. She further disclosed opinions related to the entire 2014 Map by locating her own gradient boundary that differs significantly from the Winter work, APP. 0003-0021, which served as an "preexisting data points" for the entire 2014 map. APP. 0027 at 42:4-20. Thus, BLM's objection to Ms. Foster's evidence is meritless. Further, because BLM offers no contrary evidence, the Court should deem admitted all facts supported directly or circumstantially by Plaintiffs' evidence, at least for purposes of Plaintiffs' motion. *Nautilus Ins. Co. v. Texas State Sec. & Patrol*, No. CIV. SA-09-CA-390-OG, 2010 WL 3239157, at *1 (W.D. Tex. June 8, 2010), *report and recommendation adopted*, No. SA-09-CA-390-OG, 2010 WL 3239159 (W.D. Tex. July 13, 2010) ("An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him." (citing Fed. R. Civ. P. 56(e)(2)). While BLM may object to some minor details, it disputes nothing with any *evidence*. There is no issue of material fact prohibiting summary judgment.

III. PLAINTIFFS' MOTION COMPLIED WITH RULE 56 AND THEIR REQUESTED RELIEF IS PROCEDURALLY APPROPRIATE.

Contrary to BLM's argument in response, the Court has summary judgment authority to do more than resolve only entire "claims." In 2010, Rule 56 was amended to clarify judicial authority to adjudicate on summary judgment any *part* of a claim. *Norton v. Assisted Living Concepts, Inc.*, 786 F.Supp.2d 1173, 1187 (E.D. Tex. 2011) (describing effect of Rule 56 amendment). As discussed in detail below, each of Plaintiffs' requests asks for the Court to adjudicate a portion of at least one of Plaintiffs' claims. Doing so will advance this litigation toward ultimate resolution and, at a minimum, streamline any future trial. Summary judgment is therefore procedurally appropriate. Moreover, for the reasons discussed in Plaintiffs' opening motion and further below, Plaintiffs have met their burden to show their entitlement to relief.

IV. THE COURT SHOULD GRANT PLAINTIFFS' REQUESTED RELIEF

a. Plaintiffs' Requested Relief is Appropriate Based on the Quiet Title Act.

i. The Court Has Authority Under the Quiet Title Act to Invalidate the Winter Survey and Related Map.

As discussed above, BLM's motion depends on the flawed premise that the Court can grant summary judgment on only entire claims. However, because the Court has clear judicial authority to resolve "part" of any live claim or defense, summary judgment invalidating Mr. Winter's survey and BLM's map of estimated lands is plainly appropriate because these materials remain part of Plaintiffs' Quiet Title claims.

Although the Quiet Title Act is ultimately governed by federal law, the Fifth Circuit has held that federal courts should also look to state law is evaluating the underlying title questions. In both Oklahoma and Texas, quiet title actions require a plaintiff to plead and ultimately prove the invalidity of a defendants' claim on the property. *Wagner v. CitiMortgage, Inc.*, 995 F.Supp.2d

621, 626 (N.D. Tex. 2014) (noting that third element of quiet title action is that "the defendant's claim, though facially valid, is invalid or unenforceable" and concluding the quiet title action "relies on the invalidity of the defendant's claim to the property."); *McGrath v. Majors*, 66 P.2d 915, 916 (Ok. 1936) (indicating that well-pled quiet title complaint alleged that defendant's claim was "without merit."). Here, the BLM's claim giving rise to Plaintiffs' Quiet Title Act claim was both the erroneous Winter Surveys and the related maps that relied on them. Thus, far from irrelevant, invalidating these surveys and the maps resolve an essential element of Plaintiffs' quiet title action. Because, as discussed above, the Court may resolve "part" of a Plaintiffs' claim, summary judgment is an appropriate procedure.

BLM's argument to the contrary about Plaintiffs' ultimate burden of proof is a red herring. Even assuming that Plaintiffs must ultimately prove their increased land holdings, BLM's original claim is still more than still relevant; it is an essential element to recovery.[1] And if BLM "do[es] not intend to rely on" these official materials at trial or oppose Plaintiffs' proof as to their invalidity, Dkt. 176 at 26, there is no reason to oppose a judgment invalidating them.

[1] While Plaintiffs recognize that parties claiming increased landholdings as a result of accretion must typically prove accretion, *Oklahoma v. Texas* provides its own burden of proof that a party asserting a material change in the boundary has the burden of proving it. In applying this burden, the Supreme Court held a person claiming an avulsion—i.e., claiming that the boundary stayed the same—to that burden of proof. *Oklahoma*, 260 U.S. at 638-39. Here, Plaintiffs are alleging that the boundary has not changed and that it remains on a bank washed by ordinary high water where one side is kept practically bare of vegetation and the other has an upland appearance. It is BLM who reserves the right to contend that the appropriate boundary is something different. Therefore, BLM bears the burden prove a materially different boundary bank because of, for example, the effects of invasive plant species. *See infra* at II.a.iv.

ii. The Court Should Exercise its Summary Judgment Authority and Invalidate the Winter Surveys and Related Map Under the Quiet Title Act.

Because the Court has authority to invalidate the Winter surveys and map, the Court must do so because BLM has raised no issue of material fact regarding their validity. Indeed, BLM admits that the Winter surveys failed to account for accretion or erosion and thus failed to comply with *Oklahoma v. Texas*. Dkt. No. 168-1. Additionally, although BLM fails to address the points specifically, Mr. Winter's work was infected by erroneous understandings of the meaning and impact of "substantial flow" on the gradient boundary analysis, and, regardless of BLM's admitted error that Mr. Winter failed to account for accretion and erosion, Mr. Winter also independently concluded that the boundary bank was the base of the bluffs—a conclusion that was approved by BLM, even though expressly rejected by the Supreme Court in *Oklahoma v. Texas*. APP. 0002. Because Mr. Winter used an unlawful process and reached legally baseless conclusions, the Court should grant summary judgment invalidating them as part of resolving the invalidity of BLM's claim to Plaintiffs' land.

Similarly, the Court should also invalidate BLM's related map for two reasons. First, as described in Plaintiffs' original motion, that map depends upon the unlawful Winter surveys and incorrect legal positions concerning the definition of the River Bed and adjacent bank by "hand draw[ing] where the gradient boundary appeared to occur from space" by "connect[ing] it to preexisting data points" (e.g., the Winter surveys). Dkt. 165 at 14-15. Because the "preexisting data points" are wrong the map is inherently flawed, and to allow it to stand would continue to create a "cloud on title" for at least the un-surveyed Plaintiffs' lands because, by mis-identifying the boundary bank, it estimates that the federal government owns land lawfully belonging to Plaintiffs. Thus, it should be invalidated. Additionally, as discussed further below, the map

reflects BLM's flawed legal positions about locating the correct bank. These legal positions themselves constitute an independent "claim" which can also be resolved and rejected on summary judgment as part of Plaintiffs' Quiet Title Burden.[2] *See Alaska v. United States*, 201 F.3d 1154, 1160-61 (9th Cir. 2000) (reasoning that BLM position that river was "non-navigable at statehood" constituted claim clouding title).

This specific relief is also not moot for at least two reasons. First, although BLM's response implies that the surveys have been irrevocably cancelled, the Suspension Memorandum itself makes clear that BLM reserves the right to re-urge a claim identical to the one made by the Winter surveys. The letter itself says that an improper methodology only "may have caused errors," that the suspension only holds the survey "in abeyance," and that after an investigation "the survey may be cancelled, correct, or reinstated." Dkt. No. 168-1 at 1. Thus, BLM's contention that it has somehow disclaimed the boundary set by these surveys is simply false. BLM certainly has not met its burden, as a governmental entity, "to make absolutely clear" that this unlawful claim "cannot reasonably be expected to recur." *Sossamon v. Lone Star State of Texas*,

[2] Plaintiffs note that some of the holdings in the *Alaska* opinion have been rejected by the 10th Circuit in *Kane Cnty., Utah v. United State*s, 772 F.3d 1205, 1211 (10th Cir. 2014), namely whether the United States subjects itself to jurisdiction via only a "cloud" on title or whether there must be an express or implicit dispute as to title. *Id.* However, the Court can resolve the issues presented in this motion without resolving this circuit split as to all aspects of Plaintiffs' requested relief. The Winter survey and map are clearly claims because they expressly locate the southern boundary of federal holdings (even if one was only an "estimate"). And the suspension, without a disclaimer, does nothing to divest the claim. *See Kane Cnty.*, 772 F.3d at 1211 ("Nor is the United States shielded by sovereign immunity where it previously disputed a plaintiff's title but does not do so presently."). Regarding BLM's legal positions, those positions themselves determine the methodology for locating that southern boundary and thus "implicitly dispute[]" Plaintiffs' lawful title because those positions result in an incorrect gradient boundary located south of the true boundary bank. *Kane Cnty.*, 772 F.3d at 1212.

560 F.3d 316, 325 (5th Cir. 2009). Indeed, the notice of suspension provides that the decision is preliminary and expressly contemplates a potential re-occurrence.

Second, even if BLM did formally cancel or revoke the Winter surveys or the map, the Court would retain jurisdiction to invalidate these documents because BLM has not formally disclaimed *all* unlawful aspects of them. Under the *Alaska* decision, where BLM ever makes a historical "claim" on disputed land, that claim continues to provide a justiciable controversy until it is either resolved in court or BLM files a formal section (e) disclaimer giving up its former claim. *Alaska*, 201 F.3d at 1162. Mr. Winter's work, approved by BLM, makes claims beyond the mere geographical location of some monuments. Mr. Winter also concluded, among other things, that substantial flow is something more than ordinary high water mark and that areas north of the boundary bank can have areas covered in upland vegetation, while BLM has only admitted that Mr. Winter "may" have failed to account for accretion, erosion, and avulsion. Like BLM's claim in *Alaska* that a river was non-navigable, these conclusions, too, continue to present a cloud of Plaintiffs' title absent disclaimer. Until BLM formally revokes the Winter surveys *and* the unlawful theories which served as the basis for Mr. Winter's conclusion, the Court retains jurisdiction to invalidate the documents themselves. And because BLM has made no offer to file such a disclaimer, the Court should grant Plaintiffs' motion for summary judgment and invalidate both the Winter surveys and the map of estimated federal lands under the Quiet Title Act.

iii. The Court Has Authority Under the Quiet Title Act to Reject BLM's Flawed Methodological Defenses.

Plaintiffs have also provided sufficient basis for rejecting BLM's defenses—both to the Winter surveys and in rebuttal to Plaintiffs' evidence in this case—as part of Plaintiffs' quiet title claim for at least two reasons. First, as discussed above, rejecting those theories provides the basis

for *why* the Winter surveys are invalid and the full extent of the legal errors which led to that wrongful identification of the boundary. As the disagreement concerning the meaning of *Oklahoma v. Texas* makes clear, the parties may agree that Mr. Winter's surveys were conducted incorrectly, but there is nevertheless a live, justiciable dispute over the extent to which BLM's work in approving the Winter work was unlawful. Indeed, BLM likely seeks to moot the issues here precisely because it wishes to preserve future legal arguments based on future expediency. In invalidating this invalid claim pursuant to the Quiet Title Act, the Court has full authority to explain the entire extent to which the survey was erroneous, not only the discrete issue on which BLM has admitted error.

Second, the Court can reject these theories because even if the Winter surveys and related maps are invalidated or somehow moot, BLM's present and past flawed legal theories about how to locate the qualified bank on which the gradient boundary lay are themselves claims that cloud title on Plaintiffs' property. Indeed, the Court may reject those legal theories *even if BLM chooses not to presently rely on them* so long as BLM has relied on them at some point and reserves the right to rely on them in the future. Indeed, the mere reservation of rights presents a live controversy and justiciable claim. *Alaska*, 201 F.3d at 1163 (affirming judgment on the pleadings that the entirety of two rivers in Alaska were "navigable at Statehood" and thus belonged to Alaska rather than the United States despite BLM declining to admit or deny its position). Thus, the Court accordingly has authority to resolve these issues on summary judgment.

iv. <u>The Court Should Exercise its Summary Judgment Authority and Grant Summary Judgment Against BLM's Methodological Defenses.</u>

Not only can the Court reject BLM's legal theories under the Quiet Title Act, the Court must reject these theories because they are each part of live claims and defense, and there is no issue of material fact concerning them. Thus, to streamline the trial, the Court should grant

summary judgment against BLM's methodological defenses and confirm that (1) vegetation is the test for defining the bed; (2) substantial volume means the ordinary high water mark; and (3) accretion by reliction applies.[3]

Vegetation is the Test for Defining the Bed. First, Plaintiffs seek summary judgment on BLM's defense that the vegetation line is not the proper test for defining the river bed. Definition of the river bed is an important step under *Oklahoma v. Texas* because the southern gradient boundary lies at the edge of the bed.[4] Although BLM pretends that it accepts the concept that the river bed is kept "practically bare of vegetation," it highlights its *de facto* dispute of this holding in the following sentences.

First, BLM attempts to take issue with the nature of the vegetation present on the river to reframe the issue as one of whether "the descriptions of the river bed and 'adjacent upland' remain as true today as they did in 1923." Dkt. 176 at 27. This is a red herring. The issue is not whether there have been changes in the area that was once the Red River bed. That is undisputed. BLM's unlawful position is that, notwithstanding the existence of significant new vegetation in those former bed areas, that area *remains the river bed*, it has merely "assume[ed] an upland *appearance*." APP. 0161 (emphasis added). According to BLM, the old sandy bed has

[3] Although for the reasons discussed in this section, addressing these legal issues is plainly appropriate under the QTA, these issues may also be addressed in light of Plaintiffs' pleading seeking an injunction compelling BLM to conduct a *correct* gradient boundary survey. Dkt. No. 86 at 25-26. Additionally, Plaintiffs note that the State of Texas has a live claim for declaratory judgment "to determine the proper method for finding the Red River riverbank." Dkt. No. 100 at 21-22.

[4] Dkt. 165 at 16-17 (requesting affirmation that "[t]he 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.").

disappeared due to the presence of fast-growing, invasive salt cedar which causes accretion by "arrest[ing] wind-carried material blown in from all directions, resulting in a substantial build-up parallel to the channel."[5] APP. 0159-60.

However, BLM maintains that this area is still "part[] of the river bed" although it is covered in upland vegetation because of salt cedar. Indeed, even for purposes of this motion, despite taking pains to avoid papering any actual position, BLM even admits that there is currently vegetation *along virtually the entire* length of Mr. Winter's identified gradient boundary on Plaintiffs' properties. Yet BLM nevertheless believes that Mr. Winter's work only "*may* have resulted in errors" and reserves the right to re-instate his boundary as is, highlighting BLM's true legal position, which clearly rejects the sandy bed/upland vegetation dichotomy as the defining test of the appropriate boundary bank.

This position is plainly inconsistent with the teachings of *Oklahoma v. Texas*. That decision makes no issue of the species of vegetation in the uplands abutting the river bed, and while a variety of types of vegetation are discussed at a high level, nothing in case indicates that "the introduction of invasive species" in any way modifies the Court's teachings about how to locate the appropriate boundary bank. If anything, the Court repeatedly recognized that the location of the vegetation line could change, taking the boundary with it. Those teachings specifically exclude from the definition of the river bed any areas covered in vegetation.

There is no exception for vegetation that makes an area merely "assume[] an upland

[5] To the extent that BLM contends that the "invasive" nature of salt cedar changes the *Oklahoma v. Texas* analysis, BLM is wrong because accretion is accretion even if caused by artificial influence. *Brainard v. State*, 12 S.W.3d 6, 23 (Tex. 1999) (holding that an artificial change theory has no effect on the normal riparian rights that take title to new land formed by accretion or reliction, as long as the owner does not cause the artificial influence) *disapproved of on other grounds by Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004).

appearance." The test created by *Oklahoma v. Texas* is one defined by appearance. *Oklahoma*, 260 U.S. at 628-29 (reasoning that locating a bank "require[d] no scientific exploration" because "the eye traces it in going either up or down a river, in any stage of water."). Thus, there can be no area of river bed that "assumes an upland appearance" because, under *Oklahoma v. Texas*, an area with an upland appearance *is* upland—at least in all areas that abut other areas kept practically bare of vegetation by the flow of the Red River's waters. BLM's position that an area can merely "assume[] the appearance" of upland but remain part of the river bed is simply a rejection of *Oklahoma v. Texas*.

BLM's remaining arguments against Plaintiffs' requested relief fail. First, without actually rejecting or disclaiming the position, BLM astoundingly claims that Plaintiffs' cited evidence "should not be attributed to BLM" because the views are allegedly of only a former employee doing works decades ago. Yet, while BLM argues for purposes of its response that this is stale, minimal-value evidence, BLM neglects to highlight that BLM's chosen experts *in this case* expressly rely on it. APP. 0187 (Defendants' rebuttal expert report, finding, after a discussion of the introduction of salt cedar, that "I believe Mr. Bouman was correct in his opinion that the vegetative changes alone would not materially change the gradient boundary established by Kidder and Stiles, and I believe his analysis would also apply to the boundaries fronting the plaintiff's [sic] parcels in this case."). Indeed, BLM relies on this material in its actual summary judgment response. *Compare* Dkt. 176 at 28 *with* Dkt. 176 at 27 (citing, in support of their vegetation position "Pls.' APP. 0160-61" which is the same 1970 Bouman report). Plainly, this position should be attributed to BLM because BLM continues to rely on it. But in any event, even if the evidence were somehow stale, by not rejecting or disclaiming these views that BLM has once expressed, BLM is still making a justiciable claim to Plaintiffs' land that can be rejected under the

Quiet Title Act. *Alaska*, 201 F.3d at 1162.

BLM's remaining point—that the vegetation line cannot be the critical test because even in the 1920s "there was [sic] patches of vegetation in the riverbed" on the "higher sandbars" and "islands" that "probably still exist today in those cases"—is pure deflection. Dkt. 176 at 28. For one, BLM presents no evidence supporting their arguments that vegetation on high sandbars or islands still actually exists in the riverbed. Instead, as discussed, BLM admits that there is vegetation on both sides of practically the entire boundary located by Mr. Winter, not just vegetation on isolated islands. And even if there is vegetation on islands, the test BLM rejects is locating a bank where there is a sandy bed on one side and upland vegetation on the other. Isolated vegetation somewhere in the middle of that sandy bed is obviously beside the point. BLM's musings on this point do not provide any basis for rejecting BLM's both former and current position that the appropriate bank is not located in an area between a "sandy bed" and "upland vegetation" because the bed itself has "assumed an upland appearance." Because this is a pure issue of law concerning appropriate methodology under *Oklahoma v. Texas*, and because this justiciable issue critical to efficient resolution of the case, Plaintiffs request the Court grant summary judgment on BLM's defense that the vegetation line is not the proper test for defining the river bed.

Substantial Volume Means Ordinary High Water Mark. Plaintiffs also seek summary judgment on BLM's defense that substantial volume means something more than the ordinary high water mark. Dkt. 165 at 20. Under *Oklahoma v. Texas*, the southern gradient boundary is on the southern, "*water-washed*" bank "at the average or mean level attained by the waters in the periods when they reach the bank without overflowing it." 260 U.S. at 631-32. *Oklahoma v. Texas* also states that "when the water is in *substantial volume*, it flows over the whole of the sand bed and

washes both banks." *Id*. at 634. In other words, when the water is in substantial volume, it must reach the boundary bank on which the gradient boundary lay.

In their opening motion, Plaintiffs conclusively explained why "substantial volume" means "ordinary high water mark," which is the high-water mark of the river under non-flood conditions in a given year. Dkt. 165 at 17-20. Thus, the flowing water of the river must reach that bank during ordinary high water conditions in a given year. BLM fails to address this issue in response; the phrase "ordinary high water mark" is conspicuously absent. *See* Dkt. 176.

Nonetheless, BLM opposes Plaintiffs' request for summary judgment because, to defend the original Kidder and Stiles line and ignore accretion via reliction, BLM contends that "substantial volume" means something more than "ordinary high water mark." *See* Dkt. 165 at 20. BLM fails to define what "substantial volume" *is*; rather, it quotes rejected arguments from a party in *Oklahoma v. Texas* to claim what "substantial volume" *is not*. Yet there is no dispute that substantial volume is something more than "the edge of the water at that usual and ordinary stage in which it is found during most of the year." Dkt. 176 at 29. Indeed, BLM's quotation is (irrelevantly) the definition of "low-water mark," *Oklahoma*, 260 U.S. at 625, and, as Plaintiffs established in their opening motion, *Oklahoma v. Texas* provides that substantial volume is ordinary *high* water.

Thus, by defining substantial volume as something more than low water but refusing to acknowledge substantial volume as equivalent to ordinary high water, BLM is obviously reserving the right to rely on a bank reached only by flows higher than the typical high water mark. And in doing so, BLM de-couples the concept of substantial volume from present water volume, allowing itself carte blanche to locate a bank far from the true gradient boundary because, as BLM's corporate representative testified, "substantial flow gets to the bank *to identify the bank*." APP.

0137 at 59:22-24. Thus, by defining substantial flow as "something more than" the low-water mark without any high-water definition, BLM can still, as it has in the past, improperly treat the Kidder-Stiles line as still relevant (or even conclusive) by reserving the right to contend that the 1923 volume of water is treated as a fixed substantial volume (and, therefore, rejecting any rights acquired via reliction in the interim).[6] Moreover, BLM can improperly criticize Plaintiffs' expert for not conducting her survey when the river was at "substantial volume" because, whatever substantial volume is, it must be more than that which would support Plaintiffs' position.[7]

Of course, unlike BLM, the Supreme Court did not define substantial volume as "something more than low water mark." It defined it as the ordinary high water mark. Dkt. 165 at 17-20. And not surprisingly, by defining substantial volume as ordinary high water, the Court brought consistency to its opinion because the ordinary high water mark is consistent with flows that inundate land sufficiently often to keep the area practically bare of vegetation.[8] BLM's refusal to acknowledge this teaching of *Oklahoma v. Texas* is a claim on all land located south of that

[6] *See* APP 0002 (Winter Field Notes) ("On average every twelve to fifteen years there is a substantial flow and the Red River's high waters are contained by the banks and all between is covered by flowing water," and "in a most real and substantial sense, the bluff banks are the banks of the river."); APP. 0165 (Bouman Report) ("All indications are that the waters of the river when rising to the mean level as determined in 1923, will reach and wash the bank along which the Stiles-Kidder boundary is located."); *see also* APP. 0137 at 60:2-8 (Casias Depo) (testifying that "if Kidder and Stiles bank remains in place today and still holds the water at a substantial flow, then that elevation determined for the gradient is still applicable.").

[7] *See* APP. 0165 (Bouman Report); APP. 0137 at 60:2-8; APP. 0193 (Doman Rebuttal Report) (arguing the bank identified by Plaintiffs' expert "is not the bank that will hold the waters at more substantial flows").

[8] *See* 1973 BLM Surveying Instructions, APP. 0234 ("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.").

mark and is an unlawful and invalid claim on Plaintiffs' land. *Alaska*, 201 F.3d at 1162. Accordingly, because this, too, is a strictly legal issue critical to Plaintiffs' claims, Plaintiffs respectfully request that the Court grant summary judgment on Defendants' defense that substantial volume means something more than the ordinary high water mark.

Accretion by Reliction Applies to Plaintiffs' Claims. Plaintiffs also seek summary judgment on BLM's defense that the doctrine of accretion by reliction does not apply to this case. Dkt. 165 at 20-23. Plaintiffs explained why the doctrine of accretion by reliction does apply in this case, and that *Oklahoma v. Texas* explicitly rejected the invitation to exclude the Red River from ordinary riparian principles at common law. Dkt. 165 at 22. Again, BLM presents no substantive argument to the contrary. Dkt. 176 at 29-30. It does not even contend that reliction is inapplicable to the Red River. *Id*. Instead, BLM simply claims that *Oklahoma v. Texas* does not contain the word "reliction" and that in any event it is immaterial because allegedly no experts will be relying on the concept of reliction. *Id*. at 30. These arguments provide no basis for declining to resolve the parties' dispute as to this critical issue in the case.

First, the word "reliction" need not expressly appear in *Oklahoma v. Texas* for the doctrine to apply to the Red River as a normal riparian right. Dkt. 165 at 22. As described in Plaintiffs' motion, reliction applies to all rivers; there is no evidence that the Supreme Court intended any sort of Red River exceptionalism as it relates to these normal riparian doctrines and, in fact, the thrust of the opinion holds the opposite.

Furthermore, this issue is neither immaterial nor advisory. First, whether the word appears in an expert report is not controlling on whether the issue is material. Second, BLM is simply wrong that this issue is not addressed by experts. Because reliction directly relates to the concept of substantial flow—a topic mentioned in the parties' reports—reliction is very much part of the

expert's disputes. *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); *see also* APP. 0193 (Doman Rebuttal Report) (arguing the bank identified by Plaintiffs' expert "is not the bank that will hold the waters at more substantial flows"). In any event, even if the topic is not something on which any expert will expressly opine, the fact that there is less water in the river now than in 1923 is a concept that nevertheless undermines BLM's defenses. For example, it is relevant to BLM's vegetation defense: by ignoring the fact that the river has much less water in it, which results in accreted land to Plaintiffs, BLM can falsely conclude that all vegetated land between the Kidder-Stiles line and the present active channel of the river is still the "river bed." Furthermore, by ignoring that the river has diminished volume since 1923, BLM defines "substantial volume" to exclude all flows but those floods that reach back to the Kidder-Stiles line, allowing BLM to continue ignoring obviously accreted lands.

Finally, although BLM implies that the fact of diminished flows is somehow factually unsupported, the *only* evidence offered in summary judgment proves that there is less water in the river than in 1923.[9] *Compare* Dkt. 165 at 21 *with* Dkt. 176 at 29-30. BLM has offered no evidence to contradict that evidence and a corporate representative's disclaimer of knowledge is not a dispute of fact of otherwise undisputed evidence. [10] Accordingly, Plaintiffs' respectfully request

[9] Plaintiffs cited both the testimony of a former employee witness as well as a report prepared by a different former BLM employee. Dkt. 165 at 21.

[10] This is especially true because this same corporate representative admitted to at least 60 years of quantitative flow data that BLM has inexplicably declined to produce in this litigation. SUPP. APP. 0055-58 at 84:18-85:9. In other words, if evidence to rebut this undisputed evidence existed, BLM has it. However, they have not produced it in this litigation or relied on it during summary judgment.

that the Court grant summary judgment on BLM's defense that the doctrine of accretion by reliction does not apply to the Red River and on the uncontroverted fact that the Red River contains less water than it did in 1923.

b. Plaintiffs' Requested Relief is Appropriate Based on the APA Because the APA Does Not Preclude the Requested Invalidation of Winter's Surveys and the 2014 Map.

For the reasons discussed above, the Court has authority to invalidate the three Winter surveys and the 2014 Map under Plaintiffs' QTA claims and should do so. Although BLM presents mere *ipse dixit* in claiming that a challenge to the Winter surveys and the 2014 Map is "a proto-typical APA claim," Dkt. 176 at 17, implying that invalidating the surveys and map is appropriate only under the APA, BLM presents no authority showing that this the *only* method by which these documents may be invalidated. Plainly, as described *supra*, they may be invalidated under Plaintiffs' QTA claims because these agency actions improperly cloud Plaintiff's title. BLM has also provided no authority suggesting that if the Court invalidates the surveys and map under the QTA claims those documents remain valid with respect to the non-QTA claims. Accordingly, the Court need not even reach BLM's argument that "[p]laintiffs fail to demonstrate that they are entitled to judgment regarding the validity of the Suspended Surveys and the 2014 map *under the APA*." Dkt. 176 at 17 (emphasis added); *Id*. at 17-22.

In any event, BLM's substantive APA arguments are also wrong. As a threshold matter, BLM has already conceded that the Winter surveys and the 2014 Map are in fact wrong.[11] As with

[11] BLM suspended the three surveys because "the surveys did not comply with the requirements of *Oklahoma v. Texas*." Dkt. 176 at 16; Dkt. 168 (notice of suspension). While BLM did not suspend the 2014 Map, "[it] do[es] not believe the 2014 map accurately describes the boundary between the federal public lands and other properties." Dkt. 176 at 26.

the QTA, unless BLM actually intends to reinstate the surveys in the future, it is unclear why Plaintiffs' motion to invalidate the Winter surveys and the 2014 Map is even opposed. Because it is undisputed that the Winter surveys and the 2014 Map are "not in accordance with law," summary judgment under the APA is appropriate. 5 U.S.C. § 706(2)(A); Dkt. 176 at 13-14.

Furthermore, in arguing that the requirements of the APA prevent the Court from being able to invalidate the Winter surveys and the 2014 Map, BLM mostly rehashes arguments made during motion to dismiss proceedings. For example, while BLM now claims that the Amended Complaint fails to allege a challenge to the three surveys or the issuance of the map, BLM recognized in its motion to dismiss that Plaintiffs' non-QTA claims "ask the Court to (1) invalidate existing surveys performed by BLM." *Compare* Dkt. 176 at 18 *with* Dkt. 49 at 20. Indeed, Plaintiffs' response contained an entire section titled "Plaintiffs Challenge 'Agency Action.'" Plaintiffs did not disclaim that they are challenging these surveys under the APA,[12] and that section discussed in detail the pleadings related to these surveys and maps as it relates to Plaintiffs' non-QTA claims. Dkt. 53 at 23-24. A pleading which challenges surveys as implementing flawed survey methodology is obviously tantamount to a request to invalidate those flawed surveys.[13]

[12] *Compare* Dkt. 176 at 18 *with* Dkt. 73 at 2-3. Rather, Plaintiffs merely stated that the 2009 survey was not the "final" agency action for limitations purposes giving rise to their non-QTA claims for the un-surveyed Plaintiffs' (which are a subset of Plaintiffs' non-QTA claims). Dkt. 73 at 2-3. Furthermore, Plaintiffs have already briefed how a "final" agency action is not required under 5 U.S.C. § 702 for Plaintiffs' non-QTA claims because these claims do not arise under the general provisions of the APA. Dkt. 53 at 25-26; *see also* Dkt. 86 at 33 (finding sovereign immunity waived under § 702).

[13] Defendants also fail to note that the Court recognized that regardless of these statements, Plaintiffs challenged the surveys and maps under the APA in the alternative, but that "Defendant did not address this argument in its Reply." Dkt. 86 at 27 n.4.

Accordingly, BLM is wrong to argue that "Plaintiffs are seeking summary judgment on a claim or claims that they never pled." Dkt. 176 at 18.

BLM also boldly argues that the Court does not have authority to invalidate the surveys and maps in question because Plaintiffs insufficiently cited to the administrative record—despite BLM's concession that the surveys and maps are actually wrong. Dkt. 176 at 19-20; n.11 *supra*. Yet BLM concedes that Plaintiffs cited to Mr. Winter's field notes, which are part of the administrative record and explain his incorrect methodology, Dkt. 176 at 20, and review of these notes alone provides sufficient reason to invalidate the surveys and maps which rely on them. Additionally, BLM provides no excuse for failing to include the Notice of Suspension and the Winter's Deposition Transcript in the Revised Administrative Record that was filed on the same day as Defendants' response, s*ee* Dkt. 174, and even the case BLM relies on teaches that one of the "unusual circumstances" justifying supplementation of the record is that "the agency deliberately or negligently excluded documents that may have been adverse to its decision." *Medina County Envt'l Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010). While the field notes themselves are sufficient to invalidate the survey and the maps, even if they were not, BLM's refusal to include these critical documents in the record and its own admission of error provides more than sufficient grounds to supplement the record, rely on this evidence, and invalidate these documents. A contrary ruling would be manifestly unjust. 5 U.S.C. § 706(2)(A).

BLM is also wrong to claim that the Court cannot invalidate the 2014 map under the APA because it is not a "final agency action." Dkt. 176 at 20-21. As an initial matter, BLM makes this argument only for the 2014 map; it concedes that the Winter' surveys are in fact final agency actions. But as to the map-related request, Plaintiffs' reiterate from their prior briefing that the non-QTA claims do not require a "final" agency action under § 702 of the APA. Dkt. 53 at 25-

26; *see also* Dkt. 86 at 33 (finding sovereign immunity waived under § 702). Thus, BLM's argument is irrelevant. But in any event, the 2014 map is "final" for purposes of adjudication because even assuming the map is merely an "estimate," the map nevertheless is action "from which legal consequences will flow," *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011), because the map clouds Plaintiffs' title and that cloud is such a legal consequence.[14]

Finally, BLM is wrong to argue that Plaintiffs' request to invalidate the Winter survey is time barred.[15] Dkt. 176 at 21-22. Regarding timeliness, Plaintiffs note that to the extent the Court grants relief under the QTA, the limitations argument is irrelevant because the QTA statute of limitations is 12 years. 28 U.S.C. § 2409a. But even under the APA, Plaintiffs' challenge to the surveys is not time barred. Indeed, this is essentially undisputed for two of the three surveys, which were first published in the Federal Register within 6 years of the filing of the lawsuit.[16] And

[14] "A cloud on title exists when an outstanding claim or encumbrance is shown, which on its face, if valid, would affect or impair the title of the owner of the property." *Hahn v. Love*, 321 S.W.3d 517, 531 (Tex. APP.—Houston [1st Dist.] 2009, pet. denied); *See Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705, 719 (5th Cir. 1951) (finding state law applies to the question of what constitutes a cloud upon title).

[15] Defendants do not challenge Plaintiffs' request concerning the 2014 map as either time barred or moot. Additionally, Plaintiffs note that even if some claims as to the Group 85 survey were time-barred, the Court could nevertheless rule on its invalidity because the BLM has used the map for other purposes (i.e., the unchallenged map) because an agency's re-affirmation of a prior ruling restarts the limitations period. *Dunn-McCampbell Royalty Interest, Inc. v. Natl. Park Serv*., 112 F.3d 1283, 1287 (5th Cir. 1997) ("[A]n agency's *application* of a rule to a party creates a new, six-year cause of action . . . ."); *Fulbright v. McHugh*, 67 F.Supp.3d 81, 92 (D.D.C. 2014) (citing *Interstate Commerce Comm'n v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1993) (reasoning that an agency "merely reaffirm[ing] its original decision" restarts limitations period.).

[16] *Donnelly v. U.S.*, 850 F.2d 1313, 1319 (9th Cir. 1988) (finding the statute of limitations triggered by publication of the survey in the Federal Register). Defendants cite *Donnelly*, but do not offer any authority that the statute of limitations could have begun to run at the time of survey acceptance—which is before public knowledge of the accepted surveys is even possible.

although the third survey was published in the Federal Register 6 years and 5 months prior to the filing of this case, the Court can and should equitably toll the APA limitations period for the Group 85 survey for several reasons.[17] First, the *Donnelly* case points out that statutes of limitations may be "tolled by [Plaintiffs'] pursuit of administrative process." *Donnelly*, 850 F.2d at 1319. In this case, both Plaintiffs Hunter and Canan began the administrative process for challenging the BLM's incorrect Group 85 survey within the APA's limitation period. RAR0000048-258, 0000260-1245, 0002099-2117. Second, five months is a minimal period of time, and it would be both inequitable and impractical to cancel only two of three surveys that all erred in exactly the same way. Lastly, equity dictates that the Court allow a challenge to the Group 85 survey because Defendants have already admitted that it is wrong.[18] *See* n.11 *supra*. For all of these reasons, the Court can and should invalidate the surveys and map under the APA.

c. Plaintiffs' Requested Relief Is Appropriate Under Plaintiffs' 4th Amendment Unreasonable Seizure Claim.

Although unaddressed in BLM's response, Plaintiffs' requested relief is also appropriate because each request is related to Plaintiffs' claim that BLM has unreasonably seized Plaintiffs' land in violation of the 4th Amendment. The seizure of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States. v. Jacobsen*, 466 U.S. 109, 113 (1984). To the extent that Court disagrees with Plaintiffs' arguments that any of the Winter surveys, BLM's map, or BLM's methodological positions for locating the gradient boundary are "claims" under the QTA, or to the extent the Court declines to

[17] The doctrine of equitable tolling applies to 28 U.S.C. § 2401(a). *Clymore v. U.S.*, 217 F.3d 370, 374-75 (5th Cir. 2000).

[18] Defendants also contend that the APA claims are moot in light of the suspension of the Winter survey. For the reasons discussed above in the context of the QTA, Defendants are wrong.

grant relief under the APA, each of these actions and positions have interfered with Plaintiffs' possessory interests by hindering Plaintiffs' lawful right to full use and enjoyment of the disputed property because of the cloud on ownership. To the extent not a claim of actual title or viable under the APA, this is a cognizable seizure and summary judgment would also be appropriate as to the seizure portion of Plaintiffs' 4th Amendment claim.

V. CONCLUSION

For the reasons in this Reply, and in Plaintiffs' opening motion, the Court should grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above **Plaintiffs' Reply Memorandum in Support of its Motion for Partial Summary Judgment** was served via the CM/ECF electronic system to all parties of record on May 2, 2017.

/s/Robert Henneke
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