

**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.

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CIVIL ACTION NO. 7:15-cv-00162-O

**BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS' REQUEST FOR
QUIET TITLE AND DECLARATORY JUDGEMENT AND IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

INTEREST OF AMICI CURIAE

Amici curiae are United States Representatives and United States Senators currently serving in the One Hundred Fourteenth Congress. As legislators and as citizens, *amici* share a strong interest in upholding the Constitution and the separation of powers within the federal government to protect the secure property rights of private landowners. The area of the Red River in question also directly affects constituents represented by *amici curiae*.

Amici are: U.S. Representative Mac Thornberry, U.S. Senators John Cornyn and Ted Cruz, and U.S. Representatives Kevin Brady, Michael Burgess, John Carter, Mike Conaway, John Culberson, Blake Farenthold, Bill Flores, Louie Gohmert, Kay Granger, Jeb Hensarling, Sam Johnson, Kenny Marchant, Michael McCaul, Randy Neugebauer, Ted Poe, John Ratcliffe, Pete Sessions, Randy Weber, and Roger Williams.

INTRODUCTION

Secure property rights, which are recognized and protected by government, have been and will continue to be vital to our American way of life. The Bureau of Land Management (BLM) has overstepped its constitutional and legal authorities by arbitrarily claiming thousands of privately owned acres of land along the Red River in Texas. The BLM's incorrect application of the gradient boundary survey method is in violation of the explicit U.S. Supreme Court instructions in *Oklahoma v. Texas* and runs counter to the long-established responsibility of the federal government to protect the private property rights of its citizens. The BLM's claim of ownership over Plaintiffs' private property has caused direct harm to Plaintiffs. The BLM's failure to delineate with reasonable specificity the unsurveyed Texas lands of which it asserts ownership has clouded the title along the 116-mile contested stretch of the Red River, making it impossible for the Wilbarger, Wichita, and Clay County Plaintiffs and Plaintiff Clay County Sheriff Lemons to carry out legislatively assigned duties and responsibilities. In addition, the BLM's actions have the possibility of harming private landowners beyond the 116-mile stretch of the Red River if the BLM's unlawful survey methods are allowed to prevail.

ARGUMENT

I. BLM has Overstepped its Legal Authorities

The inception of our nation emanated from the desire for freedom from governmental tyranny. As such, our Constitution explicitly forbids the federal government from depriving or unreasonably seizing private property “without due process of law[.]”¹ The BLM has violated this most basic tenet of our Republic by

¹ U.S. CONST. amends. IV and V.

utilizing unlawful survey methods that ignore and contradict the holding of the Supreme Court in 1923.

The BLM's authority to conduct surveys of federal land is not unlimited. Federal law prevents the BLM from impairing "the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement."² In the surveys that the BLM did perform along the Red River in the disputed stretch, the BLM sought to reestablish survey markers from 1875 and the 1923 Court decision. The resulting markers placed in 2008 and 2009 are far outside the gradient boundary intended by the 1923 decision, in some places lying one mile from the water's edge inside Texas.³ In utilizing this improper survey methodology, the BLM has overstepped its legal authorities and is arbitrarily claiming thousands of acres of privately owned land in Texas.

II. Incorrect Application of the Gradient Boundary Survey Method:

A. BLM Ignores Erosion and Accretion

When the BLM representatives entered Plaintiffs' property in 2007 and 2008, its survey techniques were guided by the BLM's survey manual. The manual dictated that when an original survey has occurred, a dependent resurvey is what should be conducted for the "reestablishment of the lines of the original survey in their true original positions..."⁴ This is improper procedure along the Red River as the BLM's survey manual is subservient to the Supreme Court's 1923 decision.

The Supreme Court, knowing that accretion and erosion would change the gradient boundary from day to day, decreed that these natural and gradual changes to the

² 43 U.S.C. §772 (Current).

³ Plaintiffs' Amended Complaint, ECF No. 40.

⁴ Bureau of Land Management, *Manual of Instructions for the Survey of the Public Lands of the United States*, Dept. of Int. (1973) 6-4.

gradient boundary would change the boundary between Texas and Oklahoma as well. Moreover, the Court stated that these changes to the gradient boundary would apply to such changes in the future.⁵ According to surveys filed in the Federal Register, the BLM located original evidence for Witness Post 5, part of the survey conducted by Arthur D. Kidder and Arthur A. Stiles (Kidder and Stiles) in 1925 under the decree issued by the Supreme Court.⁶ The BLM then used this reestablished corner as the base point and “then followed the sinuosities of that qualified bank within the flood plain and below the high bluff bank.”⁷

The BLM’s location of the original markers contradicts the Supreme Court’s mandate and ignores erosion and accretion. Conducting a dependent resurvey based on the Kidder and Stiles 1925 survey ignores the movements of the dynamic changes of the Red River in the last 90 years.

In order to fix the boundary in its 1923 location, the BLM would have to prove that an avulsion occurred in the region.⁸ However, the BLM does not appear to allege this. In fact, the field notes to the 2009 survey make no mention of there being an avulsion in the area.⁹ Additionally, following the “sinuosities” of a “qualified bank” contradicts the survey methods employed by Kidder and Stiles who state, “The physical top of the cut bank being very uneven in profile, cannot be a datum for locating the boundary line.”¹⁰

⁵ Partial decree in *Oklahoma v. Texas*, 261 U.S. 340, 341 (1923).

⁶ June 9, 2015, BLM 9600 (95400) Group 85 OK Letter to Patrick A. Canan.

⁷ *Id.*

⁸ *Oklahoma v. Texas*, 260 U.S. 606, 636 (1923) (quoting *Arkansas v. Tennessee*, 246 U.S. 158, 173 (1918)).

⁹ Field Notes OK Volume O0243, DM ID 149977, Texas-Oklahoma Line; Red River; Section 35-Township 5 South.

¹⁰ Report of the Boundary Commissioners, October Term, 1923, No. 15, Original, April 25, 1924.

B. Gradient Boundary Standard

Several of the Individual Plaintiffs sought out Registered Professional Land Surveyors in Texas to conduct surveys on their individual parcels of land in order to contest the BLM's ownership assertions. These surveys show the gradient boundary is located south of the waters edge, north of the vegetation line, and in many places as much as one mile north of the survey markers driven in the ground by the BLM.¹¹ However, the BLM responded to Plaintiffs' appeals by claiming that it is an incorrect procedure to "go to the running water to define the Gradient State boundary, accepting the bank at the south edge of the running water as the State boundary."^{12, 13}

The BLM's position is untenable and in complete contradiction to Supreme Court precedent, where the Court has stated that the edge of the flowing water must be used as a datum to locate the gradient boundary as, "[t]he boundary line is a gradient of the flowing water in the river."¹⁴ The gradient boundary "is located midway between the lower level of the flowing water that just reaches the cut bank and the higher level of it that just does not overtop the cut bank."¹⁵ Moreover, Arthur Stiles, in his preeminent law review article on gradient boundaries, went on to explain that, "[a] realistic view of the gradient

¹¹ See May 7, 2015, Patrick A. Canan Letter to BLM NM State Director (SD) Aden Seidlitz, May 13, 2015, Kevin Hunter Letter to BLM NM SD Seidlitz, and August 25, 2015, Ronald K. Jackson to BLM NM SD Seidlitz.

¹² June 9, 2015, BLM 9600 (95400) Group 85 OK Letter to Patrick A. Canan.

¹³ As justification for their position, the BLM cites the Court opinion that states, "[t]he main channel of the Red River was not intended to be limited to the ribbons of shallow water which in relatively dry seasons find their way over the sand bed. Rather, the main channel extends from one cut bank to the other, which carries the water in times of substantial flow."

¹⁴ *Oklahoma v. Texas*, 265 U.S. 500 (1924).

¹⁵ *Id.*

boundary” can only be had by “walking along the bank of the river and closely observing the edge of the flowing water.”¹⁶

In a 1996 meeting of the Texas and Oklahoma Red River Boundary Commissions, the Chief Cadastral Surveyor for the BLM agreed that the gradient boundary is somewhere between the water line and vegetation line.¹⁷ In fact, the Boundary Commission selected the unbroken and readily identifiable vegetation line to be the jurisdictional and political boundary between Texas and Oklahoma. The Commission’s reason for the vegetation line boundary was two fold: the vegetation line is close to the gradient boundary, and it was in keeping with the spirit of the 1819 Treaty between the United States and Spain, which granted ownership of the entire Red River up to the southern bank.¹⁸

III. Impact of BLM Surveys Beyond 116-mile Stretch of the Red River:

Though this case specifically concerns a 116-mile stretch of the Red River from its confluence with the North Fork on the West to the 98th meridian on the East between the States of Texas and Oklahoma, the gradient boundary survey method set out and mandated by the Supreme Court in 1923 applies to the entire 539-mile expanse of river between Texas and Oklahoma.¹⁹ For nearly a century, landowners in both Texas and Oklahoma have necessarily relied on the explicit instructions of the Supreme Court and the expertise of Registered Professional Land Surveyors to utilize the gradient boundary survey method to establish the proper ownership boundaries.

¹⁶ Arthur A. Stiles, *The Gradient Boundary - The Line Between Texas and Oklahoma Along the Red River*, 30 TEXAS L. REV. 305, 310 (1952).

¹⁷ Red River Boundary Commission Minutes, September 27, 1996, Joint Meeting.

¹⁸ Red River Boundary Compact of 2000, Pub. L. No. 106-288, 114 Stat. 919.

¹⁹ *Oklahoma v. Texas*, 265 U.S. 493 (1924).


The Texas Board of Professional Land Surveying (the Board) is responsible for the licensure of professional land surveyors in Texas. In addition to meeting the education and experience requirements, candidates seeking a license from the Board must successfully pass an examination that includes a legal section on the gradient boundary.²⁰ Invalidating gradient boundary survey techniques would have widespread and detrimental effects to how licensed Texas surveyors conducted survey operations, as well as invalidating nearly a hundred years of surveys and precedent.

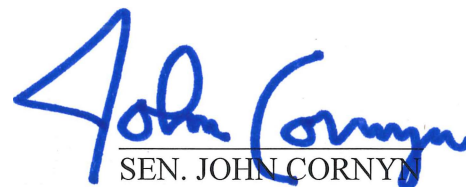
Upholding the BLM surveys and claims of ownership over Plaintiffs' property would cloud title on thousands of acres of private property up and down the Red River, frustrate or remove the ability dispose of property, and make it impossible to make improvements to the land. It is, therefore, imperative that the gradient boundary survey method as understood and applied over the last several decades by the State of Texas and Registered Professional Land Surveyors be upheld in full and that the BLM's surveys be overturned as they do not comply with the Court's 1923 decision.

CONCLUSION

For the reasons given, *amici curiae* respectfully support the Plaintiffs' request for Quiet Title and Declaratory Judgment in its entirety.

Respectfully submitted,

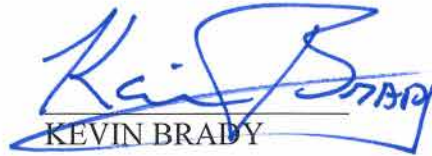

MAC THORNBERRY
Member of Congress


SEN. JOHN CORNYN
Member of Congress

²⁰ Professional Land Surveyors Candidate Guide, August 2, 2010,
http://www.txls.state.tx.us/16_application/candidate_guide/candidate_guidelines_8_02_10.pdf.



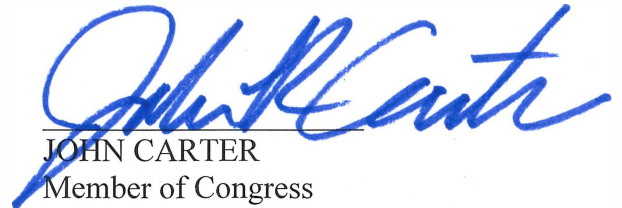
SEN. TED CRUZ
Member of Congress



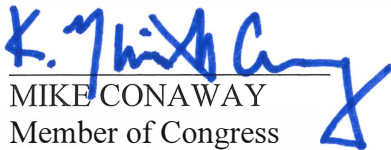
KEVIN BRADY
Member of Congress



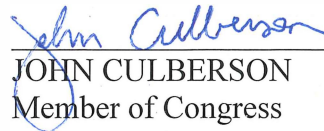
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Member of Congress



JOHN CARTER
Member of Congress



MIKE CONAWAY
Member of Congress



JOHN CULBERSON
Member of Congress



BLAKE FARENTHOLD
Member of Congress



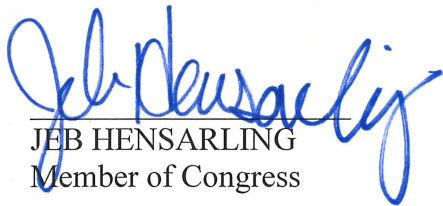
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LOUIE GOHMERT
Member of Congress



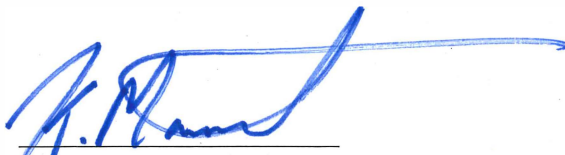
KAY GRANGER
Member of Congress



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Member of Congress



SAM JOHNSON
Member of Congress



KENNY MARCHANT
Member of Congress





MICHAEL MCCAUL
Member of Congress

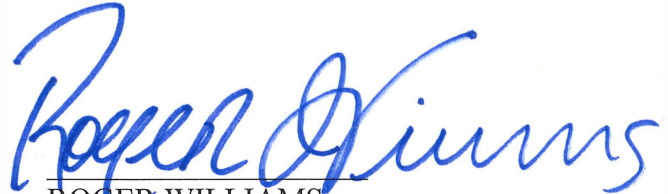

RANDY NEUGEBAUER
Member of Congress


TED POE
Member of Congress


JOHN RATCLIFFE
Member of Congress


PETE SESSIONS
Member of Congress


RANDY WEBER
Member of Congress


ROGER WILLIAMS
Member of Congress