

LS 2110 Spring 2017  
Research Paper Assignment  
Henry Taylor April 9, 2017

### Has the Bureau of Land Management Invaded Texas?

This paper will attempt to assess the truth of the following statement, which is at the center of a trial scheduled at this writing to begin July 24, 2017<sup>1</sup>: The U. S. Bureau of Land Management, in its recent resurveys of land along the south side of the Red River in Texas, is engaged in a misguided if not illegal attempt to adjust boundaries between public and private land that have already been legally established.

On November 16, 2015, a complaint was filed in the U. S. District Court in Wichita Falls, Texas, and superseded on February 9, 2016 by an amended complaint, in which a group of Texas landowners from Clay, Wichita, and Wilbarger Counties, their respective county governments, and the Sheriff of Clay County “collectively sue the federal government in opposition to the Bureau of Land Management’s (BLM) claim that the individual Plaintiffs’ and other private property within Texas along the Red River is federal land.”<sup>2</sup>

The “claim” referred to became evident when in 2007 one of the plaintiffs, Patrick Canan, was asked by the BLM for permission to come on his land for surveying purposes. “Without his knowledge, BLM affixed survey markers onto Canan’s property

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<sup>1</sup> Telephone conversation March 28, 2017 with Erin Wilcox, an attorney with the Texas Public Policy Foundation.

<sup>2</sup> *Aderholt et al v. Bureau of Land Management et al.*, Civil Action No. 7:15-cv-00162-O, Document 40. Amended Complaint, filed in U. S. District Court, Northern District of Texas, Wichita Falls Division, 2/9/2016, p. 1. Hereafter cited in the text as Amended Complaint, followed by a page number.

in 2008. One of these markers—approximately a mile away from the Red River—designates a boundary line of Texas as part of its identification of BLM claimed public lands within Canan’s property.



According to BLM’s survey, approximately 1400 acres of Canan’s property belongs to the federal government.” (Amended Claim 15)

The lawsuit has not yet reached a stage where the BLM is obliged to provide a formal explanation of what it is doing. The plaintiffs are dissatisfied with such responses as they have received to their individual questions. They also feel confident in the deeds that describe their lands. However, on March 28, 2017, the plaintiffs filed a motion for summary judgment of a collection of “undisputed facts” concerning the case, and some of these are based on depositions taken earlier from BLM staff members and the surveyor in charge of the project. These will be addressed below, when background for them is in place.

Disagreements about where a surveyed line ought to go are generally argued as questions of surveying practice or as questions of legal construction. The division between these categories is not sharp; moreover, both comprise elements that have been

refined in the course of time. The successive definitions of the boundary line between what is now Texas and what is now Oklahoma have probably seemed reasonable enough to those who were there when each definition was established. Now, the BLM and the plaintiffs in this case appear to be in serious disagreement about where that boundary lies.

The first subsection of the third principal section of the Amended Complaint (paragraphs 31-36) lays out the historical background in a manner that is easily summarized. The Louisiana Purchase (1803) gave the U. S. the bed of the Red River and the land north of it. The Adams-Onís Treaty between the U. S. and Spain (1819, ratified 1821) stated this more precisely, establishing the border between the two nations as “the south cut bank” of the Red River. When Texas became a republic, it entered in 1838 into a treaty with the U. S. confirming the Adams-Onís definition, which also stated that while the bed of the river belonged to the U. S., the water flowing over the bed was equally accessible for navigation to both countries. (Amended Complaint 9-10)

The second subsection, paragraphs 37-53, takes up a matter of somewhat more complexity, and somewhat less clarity. In 1921 Oklahoma sued Texas and the U. S. intervened, concerning the states’ rights to portions of the Red River. In a decision of May 1922, the question came down to whether or not the Red River was navigable in fact from the border of Arkansas westward. The Court determined that “no part of the Red River in Oklahoma is navigable.”<sup>3</sup> The importance of this question lies in the ownership of navigable and nonnavigable streams and rivers as they flow between uplands whose ownership may be private or public. As pointed out in the BLM’s *Manual of Surveying Instructions*,

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<sup>3</sup> *State of Oklahoma v. State of Texas, United States, Intervener*. (258 U. S. 574, 591).

In *Pollard's Lessee v. Hagan*, 44 U. S. 212 (1845), the Supreme Court held that:

First, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the States respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original states.<sup>4</sup>

A page earlier, the *Manual* addresses the ownership of nonnavigable waters, and cites one of the Supreme Court decisions pertinent to the cause under discussion:

Title to the beds [of nonnavigable waters] remains in the United States until the shore lands have passed into private ownership (*United States v. Oregon*, 295 U. S. 1 (1935)). The Government's conveyance of title to a fractional subdivision fronting upon a nonnavigable body of water, unless specific reservations are indicated in the patent, carries ownership to the middle of the bed *in front of the basic holding* [*Manual's* emphasis] (*Oklahoma v. Texas*, 261 U. S. 345 (1923); see also 43 U. S.C. 931). (*Manual* 186)

In a supplemental decree at 261 U. S. 345, the court's attention is primarily on the north side of the Red River, but paragraph 4 is specific to the question before us here:

"The full title and ownership of so much of the bed of the river as lies south of its medial

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<sup>4</sup> *Manual of Surveying Instructions For the Survey of the Public Lands of the United States* (U. S. Department of the Interior, Bureau of Land Management, Cadastral Survey, 2009), p. 187. Hereafter cited in the text as *Manual*, followed by a page number.

line are in the United States.”<sup>5</sup> That is, the south boundary of the bed of the Red River, wherever that turns out to be, is the boundary between the states of Texas and Oklahoma.

Establishing this fact first involved the U. S. Supreme Court in 1895, when the main question was the ownership of Greer County, which lay between two forks of the Red River; at issue was which fork was the one intended by the Adams-Onís Treaty. The Court held that the disputed land was in the United States, that the South rather than the North Fork of the Red River was the intended boundary named in the Treaty, and that it was the south bank of the river rather than its medial line that was the boundary line.<sup>6</sup>

Between 1921 and 1928, *Oklahoma v. Texas, United States, Intervener* generated fifty memoranda, orders, interlocutory decrees, and decisions now available through Lexis-Nexis. Early in the process, the Court, making careful examination of the pleadings and evidence in the Greer County suit of 1895, declared that it was *res judicata* that the boundary between the two states was the south bank of the Red River.<sup>7</sup>

The most thorough recorded attempt to arrive at a legal definition of the south bank of the Red River arises from this same lawsuit, and appears in a supplementary decision handed down in 1924. In the words of Justice Willis Van Devanter, who delivered the opinion for the Court, “As to the line in question [the south bank of the Red River] that definition is still controlling; it has been reaffirmed on several occasions, but never changed. The controversy arises chiefly out of diverging views of what the definition means and how it is to be applied.”<sup>8</sup>

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<sup>5</sup> *State of Oklahoma v. State of Texas, United States, Intervener* (261 U. S. 345).

<sup>6</sup> *United States v. Texas* (162 U. S. 1)

<sup>7</sup> *State of Oklahoma v. State of Texas, United States, Intervener* (256 U. S. 70, 92-93).

<sup>8</sup> *State of Oklahoma v. State of Texas, United States, Intervener* (260 U. S. 606, 623).

The subsequent interlocutory decrees led gradually to the legal existence of something called “the gradient boundary.” The term has not met with universal approval among surveyors, but it is defined in a decision of March 12, 1923, and affirmed, overruling exceptions, on June 9, 1924:

The boundary line is a gradient of the flowing water in the river. It 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. The physical top of the cut bank being very uneven in profile, cannot be a datum for locating the boundary line, but a gradient along the bank must be used for that purpose. The highest point on this gradient must not be higher than the lowest acceptable point on the bank in that vicinity. The boundary line has been determined accordingly.<sup>9</sup>

As this case developed, Oklahoma argued for a location of the south bank along a “bluff line” that the water reaches only at times of unusual flooding. The Court disagreed, saying “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. And that this is the natural and reasonable view of the situation is illustrated by a long course of public and private action.”<sup>10</sup>

The line thus described was surveyed by Court order; the surveyors were Arthur Kidder and Arthur A. Stiles, and they worked only in places where there had at the time been disagreement about where the boundary was. The Big Bend area along the north

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<sup>9</sup> *State of Oklahoma v. State of Texas, United States, Intervener* (265 U. S. 493, 497).

<sup>10</sup> *State of Oklahoma v. State of Texas, United States, Intervener* (260 U. S. 606, 635).

shore of Wichita County was important because there were oil wells there which could have been in either state. Other short stretches were important because they might have been the product of an avulsive act sometime since 1821, the cutoff date established by ratification of the Adams-Onís Treaty. (Avulsion is a sudden alteration in a watercourse, as when the water breaks through the base of an oxbow, leaving the arc of the bow intact but not strongly flowing. Unlike erosion and accretion, avulsion does not change the position of a boundary apparently affected by it. [*Manual* 198-199])

This boundary cannot be directly monumented because it is on the nearly vertical side of a river bank and therefore is sometimes under water. The difficulty and tedium of locating it precisely and setting reference monuments on the upland was clear even in 1925. Furthermore, as Arthur A. Stiles, one of the official surveyors appointed by the Court, put it in an article in 1951, “The boundary bank is ever subject to changes by erosion and accretion and the gradient boundary follows the change. Where the bank is, there is the boundary also.”<sup>11</sup> The Court decision also states this fact, holding with *Arkansas v. Tennessee* 246 U.S. 158, 173 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 . . . .”<sup>12</sup>

According to *Aderholt et al.*, the BLM is using soil sampling as one of its methods of deciding where to place the line it is surveying. The Amended Complaint quotes one of the very few instances of official explanation of the process, when Steve Ellis, then Deputy Director of the BLM, was testifying in July of 2014 before the House

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<sup>11</sup> Stiles, Arthur A, “The Gradient Boundary – The Line Between Texas and Oklahoma Along the Red River” (*Texas Law Review* 30 [1951]), p. 314.

<sup>12</sup> *State of Oklahoma v. State of Texas, United States, Intervener* (260 U. S. 606, 636).

Natural Resources Committee concerning one of the bills recently introduced in Congress to protect the Texas landowners. In a brief and sketchy reference to historical moments touched on above, he seemed to describe the “gradient line” as something that was permanent rather than moving with the river bank, and that can be located by quasi-archaeological methods: “Everything then south of [the center line of the river] to what was referred to as a gradient line is now public domain, and this approximate acreage, our staff tells me, based on their soil surveys, is approximately 30,000 acres.” (Amended Complaint 20; Ellis is referred to there as Director of the BLM, but he was in fact Deputy Director until his retirement December 1, 2016.)

It is revealed in the aforementioned Motion for Summary Judgment that Mr. George Winter, the surveyor in charge of this resurvey, made the following assumptions, based, he said, on instructions received: first, he assumed that the bank of the Red River was the bluff line; second, he was to retrace the exact line located by Kidder and Stiles; third, he did not concern himself with erosion, accretion, or avulsion.<sup>13</sup> Whether these assumptions are based on accurate interpretations of the instructions will probably emerge at trial. In any case, all three of them are contrary to the definitions and instructions laid down in *Oklahoma v. Texas*.

Two recent non-judicial treatments of the issue may come to bear on the present lawsuit, though probably not very strongly. In 1999, faced with increasing petty crime in the “no-man’s land” created by uncertainty about the boundary between them, the two

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<sup>13</sup> *Aderholt et al. v. U. S. Bureau of Land Management et al.*, Case 7:15-cv-00162-O, Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment, United States District Court, Northern District of Texas, Wichita Falls Division, pp. 5-6.

states agreed on a “Red River Compact” that was ratified by Congress in 2000. That agreement is accurately summarized in the Amended Complaint:

Through the Red River Boundary Compact, Texas and Oklahoma established the permanent political and jurisdictional boundary between Texas and Oklahoma as the vegetation line along the south cut bank of the Red River, a line which is close to the historical boundary location, and which can be visually identified without the need of a current survey. H.B. 1355, 76th Leg., Reg. Sess. (Tex. 1999); S.B. 175, 47th Leg., 1st Spec. Sess. (Okla. 1999); Red River Boundary Compact of 2000, Pub. L. No. 106-288, 114 Stat. 919, [hereinafter “Red River Compact”]. (Amended Complaint 14)

“Political and jurisdictional” means that shifts in the vegetation line will not affect private property boundaries. (*Ibid.*) It must be added that if the vegetation line moves, the gradient boundary is likely also to move, but they remain separate.

Much more recently, a bill (H.R. 428, S. 90) has been introduced in both houses of the U. S. Congress. The House of Representatives passed it on February 14, 2017, and it is at this writing before the Senate Committee on Energy and Natural Resources. The intent of the bill is to authorize and fund a survey of the gradient line along the affected area within two years of the bill’s becoming law. This survey is to be carried out not by the BLM, but by surveyors agreed to by Texas and Oklahoma. In the House, every one of the present and voting Republican representatives voted yes, but only 15 of the Democrats did so. Why the issue is so heavily partisan is not quite clear, except as another bit of turbulence in the present political climate. The yeas seem to hold (1) that the beleaguered landowners must be rescued as soon as possible, and (2) that the BLM

has too long ignored its responsibility to get the survey done. The nays seem to hold (1) that the matter is in the courts, where it should not be interfered with, and (2) that the task should not be wrested from the grasp of the BLM purely on the basis of the Plaintiffs' assertions in the lawsuit.<sup>14</sup>

If the bill passes the Senate, the chances are excellent that whatever action follows from it by way of surveys on the affected ground will not be immune from litigation. It is also possible that *Aderholt et al. v. U. S. Bureau of Land Management et al.* will take several more years to reach a resolution. The gradient boundary concept is not widely used along the nation's rivers; indeed, it is unique to Texas.<sup>15</sup> It is much more common to locate riparian boundaries on the line of mean high water or, somewhat less commonly, the line of mean low water. Nevertheless, the Supreme Court's definition of the gradient boundary, as has been shown here, is not hard to understand. What is difficult is marking the gradient boundary for any appreciable period of time, since by law it goes where the river bank goes. For the BLM to prevail in this case, it will have to be proven that its interpretation of *Oklahoma v. Texas* is correct. The clarity of that decision appears to make that extremely difficult, if not impossible. On the other hand, the U. S. government's capacity for delay may well exceed that of the plaintiffs.

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<sup>14</sup> *Congressional Record – House*, February 14, 2017, pp. H1154-H1159.

<sup>15</sup> Walter G. Robillard et al., *Evidence and Procedures for Boundary Location*, Sixth Edition (Hoboken, NJ: John Wiley & Sons, 2011), 271.

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