GOING WITH THE FLOW? PUBLIC LANDS AND PRIVATE PROPERTY ALONG THE RED RIVER

RAYMOND B. WRABLEY, JR., PHD*

If public land lies under the Red River, does the public land move as the river moves—does it go with the flow? Several treaties and a 1923 Supreme Court decision established federal ownership of the bed of the Red River from the river's medial line to its south bank. But over almost one hundred years the river has meandered several miles north of what had been its south bank in 1923. In 2003, the United States (U.S.) Bureau of Land Management (BLM) began a series of land surveys along the Texas side of the Red River. BLM surveyors appeared to stake out public land claims well south of the bank of the Red River onto property to which several Texas families held deeds and on which they had paid taxes, touching off a political and legal dispute. Individual landowners were joined by local counties and the State of Texas in a suit against the BLM, asserting that BLM actions and land claims were unlawful and unconstitutional, and seeking to establish their title to the disputed lands. At the center of the case is a dispute over how the boundaries of a river are established as its flow changes over time, but the case also illustrates how public lands policies evolve in an ecological process through the interaction of political and natural landscapes.

I. INTRODUCTION

The Federal Land Policy and Management Act (FLPMA)[1] recently turned forty. FLPMA, passed in 1976, finally established the authority and mandate of the U.S. Bureau of Land Management (BLM) to manage public lands for multiple-use and sustained yield. But for a citizen interested in understanding the substance of public lands policies, reading the statute only

* The author would like to thank Robert Henneke of the Texas Public Policy Foundation for providing material and insights that were helpful in the preparation of this article.

1. Federal Land and Policy Management of 1976, 43 U.S.C. § 1701 (2012).

provides a broad view of the conflicting goals of public land management and the complicated structure and process for further policymaking. The statute delegates to BLM wide latitude to write and enforce detailed regulations regarding the use of public lands. Reading the regulations promulgated by BLM, however, obscures as much as it illuminates about how public lands policies emerge and evolve over time across expansive and diverse landscapes.

Public lands policies get made in an organic or ecological process that involves the interaction of political and natural landscapes.[2] Natural landscapes vary widely across the hundreds of millions of acres of public lands, from the temperate rainforests of the Pacific Northwest to the parched deserts of the southwest borderlands. The topography, climate, flora, fauna, and other natural resources that are part of these landscapes shape the substantive policies and policymaking processes on these diverse public lands. The political landscape across time and geography—the statutory and regulatory regimes; the ideological leaning of federal and state executives, legislators, and judges; and the relative political influence of science, bureaucracies, and organized interests—interacts with natural landscapes to produce public lands policies that change over time and space.

Part I of this article describes the ecological process by which public lands policies are made and changed. Part II traces the history of the legal and political conflicts over public land and private property along the Red River in Texas. Due to its unique path to statehood, very little of the land in Texas falls under federal ownership. However, federal land claims in the Red River date back to the Louisiana Purchase in 1803 and land claims in the Red River have been the subject of multiple Supreme Court cases, state and federal legislation, and political conflicts that once included a showdown between Oklahoma National Guard troops and Texas Rangers.[3] There are economic stakes for private landowners, the states, and the federal government in who holds title to these lands and the resources they contain.

The most recent clash between private land owners in Texas and the United States resulted again in a federal court case, *Aderholt v. BLM*,[4] and it prompted the introduction of more federal legislation in the U.S. Congress.[5] The election of Donald Trump as president and his appointment of new administrators in the

2. Raymond B. Wrabley, Jr., *Showdown at Catron: Cows, Wolves, and the Ecology of Public Lands Policies*, 51 NAT. RESOURCES J. 119, 119–20 (2011).

3. RUSTY WILLIAMS, THE RED RIVER BRIDGE WAR: A TEXAS-OKLAHOMA BORDER BATTLE 166 (2016).

4. Civil Action No. 7:15-CV-00162-O, 2016 WL 3541857 (N.D. Tex. Jun. 29, 2016).

5. *See* Red River Gradient Survey Act, H.R. 428 and S. 90, 115th Cong. (2017).

Department of the Interior have changed the political landscape with consequences for the Red River land dispute and the policies that govern it. Part III of this article analyzes *Aderholt v. BLM*, assessing how conflicts between private citizens, the state of Texas, and the organized interests who were its friends in court and the United States and its land management bureaucracies shaped public lands policies on the contested banks of the Red River. Part IV makes some conclusions about the sometimes adversarial, sometimes cooperative public lands policymaking process that is illuminated by the Red River land dispute.

II. THE ECOLOGY OF PUBLIC LANDS POLICYMAKING

In the first months of his presidency, Donald J. Trump revoked earlier presidential orders regarding the management of public lands,[6] signed legislation that cancelled regulations on public land use and management that had been promulgated toward the end of the Obama Administration,[7] and mandated extensive review by the Department of Interior of previous presidential proclamations of national monuments under the 1906 Antiquities Act.[8] In his public statements regarding these actions, President Trump said he was ending "federal overreach,"[9] cancelling "federal power grabs that centralize[d] decision-making in Washington away from states and local governments,"[10] and "returning power to the states—where that power belongs."[11] The implication of Trump's comments and actions—and those of his congressional supporters—is that public lands policymaking has become centralized in Washington and its federal land management bureaucracies, and that the interests of state and local governments and the constituencies they represent have been disregarded. Yet, these assertions fail to capture the realities of the public lands policymaking process.

---

6. Promoting Energy Independence and Economic Growth, Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

7. H.R.J. Res. 44, 115th Cong. (2017).

8. Review of Designations Under the Antiquities Act, Exec. Order No. 13792, 82 Fed. Reg. 20429, (Apr. 26, 2017).

9. *Remarks by President Trump at Signing of Executive Order to Create Energy Independence*, WHITEHOUSE.GOV (Mar. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/03/28/remarks-president-trump-signing-executive-order-create-energy [hereinafter *Remarks*].

10. *Remarks by the President on Signing House Joint Resolutions 37, 44, 57, and 58 under the Congressional Review Act*, WHITEHOUSE.GOV (Mar. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/03/27/remarks-president-signing-house-joint-resolutions-37-44-57-and-58-under.

11. *Remarks*, *supra* note 9.

"Textbook" explanations of natural resources policymaking make the process seem rational and mechanical. Here is a typical description:

> Problems are perceived, and demands are made to place those problems on a specific agenda for action. New policies are then formulated to deal with the problem, and a specific policy is selected to address the problem. That policy statement is then implemented and, subsequently, evaluated for its effectiveness. Based on the evaluations and continual public feedback, improvements in the selected policy are considered and perhaps adopted.[12]

In fact, however, public lands policymaking is more organic and ecological, and evolves through the continuous interactions of federal, state, and local legislatures, courts, bureaucracies, and organized interests. The political landscapes on which those interactions occur vary across the country, as do the natural landscapes that are shaped by those interactions.[13] Early public lands policies reflected a political landscape tilted toward privatizing public lands and favored speculators, industrial interests, and economic development. Those policies took the form of land grants, subsidies, and military protection (and Indian removal) for homesteaders, railroads, miners, and ranchers.[14] After the middle of the 20th century, a more adversarial policymaking process evolved as a new statutory regime that empowered emergent interests in conservation, recreation, and wildlife and landscape preservation was layered over the older statutes and policies—the "lords of yesterday"[15]—leading to the development of a political landscape that has been described as a thick "green state."[16]

This green state consists of environmental laws, agencies, policies, and legal precedents layered across the political landscape over two hundred years, many with contradictory goals and missions, creating a complex environmental and public lands

---

12. FREDERICK CUBBAGE, ET AL., NATURAL RESOURCE POLICY 47 (2017).

13. Wrabley, *supra* note 2, at 124–27 (discussing the political landscapes from the Age of Disposition to the Age of Preservation).

14. RANDALL WILSON, AMERICA'S PUBLIC LANDS: FROM YELLOWSTONE TO SMOKEY BEAR AND BEYOND 28–33 (2014).

15. Charles F. Wilkinson described the 19th century laws and policies that privatized many of the resources on public lands or subsidized private economic interests through policies like dams and river diversion as the "lords of yesterday." CHARLES E. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE AMERICAN WEST 3–27 (1992).

16. CHRISTOPHER MCGRORY KLYZA & DAVID SOUSA, AMERICAN ENVIRONMENTAL POLICY: BEYOND GRIDLOCK 31–41 (2013).

policy "labyrinth."[17] In the last several decades, legislative gridlock has dammed the flow of environmental legislation and opened "alternative pathways" for public lands policymaking, including through administrative processes, litigation, and public-private collaboration that have allowed policies to continue to "drift" in a green direction.[18] The green state political and policymaking ecosystem has subtle and not-so-subtle variations across natural landscapes. Nature has a role in this policymaking ecology.

For example, the nature of wild horses and the vast western landscapes on which they roam—the dispute over whether they are a native or feral population and whether the land resources can support large horse populations along with other wildlife or livestock—shape federal policies on wild horse protection.[19] The local political landscape in western New Mexico interacted with the behavior of reintroduced Mexican grey wolves to shape the details of Endangered Species Act implementation in Catron County.[20] Policies regulating the use of the rivers that run through public lands reflect the diversity of the country's political and natural landscapes. The characteristics of the Columbia River in the northwest, the Colorado River in the southwest, or the Red River as it flows across Texas into Louisiana and the Gulf of Mexico shape the policies that govern these rivers and lands. Riparian law emerged primarily from states rather than the federal government and its variation is grounded in differences in hydrology and political history across the states.[21] Eastern states, where water was abundant and political authority was well-established, developed different policies regarding water access, use, and ownership compared to the arid west, where water scarcity and underdeveloped political authority shaped the law.[22]

When a river is the legal boundary between properties or between public jurisdictions, river ecology shapes the land and the

---

17. *Id*. at 41.

18. *Id*. at 2. *See also* David J. Sousa & Christopher Klyza, *"Whither We Are Tending": Interrogating the Retrenchment Narrative in U.S. Environmental Policy*, 132 POL. SCI. Q. 467 (2017).

19. *See* Wild Free-Roaming Horses and Burros Act of 1971 16 U.S.C. § 1331 (2012). The legal landscape has also evolved over several decades to shape changes in wild horse management policies. *See* Mara C. Hurwitt, *Freedom Versus Forage: Balancing Wild Horses and Livestock Grazing on Public Lands,* 53 IDAHO L. REV. 425 (2017).

20. Wrabley, *supra* note 2, at 159–60.

21. JAN G. LAITOS & SANDRA B. ZELLMER, NATURAL RESOURCES LAW 480 (2015). The endangered snail darter, a fish species native to Tennessee, shaped federal policies on the Little Tennessee River, see Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). The endangered Lost River Sucker, a fish species native to the Pacific Northwest, has played a role in the policy controversies in the Klamath Basin. *See* MATTHEW MCKINNEY & WILLIAM HARMON, THE WESTERN CONFLUENCE: A GUIDE TO GOVERNING NATURAL RESOURCES 3–9 (2004).

22. LAITOS & ZELLMER, *supra* note 21, at 480.

law: "In law, boundaries are bright lines—clear and determinate. But the edge of a river is mobile and indistinct. Water shades into mud, which may become land. The river, in that sense, is a legal actor."[23] Many rivers, on various stretches, meander over time as water flow erodes one bank and deposits soil along the opposite bank or a downstream bank, in a process known as accretion.[24] Gradually, a river changes course through erosion and accretion, often moving miles from its previous flow or bed.[25] Or, a flood event leads a river to leave its channel and carve a new course through avulsion.[26] So, a river becomes a "legal actor" by changing the location of political boundaries or the size of private and public property through the natural riparian processes of accretion, erosion, or avulsion. Ancient and modern law have accounted for these behaviors of rivers.[27] In *Nebraska v. Iowa* (1892), the U.S. Supreme Court asserted:

> It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possession may vary. . . . It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that boundary remains as it was. . . . [t]his sudden and rapid change of channel is termed, in the law, avulsion.[28]

In its *Public Lands Surveying Casebook* chapter on the law of water boundaries, BLM defines accretion, erosion, and avulsion and reiterates the principle in law followed by the government of the United States: "The general rule is that ownership of accreted land inures to the upland riparian or littoral owner while avulsive action does not work a boundary or ownership change."[29] The application of this general rule in specific cases has been the

---

23. Nicholas Blomley, *Simplification is Complicated: Property, Nature, and the Rivers of Law*, 40 ENV'T & PLAN. 1825, 1838 (2008).

24. LAITOS & ZELLMER, *supra* note 21, at 482–83.

25. *Id.*

26. *Id.*

27. *Id. See also* Nebraska v. Iowa 143 U.S. 359 (1892). For a more extensive explanation of the evolution of law regarding accretion, erosion, and avulsion, see James J. Walsh, *The Federal Common Law of Accretion: A New Element in Property Law*, 35 LA. L. REV. 178 (1974).

28. *Nebraska v. Iowa*, 143 U.S. at 360–61.

29. BUREAU OF LAND MGMT. CADASTRAL TRAINING STAFF, PUBLIC LANDS SURVEYING CASEBOOK D1-1 (1975).

subject of controversy, due partly to the differences in river and land ecosystems across the country. Even the Red River, over its course, varies in its flow and characteristics as to make policymaking issues in its headwaters region different than in the Gulf region where it ends. According to Geographer Isaiah Bowman:

> Since the Red River rises in one climatic region and flows into another, it is one river in its upper course and quite another in its lower course. When the Supreme Court tries to frame a decision that will fit 539 miles of river course in such a case it is precisely as if it tried to frame a decision which should apply equally to a river in western Texas and another river in Ohio.[30]

The long history of land claim conflicts in the Red River reveals the complexities of applying general legal rules in river ecosystems, and also illustrates the ecological nature of the public lands policymaking process.

III. THE RED RIVER: A HISTORY OF LAND CLAIM DISPUTES

In his history of the Red River, Carl Tyson writes:

> The Red River has no single source. It is born in the foothills of the Rockies from a thousand tiny rivulets. . . As it gathers strength from the tiny streams that flow into it, the river becomes broader and more stately, but everywhere its course winds and curves like the path of some giant snake.[31]

The Red River snakes from west to east across northern Texas, through the Staked Plains of the Panhandle, down to prairie dog country and through the Cross Timbers, and over five hundred miles later flows over the cypress swamps of Louisiana's bayou country, before joining the Mississippi River south of Natchez.[32] On some long stretches the river is actually dry, and does not flow unless there has been rainfall.[33] The Red River also snakes across

---

30. Isaiah Bowman, *An American Boundary Dispute: Decision of the Supreme Court of the United States with Respect to the Texas-Oklahoma Boundary*, 13 THE GEOGRAPHICAL REV. 161, 179 (1923).

31. CARL N. TYSON, THE RED RIVER IN SOUTHWESTERN HISTORY 1–2 (1981).

32. *Id.*

33. *Consent of Congress to the Red River Boundary Compact: Hearing on H.R.J. Res. 72 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the* Judiciary,

the political landscape of Texas—and the United States—shaping law and policy. It has long been recognized as the boundary between nations, and then states, but the location of the river and its banks and the ownership of its bed and adjacent lands has also been the subject of a good bit of legal and political controversy.

In 1803, the United States purchased from Spain a huge swath of the North American continent—from the northernmost Rocky Mountains and the headwaters of the Missouri River, the longest river in the United States, to the delta swamplands where the Mississippi River flows into the Gulf of Mexico at New Orleans.[34] The Louisiana Purchase established the Red River as the boundary between the United States and Spain and gave the United States title to the river and all lands lying to the north.[35] The Adams-Onis Treaty in 1819 reaffirmed the Red River as the border between Spain and the United States.[36] In 1821, south of the banks of the Red River, Mexico won independence from Spain and in 1836, Texas won independence from Mexico.[37] In 1838, Texas and the United States confirmed the south bank of the Red River as the border between the two nations, and when Texas entered the Union as the 28th state in 1845, the United States recognized the new state as owner of all "vacant and unappropriated lands lying within its limits," which did not include the Red River.[38]

In the decades after Texas entered the Union there was a prolonged dispute over which fork of the Red River constituted the boundary between Texas and the United States.[39] Texas claimed, settled, and governed for more than thirty years 1.5 million acres of land that it called Greer County, but the United States claimed this area was north of the Red River; thus, the United States argued it was federal land that had been designated as Indian Territory.[40] The dispute between Texas and the United States was

---

106th Cong. 32 (1999) (statement of Rep. David Braddock (D-OK))[hereinafter *Red River Hearing*].

34. *See id*.

35. *Id.* (statement of Rep. Thornberry).

36. Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty art. 3, Feb. 22, 1819. Secretary of State Johns Quincy Adams engaged in tedious and protracted negotiations with Spain before both sides agreed that the south bank of the Red River was recognized as the northern boundary of Spain and that the Red River would fall under ownership of the United States. AMERICAN STATE PAPERS: FOREIGN RELATIONS, SPAIN: INDEMNIFICATION–LIMITS–FLORIDA, VOL. IV, 530–533 (1834), *available at* https://memory.loc.gov/ammem/amlaw/lwsplink.html.

37. RICHARD L. NOSTRAND, THE MAKING OF AMERICA'S CULTURE REGIONS 169 (2018).

38. J. Res. 8, 28th Cong., 5 Stat. 797(1845).

39. Berlin B. Chapman, *The Claim of Texas to Greer County*, 53 SW. HIST. Q. 19, 19–20 (1949).

40. *See generally id*. (laying out in detail the complicated story involving various acts of Congress and courts surrounding the dispute over the location of the Red River).

complicated by the claims and rights of Indian tribes that had been established by the creation of the Kiowa-Comanche-Apache (KCA) Reservation north of the Red River in 1867.[41] The southern boundary of the reservation was set as the "middle of the main channel" of the Red River between the 98th meridian and the North Fork of the Red River.[42] The United States retained ownership of the land from the "medial line" of the Red River to its south bank.[43] Congress later established a trust fund for the benefit of enrolled members of the KCA tribes and their children with moneys derived from development of mineral resources on federal lands in the south half of the Red River.[44]

In 1890, the US Congress established a government for the territory of Oklahoma and directed the Attorney General of the United States to initiate a suit in equity against the state of Texas, setting forth the title and claim of the United States to the land that Texas claimed as Greer County.[45] In his decision for the US Supreme Court in *United States v. Texas* (1896), Justice Harlan wrote presciently:

> It is a matter of regret that the question now presented, involving interests of great magnitude, should not have been determined, in some more satisfactory mode, before, or shortly after, Texas was admitted as one of the states of the Union. It has remained unsettled for so long a time that it is not now so easy of solution…[46]

The Court also recognized the conflicting private and public interests at stake:

> It is also said that many titles to land in the disputed territory are held under the state, and that much confusion may follow, and injustice be done to individuals, if the claim of the United States be sustained. On the other hand, it is to be inferred that there are many settlers in the disputed territory who assert title to land under the United States.[47]

41. *Id*. at 28.
42. Treaty with the Kiowa and Comanche art. 2, Oct. 21, 1867. 15 Stat. 581.
43. *Id*.
44. S.J. Res. 71, 69th Cong. (1926).
45. United States v. Texas 162 U.S. 1, 2–3 (1896).
46. *Id*. at 43.
47. *Id*. at 89.

After an exhaustive review of treaties, diplomatic correspondence, acts of Congress and the Texas legislature, and conflicting historical surveys, the Court ruled:

> [I]t is ordered, adjudged, and decreed that the territory…sometimes called 'Greer County'–constitutes no part of the territory properly included within or rightfully belonging to Texas at the time of the admission of that State into the Union, and is not within the limits nor under the jurisdiction of that State, but is subject to the exclusive jurisdiction of the United States of America.[48]

In its decree, the Court found the line along the south bank of the Red River to be the southern boundary of the lands of the United States.[49]

Just over a decade later, the issue found its way back to the Supreme Court. The discovery of oil and gas deposits in the bed of the river re-ignited a conflict over land claims that threatened to break into armed conflict.[50] Texas and Oklahoma made conflicting claims on the land in the Red River and began leasing portions of that land for oil development, and each state called out National Guard units to support its claims.[51] According to geographer Isiah Bowman:

> Up to the time that oil was discovered the moderate or normal economic value of the land and of the broad, half-dry bed of the river throughout the upper half of the boundary zone led to the undisputed occupation of the land down to the cut bank of the river on either side; but when oil wells were drilled the question of location became important down to the last foot, not only from the standpoint of the property owner himself but also from the standpoint of the state and its expected increase in taxable wealth.[52]

Oklahoma filed a suit against Texas and claimed ownership of the river bed to the south bank as riparian owner along a navigable river.[53] Texas asserted that the border between the two states was fixed in the middle of the main channel of that river,

48. *Id*. at 90–91.
49. *Id*.
50. Oklahoma v. Texas, 256 U.S. 70, 84 (1921).
51. TYSON, *supra* note 31, at 170–71.
52. Bowman, *supra* note 30, at 166.
53. *See Oklahoma*, 256 U.S. at 83.

the decree of the Supreme Court in *United States v. Texas* (1896) notwithstanding.[54] The United States intervened to protect its interests and those of the Indian tribes whose lands bordered the Red River to the north.[55] In *Texas v. Oklahoma* (1921), the Supreme Court rejected the claims of Texas and reiterated that the south bank of the Red River was the legal boundary between Texas and Oklahoma.[56] It also rejected Oklahoma's claim that the Red River was navigable, giving Oklahoma riparian ownership rights to the river bed.[57] However, the Court agreed to take evidence and hold a hearing "to determine what constitutes the south bank, where along the bank the boundary is, and what is the proper mode of locating it on the ground."[58]

Oklahoma and the United States contended that the south bank and boundary were at the foot of a range of bluffs that stretch along the south side of the valley through which the river runs, and Texas asserted that the bank and boundary were on the low water mark of the river.[59] While the case seemed straightforward, it was not. Surveyor Arthur Stiles, who was ultimately appointed by the Supreme Court as one of two commissioners to fix and mark the boundary between the two states wrote:

> This case is so memorable for the large monetary values involved, for the wide field covered by the scientific investigations, for the eminent counsel employed, and for the noted scientists who testified at great length. The record in the case fills nine volumes containing a total of 5510 printed pages. Altogether, 418 witnesses testified regarding 539 miles of the Red River.[60]

The Court also recognized the influence of nature on the law: "[T]here are inanimate witnesses, such as old trees, which tell a good deal."[61]

After an extensive review of the ecology of the Red River and case law, the Court split the difference:

---

54. *Id.*
55. *Id*. at 84.
56. *Id*. at 92–93.
57. Oklahoma v. Texas 256 U.S. 574, 591 (1922).
58. Oklahoma v. Texas 260 U.S. 606, 624 (1923).
59. *Id*. at 625.
60. Arthur A. Stiles, *The Gradient Boundary- The Line Between Texas and Oklahoma Along the Red River*, 30 TEX. L. REV. 305, 306 (1952).
61. *Oklahoma*, 260 U.S. at 638.

> 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. . . . Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river, and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it.[62]

According to the Supreme Court, the boundary is the same as it was in 1821, subject to the doctrines of accretion and avulsion.[63] Writing in 1923, the geographer Bowman argued that the cut bank was the most natural boundary from the standpoint of the actual residents: "Ranches and farms, cemeteries and schoolhouses, churches, fences, cultivated land, roads, cow paths, lanes, and every sign of occupation and civilization extend in many places to the cut bank."[64] He also noted that the effect of the Supreme Court decision is that "*both the cut banks and the medial line are constantly on the move legally as well as in fact and hereafter as well as heretofore*."[65] He argued that the tendency of the river to widen its bed would greatly advantage the United States in the future extraction of oil from the river bed.[66]

So where was the south cut bank of the Red River? The effort to determine its actual location was a clear example of the interaction of natural and political landscapes. The surveyor Stiles "walked for miles along the river with the [Supreme Court] opinion in hand studying the river."[67] He later wrote:

> This work amounted to fitting the opinion to the river. It clearly indicated that a gradient of the flowing water in the river was the only possible datum for locating the boundary upon the ground in thorough compliance with the

62. *Id*. at 635–36. Bowman claims that had the Supreme Court agreed with the United States that the south bank lay along the bluffs at the southern edge of the valley, "it would have involved defining the bed as the whole valley floor." Bowman, *supra* note 30, at 180 n.6. Texas defines the "cut bank" as "the outer edge of a stream's bed, separating the bed from the adjacent upland and confining the waters to a definite channel," *The Gradient Boundary,* TEX. PARKS & WILDLIFE, https://tpwd.texas.gov/publications/nonpwdpubs/water_issues/rivers/navigation/riddell/gradientboundary.phtml (last visited Mar. 11, 2018).

63. *Oklahoma*, 260 U.S. at 636.

64. Bowman, *supra* note 30, at 180.

65. *Id*. at 187 (emphasis in original).

66. *Id*.

67. Stiles, *supra* note 60, at 308.

> requirements of the Court. In this way, the gradient boundary was laboriously worked out on foot, bank by bank, on the Red River.[68]

The Kidder and Stiles report that was accepted by the Supreme Court finally defined the boundary, and according to the Court, "armed conflicts between rival aspirants for the oil and gas had been but narrowly averted."[69] The Court decided that 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."[70]

Writing about *Oklahoma v. Texas* (1923) in 1981, Tyson claimed:

> Thus, after approximately one hundred years, the dispute over the Red River finally ended. For more than two centuries nations and states had argued over the boundary of the Red, first France and Spain, then Spain and the United States, later the United States and Texas, and finally Texas and Oklahoma.[71]

Of course, Tyson's optimistic pronouncement of the end of conflict belied the history of the Red River. In 1981, the issue of the Red River boundaries was already back in federal courts.

In *James v. Langford*, plaintiff landowners on the Oklahoma side of the Red River sought title to the bed of the Red River to the south bank opposite most of their land and to the medial line of the Red River bed opposite the rest of their lands.[72] Buck James, one of the Oklahoma plaintiffs had commenced sand and gravel operations in the disputed land south of the Red River, sparking tension and ill-will and prompting one of the Texas landowners to comment that James "ought to be worried about his own safety."[73] James was represented *pro bono* in the legal effort to secure title to this land by former Oklahoma Attorney General Charles Nesbitt, who took the case for a third interest in the sand and gravel operation.[74]

---

68. *Id*.
69. Oklahoma v. Texas, 258 U.S. 574, 580 (1922).
70. Oklahoma v. Texas, 265 U.S. 500, 501 (1924).
71. TYSON, *supra* note 31, at 175.
72. James v. Langford, 558 F. Supp. 737, 739 (W.D Okla. 1981).
73. J. Michael Kennedy, *Landowner Suits Stirring Red River 'Border War,'* LOS ANGELES TIMES, Feb. 25, 1985, 1 at 15.
74. *Id.* at 14.

Defendant Texas landowners, who had occupied and used the disputed land for grazing livestock, asserted that it had been added to their land by accretion as the south bank of the Red River had migrated north over many decades.[75] The United States was added as a defendant since it also claimed ownership of the bed of the Red River from the medial line to the south bank along some of the disputed sections of the land.[76] Federal judges were once again tasked with deciding the location of the south bank of the Red River: "It is clear that the primary issue in this case is the location of the south bank of the Red River in the disputed area."[77]

The District Court applied the rules laid out in 1923 by the Supreme Court in *Oklahoma v. Texas*: "The boundary as it was in 1821 . . . is the boundary of to-day [*sic*], subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes."[78] The application of these doctrines required a study of the evolution of the natural landscape along the river. In reaching its decision, the Court examined the depth and composition of the sand in the river bed, the nature of the vegetation along the river, the thickness of the groundcover, the water flow rates in the Red River over time, and the location and age of trees in the region.[79] It studied the "prominent bluff that rises vertically some forty feet or more" on the Oklahoma bank of the Red River, the "wheat field bank" nearly a mile west of the river where "the surface of the land rises sharply approximately ten feet," and another "prominent bank" further west "characterized by an outcropping of bedrock rising some twenty feet above the wheat field."[80] The Court looked at aerial photographs that indicated that "the present watercourse in the area generally follows a serpentine path between well-defined outer banks which range from one to two miles apart."[81] It reviewed surveys of the area conducted by Texas in 1861 and the United States in 1874, and read histories of floods, bank stabilization efforts, and bridge and jetty construction on the river over several decades.[82]

---

75. *James*, 558 F. Supp. at 740.
76. *See id.*
77. *Id.*
78. *Id.* at 739 (quoting Oklahoma v. Texas, 261 U.S 340, 341–42 (1923)).
79. *Id.* at 741. ("[A] single large elm tree, estimated by some witnesses to be over 100 years old, is located approximately 1,000 feet east of the wheat field bank. This tree is by far the largest and oldest in the area, and its location is consistent with the presence of a prior channel west of it in the past.").
80. *Id.*
81. *Id.* at 740.
82. *Id.*

The District Court concluded that the disputed land was part of the river bed north of the south bank of the Red River and owned by the Oklahoma plaintiffs or the United States.[83] According to the Court, the Red River had moved north as a result of avulsive events connected to floods in 1908 and 1935, and therefore, the south bank boundary had not moved north with the river.[84] The land had not been added by accretion to the land owned by Texas defendants.[85] The Tenth Circuit Court of Appeals agreed with the District Court:

> The trial court . . . found that the movement of the channel of the stream and the change in the stream bed were the result of avulsion during the 1908 flood and the several subsequent large floods. The findings of the trial court are supported by the record. We fully agree with the conclusions reached as they are in accord with the applicable doctrines and with *Oklahoma v. Texas*.[86]

The Supreme Court refused to hear an appeal.[87] In a similar case two years later, the District Court for the Western District of Oklahoma reiterated findings from *James v. Langford* that the south bank of the Red River in the area of dispute is the northern border of Texas; that land was added to the Texas side of the river by avulsive activity and not accretion; that the United States owns the land of the river bed from the medial line to the south bank as identified by the Court (the wheat field bank); and that Oklahoma landowners own the land in the river bed from the medial line to the north bank.[88]

Due to continuing legal disputes about the location of the south bank of the Red River—and thus, the border between the lands of Texas, Oklahoma, and the United States—Oklahoma and Texas each created Red River Boundary Commissions in the early 1990s to settle the location of the boundary.[89] The states claimed that the Supreme Court's definition of the boundary as the "gradient of the

---

83. *Id*. at 743–44.
84. *Id.* at 744.
85. *Id*.
86. James v. Langford 701 F.2d 123, 126 (10th Cir. 1983).
87. Langford v. James, 464 U.S. 1040 (1984).
88. Currington v. Henderson, No. CIV-84-1199T (W.D. Okla. Nov. 26, 1984). In this case, 140 acres on which Texas rancher Tommy Henderson was paying a mortgage and taxes was determined to be owned by the United States or Oklahomans. In 2015, thirty years after he applied to "buy back" the land from the United States under the Color of Title Act of 1928, Henderson acquired title to 94 of the 140 acres from the BLM. *See* Jim Malewitz, *In Red River Dispute, A Cloud Over This Land,* THE TEX. TRIB., Nov. 1, 2015, 6:00AM, https://www.texastribune.org/2015/11/01/red-river-reunion-95-acres-court-took/.
89. *Red River Hearing*, *supra* note 33, at 13.

flowing water in the river . . . 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"[90] was unworkable in practice, because "you cannot see it or mark it and it is thus a problem to use as a jurisdictional boundary."[91] In fact, six different sovereignties still had a stake in the resolution: Texas, Oklahoma, the United States, and the KCA tribes that still derived monetary benefits from resource development on the US-owned lands in the bed of the Red River.[92] In congressional testimony regarding the issue, U.S. Representative Max Sandlin (D-TX) said:

> [T]here are actual and potential disputes, controversies, criminal proceedings and litigation arising or that may arise out of the location of the boundary line between the states there along the Red River. An inability to identify the boundary at a point in time is a significant problem for law enforcement and law enforcement personnel. It is a problem for taxing authorities and citizens on both sides of the river.[93]

In 1999, Texas and Oklahoma agreed to the Red River Boundary Compact which asserted that "the interests of the party states are better served by establishing the boundary between the states through use of a readily identifiable natural landmark than through use of an artificial survey line."[94] The Compact established the permanent political boundary line between the states as "the vegetation line along the south bank of the Red River."[95] The Compact recognized that the vegetation line may move gradually as the river moves, and thus, the boundary between Oklahoma and Texas will move. However, despite the movement of the political boundary between the states, the Compact was also clear in ensuring that "[t]he title of any person or entity, public or private, to any of the lands adjacent to the Red River" did not change.[96]

---

90. Oklahoma v. Texas, 265 U.S. 500, 501 (1924).
91. *Red River Hearing*, *supra* note 33, at 15.
92. *See id.* at 53.
93. *Id.* at 17 (Statement of U.S. Rep. Max Sandlin) A journalist wrote of this no man's land: "rumor has it, a man committed suicide in the river bottom and authorities spent hours trying to figure out who had jurisdiction over the body." Kathryn Jones, *Drawing the Line: Once and for All, Where is the Border Between Texas and Oklahoma?* TEX. MONTHLY, Jan. 1997, http://www.texasmonthly.com/politics/drawing-the-line/.
94. Red River Boundary Compact, S.B. SB175, 47th Legis., 1st Sess. 3 (Okla. 1999).
95. *Id.* art. II (B).
96. *Id.* art. VII (1).

In October 2000, the US Congress consented to the Red River Boundary Compact.[97] In a congressional hearing prior to the vote, Rep. Gerald Nadler (D-NY) asked whether any change in the Texas-Oklahoma border that would result from congressional consent to the Red River Boundary Compact would affect the public lands managed by BLM for the benefit of the KCA tribes: "Land that is now owned in Oklahoma by the Bureau of Land Management, if such land, any such land, any acre of such land, should now be construed as on the other side of the boundary in Texas, will it still belong to the Bureau of Land Management?"[98] In response, Eric Sigsbey, General Counsel for the Texas Land Office said: "I don't think the provision that we have in there could be any more clear from a legal standpoint that this Compact does not change the jurisdictional authority of the BLM or the BIA or any other tribe."[99] As a result, if the vegetation line that was now designated as the political border between Texas and Oklahoma migrated north, public lands previously in Oklahoma may be located in Texas.

IV. ADERHOLT V. BUREAU OF LAND MANAGEMENT

FLPMA requires BLM to promulgate Resource Management Plans (RMP) for the public lands that it manages, consistent with its multiple use-sustained yield mandate.[100] In developing the RMP, BLM is required to solicit input from the public, federal and state agencies, and relevant stakeholders.[101] The National Environmental Policy Act (NEPA) requires the BLM to conduct environmental analyses of alternative management plans for the land.[102] In 1994, the BLM issued a RMP for Oklahoma that included management directives for the public lands in the Red River Management Area (RRMA) that would be effective "for the next 20 years."[103] The RMP recognized the "unique situation" of the RRMA due to the fact that land ownership along the 166 mile

97. H.R.J. Res. 72, 106th Cong., 114 Stat. 919 (2000). Formal consent to the Compact by the U.S. Congress was required by the U.S. Constitution, Article I, § 10, clause 3: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ."

98. *Red River Hearing*, *supra* note 33, at 53 (Statement of Rep. Gerald Nadler).

99. *Id.* at 54 (Statement of Eric Sigsbey).

100. *See* 43 U.S.C. § 1712 (2012).

101. *Id.* § 1712(c)(9).

102. *See* 42 U.S.C. § 4332 (2012).

103. U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., OKLAHOMA RESOURCE MANAGEMENT PLAN RECORD OF DECISION AND PLAN, at i (1994) [hereinafter OKLAHOMA RESOURCE MANAGEMENT PLAN]. The RMP was based on the comprehensive Final Environmental Impact Statement that had been conducted for the public lands in Oklahoma. *Id.* (cover letter from Paul Tanner, Area Manager, Okla. Resource Area).

length of the Red River between its North Fork and the 98th meridian was still contested.[104] This contention stemmed from ongoing disputes regarding the location of the river's south bank.[105] The RMP did refer to the Supreme Court's 1923 decision in *Oklahoma v. Texas* establishing that the United States owned lands in the bed of the Red River to its south bank.[106] Furthermore, it asserted U.S. ownership of at least 1440 acres in the area, as a result of the 1980s federal court decisions in *James v. Langford* and *Currington v. Henderson*.[107]

Given the uncertainty regarding the status of the lands in the RRMA, BLM issued management plans for three different scenarios: 1) if congressional legislation created the boundary between Oklahoma and Texas at the medial line between the geologic cut banks on each side of the river—this would, in effect, almost completely eliminate any federal public lands in the area; 2) if no federal or state decisions were made on the location of the state boundaries or the south bank of the river; thus, adding potentially 46,000 acres to federal lands by application of the *James* and *Currington* decisions to the rest of the river bank; and 3) if legislation established the south geologic cut bank as the state boundary, adding up to 90,000 acres to federal holdings in the broad river bed.[108] Under scenario three, BLM would retain and manage the Red River public lands and resources for recreation, grazing, wildlife protection, and mineral leasing.[109] In the subsequent twenty years after issuing the RMP, none of the three scenarios played out. The Red River Boundary Compact of 2000 did establish the political boundary between Oklahoma and Texas, but explicitly did not affect titles to land. And, apparently, the BLM did little to manage the contested lands.[110]

In 2013, BLM published a Notice of Intent (NOI) to prepare a new RMP for Oklahoma and sought public comment on "issues and planning criteria."[111] The NOI insisted that "public participation and collaboration [would] be an integral part of the planning

104. *Id.* at 101.
105. *Id.*
106. *Id.* at 7.
107. *Id.*
108. *Id.* at 101.
109. *Id*. at 108.
110. *See* Christopher Hooks, *The Other Border War: Along the Red River, the Federal Government and Local Landowners are Engaged in a Grueling Battle*, THE TEX. MONTHLY, July 2016, http://www.texasmonthly.com/articles/the-other-border-war/. Steve Tryon, field manager for the BLM's Oklahoma office said of the RRMA: "We've never actively managed it, we've passively managed it." *Id.*
111. Notice of Intent to Prepare a Resource Management Plan, 78 Fed. Reg. 45266–67 (July 26, 2013).

process."[112] This notice came on top of earlier BLM actions that appeared to assert federal claims to land to which Texas citizens claimed ownership. In 2003, in response to inquiries from the Bureau of Indian Affairs (BIA), BLM began conducting dependent resurveys along portions of the Red River.[113] In 2008, BLM affixed survey markers identifying the medial line of the river and a boundary line of Texas on land claimed by several Texas residents.[114] In 2009 and 2010, BLM published in the Federal Register notice of its intent to officially file these updated surveys with the BLM New Mexico State Office.[115] BLM subsequently acknowledged that it would not conduct resurveys along the entire 166 miles of the Red River in these counties because it lacked the resources to do so.[116] The BLM surveys, the placement of survey markers, and the notice of intent to prepare a new RMP for management of federal lands along the Red River appeared to indicate that BLM was asserting federal ownership of lands regarded by Texans as private lands, sparking outrage and triggering another federal lawsuit.

Then Texas Governor Rick Perry said: "It's not a dare, it's a promise that we're going to stand up for private property rights in the state of Texas."[117] Attorney General Greg Abbott (now governor) called BLM's action an "unconscionable land grab"[118] and in a letter to BLM he wrote: "Private landowners in Texas have owned, maintained, and cultivated this land for generations. Despite the long-settled expectations of these hard-working Texans along the Red River, the BLM appears to be threatening their private property rights by claiming ownership over this

---

112. *Id*. at 45267.

113. Amended Complaint at 15, Aderholt v. Bureau of Land Mgmt., (N.D. Tex. June 29, 2016) (No. 7:15-CV-00162-O).

114. *See id*. at 15–16. The Texas residents on whose lands survey markers were placed are identified in the *Aderholt* complaint. *See id*. The BLM defines a dependent resurvey as:

> [A] retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. The section lines and lines of legal subdivision of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the plat of the original survey.

BUREAU OF LAND MGMT., MANUAL OF SURVEYING INSTRUCTIONS 145 (1973).

115. Notice of Filing Plats of Survey, New Mexico, Oklahoma, Texas, and Kansas, 74 Fed. Reg. 28061–62 (Jan. 12, 2009); Notice of Filing of Plats of Survey, New Mexico, 75 Fed. Reg. 8738–39 (Feb. 25, 2010).

116. Amended Complaint, *supra* note 113, at 19.

117. *Perry Rips 'Out-of-Control' Federal Government Over Texas Land Dispute*, FOX NEWS (Apr. 23, 2014), http://www.foxnews.com/politics/2014/04/23/perry-rips-out-control-federal-government-over-texas-land-dispute.html.

118. Bob Price, *Abbott to BLM: 'End this Unconscionable Land Grab' in Texas,* BREITBART (Oct. 17, 2015), http://www.breitbart.com/big-government/2015/10/17/abbott-blm-end-unconscionable-land-grab-texas/.

property."[119] Texas rancher Kenneth McAllister complained: "I've already tended to the land. I've already paid taxes on it. I've already assumed that I take ownership of it. It's been in my family since the late 50s. It's pretty hard to say that it is not ours."[120] Activists organized protests in opposition to BLM "land grab."[121]

Several Texas residents filed protests of the updated BLM surveys—those indicating that hundreds of acres the residents claimed to own and to which they held deeds to were actually public lands to be managed by BLM. BLM dismissed the protests and insisted that BLM surveys followed the gradient boundary as defined by the Supreme Court in 1923.[122] BLM also rejected the residents' claims to ownership of the land despite their presentation of deeds:

> The patent issued for your lands by the State of Texas extended across the south bank of the Red River, across the medial line of the Red River and on to lands disposed of by the General Land Office north and along the Red River between the medial line and the north bank, in the State of Oklahoma. It is the BLM's fiduciary responsibility to protect Indian lands on the north side of the river from encroachment… Since the State of Texas had no authority to dispose of lands beyond the south bank of the river, your claim to those lands owned by the patentees on the north side is not valid. You are limited by the Gradient boundary on the south bank as depicted on the 2009 BLM survey which is in conformance with the Supreme Court decisions.[123]

In late 2015, the Texas Public Policy Foundation, a free enterprise-oriented non-profit organization, filed a federal lawsuit against BLM on behalf of several Texas landowners and

---

119. Letter from Greg Abbott, Attorney General of Texas, to Neil Kornze, Director of BLM, (Apr. 22, 2014).

120. *Rancher Along Red River Voices Concern Over Possible BLM Land Grab*, TEXOMA'S (Apr. 29, 2014), http://www.texomashomepage.com/news/local-news/rancher-along-red-river-voices-concern-over-possible-blm-land-grab/147142862.

121. *See Republicans Warn BLM Eyeing Land Grab Along Texas-Oklahoma Border,* FOX NEWS (Apr. 23, 2014), http://www.foxnews.com/politics/2014/04/22/republicans-warn-blm-eyeing-land-grab-along-texas-oklahoma-border.html; Tov Henderson, *Gathering of the American Patriot,* YouTube (May 10, 2014), https://www.youtube.com/watch?v=qu2Her54lxs.

122. Amended Complaint, *supra*, note 113, at 118. (BLM letter to Patrick Canan, June 9. The letter pointed out that the time frame for filing a protest had expired in 2009—six years earlier).

123. *Id.* at 119.

counties.[124] The State of Texas and the Texas General Land Office intervened as plaintiffs and members of the Texas congressional delegation filed amicus curiae briefs.[125] In their complaint, plaintiffs asserted that BLM's public land claims along the Red River erroneously presumed that the Supreme Court in 1923 fixed the southern boundary of federal land.[126] According to the plaintiffs, public lands follow the flow of the river—public lands do not expand as the river moves through erosion and accretion: "Defendants are incorrect that, as the Red River eroded north, U.S. territory was expanded instead of its territory conforming to the constant meandering of the river."[127]

In its complaint, plaintiffs alleged that:

1) The survey methodology used by BLM in 2009 to indicate federal ownership of lands claimed by plaintiffs was "fundamentally flawed in that it is not the gradient boundary survey method instructed by the Supreme Court,"[128] and is therefore "invalid and unlawful."[129]

2) BLM's publication of maps indicating federal ownership of land that it has not—and will not survey—leaves a cloud over the use or disposal of land the plaintiffs' claim to own and violates the U.S. Constitution's due process protections.[130]

3) BLM's claim of federal ownership of plaintiffs' private property amounts to an unreasonable seizure of private property in violation of the U.S. Constitution's fourth amendment protections.[131]

Plaintiffs' asked the Court for an order quieting BLM's title to plaintiffs' property;[132] a declaration that the surveys by BLM were invalid and unlawful; an order enjoining BLM from using survey methods that find the south bank beyond the vegetation line;[133] and a declaration that BLM's actions had violated the U.S.

---

124. *See* Aderholt v. Bureau of Land Mgmt., (N.D. Tex. June 29, 2016) (No. 7:15-CV-00162-O).

125. Elizabeth Koh, *22 Texas Lawmakers Submit Amicus Brief in Red River Land Dispute*, DALLAS NEWS, Mar. 20l6, https://www.dallasnews.com/news/politics/2016/03/30/texas-congressmen-submit-amicus-brief-in-red-river-land-case.

126. Amended Complaint, *supra*, note 113, at 10–13.

127. *Id.* at 28.

128. *Id*. at 22.

129. *Id*. at 29.

130. *Id*. at 39.

131. *Id*. at 41.

132. *Id*. at 42.

133. *Id*. at 42, 44. Plaintiffs' sought recognition from the Court that the "vegetation line" as established by the Red River Boundary Compact is the northern boundary of Texas, and therefore, no federal lands exist beyond it. According to plaintiffs, the legally recognized political boundary moves with the vegetation line that divides the river bank from the river bed. *Id.*

Constitution's fourth and fifth amendment protections regarding seizure of private property and rights of due process.[134]

BLM moved to dismiss most of the complaints, claiming that under the doctrine of federal sovereign immunity the United States is immune from suit except when Congress expressly waives that immunity.[135] According to BLM, Congress enacted a limited waiver of immunity with respect to suits involving land title disputes in the Quiet Title Act (QTA),[136] and the QTA establishes the exclusive framework for settling these disputes.[137] BLM asserted that only three of the twelve plaintiffs had potentially relevant claims under the QTA, and since the plaintiffs' complaint regarding constitutional fourth amendment violations was really a dispute about title to the land, it should be dismissed and adjudicated through the QTA.[138]

The Court ruled that some of the plaintiffs lacked standing; however, it also ruled that some plaintiffs had asserted justiciable constitutional claims, because BLM's placement of survey markers on their property may have created "a concrete and particularized injury in fact."[139] The Court also ruled that BLM was bound by *Oklahoma v. Texas* (1923) regarding locating the boundaries between public and private lands; that BLM's failure to conduct a gradient boundary survey may be unlawful; and that a court may order BLM to conduct such a survey before BLM asserts claims that the boundary has changed.[140] During the subsequent discovery process, BLM sought a court order to compel plaintiffs to allow BLM employees to "inspect, measure, survey, take GPS coordinates, and photograph" plaintiffs property, while accompanied by armed law enforcement officers.[141] While the Court set some conditions on BLM's inspection of plaintiffs' properties, it ordered that "Plaintiffs must promptly allow access to the northern boundary of their land."[142]

---

134. *Id*. at 45.

135. Defendant's Memorandum in Support of their Motion for Partial Dismissal of Plaintiffs' Amended Complaint at 16, Aderholt v. Bureau of Land Mgmt., (N.D. Tex. June 29, 2016) (No. 7:15-CV-00162-O). For a history of the doctrine of federal sovereign immunity, see Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521–609 (2003).

136. 28 U.S.C. § 2409a (2012).

137. *See* Block v. North Dakota, 461 U.S. 273 (1983) ("The legislative history establishes that Congress intended the QTA to provide the exclusive means by which adverse claimants can challenge the United States' title to real property.")

138. Defendant's Memorandum, *supra* note 135, at 6–22.

139. Memorandum Opinion and Order at 20–21, Aderholt v. Bureau of Land Mgmt., (N.D. Tex. June 29, 2016) (No. 7:15-CV-00162-O).

140. *Id*. at 15.

141. Order at 2, Aderholt v. Bureau of Land Mgmt., (N.D. Tex. June 29, 2016) (No. 7:15-CV-00162-O).

142. *Id*. at 11.

Outside of the federal court, the Congress sought to establish new federal policy along this stretch of the Red River through the legislative process. In June 2014, Representative Mac Thornberry (R-TX) introduced the Red River Private Property Protection Act, which would require the United States to "relinquish, disclaim, and transfer by special deed all right, title, and interest of the United States in Red River lands to any claimant who demonstrates that they hold a title, have a deed, and have paid taxes on the land."[143] Congressional supporters claimed that the bill would "provide legal certainty to property owners along the Red River in Texas" and insulate those property owners from federal efforts to "hold their land hostage for a ransom to regain title to property they already own."[144]

In testimony before the House Natural Resources Subcommittee on Public Lands and Environmental Regulation, Deputy Director of BLM Steve Ellis outlined the Obama Administration's opposition to the bill, insisting that BLM's planning process did not aim to expand federal holdings along the Red River, but was "intended to identify, with certainty, and propose management alternatives for lands which fall within the public domain."[145] According to Ellis, the Administration opposed the bill's requirement that BLM "transfer what may be public lands out of federal ownership without ensuring a fair return to the U.S. taxpayer."[146] The White House indicated that President Obama was likely to veto the Red River Property Protection Act, claiming that it "would require the Secretary to delegate her authority for determining Federal estate to a state agency, would be counter to nearly 100 years of settled law, and could reduce mineral revenue opportunities for the Kiowa, Comanche, and Apache Tribes and the State of Oklahoma."[147] After being reported by the Committee, no further action was taken in the House.

A revised version of the Red River Private Property Protection Act was introduced again in the House and Senate in 2015.[148] The new bill would require BLM to commission a survey along the 116-mile stretch of the Red River using the gradient boundary survey

---

143. Red River Private Property Protection Act, H.R. 4979, 113th Cong. (2014).

144. *Id.* at 1.

145. *Red River Private Property Protection Act Hearing on H.R. 4979 Before the Subcomm. On Pub. Lands and Env't Reg. of the H. Nat. Resources Comm.*, 113th Cong. 2 (2014) (testimony of Steve Ellis, Deputy Director, Bureau of Land Management, Department of the Interior).

146. *Id.* at 4.

147. *Barack Obama: Statement of Administration Policy: H.R. 2130 - Red River Private Property Protection Act*, AM. PRESIDENCY PROJECT (Dec. 8, 2015), http://www.presidency.ucsb.edu/ws/index.php?pid=111332.

148. Red River Private Property Protection Act, H.R. 2130, 114th Cong. and S. 1153 (2015).

method to be conducted by licensed State Land Surveyors approved by the Texas General Land Office and the Oklahoma Commissioners of the Land Office—but not BLM.[149] Federal lands identified by the survey would be excluded from BLM's new RMP, and BLM would be required to sell the surface rights of federal lands at fair market value.[150] The bill passed the House 253-177, but died when the Senate failed to act on it, facing a likely filibuster or veto.[151]

As the Red River controversy played out in the courts and the Congress, the national political landscape shifted dramatically in 2016 with the election of Donald Trump as president and his appointment of Republican Montana congressman Ryan Zinke as Secretary of Interior, who was sworn in on March 1, 2017.[152] On March 29, 2017, BLM issued a memorandum announcing a suspension of the contested 2009 surveys along the Red River.[153] BLM declared that the surveys had used incorrect methodology by failing to appropriately consider the doctrines of erosion, accretion, and avulsion, which may have caused errors in identifying the location of the south bank gradient boundary.[154] According to the BLM memo, the suspension of the surveys barred any BLM action based on those surveys.[155] Texas Attorney General Ken Paxton, credited the Trump Administration for the action: "This latest action by the Trump administration protects the property rights of Texans as defined by the U.S. Supreme Court and prevents the federal government from infringing upon Texas' sovereign borders."[156] Organized interests that advocate for livestock grazing interests and private property rights also praised the BLM decision.[157]

In the new 115th Congress, the House passed another version of the Red River Private Property Protection Act, now named the Red

149. *Id.*

150. *Id.*

151. *H.R. 2130: Red River Private Property Protection Act*, GOVTRACK, https://www.govtrack.us/congress/votes/114-2015/h686 (last visited Apr. 25, 2018).

152. *Ryan Zinke Sworn in as 52nd Secretary of the Interior*, U.S. DEP'T OF THE INTERIOR (Mar. 7, 2017), https://www.doi.gov/pressreleases/ryan-zinke-sworn-52nd-secretary-interior.

153. Memorandum from Stephen Beyerling, Chief Cadastral Surveyor to State Director of New Mexico State Director (Mar. 29, 2017) https://thornberry.app.box.com/v/BLM-Letter/file/155890404958.

154. *Id.* Notice of the suspension of the surveys was published in the Federal Register. Notice of Filing of Plat Survey, Oklahoma, Suspended, 82 Fed. Reg. 35236 (July 28, 2017).

155. *Id.*

156. *AG Paxton: Suspension of BLM Red River Surveys is a Win for Texas*, ATTORNEY GENERAL OF TEXAS KEN PAXTON (Apr. 17, 2017), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-suspension-of-blm-red-river-surveys-is-a-win-for-texas.

157. *Texas Farm Bureau applauds BLM suspension of Red River surveys*, TEX. FARM BUREAU, (Apr. 6, 2017), http://media.texasfarmbureau.org/texas-farm-bureau-applauds-blm-suspension-of-red-river-surveys/.

River Gradient Boundary Survey Act.[158] However, back in court, the BLM continued to prepare for trial. In response to plaintiffs' motion for partial summary judgment, BLM argued that given the suspension of the disputed 2009 surveys, plaintiffs' challenge to these surveys "is now moot."[159] BLM agreed with the plaintiffs that "any identification of the gradient boundary must necessarily account for the riparian doctrines of accretion, erosion, and avulsion."[160] Nevertheless, BLM asserted that the boundary between private and public lands was still in dispute and that the plaintiffs bear the burden of proving the location of the boundary between their lands and the public's lands under the QTA.[161]

In response to plaintiffs' motion that included a picture showing that the area BLM claimed as the river bed was covered in mature vegetation, BLM argued that the legal determination of the boundary between the bed and the bank—and therefore between the private and public land—was contingent on a close examination of the river's ecology.[162] BLM agreed that the bed is generally kept "practically bare of vegetation."[163] However, the BLM also asserted that the river bed may now be covered in vegetation since,

> there have been changes to the type of vegetation present on the river, including the introduction of invasive species such as Salt Cedar that have affected the appearance of the bed, including as a result of its tendency to survive in [a] water-rich environment and its impact as a wind-block.[164]

In response to plaintiffs' argument that the bank of the river should be located at the water's edge, BLM claimed that the law recognizes that the river's flow does not always need to "wash both banks," but only does so when it is at "substantial volume."[165]

---

158. Red River Gradient Survey Act, HR 428, 115th Cong. (2017). House passage of the Red River Gradient Boundary Survey Act was supported and applauded by the livestock lobby. *Texas Cattle Raisers Commend US House for Passing Bill in Support of Red River Landowners*, TEX. AND SW CATTLE RAISERS ASS'N, (Feb. 15, 2017), http://tscra.org/texas-cattle-raisers-commend-us-house-for-passing-bill-in-support-of-red-river-landowners/; *Cattlemen Applaud Bipartisan House Passage of Red River Bill*, NAT'L CATTLEMEN'S BEEF ASS'N AND PUB. LANDS COUNCIL, (Feb. 14, 2017), https://www.beefusa.org/newsreleases1.aspx?NewsID=6199.

159. Defendants' Memorandum in Support of Response to Plaintiffs' Motion for Partial Summary Judgment at 18, Aderholt v. Bureau of Land Mgmt., (N.D. Tex. June 29, 2016) (No. 7:15-CV-00162-O).

160. *Id*. at 23.

161. *Id*. at 24.

162. *Id*. at 27–28.

163. *Id*. at 27.

164. *Id*.

165. *Id*. at 29.

On the eve of the September 2017 trial, BLM offered a settlement, and in November 2017 the District Court accepted the Settlement Agreement.[166] The parties agreed that the boundary between the plaintiffs' property and public lands is the south bank of the Red River described in *Oklahoma v. Texas* (1925) as "the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed," and that its actual location is to be determined using the gradient boundary survey method approved by the Court in that case.[167] The parties also agreed that the location of the boundary changes as the river moves through the processes of erosion, accretion, and avulsion: "where a boundary bank is changed by these processes, the boundary, whether private or public, follows the change."[168] BLM agreed to cancel the portion of field notes and plats for the suspended 2009 surveys that had located the south bank of the Red River on property claimed by the plaintiffs and to disclaim the June 2014 planning map that had similarly located the south bank.[169] The agreement did not resolve the actual geographic location of the south bank boundary between the plaintiffs' and the public's property, and it did not preclude BLM from preparing any future survey to establish the location of public lands along the Red River as part of the process for developing a new RMP as required by FLPMA.[170]

V. ANALYSIS

Statutes like FLPMA, federal regulations and RMPs promulgated by BLM to implement the statute, and decisions issued by the federal courts provide details regarding the federal policies that created and resolved the legal conflicts along the Red River. However, the process through which federal policies get made and re-made, the process through which public lands policies evolve and make impacts in specific instances, including in the controversies litigated in *Aderholt v. BLM*, is rooted in the interaction of political and natural landscapes. The "centralized bureaucracy in Washington, DC" decried by its critics does have policymaking power—but its force and effect varies on the ground.[171]

---

166. Order, *supra*, note 141, at 1.

167. Settlement Agreement at 6–7, Aderholt v. Bureau of Land Mgmt., (N.D. Tex. June 29, 2016) (No. 7:15-CV-00162-O).

168. *Id*.

169. *Id*. at 7–8.

170. *Id*. at 8.

171. Adam M. Sowards, *Sometimes, It Takes a Table*, 23 ENVTL. HIST. 143, 147–48 (2018).

The natural landscape peculiar to the stretch of the Red River contested in *Aderholt v. BLM* shaped the legal dispute and its outcome. How much and the way the river flows and changes the location of its banks through erosion and accretion were factors in determining legal property boundaries. Whether and how a water-washed "cut bank," a "wheat field bank," a "geologic bank," or a vegetation line could and should be identified, and whether the river bed is bare of vegetation or is covered in vegetation were also factors in the legal clash.

The political landscape—that is, the substance of federal laws, their interpretation by federal agencies and courts, the power and actions of federal, state, and local officials, and the political capabilities of private citizens and organized interests—from Austin to North Texas to Washington, DC also shaped how policymaking played out along the Red River. Federal law requires the BLM to develop and revise land use plans that use the principles of multiple use and sustained yield and integrate physical, biological, economic, and other sciences.[172] Federal law also mandates that BLM ascertain the boundaries of the public lands, provide the public with a means for identifying them, and provide state and local governments with data for the purpose of planning and regulating the uses of non-federal lands in the proximity of federal lands.[173] Yet, BLM has discretion "to plan when, where, and how it chooses," and it has generally given low priority to planning, including along this stretch of the Red River.[174] BLM's 1994 RMP for the Red River Management Area laid out multiple land management alternate scenarios, none of which it pursued for decades.[175] The federal policy during the 1990s was, in effect, a combination of indifference and deference to the status quo in which private landowners in Texas held title to and made use of lands to the customarily-recognized location of the south bank of the Red River.

The Aderholt lawsuit filed against BLM was triggered when the political and policy landscape changed. BLM surveys conducted in 2004 and 2009 indicated that BLM might now identify anywhere from several thousand acres and up to 90,000 acres in Texas as public lands. In 2014 congressional testimony, Steve Ellis, Deputy Director of the BLM said:

---

172. 43 U.S.C. § 1712 (2012). Public land policy decisions, then, are informed by biology, anthropology, archaeology, sociology, and economics, among other natural and social sciences.

173. *Id.* § 1711.

174. ROBERT L. GLICKSMAN AND GEORGE CAMERON COGGINS, MODERN PUBLIC LAND LAW 257, 262 (Thomson West 3d ed.2006) (1995).

175. OKLAHOMA RESOURCE MANAGEMENT PLAN, *supra* note 103.

> The current work underway by the BLM through its resource management planning process is intended to identify, with certainty, and propose management alternatives for lands which fall within the public domain . . . The BLM estimates approximately 30,000 acres of public lands exist along the Red River between the North Fork of the river and the 98th Meridian.[176]

Ellis, a career BLM employee, has been described as "a subtle but influential player as BLM continues a major culture shift, one that tries to place resource conservation on par with extraction."[177] BLM, as much as any federal agency, is subject to periodic "culture shifts" as partisan control of the executive branch shifts.[178] But its evolutionary drift, not just in Washington, D.C., but in state field offices across the west, has been in the direction of giving more weight to conservation and preservation values in balancing multiple uses in land management plans.[179] In 2003, former Interior Secretary Bruce Babbitt wrote:

> My hope is that, by endowing the BLM with a high-profile conservation mission, the old bureaucratic mule will awaken to a new future as environmental steward right up there with the National Park Service and the National Wildlife Refuge System. The day is coming, I believe, when the BLM, so often stereotyped and dismissed as the Bureau of Livestock and Mining, will be better known as the Bureau of Landscapes and Monuments.[180]

By 2014, BLM was asserting that the 2000 Red River Boundary Compact that established the Texas-Oklahoma border along a moving vegetation line south of the Red River meant that

---

176. *Red River Private Property Protection Act Hearing on H.R. 4979 Before the Subcomm. On Pub. Lands and Env't Reg. of the H. Nat. Resources Comm.*, 113th Cong. 2 (2014).

177. Phil Taylor, *The Man Who's Got BLM's Back*, E&E NEWS, (Mar. 23, 2016), https://www.eenews.net/stories/1060034406.

178. *See* JAMES R. SKILLEN, THE NATION'S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST (2009).

179. Adam M. Sowards, *Inside the Fight to Undo BLM's Planning Overhaul*, HIGH COUNTRY NEWS (Feb. 22, 2017), http://www.hcn.org/articles/in-latest-skirmish-of-land-wars-congress-supports-mining-and-ranching. The "drift" of the BLM has been fitful and not uniform across the decentralized bureaucracy. *See also* PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT (2011).

180. Bruce Babbitt, *The Heart of the West: BLM's National Landscape Conservation System*, *in* MICHAEL P. DOMBECK, ET AL., FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 101 (2003).

the United States may own lands in Texas that were formerly in Oklahoma.[181] BLM was also claiming that these public lands that may be in Texas possess oil and gas reserves, livestock forage, and "significant riparian and wildlife resource values" that may be subject to BLM management directives.[182]

BLM's apparent "culture shift," its new survey and planning actions, and its new interpretation of previous legal guidance on locating the public-private land boundary on the Red River sent shockwaves across the Texas political landscape and provoked public, legislative, and legal responses from the wielders of political influence in the state. Texas's U.S. Senators and Representatives, the Texas Governor, Attorney General, other statewide elected officials, county officials, and organized interests issued public statements through the press denouncing the "land grab."[183] Along the river, local activists organized public protests targeting federal officials and policies.[184] In Washington, Texas representatives introduced bills to strip BLM of authority to determine the location of public lands on the Red River and move it to the states.[185] Back in North Texas, private property rights advocates, led by the Texas Public Policy Foundation, sought a court ruling to block BLM's actions.

The BLM and Department of Justice (DOJ) responded forcefully in federal court and sought to continue efforts to identify and map public lands along the Red River for inclusion in BLM management plans. A federal judge in Wichita Falls gave Texas land owners access to judicial remedies, but also gave federal employees armed access to owners' lands as part of the legal discovery process.[186] And yet, as a federal trial approached, it was not clear whether federal policymakers pushing to expand BLM management control over Red River resources or the local, landowner and government resistance would prevail in court.

---

181. *Bureau of Land Management Frequently Asked Questions Regarding the History of Public Domain Land in the Red River Area, Land Use Planning, and Management Authorities*, BUREAU OF LAND MGMT. 2 (May 2014), https://eplanning.blm.gov/epl-front-office/projects/lup/72142/96125/116179/FAQs_w_BLM_&_SOL_edits_05.24.14.pdf.

182. *Id*. at 3.

183. Price, *supra* note 118.

184. *See* Poster, Gathering of the American Patriot (May 24, 2014) (available at http://comeandtakeitamerica.com/wp-content/uploads/2014/05/poster.jpg) (advertising a public protest against the BLM's "Land Grab").

185. Red River Private Property Protection Act, H.R. 2130, 114th Cong. The movement in some western states to push management authority or ownership of federal lands to the states has spanned decades and has continued into the Trump Administration. *See* John Freemuth et al., *Should Federal Lands be Transferred to Western States?* 36 PROP. AND ENVTL. RESEARCH CTR.: PERC REPORTS 1, (July 27, 2017), https://www.perc.org/articles/should-federal-lands-be-transferred-western-states.

186. Order, *supra* note 141, at 8.

The presidential election suddenly reshaped the political landscape in the executive branch, prompting a reversal in the position of the BLM and delivering an apparent policy victory to the local political forces in Texas that had held their ground along the Red River. Texas officials and activists claimed credit for the victory and recognized the actions by the Trump Administration. Texas Land Commissioner George P. Bush said, "I applaud President Donald Trump's administration for withdrawing the previous administration's false claim to private land."[187] Texas Attorney General Ken Paxton said, "The Obama Administration's efforts to take from Texas tens of thousands of acres of our land failed, and we are grateful to the Trump Administration for finally removing this impermissible infringement upon Texas' sovereign borders."[188]

The influence of local political forces on federal public lands policies on the Red River is characteristic of the public lands policymaking process across the west. Federal statutes that govern BLM's public lands management process—FLPMA, NEPA, and APA, among others—empower local governments and organized interests to shape the impact of policies in their region. The integration of public comment, consultation, and judicial review into decision making enhances the role of local governments, organized interests, and activist citizens, even as it often turns policymaking into a contentious and drawn out process.[189] The requirement that RMPs be periodically revised also means that there is rarely finality to public lands policymaking. The changing cast of public officials and private interests over time—the evolution of the political landscape—means that policy is likely to evolve over time as well, sometimes through the adversarial legal process, occasionally through the legislative process, and

187. *Cmr. George P. Bush Announces Successful Settlement of Red River BLM Lawsuit*, TEX. GEN. LAND OFFICE (Nov. 8, 2017), http://www.glo.texas.gov/the-glo/news/press-releases/2017/november/cmr-george-p-bush-announces-successful-settlement-of-red-river-blm-lawsuit.html.

188. Robert Henneke, *Texas Parties Win in Red River Private Property Rights Lawsuit*, TEX. PUB. POLICY FOUND., (Nov. 8, 2017), https://www.texaspolicy.com/press_release/detail/texas-parties-win-in-red-river-private-property-rights-lawsuit.

189. Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1150 (2005). While state and local governments have a formal role and influence in the public lands planning process, their efforts to pre-empt federal policy has typically failed. *See* Michael C. Blumm & James A. Fraser, *"Coordinating" with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands*, 38 PUB. LAND & RESOURCES L. REV. 1 (2017). Regarding the contentious nature of the participatory process, historian Adam Sowards writes: "In the last several decades, conversations about our national forests, parks, rangelands, and refuges have become more contentious, in part because they included constituencies broader than a managerial elite and self-interested commodity users that existed in a golden age those very groups remember and often pine for." Sowards, *supra* note 171, at 144.

sometimes through a collaborative process that emerges in the confluence of particular political and natural landscapes.[190]

The public lands policymaking process is not mechanics, engineering or science. It is political, but it operates in an ecological or organic fashion that provokes criticism from multiple angles—about the overly powerful administrative state or about the capture of regulatory agencies by the regulated interests.[191] Both criticisms are often true. But across the public lands-scape, the policymaking process usually opens access for local interests and local landscapes to influence policies, and for those policies to be revised over time. Along the 166 miles of Red River banks in north Texas, multiple interests, institutions, and values collided to produce the policy outcome of *Aderholt v. BLM*.

VI. CONCLUSION

In the federal policymaking process along the Red River regarding the location and management of public lands, Washington—legislators, bureaucrats, presidents, and Supreme Court justices—mattered. Federal legislation empowered a federal agency to identify and manage public lands, and federal treaties and Supreme Court cases located public lands in the bed of the Red River. The management discretion delegated by Congress to the executive branch allowed successive presidential administrations to decide the extent to which they would defer to the status quo on the ground in Texas or challenge it. Despite the fact that BLM's inclination in the 2010s to identify more lands in Texas as public lands and its subsequent policy reversal were shaped by Washington politics, the outcome of public lands policymaking was not dictated purely by a centralized federal bureaucracy. Texas mattered—its federal, state, and local officials, its organized interests, its public advocates, and its private citizens played a role in reaffirming a recognized legal boundary between private and public lands.

For the moment, the issues contested in *Aderholt v. BLM* appear to be settled. However, an RMP for the Red River public lands is still to be written or revised and the boundary between

---

190. For example, see the agreements among federal agencies, state governments, tribes, environmental organizations, and agriculture and fishing interests regarding water allocation and dam removal in the Klamath Basin. *See* Mary Milner, *Water Law Meets Participatory Democracy: A Klamath Basin Example*, 30 J. ENVTL. L. & LITIG. 87 (2015).

191. For criticism of the power of the administrative, see Christopher DeMuth; *Can the Administrative State be Tamed?*, 8 J. OF LEGAL ANALYSIS 121, 174 (June 2016). For discussion of the capture of agencies by regulated interests, see Sidney A. Shapiro, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe: The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 235–236 (2012).

public and private lands is still potentially tied to an actual survey of the river's banks. The Red River between its North Fork and the 98th meridian will continue to flow across the landscape and move political boundaries. Whether the public lands that are in its bed will move with that flow will depend on how the political landscape shifts with the natural landscape.