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

KENNETH ADERHOLT et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT et al.,

Defendants.

Civ. No. 7:15-CV-000162-O

DEFENDANTS' DRAFT SETTLEMENT AGREEMENT

Plaintiffs Kenneth Aderholt et al., ("Plaintiffs"), Plaintiff-Intervenor the Texas General Land Office ("GLO"), and defendants Bureau of Land Management ("Defendants") ("the Parties") have reached an agreement to resolve this case *Aderholt v. Bureau of Land Mgmt.*, 7:15-CV-0162-O, with the Parties agreeing to undertake and perform the measures set forth in this stipulated Settlement Agreement ("Agreement").

WHEREAS, Plaintiffs filed a complaint in this, the above-captioned case ("this Case") on November 16, 2015 (ECF No. 1), and an amended complaint on February 9, 2016 (ECF No. 40);

WHEREAS, Plaintiffs' amended complaint asserted seven counts against Defendants, including two claims by plaintiffs Aderholt, Canan, Hunter, Jackson, Lalk, Patton, and Smith (the "Individual Plaintiffs") under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a (Counts One and Two), one claim by plaintiffs Clay, Wichita, and Wilbarger Counties (the "County Plaintiffs") under the QTA; (Count Three); a claim by the County Plaintiffs seeking declaratory, mandamus, and injunctive relief alleging unlawful and unconstitutional actions (Count Four); a claim by all Plaintiffs seeking declaratory, injunctive, and mandamus relief to determine proper

14

survey standards (Count Five); a claim by plaintiff Clay County Sheriff Lemons seeking declaratory, injunctive, and mandamus relief (Count Six); a claim by all Plaintiffs asserting violations of the Due Process Clause of the Fifth Amendment (Count Seven); and a claim by the Individual Plaintiffs alleging violations of the Fourth Amendment (Count Eight);

WHEREAS, on March 30, 2016, the GLO's Original Intervenor Complaint ("GLO's Complaint") was filed, ECF No. 57;

WHEREAS, the GLO's Complaint asserted one claim against Defendants under the QTA ("GLO's Claim");

WHEREAS, on June 29, 2016, the Court dismissed Counts Three and Seven, ECF No. 86;

WHEREAS, the Parties have filed cross-motions for summary judgment and partial summary judgment addressing the remaining Counts, which motions were fully briefed as of July 12, 2017;

WHEREAS, this matter is set for trial on the Court's four-week docket beginning on September 25, 2017;

WHEREAS, issues raised in Plaintiffs' and the GLO's claims include the location of the boundary between lands they claim abutting the Red River and lands owned by the United States and Indian allottees that comprise the bed of the Red River;

WHEREAS, BLM performed three surveys at the request of the Bureau of Indian Affairs ("BIA") to identify the boundaries of certain individual Indian allotments located north of the medial line of the Red River, including an official cadastral survey and resurvey in Townships 5 and 6 South, Range 12 West of the Indian Meridian, Oklahoma, accepted May 8, 2009, for Group 85 OK; a dependent resurvey and survey in Township 5 South, Range 13 West, of the

Indian Meridian, accepted September 24, 2009, for Group 80 OK; and a dependent resurvey and survey, in Township 5 South, Range 15 West, of the Indian Meridian, accepted September 24, 2009, for Group 82 OK. *See* 74 Fed. Reg. 28061-62 (June 12, 2009); 75 Fed. Reg. 8738 (Feb. 25, 2010);

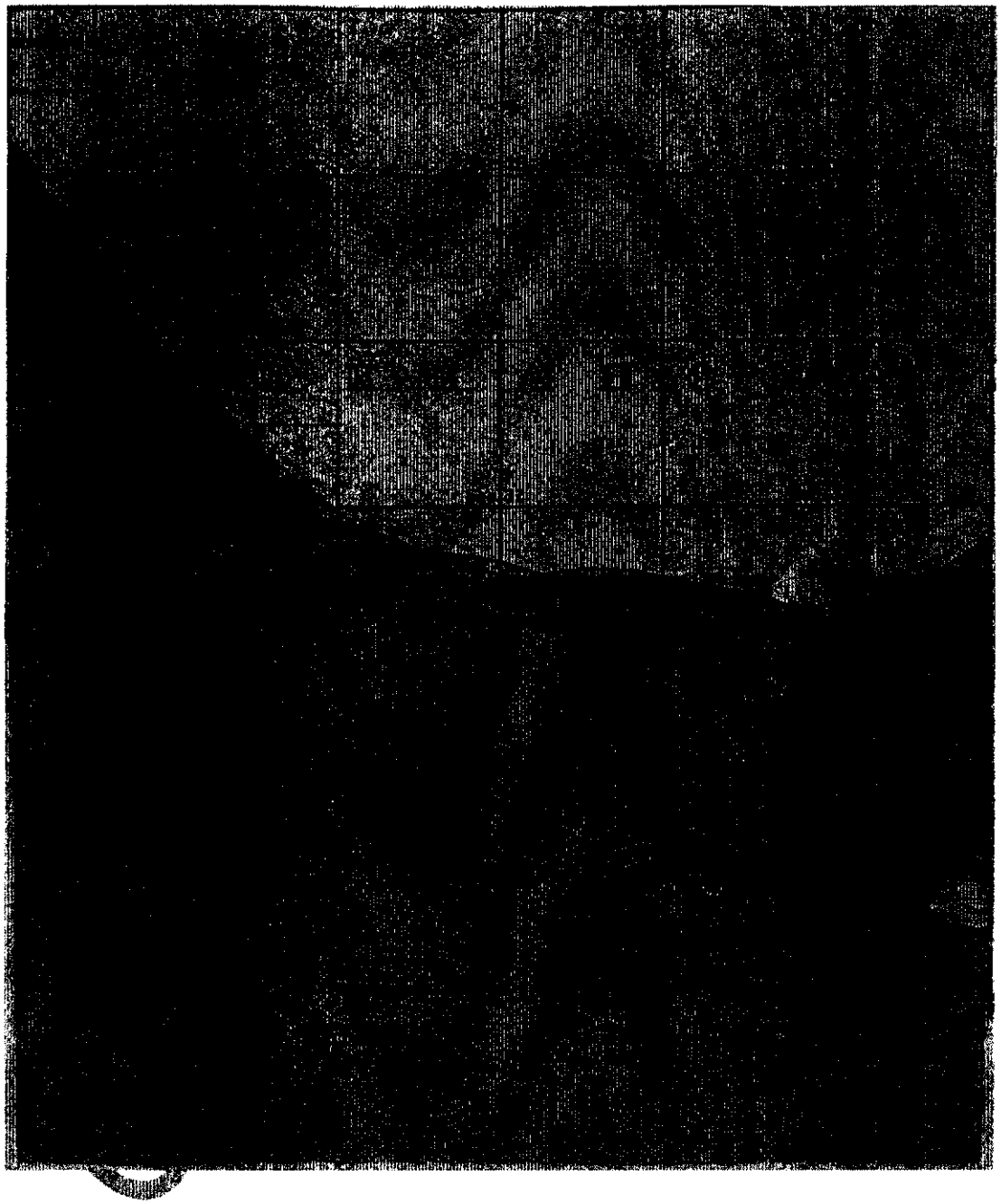
WHEREAS, BLM has now suspended these three surveys (hereinafter the "Suspended Surveys") based on its belief that "the survey methodology used was in error," because the surveyor failed to account for the doctrines of erosion, accretion, and avulsion; ECF No. 168-1 at 1;

WHEREAS, as part of its initiation of a resource management plan revision, BLM prepared a map dated June 2, 2014 (hereinafter "2014 map"), using GIS information, which included an informal estimate of potential federal lands to be addressed in that process, which 2014 map was attached to Plaintiffs' Amended Complaint as Exhibit K, and BLM prepared subsequent maps, which included informal estimates of potential federal lands to be addressed in that process;

WHEREAS, Defendants do not know the present location of the boundary between the United States' and Indian allottees' property and the lands claimed by Plaintiffs and the GLO;

WHEREAS, no parties dispute that the Supreme Court's use of the term 'accretion' includes both 'accretion by alluvium' and 'accretion by reliction';

WHEREAS, the Kidder and Stiles 1925 Third Report of the Boundary of Commissioners discussed Gilbert Creek and McFarland Island in Wichita County, found that there had been an avulsive event in the McFarland Island area, and accordingly, established and marked the boundary line on and along the north cut-bank of McFarland Island, as shown below:



WHEREAS, the Parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiffs' and the GLO's claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of this Case; and

WHEREAS, the Parties believe that it is in the interests of the public, the Parties, and judicial economy to resolve the claims in this Case without additional litigation;

NOW, THEREFORE, the Parties stipulate and agree to the following:

I. SCOPE OF AGREEMENT

1. This Agreement shall constitute a complete and final settlement of all of Plaintiffs' and the GLO's claims alleged in this Case.

2. This Agreement shall not (and shall not be construed to) limit or modify the discretion accorded to Defendants by the Federal Land Policy and Management Act ("FLPMA"), the Administrative Procedure Act ("APA"), or general principles of administrative law with respect to the procedures to be followed in undertaking the actions required herein, or as to the substance of any final determination. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take any action in contravention of the FLPMA, the APA, or any other law or regulation, either substantive or procedural.

3. This Agreement in no way affects the rights of the United States as against any person or entity not a party hereto.

4. This Agreement in no way affects the rights of any federally recognized Indian tribe or Indian allottee.

5. This Agreement is for the purpose of settling litigation and nothing in this Agreement shall be deemed a precedent or constitute an admission of fact or law by any party. This Agreement shall not be used or admitted against any of the Parties to this Agreement in any proceeding except as authorized under Rule 408 of the Federal Rules of Evidence.

6. It is hereby expressly understood and agreed that the Parties jointly drafted this Agreement. Accordingly, the Parties hereby agree that any and all rules of construction to the

effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

7. This Agreement shall be governed by and construed under federal law.

8. This Agreement contains all of the agreements between the Parties, and is intended to be and is the final and sole agreement between the Parties concerning the complete and final resolution of Plaintiffs' and the GLO's causes of action in the Case. The Parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this Agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this Agreement must be in writing, and must be signed and executed by or on behalf of the Parties.

9. The provisions of this Agreement shall apply to and be binding upon each of the Parties.

II. SPECIFIC PROVISIONS

Agreements as to Application of *Oklahoma v. Texas* to the location of the boundary:

10. The Parties agree that the northern boundary of private property along the Red River within Wilbarger, Wichita, and Clay counties, Texas, is governed by the Opinion of the Supreme Court defining the boundary in *Oklahoma v. Texas*, 260 U.S. 606 (1923), and the gradient boundary methodology the Court approved in *Oklahoma v. Texas*, 265 U.S. 493 and 265 U.S.500 (1924), subject, however, to all other applicable provisions of riparian law

11. The Parties agree that under *Oklahoma v. Texas*, and subject to applicable provisions of riparian law, the geographic location of this boundary may change, for instance, based on the principles of erosion and accretion. 260 U.S. at 636. The Parties agree that "where a boundary bank is changed by these processes, the boundary, whether private or public, follows

the change." *Oklahoma v. Texas*, 268 U.S. 252, 256 (1925).

12. The Parties agree that the south bank of the Red River is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed, as the phrases "outer line" and "river bed" are discussed in *Oklahoma v. Texas*, 260 U.S. 606, 628-33 (1923).

13. Notwithstanding the foregoing, this Agreement does not comprise the Parties' resolution of the geographic location of the boundary, but comprises their agreement that the BLM, in preparing any future survey or resurvey addressing the southern boundary of federal public lands comprising the southern half of the bed of the Red River, will apply the principles set forth in paragraphs 10 through 12, subject to any change in governing law. Any judicial challenge to such future survey must be brought in a separate lawsuit, supported by an independent waiver of sovereign immunity such as 28 U.S.C. § 2409a(a) or 5 U.S.C. § 702, and subject to any applicable limitations on judicial review, including those limitations under the Section 2409a(a) of the QTA for challenges to trust or restricted Indian lands.

Discrete Undertakings

14. Within thirty (30) days of the Court approving this settlement, Defendants will cancel the portion of the field notes and the plats for the Suspended Surveys that identify the boundary on the southern bank of the Red River and any medial line for the Suspended Surveys (*see* BLM Manual of Surveying Instructions 9-35; 9-87). As a result of such cancellation, the survey monuments identifying the medial line, the southern bank, or the Texas/Oklahoma state boundary associated with such surveys are void but remain subject to 18 U.S.C. § 1858. Nothing in this paragraph prevents BLM from undertaking a resurvey or new survey of the same boundary lines, and BLM may request access from Plaintiffs to undertake a survey or resurvey of the boundary. Neither this agreement nor Plaintiffs' agreement to consider to allow BLM access

in this paragraph creates for or conveys to the BLM any right or interest in Plaintiffs' or the GLO's property (e.g., no easement or right of way is created or conveyed). Any challenge to such resurvey or new survey must be in the form of an administrative protest or a separate lawsuit, the latter of which must be supported by an independent waiver of sovereign immunity such as 28 U.S.C. § 2409a(a) or 5 U.S.C. § 702, and will be subject to any applicable limitations on judicial review in a separate lawsuit.

15. Within 30 days of the Court approving this settlement, Defendants will post a statement on BLM's website disclaiming that the June 2014 Map (or Exhibit K) represents the BLM's determination of the southern boundary of the federal lands comprising the southern half of the bed of the Red River abutting the counties of Clay, Wichita, and Wilbarger Counties, Texas.

16. Nothing in Paragraph 15 prevents BLM from using the June 2014 Map or similar maps in ongoing planning activities, as long as any such map includes the statement that "This map does not represent the BLM's determination of the southern boundary of the federal lands comprising the southern half of the bed of the Red River abutting the counties of Clay, Wichita, and Wilbarger Counties, Texas. BLM has not determined the location of this boundary" or a substantially similar statement.

17. Within forty-five (45) days of the Court approving this Agreement, the Parties will file a joint stipulation, consistent with the joint dismissal attached hereto, dismissing all remaining claims, unless Plaintiffs have filed a motion seeking an order compelling compliance with Paragraphs 14 and 15 under Paragraph 22 below, or the GLO has filed a motion seeking an order compelling compliance with Paragraph 15 under Paragraph 22 below, in which case the Parties will file such joint dismissal within fourteen (14) days following the Court's resolution of

Plaintiffs' and/or the GLO's motion, and completion of any action required under the Court's resolution of such motion. The Parties agree that such dismissal will be with prejudice, except that it shall be without prejudice to Plaintiffs or the GLO asserting any claims as to any future survey or resurvey, or any claim under the QTA asserted on the basis of any action taken by Defendants after the effective date of this Agreement.

III. SAVINGS PROVISIONS

18. Nothing in the terms of this Agreement shall be construed to limit, expand, or otherwise modify the authority accorded to Defendants under the United States Constitution, any statute or regulation, or by general principles of administrative law.

19. The obligations imposed upon Defendants under this Agreement can only be undertaken using appropriated funds. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that Defendants are obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. §1341, or any other appropriations law.

IV. EFFECTIVE DATE, REMEDIES, AND RELEASES

20. This Agreement shall be filed with the Court, along with a proposed order of dismissal that will incorporate the terms of this Agreement.

21. This Agreement shall become effective on the date upon which the Court approves the Agreement. If the Court does not approve the Agreement as submitted, this Agreement is voidable by either party.

22. If Defendants fail to comply with their obligations under Paragraphs 14, Plaintiffs are entitled to move the Court for an order mandating compliance with Paragraphs. If Defendants fail to comply with their obligations under Paragraph 15, Plaintiffs and the GLO are entitled to

move the Court for an order mandating compliance with Paragraph 15. The Parties agree that otherwise, Plaintiffs and the GLO's sole remedy for any breach of this Agreement is to bring a separate lawsuit, which must be supported by an independent waiver of sovereign immunity such as 28 U.S.C. § 2409a(a) or 5 U.S.C. § 702, subject to any applicable limitations on judicial review in a separate lawsuit.

V. FEES AND COSTS

23. Plaintiffs reserve the right to seek fees and costs under applicable law, including the Equal Access to Justice Act ("EAJA"), 24 U.S.C. § 2412. Defendants retain all defenses to any such claim. VI. SIGNATURE OF PARTIES

24. The Parties represent that the persons executing the Settlement Agreement on each Party's behalf have been duly authorized by all necessary and appropriate action to enter into this Settlement Agreement.

SO STIPULATED

Kenneth Liggett

From: Robert Henneke <rhenneke@texaspolicy.com>
Sent: Wednesday, September 20, 2017 12:14 PM
To: Greg Tyra (countyjudge@co.wilbarger.tx.us); Kenneth Liggitt (ccjudge@claycountytx.com); Lee Harvey (lee.harvey@co.wichita.tx.us); Woodrow Gossom
Cc: Austin Curry; Yvonne Simental; Erin Wilcox; Meredith Kennedy
Subject: draft settlement agreement for Commissioners Court approval
Attachments: BLM Red River Settlement Agreement.pdf

Dear Judges Gossom, Tyra, and Liggett and Commissioner Harvey,

After this morning's hearing, the settlement proposal appears far enough along that the next step is for each of your counties to consider approval of the attached final settlement draft. Counsel for DOJ told the Court today that they recommended approval of the attached and have already submitted it to start the DOJ approval process, which may take 4-6 weeks. DOJ has been ordered to file a Status Update with the Court in 14 days, at which time we would like to notify the Court that we have full and complete approval on our end.

Attached is the final draft of the Settlement Agreement for your consideration and approval. I am not able to appear in person, but I am available to answer any questions and discuss with your Commissioners Court members via phone in executive session or otherwise if you'd like. I will be on standby and available on my cell phone (512) 791-2037.

For your consideration, the following is a draft agenda notice that you may wish to use in posting this:

+ Consider, discuss, and take appropriate action to approve Settlement Agreement in the matter of *Aderholt, et. al. v. Bureau of Land Management, et. al.*, Cause No. 15-CV-000162; In the United States District Court for the Northern District of Texas – Wichita Falls Division and authorize counsel to execute.

Of course, I understand that Commissioners Court approval of the attached will make the document public. However, while the same is pending DOJ approval, I would recommend that we withhold comment to the media or much public discussion until this is locked in and final.

Please send me a copy of the Order approving, and let me know if you have any questions in the interim. Thank you,

Rob
(512) 791-2037 (cell)

++++++++++++++++++++

Robert Henneke

General Counsel &

Director, Center for the American Future

Texas Public Policy Foundation

901 Congress Avenue

Austin, Texas 78701

(512) 472-2700 (o)

rhenneke@texaspolicy.com

www.americanfuture.com

facebook.com/centerfortheamericanfuture

@robhenneke