

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

KENNETH ADERHOLT, PATRICK CANAN, §  
KEVIN HUNTER, RONALD JACKSON, §  
WILLIAM LALK, KENNETH PATTON, §  
BARBARA PATTON, JIMMY SMITH, §  
KENNETH LEMONS, JR., in his official §  
capacity as Clay County Sheriff, WICHITA §  
COUNTY, TEXAS, CLAY COUNTY, §  
TEXAS, and WILBARGER COUNTY, TEXAS, §

Plaintiffs, §

v. §

BUREAU OF LAND MANAGEMENT, NEIL §  
KORNZE, in his official capacity as director, §  
Bureau of Land Management, UNITED §  
STATES DEPARTMENT OF THE §  
INTERIOR, SALLY JEWELL, in her official §  
capacity as Secretary of the Interior, and §  
UNITED STATES OF AMERICA, §

Defendants. §

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

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GEORGE P. BUSH, COMMISSIONER of the §  
GENERAL LAND OFFICE of the STATE §  
of TEXAS, §

Plaintiff-Intervenor. §

**GLO’S COMPLAINT IN INTERVENTION**

GEORGE P. BUSH, the Commissioner of the General Land Office of the State of Texas (hereinafter “Commissioner Bush” and the “GLO”), Plaintiff-Intervenor in this action, joins this suit challenging the federal government’s unconstitutional and arbitrary seizure and taking of Texas public school land along the Red River, and complains as follows:

### **Plaintiff-Intervenor**

1. Texas constitutionally dedicates its public school land to the Permanent School Fund, which is maintained for the benefit of the public school children of the State of Texas. All proceeds that the State of Texas receives from its ownership of mineral interests in sold public school lands flow to the Permanent School Fund. Commissioner Bush and the GLO are constitutionally charged with the sacred and solemn responsibility to maximize revenues from Texas public school lands. The BLM has unlawfully taken Texas public school land for which the GLO hereby seeks relief.

### **Other Plaintiffs**

2. The current plaintiffs in this action are Plaintiffs Kenneth Aderholt, Patrick Canan, Kevin Hunter, Ronald Jackson, William Lalk, Kenneth Patton, Barbara Patton, Jimmy Smith, Kenneth Lemons, Jr., in his official capacity as Clay County Sheriff, Wichita County, Texas, Clay County, Texas and Wilbarger County, Texas (collectively “Aderholt Plaintiffs”).

### **Defendants**

3. The current defendants are the Bureau of Land Management (“BLM”), Neil Kornze, in his official capacity as director of BLM, United States Department of the Interior, Sally Jewell, in her official capacity as Secretary of the Interior, and United States of America.

### **Jurisdiction and Venue**

4. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1346 and 2409a, as this case involves the GLO’s claim to ownership of real property in the State of Texas, along the southern border of the Red River.

5. This Court has subject matter jurisdiction under 28 U.S.C. § 1331, as this case arises under the Constitution of the United States.

6. The GLO is entitled to bring this suit as the GLO owns the mineral interests associated with approximately 342 acres situated in Wilbarger County to which the BLM is now asserting ownership of the surface and mineral interests.

7. Venue is proper in the Wichita Falls Division of the United States District Court for the Northern District of Texas under 28 U.S.C. § 1391(e), because (1) the United States and its Department of Interior and Bureau of Land Management are Defendants; (2) a substantial part of the events or omissions giving rise to the Aderholt Plaintiffs' and Plaintiff-Intervenor GLO's claims occurred in this District and; (3) the lands which are the subject of this lawsuit are located in Wichita, Wilbarger, and Clay Counties, State of Texas, and particularly, the state-owned mineral interests managed by GLO are located in Wilbarger County, Texas.

### **Factual Background**

8. The Louisiana Purchase in 1803 established the southern bank of the Red River as the boundary between the United States and Spain, the predecessor in interest to the State of Texas. In the treaty between France and the United States, the United States acquired ownership of the entire bed of the Red River and the lands lying to its North. U.S. Library of Congress, Collections. *Louisiana: European Explorations and the Louisiana Purchase: A Question of Boundaries*. Available at: <https://www.loc.gov/collections/louisiana-european-explorations-and-the-louisiana-purchase/articles-and-essays/a-question-of-boundaries> (accessed 11/20/15).

9. Reaffirming the Louisiana Purchase boundary, Spain's 1819 treaty with the United States established the border between the two nations as the "south cut bank" of the Red River.

*Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty*, art. 3, Feb. 22, 1819, 8 Stat. 252 (“Adams-Onís Treaty”).

10. In 1838, after the Republic of Texas gained its independence from Mexico, the nation of Texas entered into a treaty with the United States upholding the Adams-Onís Treaty as the official border. *Id.* Under the Adams-Onís Treaty, both countries maintained their ability to access and navigate the river, but full ownership of the riverbed remained with the United States. *Id.*; *State of Okl. v. State of Tex.*, 260 U.S. 606, 623 (1923).

11. In 1922, Oklahoma sued Texas claiming that, per its admittance into the union, Oklahoma owned the entirety of the Red River riverbed. *State of Okl. v. State of Tex.*, 258 U.S. 574, 583, 588 (1922).

12. Intervening, the United States also claimed title to the entirety of the riverbed, insisting that because the Red River is not navigable in the disputed stretch, Oklahoma did not gain title under the rule of equality among the states. *Id.* at 588.

13. The Supreme Court found that no portion of the Red River within Oklahoma was navigable. Therefore, title to the riverbed did not pass to Oklahoma upon its admission to the Union. Any lawful claim gained upon admission, to any part of the riverbed, could only be sustained through incidental claims relating to its ownership of riparian lands on the northerly bank *Id.* at 591.

14. Through a 1867 treaty between the United States and the Kiowa, Comanche, and Apache Tribes, the territory north of the “middle of the main channel” of the Red River was set apart as a reservation and permanent home for those tribes. *State of Okl. v. State of Tex.*, 258 U.S. at 592; *Treaty with the Kiowa and Comanche*, art. 2, October 21, 1867, 15 Stat.

581. This reservation was maintained until the Act of June 6, 1900, § 6, 31 Stat. 672, 676 and Enabling Act of June 5, 1906, 34 Stat. 213, which directed that the reservations be disposed of by reserving common grazing lands, allotting severalty to each member of the tribes, reserving four sections in each township for the future state of Oklahoma, and by subjecting the remaining lands to particular modes of entry and acquisition. *Id.* Like the 1867 treaty, these acts were limited to the territory north of the middle of the main channel of the river. *Id.* The Court determined that the main channel designated under the treaty must extend from one cut bank to the other, and that north of the medial line must be what was designated as the Indian boundary. *State of Okl. v State of Tex.*, 258 U.S., at 594.

15. In 1923, the Supreme Court reaffirmed that the south cut bank, or the southern gradient boundary, was the northern border of Texas. *State of Okl. v. State of Tex.*, 260 U.S. 606, 625 (1923).

16. The Court determined that the south cut bank is “[the] bank at the mean level of the water, when it washes the bank without overflowing it ... subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes.” *Id.* at 636.

17. Both title and jurisdictional boundaries follow the natural and gradual progression of the river as it changes through accretion and erosion. *Id.*

18. Where avulsive acts have caused the river to suddenly leave its old bed and form a new channel, the resulting change of the channel does not change the title boundary. *Id.*

19. Due to its sandy riverbeds, avulsive acts along this stretch of the Red River are rare.

20. As of 1923, the totality of the Supreme Court opinions, historical acts, and treaties established:

(a) Any ownership rights belonging to Oklahoma in the bed of the Red River came through grants or reservations given it by the United States and stop at the medial line of the river due to the river's non-navigability and prior congressional actions;

(b) Ownership of the southern strip of riverbed to the south bank remained with the United States and was not considered Indian Territory, though it did jurisdictionally lie within Oklahoma. This left the United States with title to the portion of the Red River riverbed lying between the medial line and the southern bank of the Red River; and

(c) Texas possessed no ownership of the Red River riverbed. Its "northern" boundary for private property ownership, political, and jurisdictional boundaries ended at the south gradient boundary of the Red River;

(d) As the Red River ebbed and flowed due to erosion and accretion along its sandy banks, so too did these boundaries meander.

21. In accord with its 1923 ruling, the Supreme Court commissioned a survey and ordered that surveyors Kidder and Stiles apply the Court's process to determine the gradient boundary as of 1923 and conduct a survey of various portions of the boundary-bank of the Red River.

22. The Kidder and Stiles survey was completed and certified by the Court in 1925 and entered into the record by an official decree of the Court. The Kidder and Stiles survey does not establish a static boundary. Rather, it identified parts of the gradient boundary at that point in time.

22. Kidder and Stiles did not survey the entire 116-mile stretch of the Red River at issue in this dispute. Land belonging to several of the individual Aderholt Plaintiffs and the GLO was not encompassed by the Kidder and Stiles survey.

23. The Kidder and Stiles survey does not represent the current south bank's gradient boundary due to the Red River's erosion and accretion over the past 90 years. In many places, the waters of the Red River flow more than a mile away from their 1923 location.

24. In 1999, Texas and Oklahoma entered into an interstate compact addressing the political and jurisdictional boundary between the two states. The Red River Boundary Compact was ratified by Congress in 2000.

25. Prior to the compact, and due to the highly transitory nature of the Red River, questions as to jurisdiction between Oklahoma, Texas, and the federal government along the Red River rendered all sovereignties unable to prosecute for crimes or collect taxes. This rendered large portions of the northern border of Texas a "no man's land" where distribution and production of drugs, prostitution, and illegal gambling occurred regularly without any means of redress.

26. Through the Red River Boundary Compact, Texas and Oklahoma established the permanent political and jurisdictional boundary between Texas and Oklahoma as the vegetation line along the south bank of the Red River, a line that can be visually identified without the need of a current survey. H.B. 1355, 76th Leg., Reg. Sess. (Tex. 1999); S.B. 175, 47th Leg., 1st Spec. Sess. (Okla. 1999); Red River Boundary Compact of 2000, Pub. L. No. 106-288, 114 Stat. 919.

27. The Compact explicitly granted Texas sovereignty over all lands south of the southern vegetation line. *Id.*

28. In a departure from the 1923 case, the Compact states that an immediately perceivable naturally occurring avulsion would no longer fix the state boundaries. Instead, Oklahoma and Texas agreed that the boundary line would move with the “visually identifiable continuous line of vegetation” adjacent to the riverbed. *Id.*

29. The Compact does not change the title or rights of any person or entity, public or private, to any of the lands adjacent to the Red River, nor does it change the boundaries of those lands. The vegetation line may change, and with it the state boundaries, but not what is owned by the respective property owners. *Id.*

30. The GLO is a property owner of mineral interests associated with lands adjacent to the south gradient boundary of the Red River in Wilbarger County affected by BLM’s improper assertion of ownership at issue in this case.

31. The GLO holds title to these mineral interests as the result of the State of Texas’ ownership of public lands dating back to Texas becoming part of the United States.

32. In 1845, Texas entered the United States retaining all of its public land not already sold by Spain or Mexico to private citizens, including mineral rights retained by the prior sovereigns – Spain and Mexico – when land was sold.

33. In 1876, the Texas Constitution set aside half of Texas’ public lands to establish the Permanent School Fund to help finance public schools. The Texas Constitution intended for this land to be managed or sold and the proceeds to be deposited into the Permanent School Fund. After 1895, Texas law provided that the State must retain all minerals when land classified by the State as “mineral land” was sold. For sales of mineral-classified school land in Texas



between September 1, 1895, and August 21, 1931, the State owns the minerals under those lands, which rights are dedicated to the Permanent School Fund.

34. Commissioner Bush and the GLO are responsible for managing these lands and mineral interests, including sales, trades, leases and improvements, as well as administration of contracts, mineral royalty rates, and other transactions. Commissioner Bush and the GLO are also charged by Chapter 32 of the Texas Natural Resources Code with the authority to lease mineral rights owned by the State of Texas. Commissioner Bush and the GLO are constitutionally charged with the obligation to maximize revenues from leasing public school lands and interests. *See Coastal Oil and Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 34 (Tex. 2008); *Rutherford Oil Corp. v. General Land Office of State of Tex.*, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989, no writ).

35. The interest earned on the Permanent School Fund investments is distributed by the State Board of Education to every school district in Texas on a per-pupil basis and, as such, this action affects every school child in Texas. Since only interest income may be spent, the principal amount of the Permanent School Fund remains intact and will continue to benefit the public school children of Texas.

36. The GLO owns the mineral interests dedicated to the Permanent School Fund associated with what were initially 78.2 acres in Wilbarger County adjacent to the south gradient boundary of the Red River but which, due to accretion, are now approximately 113 acres, to which BLM is asserting ownership of approximately 35 acres (“GLO tract”). *See Exs. A, B and C.*

37. On its own initiative in 2003, BLM began the process of conducting a dependent resurvey along portions of the Red River to determine United States’ interest in the Red River riverbed.

38. In 2009, the BLM published in the Federal Register an updated survey covering a small portion of the Red River through Clay and Wichita Counties in which it asserts federal ownership of land south of the south gradient boundary of the Red River as defined by the Supreme Court in 1923, land located within Texas. 74 Fed. Reg. 28061-62.

39. On June 2, 2014, BLM published a map that indicates BLM's intent that the same surveying method used in the 2009 survey is applicable to a 116-mile stretch of the Red River through Clay, Wichita and Wilbarger Counties, including to the GLO tract. *See* Exs. B and C.

40. GLO's initial 78.2-acre tract is located as marked on the June 2, 2014 BLM map as indicated. *See* Ex. C.

41. In some places, the BLM map and survey place its boundary more than a mile beyond the south gradient boundary as defined by the Supreme Court in 1923.

42. BLM's map and survey likewise place its boundary outside and south of the flood line as it existed during the May 2015 floods.

43. During the May 2015 floods, the United States Geological Survey ("USGS") measured the flow rate of the Red River at 49,800 cubic feet per second – over 820 times higher than its average rate from the previous eight months. At the same time, the USGS measured the depth of the Red River in that area to be 11.88' – nearly three feet above what the National Weather Service considers flood-stage for that part of the river. Nevertheless, the water at that time did not reach the BLM's alleged boundary.

44. In some areas, the boundary that the BLM now claims in its survey lies a mile into Texas from the current path of the river and 100 feet up on a high bluff. In many more areas, BLM's asserted "boundary line" lies thousands of feet into Texas from the current Red River riverbank.

See Ex. B.

45. BLM alleges that the federal government owns up to and possibly exceeding 90,000 acres of Texas land lying outside of the south vegetation line of the Red River.

46. By contrast, in litigation arising out of a dispute among landowners along the Red River in the early 1970s, the United States declined to participate because it claimed not to own any property outside the riverbed. *Hamill v. Bryant*, 7-CV-586, Vol. 1116 at 20 (N.D. Tex., Mar. 20, 1972).

47. The GLO's mineral interests fall within this disputed area that BLM now claims belongs to the United States.

48. BLM has not surveyed most of the land it claims despite the map's indication of where BLM believes the boundary to its land lies.

49. Defendants do not intend to survey most of the land they claim to own. During an October 13, 2015, public hearing on BLM's proposed revisions to its Management Plan, BLM representatives notified attendees that "... we don't have the funds to survey it. We're not allowed to survey it right now. Until that happens we can't get those implementation level decisions that you want answered – until we get whether or not we should or should not do something with it later on."

50. During the same public meeting, when asked whether or not clarity would be given on boundary issues, the BLM representative answered, "Not on property ownership. The reason is because it's going to take a lot of money to do that and we don't want to tie the [Resource Management Plan] process to the Red River because that will break down the processes ..."

51. BLM's assertions of ownership have put a cloud upon GLO's title, preventing the GLO

from fully exercising the state's property for the benefit of school children in the State of Texas.

52. Due to BLM's failure to delineate the property it claims, GLO has no reasonable way of knowing where it must comply with BLM's regulations on portions of its property or who is lawfully on land potentially claimed by Defendants.

53. Failure to comply with BLM's regulations could result in criminal and civil penalties.

54. BLM has caused the kind of "no man's land" situation that the Red River Boundary Compact was enacted to prevent.

55. In *State of Okl. v. State of Tex.*, 265 U.S. 493, 496 (1924), the Supreme Court defined the southern bank of the Red River as "the water-washed and relatively permanent elevation or acclivity ... along the southerly side of the river."

56. The northern boundary of Texas, the Court noted, is an imaginary line "along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it." *Id.* at 497.

57. BLM's managed territory is between this southern bank and the medial line of the Red River.

58. By definition, the "bank" is the sliver of land that separates the sandy "[river]bed from the adjacent uplands." *State of Okl. v. State of Tex.*, 260 U.S. 606, 632 (1923).

59. "On the valley side of the bank is vegetation and on the river side is bare sand." *Id.* at 634.

60. The vegetation line marks the outermost boundary of the bank.

61. The riverbed includes "all of the area which is kept practically bare of vegetation by the

wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time.” *Id.* at 632.

62. The riverbed “neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or unenclosed pasture.” *Id.* at 629.

63. The uplands are “fairly covered with grasses and other upland growth, and often studded with trees,” despite the fact that they may be “temporarily overflowed in exceptional instances when the river is at flood.” *Id.* at 634, 632.

64. The valley land south of the vegetation line has “always has been dealt with as upland.” *Id.* at 636.

65. In the event of erosion or accretion (small and gradual changes in the riverbank over time), the boundary between the states follows the river.

66. However, in the event that an avulsion occurred, natural or otherwise, the boundary does not follow the avulsive change, but remains fixed in its location prior to the avulsive act.

67. An avulsion represents a sudden departure from the river channel followed by the river cutting a new path across a neck of land and moving land from one side of the river to the other. *Id.* at 640.

68. The party asserting that river’s current path was caused by avulsion has the burden of proving its assertion. *State of Okl. v. State of Tex.*, 260 U.S. 606, 638 (1923).

#### **Claim - Quiet Title for GLO Mineral Interests**

69. The factual allegations in paragraphs 1-68, above, are incorporated into this claim.

70. Pursuant to 28 U.S.C. § 2409a, the United States is subject to a suit to quiet title to real property in which both the Plaintiff-Intervenor GLO and the United States claim an interest.
71. Defendants claim land on Plaintiff-Intervenor's property along the Red River.
72. In particular, the Defendants claim to own all the land between the medial line and the southern "gradient boundary," or boundary-bank of the Red River.
73. Defendants claim that this boundary bank falls a significant distance – in some places over a mile – inland of the vegetation line and the flowing water of the Red River.
74. Defendants also claim that this boundary bank falls outside the outermost edges of the Red River when the river was at flood-stage in May of 2015.
75. Defendants are incorrect in claiming that the 1923 Supreme Court decision fixed permanently the southern boundary of federal land. As the Red River eroded north, BLM claims that this expanded its territory instead of its territory conforming to the constant meandering of the river.
76. Plaintiff-Intervenor GLO alleges that the method for determining the boundary bank must be in accord with *State of Okl. v. State of Tex.*, 260 U.S. 606 (1923).
77. Plaintiff-Intervenor GLO also alleges that, as a matter of law, the boundary bank may not fall outside the vegetation line unless there has been an avulsive event.
78. Plaintiff-Intervenor GLO also alleges that, as a matter of law, the boundary bank may not fall outside the edge of the river when the river is at flood stage unless there has been an avulsive event.
79. Defendants have not proven that its alleged location of the boundary bank was caused by avulsion.

80. Plaintiff-Intervenor GLO alleges that any United States claim to Plaintiffs' property south of the boundary bank is invalid and unlawful.

81. Plaintiff-Intervenor GLO is entitled to an order of this Court quieting title to its mineral interests associated with the GLO tract to approximately 35 acres of which the BLM is now asserting ownership.

**Prayer for relief**

Based upon the foregoing matters, Plaintiff-Intervenor GLO prays that this Court:

- a. issue an order quieting title in and to Plaintiff-Intervenor GLO's property as pleaded herein; and
- b. issue an order granting any such further and other relief as may be appropriate.

Respectfully submitted,  
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By: /s/

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been sent to the person listed below by operation of the Court's electronic filing system and certified mail, on this 1<sup>st</sup> day of December, 2015:

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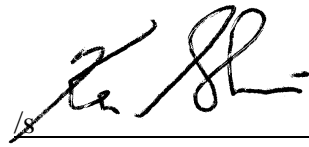
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A handwritten signature in black ink, appearing to read "Ken Slavin", written over a horizontal line.

Ken Slavin