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' MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL ACCESS TO THE INDIVIDUAL PLAINTIFFS' LANDS

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The Plaintiffs in this action include seven individuals who have asserted claims under the Quiet Title Act ("QTA"), alleging a dispute between themselves and the United States regarding the location of the boundary between their lands and federal public lands managed by the U.S. Bureau of Land Management ("BLM"). Because the appropriate location of property boundaries is at the center of these claims, under the Federal Rules of Civil Procedure Plaintiffs must now make their property available for survey and inspection without heaping unreasonable burdens on Defendants' access.

Given the central importance of the location of the property boundaries, the irreparable harm to Defendants if prevented from conducting survey work cannot be questioned. Conversely, allowing the inspection—which will in no way be invasive or disruptive—will cause no hardship to the Individual Plaintiffs.

Defendants duly served a request to inspect Plaintiffs' property. And, the Individual Plaintiffs appear to concede that some access to their properties is required by Rule 34(a) of the Federal Rules of Civil Procedure. Despite this concession, Plaintiffs have raised objection after objection to what should have been easily negotiated terms for routine discovery. Despite Defendants' best efforts at a negotiated resolution over the entire month of September, Individuals Plaintiffs continue to object to discovery that is commonplace in QTA litigation.

All four of the Individual Plaintiffs' unreasonable objections should be rejected by the Court and the discovery should be ordered to commence in very short order. First, neither Rule 34 nor the courts applying it support Plaintiffs' attempt to force Defendants to execute an indemnity agreement as a precondition for the survey work. Second, having acknowledged that a law enforcement detail should accompany the BLM surveyors on these isolated lands, Plaintiffs may not now prevent a one or two person BLM law enforcement detail from

accompanying BLM surveyors for their safety. Third, having put their property at issue in this case, Plaintiffs may not arbitrarily limit the facets of their property subject to survey. Fourth, Plaintiffs have presented no reasonable argument for forcing the BLM surveyors to slog for miles up the river or along the river shoreline to access their properties, when access directly across Plaintiffs land will impose no burden on Plaintiffs.

As set forth in Defendants contemporaneously filed motion to expedite the briefing and consideration of this motion to compel, time is of the essence. As such, the Court should expeditiously reject Plaintiffs' unreasonable objections and compel Plaintiffs to move forward with the discovery they have acknowledged is mandated by Rule 34.

BACKGROUND

The Individual Plaintiffs each assert ownership of properties abutting the Red River, and have asserted QTA claims against the United States. ECF No. 40, ¶¶ 4-17. Under *Oklahoma v. Texas*, 261 U.S. 340, 341-42 (1923) (per curiam), the United States owns the southern half of the bed of the Red River. The parties do not dispute that the determination of the southern boundary of these federal public lands must be determined consistent with the method set forth by the Supreme Court.

Defendants have never surveyed the southern boundary for the vast majority of the federal public lands underlying the Red River, including the portion of the river abutting property claimed by several of the Individual Plaintiffs. *See* ECF No 40, ¶¶ 78-79. Defendants have surveyed other portions of the river that abut lands claimed by some of the Individual Plaintiffs. But, Plaintiffs assert that those BLM surveys from 2007 and 2008 are inconsistent with the Supreme Court's decision in *Oklahoma v. Texas*. ECF No. 40 ¶¶ 69-70. The Court has allowed all of the Individual Plaintiffs' claims to proceed to trial. ECF No. 86 at 19.

In order to evaluate the Individual Plaintiffs' claims and to investigate and inform their defenses, Defendants seek access to the Individual Plaintiffs' properties under Rule 34(a) of the Federal Rules of Civil Procedure. Defendants' counsel first broached the subject in person after the July 21, 2016 hearing, indicating that Defendants would need access to the Individual Plaintiffs' properties as part of their discovery efforts. On August 11, 2016, Defendants' counsel followed up on that conversation with an email to Plaintiffs' counsel requesting permission to inspect the Individual Plaintiffs' lands. App'x 013. On August 19, 2016, Plaintiffs' counsel responded with several concerns, and requested that Defendants provide a formal request pursuant to Rule 34. App'x 011.

On August 29, 2016, the United States served formal requests for permission to inspect the Individual Plaintiffs' properties ("Requests"), seeking permission to undertake inspections on specific dates in October 2016. App'x 015-18. Over the course of the next month, Defendants attempted to negotiate access to the Individual Plaintiffs' properties. *See* App'x 018-24. In response to Individual Plaintiffs' request, Defendants agreed not to perform any inspections on weekends, and provided a new schedule, reflecting that agreement. App'x 021. In light of concerns that the Requests were not sufficiently specific, Defendants (although disagreeing with Plaintiffs' assertion that the Requests did not meet the requirements of Rule 34), provided more information on BLM's specific plans. *Id*. In doing so, Defendants specifically confirmed that (1) they would not be undertaking any "excavation, soil sampling, or movement of earth," and (2) they had no intention of entering into any buildings on the properties. App'x 018. Defendants also agreed to provide the names and titles of all personnel who would be present for the inspections three days in advance, and to have them show identification when they arrived. App'x 018, 022. Defendants also explained that they were unwilling to enter into any

indemnification and/or waiver agreements to allow them the access provided under Rule 34, and asked Plaintiffs to identify any legal authority that might support this condition. App'x 022. Plaintiffs provided nothing.

Individual Plaintiffs next suggested that local law enforcement be procured by the parties to attend all inspections, with Defendants bearing the cost. Defendants responded that BLM would provide its own law enforcement personnel. App'x 022. Defendants have consistently made clear that law enforcement personnel would only be present to ensure the safety of BLM personnel. App'x 019.

Individual Plaintiffs also repeatedly asserted that Defendants should access their property from the Red River, Defendants explained that this was unworkable and unreasonable because it would require BLM personnel to trek for miles by land. *Id.*

In response to Individual Plaintiffs' questions as to why Defendants could not limit their inspection to the northern border of their properties, Defendants explained why they needed to ground-truth the other boundaries, given the allegations in Plaintiffs' Amended Complaint. App'x 018.

On September 27, 2016, Plaintiffs served their Response and Objections to Defendants' Request to Enter and Inspect Lands Pursuant to Rule 34. App'x 001-10. In a final effort to negotiate an arrangement, the parties' counsel spoke again on the evening of September 29, 2016, to see if a resolution was possible without involving the Court. App'x 0025-27. The parties were unable to reach such a resolution, necessitating this motion. *Id.*

STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 34(a)(2)

Federal Rule of Civil Procedure 34(a)(2) provides that "[a] party may serve on any other

party a request . . . (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." A Rule 34 inspection should only be circumscribed by the Court if it "is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive," or where "the burden or expense of the proposed [inspection] outweighs its likely benefit." *See Dittmar v. Kroger Texas, L.P.*, No. 3:14-CV-3501-G-BN, 2015 WL 11019135, at *4 (N.D. Tex. June 9, 2015).

B. Federal Rule of Civil Procedure 37

Rule 37 authorizes a party to move for an order compelling disclosure or discovery. Fed. R. Civ. P. 37(a)(1). Such motion is appropriate when a party "fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34." Fed. R. Civ. P. 37(a)(3)(B)(iv). It is the party opposing discovery that bears the burden of showing why discovery should be denied. *S.E.C. v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004)). *Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 477 (N.D. Tex. 2005) ("[A] party who opposes its opponent's request for production [must] 'show specifically how... each [request] is not relevant or how each [request] is overly broad, burdensome or oppressive'") (quoting *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)). With respect to a request for inspection, the court may look at "'the degree to which the proposed inspection will assist the moving party and its search for truth must be weighed against the hardships and hazards created by the inspection.'" *Dittmar*, 2015 WL 11019135, at *4 (citing *Jones v. Gen. Growth Props., Inc.*, Civ. A. No. 11-681-SDD-RLB, 2013 WL 2948151, at *2 (M.D. La. June 14, 2013).

ARGUMENT

In light of the QTA claims raised in this litigation, Defendants must be permitted access to the Individual Plaintiffs' properties in order to fully understand the contours of the Individual Plaintiffs' claims, and to prepare defenses to the claims. Individual Plaintiffs attempt to significantly limit or burden this access. But, none of their objections have any support under Rule 34 or the relevant case law. Defendants must be provided a fair opportunity to defend themselves. A fair defense in this case is contingent upon an opportunity to evaluate the Individual Plaintiffs' QTA claims, which, of necessity, includes inspection of the lands at the center of these claims. As such, the Court must overrule the Individual Plaintiffs' objections and issue an order compelling Individual Plaintiffs to make their property reasonably and expeditiously available, including the availability for Defendants to inspect, measure, survey, take GPS coordinates, and photograph the properties consistent with their discovery Requests.

A. Defendants Should Not Be Required to Enter an Indemnification Agreement to Exercise a Right Provided to Litigants under the Federal Rules of Civil Procedure

The Individual Plaintiffs refuse to allow Defendants or their employees to enter upon and inspect their properties unless Defendants agree to indemnify and/or hold harmless the Individual Plaintiffs for any injury that occurs during the inspection. App'x 005. The Individual Plaintiffs would allow access only if Defendants' employees each execute a liability waiver prior to entering the Plaintiffs' properties, or Defendants otherwise indemnify the Individual Plaintiffs for potential injury. *Id.* The Individual Plaintiffs also object to allowing Defendants on their properties "without providing for liability owed Plaintiffs in the event that Defendants' agents cause damage or injury while within Plaintiffs' properties." *Id.* The Individual Plaintiffs' objection is not supported by Rule 34 or the case law applying it, and it should be rejected.

By its express terms, Rule 34(a) authorizes the inspection of another party's property. Fed. R. Civ. P. 34(a). Neither the Rule, nor any of its Advisory Committee Notes, makes inspection contingent upon a party-opponent agreeing to indemnify or waive liability. And, in fact, courts applying Rule 34 have consistently refused to require parties to enter into an agreement addressing potential tort liability before undertaking a Rule 34(a) inspection. As one district court explained:

> It is unnecessary to determine now the exact extent of the duty, if any, owed by the [defendant] to persons who come aboard [its ship] for the purpose of obtaining evidence pursuant to court authority. The extent of that duty, whatever it is, is fixed by law. The [defendant], by permitting access, is not doing a favor and is in no position to stipulate that, in the event of accident, it shall receive treatment more favorable than that to which it would be entitled by law.

Hindle v. Nat'l Bulk Carriers, 18 F.R.D. 198, 199 (S.D.N.Y. 1955). *See also White v. Union Pac. R.R. Co.*, Case No. 09-cv-1407-EFM-KGG, 2011 U.S. Dist. LEXIS 40962, at *2 (D. Kan. Apr. 14, 2011) ("the Court considers it neither necessary or wise to require Plaintiff to, as a condition to conducting a proper inspection, waive any and all legal duties which Defendant might otherwise have in hosting the inspection") (attached hereto at App'x 028).

Most pertinently, in *United States v. Bunker Hill Co.*, 417 F. Supp. 332, 333 (D. Idaho 1976), the court addressed almost identical circumstances. There, like here, a party argued that it could refuse access to employees of the United States unless the United States agreed to indemnify the party for any claims arising from injury to, or caused by, the United States' agents. The court rejected the argument and held that the United States:

> is not required to indemnify the defendant in the manner requested before entering on the lands of the defendant for purposes of carrying out discovery procedures in preparation for trial. Further, the Court is of the view that no officer of the United States is authorized to execute such an indemnity agreement, and that if executed the same would be unenforceable.

Id. The argument against requiring indemnification is even stronger here, where it is the

Individual Plaintiffs who have invoked the jurisdiction of the Court, not the United States.

Consistent with this unanimous authority, the Individual Plaintiffs' insistence that Defendants require their employees to waive their rights to liability in order to undertake activities expressly permitted by the Federal Rules of Civil Procedure and necessary to litigate this case is unreasonable and contradicted by the relevant case law.[1] This objection should be overruled.

B. Defendants' Plan to Have BLM Law Enforcement Present for the Inspection is Reasonable and Presents no Harm to Plaintiffs

The Individual Plaintiffs next object that Defendants' plan to have BLM law enforcement personnel present is "abusive" and would violate the Individual Plaintiffs' rights under the Fourth Amendment to the U.S. Constitution. BLM's intention to bring its own law enforcement personnel—solely for the purpose of ensuring the safety of BLM personnel—is perfectly appropriate under the circumstances, and does not infringe upon any of the Individual Plaintiffs' constitutional rights.

Defendants intend to have a limited law-enforcement presence accompanying the BLM surveyors to ensure their safety. Such presence would be limited to one or two plain-clothes officers, employed by BLM. App'x 033-34, ¶ 7. BLM believes that such presence is necessary to ensure its surveyors' safety. *Id.* The Individual Plaintiffs' properties are located in a sparsely populated area. And, while BLM is not apprehensive that the Individual Plaintiffs themselves pose a risk to the BLM personnel, BLM has a reasonable expectation that it could encounter third parties who could pose a risk. *Id.*

In fact, Plaintiffs acknowledge that trespassers, encroaching on private land, are common

[1] Nor does Defendants' counsel have the authority to bind the United States for any potential tort liability. Congress exercises such authority, and the United States' susceptibility to tort liability is governed by the Federal Tort Claims Act, 28 U.S.C. § 2679(b)(1).

in this area. ECF No. 40 ¶¶ 23, 111. Plaintiffs allege that a "no man's land" exists in the vicinity, with a variety of unlawful and dangerous activity occurring. *Id*. ¶¶ 104-111. Plaintiffs also acknowledge that they "and their neighboring property owners have experienced numerous incidents of trespass by the public, on foot as well as using ATVs up and down the river." *Id*. ¶ 105. Because some of Defendants' work will occur on the borders of the Individual Plaintiffs' lands, the potential for conflict with neighbors exists as well. Moreover, Plaintiffs themselves initiated the idea of having law enforcement officers present to facilitate and oversee Defendants inspection of the properties. *See* App'x 022-23. Plaintiffs' suggestion to arrange for the presence of law enforcement certainly corroborates BLM's concerns for its employees' safety.

Ensuring BLM employee safety is the only reason BLM law enforcement personnel will be present. App'x 033-34 ¶ 7. Their role will not be to undertake any investigative activity. *Id.* In fact, it is not unusual for BLM to have its law enforcement agents fulfill this protective role and accompany surveyors in the field, particularly when there are reports of illegal activity, in the area where the work will be done, to ensure the safety of its employees, and to deflect any hostility that may be directed towards them. *Id.*

Under these circumstances, the Individual Plaintiffs' assertions of a Fourth Amendment violation are unfounded. An inspection pursuant to Rule 34 of the Federal Rules of Civil Procedure does not compromise any privacy interest protected under the Fourth Amendment. *See United States v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003) (rejecting argument that discovery was prohibited under the Fourth Amendment because "[t]here is no 'right of privacy' privilege against discovery in civil cases"). Indeed, in *United States v. Acquest Wehrle, LLC*, No. 09-CV-637C(F), 2010 WL 1708528, at *2 (W.D.N.Y. Apr. 27, 2010), the court held that even though "potential criminal charges against Defendant and its principals [were] being

considered," a Rule 34 inspection could not violate the Fourth Amendment, where there was no indication that the plaintiff agency was acting at the behest of the United States Attorney's Office in bringing this action or seeking the inspection.

Individual Plaintiffs provide no rationale for their position that the presence of law enforcement officers (particularly given their sole role as a security detail) is in some way more burdensome, for Fourth Amendment purposes, than that of the other BLM employees. Nor is it clear why the Individual Plaintiffs did not have the same concerns when they proposed that local law enforcement officers accompany BLM personnel.

BLM's plan to have a BLM law enforcement officer or officers present is reasonable under the circumstances to ensure the safety of its surveyors, and in no way increases the burden or hardship of the inspection on the Individual Plaintiffs. The objection should be overruled.

C. The Scope of Defendants' Inspection Activities are Appropriate and Reasonable under the Federal Rules of Civil Procedure

The Individual Plaintiffs next object to Defendants inspecting boundaries other than "the northern boundaries that abut the southern gradient boundary of the Red River, and the portions of the eastern and western boundaries which intersect with the southern gradient boundary of the Red River." App'x 007. But because Plaintiffs have, to this point, failed to provide Defendants with their position as to the precise location of the southern gradient boundary, Defendants need to inspect and confirm the other borders of Plaintiffs' properties to help them understand Plaintiffs' claims and the extent of the area in controversy.

The scope of discovery under Rule 26(b)(1) is broad: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). As the U.S. Supreme Court explained in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), "[relevance] has been construed broadly to encompass any matter that

bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Of course, the value of fact-finding is not unlimited under the Federal Rules of Civil Procedure. Thus, for an inspection under Rule 34(a)(2), "'the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection.'" *Banks v. Interplast Group Ltd*., Civ. A. V-02092, 2003 WL 21185685, at *1 (S.D. Tex. Apr. 16, 2003) (quoting *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir. 1978)).

Here, the balance weighs in favor of allowing Defendants' request to inspect the other borders of the Individual Plaintiffs' properties. Doing so is necessary for Defendants to understand (and test) the Individual Plaintiffs' contention of the location of their property along the Red River. In their Amended Complaint, the Individual Plaintiffs allege ownership of certain properties. ECF No. 40, ¶¶ 4-17, and Exs. A-G, I, J, & O. But they have not, to this point, provided Defendants with their position as to the precise location of the northern borders of their lands.[2] And, the Individual Plaintiffs assert that they have acquired some portion of these properties through accretion (i.e., as a result of the gradual change in the course of the river), and they purport to satisfy the particularity pleading requirements of the QTA, in part by identifying the total acreage of their lands. *See id.*; *see also* ECF No. 40-1; 40-5; 40-6 (deed referring to "accreted land"). Confirming the other boundaries of the Individual Plaintiffs' lands, and taking GPS measurements along these fixed boundaries, will allow Defendants to use acreage numbers to attempt to identify the location of the northern border claimed by the Individual Landowners

[2] In discovery, Mr. Canan, Mr. Hunter, and Mr. Jackson have produced surveys of their lands, and Mr. Aderholt has produced a survey of one of his parcels. App'x 033 ¶ 5. Defendants have no surveys for the other four parcels. *Id.* Further, Defendants do not know at this point whether such surveys depict those plaintiffs' current position as to the boundaries of their properties. For instance, Mr. Jackson's survey is dated 2006. *Id.* Further, Mr. Canan's survey does not appear to match up to the relevant deeds. *Id.*

in their Amended Complaint and to understand the extent of the area in controversy.

Moreover, the deeds the Individual Plaintiffs have provided, and the statements in the Amended Complaint regarding the total acreage claimed by the Individual Plaintiffs, sometimes vary. App'x 32 ¶ 4. There are also inconsistencies between what the Individual Plaintiffs claim and what the relevant County tax records report. *Id.* These inconsistencies may, at the very least, be useful in demonstrating to the Court the inherent difficulty of identifying the location of the gradient boundary. Under these circumstances, Defendants' plan to inspect the borders of the properties, to ground-truth and record the borders identified by Plaintiffs and the Counties in their tax records, seeks relevant and discoverable information, and is important for Defendants to understand (and potentially dispute or corroborate) the Individual Plaintiffs' position regarding the location of the borders between their lands and the federal public lands managed by BLM.

Counterbalanced against the benefit of obtaining this information, Defendants' activities with respect to ground-truthing and inspecting the other borders of the Individual Plaintiffs' properties will not create any undue burden or hardship on the Individual Plaintiffs. Defendants will simply be walking the boundaries, making field observations, and taking GPS measurements and photographs. App'x 032-33 ¶ 5. They will not be undertaking any surface disturbing activity, and they certainly will not be "entering any structure on Plaintiffs' properties, [or] touching, altering, moving, or otherwise interfering with any structures or equipment related to livestock or hunting while on Plaintiffs' properties." *See* App'x. 007. *See also* App'x 032-33 ¶ 5. Indeed, Defendants have always been clear on this. App'x 018, 021. In order to minimize any inconvenience to the Individual Plaintiffs, Defendants have committed to providing reasonable notice and they will be undertaking any inspection activities only between 8:00 a.m. and 5:00 p.m. (and only on weekdays at Plaintiffs' request). *Id.* Any inspection would only last

two or three days per property, and the Individual Plaintiffs' attendance is not required (although it is certainly allowed, from an appropriate distance). Additionally, Defendants have invited the Individual Plaintiffs to identify any particular concerns with any of the specific properties, App'x 022, but have received no response. Defendants will consider any concerns the Individual Plaintiffs raise in advance of any site visit, and accommodate reasonable requests. Particularly given Defendants' efforts to minimize the burden, the Individual Plaintiffs cannot credibly assert that Defendants' plan to inspect all of the borders of their properties will result in any undue hardship.

Finally, the Individual Plaintiffs do not appear to object to any of Defendants' proposed inspection activities that are related to the northern boundary of their properties. As Defendants noted while conferring with the Individual Plaintiffs' counsel, the parties may have different opinions on how to apply the Supreme Court's rulings from *Oklahoma v. Texas,* and therefore Defendants may be inspecting areas that the Individual Plaintiffs do not believe are relevant to such determination (including, for instance, areas where BLM placed prior survey monuments, as alleged in the Amended Complaint). App'x 021. The Individual Plaintiffs have not raised any concerns in their objections regarding these activities (and any such objection would be unwarranted), so Defendants believe that there is no need for the Court to address the scope of activities that Defendants will be undertaking with respect to the northern boundary of Plaintiffs' claimed properties.

In summary, Plaintiffs cannot show that the scope of the inspection activities Defendants propose is not tailored to obtaining relevant, discoverable information—nor can they demonstrate that Defendants' inspection will result in undue burden or hardship. The Court should overrule this objection.

D. The Court should Ensure Reasonable Access to the Individual Plaintiffs' Properties

In their final objection, the Individual Plaintiffs "object to Defendants entering onto their properties when access to the southern gradient boundary of the Red River is accessible from lands already owned by the federal government." App'x 008. Given that in the course of the negotiations they appeared willing to grant Defendants access to their properties, it is not clear that the Individual Plaintiffs will stand on this objection now. However, despite Defendants' numerous efforts to explain the unreasonableness of the objection, *see* App'x 019, 026, the Individual Plaintiffs continue to raise the issue, so Defendants address it here.

The Individual Plaintiffs assert that Defendants should be required to access their properties by travelling either upstream or downstream from public access points near the Highway 79 bridge, the Highway 183 bridge, or the Interstate 44 bridge. App'x 008. This position is patently unreasonable. As the satellite imagery attached to the Doman Declaration demonstrates, each of these bridges is miles away from the various Individual Plaintiffs' properties (with the exception of Mr. Smith's property). App'x 035. The most obvious example is Mr. Patton's property, which is over 15 miles in either direction from any of the bridges. *Id.* Using Individual Plaintiffs' proposed access points would require BLM personnel to trek cross-country for miles, when access could easily be achieved across Plaintiffs' properties. This additional burden is unreasonable.

Moreover, there are no roads traversing these distances from the access points proposed by the Individual Plaintiffs, so Defendants would have to travel by foot. App'x 031-32 ¶¶ 3-4. This cross-country travel would also lead to the potential for conflict with other landowners whose lands abut the Red River, and who might assert that Defendants were trespassing. *Id.* It would also substantially increase the time it would take to complete any inspection, as well as

the associated expenses. *Id.* The use of boats to access the properties via the Red River is not a feasible alternative either. *Id.* When coupled with the delay already occasioned by Plaintiffs' refusal to allow access, this further time-consuming burden is wholly unreasonable.

Requiring Defendants to access the Individual Plaintiffs' properties in this manner does not address any realistic burden raised by the Individual Plaintiffs. Indeed, while the Individual Plaintiffs appear to concede that *some* access to their properties is appropriate, they do not explain why forcing Defendants to obtain this access only through burdensome and potentially dangerous cross-country travel by foot for distances of up to fifteen miles would reduce any perceived burden. This objection should be overruled.

CONCLUSION

In this QTA litigation, Defendants have a clear-cut right to access the Individual Plaintiffs' lands under Rule 34(a) of the Federal Rules of Civil Procedure so that they may evaluate Plaintiffs' claims and their defenses. The Individual Plaintiffs cannot demonstrate that Defendants' proposed inspection of their properties is unreasonable—or that it would inflict any undue harm on them. Their attempts to condition Defendants' access are unreasonable. The Court should overrule the Individual Plaintiffs' objections and issue an order authorizing Defendants and their employees to enter the Individual Plaintiffs' lands to inspect, measure, survey, take GPS coordinates, and photograph the properties consistent with their Requests.[3]

Respectfully submitted this 6th day of October, 2016,

JOHN C. CRUDEN
Assistant Attorney General

[3] Because at least some of the dates originally proposed by Defendants in their Requests, and generally agreed to by the Individual Plaintiffs, will likely have passed by the time the Court rules on this motion, the Court should either (1) allow Defendants access to the Individual Plaintiffs' property upon providing seven days' notice; or (2) require the parties to negotiate imminent dates consistent with its order.

JOHN R. PARKER
United States Attorney

/s/ Romney S. Philpott
ROMNEY S. PHILPOTT, CO Bar #35112
JASON A. HILL, DC Bar #477543
United States Department of Justice
Environment and Natural Resources Division
999 18th Street, Suite 370
Denver, CO 80202
Telephone: (303) 844-1810 (Philpott)
(202) 514-1024 (Hill)
Facsimile: (303) 844-1350 (Philpott)
(202) 305-0506 (Hill)
E-mail: romney.philpott@usdoj.gov
jason.hill@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Romney S. Philpott, hereby certify that on October 6, 2016, I caused the foregoing to be served upon the following counsel of record through the Court's electronic service system:

Bradley W Caldwell – bcaldwell@caldwellcc.com
J Austin Curry – acurry@caldwellcc.com
Robert Henneke – rhenneke@texaspolicy.com
Andrew Miller –drew.miller@kempsmith.com
Megan M. Neal – megan.neal@texasattorneygeneral.gov
Ken K. Slavin – kslavin@kempsmith.com
Joel Stonedale – jstonedale@texaspolicy.com
John Franklin Summers -- jsummers@caldwellcc.com
Deborah Trejo – debroah.trejo@kempsmith.com
Leigh Ann Thompson – lthompson@texaspolicy.com
Chance Weldon – cweldon@texaspolicy.com

s/ Romney S. Philpott
ROMNEY S. PHILPOTT