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RED RIVER GRADIENT BOUNDARY SURVEY ACT

DECEMBER 11, 2018.—Ordered to be printed

Ms. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

MINORITY AND SUPPLEMENTAL VIEWS

[To accompany S. 90]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 90) to survey the gradient boundary along the Red River in the States of Oklahoma and Texas, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 90 is to survey the gradient boundary along the Red River in the States of Oklahoma and Texas.

BACKGROUND AND NEED

There is a 116-mile stretch of land along the Texas-Oklahoma border that is in disputed ownership. Under the Louisiana Purchase in 1803, the United States bought land from France that included the riverbed of the Red River. Subsequent treaties between the United States and Spain, Mexico, and the Republic of Texas confirmed that the boundary between Texas and Oklahoma was the Red River's south bank.

In 1867, the U.S. signed a treaty with the Kiowa, Comanche, and Apache Tribes that designated a reservation north of the "middle of the main channel" of the Red River between the 98th Meridian

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and the North Fork. Congress later disposed of the reservation and created a grazing reserve that was ultimately disposed of in 1906. However, since the southern boundary of the reservation and grazing reserve was defined as the "middle of the main channel," the land between the medial line of the Red River and the south bank remained as Federal land.

After oil was discovered in an area around the Red River, Oklahoma brought suit against Texas in 1919 to determine the common boundary. In a 1923 decision and decree, the U.S. Supreme Court adopted the gradient boundary survey method for determining the boundary between Texas and Oklahoma (*Oklahoma v. Texas, 261 U.S. 340*). According to this decision, the gradient boundary is on and along the south bank, at the average or mean-level of the waters when they reach and wash the bank without overflowing it. In unique areas where there is no well-defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line conforming to the mean-level of the water when at other places in that vicinity they reach and wash the cut bank without overflowing it.

In 2000, Congress gave its consent to the *Red River Boundary Compact* (Compact) between the States of Texas and Oklahoma (Public Law 106–288). The purpose of the Compact was to establish a visible boundary between the two States that would resolve jurisdictional and sovereignty disputes issues. The Compact set the political boundary as the vegetation line on the south bank of the Red River. While the Compact does not affect land ownership, it is widely accepted that the vegetative line and the gradient boundary can be relatively the same or at least within feet of each other.

Accretion, erosion, and avulsion have gradually altered the course and location of the Red River in the area subject to S. 90. Accretion can be generally defined as the deposit of soil along the bank or bed of a river and erosion is the removal of soil from the bank or bed of a river. Legally, a landowner is allowed to keep the accretions attached to his or her land but loses title to eroded lands. An avulsion is the sudden change in a channel of a boundary river that can be caused through natural events or from human activity. When this sudden change occurs, the boundary remains where it was before the avulsion event. The decree rendered in the 1923 U.S. Supreme Court decision explicitly addresses accretion, erosion, and avulsion and recognized that the boundary between Texas and Oklahoma would continually move with the River through accretion and erosion but not through avulsion.

The Bureau of Land Management (BLM) is currently updating its Oklahoma, Kansas, and Texas Resource Management Plan (RMP), which covers the 116-mile stretch of the Red River subject to S. 90. BLM originally stated that an estimated 90,000 acres of land along this stretch of the river may be considered public domain and managed as Federal land. BLM has since reduced this estimate to 30,000 acres at the most, of which only 6,402 acres have been actually surveyed.

BLM's statements and the pending RMP revision have caused great concern among local landowners and others that the Federal government is claiming to own land which was previously deeded to individual citizens. Most landowners along the river are now unsure whether the land they have held title to and have paid taxes

on, in many cases for generations, will remain in their families or be subject to Federal ownership and management. Further, the entirety of the 116-mile stretch of the Red River in question has never been surveyed by the BLM, and the method used to survey certain small portions of the river differs from the accepted gradient boundary survey method established by the 1923 U.S. Supreme Court decision and decree. These BLM surveys have been contested by landowners, county officials, the Texas General Land Office (GLO), and others.

In November 2015, Texas landowners initiated litigation, which was later joined by the GLO, against BLM alleging unconstitutional and arbitrary seizure of private property in Texas. In November 2017, a settlement agreement was reached, which stipulated that the northern boundary of private property along the Red River between Texas and Oklahoma is governed by the opinion of the Supreme Court in Oklahoma v. Texas, which established the gradient boundary as the ownership boundary. However, the settlement agreement does not resolve the geographic location of the boundary, but requires the BLM to apply the principles originally established in *Oklahoma v. Texas* in preparing any future survey or resurvey of the Red River.

S. 90 seeks to clarify the ownership of the land in question by requiring the Secretary of the Interior to commission a survey of the South Bank boundary line using the gradient boundary survey method to survey the southern bank of the Red River, using surveyors that have been approved by the Texas GLO and the Oklahoma Land Office (LO).

LEGISLATIVE HISTORY

S. 90 was introduced by Senators Cornyn and Cruz on January 10, 2017, and referred to the Judiciary Committee. On February 28, 2017, the Judiciary Committee discharged S. 90 by unanimous consent and the bill was referred to the Energy and Natural Resources Committee. The Subcommittee on Public Lands, Forests, and Mining, held a hearing on S. 90 on July 26, 2017.

Similar legislation, H.R. 428, was introduced in the House of Representatives by Representative Thornberry on January 10, 2017. On February 14, 2017, H.R. 428 passed the House of Representatives by a vote of 250–171.

In the 114th Congress, similar legislation, S. 1153, was introduced by Senator Cornyn and referred to the Energy and Natural Resources Committee.

Similar legislation, H.R. 2130, was introduced by Representative Thornberry in the House of Representatives on April 30, 2015, and referred to the Natural Resources Committee. The Natural Resources Committee favorably reported H.R. 2130 on September 10, 2015, by a vote of 21–11 (H. Rept. 114–327). On December 9, 2015, H.R. 2130 passed the House of Representatives by a vote of 253–177.

In the 113th Congress, S. 2537 was introduced by Senator Cornyn on June 26, 2014, and referred to the Energy and Natural Resources Committee.

Similar legislation, H.R. 4979, was introduced by Representative Thornberry in the House of Representatives on June 26, 2014, and referred to the Natural Resources Committee. The Natural Re-

sources Committee favorably reported H.R. 4979 on November 19, 2014 (H. Rept. 113–700).

The Senate Committee on Energy and Natural Resources met in open business session on October 2, 2018, and ordered S. 90 favorably reported.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on October 2, 2018, by a majority voice vote of a quorum present, recommends that the Senate pass S. 90. Senators Cantwell, Stabenow, Heinrich, and Smith asked to be recorded as voting no.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title

Section 1 provides a short title.

Sec. 2. Definitions

Section 2 defines key terms.

Sec. 3. Survey of south bank boundary line

Subsection (a) directs the Secretary of the Interior (Secretary), within two years of enactment, to commission a survey of the South Bank boundary line using the gradient boundary survey method and surveyors that are selected by and operating under the Texas GLO and the Oklahoma LO. This subsection further directs the Texas GLO to consult with each affected Federally recognized Indian Tribe and the Oklahoma LO to consult with the State of Oklahoma's attorney general and each affected Federally recognized Indian Tribe. It further requires the survey to be completed not later than 2 years after the date of enactment.

Subsection (b) requires the Secretary, within 60 days of the survey's completion, to submit the survey to the Texas GLO and the Oklahoma LO for approval and provides the Texas GLO and the Oklahoma LO 60 with days to make a determination on the survey. This subsection also directs the Texas GLO to consult with each affected Federally recognized Indian Tribe and the Oklahoma LO to consult with the State of Oklahoma's attorney general and each affected Federally recognized Indian Tribe.

This subsection further requires surveys of individual parcels to be conducted in accordance with this section, including the timing for approval and consultation requirements. This subsection also makes clear that the survey of the boundary line and the individual parcel surveys do not need to be approved by the Secretary.

Subsection (c) directs the Texas GLO and the Oklahoma LO, to submit to the Secretary, within 60 days of a survey's approval for an individual parcel, a notice of approval and a copy of the survey and any related field notes. This subsection also requires the Secretary to notify adjacent landowners of a survey's approval for an individual parcel within 30 days of receiving the notice of approval and provide a copy of the survey and any related field notes.

Sec. 4. Effect of act

Section 4 makes clear that nothing in the bill modifies any interest of the States of Oklahoma or Texas, or the sovereignty, property, or trust rights of any Federally recognized Indian Tribe, to land north of the South Boundary line as established by the survey; modifies land patented under the Color of Title Act (43 U.S.C. 1068); modifies the Red River Boundary Compact; creates or reinstates any Indian reservation; or alters mineral interests held by the State of Oklahoma and certain Indian tribes.

Sec. 5. Authorization of appropriations

Section 5 authorizes $1 million to carry out this legislation.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the costs of this measure has been provided by the Congressional Budget Office:

S. 90 would authorize the appropriation of $1 million for the Bureau of Land Management (BLM) to commission a survey to identify the boundary between federal and nonfederal lands along the Red River in Texas and Oklahoma. The bill would require officials from those states to select licensed surveyors. Under the bill, BLM would submit the results of the survey to state officials for approval; federal approval would not be required. Assuming appropriation of the authorized amounts, CBO estimates that implementing S. 90 would cost $1 million.

Enacting S. 90 could affect direct spending; therefore, pay-as-you-go procedures apply. Under current law, 100 percent of the receipts (which are recorded in the budget as reductions in direct spending) from mineral leasing on the affected federal lands are distributed without further appropriation to the Kiowa, Comanche, and Apache tribes and to the state of Oklahoma. Those amounts totaled less than $50,000 in 2018. Any reclassification of lands resulting from the survey could affect the amount of receipts collected and distributed thereafter. However, because any change in receipts would be offset by an equal change in direct spending, CBO estimates that the net effect on direct spending would be negligible. Enacting the bill would not affect revenues.

CBO estimates that enacting S. 90 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 90 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 90. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 90, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 90, as ordered reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

The testimony provided by the Department of the Interior at the July 26, 2017, hearing on S. 90 follows:

STATEMENT OF JOHN RUHS, ACTING DEPUTY DIRECTOR OF OPERATIONS, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

S. 90, RED RIVER GRADIENT BOUNDARY SURVEY ACT

Thank you for the opportunity to present the views of the Department of the Interior on S. 90, the Red River Gradient Boundary Survey Act. S. 90 addresses a complex set of issues concerning the location of the southern boundary of the public domain along the Red River, which since the early 1800s has eluded final resolution. Enacting legislation would be a constructive approach toward long-term resolution of the Red River issues, and the Department supports the overall intent of the bill—obtaining certainty on the location of federal land in relation to adjacent private land.

Along approximately 116 miles of its length, the southern bank of the Red River (as defined by the Supreme Court in 1923) forms the boundary between Federal and non-Federal lands. The vegetation line as described in the Red River Boundary Compact establishes the state line between Oklahoma and Texas. Because of treaties between the United States and Spain that followed the Louisiana Purchase, and the 1867 treaty between the U.S. and three American Indian Tribes that established the Kiowa, Comanche, and Apache (KCA) reservation, there remains a 116-mile strip of public domain land that lies between the medial line and the southern bank of the Red River, from the North Fork of the river east to the 98th Meridian. Under the Act of June 12, 1926, specific percentages of the fluid mineral development royalties on that public domain are deposited into a trust account for the KCA, with the remaining percentage going to the State of Oklahoma.

Identification of the exact boundaries of the public lands along the Red River is challenging for a multitude of reasons. The Department has attempted to survey portions of the area in order to identify the boundaries of certain Indian allotments.

S. 90 requires the Secretary of the Interior to commission and fund a gradient boundary survey along 116 miles of the Red River. The survey would be conducted by sur-

veyors that are selected jointly by and operating under the joint direction of the Texas General Land Office and both the Attorney General of the State of Oklahoma and Oklahoma Commissioners of the Land Office, in consultation with each affected federally recognized Indian tribe. Surveyors will also survey individual parcels and identify property boundaries of private parties' property interests. Once conducted, these surveys would be submitted for approval to the specified Texas and Oklahoma authorities. The surveys would not be submitted to the Secretary for approval.

After receiving a notice from specified Texas and Oklahoma authorities of the approval of a survey related to an individual parcel, the Department would be required to identify and provide notice of the completed survey to each private owner of land adjacent to that parcel.

The Department would like to work with the sponsor and the Committee on a number of issues, including modifications to provide clarity on the resolution of private property claims. Under S. 90, the Federal contract for a survey of the South Bank Boundary of the Red River would include surveys of individual parcels along the river, which the States of Texas and Oklahoma, respectively, would approve or disapprove, in consultation with affected federally recognized tribes. We encourage the sponsor to clarify whether the term "individual parcels" refers to private lands owned in either the State of Texas or the State of Oklahoma, as well as whether this term is intended to include parcels allotted to individual Indians. If it is intended to refer to the latter, there is some question as to whether the bill—assigning approval authority for the survey of individual parcels to the states of Texas and Oklahoma—is consistent with the Federal government's trust responsibilities toward these individual Indian allottees. In any event, if "individual parcels" is intended to encompass private landowners' parcels, we encourage the sponsor to include in the legislation an appropriate mechanism for affected private landowners to dispute surveys completed pursuant to the legislation.

The Department further notes that section 3(c) appears to associate completion of individual parcel surveys with a determination of which individuals own a parcel. If a private surveyor is expected to make determinations of individual ownership in addition to conducting surveys of individual parcels, the legislation and the Department's contract with the surveyor should state this clearly, and whether the survey authorized by this bill would supersede any prior surveys and associated deeds.

Especially because the legislation appears to provide for private surveyors making determinations about private property owners' parcels, the Department would like to work with the sponsor on modifications to ensure notification to landowners by an appropriate agency about these determinations. Under section 3(c)(2), within 30 days after receiving a notice of individual parcel approval from the

Texas or Oklahoma authorities, the Secretary of the Interior is required to provide notice of the approval to each landowner adjacent to the individual parcel. Because the Secretary of the Interior has no authority to survey privately owned lands that are not coincident with a Federal boundary, the Department has no records of private land ownership in Texas. The Texas General Land Office and the Oklahoma Commissioners of the Land Office have all the information needed to identify private owners of land adjacent to any particular parcel. It may be more appropriate for those offices to notify private property owners in their respective states versus the Secretary of the Interior.

The survey required by S. 90 differs in a key respect from regular surveys that are conducted under contract with the Department. The S. 90 survey would be performed under the direction of the Texas General Land Office and both the Attorney General of the State of Oklahoma and Oklahoma Commissioners of the Land Office, in consultation with each affected Federally recognized Indian tribe; the Secretary of the Interior is explicitly excluded from directing and approving the survey results.

S. 90 divests the Department of the Interior of its role as surveyor of record to identify the boundaries of public lands, a role it has fulfilled since the Land Ordinance of 1785 and the Northwest Ordinance of 1787. The authority to identify the limits of Federal ownership—in this case, the boundary between Federal and private lands along the Red River—is a responsibility vested in the Secretary. The purpose is to assure that no clouds on title exist for lands conveyed out of Federal ownership. For the past two centuries, the Federal Government has surveyed public lands into townships and sections (Public Land Survey System), establishing legal records that formed the basis on which the government transferred public land to railroads, homesteaders, and others until 1976. The legal descriptions contained in these land records may also form the basis for modern title records and private real estate sales and purchases. The Department also conducts cadastral surveys that establish the boundary between Federal and private lands. The Department would like to work with the sponsor on modifications to ensure that the overall goals of the bill are achieved without divesting the Secretary of his responsibility to review and approve associated surveys.

The Department would also like to work with the sponsor on modifications to ensure consistency with the laws governing Federal contracts. S. 90 requires the Secretary to enter into a Federal contract with a contractor selected by third parties (the Texas General Land Office and the Oklahoma Commissioners of the Land Office, in consultation with the attorney general of the State of Oklahoma and each affected Federally recognized Indian tribe) to perform work that the third party directs and approves. Generally, standard Federal contracting law requires an agency to offer an open competition and to review the qualifications and capacities of the firms responding to the contrac-

tual solicitation. Moreover, it would be helpful to the Department if S. 90 clarified the dispute resolution procedures to be used in case a dispute arises between the contractor and the third parties, as well as clarifying which party bears responsibility for enforcing terms in the legislation; for example, the two-year time period for completing the surveys. The Department's role in evaluating whether the contractor fully performed the terms of the contract is also unclear.

Finally, section 4 provides that nothing in the Act modifies any interest of the States of Oklahoma or Texas, or of any Federally recognized Indian tribe, relating to land located north of the South Bank boundary line; modifies any land patented under the "Color of Title Act;" modifies or supersedes the Red River Boundary Compact enacted by the States of Oklahoma and Texas and consented to by Congress pursuant to P.L. 106–288; creates or reinstates any Indian reservation or any portion of such a reservation; or alters any valid right of the State of Oklahoma or the Kiowa, Comanche, or Apache Indian tribes to the mineral interest trust fund established under the Act of June 12, 1926. The Department encourages the sponsor to add individual Indian allottees to the list of parties exempted from effect of this Act. Also, we understand that the Department of Justice would like to work with the subcommittee to address a constitutional concern with some of the text in the bill.

MINORITY VIEWS OF SENATORS CANTWELL AND HEINRICH

S. 90 arose out of a dispute over a boundary survey conducted by the Bureau of Land Management along a 116-mile stretch of the Red River, on the border between Texas and Oklahoma, between its confluence with the North Fork of the Red River on the west and the 98th meridian on the east.

The Red River boundary

The bed of the Red River and the uplands to the north were acquired by the United States as part of the Louisiana Purchase in 1803.[1] The use of the river as a boundary has a long history. The United States and Spain agreed to make the south bank of the Red River the boundary between our two nations by treaty in 1819.[2] The south bank continued to serve as a boundary after Mexico achieved its independence from Spain in 1821,[3] and after Texas received its independence from Mexico in 1836.[4] It remained the boundary between the State of Texas and the public lands north of the river after Texas was admitted to the Union in 1845.[5]

In 1867, Congress reserved the land north of the Red River, from its confluence with its North Fork to the 98th meridian, for the Kiowa, Comanche, and Apache Indian tribes.[6] But the treaty with the tribes established "the middle of the main channel" of the Red River, rather than the south bank, as the southern boundary of the reservation.[7] As a result, the bed of the Red River south of the reservation boundary in the middle of the main channel of the Red River to Texas border on the south bank of the river, from the confluence with the North Fork to the 98th meridian, remained in the public domain.[8]

Congress abolished the reservation in 1900, when it directed the Secretary of the Interior to allot the reservation lands to tribal members, set apart some as a grazing reserve, and open the remainder to settlement under the public land laws.[9] Congress abolished the grazing reserve in 1906 when it directed that the lands be allotted to tribal members and the remainder sold.[10] All private landowner claims to the bed of the Red River within the dispute 116-mile stretch rest on disposals of the lands on the north bank under these two laws. The Supreme Court has held that "the disposal of lands on the northerly bank carried with it a right of the

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[1] *Oklahoma* v. *Texas*, 258 U.S. 574, 583 (1922).
[2] Adams-Onis Treaty, 8 Stat. 252, 254 (1819).
[3] Treaty of Limits between the United States and Mexico, 8 Stat. 372, 374 (1828).
[4] Convention between the United States and the Republic of Texas, for marking the boundary between them, 8 Stat. 511 (1838).
[5] *United States* v. *Texas*, 162 U.S. 1, 90 (1896).
[6] Treaties with the Kiowa, Comanche, and Apache Tribes, 15 Stat. 581 and 589.
[7] *Id.* at article II, 15 Stat. at 582.
[8] *Oklahoma* v. *Texas*, 258 U.S. 574, 595 (1922).
[9] Act of June 6, 1900, 31 Stat. 672, 679.
[10] Act of June 5, 1906, 34 Stat. 213, 214.

bed of the river as far, but not beyond, the medial line" of the river.[11] Congress "intended to dispose of the upland and the northerly half of the river bed, but nothing more." It retained ownership of the river bed from the middle of the main channel to the Texas border on the south bank.[12]

Locating the boundary

Although the south bank of the Red River has served as a boundary for nearly 200 years, the precise location of the boundary on the south bank has often been disputed. This is because the river bed in the disputed stretch is relatively level and composed of loose sand. It is between a quarter of a mile and a mile and a quarter wide. In dry seasons, only "mere ribbons of shallow water . . . find their way over the sand bed, readily and frequently shifting from one side to the other. . . ."[13] Moreover the location of the river bed changes over time. It moves both gradually, as soil erodes from one bank and is deposited on the other, and sometimes dramatically, as when it cuts a new channel during a flood. As a result of these natural movements, the precise location of the south bank of the Red River has changed, and continues to change, over time.

The difficulty in locating the boundary has generated a great deal of litigation. In a series of cases between Oklahoma and Texas nearly a century ago, the Supreme Court determined that the boundary was marked by "the water-washed and relatively permanent elevation . . ., commonly called a cut bank, along the southerly side of the river, which separates its bed from the adjacent upland . . . and usually serves to confine the waters within the bed. . . ."[14]

The Court then defined what has become known as the "gradient boundary" method to locate the precise boundary. The south bank generally "ranges in height from two to ten or more feet. . . ."[15] Where that is the case, the Court said, the boundary is "at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it."[16] In other places, "there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland. . . ." Here, the Court said, "the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it."[17]

In addition, the Court held that where the location of the river bank changes through the natural processes of soil erosion and deposition over time, the boundary shifts with movement of the bank, "but where the stream has left its former channel and made for itself a new one through the adjacent upland" in a flood, the boundary does not change, but remains where it was before.[18]

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[11] *Oklahoma* v. *Texas*, 258 U.S. at 596.
[12] 258 U.S. at 595.
[13] 258 U.S. at 593–594. See also *Oklahoma* v. *Texas*, 260 U.S. 606, 634 (1922).
[14] *Oklahoma* v. *Texas*, 261 U.S. 340, 341–342, para. 5 (1923), previously established in *Oklahoma v. Texas*, 260 U.S. 606, 631–632 (1922).
[15] *Oklahoma* v. *Texas*, 260 U.S. at 634.
[16] *Oklahoma* v. *Texas*, 261 U.S. at 342, para. 6.
[17] *Id.* at para. 7.
[18] *Oklahoma* v. *Texas*, 261 U.S. 340, 341 (1923).

"The gradient boundary line is an artificial line that must be located and marked by a surveyor; . . . you cannot see it. . . ." [19] Because it cannot be seen, use of the gradient boundary line posed practical problems as a jurisdictional boundary. To resolve these difficulties, the Texas and Oklahoma entered into a compact in 1999 to use the readily identifiable vegetation line on the south bank of the Red River rather than the gradient boundary as the boundary between them. Congress gave its consent to the compact in January 2000.[20] As Rep. Thornberry, the sponsor of the consent legislation explained, the vegetation line "is an easily visible boundary," which can be readily determined "without the necessity of a surveyor and a lawyer." [21]

Importantly, though, the compact only adopts the vegetation line as a boundary for state jurisdictional purposes. It does not affect private property ownership. Article VII of the compact expressly states that the compact does not change the title to any lands adjacent to the Red River or the boundaries of those lands.[22] Private property boundaries are still governed by the earlier gradient boundary survey method.

The surveys, lawsuit, and settlement agreement

Parts of the boundary within the disputed area were originally surveyed using the gradient boundary method between 1923 and 1924 by two surveyors commissioned by the Supreme Court.[23] The Court confirmed their survey and declared the boundary line they had delineated "to be the true boundary" between Texas and Oklahoma, "subject however to such changes as may hereafter be wrought by the natural and gradual processes known as erosion and accretion. . . ." [24]

Meanwhile, "[t]he United States surveyed and disposed of [the uplands] on the north side [of the river] under its public land and Indian laws, and Texas surveyed and disposed of [the uplands] on the south side under her land laws. . . . Patents were issued for practically all of the land." [25]

In 2003, the Bureau of Land Management began resurveying portions of the Red River boundary. In doing so, its surveyors placed survey markers far to the south of the original gradient boundary established by the previous gradient boundary survey. According to the new survey markers, hundreds, and in at least one case thousands, of acres of land owned by individual Texas landowners are now north of the new gradient boundary and thus now owned by the United States.[26] Several Texas landowners, their respective county governments, the State of Texas, and the Texas

[19] Hearing before the House Judiciary Committee on H.J. Res. 72, 106th Cong., at 4 (Oct. 26, 1999) (Statement of Rep. Thornberry).

[20] Public Law 106–288, 114 Stat. 919 (2000).

[21] Hearing before the House Judiciary Committee on H.J. Res. 72, 106th Cong., at 5 (Oct. 26, 1999) (Statement of Rep. Thornberry).

[22] 74 Oklahoma Statutes § 6106; Texas Nat. Res. Code § 12.002.

[23] *Oklahoma* v. *Texas*, 261 U.S. at 342, para. 12.

[24] *Oklahoma* v. *Texas*, 267 U.S. 452, 454–455 (1925).

[25] *Oklahoma* v. *Texas*, 260 U.S. at 635. The Court noted that ownership of the river bed was not disputed "until some land on the south side was discovered to be valuable for oil . . . . However much the oil discovery may affect values, it has no bearing on the question of boundary and title." *Id.* at 636.

[26] *Alderholt* v. *Bureau of Land Management*, 2016 U.S. Dist. LEXIS 84090 at 7–9 (N.D. Texas 2016).

General Land Office challenged the resurvey as an "unconstitutional and arbitrary seizure" of private property.[27]

Prior to trial, the Bureau of Land Management suspended the surveys and conceded that "the survey methodology used was in error," because the surveyors had failed to account for the natural processes of soil erosion and deposition that the Supreme Court long ago held must be taken into account in accordance with the gradient boundary survey method. The Bureau agreed to settle the case. Pursuant to the settlement agreement, the Bureau agreed to cancel the suspended surveys, void the new survey markers, and disclaim the map depicting the redrawn boundary. In addition, the parties agreed that, in conducting any future survey of the boundary, the Bureau would apply the gradient boundary methodology and the principles announced by the Supreme Court in the *Oklahoma v. Texas* cases.[28] The district court approved the settlement agreement on November 8, 2017.

S. 90

S. 90 requires the Secretary of the Interior to commission a new survey of the boundary line in the disputed area. But it would require the survey to be carried out by surveyors chosen by, and operating under the direction of, the Texas General Land Office and the Oklahoma Commissioners of the Land Office, rather than the Secretary, and it would give the power to approve the completed survey to Texas and Oklahoma land commissioners instead of the Secretary.

We oppose S. 90 for three major reasons. First, the bill would overturn a valid settlement agreement that has already resolved the dispute that gave rise to the bill. Public policy favors settlement of litigation.[29] As the Supreme Court announced over a century ago, "settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored."[30] Here, the Bureau of Land Management admitted the error of its survey and has canceled it. The dispute that gave rise to bill has been resolved. There is no reason for Congress to step in now, months after the dispute was settled, and impose a different solution from the one the parties worked out and agreed to among themselves.

Second, S. 90 takes the authority to conduct and oversee the survey of the public lands in the disputed area away from the Secretary of the Interior and gives it to state officials. "From the earliest days matters appertaining to the survey of public . . . lands have devolved upon the Commissioner of the General Land Office [now the Bureau of Land Management], under the supervision of the Secretary of the Interior."[31] The "power to make and correct

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[27] *Id*. at 3.

[28] Settlement Agreement at 6–8.

[29] *Mannion* v. *Department of Treasury,* 429 Fed. Appx. 986, 989 (Fed. Cir. 2011). *See also United States* v. *Contra Costa County Water District,* 678 F.2d 90, 92 (9th Cir. 1982) (invoking "the public policy favoring the compromise and settlement of disputes").

[30] *St. Louis Mining & Milling Co. v. Montana Mining Co.,* 171 U.S. 650, 656 (1898). *See also Williams* v. *First National Bank,* 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts.").

[31] *Cragin* v. *Powell,* 128 U.S. 691, 697–698 (1888). See 43 U.S.C. § 2 ("The Secretary of the Interior . . . shall perform all executive duties appertaining to the surveying . . . of the public lands of the United States. . .").

surveys of the public lands belongs" to the Secretary.[32] This power has been left to the Secretary because "great confusion and litigation would ensue if [other state and federal officials] were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."[33] Congress should leave the task of resurvey the boundary to the Secretary of the Interior, where it belongs.

Third, S. 90 divests the Secretary of the Interior not only of his authority to conduct, but also to approve the completed resurvey of the disputed boundary and gives that authority to state officials. Doing so deprives the Secretary of the authority he needs to fulfill his obligations as "the guardian of the people of the United States over the public lands."[34] As the Supreme Court has said, "the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the" Department of the Interior; "and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved."[35] S. 90 takes the power to fulfill that obligation in the disputed area away from the Secretary and gives it to state officials, who owe no such duty to the American people as a whole.

Moreover, the Secretary has supervisory obligations not just "over all public lands," but also specific "authority to survey Indian lands."[36] And he has a solemn trust responsibility to protect tribal interests.[37] These trust responsibilities extend to the management of Indian trust funds, including those derived from the development of natural resources for the benefit of Indian tribes and their members.[38] "The Secretary has an 'overriding duty . . . to deal fairly with Indians."'[39] State officials do not.

Thus, we remain concerned that redrawing the property boundary in the area affected by S. 90 may affect the Kiowa, Comanche, and Apache Tribes and their members, who hold a beneficial interest in the oil and gas receipts derived from oil and gas production on the public lands in the area affected by S. 90. The Act of June 12, 1926, directs the Secretary of the Interior to deposit 62½ per-

[32] *Cragin* v. *Powell,* 128 U.S. at 699. The Secretary's responsibility for public land surveys, "if not an elementary principle of our land law, is settled by such a mass of decisions of [the Supreme Court] that its mere statement is sufficient." *Id.*

[33] *Id.,* quoting *Haydel* v. *Dufresne,* 58 U.S. 23, 30 (1855).

[34] *United States ex rel. Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 324 (1903). "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands." *Id.*

[35] *Cameron* v. *United States,* 252 U.S. 450, 459, 460 (1920).

[36] *Pueblo of Sandia* v. *Babbitt,* 1996 U.S. Dist. LEXIS 20619 (D.D.C. 1996), citing 43 U.S.C. § 2 (giving the Secretary the duty of surveying the public lands); 25 U.S.C. § 176 (directing the Secretary, through BLM, to survey Indian lands).

[37] *E.g., Washington* v. *Daley,* 173 F.3d 1158, 1168 (9th Cir. 1998) (stating that "the federal government, including the Secretary, has a trust responsibility to the Tribes"). *See also Parravano* v. *Masten,* 70 F.3d 539, 546 (9th Cir. 1995) ("We have noted, with great frequency, that the federal government is the trustee of the Indian tribes" rights").

[38] 25 U.S.C. § 162a(d).

[39] *Cobell* v. *Norton,* 240 F.3d 1081, 1099 (D.C. Cir. 2001), quoting *Morton v. Ruiz,* 415 U.S. 199, 236 (1974).

cent of the receipts derived from oil and gas deposits underlying the public lands between the middle of the main channel and the south bank of the Red River into a trust fund for the benefit of the tribes and their members.[40] At the urging of Secretary Babbitt,[41] in giving its consenting to Texas and Oklahoma to use the vegetation line as a jurisdictional boundary, Congress required that the compact "not in any manner alter the rights and interests of the tribes and their members.[42]

We recognize that section 4(5) of S. 90 contains a similar assurance that nothing in the bill "alters any valid right of . . . the Kiowa, Comanche, or Apache Indian tribes to the mineral interest trust fund established under the Act of June 12, 1926 . . . ." But we remain concerned that while nothing in the bill may directly alter the right of the tribes to receive money that is deposited in the trust fund, any alteration of the boundary that results in the ownership of public lands in the affected area being transferred to private landowners may reduce the amount of money that is deposited into the trust fund and thus, indirectly, reduce the amount of money paid to the tribes and their members. In other words, while the savings clause may protect the tribes' right to receive money *from* the trust fund, it could be read as not protecting the amount of money being paid *into* the fund if the United States loses ownership of some of the public lands in the affected area as a result of the new survey.[43] Because the new survey may affect ownership of public lands and Indian trust funds derived from those lands, any resurvey must be approved by the Secretary, who bears responsibility for the public lands and for Indian trust funds, and not by state officials who bear no such responsibility.

Finally, we note that S. 90 was introduced on January 10, 2017, ten months before the Texas landowners and state and local officials and the United States settled the lawsuit that originally gave rise to the bill.[44] We do not believe that it was ever necessary to divest the Secretary of the Interior of his authority over public land surveys and his ability to protect the beneficial interests of Indian tribes and their members in order to correct an erroneous boundary survey.[45] We believe still more strongly that such a radical step is even less warranted now that the erroneous survey has been withdrawn and the parties to the dispute have agreed on how any future surveys should be conducted.

For all of these reasons, we strongly oppose passage of S. 90.

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[40] 44 Stat. 740.

[41] H. Rept. 106–770 at 5–6 (2000) (letter from Secretary Babbitt to House Judiciary Chairman Hyde).

[42] Public Law 106–288, § 1(d).

[43] Moreover, as the Bureau testified at the Committee's hearing on the bill, the savings clause only protects of the tribes, and not the rights of individual Indian tribal members and allottees.

[44] Similarly, H.R. 428, the House companion measure to S. 90, passed the House of Representatives on February 14, 2017, nine months before the settlement.

[45] *Cragin* v. *Powell,* 128 U.S. 691, 697–698 (1888) (noting that while "mistakes and abuses ... have crept into the official surveys of the public domain," the Secretary of the Interior "is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularity and fraud" in the public land surveys).

SUPPLEMENTAL VIEWS OF SENATOR CORNYN

NOVEMBER 20, 2018.

Hon. LISA MURKOWSKI,
Chairman, Committee on Energy and Natural Resources, Washington, DC.

Hon. MARIA CANTWELL,
Ranking Member, Committee on Energy and Natural Resources, Washington, DC.

DEAR CHAIRMAN MURKOWSKI AND RANKING MEMBER CANTWELL, I write to address remarks made during consideration of S. 90, the *Red River Gradient Boundary Survey Act,* at the business meeting held on Tuesday, October 2, 2018. During this business meeting, Ranking Member Cantwell opined that S. 90 does not reflect the settlement agreement reached in *Aderholt et al. v. Bureau of Land Management et al.* and she does not "believe we should overturn the settlement, and certainly, as a result of the settlement, there is no need for Congress to take action."

S. 90 does not overturn or interfere with the settlement agreement reached in November 2017. The settlement agreement simply reaffirms that the northern boundary of private property along the Red River between Texas and Oklahoma is governed by the opinion of the Supreme Court in *Oklahoma v. Texas,* 260 U.S. 606 (1923), which establishes the gradient boundary as the only legally defensible ownership boundary. S. 90 embraces the Supreme Court's ruling by referencing *Oklahoma v. Texas* and its principles and definitions in the bill's language.

The settlement agreement states that "this Agreement does not comprise the Parties" resolution of the geographic location of the boundary." It has been nearly 100 years since *Oklahoma v. Texas* was decided, and the Bureau of Land Management (BLM) has attempted to survey only a small portion of the contested 116-mile stretch of the Red River. In fact, BLM conceded in a March 29, 2017, letter that even these small portions were incorrectly surveyed and failed to identify the accurate federally mandated gradient boundary. Congressional action is necessary to resolve this issue.

Even with the settlement agreement in place, landowners along the Red River are left with uncertainty and clouded titles, and the Federal government has been unable to properly manage the land it does own. Conducting a survey using the proper federally mandated methods and using qualified surveyors is the only way to resolve this issue and bring certainty to the landowners and the

BLM. This is exactly what S. 90, the *Red River Gradient Boundary Survey Act,* would to accomplish.

Sincerely,

JOHN CORNYN,
U.S. Senator.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by S. 90 as ordered reported.