

OKLAHOMA'S RED RIVER BOUNDARY:
UNDER U. S. SUPREME COURT DECISION IN 1927

By Bunyan Hadley Andrew*

A judicial settlement of the twin issues of what constitutes the Red River and the position of the northern boundary of Texas along said river antedated the admission of Oklahoma to statehood. The position taken by the United States Supreme Court on these issues in 1896 stood as no mean heritage, of the new state in 1907. In subsequent years Oklahoma was able to retain her boundary, as against Texas, only after prolonged litigation. In the process, she failed to establish her claim to complete ownership of the river bed where the Red River forms the Oklahoma-Texas boundary. The United States succeeded in retaining ownership of the southern half of the river bed.

When the 1819 treaty with Spain designated the southern boundary line of the United States as following, in part, the Red River westward to the one-hundredth meridian,¹ it was not known that the Red River divides into a north and a south branch east of the one-hundredth meridian. An act of the Texas Congress, December 19, 1836, defined the northern limits of this new republic as "the boundary line as defined in the treaty between the United States and Spain."² On March 1, 1845, the United States Congress agreed that Texas might be erected into a state of the Union, "subject to the adjustment of this government of all questions of boundary that may arise with other governments. . . ." On the following December 29, 1845, Texas became a state with "the territory properly included within and rightfully belonging to the Republic of Texas."³

A joint United States-Texas commission was set up in 1859 to survey the Texas boundary. The two commissioners who were appointed to do this survey could not agree as to which of the two branches of the Red River is the main branch. The United States commissioner maintained that the South (Prairie Dog)

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¹ W. M. Malloy (comp.), *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers*, 1778 ff., (Washington, 1910), Vol. II, pp. 1852-53.

² H. P. N. Ostrumel (comp.), *The Laws of Texas, 1822-1897* (10 vols., Austin, 1898), Vol. I, pp. 132-134.

³ *Ibid.*, p. 787.

⁴ *Ibid.*, p. 108.

Fork is the main stream, and in 1861 so reported to the General Land Office.⁷ Texas, meanwhile, holding out for the North Fork, passed an Act, February 8, 1860, declaring the territory between the north and south forks to be a county of Texas, and named it Greer County.⁸

An act of Congress, February 24, 1878, which named Greer County as one of the several counties included in the northern judicial district of Texas created by this act,⁹ was interpreted by Texas as giving federal sanction to Texas' jurisdiction in Greer County. The United States never conceded this, however. And despite former assertions of control over Greer County, Texas again authorized, May 2, 1882, a commission to work with representatives of the United States to determine whether North Fork or Prairie Dog Fork "is the true Red River designated in the treaty (of 1819)."¹⁰ Congress matched this act on January 31, 1885,¹¹ and the joint commission met at Galveston in February, 1886; but still no agreement could be reached.¹²

Recognizing the seriousness of the situation, President Cleveland in a proclamation on December 30, 1887, warned all persons, including Greer County officers, against selling or disposing of, or trying to exercise authority over any Greer County lands, and "against purchasing any part of said territory from any person or persons whatever," since the title and jurisdiction of Greer County was vested in the United States.¹³

Inasmuch as the matter remained unsettled when Congress organized Oklahoma Territory, May 2, 1890, which was contiguous territory to that of Texas along the disputed line, Greer County was excepted until its title could be adjudicated. At the same time Congress authorized and directed the Attorney General to start a suit in equity against Texas in the Supreme Court to determine such title.¹⁴

The first part of the Supreme Court's decision in the case of *United States vs. Texas* was rendered February 29, 1892.¹⁵ Texas had demurred, arguing that the question was political and not susceptible of judicial determination; that the United States was incompetent to bring suit against one of its component parts for recovery of a right mutually owned; and that the complainant's cause of action was legal instead of equitable, anyway, and there-

⁷ 143 U. S., p. 835.

⁸ Gammel, *The Laws of Texas*, Vol. IV, pp. 1500-1501.

⁹ 20 Stat. L., p. 318.

¹⁰ Gammel, *The Laws of Texas*, Vol. IX, pp. 296.

¹¹ 23 Stat. L., p. 296.

¹² 143 U. S., pp. 636-637.

¹³ 25 Stat. L., pp. 1463-64.

¹⁴ 26 Stat. L., pp. 81-100.

¹⁵ 143 U. S., p. 621.

fore, the Supreme Court as a court of equity lacked jurisdiction to hear the cause. Texas argued that even the federal law of May 2, 1890, was unconstitutional on the ground that it directed a suit at law to be made a suit in equity.¹⁴

A majority opinion of the court overruled Texas's demurrer and held that this case was one "for the interposition of a court of equity." However, Mr. Chief Justice Fuller and Mr. Justice Larnar dissented, being of the opinion "that this case is not within the original jurisdiction of the court."¹⁵

After this jurisdictional question had been determined, the case was argued in October, 1895, and decided March 16, 1896.¹⁶ In an opinion of the Supreme Court of March 14, 1820, Mr. Chief Justice Marshall had said, "where a river is a boundary between states, it is the main, the permanent river, which constitutes that boundary."¹⁷ The court (1896) held that the Prairie Dog Town Fork, or South Fork, constitutes the main branch of the Red River; that Greer County was not and never had been a part of Texas; that Greer County was subject to the jurisdiction of the United States only, and that the inclusion of this county among the counties named by the act of 1879 for the northern judicial district of Texas did not admit the right of Texas to that Territory. The controlling factor in the decision was not purely geographical, but rather the fact that the south fork seemed most nearly to answer to the description of the upper Red River as given on the early Melish map. This was used as a basis for the 1819 treaty line, which the court considered to be a part of the treaty.¹⁸

Greer County was established as "Greer County of Oklahoma" by act of Congress May 4, 1896.¹⁹

The Supreme Court, after having ruled in 1896 that the south instead of the north branch of Red River was intended as the line of 1819, and therefore must be accepted by Texas as her northern boundary in this area, specified by decree a northern boundary for Texas "along the south bank, both of Red River and of the . . . South Fork of Red River until such line meets the 100 meridian of longitude."²⁰ Oklahoma, upon admission to statehood, acquired a southern boundary along the Red River coterminous with Texas.

The exact location of the boundary line following the Red

¹⁴ 143 U. S., pp. 622-630.

¹⁵ 143 U. S., pp. 648-649.

¹⁶ 162 U. S., p. 1.

¹⁷ *Hendly's Lessee v. Anthony et al*, 5 Wheaton (18 U. S.) 267-274, 280.

¹⁸ 162 U. S., p. 90.

¹⁹ 29 Stat. L., pp. 313-114.

²⁰ *United States v. Texas*, 183 U. S., 1 ff., p. 61.

River was not an issue in 1896, and the court's designation of a bank boundary was apparently dictum. This was put to a test in the twentieth century in the most complicated of all river boundary controversies which have come before the Supreme Court—the case of *Oklahoma v. Texas*.

The discovery of oil in 1918-19 along Red River and under the bed of the river itself, made the exact location of the boundary a significant question for property owners who held titles under the United States, Texas, or Oklahoma, and for the states, whether from the standpoint of ownership in the river bed or from that of taxation.²¹ Oklahoma would naturally want to establish the boundary as designated by the Supreme Court in 1896, and to establish ownership of the river bed for Oklahoma. She brought suit against Texas for this purpose. But the United States had an interest in the bed of Red River, and asked to intervene in the case. An order of the court, April 1, 1920, granted the United States the right to intervene. The order also appointed a receiver to take charge of the disputed area, and to supervise all oil production here, pending settlement of the case. Proceeds were to be in the hands of the receiver until the titles of claimants could be determined by the court.²²

Against the court decree of 1896, and the claim of Oklahoma to the south bank, Texas argued that the part of the decree fixing the south bank had been purely dictum; and, anyway, a proper construction of the treaty of 1819 fixed the boundary along the middle of the main channel of Red River.²³

The treaty of 1819 with Spain had been used as a basis for the court's decision in 1896—both as to the branch and the bank of the Red River boundary. This document is again invoked and interpreted. The court held, April 11, 1921, that it had properly interpreted this treaty in 1896. The line intended in 1819 followed not only the bank of the Sabine River but also that of the Red because, according to much evidence, both rivers were reserved to the United States. While the question of a bank or mid-channel boundary had not been a direct issue in the former suit, the court held that it had been necessary to define this boundary in order to describe the territory to which the United States was establishing her right in 1896. And if a construction of Article III of the treaty of 1819 put the boundary between Greer County and Texas at the south bank, it necessarily applied to the entire

²¹ Isaiah Bowman, "An American Boundary Dispute Decision of the Supreme Court of the United States with Respect to the Texas-Oklahoma Boundary," *The Geographical Review*, 13 (New York, April, 1923), p. 188.

²² 252 U. S., pp. 372-378.

²³ 256 U. S., p. 70, argument for defendant, pp. 71-81.

course of the Red River boundary. The matter was *res judicata*. The decree of 1896 was conclusive and final.²⁴

A decree was entered on June 1, 1921, declaring the boundary to be "along the south bank of Red River." But the same decree recognized that "it still needs to be determined . . . what constitutes the south bank of Red River . . . where along that bank the true boundary line is," and what mode of locating the line should be used. A commissioner was appointed to take further evidence and present to the court for the use of either party in the suit; and the case was set down for subsequent hearing.²⁵

A decision on what constituted the boundary, other than the general term "south bank," was not reached until January 15, 1923. Having heard and considered the arguments presented, the court states:

We hold that the bank intended by the treaty provision is the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the source of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it. When we speak of the bed we include 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; and we exclude the lateral valleys which have the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

The boundary was to be established according to this definition of bank and bed. But the court also attempted to apply the doctrines of erosion-accretion and avulsion to the boundary, despite the difficulties arising from the many previous changes and anticipated future changes in all parts of the river. Avulsions on the river since 1921, the date that the treaty of 1819 became effective, would be recognized if the facts concerning such changes could be established.²⁶

In most instances our interstate river boundaries were defined without reference to the changeableness of rivers. And the first case in which the doctrines of accretion and avulsion are definitely stated and applied in determining a river boundary between states is that of *Nebraska v. Iowa*, decided on February 29, 1892. Applying the doctrine of accretion to the changing Missouri River boundary between Nebraska and Iowa, the court held that, "The boundary . . . is a varying line, so far as affected by . . . changes of diminution and accretion in the mere washing of the waters

²⁴ 256 U. S., pp. 81-92.

²⁵ 296 U. S., pp. 608-610.

²⁶ 260 U. S., pp. 605-640.

of the stream."²⁷ In contrast to the rule of accretion the court explained that "where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary . . . This sudden and rapid change of channel is termed, in the law, *avulsion*."²⁸

In the case of *Oklahoma v. Texas* each party relied heavily upon scientific findings and testimony. Never before was such an array of scientific experts—physiographic, geologic, agrologic, and many other brands—lined up by opposing counsels.²⁹ Many theories were advanced by the scientists, but few carried much weight as the scientific testimony for one counsel was usually contradictory to the scientific testimony of the opposing counsel. To illustrate, scientists for Oklahoma and the United States claimed that in the area of the Big Bend, the river channel had once followed close to the Texas bluffs, and had shifted north by avulsion. And while no documentary proof could be offered, and the date of the avulsion was uncertain, a physiographic study of the surface land and soil sections made these experts certain that an avulsion had occurred since 1819. On the other hand, Texas scientists were just as sure that the river had followed its course around the Big Bend for more than a century, regardless of how it got there in the first place. No wonder the court thought this scientific testimony "essentially speculative and not a proper basis for judgment." So the boundary was placed at the cut bank around the northerly limits of the Big Bend area.³⁰ Erosions, accretions, and avulsions occurring between 1819 and 1923 were recognized by the court in certain instances, but on the strength of documentary evidence and personal testimony of eye-witnesses, rather than on scientific evidence.

A decree ordering the general course of the boundary and appointing commissioners to locate and mark the position in the disputed area was entered March 12, 1923. While the jurisdiction of Texas was limited to the southern "cut-bank" of Red River, the decree established the fact, also on the basis of the 1819 treaty, that the inhabitants of Texas have "a right of reasonable access to the waters of the river along the state boundary, such as will enable them to reach the waters at all stages and to use

²⁷ 143 U. S., pp. 368-370.

²⁸ 143 U. S., p. 361.

²⁹ E. H. Sellards, H. C. Thorp, and R. T. Hill, *Investigations on the Red River made in Connection with the Oklahoma-Texas Boundary Suits* (Univ. of Texas Bull. No. 2927, July 15, 1923), pp. 18-20.

³⁰ 260 U.S., pp. 622-640. (The "Big Bend of Red River" mentioned here is formed by that portion of the river flowing in a general direction east as the boundary of Southeastern Oklahoma and on across the western line of Arkansas. The river continues east to the vicinity of the old town of Fulton where it turns south. The stream thus forms the Big Bend region taking in Northeast Texas, the southwestern corner of Arkansas and the northwestern strip of Louisiana.—Ed.)

the same for beneficial purposes. . . ."¹¹ The report of the commissioners which described the boundary as surveyed and marked by "wooden posts called 'witness posts,'" was confirmed June 9, 1924.¹² However, the commissioners continued their work on other parts of the boundary until portions of the line all the way from the one hundredth meridian to the eastern boundary of Oklahoma had been marked. Various reports were filed and confirmed. The commissioners' final report was filed March 24, 1927, and confirmed by the court on April 25.¹³

The boundary established along the southern cut-bank deprived Texas, and those holding land titles under Texas, of all property rights in the bed of Red River. In the struggle for control of the oil-producing areas along the river, Texas and property holders in this state could share in only so much as was located south of this cut-bank line. It would not be in order to discuss here the long and complicated process by which conflicting claims to property along the Red River boundary were adjusted. But a general statement on this subject is necessary in order to show how the United States emerged as a property holder in the area.

The boundary as decided upon by the court placed the entire river, where it forms the Oklahoma-Texas boundary, within the limits of Oklahoma. Therefore, Oklahoma claimed complete ownership of the entire river bed. In support of this claim it was contended that Red River is navigable; that the constitutional rule of the equality of states gave to each new state the ownership of soil beneath the navigable waters within its boundaries, since such ownership existed in each of the original states; and, therefore, when Oklahoma became a state in 1907, the title to the bed of the river passed from the United States to this state. After much consideration had been given to the nature of the Red River, the court concluded that¹⁴

No part of the river within Oklahoma is navigable and therefore . . . the title to the bed did not pass to the State on its admission into the Union. If the State has a lawful claim to any part of the bed, it is only such as may be incidental to its ownership of riparian lands on the northern bank. And so of the grantees and licensees of the State.

Too, the court held that north shore riparian owners, including Oklahoma, owned the bed of the river only to the median line between the northern and southern cut-banks. In 1867, there had been created for the Kiowa, Comanche, and Apache Indians, a reservation with a southern boundary on the Red River along the portion now under consideration. The boundary of this reservation followed the "middle of the main channel" of the river.

¹¹ 261 U. S., pp. 342-344. Quote, pp. 342-343.

¹² 265 U. S., pp. 506-507.

¹³ 268 U. S., p. 546; 269 U. S. 453; 269 U. S., pp. 538 and 539; 271

Later these Indian lands were allotted to individual Indians, to Oklahoma, or to others upon entry. The court held that titles so acquired could not extend beyond the boundary of the territory out of which they had been allotted, and since the Red River here was not navigable, the middle of the river could only mean a median line—not a *thalweg* line.

Furthermore, it was held that except for very limited areas, none of which were in dispute in this case, the southern half of Red River had never been opened to entry under the mining laws of the United States. The disposition of Oklahoma lands had been made under laws and treaties exclusive of mining laws. Therefore, all claims to the ownership of land in the southern half of the river, which were based on placer mining laws, were rejected.¹³ Having excluded all individual or state titles to the bed of Red River between the southern cut-bank and a medial line in the river, the Supreme Court decreed that "the full title and ownership of so much of the bed of the river as lies south of its medial line are in the United States."¹⁴

The portion of the Red River bed belonging to the United States, a grotesquely delineated strip, to say the least, acquired the additional novel characteristic (for a tract of the national domain) of variability in both configuration and total area. Inasmuch as the Supreme Court recognized an application of the rule of erosion and accretion, the shifts in the position of the cut-banks and of the medial line, due to these processes, legally carry the boundary with them.

¹³ 254 U. S. pp. 592-902.

¹⁴ 261 U. S., p. 346 (Entered March 12, 1923).