

FOREST OIL CORPORATION

IBLA 73-302

Decided February 28, 1974

Appeal from a decision of the Montana State Office, rejecting oil and gas lease offer, M 24208.

Affirmed as modified.

Oil and Gas Leases: Generally--Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Lands Subject to

It is proper for the authorized officer to reject an offer for an oil and gas lease for lands, the title of which is in controversy.

Accretion--Public Lands: Riparian Rights--State Laws

Title to accretion to federal land riparian to the navigable waters of a State is governed by federal law; title to accretion to land patented by the federal government riparian to the navigable waters of a State is governed by state law.

Raymond W. Winters, A-28125 (January 15, 1960), is overruled.

APPEARANCES: R. E. Stevens, Esq., Division Attorney, Forest Oil Corporation, Denver, Colorado.

OPINION BY MR. HENRIQUES

Forest Oil Corporation has appealed from a decision, dated February 20, 1973, whereby the Montana State Office, Bureau of Land Management, rejected its offer, M 24208, for a noncompetitive oil and gas lease of a tract of accreted lands adjacent to the bed of the Missouri River, described by metes and bounds and lying in sec. 33, T. 27 N., R. 59 E., and secs. 4, 5, T. 26 N., R. 59 E., P.M., Montana. The decision stated that the official land title plats of BLM disclosed:

1. A portion of the lands described embrace a portion of the bed of the Missouri, which at this point was considered navigable when the State of Montana was admitted to the Union, and the minerals thereunder are held to be owned by the State of Montana.
2. A portion of the described lands embrace fee owned minerals which the federal government has no authority to lease.
3. A portion of the described lands embrace lands which presently are under oil and gas lease.

Accordingly, oil and gas offer M 24208 is rejected in its entirety.

Appellant contends that the Missouri River now flows immediately south of the area described in its offer instead of in the channel shown on the BLM plats, so that the area described by metes and bounds is accreted to the Federally--owned surveyed lands in secs. 4 and 5, T. 26 N., R. 59 E., and sec. 33, T. 27 N., R. 59 E., and therefore is leasable for oil and gas by BLM.

This case defies easy resolution. In order to examine the difficulties attendant to this appeal the physical situation of the land must be explained. The original plat of survey, approved on December 4, 1902, showed the Missouri River entering T. 27 N., R. 59 E., in the SW 1/4 SW 1/4 of sec. 31, flowing on a northeasterly course through sec. 31 until it reached the northeastern corner and then slightly into secs. 29 and 30, at which point the Missouri veered sharply south flowing through the W 1/2 of sec. 32. It entered T. 26 N., R. 59 E., in the NW 1/4 of sec. 5 and continued on a southerly course through the NE 1/4 SW 1/4 at which point it resumed a northeasterly direction, exiting sec. 5 at the E 1/2 NE 1/4 and continuing on a northeasterly trend into the NW 1/4 of sec. 4. At this point the north bank of the river reentered T. 27 N., R. 59 E., in the S 1/2 SW 1/4 of sec. 33. The river thereupon resumed a southeasterly flow through E 1/2 sec. 4, T. 26 N., R. 59 E., and exited sec. 4 into sec. 9. The left bank of the river was approximately identical with the section line between secs. 3 and 4 in the SE 1/4 of sec. 4. The subsequent wanderings of the river are not germane to this appeal.

Because of the Missouri River's serpentine meanderings it was necessary to create lots 1, 2, and 3 in S 1/2 SW 1/4 and SW 1/4 SE 1/4 of sec. 33, T. 27 N., R. 59 E., along the north bank of the river. In sec. 4, T. 26 N., R. 59 E., eight lots were created including lot 3, 0.74 acres in the NW 1/4 NW 1/4 riparian on the

north (left) bank of the river, and lot 4, 49.79 acres in the NW 1/4 NW 1/4 and SW 1/4 NW 1/4, riparian on the south (right) bank of the river, across from the lot 3 sec. 4 in T. 26 N., R. 59 E., and lot 1 sec. 33 in T. 27 N., R. 59 E. In T. 27 N., R. 59 E., lots 1 and 3 of sec. 33 were patented with no mineral reservation to the United States; lot 2 sec. 33, was patented with a mineral reservation to the United States. In T. 26 N., R. 59 E., neither lot 3 nor lot 4 in sec. 4, was patented.

As of the present time lot 2 sec. 33, T. 27 N., R. 59 E., is under oil and gas lease M 5846, to the appellant. Lot 3 sec. 4, T. 26 N., R. 59 E., is under oil and gas lease M 1652. Lot 4 sec. 4, is under oil and gas lease M 8170. These three oil and gas leases were issued in accordance with the oil and gas plat based on the 1902 surveys. There can be no doubt, however, that the survey does not correctly show the position of the river as it is today.

Appellant has submitted a 1959 survey made by one Willard W. Webster, a registered land surveyor in the State of Montana, which shows the river entering sec. 4, T. 26 N., R. 59 E., not in the NW 1/4 as shown in the 1902 survey, but in the SW 1/4, and continuing on an easterly path through the S 1/2 to the east line of the section, at which point it goes slightly north and then turns south, exiting sec. 4 and flowing into sec. 9. This survey finds corroboration in the dependent resurveys of T. 26 N., R. 59 E., approved July 20, 1949, and of T. 27 N., R. 59 E., approved August 19, 1949, and the Geological Survey topographic quadrangle "Bainville SE, Mont-N. Dak. (1968)."

The dependent resurveys, accepted in 1949, were retracements and reestablishments of a portion of the township boundaries and the subdivisional lines of the townships. They did not purport to establish new meander lines bounding the river. But the returned plat of survey for T. 26 N., R. 59 E., noted, by means of a dotted line, that the bed of the Missouri had shifted east and south in sec. 5 and south in sec. 4. It should be pointed out, however, that the 1949 dependent resurvey indicated that the Missouri River extended further north in the SE 1/4, sec. 4, than the 1959 private survey showed.

The 1968 Geological Survey topographic map also supports appellant's contention that the river now flows through the south half of sec. 4, though it places the job north further east than either the 1949 dependent resurvey or the 1959 private survey, so that the river exits sec. 4 in the S 1/2 NE 1/4 and flows into sec. 3 and then turns southwesterly through the NW 1/4 NW 1/4 of sec. 10, thence into the NE 1/4 NE 1/4 of sec. 9.

Further confirmation of this change can be inferred from the plat of survey of accreted lands in secs. 5 and 8, T. 26 N., R. 59 E., accepted March 16, 1960. This survey shows the river entering sec. 5 in the NE 1/4 NW 1/4 and NW 1/4 NE 1/4, i.e., east of the 1902 survey, and continuing on a southerly course through sec. 5, across the bed of the river as shown in the 1902 survey. In the SE 1/4 of sec. 5 the river turns easterly and exits the section. The current oil and gas plat attempts to reconcile this supplemental plat of survey of secs. 5 and 8, with the 1902 plat of survey for secs. 4 and 9, by showing the river flowing to the east section line in SE 1/4 of sec. 5 and then turning in a straight line, up the section line and emerging easterly in the NW 1/4 NW 1/4 of sec. 4. The river, unfortunately, flows independently of approved plats of survey and we can perceive no basis on which to find that the oil and gas plat correctly shows the physical situs of the Missouri River in secs. 4 and 9 of the township.

Thus we find that the river as it flows through sec. 4 has, in fact, moved considerably south of its bed as originally surveyed. In such a situation as this, a survey of the lands involved by a surveyor, duly licensed within the State where the lands are situated, would be acceptable for the purpose of showing the existing lands situation. See Ted Hickman, NM 0273396 etc. (Oklahoma) (July 1, 1964). While such a survey was submitted by appellant, the passage of more than 14 years deprives that survey of its efficacy. We note that the topographic quadrangle, published in 1968, shows a situation at some variance with the 1959 plat of survey submitted with the appeal. For this reason alone we would affirm the State Director's decision. 1/ But there are other problems of dimensional magnitude so great as to have compelled us to reject appellant's appeal even had it submitted a recent private survey of the lands in question.

The lease offer appellant submitted is premised on a number of assumptions, the first and most critical of which is that lands have accreted to federal land, or to private lands in which the federal government has retained the mineral estate. Assuming, for the sake of discussion, that the river's movement has resulted in accretions to riparian owners on the north bank of the river, it is immediately obvious that much of this accretion has occurred to lots 1

1/ We would also point out that the metes and bounds description submitted by appellant does not attain the "limit of closure" allowed to cadastral surveyors of the Bureau of Land Management. See Manual of Instructions for the Survey of the Public Lands of the United States, 1947, § 234. This deficiency would also be a sufficient cause for rejecting appellant's offer. See Harold L. Rowland, A-29092 (December 10, 1962).

and 3 of sec. 33, T. 27 N., R. 59 R., as well as lots 1 and 6 of sec. 4 and lot 1 of sec. 5, T. 26 N., R. 59 E. All of these lands have been patented without a mineral reservation to the United States, and therefore, the United States would have no mineral interest to lease. To this extent the application would have to be rejected. We must now turn to the question of whether the change in the Missouri River's situs was, in fact, the result of reliction and erosion, and the additions are thus properly classified as accretive.

It is well settled that the riparian rights of those taking under a grant from the United States are determined by state law. See Hardin v. Shedd, 190 U.S. 508, 519 (1903); Hardin v. Jordan, 140 U.S. 371, 384 (1891); Herron v. Choctaw and Chickasaw Nations, 228 F.2d 830, 832 (10th Cir. 1965); cf. United States v. Oregon, 295 U.S. 1, 28 (1935); United States v. 2,134.46 Acres of Land, 257 F. Supp. 723, 727 (D. N.D. 1966). But the riparian rights of lands in which United States ownership is retained is governed by the federal law in the absence of an election to follow state law. See Hughes v. Washington, 389 U.S. 290 (1967); Widdicombe v. Rosemiller, 118 F. 295 (1902); Towl v. Kelly and Blankenship, 54 I.D. 455 (1934); Charles J. Babington, BLM 045402, etc. (January 13, 1960); cf. Bonnelli Cattle Co. v. Arizona, 94 S.Ct. 517 (1973); Arkansas v. Tennessee, 246 U.S. 158, 176-77 (1918); Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). ^{2/} Normally, in the State of Montana, this duality of approach would not be cause for concern as Montana law establishes that the riparian owner owns land to the low-water mark of a navigable stream, and that the river, not the meander line, represents the boundary of the grant. Mont. Rev. Stat., ch. 67, s 1302 (1947). See Smith v. Whitney, 105 Mont. 523, 527, 74 P.2d 450, 453 (1937); United States v. Eldredge, 33 F. Supp. 337 (D. Mont. 1940). Thus, state law is in agreement with federal law as regards the effect of accretive additions. See Jefferis v. East Omaha Land Co., 134 U.S. 178, 189 (1890); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); United States v. 11,993.32 Acres of Land, 116 F. Supp. 671 (D. N.D. 1953).

Similarly, Montana follows the general rule that if a river movement is avulsive no change in boundary or ownership of riparian

^{2/} We note that the Department, in Raymond W. Winters, A-28125 (January 15, 1960), held that the question of title to accretions to federal land adjacent to a navigable lake in Louisiana was governed by state law. We find no support for this proposition and hereby overrule that case insofar as it is inconsistent with the views expressed herein.

land owners is thereby worked. McCafferty v. Young, 144 Mont. 385, 397 P.2d 96, 99 (1964); Bode v. Rollwitz, 60 Mont. 481, 493, 199 P. 688, 692 (1921). See Mont. Rev. Stat., ch. 67, s 1303 (1947). Compare Philadelphia Co. v. Stimson, *supra* at 624; Beaver v. United States, 350 F.2d 4, 10 (9th Cir. 1965).

The difficulty which this case presents is a difference of opinion as to what constitutes either an accretion or an avulsion. The classic definition of accretion was rendered by the United States Supreme Court in County of St. Clair v. Lovington, 90 U.S. (23 Wall) 46 (1874). Therein the Court said:

In the light of the authorities alluvion [accretion] may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. * * * The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.

Id. at 68. Accord, Bonnelli Cattle Co. v. Arizona, *supra*; Jefferis v. East Omaha Land Co., *supra* at 190-91; Beaver v. United States, *supra*.

The Montana Supreme Court has stated that accreted lands are "additions to the area of real estate from the gradual deposit by water of solid material, whether mud, sand or sediment, producing dry land which before were covered by water, along the banks by a navigable or unnavigable stream. * * *" Bode v. Rollwitz, *supra*, 199 P. at 691.

The concept of imperceptibility is central to the difference of accretion from avulsion. Avulsion has been defined as a change in a stream that is "sudden, or violent and visible." Philadelphia Co. v. Stimson, *supra* at 624. See also, Bauman v. Choctaw-Chicksaw Nations, 333 F.2d 785, 789 (10th Cir. 1964). Avulsion is, in contradistinction to accretion, sensible and perceptible.

While Montana purports to follow the general rule, a recent decision of the Montana Supreme Court, McCafferty v. Young, *supra*, indicates a divergence in Montana's view of what constitutes an avulsion from that followed under federal law. The common law was fixed in its view that so long as the changes were imperceptible, additions to riparian land were accretive, regardless of the amount

accreted. In Jefferis v. East Omaha Land Co., *supra*, the Court declared that a riparian change, which in the period of 17 years resulted in the addition of 40 acres of land, and which change occurred "so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore," was the result of accretion. *Id.* at 191-192. In Olsen v. Jones, 412 P.2d 162 (Okla. 1966), the Supreme Court of Oklahoma held that a shift in the Red River, aggregating, in a period of 57 years, over one mile, was the result of accretion.

In the McCafferty case, the Montana Supreme Court ruled that a change in the Sun River was the result of avulsion. The court adverted to certain physical evidence, *e.g.*, trees lying on the land between the two channels, in support of its ruling. The court, however, went further, and declared that:

In less than 100 years the river here has moved approximately a quarter of a mile from the SW 1/4 of Section 8 into the NE 1/4 of Section 18. This is substantial movement and is perceptible over the period of just one generation. Even without the clear evidence of a sudden flood we would be inclined to label this migration "perceptible" and, therefore, avulsive. [citations omitted] (Emphasis added.)

Id. at 100. Thus, Montana has apparently introduced a dimensional test which looks simply to the amount of land deposited or eroded and the amount of time in which such deposition, reliction or erosion has occurred, quite apart from the existence or nonexistence of a violent change, or one perceptible to a person as he watches the river. ^{3/}

A number of problems now come into focus. It is possible, and indeed likely, that we may be faced with a situation in which under federal law an accretion has occurred whereas under state law the change is avulsive. We note that in both the Olsen case and the McCafferty case physical evidence was adduced in support of accretion and avulsion, respectively. The record before us is bare of such aids and thus we are reluctant to determine the nature of the change on this appeal. It could be pointed out that the 1960 dependent resurvey and survey of accretion lands of secs. 5

^{3/} In Jefferis v. East Omaha Land Co., *supra*, the Court specifically noted that English law "does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time." *Id.* at 193.

and 8, designated new lot numbers to the additions to federal lands, thus implicitly finding the changes to be accretive.

If the additions are accretive under federal law, but avulsive under state law the following problems occur. Lot 2 of sec. 33, T. 27 N., R. 59 E., was patented with a mineral reservation to the United States. We have noted above that lands granted to private citizens are subject to state law on riparian rights. Thus, if the state law determines the change to have been avulsive no land accretes to the surface patentee. But what of the federal mineral estate? Can the mineral estate accrete independently of the surface estate? If so, the anomalous result would occur that lands south of the river in 1902 which had been patented without a mineral reservation are now impressed with a mineral reservation despite the fact that the ownership of the land, under state law, has not changed.

If an accretion under federal law has occurred, much of the federal land in lot 4 sec. 4, T. 26 N., R. 59 E., has accreted to lot 1 sec. 33, T. 27 N., R. 59 E., for which a patent was issued without a mineral reservation. The United States would thus lose title to the land. But then under state law there would be no accretion to lot 1 sec. 33, T. 27 N., R. 59 E., and state authorities would assert jurisdiction over the former bed of the Missouri River and not recognize any private accretion to lot 1. As we have noted above, the rights of the owner of lot 1 are prescribed by state law. Thus, a piece of land would exist in which the United States claims no rights, the State of Montana claims no rights, and the owner of lot 1 sec. 33, T. 27 N., R. 59 E., can claim no rights. Certainly, such a result is not to be preferred. ^{4/}

A further complication occurs inasmuch as the State Office has issued oil and gas lease M 8170, embracing, to a great extent, the lands which may have accreted to lot 1 sec. 33, T. 27 N., R. 59 E. If the change in the river bed is the result of accretion the United States is presently leasing some lands in which it has no mineral interest. That would raise a subsidiary question of whether the lessee was still obligated to pay rent. See e.g., Sam K. Vierson, Jr., 72 I.D. 251 (1965); Thomas D. Chace, 72 I.D. 266 (1965).

^{4/} Such a result is particularly troublesome since, as the Supreme Court noted in Jefferis v. East Omaha Land Co., supra, the rule of accretion is, in part, derived "from the principle of public policy, that it is in the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow title to the shore itself." Id. at 189, citing Banks v. Ogden, 69 U.S. (2 Wall.) 57, 67 (1864).

Finally, though certain lands may have accreted to lot 3 sec. 4, T. 26 N., R. 59 E., most of this accretion would be situated in lands covered by oil and gas lease M 8170. Thus, an issue would be raised whether or not all or part of these lands are presently under lease. In any event, the doctrine is firmly established that to the extent an offer to lease lands embraces lands presently under lease, the offer is properly rejected regardless of whether the lease is void, voidable or valid, Frances M. Kanowsky, 10 IBLA 358 (1973); Bertil A. Granberg, 7 IBLA 162 (1972); Appellant's offer to lease lands covered by oil and gas lease M 8170 would have to be rejected regardless of the ultimate status of the land.

Thus, considering the attendant uncertainties it is proper to reject a lease for the subject lands until questions of the title ownership of accretions, if such have occurred, can be resolved. Prerequisite to such resolution would be a determination that there is, in fact, accretion to lands in federal ownership and, if so, a dependent resurvey by the Bureau of Land Management of such federally owned lands in sec. 33, T. 27 N., R. 59 E., and secs. 4 and 9, T. 26 N., R. 59 E. Until such a plat of survey is returned and accepted, no offer to lease should be entertained. See J. W. McTiernan, 11 IBLA 284 (1973); Georgette B. Lee, 10 IBLA 23 (1973). 5/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for reasons herein stated.

Douglas E. Henriques, Member

I concur:

Anne Poindexter Lewis, Member

5/ The concurring opinion suggests that it is enough to simply state that the federal ownership of the land is in controversy and that therefore no lease should issue. We believe, however, that it is better to fall victim to excess elaboration than to obfuscate by silence.

FREDERICK FISHMAN, CONCURRING IN THE RESULT

This case presents the simple question whether an oil and gas lease offer should be approved where title to the land covered thereby is not clearly shown to be in the United States. The answer is in the negative. Georgette B. Lee, 10 IBLA 23 (1973) citing California Co., A-30287 (March 23, 1969).

I believe that the case should be disposed of on that basis without further exegesis.

Frederick Fishman, Member

