

STANLEY G. WEST

IBLA 74-71

Decided January 10, 1975

Recommended decision of Administrative Law Judge Robert W. Mesch dismissing a protest against the acceptance of a plat of survey of an island in the Yellowstone River in sec. 33, T. 1 S., R. 10 E., P.M., Montana.

Recommended decision adopted.

1. Hearings -- Rules of Practice: Generally -- Rules of Practice: Hearings

Where the party bearing the risk of nonpersuasion does not appear at a hearing ordered pursuant to 43 CFR 4.415, that party's appeal is properly dismissed.

APPEARANCES: Richard Aldrich, Esq., Office of the Field Solicitor, Billings, Montana, Department of the Interior.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

By letter dated August 17, 1973, Stanley G. West protested the acceptance of a survey of an island in the Yellowstone River located in sec. 33, T. 1 S., R. 10 E., P.M., Montana. Because his appeal presented questions of fact which we were unable to resolve on the record, this Board, pursuant to 43 CFR 4.415, remanded this case for hearing before an Administrative Law Judge. Stanley G. West, 14 IBLA 26 (1973). In our decision we noted that West, as the appellant, "will bear the risk of nonpersuasion that the BLM determination is erroneous." [**2]

Pursuant to notice timely served on the appellant, Administrative Law Judge Robert W. Mesch held a hearing on July 29, 1974, at Livingston, Montana. Appellant did not appear at the hearing.

The Government did proceed and presented its prima facie case in support of the acceptance of the survey.

[1] Judge Mesch, in his decision of November 6, 1974, recommended dismissal of the appeal. 1/ We concur. Where the party to a hearing bears the risk of nonpersuasion and does not appear, the appeal is properly dismissed. Further, we note, as did the Judge, that the evidence presented by the Government clearly supports its contention that the island was unsurveyed land in 1889 when Montana was admitted into the Union and is therefore public land.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision is adopted and the appeal is dismissed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joseph W. Goss
Administrative Judge.

1/ A copy of the recommended decision is attached hereto as Appendix A.

November 6, 1974

RECOMMENDED DECISION

STANLEY G. WEST, : IBLA 74-71 :
Appellant :
: Survey: Group 568, Montana :
: Involving a protest : against the acceptance
: of a plat of survey of an : island in the
Yellowstone : River in Section 33, : T. 1
S., R. 10 E., P.M., : Montana.

This proceeding arises from the filing of a protest against a public land survey of an island in the Yellowstone River some three or four miles northeast of Livingston, Montana. The Chief, Division of Cadastral Survey, acting on behalf of the Director, Bureau of Land Management, dismissed the protest on the grounds that the survey of July 25, 1973, was properly executed. The decision of the Bureau of Land Management found that the island was in existence in 1889 when Montana was admitted into the Union, and that the island is, therefore, public land and properly subject to survey.

Stanley G. West appealed to the Interior Board of Land Appeals. On the appeal, Mr. West contended that the land was not an island in 1889 but rather was attached to the North bank of the Yellowstone River and that it did not become an island until the late 1940's. By an order dated November 28, 1973, the Interior Board of Land Appeals granted Mr. West's request for a hearing. The Board stated:

In light of the factual situation presented, we believe a hearing is appropriate for presentation of evidence on the issue:

Were the lands in issue part of the fixed uplands forming the north bank of the Yellowstone River on November 8, 1889, the date that Montana was admitted into the Union as a State?

The appellant will bear the risk of nonpersuasion that the BLM determination is erroneous.

The Board referred the case to the Hearings Division, Office of Hearings and Appeals, for a hearing before an Administrative Law Judge and directed that a recommended decision be submitted to the Board.

A hearing was held on July 29, 1974, at Livingston, Montana. Mr. West did not appear and was not represented at the hearing. 1/ Mr. Richard Aldrich, Esq., Office of the Solicitor, Department of the Interior, Billings, Montana, appeared in behalf of the Bureau of Land Management.

In view of the default of Mr. West, the Bureau of Land Management had no obligation to present any evidence in support of its position that the island was in existence in 1889 when Montana was admitted as a State. However, rather than moving for a summary dismissal of the appeal, the Bureau voluntarily presented a case in support of its position.

Inasmuch as Mr. West had the burden of proof and since he did not appear and was not represented at the hearing, I see no reason to detail or summarize the evidence presented by the Bureau. I have, however, considered that evidence and find that it supports the decision of the Bureau of Land Management which was appealed by Mr. West.

1/ By a letter dated July 23, 1974, Mr. West advised his attorney as follows:

Please take no further action in our fight with the BLM over my island. Do not appear at the hearing. I imagine they will take it by default, or something like that .

...

The appeal is dismissed because (1) Mr. West did not present any evidence that the determination of the Bureau of Land Management was erroneous, and (2) the evidence presented by the Bureau shows that the determination was correct.

Robert W. Mesch
Administrative Law Judge

18 IBLA 341

