

JOE S. DENT
and
DELORES L. DENT

IBLA 74-315

Decided January 30, 1975

Appeal from decision 9182(420) Group 566, Montana, by the Director, Bureau of Land Management, dismissing a protest against acceptance of a plat of survey.

Hearing ordered.

1. Secretary of the Interior -- Surveys of Public Lands: Generally --
Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands require extension or correction of past surveys.

2. Accretion -- Avulsion -- Boundaries -- Hearings -- Surveys of Public
Lands: Generally

Where one who protests the performance and acceptance of a survey of land, identified by the cadastral engineer making the survey as public domain land, offers probative evidence that changes arose because of avulsion rather than accretion and so the land is not in fact federally-owned, a hearing will be ordered to receive and consider such evidence and to ascertain the facts.

APPEARANCES: Bruce M. Brown, Esq., Miles City, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Joe S. and Delores L. Dent have appealed from a decision of the Director, Bureau of Land Management, signed by the Chief, Division of Cadastral Survey, dated April 24, 1974, dismissing their protest directed against acceptance by the Bureau of a plat of survey which represents a dependent resurvey of portions of the north boundary and subdivisional lines and a survey of a portion of the meanders of the Tongue River in T. 7 N., R. 47 E., and the survey of Tracts Q, R, S, T, U and V in Ts. 7 and 8 N., R. 47 E., P.M., Montana. The protest is directed primarily at the survey of Tract "U" in T. 7 N., R. 47 E.

The surveys were authorized by the State Director on July 8, 1970, to facilitate the administration of public lands in these townships.

The Bureau's decision maintained that with respect to the land in question, the change of location of the river, prior to a channel cut in 1961 by the U.S. Corps of Engineers, was a gradual change resulting in erosion on one bank and accretion along the opposite bank. Appellant contends that there was an avulsive change in the river location over the past 25 years.

Accretion is the gradual and imperceptible addition of land to adjacent riparian land. Jefferis v. East Omaha Land Co., 134 U.S. 178, 189 (1890); County of St. Clair v. Lovington, 90 U.S. (23 Wall) 46, 68 (1874). Avulsion is the result of a change in a stream or river which is "sudden or violent and visible." Philadelphia Co. v. Stimson, 223 U.S. 605, 624 (1912).

The Secretary of the Interior has the authority and duty to determine what lands are public lands, what public lands have been or should be surveyed, and what surveys of the public lands should be extended or corrected, as necessary, to include lands omitted from earlier surveys. Utah Power & Light Company, 6 IBLA 79, 79 I.D.

397 (1972); Burt A. Wackerli, 73 I.D. 280 (1966). 1/ See Kirwan v. Murphy, 189 U.S. 35 (1903).

We have examined carefully the arguments submitted by appellants and the Bureau along with Exhibits attached thereto, and find the facts have not been sufficiently developed on which to base a decision as to whether the change in the banks of the Tongue River was through avulsion or accretion. Therefore, we believe a hearing is appropriate, see 43 CFR 4.415, for presentation of evidence on the issue:

Was the change in the former channel of the Tongue River at issue due to avulsion or accretion during the period the land affected was owned by appellants or their predecessors?

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

We note that appellants have placed great emphasis on the Montana Supreme Court decision in McCafferty v. Young, 144 Mont. 385, 397 P.2d 96 (1964). In Forest Oil Corporation, 15 IBLA 33 (1974), this Board adverted to that decision, noting that "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." Id. at 39. But as Forest Oil pointed out the Montana test is not the Federal test and the riparian rights of lands in which United States ownership is retained are governed by the federal law. Id. at 37. Appellants are cautioned that they must prove avulsion under federal law and that reliance upon the mathematical formulation advanced by the Montana Supreme Court in McCafferty v. Young, supra, will not avail them.

1/ The Wackerli decision has been challenged in Wackerli v. Morton, Civil 1-66-92, in the United States District Court for the District of Idaho. The case involves the survey of omitted lands along the Snake River in Idaho.

This case shall be transferred to the Division of Hearings, Office of Hearings and Appeals, of this Department for assignment to an Administrative Law Judge for a hearing to be held in accordance with the rules in 43 CFR 4.430 to 4.439 (1972).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, a hearing is ordered and the case is transferred to the Division of Hearings, Office of Hearings and Appeals.

Douglas E. Henriques
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

