

ELDIN L. R. JOHNSON  
MARILYN JOHNSON

IBLA 80-77

Decided May 21, 1980

Appeal from decision of the Montana State Office, Bureau of Land Management, dismissing protest against oil and gas lease offer M-44226 (ND).

Hearing ordered.

1. Administrative Procedure: Hearings -- Hearings -- Oil and Gas Leases

Where a question of fact exists as to when accreted land was formed in front of a patented upland lot along the Yellowstone River and whether title to the accreted land is in the United States and, therefore, subject to oil and gas leasing, a hearing may be ordered by this Board pursuant to 43 CFR 4.415.

2. Oil and Gas Leases: Generally -- Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Discretion to Lease -- Oil and Gas Leases: Lands Subject to

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

APPEARANCES: Vern C. Neff, Esq., of Williston, North Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Eldin L. R. and Marilyn Johnson have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dismissing their protest against the issuance of oil and gas lease M 44226 (ND) to David A. Provinse.

The record shows that Provinse filed a noncompetitive oil and gas lease offer August 2, 1979, with the Montana State Office, BLM. The offer described by metes and bounds a tract of 17.512 acres of unsurveyed lands accreted to lot 2 of sec. 10 in T. 150 N., R. 104 W., fifth principal meridian, North Dakota, bordering the Yellowstone River. The upland lot, lot 2, sec. 10, was originally patented to Jacob Weigum November 20, 1942, with no reservation of oil and gas to the United States, as part of Patent No. 1115375, containing 79.05 acres.

On September 14, 1979, BLM requested the applicant to submit additional evidence that the applied for accreted lands did exist and to furnish a legal basis for the assertion that substantial accretion existed prior to entry of the upland lot. Provinse responded, submitting an aerial photo No. AXD-200-106, dated July 26, 1939, and an aerial photo No. 38053 274-269, dated July 17, 1974, which he contends support his position that this land is owned by the Government and show the earliest and the latest aerial photography covering the area.

On September 22 and 27, 1979, appellants filed a protest to the issuance of the lease as the current owners of lands which include lot 2, sec. 10, T. 150 N., R. 104 W. Appellants claim ownership of the title to all accretions to the lot in question. The State Office, relying on an opinion of the Chief, Branch of Cadastral Survey, dismissed the protest stating:

1. Substantial accretion in front of Lot 2 existed prior to entry on July 30, 1937, as evidenced by aerial photo dated July 27, 1939.
2. Patent No. 1115375 issued for the surveyed upland for a total of 79.05 acres, which did not include the unsurveyed accretion.

If at the time entry is made, a large body of land previously formed by accretion is existing between the meander line and the water of the stream, the patent will be construed to convey only the lands within the meander line. Madison v. Basart, 59 I.D. 415 (1947).

Appellants take issue with this determination contending in their statement of reasons, essentially, that they are the owners of the applied-for lands because substantial accretions did not exist in front of lot 2 as of July 26, 1939. They contend they and their predecessors in title have paid real estate taxes on the accretions to lot 2 since 1944. They conclude:

[T]hat all of the relevant evidence establishes that the accretions attaching to the Lot 2 evolved over a period of

time. That no credible evidence exists that the accretions to Lot 2 were "substantial" in 1937 as that term must be applied to cases of this kind. That the facts are that by the year 1944, as the result of a 1943 survey, McKenzie County found only 18.15 acres of accretions had attached to the Lot 2.

In support of these contentions appellants have submitted several exhibits showing the area in question. These include a series of aerial photos of the critical area of the Yellowstone River, dated July 26, 1939; a photocopy of a survey of T. 150 N., R. 104 W., fifth principal meridian, dated December 8, 1902, of the Surveyor General's Office; an uncertified photocopy of a Farm Unit Plat for the Lower Yellowstone Irrigation Project, prepared by the Bureau of Reclamation, approved November 19, 1931; and a 1972 Geological Survey topographical map of Cartwright Quadrangle, McKenzie County, North Dakota.

[1] Appellants have presented sufficient evidence to raise a question of fact as to when the applied for land was formed. Because there is limited survey information and a lack of expert evidence of record we are unable to make an informed judgment on the matter of whether title to this tract of land is in the United States. Where such a crucial factual question exists this Board may, on its own motion, order a hearing pursuant to 43 CFR 4.415 to resolve the question.

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

[2] It should be noted that if the question cannot satisfactorily be resolved that title is clearly shown to be in the United States, then BLM must properly reject the lease offer at issue. David A. Provinse, 45 IBLA 111 (1980); Forest Oil Corporation, 15 IBLA 33 (1974).

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 set aside, a hearing is ordered, and the case is referred to the Hearings Division, Office of Hearings and Appeals, for a hearing before an Administrative Law Judge at which evidence will be received to determine whether or not the land at issue had accreted to lot 2 prior to the original entry on July 30, 1937, and in fact, whether title to this land is in the United States.

We point out that the oil and gas leasing regulations at 43 CFR 3110.1-3(a) state that no offer may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are

within an approved unit plan of operation or where the land sought is surrounded by lands not available for leasing under the Act. The hearing should also inquire into the question whether there is land accreted to lots 1 or 4, sec. 10, contiguous to the tract described in the lease offer of appellant. If any such accretion exists as property of the United States, the offer of appellant is fatally defective and must be rejected pursuant to 43 CFR 3110.1-3.

After the hearing is held, the Judge will submit a recommended decision to this Board and to the parties, and afford the parties an opportunity to file briefs with this Board within 30 days after receipt of his recommended decision.

Anne Poindexter Lewis  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

