

DAVID A. PROVINSE

IBLA 83-943

Decided May 31, 1984

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting oil and gas lease offer M 54604 (ND).

Affirmed.

1. Accretion -- Boundaries -- Navigable Waters -- Public Lands:
Riparian Rights

Where riparian public land has been completely eroded away by the actions of a navigable river, title is lost to the United States and, where said land is subsequently restored through accretion by the continued action of the river, title belongs to the riparian owner.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

David A. Provinse has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated July 27, 1983, rejecting oil and gas lease offer M 54604 (ND) for lands described in the offer as an accretion to lots 4, 5, and 8 of sec. 19, T. 153 N., R. 101 W., fifth principal meridian, Williams County, North Dakota.

On February 18, 1982, appellant filed a noncompetitive oil and gas lease offer M 54604 (ND) for accretions to lots 4, 5, and 8 of sec. 19, T. 153 N., R. 101 W., fifth principal meridian, Williams County, North Dakota.

On March 23, 1983, BLM issued a decision rejecting appellant's offer stating the following:

The Corps of Engineers has advised that in 1952 when the United States was acquiring land for the Garrison Project and reservoir, the area in your lease offer was in the bed of the Missouri River and was not acquired. * * * The bed of the Missouri River belongs to the State of North Dakota and your offer is rejected.

In a letter dated April 21, 1983, the Army Corps of Engineers (COE) advised BLM that several errors had been discovered in their recommendation dated November 24, 1982, which had been the basis of the March 23, 1983, rejection, and advised that the area described in appellant's offer would be replatted. By notice to appellant dated April 28, 1983, BLM rescinded its March 23, 1983, decision.

In a subsequent letter dated June 20, 1983, COE stated:

Our findings indicate that in November, 1957, application was made to the Department of the Interior for the withdrawal of certain federal lands for use in connection with the Garrison Dam and Reservoir Project, under the supervision of the Department of the Army. Included in these requested federal lands were Lots 4, 5, 8 and unsurveyed accretions thereto in Township 153 N., Range 101 W. Attached is a Garrison "Segment GG" map depicting said Lots 4, 5, 8 and unsurveyed accretions thereto as they were depicted on the Garrison Segment GG map included in the application for withdrawal. At the time the request for withdrawal was made it appears as though all lands lying to the east and west of Lots 4, 5 and 8 were considered to be accretions to said lots.

In reviewing these maps and comparing them with the appropriate GLO [General Land Office] map, it appears that land lying to the east of Lots 4, 5 and 8 are not accretions to public land. As the GLO map indicates, the area of Lots 4, 5 and 8 was platted as fast lands in the original survey and was located on the bank of the Missouri River at the time of the GLO survey. Once surveyed and platted as lots in the original GLO survey it is our contention that said lot determinations are permanent.

At the time the Department of the Interior transferred these lands to the Department of the Army for use in connection with the Garrison Project the course of the Missouri River was no longer as depicted on the original GLO survey maps but rather as depicted on the attached Garrison Segment GG map. In comparing the GLO map and the Garrison Segment GG map it appears that lands lying to the west of Lots 4 and 5 are accretions to public lands while lands lying to the east of Lots 4 and 5 are not accretions to public lands. It also appears that lands lying to the east of Lots 4 and 5 were never transferred from the Department of the Interior to the Department of the Army notwithstanding the Garrison Segment GG map indication that the entire area was so transferred.

Assuming that the description of Tract No. 2 included in Oil and Gas Lease No. M 54604 (ND) is based on the original GLO survey, it is our opinion that these are the only lands described in said lease offer which are accretions to public land.

By memorandum dated July 25, 1983, BLM contacted the Branch of Cadastral Survey to determine if they concurred with the conclusion of COE. Their response, dated July 26, 1983, stated the following determination:

Based upon information contained in the case file (M 54604), lots 4, 5 and 8, section 19, T. 153 N., R. 101 W., 5th P.M., N.D. have been eroded away in their entirety by a gradual movement of the Missouri River, a navigable body of water. This erosion had taken place prior to the acquisition of the lands for the Garrison Project and extinguished the Federal Government's claim to the subject lots, which [ownership] now would be attached as accretions to private lands along the original left (west) bank of the Missouri River, or, [in the case of] an island [formed] from the bed of the river, * * * the lands would belong to the State of North Dakota.

Based on the conclusion of the Branch of Cadastral Survey, on July 26, 1983, BLM issued the decision which is the subject of this appeal. The decision finds that the lots applied for had eroded away in their entirety by a gradual movement of the Missouri River. The decision further states that the erosion took place prior to the acquisition of the land for the Garrison project and extinguished the Federal Government's claim to the subject lots.

On appeal appellant contends that BLM's action denying his offer was arbitrary. Appellant contends that since COE was the Federal Agency charged with surveying, mapping, acquiring, and administering the lands at issue from prior to North Dakota statehood, it would be in a better position to determine their origin and status than the Branch of Cadastral Survey who based their determination on "limited information."

The record indicates that on March 30, 1901, the Surveyor General approved a plat of survey of T. 153 N., R. 101 W., fifth principal meridian, North Dakota. That plat shows lots 4, 5, and 8 in sec. 19 as riparian land bordering the east bank of the Missouri River. Subsequent plats and photographs indicate that the course of the river gradually shifted to the east and channeled, creating an island. The south half of lot 4 and all but the southwestern corner of lot 5 are now situated in this island, the northwest portion of lot 4 is riparian to the west of left bank of the river, and the remainder of land covered by appellant's applications are now submerged in the river.

It was the conclusion of COE that "[o]nce surveyed and plotted * * * lot determinations are permanent * * *." It would therefore follow according to this analysis that title to the lots is still with the United States.

[1] There is little question that the thread of the Missouri River gradually moved to the east subsequent to the first survey. An examination of the various maps and photographs contained in the record discloses that there is a linear pattern of vegetation on the westerly shore of the river indicating a new line of growth with each succeeding easterly movement. This linear vegetation is also present on the island, demonstrating that the island was a part of the westerly shore before the river braided creating the island. The island itself has a very low profile and the photographs clearly indicate that it changes in size and shape almost yearly, and has been inundated and partially denuded on a number of occasions. The most recent photograph

indicates the island is now, in fact, a sandbar in the river. Lacking firm evidence to the contrary, we must conclude that the eastward movement of the Missouri River has been due to accretion.

The rule of accretion is discussed by the Board in Ralph F. Rosenbaum, 66 IBLA 374 (1982):

The generally accepted rule governing accretions holds that title to the accreted land belongs to the riparian owner. California ex rel. State Lands Commission v. United States, 50 U.S.L.W. 4672 (U.S. June 18, 1982); Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890); David A. Provinse, 35 IBLA 221, 85 I.D. 154 (1978). The Supreme Court in Jefferis v. East Omaha Land Co., *supra*, at 189, 191, found that the rule is supported on two grounds: (1) that such owners should be entitled to accretions because they must bear without compensation the losses of encroachment by the water, and (2) that as a matter of public policy all lands ought to have an owner, and it is most convenient that insensible additions to the shore follow title to the shore.

Courts, however, are divided on the question of title where land in a riparian lot has eroded away to such an extent that a formerly remote lot becomes riparian and then by the process of accretion the land is restored, *i.e.*, as to whether title to the restored land is in the remote riparian owner or the original riparian owner. 78 Am. Jur. 2d Waters § 421 (1975). The question of title to the unpatented tract is governed by Federal common law. California ex rel. State Lands Commission v. United States, *supra*; Wilcox v. Jackson, 38 U.S. (13 Pet.) 266, 276 (1839); David A. Provinse, *supra*, at 227-30, 85 I.D. at 157-58; *cf.* Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (state law held applicable where land at issue in riparian rights case had long been in private ownership).

* * * * *

In cases where land accretes to a riparian lot to such an extent that it reaches across a former riverbed and restores land on the opposite shore which had eroded away, title to the accretion is deemed to be in the riparian owner to whose land the accretion attaches and not in the original owner of the eroded land. Matthews v. McGee, 358 F.2d 516 (8th Cir. 1966); Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); Edwin J. Keyser, 61 I.D. 327 (1954), and cases cited therein.

* * * * *

We believe that the rule of accretion as set forth in cases where an accretion restores land, whether the opposite bank of a river or an island, which has eroded away, is equally applicable

in cases where land, once eroded away, has reappeared, on the same side of the river, through accretion. In all such cases, the original owner of the eroded land loses title to the land when it erodes away entirely and does not regain it when the new land reappears through accretion. Rather, the riparian owner to whose land the accretion attaches takes title. [Emphasis in original.]

Id. at 379-82.

The issues involved in the instant case are not unlike those presented in Rosenbaum. In Rosenbaum the land reappeared when the river returned to its original position, while in the instant case the land reappeared due to the continual eastward shift of the river. This distinction obviously does not dictate a different result. Thus, there was no remaining public domain consisting of lots 4, 5, and 8 in sec. 19 which could be leased pursuant to appellant's public domain oil and gas lease offer. 1/

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.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

1/ Although there is no deed to the accreted land in the record, it appears from the COE tract acquisition map that the United States acquired title to the west bank of the river and its accretions. Accordingly, the land may be subject to leasing pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1982).

