

STATE OF MONTANA

IBLA 85-108

Decided March 14, 1986

Appeal from a decision of the Montana State Office, Bureau of Land Management, dismissing protest to claim on behalf of the United States of the lakebed of Little Bitter Root Lake, Montana. 7-55672.

Set aside; referred for hearing.

1. Navigable Waters

Federal law must be applied by BLM to determine whether a lake is navigable in fact when determining ownership of a lakebed for purposes of issuance of a Federal oil and gas lease. In such a case, navigability depends upon whether there is evidence to show the lake had been used or was susceptible of being used as a highway for commerce at the time Statehood was conferred in 1889. An offer by the state to prove the lake was used as a waterway for commercial logging raises a sufficient issue of fact to require a factfinding hearing to determine navigability of the lake at statehood.

APPEARANCES: John F. North, Esq., Department of State Lands, State of Montana.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Montana, Department of the State Lands, has appealed from a September 25, 1984, decision of the Montana State Office, Bureau of Land Management (BLM), dismissing the State's protest of BLM's claim of Federal ownership of the lakebed of Little Bitter Root Lake (sec. 16, T. 27 N., R. 24 W., principal meridian, Montana).

The origin of this controversy is noncompetitive oil and gas lease offer M-55672, submitted by David A. Provinse on June 30, 1982, for 421.176 acres of land. 1/ The described lands constitute part of the lakebed

1/ "TRACT NO. 1

"That portion of the bed of Little Bitter Root Lake riparian to Lots 1, 2, 3, 4, 5, 6 and 7 of Section 16 in Township 27 North, Range 24 West, P.M.M. and which lies within the exterior boundaries of said section 16 and being more particularly described as follows: Beginning on the East shore of said lake at the meander corner of fractional sections 9 and 16 in said township; thence in section 16 along the meanders S. 10 degrees 40' E., 10.00 chains;

of Little Bitter Root Lake and certain lands riparian to the lake. On July 22, 1983, BLM sent a notice to the State of Montana declaring that "the United States asserts its rights to the mineral interest in the lakebed," and offering the State 30 days from receipt of the notice to inform BLM referred to the fact the State of Montana had "used the deficiency acreage (496.98) in Section 16 as base in lieu selections (IL #9, #16, #37, #38, #40 and #62)." Citing David A. Provinse, 15 IBLA 387, 81 I.D. 300 (1974), BLM stated

the acceptance by a State of other lands in lieu of lands lying within the meander line of a nonnavigable body of water adjacent to the granted upland school section was a relinquishment of any interest in the land underlying the water and precludes assertion of a State claim to such lands.

In an August 25, 1983, response to BLM's notice, the State introduced a claim based upon the theory that Little Bitter Root Lake is a navigable body of water, stating:

A sawmill was operated on the Lake from 1916 to 1920 and rafts of logs were floated across the Lake to the mill. Because there was no major change in the Lake from 1889 to 1916, the Lake was navigable at Statehood and is property of the State of Montana.

In its September 25, 1984, decision BLM rejected the State's claim for the reason the State had furnished no evidence that a sawmill was located on the lake from 1916 to 1920. Further, the BLM decision cited Shaw v. Oswego Iron Co., 10 Or. 371 (1882), for the proposition that log flotation was not sufficient to determine navigability. Finally, the indemnity lands selection was also cited in the decision as grounds for rejecting the claim.

In its statement of reasons, the State of Montana relates a short summary of the law of navigability for title purposes and asserts the rule in this case should be determined by proof of "susceptibility of navigation."

fn. 1 (continued)

thence S. 15 degrees E., 3.40 chains; thence S. 55 degrees 55' E., 8.00 chains; thence S. 19 degrees 22' E., 7.00 chains; thence S. 0 degree 10' E., 6.00 chains; thence S. 25 degrees 40' E., 8.00 chains; thence S. 1 degree 52' W., 11.00 chains; thence S. 23 degrees 51' W., 8.00 chains; thence S. 28 degrees 10' W., 8.00 chains; thence S. 22 degrees 28' W., 4.00 chains; thence S. 42 degrees 28' W., 6.00 chains; thence S. 49 degrees 24' W., 3.00 chains; thence S. 80 degrees 55' W., 4.00 chains; thence S. 63 degrees 56' W., 4.00 chains; thence S. 77 degrees 7' W., 2.00 chains; thence S. 54 degrees W., 5.00 chains; thence S. 66 degrees 24' W., 2.00 chains; thence N. 82 degrees 28' W., 7.00 chains; thence N. 86 degrees 40' W., 7.00 chains; thence N. 82 degrees 12' W., 6.00 chains thence N. 79 degrees 50' W., 9.00 chains; thence N. 88 degrees 43' W., 7.00 chains; thence S. 89 degrees 32' W., 2.60 chains; thence N. 86 degrees 20' W., 2.26 chains to the meander corner of fractional sections 16 and 17 in said township; thence leaving the meander line N. 0 degree 4' W., 48.94 chains along an extension of the west boundary of said section 16 to a point on the medial line of said lake; thence leaving the medial line N. 64 degrees 45' E., 62.00 chains to the point of beginning. The described tract contains 421.176 acres."

The State asserts that while, Little Bitter Root Lake was not used for floating logs until 1916, its natural condition did not change between 1889, the date of Montana's admission to the union, and 1916. The State explains and distinguishes the Shaw decision and argues the lake was susceptible of use in commerce in 1889, and therefore, BLM's reliance upon Shaw was in error.

[1] This appeal involves the same legal principles which were announced by this Board in State of Montana, 88 IBLA 382 (1985), where we observed:

The Secretary of the Interior has both the authority and the duty to consider and determine what lands are public lands of the United States. See State of Montana, 11 IBLA 3, 80 I.D. 312 (1973). Such authority and duty include a determination of navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a state upon its admission into the Union. Id. The first of two principles relevant here is that the bed of a nonnavigable lake is usually deemed to be the property of the adjoining landowners. 12 Am Jur. 2d, Boundaries § 15 (1964). The second principle is that, under the "equal footing doctrine," title to land beneath navigable waters passes to the State upon its admission into the Union. Montana v. United States, 450 U.S. 544, 551 (1981). Thus, ownership of the lakebed turns on whether or not the lake is deemed navigable.

In State of Montana, supra at 383, note 3, we observed that BLM's reliance upon David A. Provinse, 15 IBLA 387, 81 I.D. 300 (1974) for the proposition that acceptance of other lands in lieu of lands under a lake was a relinquishment of the riparian land was misplaced in the context of that case. The same is true here. Navigability was not an issue in the Provinse decision. A totally different legal issue was present in Provinse and the decision is not applicable here. In fact, this appeal, which does turn upon whether Little Bitter Root Lake is navigable, was cited by the State in its briefs in State of Montana, as support for its contention that McGregor's Lake was a navigable body of water because it is allegedly so similar to Little Bitter Root Lake, located only a short distance away.

Our holding in State of Montana, is equally applicable here; the decision in that case controls this appeal. Here, the State requests that the Board reverse the BLM decision and hold that commercial log floating is sufficient to establish navigability for title purposes. However, the State has yet to submit supporting evidence to show there was ever commercial use of Little Bitter Root Lake as it claims. As was stated in State of Montana, 88 IBLA at 386, under these circumstances a hearing is properly ordered. The State of Montana is entitled to produce evidence to show Little Bitter Root Lake was used or susceptible of being used as a highway for commerce at the time of Montana's statehood in 1889. Since this appeal is apparently factually closely related to that in State of Montana, which also arose from a lease offer made by David Provinse and which involved the lakebed of McGregor's Lake, a neighboring body of water, consideration may be properly given to a consolidation of these two matters for hearing, assuming the McGregor case is still pending on the Hearings Division docket.

Finally, BLM's reliance upon the Shaw decision was also in error. As the State correctly points out in its brief, whatever vitality the Shaw decision may continue to possess in the state courts of Oregon, the determination of navigability in cases such as these under consideration turns upon Federal law described in State of Montana, as derived from the Daniel Ball standard. As we stated in State of Montana,

Nonetheless, a navigability inquiry using the Daniel Ball standard must be made here to determine whether as Provinse contends, the result is that title to the portion of the lakebed claimed by him rests in the Federal Government. A lease of the claimed underwater lands may then issue to him, all other requirements for leasing having been met. See, e.g., State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982) for discussion of the application of the Federal navigation rule to land title determination cases. 5/

5/ Navigability determinations for purposes of determining title to waterways differ from navigability determinations for other purposes, as explained, Id. at 672 F.2d 794, n.1.

88 IBLA at 387.

Accordingly, this appeal is referred to the Hearings Division for appointment of an Administrative Law Judge who will conduct a hearing concerning the State's claim that Little Bitter Root Lake is susceptible to navigation. The State of Montana, the oil and gas lease applicant, David A. Provinse, and BLM shall be notified of the hearing and permitted to participate as parties. Evidence shall be reviewed concerning the navigability of Little Bitter Root Lake in 1889, on the date of Montana's statehood. The inquiry will consider whether, when Montana was granted statehood, the lake was navigable or susceptible to navigation in its natural state without need for modification of the waterway. Evidence of actual historical use, of susceptibility of the lake to such use, and of trade and commercial patterns in the vicinity are relevant to the inquiry to be conducted.

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 and the case is referred to the Hearings Division. The Administrative Law Judge shall enter findings of fact, conclusions of law, and a decision based upon the record made at hearing. Unless a timely appeal is taken from the Administrative Law Judge's decision, it shall constitute the final decision for the Department in this matter.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

R. W. Mullen
Administrative Judge

