

**Editor's note: Reconsideration denied by Order dated Dec. 27, 1989; Board decision vacated; case remanded by Director -- 9 OHA 17 (March 26, 1991), 98 I.D. 164; appeal filed Civ.No. 89-1911 (D. Ariz. Dec. 1989), dismissed as moot (June 3, 1991), (judgment dated June 4, 1991); appeal filed sub nom. Fort Mojave Indian Tribe v. Lujan, Civ.No. 90-0280-PCT-EHC (D. Ariz. Feb. 20, 1990), dismissed as moot, judgment dated June 24, 1991.**

FIRST AMERICAN TITLE INSURANCE CO.

v.

BUREAU OF LAND MANAGEMENT

FORT MOJAVE INDIAN TRIBE, INTERVENOR

IBLA 89-209

Decided July 7, 1989

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., requiring revision of survey of accreted lands. Group No. 367.

Affirmed as modified and remanded.

1. Accretion--Surveys of Public Lands: Generally

In apportioning accreted lands between adjoining sections, BLM properly disregards partition lines previously determined by proportioning the new frontage between two zero accretion points, one of which is within an area which has subsequently been determined to have formed through the process of avulsion.

2. Estoppel--Surveys of Public Lands: Generally

BLM is not required under the doctrine of either bona fide rights or equitable estoppel to accept a line which has been surveyed on the ground with appropriate monumentation but which has never been officially approved by BLM, even where private landowners may have relied on the monuments in purchasing land and constructing improvements.

3. Accretion--Surveys of Public Lands: Generally

In apportioning accreted land between adjoining sections, BLM is not required to use a privately surveyed partition line established by the perpendicular method where the private surveyor had no adequate justification for not employing the proportionate shoreline method and, thus, the line was not within the allowable limit of error.

4. Accretion--Surveys of Public Lands: Accretion Lands

Where BLM has failed to adequately justify not employing the proportionate shoreline method for apportioning accreted land between adjoining sections and that approach will result in an equitable apportionment of



the accreted land, the Board will remand the case to BLM for adoption of that method in a corrected survey.

APPEARANCES: Donald N. McIntyre, Esq., and James T. Braselton, Esq., Phoenix, Arizona, for First American Title Insurance Company; Dale T. White, Esq., Boulder, Colorado, for intervenor Fort Mojave Indian Tribe; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE KELLY

The Bureau of Land Management (BLM) and the Fort Mojave Indian Tribe (Tribe) have appealed from a December 19, 1988, decision of Administrative Law Judge John R. Rampton, Jr., rescinding a 1982 BLM dependent resurvey and remanding the case to BLM with instructions to revise the survey to reallocate accreted lands west of secs. 10 and 15, T. 17 N., R. 22 W., Gila and Salt River Meridian, Mojave County, Arizona.

This matter was referred for hearing and decision as a result of the Board's December 16, 1987, decision in First American Title Insurance Co., 100 IBLA 270 (1987). In that decision, the Board concluded that, based on the 1973 Survey Manual, the proportionate method was the usual method of apportioning accreted lands and, citing Peter Paul Groth, 99 IBLA 104, 111 (1987), noted that the Board had ruled that "deviation from the 'primary method' [of survey] \* \* \* as set forth in the BLM Survey Manual, without 'proper justification,' constitutes gross error." First American Title Insurance Co., *supra* at 278. Accordingly, the Board referred the case to the Hearings Division "for assignment of an Administrative Law Judge to conduct a hearing on the question of whether BLM's departure from the proportionate method of surveying accreted lands is supported by adequate justification." Id. at 281.

The procedural and factual background of this appeal is fully set forth in our December 1987 decision and Judge Rampton's decision.

In his December 1988 decision, Judge Rampton initially outlined the nature of the Board's decision referring the case for a hearing, stating that it

placed upon BLM and the intervenor, Fort Mojave Tribe, the burden of justifying with adequate reasons why Shearer's survey done by the "usual" or "recommended" [method] could not be accepted. In my view, implicit in the Board's order are the instructions that, if at all possible, Shearer's method of apportionment should be acceptable and that deviation without "proper justification" constitutes gross error. [1/]

(Decision at 8).

1/ The Shearer survey refers to survey work performed by Norville Shearer, BLM Project Engineer, in 1961-62. See 100 IBLA 270-71.

Judge Rampton noted that BLM had supported rejection of the Shearer line, even though it had been determined by the proportionate shoreline survey method, on the basis that the line had resulted from improper application of that method where the location of the line was based on a "zero accretion point" which was located in land which had formed by avulsion rather than accretion, as determined in Sherrill v. McShan.<sup>2/</sup> As explained by BLM, that point, located in sec. 21, T. 18 N., R. 22 W., Gila and Salt River Meridian, Arizona, constituted the northern end of the new bank of the Colorado River allocated in proportionate parts to the riparian owners along the old bank of the river.

Judge Rampton, however, ruled that BLM did not have adequate justification for rejecting the Shearer line, concluding that there was "no legal bar" to reliance on the northern zero accretion point, especially where the Associate Solicitor, Division of Indian Affairs, by memorandum dated July 7, 1982, had stated that BLM could recognize the avulsion to have occurred "while apportioning the unaffected accretions south of that area in the most equitable manner" and where BLM had relied on that point in establishing the surveyed lines between secs. 4 and 9 and 9 and 10 across the accreted land (Decision at 16).

Moreover, Judge Rampton concluded that rejection of the Shearer line could not be adequately justified where it impaired the bona fide rights of private owners of the disputed land who had relied on that line as it was denoted by monuments on the ground in purchasing the land and constructing improvements, even though the Shearer survey had never been approved by BLM. Id. at 19.

Accordingly, Judge Rampton concluded that a 1982 survey by Paul L. Reeves, who had resumed the project of surveying the accreted lands west of secs. 10 and 15, T. 17 N., R. 22 W., Gila and Salt River Meridian, Arizona, must be rescinded. Judge Rampton remanded the case to BLM for revision of the survey "to reallocate the accretion lands between secs. 10 and 15 in accordance with the line established in 1962 by Mr. Shearer." Id. Both BLM and the Tribe have appealed from Judge Rampton's December 1988 decision.

BLM contends in its statement of reasons (SOR) at page 17, that "it is not 'gross error' or even 'error' as such to depart from the 'usual' approach to the division of accretion, the proportionate shoreline method," asserting that there is a significant distinction between the applicable provisions of the Survey Manual with respect to the apportionment of accreted lands, which are involved herein, and those with respect to the restoration of lost corners, which were involved in the case in Groth. While we recognize the distinction, we are not persuaded that BLM's failure to adequately justify use

<sup>2/</sup> This 1966 Ninth Circuit opinion, reported at 356 F.2d 607, involved litigation over lands west of secs. 27, 28, 33, and 34, T. 18 N., R. 22 W., Gila and Salt River Meridian, Arizona, and the effects of movements of the Colorado River on land titles in Arizona and California. See 100 IBLA 270, 276-77.

of the proportionate shoreline survey method would not constitute gross error.

Groth involved a failure by BLM to provide adequate justification for the use of "one-point control," rather than "two-point control," in the restoration of a lost corner. We concluded that that constituted gross error where the Survey Manual "mandated" the use of two-point control in the absence of adequate justification otherwise. Peter Paul Groth, supra at 119.

Although we cannot say that use of the proportionate shoreline survey method for apportioning accreted lands between adjoining sections is mandated by the Survey Manual, it is clear that the Manual, as further explicated in the 1975 Casebook, 3/ expresses a clear preference for this method. In the words of First American, the Manual sets forth a "priority of methodologies" (First American Answer at 11). See Tr. 265. Thus, where BLM fails to adequately explain departing from the proportionate shoreline survey method or fails to establish, in the words of BLM's SOR at page 56, the "requisite circumstances" for departing from that method, we will regard that as gross error. Domenico A. Tussio, 37 IBLA 132, 133 (1978).

[1] The initial problem with the decision of Judge Rampton is that he apparently viewed the case as requiring a determination whether BLM had adequately justified its rejection of the Shearer line, rather than whether BLM had, as a general matter, adequately justified departing from use of the proportionate shoreline survey method. In referring the case for a hearing, we had intended that the case focus on the latter question. Judge Rampton apparently viewed the Shearer line as the embodiment of a proper application of the proportionate shoreline survey method, in the absence of a further justification for departing from that method, despite contrary indications in the Board's December 1987 decision.

In his December 1988 decision, Judge Rampton stated that, in setting aside the Acting Director's February 1985 decision and referring the case for a hearing, the Board "rejected BLM's refusal to accept Shearer's zero acc[retion] point based solely on its interpretation of Sherrill v. McShan" (Decision at 8). That was never our intent. Rather, we noted that the Associate Solicitor, Division of Indian Affairs, in his July 1982 memorandum to the Director, BLM, had stated that BLM was not precluded by Sherrill from using Shearer's zero accretion point as a basis for establishing the line between secs. 10 and 15 across the accreted land. However, we then indicated that the Associate Solicitor's view might be "unacceptable." First American Title Insurance Co., supra at 277. We, therefore, did not reject outright BLM's determination not to use Shearer's zero accretion point as a basis for apportioning accreted land south of that point.

In fact, it is our conclusion that use of Shearer's zero accretion point as a basis for establishing the proper location of the various section

3/ Public Land Surveying - A Casebook (1975), prepared by the BLM Cadastral Training Staff.

lines across the accreted land south of that point, including the line between secs. 10 and 15, is not permitted under a proper application of the proportionate shoreline survey method. Contrary to Shearer's view, that point does not represent a point along the new bank of the Colorado River formed by the process of accretion where, in accordance with the holding in Sherrill, it arose through the process of avulsion. Thus, it cannot be used as the northern point of the extent of the new bank which must be proportioned among the riparian owners along the original bank of the river, according to their original frontage. <sup>4/</sup> To do otherwise would not conform with section 7-58 of the Survey Manual which provides, at page 168, that BLM may apportion only the "new frontage along the water boundary of an accreted area." (Emphasis added.)

As BLM stated in its September 28, 1987, response to the Board's August 27, 1987, order to show cause: "[A zero accretion point] can't be beyond where the accretion has stopped because you then don't have a comparable new frontage to proportion against the ancient bank." Id. First American would appear to agree, stating in its October 15, 1987, answer at page 2 that "a river channel created by an avulsion [can be disregarded because it] \* \* \* would have no effect on the apportionment of accretion."

As proof of the avulsion, in addition to the specific finding of the court in Sherrill, Jerold E. Knight, Chief of Survey Examiners, Arizona, BLM, testified that he independently confirmed that Shearer's zero accretion point was in an area which had formed as a result of an avulsive change in the course of the river. See Tr. 53. First American has submitted no evidence to dispute this conclusion. See BLM Exh. 46 (Vol. I) at 215.

First American, however, emphasizes that BLM, in its SOR at page 32, states that "[i]t has never been the Government's position that Sherrill v. McShan legally precluded use of the proportionate shoreline method south of Goat Island using Shearer's northern zero accretion point," concluding that BLM thereby admits that there is "no legal impediment to the use of Shearer's northerly [zero accretion point]" (First American Answer at 18). There is no such admission. Rather, it is clear that BLM merely asserts that Sherrill itself does not preclude reliance on that point, especially where the question of apportionment based on that point was not raised in that case.

First American also argues that adoption of the Shearer lines between secs. 4 and 9 and 9 and 10 across the accreted land constitutes an "implicit

<sup>4/</sup> In its Sept. 28, 1987, response to the Board's Aug. 27, 1987, order to show cause, at page 2, BLM explained its decision not to rely on Shearer's northern zero accretion point, stating that such a point "must be either at a point where accretion stops or at a place where the ancient bank and the bank limiting the accretion have similar characteristics in direction, such as at the south end of section 15, where a normal can be used." In either case, it is clear that the zero accretion point must be in land which has accreted to the bank of the river. It cannot be in an area which has formed through the process of avulsion.

recognition of the validity of Shearer's [zero accretion point]" (First American Answer at 21). However, as will be explained, BLM's adoption of these lines was based on the fact that they had been approved by a State court in the case of River Farms and were subsequently relied upon. There is no evidence that BLM, either expressly or implicitly, thereby recognized the propriety of using Shearer's zero accretion point as a basis for apportioning the accreted land involved herein. 5/

We also now note, contrary to the view expressed by First American and Judge Rampton, that the Associate Solicitor, in his July 1982 memorandum, never specifically endorsed use of Shearer's zero accretion point as a basis for establishing the line between secs. 10 and 15 across the accreted land. Rather, he was careful not to, concluding only that BLM might use a zero accretion point either north or south of the judicially determined avulsed area in applying the proportionate shoreline survey method. Given this, Judge Rampton was in error to the extent that he regarded the July 1982 memorandum as supporting his conclusion that there was "no legal bar to accepting Shearer's zero accretion point" (Decision at 16).

Also, Judge Rampton failed to note that our primary concern was that BLM needed to address the question of "why the zero accretion point may not be established south of the area litigated in Sherrill v. McShan." First American Title Insurance Co., supra at 277. Rather, he focused on the question of whether "Shearer's survey \* \* \* could not be accepted" (Decision at 8). Accordingly, Judge Rampton gave no consideration to the former matter. The record, however, is adequate for the Board to make the necessary determination de novo, as discussed infra.

[2] While we are persuaded that various individuals relied upon the Shearer line as denoted on the ground by survey monuments in purchasing land and constructing improvements within the disputed area, we cannot conclude that BLM was required to accept the Shearer line because of such reliance.

As support for his conclusion that BLM should not be permitted to reject the Shearer line, Judge Rampton relied on the case of Algoma Lumber Co. v. Kruger, 50 L.D. 402 (1923). As enunciated by Judge Rampton, that case

holds that where the Government through its survey, be it a "paper" or field survey, has led private persons to locate themselves and construct improvements on real property \* \* \* the Government should not in the context of a resurvey modify that earlier survey in such

5/ In its Answer at page 21, First American suggests that the action of the State court in River Farms constituted "judicial confirmation" of the "validity of the use of Shearer's northerly [zero accretion point] for proportioning south of Goat Island." There is no evidence, however, that the State court considered the validity of the method by which the Shearer lines between secs. 4 and 9 and 9 and 10 had been established.

a way as to encroach on to and effectively dispossess the owner of the improvements.

(Decision at 17).

Algoma specifically involved an attempt by the Government to survey a particular line separating patented and public land along a different course than a previous private survey which had been conducted following patent of the land bounded by that line. The disputed line had originally been "protracted on [an approved survey] plat" due west from an established corner at the time the land was patented by the United States and was thereafter surveyed by a private surveyor slightly off the cardinal direction, which survey was then relied upon by a successor-in-interest to the patentee in constructing improvements. Algoma Lumber Co. v. Kruger, *supra* at 402.

In ruling on the propriety of the attempted Government survey, the First Assistant Secretary was expressly persuaded not to accept the Government line over the private line where the private line was "within the allowable limit of error" permissible in the case of Government surveys, stating that "[n]o reason is apparent why the work of a local surveyor performing a service omitted by the Government should be held to closer scrutiny than that required in respect to official public-land surveys," and where acceptance of the private line would "protect valuable improvements innocently placed [on the land in reliance on the private survey]." *Id.* at 404.

As incorporated into section 3-109 of the Survey Manual, Algoma stands for the proposition that, in delineating the boundary between patented and public land along a "line platted but not run by the Government," the Government will not disturb a private survey of that boundary where the private line is "within allowable departure from cardinal course" and has been "relied upon by owner under title passed by the United States in the placing of improvements upon the patented land" (Survey Manual at 92).

Algoma, however, does not support adoption of the Shearer line as indicated by Judge Rampton. Initially, the present case involves reliance by private landowners on Government survey monuments set along the unapproved Shearer line, rather than reliance on a privately surveyed line, as was the case in Algoma. However, as evidenced by the September 17, 1974, "Property Map" prepared by N.J. Devlin & Associates (BLM Exh. 25), those survey monuments were apparently incorporated into a private survey which may have then been relied upon in the placement of improvements by private landowners.

Even assuming the two situations are comparable, Algoma did not turn merely on the fact that private landowners had relied upon a prior privately surveyed line in constructing improvements. Rather, the case turned on the fact that the line was relied upon by private landowners in constructing improvements and was within the allowable limit of error.

There is no evidence that the Shearer line is within the margin of error permissible under Government surveying standards in the case of establishing surveyed lines across accreted land. As discussed *supra*, the

Shearer line did not constitute the proper application of the proportionate shoreline survey method where it was based upon an improper zero accretion point. Thus, even assuming that incorporation of Government survey monuments into a private survey is the equivalent of a privately surveyed line, we are not persuaded that Algoma requires acceptance of the Shearer line as the boundary between secs. 10 and 15 across the accreted land merely because private landowners relied upon the Shearer line in constructing improvements.

Generally, in the case of Government surveys, as Judge Rampton recognized, an earlier survey is entitled to deference only where it is an approved survey. Thus, Judge Rampton stated that "[i]t is undisputed that no one can safely rely upon an unapproved BLM survey" (Decision at 17). Nevertheless, Judge Rampton concluded that BLM should not be permitted to reject the Shearer line where monuments "were placed upon the line established by Shearer and remained in place for more than 20 years," which monuments were expressly relied upon by various individuals purchasing land and constructing improvements in the disputed area, and the Shearer line "or a close approximation" was incorporated into various maps "prepared and/or published in the interim between the 1962 survey and the 1982 Reeves survey," indicating that reliance on the line was "not confined to uninformed property owners." Id. at 17, 18.

We conclude that the Shearer line is not entitled to deference simply because monuments were placed on the ground along that line. We are not aware of anything which precludes BLM from modifying an earlier survey which resulted only in the establishment of monuments, but which was never approved. Until approval of the survey and acceptance of the survey plat, the land affected by the Shearer line could not be considered surveyed. United States v. Cowlshaw, 202 F. 317, 321 (D. Or. 1913). As the Supreme Court stated in Cox v. Hart, 260 U.S. 427, 436 (1922):

[T]he running of lines in the field and the laying out and platting of townships, sections and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed \* \* \* .

See Tr. 20; BLM Exh. 46 (Vol. I) at 121-22.

Nor in these circumstances can we regard reliance by private landowners on unapproved survey monuments as justified or, moreover, as vesting in them any rights to establishment of the surveyed line along the northwest boundary of the disputed triangular area. <sup>6/</sup> To hold otherwise would mean that "once a Government employee takes a preliminary, unofficial action, the

<sup>6/</sup> The phrase "triangular area" refers to an area of approximately 60 acres of accretion land within which First American's policyholders purchased land and which BLM's 1982 survey places in sec. 10, within the boundaries of the Fort Mojave Indian Reservation.

United States is forever and irrevocably bound" (BLM SOR at 58). We cannot countenance such a result.

Nor does the fact that the Shearer line was adopted by various maps preclude modification. There is no evidence that the preparers of these maps independently assessed the validity of that line. The maps, including the September 17, 1974, "Property Map" prepared by N.J. Devlin & Associates in connection with the sale of the land (BLM Exh. 25), merely depict the unapproved Shearer line. See Tr. 71-72, 79, 167-68, 244. Even if the preparers had assessed the validity of the Shearer line, the maps, even where prepared by other agencies of the Federal Government, do not constitute official survey plats of the United States and, thus, are not binding on BLM. See BLM Exh. 46 (Vol. I) at 134. The authority to conduct, approve, and accept surveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. See Benton C. Cavin, 83 IBLA 107, 130 (1984); Arthur E. Meinhart, 6 IBLA 39, 41-42 (1972); Survey Manual at 191.

For the most part, however, as the Chief, Branch of Cadastral Survey, Arizona, explained in his April 26, 1985, memorandum to the Director, BLM, at page 3: "Most of the maps are schematic in nature and simply show a line indicating a relative position and recognizing that each of the sections [10 and 15] has some right to land formed by accretions." Unlike the Myer survey plat, 7/ none of the maps are based on an actual survey of the line between secs. 10 and 15 across the accreted land.

We distinguish the lines surveyed by Shearer between secs. 4 and 9 and 9 and 10 across accreted land from the lines surveyed by Shearer between secs. 10 and 15 and 15 and 22 across accreted land. In the former case, as explained by Knight at the hearing, BLM decided not to modify the location of those lines although they had also been established on the basis of the discredited zero accretion point in sec. 21, T. 18 N., R. 22 W., Gila and Salt River Meridian, Arizona, and had never been approved by BLM, because they had been accepted by a State court in the case of River Farms, Inc. v. Fountain, 520 P.2d 1181 (Ariz. Ct. App. 1974), and were subsequently relied upon. See Tr. 44-45. In fact, the approved field notes for the Reeves survey noted, at page 3, that the lines between secs. 4 and 9 and 9 and 10 which were accepted were "used to describe land to which title was quieted in River Farms v. Fountain."

Moreover, as noted by the Associate Solicitor in his July 1982 memorandum, at page 6, adoption of the Shearer lines in the case of the partition lines between secs. 10 and 15 and 15 and 22 would disrupt the location of the lots surveyed by Myer as part of the Bermuda Plantations, placing three

7/ The Myer survey plat refers to the results of a private survey conducted by Nelson Myer in 1961, which established a partition line between secs. 10 and 15 perpendicular to the Colorado River. BLM's 1982 resurvey accepted this line as the boundary between the Fort Mojave Indian Reservation and an area of private development of approximately 700 lots on the accreted lands west of sec. 15, T. 17 N., R. 22 W., Gila and Salt River Meridian, Arizona, known as Bermuda Plantations.

lots in "Indian section 22." This conflict was noted in the "River Movement Study of the Colorado River thru the Fort Mojave Indian Reservation from Big Bend to Topock" prepared by Davidson in March 1977 (BLM Exh. 28), at page 21. See BLM Exh. 46 (Vol. II) at 64. Moreover, this was reflected in the April 26, 1985, memorandum of the Chief, Branch of Cadastral Survey, Arizona, to the Director, BLM, at page 3, explaining adoption of the Myer, rather than the Shearer, line: "The preliminary [Shearer] plat showed a conflict at the southerly end of Bermuda Plantations. The final plat resolved that possible conflict in favor of the private landowners." See Tr. 83, 101-02.

First American essentially argues that BLM should be equitably estopped from surveying the line between secs. 10 and 15 across the accreted land other than along the line of the survey monuments placed during the course of Shearer's survey where private landowners subsequently relied on these monuments in the purchase of and placement of improvements on the land.

We conclude that the doctrine of equitable estoppel is not applicable, however, because there is no demonstrated "affirmative misrepresentation or affirmative concealment of a material fact" by the Government, as required by the court in United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978). BLM's placement and failure to remove the survey monuments does not constitute such affirmative misconduct where no effort was made to misrepresent or conceal the fact that the monuments had never been officially approved. Cf. id. at 704 ("there is no evidence that the government at any time after becoming aware of the inaccurate survey in 1922, sought affirmatively to conceal or to misrepresent the true facts"). First American does not assert, nor is there any evidence, that BLM ever affirmatively either misrepresented or concealed the fact that the survey monuments placed by Shearer were not officially approved by BLM. See Tr. 503; Answer at 49-50.

While the record establishes that BLM properly rejected the Shearer line on the basis of the discredited zero accretion point, the question originally posed by our December 1987 decision remains, i.e., whether BLM adequately justified departing entirely from the proportionate shoreline survey method or, stated differently, whether another zero accretion point could have been selected, thus permitting use of that preferred method for apportioning the accreted land. 8/

8/ The record also suggests that, for purposes of apportioning the accreted land between secs. 10 and 15, BLM could have simply reapportioned the accreted land using the already established lines between secs. 9 and 10 and 15 and 22, which were the partition lines immediately to the northwest and southeast of the line to be surveyed between secs. 10 and 15. However, that would not have constituted a strict application of the proportionate shoreline survey method, which requires that accreted land be bounded by lines drawn from the old bank of the river either to a zero accretion point on or perpendicular to the new bank of the river. See Tr. 238. The line between secs. 9 and 10 was not drawn from the old bank of the Colorado River either to a zero accretion point on or perpendicular to the new bank of the river. Nevertheless, we conclude, as discussed infra, that BLM should use this approach.

In response, BLM contends that while BLM could have selected another zero accretion point not within the avulsed area, doing so would have required the reapportionment of all of the accreted land south of that point, thereby disrupting all of the lines established by Shearer across the accreted land, including not only the lines between secs. 10 and 15 and 15 and 22 but also the lines between secs. 4 and 9 and 9 and 10 as approved by the State court in River Farms, as recognized by the Associate Solicitor in his July 1982 memorandum. Thus, in order not to cause such disruption, BLM specifically chose not to reapportion the accreted land. See Tr. 84-85, 100.

None of these surveyed lines, however, had been approved by an official survey of the United States, but rather were based on a survey which had used the proportionate shoreline survey method, relying on the discredited zero accretion point. Accordingly, it might be argued that BLM was free to disrupt all of the lines as not comporting with a proper application of the proportionate shoreline survey method.

The solution arrived at by BLM, however, was to disrupt only the lines between secs. 10 and 15 and 15 and 22 and to leave intact the lines between secs. 4 and 9 and 9 and 10. In our December 1987 decision, we questioned this selective application of the proportionate shoreline survey method. See First American Title Insurance Co., supra at 281.

BLM contends that it was the proper approach where, as noted previously, while all of these lines had been relied upon by private landowners, the lines between 4 and 9 and 9 and 10 are distinguishable from the lines between secs. 10 and 15 and 15 and 22. Unlike the latter lines, BLM notes, the former lines had received the imprimatur of the State court. To the extent that this preserved the lines between secs. 4 and 9 and 9 and 10, we conclude that this was the proper approach, consistent with an expansive reading of Algoma.

Moreover, BLM argues that this selective approach has, consistent with Algoma, the effect of leaving intact the Myer lines between secs. 10 and 15 and 15 and 22, which lines had been relied upon in the subdivision and development of the Bermuda Plantations. That this was BLM's intent at the time of preparation of the Reeves survey is evident in the testimony of Knight. See Tr. 86-87.

Thus, it is BLM's contention that it has adequately justified departing from the proportionate shoreline survey method, arguing that that method simply could not be used where a prior application of the method by Shearer had been based on a discredited zero accretion point and current application of the method would disrupt established lines approved by a State court and/ or relied upon by local landowners. Accordingly, BLM states that it was necessary to turn to application of the perpendicular survey method, which constitutes the "second preference" for apportioning accreted lands (Casebook at D1-2). We note that First American has long regarded this as the "approved method" in the present case, where the shoreline is "slightly curved" (SOR, dated Mar. 20, 1985, at 3). See BLM Exh. 46 (Vol. I) at 15; Exh. FM-6 at 2.

[3, 4] In his December 1988 decision, at page 16, Judge Rampton concluded that BLM improperly relied on the Myer survey where, because Myer's survey notes were not available, "no one knows whether Myer's survey method is evident and, in fact, whether he did partition using the normal method." While it is true that the survey notes for Myer's survey are not available, it is incorrect to say that it is not possible to discern what survey method was used by Myer or to assess the accuracy of its use. The method is evident from the results of the survey. The fact that the Myer line is drawn from the original bank of the Colorado River perpendicular to the new bank of the river clearly establishes that Myer used the perpendicular survey method. See Tr. 65-66, 164-65; BLM Exh. 66 at 6. Davidson testified that Myer employed that method. See Tr. 309-10.

Moreover, it is clearly possible to assess whether Myer had properly used that survey method. Knight testified that Myer had properly used the perpendicular survey method. Tr. 65-66. In its March 1985 SOR at page 3, First American admitted that the Myer line was "technically correct." See also Tr. 351.

Judge Rampton, however, indicated concern that, while BLM relied on the Myer survey of the line between secs. 10 and 15 across the accreted land because, in accordance with Algoma, it comported with the Survey Manual and was relied upon by private landowners, BLM disregarded a previous private survey performed by L. M. Foster in 1936 at the request of Cotton Land, which survey established that line at S. 44~46' W. by the proportionate shoreline survey method. He concluded that the question of why BLM did not rely on the Foster survey where it similarly comported with the Survey Manual and was relied upon by private landowners was unanswered (Decision at 16).

BLM has, however, adequately explained its decision not to rely on the Foster survey, stating that the survey was performed at a time when the process of accreting land to the east bank of the Colorado River had not been completed. As the Chief, Branch of Cadastral Survey, Arizona, explained in an April 26, 1985, memorandum to the Director, BLM, at page 2: "The land in question was still subject to erosion and accretion until the channelization of the Colorado River in the 1950's, at which time the river and the partition lines became fixed in position. That is why the 1936 line was not accepted in 1961, 1962 or 1982." See Tr. 55-56.

The question then arises whether Myer had adequate justification for departing from the proportionate shoreline survey method. We must conclude that he did not have such justification. While the case of Sherrill was ongoing at the time of his survey, thus casting doubt on reliance on a zero accretion point in what was later determined to be the avulsed area (see McShan v. Sherrill, 283 F.2d 462 (9th Cir. 1960)), there is no evidence that Myer could not have relied on a zero accretion point south of that area.

In addition, the Shearer survey which established the lines between secs. 4 and 9 and 9 and 10 across the accreted land, which lines were ultimately accepted by a State court in the case of River Farms, had not been initiated at the time of the Myer survey. In fact, the suit which resulted

in acceptance of those lines was not initiated until March 1967. See River Farms, Inc. v. Fountain, *supra* at 1184. The Myer survey also necessarily predated development of Bermuda Plantations. Thus, Myer's failure to apportion the accreted land south of the avulsed area using the proportionate shoreline survey method could not be justified on the basis that it would disrupt established lines.

Accordingly, we conclude that Myer had no adequate justification for departing from the proportionate shoreline survey method. Where, under Algoma, a private surveyor must be held to the same standards as a Government surveyor, we must conclude that the Myer survey which was relied upon in BLM's 1982 survey was not executed "within the allowable limit of error."

Thus, we are left with a situation where it was improper for BLM to rely on either the Shearer or the Myer line to apportion the accreted land between secs. 10 and 15. However, we conclude that apportioning the accreted land only between secs. 10 and 15 is a proper solution. This solution has not been suitably ruled out by BLM and would not involve a reapportionment of all of the accreted land south of the avulsed area, thereby disrupting the lines accepted by the State court in River Farms.

Where BLM has failed to adequately justify not employing the proportionate shoreline method for apportioning accreted land between adjoining sections and that approach will result in an equitable apportionment of the accreted land, the Board will remand the case to BLM for adoption of that method in a corrected survey.

In summary, we conclude that Judge Rampton erred in concluding that the Reeves survey must be rescinded and in remanding the case to BLM for adoption of the Shearer line as the appropriate line between secs. 10 and 15 across the accreted land. However, we conclude that BLM has not adequately justified entirely departing from the proportionate shoreline survey method and adopting the Myer line under the perpendicular survey method in apportioning the accreted land between secs. 10 and 15. Therefore, we hereby affirm Judge Rampton's December 1988 decision as modified to the extent that it overturned the Reeves survey in relevant part and remand the case to BLM for delineation of the line between secs. 10 and 15 across the accreted land in accordance with the proportionate shoreline survey method. <sup>9/</sup>

With respect to all other errors of fact or law asserted by the parties hereto, except to the extent that they have been expressly or impliedly addressed in this decision, they are rejected on the ground that they are either contrary to the facts or law or are immaterial. National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954).

<sup>9/</sup> We realize that there are problems with a strict application of the proportionate method (See footnote 8, *supra*). However, BLM has not shown that such method, with appropriate modifications, cannot be applied.

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 as modified and the case is remanded to BLM for further action consistent herewith.

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John H. Kelly  
Administrative Judge

I concur:

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Wm. Philip Horton  
Chief Administrative Judge