

Editor's note: rev'd sub nom. Edward Koch v. DOI, Civ.No. 91-470 (D. Colo. June 4, 1993), 824 F.Supp. 996; aff'd, No. 93-1298 (10th Cir. Jan. 31, 1995), 47 F.3d 1015; cert denied, S.Ct. No. 95-253 (Oct. 10, 1995), 64 LW 3269

EXXON CORP. ET AL.
v.
BUREAU OF LAND MANAGEMENT

IBLA 90-199

Decided February 21, 1991

Appeal from a decision of Administrative Law Judge Ramon M. Child reversing a decision of the Colorado State Director, Bureau of Land Management, which had dismissed protests to the acceptance of surveys of certain islands in the Colorado River, and concluding that such lands were not islands omitted from the original surveys of the area. CO-942, Group 719.

Reversed.

1. Public Lands: Generally--Public Lands: Riparian Rights--Surveys of Public Lands: Omitted Lands

The Secretary of the Interior is authorized and obligated to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States. An island, whether located in navigable or nonnavigable waters, that is omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

2. Evidence: Stipulations

A stipulation is a contract and should be read as a whole in a manner which gives a reasonable meaning to all of its provisions and leaves none of them superfluous. Where a particular interpretation of isolated provisions of a stipulation would negate other provisions, it may be concluded that such an interpretation was not intended by the parties.

3. Evidence: Generally--Public Lands: Generally--Public Lands: Riparian Rights--Surveys of Public Lands: Omitted Lands

In determining whether a land mass was an island omitted from an original public land survey, the

inquiry focuses on the existence and condition of the land at the time of the original survey. Evidence concerning its condition at later times is relevant only to the extent it reflects on the status of the land at the critical time.

APPEARANCES: Lyle K. Rising, Esq., and Robert D. Comer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management; Kenneth Balcomb, Esq., and Robert M. Noone, Esq., Glenwood Springs, Colorado, for Exxon Corp., et al.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) appeals from a December 21, 1989, decision of Administrative Law Judge Ramon M. Child reversing a July 28, 1988, decision of the Colorado State Director, BLM, which had dismissed protests to the acceptance of surveys of certain islands 1/ located in T. 6 S., R. 95 W., T. 7 S., R. 95 W., and T. 8 S., R. 96 W., sixth principal meridian, Colorado, in the reach of the Colorado River between Rifle and DeBeque, Colorado. The Judge concluded that the surveyed land masses (which he designated "parcels") were not islands omitted from the original surveys of the area and, therefore, were not the property of the United States.

I. Procedural and Factual Background

The original surveys of the particular areas in question were performed in 1889 and 1891. Deputy Surveyor Peter Churchfield surveyed T. 6 S., R. 95 W., and T. 7 S., R. 95 W., in October and November 1889, and that survey was accepted on March 12, 1890. Deputy Surveyor George W. House conducted the survey of T. 8 S., R. 96 W., in June 1891, and that survey was accepted on February 23, 1892. Although neither surveyor meandered any of the land masses at issue in this appeal, they identified each land mass in their field notes and each land mass appeared on the plats prepared from the field notes. 2/ The United States patented the

1/ In the protests to BLM, protestants challenged the surveys as they related to nine islands; however, certain protestants did not appeal BLM's dismissal of their protests. In addition, in its opening appeal brief, BLM indicates that Parcel 20 A is not being claimed by the United States (BLM Brief at 24 n.7; Tr. 494), as it did at page 18 of its Proposed Conclusions of Law filed with Judge Child. Nevertheless, in his decision, Judge Child addressed Parcel 20 A, ruling that it was not an island. Since it was not asserting title to that parcel, BLM did not challenge that ruling. For purposes of appeal, only six land masses, identified in the record as Islands or Parcels 9, 10, 14, 20, 21, and 22, are at issue. They contain 23.68 acres, 66.63 acres, 43.11 acres, 19.51 acres, 7.29 acres, and 7.97 acres, respectively.

2/ Churchfield's field notes described the land masses, identified in this case as Parcel 9, located in sec. 25, Parcel 10, located in sec. 35, T. 6 S., R. 95 W., and Parcel 14, located in sec. 7, T. 7 S., R. 95 W., as a "bar or low island," a "long low island, overflowing and unfit for cultivation,"

surveyed land adjacent to the Colorado River, incorporating by reference the plats and field notes of the areas surveyed.

In 1982, BLM commenced an investigation to determine ownership of 22 land masses in the Colorado River between Glenwood Springs and Grand Junction, Colorado, including the parcels at issue here. ^{3/} After evaluating data from the original survey records, railroad survey plats prepared in 1886 and 1919, aerial photography from 1937, 1945 or 1948, 1954, 1978, and 1984, dendrochronology analyses of samples taken from trees on the various land masses, and hydrology reports, BLM determined that 9 of the 22 land masses which had not been meandered in the original surveys were islands which existed at the time of the original surveys and continued to exist (see Exh. G-27). Based on this investigation, BLM accepted the surveys of the nine omitted islands performed between 1982 and 1987 and announced in the Federal Register that it would officially file the plats in the Colorado State Office on a particular date.

Prior to that date, as extended by BLM, various individuals and corporations protested that proposed action, alleging ownership of the land masses on the ground that the parcels were part of the riverbed which had passed to the original patentees of the riparian lots based on the original surveys (see, e.g., Exh. A, attached to Exh. A-23).

By decision dated July 28, 1988, the Colorado State Director, BLM, dismissed the protests, stating that the United States claimed ownership of the land masses because they were islands omitted from the original surveys which were in existence at the time of the original surveys of the surrounding lands (Exh. G-14).

Certain protestants (claimants) appealed that dismissal to this Board and requested a hearing. ^{4/} The Board docketed that appeal as IBLA 89-1.

fn. 2 (continued)

and a "low overflowing island * * * bar or low island" respectively; while the House field notes characterized the land masses, identified in this case as Parcels 20, 21, and 22, located in sec. 7, T. 8 S., R. 96 W., as a "large island" (the original plat depicts this parcel as three islands), an "island," and a "gravel bar," respectively. See Judge Child's Decision at 6, and BLM Brief, Attachment A.

^{3/} The investigation was precipitated by inquiries from local landowners and oil companies concerning the ownership of the land masses. Apparently, several of the land masses contain valuable sand and gravel, and oil companies have discovered natural gas and coalbed methane along this reach of the Colorado River (BLM Brief at 2; Tr. 42-43). This area has also been classified as an Area of Critical Environmental Concern due to the existence of wildlife habitat and the area's recreational potential (BLM Brief at 2; Tr. 43).

^{4/} The claimants and the adjacent parcel(s) which they seek are: Walter B. and Roberta A. Lemon - Parcel 9; Flora Dere - Parcel 10; Edward H. Koch - eastern portion of Parcel 14; Richard E. and Daisey B. Looney and Jan Ertl - western portion of Parcel 14; Edward N. Juhan and Anthony Zarlengo - northeastern portion of Parcel 20 and Parcel 22; Exxon Corp. - southwestern

By order dated March 14, 1989, the Board granted claimants' request and referred the case to the Hearings Division for assignment of an Administrative Law Judge and issuance of an initial decision, which, absent an appeal to the Board, would be final for the Department. 5/

The hearing in this case was held on June 13-16, 1989, and included a field trip to view several of the disputed land masses. However, prior to the hearing, on June 12, 1989, the parties executed a 16-page prehearing stipulation which was made part of the record at the hearing. The stipulated facts included excerpts from the relevant surveying manuals and instructions directing surveyors to meander islands and to note topographical features (Stipulation (Stip.) III. C.). The parties agreed that "[t]he surveys of the involved lands were accepted as having been completed in exact conformance with the Instructions" (Stip. III. D. 5), and that "[t]he original surveys were neither fraudulent nor erroneous" (Stip. III. D. 7). See also Stip. III. B. 1. Under the terms of the stipulation, claimants were to prove that the subject lands were below the ordinary high water mark of the Colorado River at the time of the original surveys and thus were a part of the riverbed (Stip. IV. 1.), while BLM had the burden of proving that those lands were islands at the time of the original surveys (Stip. V. 1.).

The stipulation also embraced various legal issues. The parties agreed to the following legal definition of "island": "An 'Island' is a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel" (Stip. VI. 5.). They also recognized that a legal issue remaining to be determined was "[w]hether at the time of the original surveys of the disputed lands there was in effect an official or unofficial policy of the Government not to survey islands falling within the regular course of the surveys of public lands" (Stip. VII. 1.).

fn. 4 (continued)

portion of Parcel 20 and Parcel 21. See Decision at 12-13; Stipulation (Stip.) III. A. (1)-(6). Battlement Mesa, Inc. (BMI), filed a protest in this case asserting title to the center line of the bed of the river adjacent to riparian uplands in T. 7 S., R. 95 W., and T. 7 S., R. 96 W. See Exh. B, attached to Exh. A-23, at 4. It was also an appellant before the Board in IBLA 89-1; however, it is unclear whether BMI still remains a party here since, at the hearing, claimants' counsel did not name BMI as one of the parties they represented. See Tr. 4-6.

5/ Prior to issuance of our order, claimants had filed a request with the Secretary of the Interior that he remove the case from the Board and assume jurisdiction thereof in accordance with 43 CFR 4.5. By letter dated Mar. 31, 1989, the Director, Office of Hearings and Appeals, responded to that request, informing claimants that the Secretary had declined to take personal jurisdiction of the appeal, but that he had ordered that the case be considered on an expedited basis. Accordingly, the Board has undertaken expedited consideration of this appeal. See Board order dated Oct. 11, 1990.

At the outset of the hearing, claimants stated their position that the controversy could be resolved as a matter of law without the necessity for a hearing. They asserted that although the survey manuals and instructions mandated the meandering of all islands encountered while surveying, the original surveyors had not meandered the disputed land masses; rather they had merely noted them as topographical features. Because BLM had stipulated that the surveyors had exactly complied with their instructions and that the original surveys were not erroneous, claimants argued that BLM had, in effect, admitted that the disputed lands were not islands at the time of the original surveys (see Tr. 13-25).

Claimants, however, did not request a ruling on their assertion; rather, they proceeded to call three witnesses and introduce over 25 exhibits to demonstrate that the disputed parcels were below the ordinary high water mark of the Colorado River, which they equated with the mean annual flood level of the river. BLM presented the testimony of five witnesses and over 30 exhibits to support its position that the land masses were islands in existence at the time of the original surveys, and that the Government's policy at the time of the original surveys was not to survey all islands in the regular course of surveying public land. The parties filed extensive posthearing submissions including proposed findings of fact and conclusions of law.

II. Judge Child's Decision

In his December 21, 1989, decision, Judge Child framed three issues raised in the case: (1) whether the disputed parcels were "islands" at the time of the original surveys; (2) whether the parcels were "omitted" from the original surveys; and (3) whether the parcels were property of the United States. Then, relying on testimony presented at the hearing, he recited some geologic history of the area as it related to the river, adopting the conclusion that:

In the vicinity of the reach, the Colorado can be said to be in a state of semi-disequilibrium, still showing the after effects of the glaciation. The tendency over time is for the anabranches of the channel to be resolved and the land masses within the river to become attached to the floodplain to the end that the river will become a single thread stream. Thus, this reach of the Colorado River is in the process of healing itself from an unstable stream to a stable, single-thread fluvial system.

(Decision at 3).

After accepting the parties' stipulation as controlling for the purposes of this case, the Judge addressed each of the identified issues, first determining that the land masses were not islands at the time of the original surveys. He explained:

Cursory inspection of the valley bottom through which this reach of the Colorado River runs would impress any rational person or surveyor that this river was in a state of constant change and the parcels within the [r]iver unstable and subject to being altered or eliminated at the whim of the river during any seasonal runoff. An examination of the many exhibits prepared and offered by [BLM] cannot but impress even the casual observer that these parcels have gone through dramatic shifts, alterations and changes since the original surveys in 1889 and 1891. Single parcels have divided and multiple parcels have united. None of the parcels has shown itself to have the capacity for constancy since it was noted by the surveyors and placed on the original plat. (See particularly Exhibits G-3, G-5, G-28, G-29)[.]

(Decision at 8). He found that the evidence failed to demonstrate that the parcels were fast, dry lands at the time of the original surveys.

The Judge's resolution of this issue focused on the stipulated definition of an island which required a "'permanent land mass' separated from the mainland by a 'perpetual channel'." Id. He found that the disputed parcels lacked permanency because BLM's geologic evidence indicated that this reach of the Colorado River was in a state of "[s]emi-disequilibrium which would tend to straighten itself out and remove land masses from the course of its current." Id. He distinguished a case cited by BLM, Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975), on the ground that the court in Ritter applied an "elementary school definition" of island "and did not concern itself with the permanent nature of the land mass in question." Id. at 9.

After citing the definition of "perpetual" in Webster's II New Riverside University Dictionary, 1984 ed., as meaning "[l]asting for eternity: never ending," he stated that the channels which separated the land masses from the mainland were not perpetual channels because no channel would separate the parcels from the mainland when the parcels were inundated by water when the river was at flood stage, nor would the parcels be separated by a channel from the mainland when the river was at a low stage and the channels were dry. He found that:

In order for a channel to separate a land mass in a river from the uplands or mainland, it must contain water throughout its length. In order to meet the definition of island agreed to by the parties, such a channel must do so perpetually.

Id.

He concluded that, under the stipulated definition of island, the parcels were not islands at the time of the original surveys or at the time of the hearing.

Judge Child also found that the parcels were not omitted from the original surveys. He cited precedent holding that omitted islands remain

public domain and may be surveyed and disposed of by the United States, but noted that in order for ownership to be retained by the United States, a present island must have existed in its present form as fast, dry land at the time of the original survey, and its omission from the original survey must have been an error. He noted that although the surveyors had meandered some islands in the river, they did not meander the disputed parcels; rather, they described them in their field notes as topographic features. He also referred to the parties' stipulation that the surveyors had conducted the original surveys in exact conformance with the governing instructions and that those surveys were neither fraudulent nor erroneous.

Judge Child, therefore, found that the original surveyors had committed no error in omitting these parcels from their surveys, suggesting that they apparently had "concluded that the parcels in question lacked the permanency essential to qualify as islands" (Decision at 11) and had recognized "the futility of meandering these parcels, since a meander performed on Tuesday may well be unrecognizable on Wednesday, given the instability of the Colorado River at this juncture." *Id.* In short, he concluded that the parcels were not islands omitted from the original surveys, but were properly included in the surveys as topographical features, not islands.

Finally, Judge Child found that the disputed parcels were not property of the United States because "[u]nder the circumstances of this case, the original surveyors were justified in viewing the parcels in question not to be islands, but rather part of the shifting bed of the Colorado River. As such they passed with the uplands on issuance of patent thereto" (Decision at 11). ^{6/}

Thus, Judge Child determined that the 1982-1987 surveys of the disputed parcels were legally and factually incorrect, and reversed BLM's decision accepting the surveys of Parcels 9, 10, 14, 20, 21, and 22 because those parcels were not property of the United States.

III. Arguments of the Parties

In its opening brief, BLM argues that the Judge ignored all the facts developed at the hearing concerning the existence of the disputed land masses at the time of the original surveys and virtually all the law on omitted islands. BLM asserts that the Judge's decision is premised on two erroneous factual findings: (1) the present parcels were

^{6/} The Judge also specifically found as facts that each of the parcels had surface areas above the ordinary high water mark at the time of the original survey and could have been surveyed, and that "[t]he ordinary high water mark, mean high water line and vegetation line approximate the elevation along the river of the mean annual flow, which approximates the meander line" (Decision at 13). Further, he found as a conclusion of law that no evidence supported BLM's contention that the parcels had been omitted from the original surveys because they could not be economically surveyed, noting that the contracts for survey required the survey of all islands in the involved reach of the Colorado River (Decision at 14).

not in existence as islands at the time of the original surveys and (2) the land masses are not islands because the side channels do not carry water at all times.

BLM contends that virtually all the evidence demonstrates that the parcels were, in fact, islands at the time of the original surveys. It argues that its evidence shows that the parcels were expressly noted in the original surveyors' field notes; the parcels were all shown as islands on the original plats of survey; each parcel now has one or more trees on it which predate the original 1889 and 1891 surveys; the parcels were fast, dry land at the time of the original surveys; the parcels are all surrounded today by permanent channels, except where the channels have been filled in by the adjacent riparian landowners; and the size, shape, and location of the parcels today are in close congruence with those shown on the original survey plats.

BLM argues that these facts were clearly proven by the testimony and documentary evidence it introduced, including the testimony of two geologists: Dr. Waite R. Osterkamp, an expert in fluvial geomorphology, who testified about the morphology of the river and parcels, and opined that the parcels were all 100 to 200 years old and that their appearance had probably changed little since the surveys were performed; and Dr. Gordon C. Jacoby, an expert in dendrochronology, who discussed the dating of tree bore samples taken on the parcels and concluded that because each parcel contained at least one tree predating the original surveys, the parcels had to have been in existence at that time. BLM also asserts that the testimony of its two experienced surveyors, as well as the exhibits it introduced, provide further support for its position. One of those surveyors, Donald W. Ashbaugh, who conducted the 1982-87 investigation, explained at the hearing how he reached his conclusion that the parcels were islands omitted from the original surveys.

BLM discusses each parcel individually, citing the testimony and exhibits relating to the parcel's existence as an island at the time of the original surveys (BLM Brief at 15-26). It asserts that claimants produced nothing at the hearing to rebut any of its proof. ^{7/} BLM claims that the Judge completely disregarded all its uncontroverted evidence. Instead, BLM submits, the Judge focused solely on small portions of Osterkamp's testimony to conclude that the parcels were impermanent, while ignoring the

^{7/} Instead, BLM argues, claimants' evidence at the hearing focused on demonstrating that the parcels were not legally in existence in 1889 and 1891 because they were completely submerged by the river during the height of flood stage, apparently equating the ordinary or mean high water mark with peak flood waters. While BLM agrees that the parcels and most other geomorphic features in a flood plain are inundated during a flood, it insists that this fact is irrelevant since the ordinary high water mark of the river has nothing to do with peak flood waters, but is, instead, the level of the water during average flow conditions. The Judge agreed with BLM's definition of the ordinary or mean high water mark (see Decision at 13 and note 6, supra), and the meaning of this term is not an issue in this appeal.

bulk of that testimony, including Osterkamp's expert opinion that the parcels were in existence as islands in 1889 and 1891.

BLM further argues that the Judge erroneously concluded that the parcels were not islands because some of the side channels separating them from the upland did not have water in them at all times. According to BLM, the existence of the channels today has relevance only to the extent it sheds light on the condition of the parcels at the time of the original surveys. It argues that a channel is a permanent geomorphic feature which frequently conveys water, but may sometimes be dry, citing legal authority supporting its position, which BLM claims the Judge disregarded. BLM contends that contrary to the Judge's assumption, the parties did not intend for the stipulation to mandate that the channel always be filled with water, asserting that if the parties had so intended, they would have used words explicitly indicating that the channels must be filled with water at all times. Furthermore, BLM asserts, if the stipulation meant what the Judge suggested, there would have been no reason for a hearing. 8/

In short, BLM essentially argues that the Judge erred in concluding that the disputed parcels were not islands at the time of the original surveys because he overlooked the un rebutted evidence establishing their existence as fast, dry land at that time and failed to recognize that channels separating islands from the mainland need not always be filled with water. BLM stresses that it has established that the disputed parcels were islands at the time of the original surveys, and that modern case law supports its ownership of those islands. BLM requests that its original decision dismissing the protests and accepting the 1982-87 surveys of those islands be upheld. 9/

In its answer, claimants argue that the detailed stipulation agreed to by the parties conclusively precludes all of BLM's arguments and permits no conclusion other than that reached by the Judge. They stress that BLM stipulated that the survey instructions directed the original surveyors to meander islands and to note topographical features; the involved surveyors exactly complied with the applicable instructions; the surveys were neither fraudulent nor erroneous; and in order to be an island, the land mass must

8/ BLM also asserts that, contrary to the Judge's conclusion, it has demonstrated that it was the practice of nineteenth century surveyors not to survey nonagricultural land, including islands, in the regular course of their surveys.

9/ Attachment B to BLM's opening brief consists of a letter from Jacoby, one of BLM's witnesses, commenting on the Judge's decision. Claimants filed a motion to strike that attachment on the ground that it was an inappropriate attempt to submit additional evidence after the conclusion of the hearing. By order dated Apr. 20, 1990, we took that motion under advisement, indicating that we would rule on it when we addressed the merits of the appeal. Jacoby's comments on Judge Child's opinion are irrelevant to our consideration of BLM's appeal. For that reason, we hereby grant claimants' motion to strike Attachment B to BLM's brief. See 43 CFR 4.24(a).

be separated from the mainland by a perpetual channel. Claimants assert that "[i]t is unmeaningful that either Osterkamp, Jacoby, or even the Supreme Court would otherwise define an island. The definition used was taken from the 1864 Instructions to surveyors. The parties agreed on the definition for the purposes of this case and the [Judge] found it to be controlling" (Answer at 15).

Claimants contend that the only way BLM could prove that the parcels were islands at the time of the original surveys would be to show error in those surveys. Since BLM stipulated that those surveys were not erroneous, claimants argue that any attempt to show error would be in defiance of the stipulation and cannot be allowed. Therefore, they request that the Judge's decision be affirmed.

In response, BLM denies that it is attempting to disclaim the stipulation and states that it fully supports the stipulation as long as it is read in its totality, as written, and in light of the fact that it was drafted by claimants. It contends that the only areas of dispute concern the definition of an island and whether BLM has stipulated away its case by agreeing that the original surveys were correctly done. BLM argues that the definition of island, which comes from old survey manuals, does not include a sentence requiring that the perpetual channel contain flowing water at all times. Furthermore, BLM asserts, claimants' suggestion that relevant case law should be ignored in interpreting this definition lacks legal support and defies common sense.

BLM admits that it agreed that the original surveys were correctly done, but contends that it did so in order to eliminate the question of gross error or fraud as possible legal issues in this case. It asserts that other provisions of the stipulation clearly indicate that the existence of the islands and the practice of 19th century surveyors concerning meandering islands were very much at issue in the case, citing that part of the stipulation requiring BLM to prove that the lands were islands at the time of the original surveys (Stip. V. 1.) and that part which identified as a legal issue to be determined whether there existed at the time of the original surveys an official or unofficial Government policy regarding the surveying of islands (Stip. VII. 1.). BLM argues that there would have been no need for these stipulations, if it had agreed as claimants allege.

BLM suggests that the stipulation appears to be both contradictory and ambiguous. Therefore, BLM asserts, the stipulation may not be relied on as conclusive, and the entire record must be reviewed to determine if it supports the stipulated facts.

BLM contends that it presented evidence explaining that the reason the surveyors followed some of their instructions (i.e., to note all topographical features), but disregarded others (i.e., to survey all islands) was because surveyors at that time did not survey islands which were not

useful for agricultural purposes. It further emphasizes that the preponderance of the evidence definitively establishes the existence of the parcels as islands at the time of the original surveys, and argues that it would be improper for the Board to hold that the islands did not exist in 1889 and 1891 solely because of the stipulation.

IV. Discussion

[1] The Secretary of the Interior is authorized and obligated "to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States." R. A. Mikelson, 26 IBLA 1, 8 (1976). In Emma S. Peterson, 39 L.D. 566, 567 (1911), this Department held that the United States has the authority to survey an island, located in navigable or nonnavigable waters, omitted from an original township survey if it appears that at the time of the original survey the island was a well-defined body of public land. From that time on, the Department has consistently maintained that an unsurveyed island, whether located in navigable or nonnavigable waters, remains public domain, does not pass with the bed under navigable waters to a state upon statehood or as an appurtenance to a patent of riparian land abutting nonnavigable waters, and may be surveyed and disposed of by the United States. Mr. & Mrs. Thomas Dekker, 114 IBLA 302, 305-06 (1990); Northern Michigan Exploration Co., 114 IBLA 177, 186-88, 97 I.D. 171, 175-76 (1990); Olive Wheeler, 108 IBLA 296, 301 (1989), and authorities cited therein.

In Scott v. Lattig, 227 U.S. 229, 240-42 (1913), the Supreme Court applied the same rule to islands in navigable waters, holding that the omission of an island from survey does not divest the United States of title to the island nor interpose any obstacle to surveying it at a later date if the island existed at the time of the original survey as fast, dry land above the mean high water mark. The Court explained that such an island was not part of the bed of the river and, therefore, title to it did not pass with the bed of the river. Id. at 244. See Texas v. Louisiana, 410 U.S. 702, 713 (1973) (reaffirming the vitality of Scott v. Lattig); see also R. A. Mikelson, supra at 9. We have recently reaffirmed that this rule applies to islands in nonnavigable waters, despite the conflicting holding in Bourgeois v. United States, 545 F.2d 727 (Ct. Cl. 1977). ^{10/} See Mr. & Mrs. Thomas Dekker, supra at 306-07; Northern Michigan Exploration Co., supra at 186, 97 I.D. at 175-76; Olive Wheeler, supra at 301.

^{10/} The most critical reasoning flaw in Bourgeois v. United States, supra, was the attempt to establish a dichotomy between unsurveyed islands found in navigable bodies of water and those located in nonnavigable bodies of water by, in effect, ascribing a varying "intent" to retain or convey depending on whether or not the water body was navigable. Thus, if the island is located in a navigable body of water, the island is deemed to retain its public domain status (under the theory that nothing passes except by intent) whereas if it is located in a nonnavigable body it is deemed to pass as an appurtenance of the riparian patent (if state law

Claimants contend that none of the evidence presented at the hearing nor any of the case law cited by BLM has any bearing on this case because the stipulation mandates the conclusion that the parcels were not islands at the time of the original surveys. We must reject this contention.

[2] A stipulation is a contract to which the general rules of contract interpretation apply. United States v. Ideal Cement Co., 5 IBLA 235, 241, 79 I.D. 117, 120 (1972), aff'd, Ideal Basics Industries, Inc. v. Morton, 542 F.2d 1364 (9th Cir. 1976). The stipulation should be considered as a whole with each provision given a reasonable meaning and none of it left useless. ITT Arctic Services Inc. v. United States, 524 F.2d 680, 684 (Ct. Cl. 1975). See RESTATEMENT (SECOND) OF CONTRACTS §§ 202(a), 203(a) (1981). Claimants' reading of the stipulation renders superfluous the provision recognizing that whether the disputed parcels were islands at the time of the original surveys was a claimed fact "on which the Government shall put on its proof" (Stip. V.). Additionally, BLM's agreement that the original surveys were correct and in exact accordance with the instructions must be considered in conjunction with its position, identified in the stipulation as a legal issue to be determined, that it was the Government's policy at the time of the original surveys not to survey islands falling within the regular course of public land surveys (Stip. VII.). The stipulation, read

fn. 10 (continued)

so provides) unless a contrary intent is clearly expressed. Thus, the Bourgeois theory would postulate that when a surveyor fails to survey an island in a navigable stream he does so knowing that his failure to survey the island will not abrogate the title of the United States to the island, but when he fails to survey an island in a nonnavigable stream he does so because, in his view, it is not an island worthy of survey and the United States should make no claim thereto.

This duality of approach might be understandable if, in fact, navigability determinations were a function of a cadastral surveyor; they are not. See State of Montana, 11 IBLA 3, 8, 80 I.D. 312, 314 (1973) ("The surveyors have no authority to make such [navigability] determinations"). Moreover, in many cases it would be literally impossible to make navigability determinations as of the date of survey, for the simple reason that the critical date for navigability determinations is the date of admission of the State into the Union and numerous surveys were completed prior to that date. In this case, the basis for the agreement that the Colorado River is nonnavigable throughout the reach in question is an opinion of the Colorado Attorney General, rendered on Mar. 30, 1950, that "there are no navigable waters of the United States in Colorado" (Exh. H of Exh. A of Exh. A-23). Even accepting this naked assertion of a conclusion which is totally unsupported by any factual analysis (but see United States v. Holt State Bank, 270 U.S. 49, 56 (1926) "streams or lakes which are navigable in fact must be regarded as navigable in law"), it is clear that the Colorado Attorney General's determination of navigability postdated the original surveys in this case by well over 50 years. Any attempt to premise a differentiation in the treatment of islands in navigable and nonnavigable bodies of water based on the subjective intent of the surveyor is simply wrong.

as a whole, clearly indicates that BLM did not stipulate away its case. See Ideal Basic Industries, Inc. v. Morton, *supra* at 1369-70 (ambiguous stipulations, taken as a whole, were insufficient to amount to an admission).

[3] Thus, we turn to consideration of the entire record compiled in this case to resolve the issues raised. The ultimate issue for consideration is whether, at the time of the original surveys, the disputed parcels were islands omitted from those surveys. Resolution of that issue requires that we focus on the condition of the parcels at the time of the original surveys, because if the parcels at issue here existed as islands at the time of the original 1889 and 1891 surveys, title to them remained in the United States, and BLM's 1982-87 surveys were properly accepted. See Ritter v. Morton, 513 F.2d 942, 947-48, 950 (9th Cir.), *cert. denied*, 423 U.S. 947 (1975); see also Scott v. Lattig, *supra* at 241-42. Evidence concerning subsequent changes in the parcels is relevant only to the extent it reflects on the condition of the parcels in 1889 and 1891. Thus, while it must be established that an identifiable land mass existed as an island as of the date of survey, there is no requirement that it must have been in continuous existence as an island since that time, nor is there any requirement that its size and shape remain constant over that period of time.

The Judge concluded that the parcels were not islands because the land masses were not fast, dry land at the time of the original surveys, nor were they permanent land masses separated from the mainland by perpetual channels. He reached this conclusion through an extremely narrow, literal interpretation of the stipulated definition of an island and a highly selective view of the evidence introduced at the hearing.

The parties agreed to a legal definition of "island" as "a permanent land mass rising from the bed of a meanderable body of water above the mean high water mark, separated from the mainland by a perpetual channel" (Stip. VI. 5.). ^{11/} The Judge considered this definition to be more stringent than an "elementary school definition" of island, and he distinguished Ritter v. Morton on the basis that the court had applied the less rigid "elementary school definition" in that case. BLM asserts that the stipulated definition must be interpreted in light of relevant case law. We agree.

We find nothing in the circumstances surrounding the agreement of the parties to the stipulation which would support an overly restrictive meaning of the term "island." See National Audubon Society, Inc. v. Watt, 678 F.2d 299, 307 (D.C. Cir. 1982) (a stipulation must be interpreted in light of its

^{11/} Although the Judge found that he was constrained by this legal definition, stipulations as to legal matters are not binding on adjudicators. See, e.g., Saviano v. Commissioner, 765 F.2d 643, 645 (7th Cir. 1985). Indeed, this Board has expressly refused to countenance an erroneous stipulation of law, even where to do so would benefit the United States. See United States v. Williamson, 45 IBLA 264, 275-77, 87 I.D. 34, 40-41 (1980).

evident purpose as gleaned from the circumstances under which the agreement was made). No reason has been posited why the parties would choose to use the term in other than its usual sense, and we believe that the stipulated definition, reasonably construed, does not preclude the application of common sense and relevant case law.

Judge Child found that the parcels were not fast, dry land at the time of the original surveys because they were unstable and ephemeral. According to the Judge, the evidence demonstrated that the parcels had gone through dramatic shifts, alterations, and changes since the original surveys, with single parcels dividing and multiple parcels uniting, and he concluded that none of the parcels had shown any capacity for constancy. In support of this conclusion, he cited Exhibits G-3, G-5, G-28, and G-29, which depict the shape and location of parcels at various times over the years. 12/

The key question, however, is whether these parcels were fast, dry land above the mean high water mark and separated from the mainland at the time of the original surveys. We find that the evidence in the present record overwhelmingly demonstrates that the six disputed parcels existed as islands at the time of the original surveys and that Judge Child ignored that evidence.

The disputed parcels clearly existed in some form in 1889 and 1891. The original surveyors mentioned them as topographical features in their field notes (Decision at 6), and the parcels appear on the plats prepared from those notes as surrounded by flowing water (see Tr. 262, testimony of Jacoby). BLM's virtually uncontested evidence establishes that each parcel has at least one tree on it which predates the original survey; each parcel was fast, dry land rising above the mean high water mark and separated from the mainland by a channel at that time; channels are in evidence today surrounding each parcel, although in some cases channels have been filled in by the adjacent riparian land owners; and the current size, shape, and location of each parcel are substantially similar to those shown on the original plats (see BLM Brief at 15-26 for the specific evidence pertaining to each parcel). Thus, BLM presented witnesses and exhibits establishing the existence of the parcels as islands in 1889 and 1891.

Claimants introduced no direct evidence rebutting that introduced by BLM concerning the condition of the parcels in 1889 and 1891. Instead, they focused on demonstrating that these parcels were partially, if not totally, inundated by the river in its flood stage. The mean or ordinary high water mark, however, as found by Judge Child, is not synonymous with the height of the water in the river during flood stage; rather, that term designates the level of the ordinary high flow of the river, and is readily observable as the line below which the soil is unfit for vegetation. See, e.g., State v. Bonelli Cattle Co., 108 Ariz. 258, 495 P.2d 1312, 1314-15

12/ BLM introduced these exhibits to demonstrate, among other things, that the parcels have retained essentially the same size, shape, and location over the years, and the expert witnesses called by BLM testified that those exhibits did so demonstrate.

(1972), rev'd on other grounds, 414 U.S. 313 (1973); United States v. Claridge, 416 F.2d 933, 934 (9th Cir. 1969), cert. denied, 397 U.S. 961 (1970). The fact that these parcels are partially or completely submerged during flood stage does not preclude them from being islands. See Raide v. Dollar, 34 Idaho 682, 203 P. 469, 472 (1921).

We find that the great weight of the evidence in the record clearly demonstrates that the parcels were islands at the time of the original surveys and that they were omitted from those surveys.

Despite all this evidence, the Judge found that the parcels were not permanent land masses, as required by the stipulated definition, because they would eventually become attached to the mainland. He apparently based this finding on Osterkamp's testimony that the river was in a state of semi-disequilibrium, and that over time the land masses within the river would become attached to the floodplain and the river would become a single thread stream. Osterkamp also testified, however, that the time involved for that to happen would be "centuries, if not millennia" (Tr. 364). Judge Child evidently discounted that testimony, at least partially, because of his position, based on the stipulated definition of island, that any channel which separated a land mass from the mainland had to be "perpetual," i.e., lasting for eternity (see discussion infra).

Given that over geologic time natural forces, such as erosion and accretion, change the shape and size of land masses, no land mass located in a river could satisfy Judge Child's interpretation of the terms "permanent" and "perpetual." Nothing in the stipulation, read in its entirety, indicates that the parties intended such a result. Clearly, BLM would never have agreed to such an interpretation, because it would have precluded BLM from establishing that the land masses were islands at the time of the original surveys, and the parties agreed in the stipulation that BLM was required to provide evidence of that fact at the hearing (Stip. V). 13/

The Judge also found that the channels separating the parcels from the mainland were not perpetual channels because they did not separate the parcels from the mainland when the parcels were inundated by water during the river's flood stages and when the channels were dry during low river flow. He concluded that in order for a channel to separate a land mass in a river from the mainland, it must contain water throughout its length, and that to meet the stipulated definition of island, such a channel must do so perpetually. We find these conclusions to be erroneous.

A channel is the depression of a stream bed below the permanent banks which forms a conduit through which waters flow and which may be full at

13/ It appears more reasonable to assume that the parties used the term "permanent" to designate a stable land formation above the mean high water mark, as opposed to a transitory, shifting sand bar. See, e.g., United States v. Otley, 127 F.2d 988, 1001 (9th Cir. 1942); State of Oregon, 60 I.D. 314, 315 (1949). Consistent with our discussion supra, we find that the stipulated definition of "island" only requires that the land masses be permanent, not that the islands as islands be permanent.

some times and at others nearly, if not completely, dry. State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.W. 437, 443 (1907). It consists of a well-defined bed and banks. The bed carries the waters at their ordinary stage although

[i]n extremely high water the bed may be much more than submerged; [and] at other times it may not even be covered, but by close examination of the bed and banks of a natural water course one may readily distinguish the exact line of demarkation between them. * * * The banks of a water course are the elevations of land which confine the waters to their natural channel when they rise to the highest point at which they are confined to a definite course and channel. Although at times these banks may be overflowed by flood waters, yet they themselves are unchanged, though not necessarily unchangeable. [Citations omitted.]

Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369, 376-77 (1931).

Thus, a channel is an identifiable geomorphic structure which exists independently of the water which may flow through it. BLM established that each of the disputed parcels was separated from the mainland by a channel at the time of the original surveys, and that these channels were still identifiable at the time of the hearing, although some had been filled in by the riparian land owners.

We find that this evidence satisfies the stipulated definition of an island, when the stipulation is read as a whole and in light of relevant case law. The evidence supports a finding that the parcels existed as islands at the time of the original surveys, and the fact that, over the course of geologic time, they will eventually become part of the mainland does not preclude such a finding. See R. A. Mikelson, supra at 9; see also United States v. Severson, 447 F.2d 631 (7th Cir. 1971), cert. denied, 404 U.S. 1039 (1972). 14/

Judge Child also found that, under Scott v. Lattig, supra, the omission of an island from an original survey had to be the result of error in order for the United States to retain title to the omitted islands. He concluded that the surveyors did not omit the islands as a result of error, noting that the parcels were properly identified as topographic features and appeared on the plats of survey as such.

14/ In R. A. Mikelson, this Board stated, citing Severson, that when an island in a nonnavigable river is omitted from a survey, title to the island remains in the United States and "the island remains subject to survey despite the disappearance of the channel separating the island from the lots which were formerly riparian." 26 IBLA at 9 (emphasis added).

We have held that the parcels were islands, not mere topographic features, at the time of the original surveys. A consequence of that holding is that the failure of the original surveyors to survey the islands in question must either have been the result of an error 15/ or simply the consequence of an official or unofficial Government policy not to survey islands unsuitable for cultivation. In either case, their failure to survey the islands did not divest the United States of title to those islands. See Northern Michigan Exploration Co., supra at 187-88 n.13, 97 I.D. at 176 n.13. 16/

Based on the entire record before us, we find that the parcels were islands omitted from the original surveys conducted in 1889 and 1891. Title to these islands remains in the United States, and they were properly surveyed by BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Ramon M. Child is reversed.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge

15/ Although the parties stipulated that there was no error in the original surveys, if substantial evidence contrary to a stipulation exists in the record, that stipulation may be disregarded. See Smith v. Blackburn, 785 F.2d 545, 549 (5th Cir. 1986); Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1369 (5th Cir.), reh'g denied, 699 F.2d 1163 (5th Cir. 1983).

16/ We note that in C. Albert White, A History of the Rectangular System of Survey 81 (1980), following the citation of a Jan. 29, 1824, letter from the Commissioner of the General Land Office (GLO) to the Surveyor General setting forth a policy on the surveying of islands in which the Commissioner stated that "when a favorable opportunity occurs you may take measures to cause such of them to be surveyed as from the best information you can collect, may be worth the expense," White explained:

"This treatment of islands always remained. Unless an island was large, it was seldom surveyed during the regular, original rectangular surveys. Most islands were small and the cost of surveying, platting, and sale was greater than the monetary return to the government of \$1.25 per acre. But the GLO always did and still does consider islands public lands until surveyed, platted, and sold."

See also Loyla C. Waskul, 102 IBLA 241, 246-47 (1988); Joseph Tomalino, 42 IBLA 117, 120 (1979).