

STATE OF SOUTH DAKOTA

IBLA 2001-348

Decided July 27, 2005

Appeal from a decision of the State Director, Wyoming State Office, Bureau of Land Management, dismissing a protest against the survey of an island in the Missouri River. Group 147 NE.

Set aside and referred for a hearing.

1. Public Lands: Generally--Surveys of Public Lands:
Generally--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 in a navigable river that has been omitted from a public land survey remains public land and may be surveyed and disposed of by the United States.

2. Administrative Procedure: Hearings--Hearings--Rules of Practice:
Appeals: Hearings--Surveys of Public Lands: Generally

Although there is no right to a hearing before an administrative law judge on a protest against a survey, a BLM decision dismissing a protest against a survey of an island will be set aside and referred for a hearing where the record discloses significant unresolved factual issues as to whether the island was actually in existence at the time of the admission to the Union of the state within which the island is situated.

APPEARANCES: Roxanne Giedd, Esq., Assistant Attorney General, Pierre, South Dakota, for the State of South Dakota; Lyle K. Rising, Esq., Office of the

Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; The Honorable Don Stenberg, Attorney General, and L. Steven Grasz, Esq., Deputy Attorney General, Lincoln, Nebraska, for the State of Nebraska.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

The State of South Dakota (South Dakota or the State) has appealed the April 12, 2001, decision of the State Director, Wyoming State Office, Bureau of Land Management (BLM), dismissing its protest against the survey of Tract 37, T. 32 N., R. 3 E, sixth principal meridian (6th P.M.), Cedar County, Nebraska, commonly known as Goat Island. In dismissing the protest, the State Director determined that the island existed above the ordinary high water mark (OHWM) at the time of the original public land survey and when the State of Nebraska was admitted into the Union in 1867 and, therefore, that the island is unsurveyed Federal land within the boundaries of Nebraska.

The dispute at the heart of this appeal was precipitated by an article in the June 25, 1997, edition of the Cedar County News, reporting that Cedar County, Nebraska, officials had discovered that Goat Island, which sits in the middle of the Missouri River halfway between South Dakota and Nebraska, was unclaimed Federal land, and the consequent July 1, 1997, letter to BLM from a private individual interested in acquiring that island. After learning that the island was possibly Federal property, the National Park Service (NPS) advised BLM by letter dated October 10, 1997, that it wished to acquire the island for inclusion within the Missouri National Recreational River, a component of the wild and scenic rivers system.

BLM undertook an initial review of the island, which failed to uncover any mention of it in the land status records for secs. 7-12, T. 32 N., R. 3 E., 6th P.M., Cedar County, Nebraska or the records of either John K. Cook, who surveyed the subdivisional lines and meandered the right bank of the Missouri River, T. 32 N., R. 3 E., 6th P.M. (Nebraska side), in 1858 or John E. Clark, who surveyed the subdivisional lines and meandered the left bank of the Missouri River, T. 92 N., R. 53 W., 5th P.M. (South Dakota side), in 1861. See Survey Plat, Tract 37, T. 32 N., R. 3 E., 6th P.M., Nebraska; see also May 11, 1998, BLM letter to Cedar County Assessor at 2. Based on the failure of the preliminary examination to disclose any evidence affirmatively showing that Goat Island, in whole or in part, was land in place at the date of the original 1858 township survey and at the March 1, 1867, date of statehood for Nebraska, BLM determined that Goat Island was not omitted land under 43 CFR 9185.1-1(b) and, therefore, was not public land administered by BLM. (May 11, 1998, BLM letter to Cedar County Assessor at 2.) BLM acknowledged,

however, that its determination did not preclude any party from requesting a survey of that island. Id.

By letter dated August 4, 1998, NPS requested that BLM conduct a field examination of the ownership of Goat Island as omitted Federal land. In support of its request, NPS attached a July 27, 1998, report prepared by W. Raymond Wood, Professor of Anthropology and Research Professor, University of Missouri-Columbia (Wood Report), which cited evidence supporting the existence of Goat Island as a constant feature in the channel of the river since the late 1700's. Those sources included a map drawn by John Evans in 1796-97, depicting a sandbar in the approximate location of Goat Island; a map prepared by Clark in 1804, showing a sandbar and island close to that site; a map developed by Nicollet in 1839, delineating an island near that locus; a map created by Warren in 1856, portraying an island at that position; and two post-statehood maps, an 1876 map by Howell and an 1895 map by the Missouri River Commission (MRC), indicating an island in that location. (Wood Report at 1 and attachments.) NPS indicated it was willing to underwrite the costs of the investigation.

In response to NPS' request, BLM reviewed its records, searched for aerial photographs of the area, and sought the opinion of BLM's Northwest Riparian Boundary Specialist, who concluded that Goat Island might meet the criteria for an unsurveyed island remaining in the public domain. Therefore, by memorandum dated February 5, 1999, BLM advised NPS that it was prepared to undertake an official investigation of the ownership of Goat Island, and that, if the investigation upheld its initial conclusion as to the public ownership of the island, it would conduct an official survey.

By letters dated March 3, 1999,^{1/} and resent certified mail on March 10, 1999, BLM notified the Attorney General and Secretary of State of both South Dakota and Nebraska that NPS believed that Goat Island was in existence prior to statehood and therefore qualified as unsurveyed public land; that NPS wanted to incorporate the island into the management realm of the Missouri National Recreational River system; and that NPS had accordingly applied to BLM for survey of that island. BLM advised both States that they could file a formal protest against the proposed survey. By letters dated March 8 and 10, 1999, BLM also informed the adjacent riparian land owners in Nebraska and South Dakota, respectively, of NPS' intention to apply for

^{1/} In its May 12, 1999, response to South Dakota's protest, BLM apologized for incorrectly titling its Mar. 3, 1999, letter "Notice of Intention to Apply for Survey," when, in fact, that letter was a notification of the investigation and a request for comments.

survey of Goat Island and of their option of filing a protest against the proposed survey.

BLM issued Special Instructions for Group No. 147, Nebraska, dated February 25, 1999, and approved March 2, 1999, “[p]roviding for the dependent resurvey of a portion of the subdivisional lines, and the investigation and conditional survey of unsurveyed Goat Island, located within the Missouri River, in sections 8, 9, 10 and 11, Township 32 North, Range 3 East, Sixth Principal Meridian, Nebraska.” (Feb. 25, 1999, Special Instructions at 1.) The Special Instructions indicated that the investigation and conditional survey were “needed to confirm the assertion by [NPS] that the island commonly known as **GOAT ISLAND** is public land and was omitted from the original survey. And, if confirmed[,] identify the boundaries of the unsurveyed island for possible transfer to [NPS] under the 1991 Wild and Scenic Rivers Act.” *Id.* (bold in original).

South Dakota filed a protest against the issuance of the special instructions.^{2/} The State asserted that NPS had violated the procedural requirements of 43 CFR 9185.2-2(a), which requires that a notice of intention to apply for survey be served on adjacent landowners and the Secretary of State and Attorney General of the state in which the land is situated at least 30 days before the date of application for survey, by filing its application with BLM before notifying the State. South Dakota also alleged that the island was no more than a sandbar at the time of its statehood in 1889 and, therefore, did not constitute an unsurveyed island under applicable regulations and case law. South Dakota further noted that the island was not included in the original February 18, 1862, survey of the township and outlined other evidence indicating that the island did not exist in 1862. Additionally, the State objected to BLM’s map attached to the notice of intention to the extent it set forth the boundary between South Dakota and Nebraska, averring that the main channel of the

^{2/} Nebraska and various private landowners also submitted protests against the issuance of the special instructions. By letters dated Apr. 13, 1999, BLM responded to the private landowners’ protests, which questioned the effect of the proposed survey on their property interests, explaining that “[w]e do not believe the Federal Government ownership claim with regard to this property will adversely affect ownership of the uplands.” Nebraska, in its Mar. 31, 1999, protest, objected to the Federal government’s assertion of ownership of Goat Island, pending Nebraska’s evaluation of its interest in the land. BLM, in its response, dated May 12, 1999, advised Nebraska that work to determine the status of the island was investigative only and that, following the investigation, if BLM decided the island qualified as lands omitted from the original survey, it would notify Nebraska of its intent to survey the island and the State would have the opportunity to protest at that time.

Missouri River might be south of Goat Island rather than north of the island as depicted on the map. Finally, the State questioned the designation of the island as “Goat Island,” submitting that Goat Island was actually located several miles upstream from the island at issue, which it referred to as “Jacques” or “Jaquith” island.

BLM responded to South Dakota’s protest by letter dated May 12, 1999. BLM explained that its present work was investigative only to determine whether the island qualified as land omitted from the original survey. According to BLM, that work had involved research of available information including historical maps and contemporary and historical aerial photography, a preliminary site visit during the week of April 5, 1999, and some initial retracements of the original survey during the weeks of April 19 and 26, 1999, as well as a field examination of the island by NPS archeologists during the week of April 26, 1999.^{3/} BLM first explained that its March 3, 1999, letter was actually a notification of investigation and a request for comments, rather than a notice of intention to apply for survey, as BLM incorrectly titled it. BLM further explained that the protest was not yet ripe, since there was no proposed BLM activity, pending the results of its investigation. Addressing the evidence proffered by South Dakota, BLM noted that obtaining such evidence fell within the scope of its investigation and that any further action was conditional on the results of the investigation. Regarding the boundary issue, BLM stated that it did

^{3/} By memorandum dated May 4, 1999, NPS summarized its findings from this examination and one conducted on Apr. 6, 1999, stating that “no evidence of archeological remains was observed during two visits to Goat Island, made on April 6 and 27, 1999, respectively. Given the nature of the water- and wind-laid sand deposits observed during those visits, it is our opinion that there is extremely little potential for archeological remains -- other than evidence of relatively recent (ca. 1960s? and later) farming and grazing activities, and modern beverage bottles, bits of plastic, and other river deposited trash visible on the surface of the island -- to be contained on or in the island. This lack of archeological evidence does not either support or contradict the interpretation of historical maps by Dr. W. Raymond Wood (letter to Paul Hedren, July 27, 1998), which suggests that the island accreted in size from its earliest depiction as a sand bar on a 1796-1797 map through its appearance on the Missouri River Commission 1895 map, sheet 29 (which is based on an 1892 survey).

“We recommend no further archeological investigation of the island. A better understanding of the physical history of the island, however -- particularly its landforms that have resulted from periods of erosion and accretion -- may be achieved through examination of the island by a qualified geomorphologist.” (May 4, 1999, NPS memorandum at 2.)

not have the authority to survey or resurvey State boundaries and that the attached map did not represent definite boundaries but simply was intended as a locator diagram. BLM also indicated it would research the issue of the island without reliance on local name references and would carefully associate name references to geographic location. BLM added that if, after the investigation, BLM decided that the island qualified as land omitted from the original survey, it would notify South Dakota of its intent to survey the island and the State would then have the opportunity to protest that decision.

BLM issued Special Instructions for Group No. 117, South Dakota, dated February 15, 2000, and approved February 18, 2000, “[p]roviding for the retracement and dependent resurvey of portions of the east boundary and subdivisional lines, Township 92 North, Range 53 West, and the investigation and conditional survey of unsurveyed Goat Island, located within the Missouri River, adjacent section 19, Township 92 North, Range 52 West, and sections 21, 22, 23 and 24, Township 92 North, Range 53 West, Fifth Principal Meridian, South Dakota.” (Feb. 15, 2000, Special Instructions at 1.) The Special Instructions indicated that the investigation and conditional survey were “needed to confirm the assertion by [NPS] that the island commonly known as **GOAT ISLAND** is public land and was omitted from the original survey. And, if confirmed[,] identify the boundaries of the unsurveyed island for possible transfer to [NPS] under the 1991 Wild and Scenic Rivers Act.” *Id.* (bold in original). BLM also issued Amended Special Instructions, dated and approved March 2, 2000, for Group No. 147, Nebraska.

Joel T. Ebner, Cadastral Surveyor, executed the surveys from April 22, 1999, through March 16, 2000, pursuant to the February 25, 1999, Special Instructions and the March 2, 2000, Amended Special Instructions for Group No. 147, Nebraska, and the February 15, 2000, Special Instructions for Group No. 117, South Dakota. See Survey Plat, Tract 37, T. 32 N., R. 3 E., 6th P.M., Nebraska.

BLM also contracted with Rocky Mountain Tree-Ring Research, Inc. (Rocky Mountain), to determine the age of the trees currently existing on Goat Island. On April 19, 2000, Rocky Mountain issued its final report on the results of its sampling and aging of trees on Goat Island, along with historical and ecological interpretations of tree ages found on the island (Tree Coring Report). Based on a dendro-chronological analysis of cores from 24 living trees and full cross-sections from two downed and scarred logs that had fallen in situ, Rocky Mountain concluded that the trees on Goat Island dated from the mid 1930’s to early 1940’s, at the earliest. (Tree Coring Report at 3.) Rocky Mountain added, however, that the ages of the trees currently on the island might not represent the maximum age of the island because of past “stand-replacing disturbance events” such as fires, windthrow, pathogens,

browsing, erosion, sedimentation, and ice abrasion. Id. at 4. Specifically, the contractor noted that at least two trees had fire charring on the bark and numerous others had one or two fire scars and conjectured that fire occurring on the island might have removed a previous forest and opened up space for the trees now comprising the forest. Rocky Mountain also speculated that major floods and the subsequent ice damming in the Yankton area in 1881 and 1916 might have caused sufficient ice scouring of the island to remove pre-existing trees and open up space for the establishment of new trees during the low maximum flow period of the 1930's. Id.

Ebner completed the Survey Plat for Goat Island, denominated as Tract 37, T. 32 N., R. 3 E., 6th P.M., Nebraska, on November 13, 2000. The plat contained a section entitled "Survey Information and Certificate," indicating that the plat "represents the entire record of the survey of Tract No. 37 * * *." In that section, Ebner cited seven maps as indicating that an island existed in the area throughout the entire 19th century: "Evans 1796-97, Lewis and Clark 1804, Nicollet 1839, Warren 1856, Howell 1867, Major Sutter (by Wellman) 1881, and Missouri River Commission 1895." He noted that Nebraska's date of statehood was March 1, 1867, and that the Howell map, of that same year, identified an island in the vicinity of Tract 37, depicting the northerly channel as the navigation route and added that current maps and aerial photography since 1940 also showed an island in this location. See Survey Plat, Tract 37, T. 32 N., R. 3 E., 6th P.M., Nebraska.

By separate letters dated November 16, 2000, BLM advised both South Dakota and Nebraska that, based upon its investigation, it had determined that Goat Island qualified as an unsurveyed island. BLM noted that the survey of the parcel, described as Tract 37, T. 32 N., R. 3 E., 6th P.M., Cedar County, Nebraska, had been completed on March 16, 2000, and that the Survey Plat, which contained a summary of the investigation, was approved on November 13, 2000. BLM informed the States that a 30-day period for protesting the survey would begin upon Federal Register publication of BLM's intent to file the plat. BLM attached a copy of the plat to each letter.

South Dakota filed a protest against the survey on January 22, 2001. South Dakota asserted that Goat Island was an island which formed in a navigable stream in South Dakota after statehood and thus was owned by the State and not the Federal government. The State pointed out that BLM had not cited any statutory basis for its claim of ownership of the land and that, since the island was not public land, BLM had no authority to survey it. (Protest at 1-2, ¶¶ 1, 4, 5.) South Dakota disputed BLM's placement of the island within Nebraska, averring that the island actually fell within the boundaries of South Dakota because the principal channel and

main route of navigation of the Missouri River in that location ran on the south side of Goat Island. *Id.* at 3-7, ¶¶ 11-22. The State further maintained that Goat Island was a sandbar, not an island, when South Dakota was admitted into the Union on November 2, 1889. As support for its assertion that no direct evidence existed demonstrating that Goat Island was extant as an island on November 2, 1889, South Dakota cited the February 28, 1862, survey of South Dakota, which did not indicate an island at the location of Goat Island; the 1881 Corps of Engineers (Suter) map of the Missouri River based on June 18, 1878, and March 3, 1879, surveys showing a sandbar in that location; the 1884 Andreas Historical Atlas of Clay County, South Dakota, denoting a sand bar in the approximate location of Goat Island; the Tree Coring Report; and the NPS archeological examination of the island. (Protest at 7-8, ¶¶ 23-31.)

South Dakota submitted an amended protest on February 20, 2001. The State elaborated on its assertion that Goat Island did not exist as an island on November 2, 1889, noting that the portion of the Missouri River at issue here, colloquially known in the past as “Sand Hill Reach,” was subject to repeated sandbar and island formation, inundation, and accretion to the river banks; that a comparison of the original South Dakota survey and the present course of the Missouri River showed that part of what is now Goat Island was part of the banks of the river on the South Dakota side in the original survey; that the north bank of the river had been subject to repeated avulsion and accretion events; and that the sandbar and island noted on some historical mapping of the area in question is not the same island now existing in the area. (Amended Protest at 9-10, ¶¶ 29-31.) The State also contended that the application for the survey was defective because it did not contain all the evidence demonstrating that the involved land was unsurveyed when South Dakota was admitted to the Union required by the applicable regulation, 43 CFR 9185.2-2(c). (Amended Protest at 11-12, ¶¶ 36-38.)

The State of Nebraska replied to South Dakota’s protest, stating that it did not object to the survey of Goat Island. Nebraska further indicated that it did not dispute BLM’s determination that Goat Island constituted unsurveyed public land and that it agreed with BLM’s placement of the island within the boundaries of Nebraska.

In his April 12, 2001, decision, the Wyoming State Director rejected South Dakota’s challenge to BLM’s determination that Goat Island was omitted from the original survey. According to the State Director,

the historical maps furnish clear and convincing evidence that the island has been in existence and above ordinary high-water elevation since the Evans map of 1796-97. The U.S. Government some 6 years

later under the Louisiana Purchase in 1803 acquired the lands in South Dakota and Nebraska. The seven maps comprising the historical map evidence cover a period of 99 years from 1796 to 1895. We note that the Howell map of 1867, depicting the navigation route as the northerly channel, coincides with the year of Nebraska Statehood (March 1, 1867), 22 years before South Dakota entered the Union. Contemporary maps and aerial photography dating back to 1940 establish the continued existence of an island in this location.

The historical maps clearly show an island in the same location and depict some stage of timber or vegetative growth. As part of our investigation the Bureau, by contract, sampled trees on the island for age determination. The sampling could not determine timber stands earlier than the middle 1930s. However, as noted in the Tree Coring Report, present growth "...may not represent the maximum age of the island itself because of past stand-replacing disturbance events." The report cites events such as fire and specifically cites flooding caused by ice damming, which occurred in this stretch of the river in 1881 and 1916.

(Protest Decision at 2.)

As to South Dakota's contention that Goat Island fell within South Dakota and not Nebraska, the State Director stated that BLM had no authority to survey or resurvey State boundaries because such surveys could only be made under direction of the Supreme Court or pursuant to authorization by the involved states with the consent of Congress. *Id.* He further explained that in order to identify the island with a full and complete legal description, BLM had needed to make a decision as to the state in which the island might fall, and that BLM had based its placement of the island in Nebraska on the Howell map of 1867, which depicted the navigation route as the northerly channel. He noted that, under the Island Rule, when the main channel of a navigable stream changes, the State boundary and island remained fixed at the position before the change. *Id.* The State Director concluded that the 1999-2000 survey of Tract 37 approved on November 13, 2000, was properly conducted and that the depiction of the State boundary on the Survey Plat based on the 1867 Howell map and the Island Rule was appropriate within BLM's limited authority. He therefore dismissed South Dakota's protest against the survey. *Id.* at 3.

South Dakota identifies four grounds for its appeal: (1) Goat Island did not exist as land in place above the OHWM or elevation at either Nebraska or South Dakota survey or statehood; (2) BLM's decision did not comply with the

requirements of 43 CFR 9185.2-2(c); (3) BLM's decision is arbitrary, capricious, erroneous, and unsupported by the law; and (4) BLM erred by failing to refer the protest to an administrative law judge for hearing, or, alternatively, that the matter should be referred for a hearing under 43 CFR 4.415. ^{4/} (Amended SOR at 1.)

The essence of the State's appeal focuses on its contention that the island did not exist as land in place at the time of survey of Nebraska or South Dakota or their respective dates of statehood. South Dakota points out that neither the plats nor the notes of the surveyors conducting the original surveys in the areas at issue in South Dakota and Nebraska mention or survey an island in the Missouri River in the location of Goat Island. South Dakota notes that the applicable general survey instructions required that islands be surveyed and suggests that two separate surveys conducted at two separate times could not both be in error. South Dakota submits that these surveys and plat information, which it avers should be accorded special weight, do not support BLM's conclusion that the island existed as land in place above the OHWM at survey or statehood. (Amended SOR at 10-12.)

South Dakota further avers that the historical drawings and maps in the record demonstrate that, although the river bed may have been exposed at various times and locations in the vicinity of Goat Island, the island itself did not exist as land in place above the OHWM at statehood. The State outlines the flaws it perceives in the drawings and maps relied upon by BLM, including the lack of scales, legends, identifying river bank characteristics, river flow data, and denotations of the OHWM on the depicted sandbars or islands, as well as differences in the size and shape of the portrayed land masses and the dearth of substantial vegetation commonly associated with land in place. See Amended SOR at 12-16.

In contrast, South Dakota cites the maps it proffered as clearly demonstrating that no island existed as land in place at the time of statehood. Specifically, the State contends that the Surveyor General's 1858 map of Nebraska and the 1861 map of South Dakota do not show an island in the vicinity of Goat Island; the 1881 Corps of Engineers (Suter) map executed during a low water stage shows only sandbars in the approximate location of Goat Island and not an island which, given the low water conditions, certainly would have been denoted if it had existed; and the 1901 Peterson Atlas shows a sandbar marked with the section numbers 22 and 23 and willows in the present location of Goat Island and places the original meander line of

^{4/} In recognition of the Department's lack of jurisdiction to decide the boundary line between Nebraska and South Dakota, South Dakota has abandoned its challenge to BLM's placement of the island within Nebraska. See Amended SOR at 9 n. 1.

the Missouri River far to the north of where the river bank existed in 1901. (Amended SOR at 14-16.)

South Dakota asserts that the river banks at the location of Goat Island have changed since survey and that any island present at that time could no longer exist at that same position. The State maintains that the accretion of land to Norway Township in South Dakota proximate to the purported historical site of Goat Island demonstrates that the island could not have existed at its present location at statehood. The State points to depictions in the Peterson Illustrated Historical Atlas of Clay County, South Dakota, published in 1901, of a sandbar or island with vegetation in the Missouri River in what would be secs. 22 and 23, T. 92 N., R. 53 W., and of the original meander line of the north bank of the river stretching into the east section of the sandbar or island, as evidence that the island location was a river bank at the time of the original 1860 survey. The State also observes that a comparison of the 1980 Corps of Engineers map to the 1901 Peterson Atlas reveals that the land shown as sandbars in 1901 had become affixed to the northern bank of the Missouri River by 1980, thus providing further support for its contention that Goat Island, as it exists today, could not have existed as land in place above the OHWM at the time of survey or statehood. (Amended SOR at 16-18.)

Furthermore, according to South Dakota, there is no physical evidence demonstrating that Goat Island was land in place above the OHWM at survey or statehood of either State. South Dakota notes that: tree corings date the oldest trees on the island from the mid-1930's; the record lacks adequate soil evidence supporting the pre-statehood formation of Goat Island; no archeological or cultural remains demonstrating that the island was present at statehood have been discovered; the fact of frequent flooding of the area does not prove either that vegetation existed dating back to statehood or that the island itself existed; and the record contains no evidence establishing the OHWM at the time of statehood -- an omission of particular significance given the dynamic nature of the River during the time at issue. In short, South Dakota submits that there is no physical evidence in the record supporting BLM's conclusion that Goat Island was land in place above the OHWM at the time of either Nebraska's or South Dakota's statehood. (Amended SOR at 18-23.)

South Dakota emphasizes the lack of any island depicted in the original surveys (despite instructions to survey all islands and the inclusion of other nearby islands in surveys); historical drawings and maps often developed during low conditions instead of OHWM circumstances showing the riverbed exposed at times, inundated at other times, and resurfaced in different locations; the omission of any determination of the historical OHWM on Goat Island at survey or statehood; and the dearth of physical evidence establishing that the island existed prior to 1930. It

argues that these factors distinguish this case from those where courts have determined that an island existed at statehood and maintains that Goat Island did not exist as land in place above the OHWM at survey or statehood. (Amended SOR at 22-24.)

South Dakota also alleges that BLM's decision did not comply with the 43 CFR 9185.2-2(c), which requires evidence showing that the unsurveyed island was in existence above the ordinary high water elevation when it was admitted to statehood and when the adjacent land was surveyed. The State insists that information in the record concerning the island's current size, elevation, appearance, timber growth, and other vegetation does not satisfy that requirement. (Amended SOR at 24-25.) The State further contends that the objections outlined above clearly demonstrate that BLM's decision is arbitrary, capricious, erroneous, and unsupported by law. Id. at 25.

Finally, South Dakota avers that BLM erred by failing to refer the protest to an administrative law judge for a hearing. Alternatively, the State requests a hearing under 43 CFR 4.415. The State asserts that the crucial issue on appeal is factual, i.e., whether Goat Island existed prior to statehood, and submits that it was unable to fully develop its factual case in the short time frame allowed for filing its SOR. South Dakota also submits that it has been unable to test BLM's evidence through deposition or cross-examination or to probe the qualifications of BLM's experts or the full rationale for the opinions presented in the memoranda found in the record. According to the State, the regulation governing protests, 43 CFR 4.450-2, supports the propriety of a hearing because the only appropriate action under the circumstances here is sending the case to an administrative judge for development and determination of the facts. South Dakota, therefore, requests that the Board refer the case to an administrative law judge for a hearing, should we decide that reversal of BLM's decision is not warranted. (Amended SOR at 25-27.)

Both Nebraska and BLM have responded to South Dakota's Amended SOR. Nebraska supports BLM's decision, averring that the decision is not arbitrary, capricious, or contrary to law; that Goat Island constitutes unsurveyed public lands; and that Goat Island lies within Cedar County, Nebraska. Nebraska further submits that, if the Board determines that Goat Island is not Federal public land, then it is public land within the State of Nebraska. (Nebraska Answer at 1.)

BLM contends that the evidence in this case overwhelmingly supports the existence of Goat Island as fast, dry land at the time of both Nebraska and South Dakota statehood. BLM disputes South Dakota's reliance on the absence of any mention of the island in the original survey notes and plats for the area, pointing out

that the U.S. Supreme Court has discounted such an omission when the evidence clearly demonstrates that the island was present at that time, citing Scott v. Lattig, 227 U.S. 229 (1913) and Moss v. Ramey, 239 U.S. 538 (1916). BLM asserts that Goat Island is more than four times the size of either of the islands found to have been omitted by the Court in those cases, extends for more than 3 miles in length, is as wide as half of a mile with an average width between a quarter and a third of a mile, is covered with mature timber, rises above the river 5 to 10 feet in some places and 15 to 20 feet in others, and appears to be a permanent and stable formation. (BLM Reply at 3-5.)

BLM also points out that numerous historical maps beginning in 1796 show the island, although it concedes that there is no exact congruence between the island shown on the maps and the Goat Island of today, a divergence it attributes to the lack of sophisticated positioning systems at the time of the earlier maps. Id. at 5-6. BLM points to correspondence from a prospective homesteader by the name of Riley Brewer to the General Land Office (GLO), written in the summer of 1901, indicating that he had taken up residence on the island and requesting how he could obtain title to the lands as well as to GLO's response that he would have to ask for a survey of the then unsurveyed land. It submits that those documents clearly show the existence of an island of significant permanence only 12 years after South Dakota statehood and suggest that the island was undoubtedly in nearly the same condition in 1889. Id. at 6. BLM minimizes the importance of the maps (including the official surveys) omitting the island proffered by South Dakota. BLM avers that the island's size, elevation, "mature timber," and appearance of permanence and stability, along with the depiction, on historical maps, of an island in approximately this position overcome any inference that the island did not exist and outweigh the island's omission from other maps. (BLM Reply at 4-7.)

Finally, BLM argues that a hearing is unnecessary because all the facts relevant to a decision are already in the record, and an administrative law judge is in no better position than this Board to weigh the evidence and decide the matter. Since the State has not offered to produce additional probative evidence bearing on these issues, BLM submits that the request for a hearing should be denied. (BLM Reply at 7-8.)

South Dakota has moved to supplement its SOR with a map depicting a cartographic reconstruction of the explorations of Lewis and Clark which superimposes the Lewis and Clark map, previously produced as evidence, on the currently existing conditions of the Missouri River in the area in question. South Dakota contends that this map shows that Goat Island was on the South Dakota side of the river when Lewis and Clark mapped the river in 1804 and clearly was not an island. The State avers that it first became aware of this cartographic reconstruction,

which was prepared by Martin Plamondon II and appears in the book Lewis and Clark Trail Maps, A Cartographic Reconstruction, Volume I, in August 2001. South Dakota submits that this cartographic reconstruction clearly supports its claim that the river has changed so dramatically since the historic maps were prepared that the presently existing Goat Island cannot be related to the sandbars and islands appearing on the historical maps. We grant the State's motion and accept the map into the record.

[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); see Robert A. Weigel, 147 IBLA 307, 309-10 (1999), citing Chester H. Ferguson, 20 IBLA 224, 229 (1975); see generally Manual of Instructions for the Survey of Public Lands of the United States (1973), at 1-217. 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. Since that time, 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); see also Manual of Instructions for the Survey of Public Lands of the United States (1973), at 3-4, 97-98 ("This is because such islands were not part of the bed of the stream at the date of Statehood, and therefore their title remained in the United States, subject to survey and disposal when identified.").

The issue in this case centers on whether Goat Island, which was omitted from the original surveys, existed as land in place above high-water elevation at the time of statehood and thus remains public land subject to survey. BLM has presented maps, memoranda, and other evidence supporting the existence of the island prior to statehood; South Dakota has proffered maps and other documents indicating that no island was extant in the location of the current Goat Island at that time. Both BLM and South Dakota have each attacked the persuasiveness of the other's proof.

[2] South Dakota maintains that, because the disputed question is essentially a factual issue, BLM was obligated to refer the protest for a hearing under 43 CFR 4.450-2, which directs BLM to take such action on a protest "as is deemed to be

appropriate in the circumstances.” The Board, however, has long held that there is no right to a hearing before an administrative law judge on a protest against a survey. R.A. Mikelson, 26 IBLA at 4; see Timothy J. Bottoms, 150 IBLA 200, 216 (1999). Nevertheless, the Board has the discretion under 43 CFR 4.415 to refer a case to an administrative law judge for a hearing on an issue of fact where there are significant unresolved factual issues which cannot be determined based on the current record. See Mark Patrick Heath, 163 IBLA 381, 388-89 (2004); Sydney Dowton, 154 IBLA 291, 296 (2001); Yates Petroleum Corp., 131 IBLA 230, 235 (1994); Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303, 307 (1991); R.A. Mikelson, 26 IBLA at 4; Stanley G. West, 14 IBLA 26, 27 (1973).

Although BLM insists that the record contains ample evidence to allow the Board to decide the contested factual issues and that testimony and additional evidence would not aid the Board’s deliberations, we disagree. We have carefully reviewed all the evidence currently in the record and find the conflicting evidence insufficient to support an informed decision on the issue of whether Goat Island existed as an island at the time of survey or statehood. For example, as acknowledged by BLM, the location of the island varies on the maps and drawings relied upon by BLM, but the record as presently constituted contains insufficient justification for ignoring these variances. Nor does the dendrochronological evidence in the record (dating the oldest existing trees on the island from the mid-1930’s) or other vegetative evidence support the existence of the island in 1867 or 1889. These omissions, coupled with the evidence submitted by South Dakota, including evidence of the constant dramatic shifting of the course of the Missouri River in the area and historical maps that do not depict the island, clearly demonstrate that a hearing is warranted in this case. At the hearing, South Dakota shall have the ultimate burden of establishing error in BLM’s determination.

Therefore, 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, Office of Hearings and Appeals, for a hearing before an administrative law judge. The decision of the administrative law judge shall be final for the Department in the absence of an appeal to this Board.

Christina S. Kalavritinos
Administrative Judge

I concur:

David L. Hughes
Administrative Judge