

Omitted Lands within the PLSS in Minnesota

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A. Federal Statutory Framework

- a. The Bona Fide Rights Act (43 U.S.C. § 772) provides for resurvey of public lands that have been undisposed:

The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of:

Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement. *Id.*

Omitted lands are included under this statute are considered as being “surveyed for the first time” by the federal government even though a patent was allegedly claimed by an individual or state. See *U.S. v. Ruby Co.*, C.A.9 (Idaho) 1978, 588 F.2d 697, *certiorari denied* 99 S.Ct. 2838, 442 U.S. 917 (lands had originally been surveyed in 1876 but where a 1957 survey discovered lands which had been “omitted” by the fraudulent or grossly inaccurate 1876 survey; by definition, the omitted lands were surveyed for the first time in 1957).

- b. The Color of Title Act (43 U.S.C. § 1068) provides:

The Secretary of the Interior

(a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than **twenty years**, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, **or**

(b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, **under claim or color of title for the period commencing not later than January 1, 1901**, to the date of application during which time they have paid taxes levied on the land by State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre: *Provided*, That where the area so held is in

excess of one hundred and sixty acres the Secretary may determine what particular subdivisions, not exceeding one hundred and sixty acres, may be patented hereunder ...*Id.* (emphasis added).

- c. The Federal Land Policy and Management Act of 1976 (FLPMA)(43 U.S.C. § 1701 *et seq.*) provides for the disposal of omitted land under 43 U.S.C. § 1721 to either state/local governments under section (b)(1) or to individuals under section (b)(2) as follows:

(b) Omitted lands; authorization and limitations on authority

(1) The Secretary is authorized to convey to **States and their political subdivisions**...., but without regard to the acreage limitations contained therein, lands other than islands determined by him after survey to be public lands of the United States erroneously or fraudulently omitted from the original surveys.... Any such conveyance shall not be made without a survey: *Provided*, That the prospective recipient may donate money or services to the Secretary for the surveying necessary prior to conveyance if the Secretary accepts such money or services, such services are conducted pursuant to criteria established by the Director of the Bureau of Land Management, and such survey is approved by the Secretary prior to the conveyance.

(2) The Secretary is authorized to convey to the occupant of any omitted lands which, after survey, are found to have been **occupied and developed for a five-year period prior to January 1, 1975, if the Secretary determines that such conveyance is in the public interest and will serve objectives which outweigh all public objectives and values which would be served by retaining such lands in Federal ownership**. Conveyance under this subparagraph shall be made at not less than the fair market value of the land, as determined by the Secretary, and upon payment in addition of administrative costs, including the cost of making the survey, the cost of appraisal, and the cost of making the conveyance. *Id.* (emphasis added).

Nothing in this act precludes any rights otherwise acquired under the Color of Title Act.

Id.

- d. 43 CFR Part 2540 establishes the rules by which the BLM and US Forest Service to address the treatment of omitted lands for the federal statutes listed above.

B. Caselaw regarding Omitted Lands

The statutory framework described above provides the procedures that the federal government implements when confronted with omitted lands. We now need to look at how the federal courts have shaped the GLO/BLM determination of whether omitted

lands exist on a particular water body such that title is retained by the federal government.

The primary issue being addressed is the location of original surveyed meander line in relation to the edge of the actual water body that the line purports to follow. It is this discrepancy that raises the concern as to whether omitted lands exist after the government lots have been surveyed and patented.

It is well established that meander lines are not intended to be boundary lines, but rather it is the water body that the meander lines follow. *St Paul & P. R Co. v. Schurmeier* (State Rpt. Title: *R.R. Co.*, 74 U.S. 272, 286–87 (1868)) (“Meander-lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser”).

The U.S. Supreme Court have long recognized the difficulty of following the various sinuosities of the shoreline, which is the reason for accepting the meander line as approximating to the truth as to the quantity of upland contained in the fractional lots bordering on water bodies. See *Mitchell v. Smale*, 140 U.S. 406, 413 (1891) stating:

The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow. *Id.*

This is the presumed rule that controls the disposition of federal land bordering on water bodies. It is the government’s burden to overcome this presumption and show that the land was truly omitted from the original survey. As such, when a private surveyor is evaluating for his/her client as to whether the title may involve omitted lands, the presumption must begin with this rule: **The overwhelming presumption is that the government intended to convey all of the land up to the edge of the water body.**

The general rules of construction in interpreting *intent* of a conveyance apply to federal patents in the same manner as a deed to a grantee, in that natural monuments prevail over artificial monuments, which in turn prevail over courses and distances. See *Cragin v. Powell*, 128 U. S. 691, 32 L. ed. 566; *Sec. Land & Expl. Co. v. Burns*, 193 U.S. 167, 179 (1904); *Bartlett Land & Lumber Co. v. Saunders* (1880) 103 U. S. 316 (affirming the general rule that, in matters of boundaries, natural monuments of objects will control courses and distances).

As patents to government lots adjacent to water bodies are *intended* to convey land to the water's edge, the government, on the basis of equity and a desire to not adversely affect the stability of titles dependent upon government patents, a clear and convincing standard of proof by the government is applied before the government can officially reject the prior accepted public land survey by which patents were obtained, and replace it with a resurvey of the omitted lands. See *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403, 35 S.Ct. 339, 341 (1915) (Century old surveys are bound to be inaccurate in some respects, and ". . . the immense importance of stability of titles dependent upon Government patents demand that suit to cancel them should be sustained only by proof which produces conviction.").

The rule of priority of natural monuments is not absolute, as it is based upon the assumption that the description by monuments approaches accuracy within some reasonable distance from the water body that places the monument somewhere near where it really exists. *White v. Luning*, 93 U. S. 514, 23 L. ed. 938; *Sec. Land & Expl. Co. v. Burns*, 193 U.S. 167, 179 (1904). If the water body is so unreasonably far from the meander line, it can only be assumed that the water's edge was not the intent, and thereby the courses, distances, and acreage shown for the government lot will control. *Sec. Land & Expl. Co. v. Burns* at 180. The original patentee and his successors are getting what they paid for, even though they have lost the riparian rights -rights, though, that were never intended to be conveyed due to gross error or fraud. *Id.* at 181.

Factors evaluated to determine if lands are in fact omitted

In *Jeems Bayou Fishing & Hunting Club v. U.S.*, 260 U.S. 561(1923) The evidence of a 1917 re-survey revealed substantial unsurveyed upland of **500 acres** that established that no such peninsula exists or existed at the time of the survey in original 1839 GLO survey. *Id.* at 563. On the omitted land, the area was well timbered with a growth of pine, oak and other trees present. *Id.* The court stated:

“The inaccuracy of the plat is plainly apparent upon a like inspection. Why [the surveyor] made the survey and returned the plat as he did is a matter of speculation, but the facts demonstrated that no survey of the large, compact body of land, which includes the tract in controversy, was ever made. The circumstances, as well as the extent and character of the lands, necessitate the conclusion that the omission was of deliberate purpose, or the result of such gross and palpable error as to constitute in effect a fraud upon the government” *Id.* at 563-64.

So here, the influencing factors were:

- Probable fraud by the surveyor
- Extensive omitted area (500 acres)
- Character and value of the land (omitted area covered with high valued upland trees)

In contrast, in *U.S. v. Lane*, 260 U.S. 662 (1923), the court found that there were no omitted lands. The area between the meander line and the shore of a navigable lake

contained a crescent- shaped area of 97 acres that **amounted to about 1/3 of the stated area of the government lots patented**, and which had an extreme width of 1,200 feet and a length of 4,000 feet. Running back from the shore there are numerous ravines, that at the time of original GLO survey in 1839 (and at high water) reached the back of the ravines. The court surmised that it would have been difficult to survey, and, in light of the value of the land at the time of the survey, it was not worth it to provide more accurate detail of the shoreline, as the cost of the survey would have exceeded the value of the omitted land. The court reasoned that the GLO survey, as a whole, followed with a “fair degree of accuracy the contour of the lake, and the evident purpose was to include in it all the land to the water's edge.” *Id.* at 666.

The factors considered by the court included:

1. Intent of the surveyor to approximate the contours/sinuosities of the water body, and
2. the character and value of the lands, and
3. the wildness and remoteness of the region, and
4. the difficulties surrounding the work of the surveyors, and
5. the proportion of the omitted land to patented land was not significant.

After evaluation of these factors, the court held that “failure to run the lines with more particularity was not unreasonable, and we are constrained to agree with the lower court in holding that the waters of the lake, and not the traverse line, constitute the boundary” *Id.* at 667.

The *U.S. v. Lane* omitted lands test has today been clarified in federal court and administrative law decisions (through the Interior Board of Land Appeals) using the following factors to be considered in determining whether omitted lands exist on a particular tract of land:

1. The area of the parcel in three relative aspects: a) the original area defined on the GLO plat, b) the relative size of the “new” area disclosed by a more recent survey; and c) the size and magnitude of the original surveyor’s error measured by the amount of the unsurveyed land in the surrounding vicinity as a whole;
2. The intent of the surveyor. Did he intend to meander the existing water body, or did he wrongly exclude good land by courses and distances that necessitate the conclusion that the omission was deliberate?
3. The nature and value of the land at the time of the survey; the remote and wild conditions of the terrain. *United States v. 295.90 ACRES OF LAND* 368 F.Supp. 1301 (M.D. Fla.,1974) *aff’d* 510 F. 2d 1404 (5th Cir. 1975).

The relative area of the omitted lands is generally evaluated on the percent of understated acreage of the land that was actually patented as a result of the omission in the original survey. This is calculated by dividing the omitted acreage by the sum of the omitted acreage and the original patented acreage of the adjoining lotting. As an example, in *U.S. v. Lane*, where there were 97 alleged omitted acres and 271 patented acres, the alleged omitted lands amounted to a 26% understatement (97/97+271). Remember that in that case the court held that the lands were not actually omitted.

What have the courts found to be enough of a substantial understatement of acreage so as to amount to gross error or constructive fraud? It depends on the strength of the other two factors being considered. In *United States v. Zager*, 338 F.Supp. 984 (E.D. Wis., 1972), the court held that omitted land amounting to 112.11 acres, and an understatement of 35.13% was **not a gross error** when looking at the land itself; the difficulty of the original surveyor to meander the lake due to its remote, wet, and wild condition in 1859.

In contrast, *Brothertown Realty Corp. v. Reedal*, 200 Wis. 465, 227 N.W. 390 (Wis., 1929) involved 103.28 acres of omitted upland that amounted to a 42% understatement. The court held that this **was a grossly erroneous or fraudulent** survey.

So the understatement of patented acreage due to the gross error or fraud of the surveyor would logically need to be greater than 40% to consider the land to be truly omitted.

It should be noted that it makes no real difference whether the original survey was truly fraudulent or simply grossly in error. The courts will treat gross error as constructive fraud. As such, the analysis used by the court to determine the existence of omitted land is identical.

C. Examples in Minnesota

a. **Ely Lake (a.k.a. Cedar Island Lake) in T57N R17W, 4th P.M., St. Louis County** *Security Land & Exploration Co. v. Burns*, 193 U.S. 167 (1904), an early case analyzing omitted lands in Minnesota. The controversy involved the plaintiff, Security Land, who sought to eject the defendants from occupation of lands between the meander line and the lake, claiming that its title to the patented government lots entitled it to all of the land down to the lake.

Facts of the case:

In 1876, Surveyor H.S. Howe was contracted by the GLO to survey and subdivide the township. He was supposed to survey and marked the exterior lines of the township, except the south township line, which had been previously run. Running west from the northeast corner of the township he encountered the shore of Ely lake, or, as it is sometimes called, Cedar Island lake.

A retracement by the county surveyor in 1893 revealed that no survey of the interior of said township was ever made, and no section lines within the township were ever run by Howe, with the possible exception of the west line of section 36.

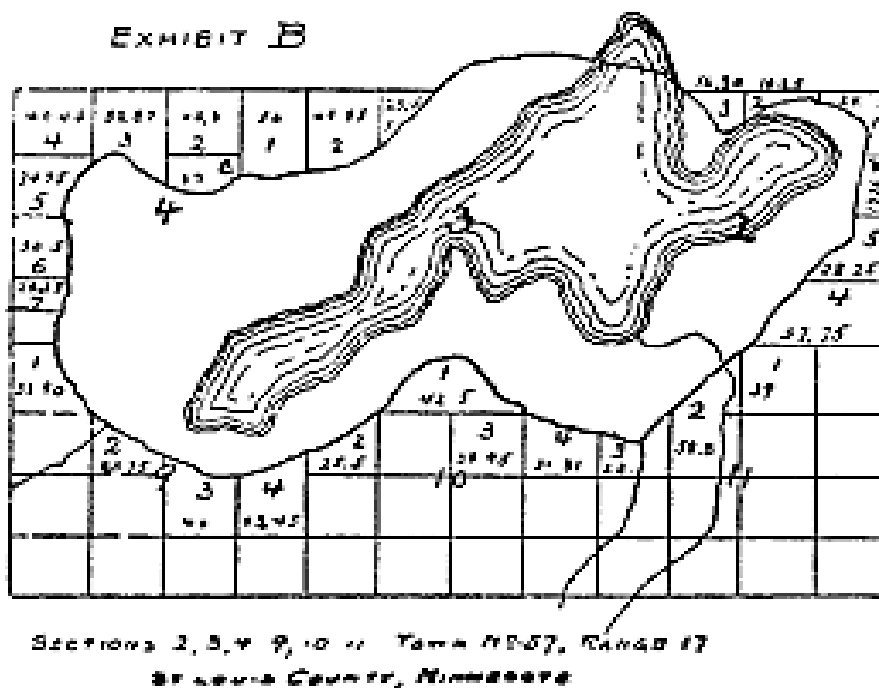
Howe filed with the United States Surveyor General of the state of Minnesota what purported to be field notes of a survey of the township made by him under said contract, purporting to give the length and directions of all interior section lines in said township, the "location of all sections and quarter section posts, and the bearing trees thereof, the character of the soil and timber in said township, and all other data and information required by the statutes of the United States and the rules of the United States General Land Office

to be ascertained and reported by deputy surveyors in due course of making surveys of public lands.”

With the exception of the description of the survey of the three exterior boundary lines of the township actually run by him, the field notes returned by Howe were “imaginary and fictitious”, and the purported facts and data contained therein were not based upon any personal knowledge or inspection of the interior of the township, and were, in fact, false and erroneous.

Ely Lake was purported to lie in sections 2, 3, 4, 9, 10, and 11 and containing 1800 acres, when, in fact, it only contained about 800 acres. **The real lake is a deep, navigable lake, having high, steep, and heavily timbered banks.**

Below is the mapping presented to the court mapping delineating the gaps between the record meander line and the lake:



For about 10 years, the defendants have been in actual and continuous occupancy of a portion of the land lying between the meander line and the lake. The occupancy has been under the claim that the lands occupied as unsurveyed government lands, subject to homestead entry, and that they have not been patented by the government. The defendants have made valuable and lasting improvements upon the lands occupied by them respectively.

According to the original plat, the land in section 4 was divided into eight fractional government lots, lots 1, 2, and 8 comprising all of the land in the east half of said section, containing an aggregate of 122.3 acres, and lots 3, 4, 5, 6, and 7 containing an aggregate of 182.08 acres, comprising all of the land in the west half of said section.

Between December, 1879, and March, 1887, all of said government lots in the township were patented and conveyed by the United States, “according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general.”

Title to said lots 3, 5, 6 and 7 was conveyed to Security Land in 1891 with the record lot acreage.

If the side lines of said lot 3 were extended in straight lines southerly from its southern boundary, as shown upon the government plat, the said lot would hit the south line of section 4 and not touch Ely lake, nor would there be any lake frontage.

If the side lines of said lot 5 were extended easterly from the eastern boundary of the lot, as shown upon the government plat to the eastern boundary of said section 4, the lot would not touch Ely lake, nor would there be any lake frontage, and the lot would contain about 112 acres of land. Similar problems would arise for lots 6 and 7.

The court also found that there would be lot lines crossing each other creating “irreconcilable interference with each other, and that no one of said lots has any prior or superior right over any of the others to be so extended.”

Sec. Land & Expl. Co. v. Burns at 168–72.

Findings:

The court held that general rule that natural monuments control over courses and distances was inapplicable here, as to be controlling, the natural monument must be within some *reasonable* distance from the natural monument called out in the survey.

The three factor test described in this paper had not been fully fleshed out by federal caselaw at the time this case was decided in 1904, but the factors could be applied as follows:

1. *Intent of the surveyor*: The court found actual fraud here. (As mentioned earlier, it wouldn't have mattered if actual fraud existed vs. gross error, as gross error of this magnitude would be recognized under the law as constructive fraud).
2. *The relative area of the omitted land*: the evidence presented showed there were 571 acres omitted and 141 acres of patented lands. This calculates to a 202% understatement! Well above a modern 40-45% threshold.
3. *Nature and Character of the land*: the omitted lands were heavily covered with high value timber that could never have been considered submerged land.

b. Color of Title - Elbow Lake in T62N R1E, 4th P.M., Cook County

Wilbur C. Nemitz. et al., IBLA 85-923 (97 IBLA 121) decided April 30, 1987

This administrative law decision presents an example of the effects on private landowners that adjoin lands that have been deemed to be omitted by the BLM and the options that are available to them in subsequently acquiring title to the omitted land.

Facts:

The original 1880 plat of T62N R1E shows lot 3, sec. 15 as containing 29.75 acres. The eastern and southeasterly boundary of the lot is the meander line of Elbow Lake. On October 6, 1883, the United States issued a patent to lot 3 to the State of Minnesota pursuant to the Swamp Lands Act, as amended, 43 U.S.C. §§ 981-986. Nemitz acquired lot 3 by quit claim deed in 1961.

In 1981, the plat of a dependent resurvey T62N R1E depicts lot 3 with some variation in the configuration of Elbow Lake when compared to the earlier plat as the BLM identified lands around the lake as omitted.

A new lot 11 (10.59 acres) was created in sec. 15 out of the omitted lands.

In 1985, Nimetz applied to the BLM to gain title to all of the land to the shore of the lake that included the new lot 11 under the Color of Title Act (43 U.S.C. §1068(b)). He alleged that his title to lot 3 from the state (that in turn was conveyed from the federal government in 1883) intended to convey all land to the shore. He alleged that the resurvey that resulted in the 1981 plat created a latent ambiguity in the patent to lot 3 and should be reformed to include the new lot 11.

As to the chain of title to lot 11 not originating back to 1/1/1901, as required by the statute, Nimetz argued that since taxes were not levied on the lands in lot 3 until 1911, they have satisfied the statute.

Findings:

As to lot 3: The Board found that the federal government cannot grant title under the Color of Title Act to lands it has already conveyed out of the public domain. In 1883, lot 3 was patented out to the state of Minnesota and was no longer federal public land. It is only logical that if anyone claims that his title is based on a source of title from the federal government, that person doesn't have color of title – he has *actual title*.

As to new lot 11: A color of title claim must be based on a source of title from someone other than the United States. Nimetz assertion that a patent for lot 11 is derived from the deed from the state of Minnesota for lot 3 doesn't comport with the statute. There was no evidence presented by Nimetz that his 1961 deed to lot 3 or any other conveyance from/to third parties conveyed to him anything more than the 29.75 acres as originally platted for lot 3.

As a result, Nimetz's color of title application to acquire lot 11 was rejected.

A possible option for Nimetz was to consider applying for title under the Federal Land Policy and Management Act (43 U.S.C. § 1721(b)(2)), if he indeed had met the requirements stated in section A. of this paper.