Opinion No. 18-2144

November 20, 1918

BY: HARRY L. PATTON, Attorney General

TO: Honorable Fred Muller, Commissioner of Public Lands, Santa Fe, New Mexico.

Where Shore Lines of a Lake Are Improperly Meandered, Title of Bordering Lots Extends Only to Meandered Line.

OPINION

We are in receipt of the letter from your office asking for an opinion as to the ownership of the bed of a certain lake in Torrance County. The lake is described in your letter as being a salt lake, so called, several miles in length. You state that when the lines of the public survey were projected over the sections traversed by the said lake, its shore lines, in part at least, were meandered by the government surveyor and so returned by him in his report. You further state in your letter that: "It is a fact capable of ready demonstration that this so called lake is not truly a permanent body of water, as that term is ordinarily understood, but usually is nothing but a bog or quagmire, with little or no water throughout its extent. It is probable that it would have been somewhat difficult to project the lines of public survey across this quagmire, and that this fact is suggestive of the reason for the meandering of the shore lines when the official survey was made."

Were this question presented in some states, it might be held that title to the lake within the meander lines was in the state by reason of the Swamp Land Act of Congress, of September 28, 1850. This was not a state at the date of the passage of the act referred to and besides it is declared by Section 7 of our enabling act that the grant of lands under the provisions of the Swamp Land Act, do not extend to New Mexico. So no right of ownership might be claimed from such source.

If this were a lake consisting of a permanent body of water, a perplexing question would be presented, since our courts have never passed upon the question of riparian rights where the boundary line of the land is meandered along a body of water. In Middleton vs. Prichard, 4 Ill. 510, cited in Hardin vs. Jordan, 140 U.S. 371, 35 L. ed. 428, the court, in defining riparian rights under common law, said:

"What will pass, then, by a grant bounded by a stream of water? At common law, this depended upon the character of the stream, or water. If it were a navigable stream, or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the center thread of the current. * * * At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide-water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership in the soil, water and

fishery, to the middle thread of the current, subject, however, to the public easement of navigation. * * * And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right. * * * We have adopted the common law, and must therefore apply its principles to the interpretation of their grant."

By Section 1354 of the Codification of 1915, this state has adopted the common law as the rule of practice and decision; but it is clear from your description of this lake that the same is not navigable under the definition of navigable waters, as set forth by the common law, and it follows that the state acquires no title to the bed of the lake through the operation of the common law in this state.

You state in your letter that some school sections, granted by the United States Government to the state, border on this lake with meandered lines, as before stated by you. Also, that the state has made some selections of lands so situated, including some fractional sub-divisions or lots, so meandered. You also say that other lands so meandered and bordering upon the lake have been appropriated through the various modes of entry by various individuals. In Hardin vs. Jordan, supra, the Supreme Court of the United States stated that grants of the government, where lands bounded on streams and other waters, without reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie. As we have before said, if this lake consisted of a permanent body of water, we might be confronted with two theories: (1) That the ownership of the meandered tract extends to the middle of the lake. This doctrine is announced in Illinois and Mississippi, with regard to the rights of riparian owners, whose land borders upon the Mississippi river. This ruling is justified under the common law and, in my opinion, is the correct interpretation of the common law with reference to the rights of riparian owners. (2) The other theory is that the boundary of the meandered lines extends only to high-water marks. This is the doctrine announced by the State of Iowa and possibly other states, as shown by cases cited in Hardin vs. Jordan, supra.

In Jordan vs. Jordan the court, in upholding the Illinois theory, as above stated, holds that it has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. But, as before stated, your letter discloses that this lake is not a permanent body of water, and that it is no more than a marsh, bog or quagmire. Under such circumstances, we are of the opinion that the rules of riparian owners bordering upon a body of water do not apply.

In Schlosser vs. Hemphill, 90 N. W. 842, the Supreme Court of Iowa held that although meander lines were run bounding unsurveyed swamp lands, the rule of riparian rights did not apply where there was no water to be meandered. In that case the court held

that the meander line became the boundary of the property, and that plaintiff's title did not extend beyond the same.

Again, the Supreme Court of Iowa, in Grant vs. Hemphill, 59 N. W. 265, said:

"But no such condition is found under the evidence in the case at bar. There is not, and has not been, any body of water upon which to locate a meandered line. * * * We are unable to discover any good reason for thus extending a government meander line. As we have said, there is no body of water anywhere within the boundary of the section to authorize any extension of the area of the lots which the government sold, and which the plaintiff now owns. * * * We hold that all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title, except through the regular government methods adopted by the general government for the disposition of the public lands."

In Carr vs. Moore, 119 Iowa, 152, 93 N. W. 52, 97 Am. St. Reps., the court held that if there is no body of water corresponding to the meander line, to which the ownership of the holders of the adjoining subdivisions can extend, then the meander line limits the extent of the land conveyed.

From your statement of the facts, I am of the opinion that there was no body of water corresponding to the meander line, and that the rules of riparian ownership do not apply. And it is further my opinion that the title of the owners of the meandered tracts extend only to the meander lines, and no further.

You further ask in your letter:

"Who in your opinion may be said to be the owner of the lands lying within the meandered shore lines and occupying the bed of the supposed lake --

1. Where the State is the owner of the bordering lands.

2. Where the bordering lands are owned by private individuals.

3. Where the bordering lands remain unappropriated Government lands.

4. Where there is a diversity of ownership of the lands bordering on the shore lines."

Since expressing the view that the title of the state does not extend beyond the meander lines, I have impliedly said that the state is not the owner of any part of the lake within the meander lines. What I have said with reference to the rights of the state applies with equal propriety to the owners of tracts which are meandered along the border of the so-called lake. I do not feel that I am called upon to express an opinion as to the ownership of the land within the meander lines, which is supposed to be the bed of the lake, -- As an opinion from me upon such a subject would not be binding upon anyone. Notwithstanding this, I express the belief that the land lying within the meander

lines is unsurveyed government land, subject to such disposition as might be made of such land by the federal government.