Madison v. Basart
A-23691

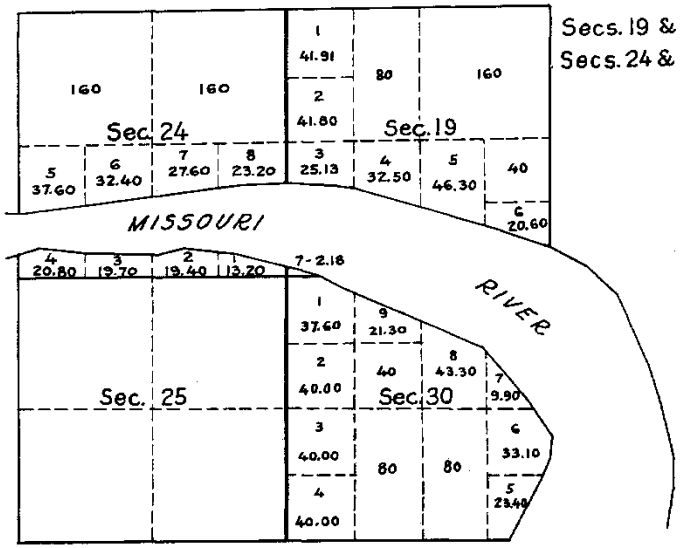
(Administrative Decisions or "A" Decisions were unpublished opinions which resulted from appeals of the Director's Decision. "A" Decisions were issued prior to the creation of the Interior Board of Land Appeals in 1970.)

This case involves accretion to the north bank of the Missouri River in North Dakota. A field investigation found that the river had moved over a half mile and that substantial accretions were deposited in front of Mr. Madison lot prior to entry and patent.

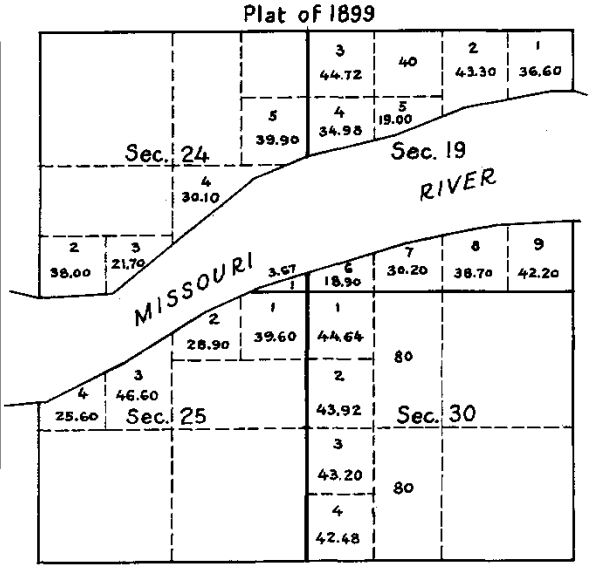
The decision in Madison v. Basart established the doctrine that substantial accretion prior to entry is treated as omitted land and therefore not a part of a patent to the upland. After reading the case, read Sections 8-179 through 8-181 of the 2009 Manual and Accretion Prior to Entry: The Basart Doctrine (Case Study) on pages 268-269 of the 2009 Manual.

APPENDIX to DEPARTMENTAL DECISION

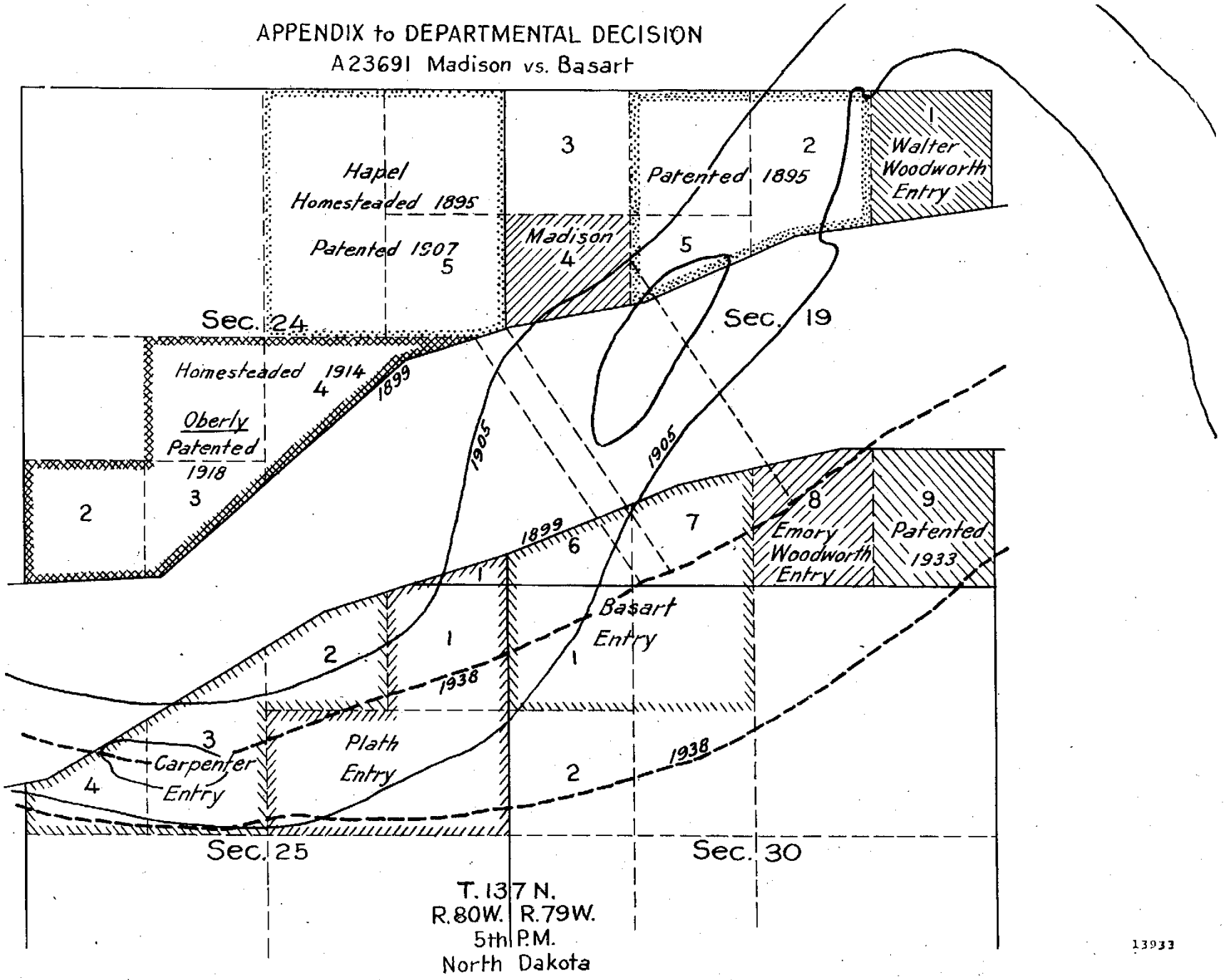
A23691 Madison vs. Basart

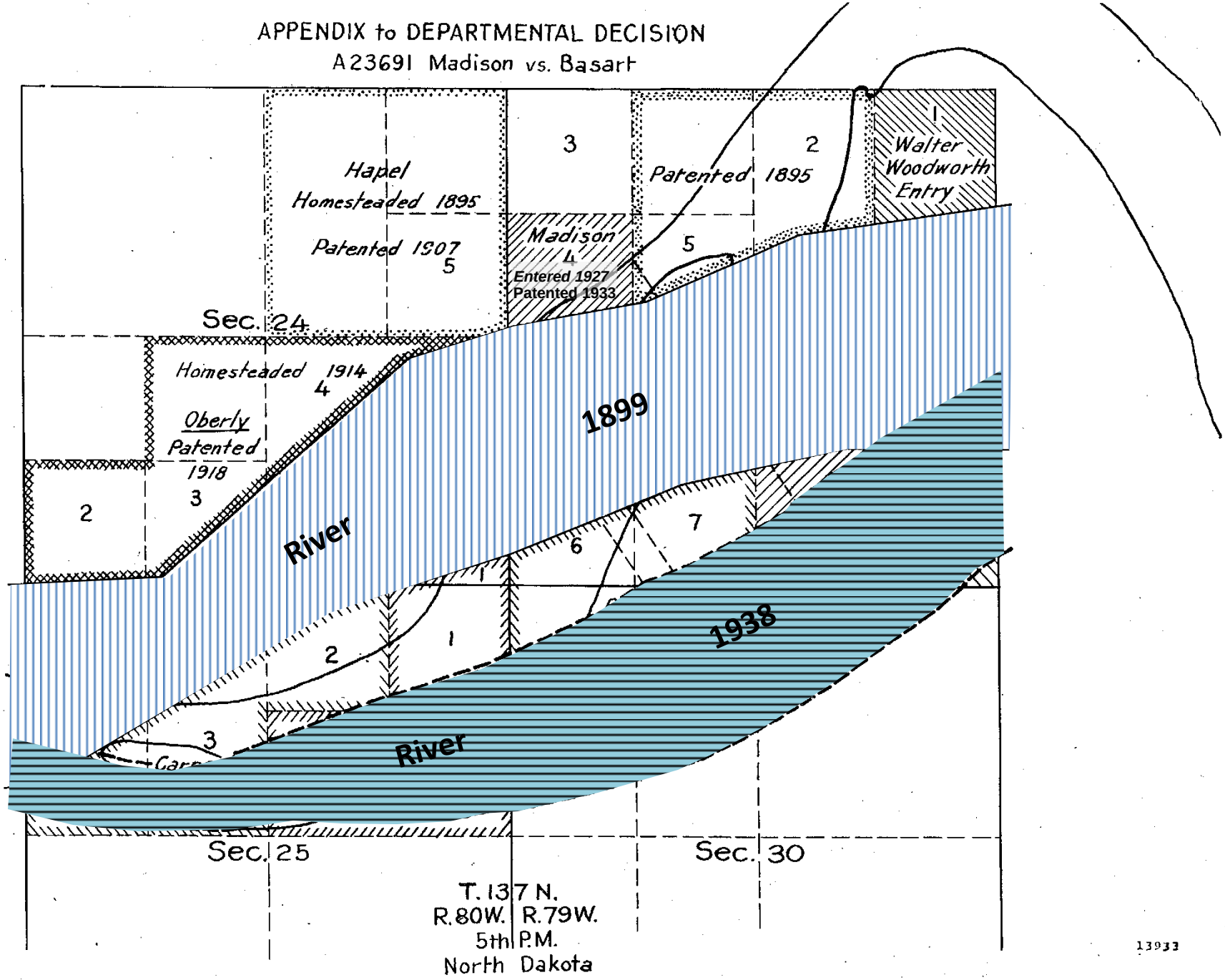


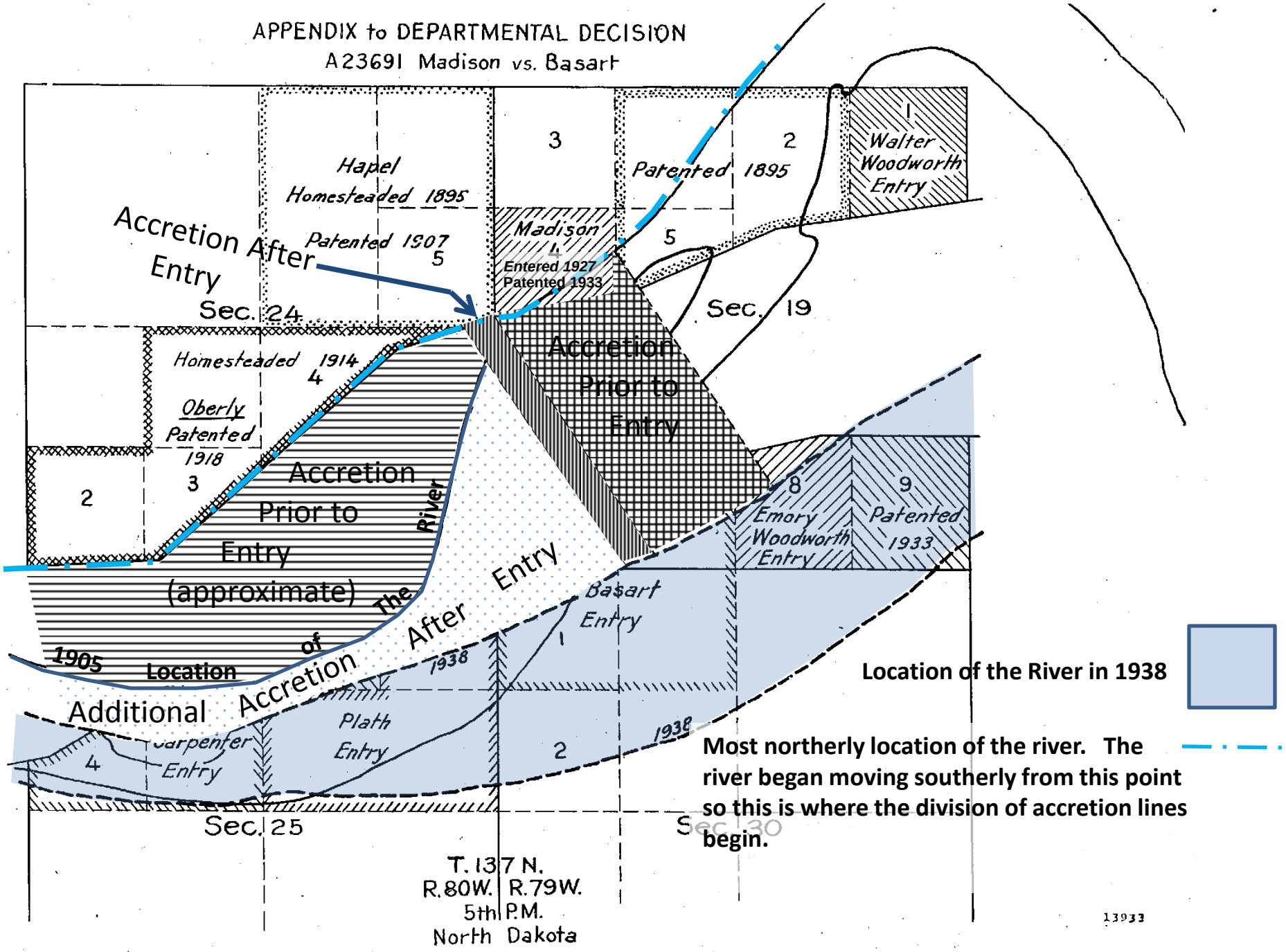
Plat of 1888



Notice that the sections were re-lotted on the 1899 plat. The plat creates some confusion because the 1888 lot numbers are used in different locations. For example, on the 1888 plat lot 4 of section 9 is in the NE1/4SE1/4; on the 1899 plat lot 4 is in the SW1/4NW1/4.


APPENDIX to DEPARTMENTAL DECISION
A23691 Madison vs. Basart
Hapel
Homesteaded 1895
Patented 1907
Madison
Patented 1895
Walter
Woodworth
Entry
Sec. 24
Sec. 19
Homesteaded 1914
Oberly
Patented
1918
1899
1905
1905
Emory
Woodworth
Entry
Patented
1933
1899
Basart
Entry
1938
Plath
Entry
Carpenter
Entry
1938
Sec. 25
Sec. 30
T. 137 N.
R. 80W. R. 79W.
5th P.M.
North Dakota
13933


APPENDIX to DEPARTMENTAL DECISION
A23691 Madison vs. Basart
Hapel
Homesteaded 1895
Patented 1907
3
2
Patented 1895
1
Walter
Woodworth
Entry
Madison
4
Entered 1927
Patented 1933
5
Sec. 24
Homesteaded 1914
4
Oberly
Patented
1918
2
3
1899
River
6
7
1
2
1
1938
3
River
Sec. 25
Sec. 30
T. 137 N.
R. 80W. R. 79W.
5th P.M.
North Dakota
13933


APPENDIX to DEPARTMENTAL DECISION
A23691 Madison vs. Basart
Hapel
Homesteaded 1895
Patented 1907
Accretion After Entry
Sec. 24
Madison
Entered 1927
Patented 1933
Patented 1895
Walter Woodworth Entry
Sec. 19
Homesteaded 1914
Oberly
Patented 1918
Accretion Prior to Entry
Accretion Prior to Entry (approximate)
The River
1905 Location of Additional Accretion
After Entry
1938
Basart Entry
Emory Woodworth Entry
Patented 1933
Plath Entry
Carpenter Entry
Sec. 25
Sec. 30
T. 137 N.
R. 80W. R. 79W.
5th P.M.
North Dakota
13933
Location of the River in 1938
Most northerly location of the river. The river began moving southerly from this point so this is where the division of accretion lines begin.

See 116 F.S. 571

15294

MADISON v. BASART, A-23691

Decided, February 17, 1947.

ACCRETION--RIPARIAN OWNERSHIP--PUBLIC LAND--PATENT.

Where, prior to the entry and patent of a lot of public land abutting on a meander line, a substantial accretion had formed between the meander line of the lot and the actual shore line of the Missouri River, title to the added area did not pass under a patent for the surveyed upland.

MISSOURI RIVER IN NORTH DAKOTA--OWNERSHIP OF LAND FORMERLY IN RIVER BED WHICH ACCRETED TO THE BANK.

Under the law of North Dakota, where the State owns the land in the bed of a navigable river, the ownership of land in North Dakota which has accreted from the bid to the banks of the river becomes vested in the owner of the riparian lands.

ERIE RAILROAD COMPANY v. TOMPKINS--EFFECT ON QUESTIONS OF FEDERAL LAW.

The question as to whether a patent conveys land between a platted traverse line and the waters of a navigable stream, being a Federal question and governed by Federal law, is not required, by the decision of Erie Railroad Company v. Tompkins, 304 U. S. 64 (1938), to be decided solely on the basis of State law. This case is therefore not governed solely by the North Dakota decision in Oberly v. Carpenter, 67 N. Dak. 495, 274 N. W. 509 (1937).

ACCRETION--RIPARIAN OWNERSHIP--SURVEY.

Generally a meander line along a bank or shore is not a line of boundary, the boundary line being the water line itself. There are however exceptions to this general rule. Thus, the meander line is held to be the true boundary line if the meander line

was run where no lake or stream calling for it exists; or where it is established so far from the actual shore line as to indicate fraud or mistake; or if, at the time a homestead entry is made, a large body of land previously formed by accretion is existing between the meander line and the water of the stream. In such cases the patent will be construed to convey only the lands within the meander line.

ACCRETION--ESTABLISHMENT OF SIDE LINES TO DIVIDE ALLUVIUM.

The general rule for establishment of side lines to divide alluvium between adjoining riparian owners along a river is to give each proprietor such proportion of the new shore line as he had of the old shore line. This is appropriately accomplished by measuring the whole ancient line of the river affecting the area involved and computing the portion of that line owned by each riparian proprietor; then measuring the whole length of the new shore line and appropriating to each proprietor such portion of the new line as he had of the old line; and then drawing the side lines from the points at which the proprietors bounded on the old line to the points of division thus determined on the new line. Such accretion side lines do not generally run cardinal to the survey lines. This rule is followed in North Dakota.

HOMESTEADS--DUTY TO PROTECT ENTRYMAN--QUIETING TITLE.

Where a State court decision beclouds the title of the Federal Government to lands entered by a homestead entryman, the Department is under an obligation to its homestead entryman to protect

his entry by appropriate action, including recommending suit by the Attorney General to quiet title.

PUBLIC LANDS OF THE UNITED STATES--EFFECT OF STATE DECISIONS.

The United States cannot be deprived to its title to public lands by a decision of a State court, particularly where the United States is not a party to the suit in the State court.

HOMESTEAD ENTRIES--SUSPENSION--SEGREGATIVE SURVEYS--LANDS SUBMERGED BY RIVER.

Where the land within the record position of a homestead entry is partially submerged, partially owned by accretion to private riparian lands, and its title partially beclouded by the invalid claim of another alleged riparian owner, the entry will be suspended pending a segregative survey and the quieting of title to the Government's lands.

SURVEYS AND RESURVEYS--EFFECT ON PATENT.

Where a homestead entry is made on the basis of a patented survey plat, the redesignation of the land in a subsequent survey plat approved between the date of the entry and the date of the patent will not necessarily control in the interpretation of the patent; and the patent, where governed by the plat of earlier survey, is subject to reformation. Secretary's Instructions, M-33711, June 20, 1946.

DEPARTMENTAL DECISIONS OVERRULED TO THE EXTENT OF CONFLICT WITH THIS DECISION:

Harvey M. LaFollette, 26 L. D. 453 (1898); John J. Serry, 27 L. D.

330 (1898); Gleason v. Pent, 14 L. D. 375 (1892); Lewis M. Pierce, 18 L. D. 328 (1894).

DECISION CRITICIZED AND NOT FOLLOWED:

Oberly v. Carpenter, 67 N. Dak. 495, 274 N. W. 509 (1937).

DECISION DISTINGUISHED:

Jefferis v. East Omaha Land Company, 134 U. S. 178 (1890).

Oscar L. Chapman, Under Secretary of the Interior.

ABBID
BZ
ABBG
ACCCA
HK
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GBD
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P
ABBQ

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington

A-23691 February 17, 1947

"E"

Alexander P. Madison
v.
Delbert R. Basart

: Bismarck 024312, 023131, 024305, 024299, 024300, 024564.

: Homestead entry canceled.

: Motion granted in part, denied in part; remanded for further action.

MOTION FOR REHEARING

* * * * * *

On October 9, 1933, Delbert R. Basart's homestead entry (Bismarck 024312) under section 2289, Revised Statutes, 43 U. S. C. sec. 161, was allowed for the following lands:

T. 137 N., R. 79 W., 5th P. M., North Dakota:
sec. 19: lots 6 and 7
sec. 30: lot 1 and NE¼NW¼.

On August 31, 1936, Joseph Keller, as guardian of Alexander P. Madison, a minor, filed a protest against Basart's entry.1/ This protest stated that Madison owns lot 4, sec. 19; that the lands here involved, lying in Burleigh County north of the Missouri River, had been built up by accretion to Madison's lands; that the lands described in Basart's entry formerly were in Morton County south of the Missouri River and had been washed away; and claimed that the lands in Basart's entry are now owned by Madison by virtue of accretion to his land. In view of this protest, the General Land Office 2/

1/ Alexander P. Madison, having become of age, renewed the protest in his letter of September 10, 1946.

2/ Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their funcitons were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876;7776).

On October 20, 1938, suspended action on Basart's application pending investigation. Intensive field investigations were thereupon made, and the respective parties were accorded full opportunity to present any facts or arguments on the questions involved.

On June 12, 1943, the General Land Office, taking the view that the title of the United States to the lands in Basart's entry had been extinguished by erosion caused by the Missouri River and that the lands in Basart's entry are actually owned by those owning lots 4, 5 and 2, sec. 19, ordered the cancellation of Basart's entry. Basart appealed.

On October 9, 1943 (A-23691), the Department affirmed the decision of the General Land Office, and on November 22, 1943, denied Basart's motion for rehearing; but before the decision became final, the Department, by decision of January 5, 1944, withdrew its decision denying Bassart's motion for rehearing and suspended action on the case pending further investigations in the field to secure complete information concerning the lands involved. These investigations have now been completed, and the Department can now rule on Basart's motion for rehearing with full knowledge of the applicable facts.

The extensive meanderings of the Missouri River in the area here involved constitute the underlying basis of this case. In many places, the river meandered more than a mile from its positions shown on the 1888 and 1899 plats of survey. There appears to be no question that the movement of the river in this area, although rapid, was entirely by erosion on one side and accretion on the other; and there is no evidence, nor any contention

apparently, of avulsive change in the course of the river. The investigation reports fully substantiate these facts. Attached are sketches of the 1888 and 1899 plats of survey of the area here involved and a sketch of the 1899 plat on which are also shown the approximate positions of the Missouri River in 1905 and 1938,3/ the tracts and entries relevant to this case, and the approximate side lines of the accreted lands here involved. The investigation reports indicate that the present position of the Missouri River is approximately the same as its 1938 position.

There have been two surveys of the lands here involved, the first in 1888, and a resurvey in 1899. Some of the land was patented on the basis of the 1888 plat.4/ The 1899 survey shows that during the 11 years since 1888 the Missouri River had moved a considerable distance to the north through

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3/ The 1905 position of the river was shown on the Geological Survey's 1905 topographic survey of the North Dakota Bismarck Quadrangle; and the 1938 position of the river was shown on aerial photographs made by the Agricultural Adjustment Administration.

4/ The W½NE¼ and the E½NW¼ sec. 19 were patented on August 10, 1895. By 1899, the Missouri River had begun to erode these lands. What remained of the W½NE¼ was redesignated on the 1899 plat as lot 2; what remained of the E½NW¼ was redesignated on the 1899 plat as lot 5 and NE¼NW¼. The only other tract in this section affected by the 1888 plat was that included in the patent on Final Certificate Bismarck 5428 which was issued to Elliot C. Barnes on October 1, 1903, for, among other lands, lot 1, sec. 19. Vol. 156, North Dakota Homestead Patent Records (Mineral), Recorder General Land Office, p. 11. Barnes made his homestead entry in 1895 on the basis of the 1888 plat of survey. When he offered final proof in 1902, sec. 19 had been resurveyed by the plat of December 20, 1899. Lot 1, sec. 19, of the 1888 plat of survey was redesignated on the 1899 survey plat as lot 3, sec. 19; and the NE¼NE¼ on the 1888 plat was redesignated as lot 1, sec. 19, on the 1899 plat. As the result of some minor acreage changes resulting from the resurvey, the patent was issued to Barnes for 162.74 acres, which is the acreage shown on the 1899

sec. 19. The lands in sec. 19 were almost entirely redesignated on the 1899 plat, as can be seen by a comparison of the attached sketches of the 1888 and 1899 plats of survey. As of 1899, the only privately owned lands in sec. 19 on the banks of the Missouri River were lots 2 and 5, all the other riparian land in sec. 19 being public lands. All the land on the banks of the Missouri River in sec. 30 of this township (T. 137 N., R. 79 W., 5th P. M.) and in secs. 24 and 25 of the adjacent township to the west (T. 137 N., R. 80 W., 5th P. M.) were public lands in 1899, except that lot 5 in sec. 24 was then in the homestead entry of one Mary E. Hapel.

The Missouri River reached its most northern position in the area here involved about 1905. Thereafter it began to move to the south, eroding the right (southern) bank and building up the left (northern) bank. At present

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fn. 4 cont'd:
plat for the lands described in Barnes' homestead application and patent But it was apparently overlooked that the description in the patent should have been changed from lot 1, sec. 19, to lot 3, sec. 19, in order to conform the patent with the application. It seems clear that Barnes had intended to acquire, and the United States had intended to patent, that parcel of land shown as lot 1, sec. 19, on the 1888 plat and as lot 3, sec. 19, on the 1899 plat, and that his patent is therefore subject to reformation. See Acting Secretary Chapman's Instructions of June 20, 1946 (M-33711); Williams v. United States, 138 U. S. 514 (1891). Lot 1, sec. 19 (1899 plat), is now embraced in the homestead entry Bismarck 024305 of Walter Woodworth. Since lot 3 (1899 plat) was never on the banks of the Missouri River, it clearly never had riparian rights. And it is unnecessary at this time to decide whether the title to lot 1 (1899 plat), which was completely eroded but later completely restored by the erosive-accretive action of the river, is in the United States or in the owners of the remote nonriparian lands which for a time were shore lands. Cf. Towl v. Kelly and Blankenship, 54 I. D. 455, 458-462 (1934), and cases cited; Rex Baker, 58 I. D. ____ (A-23323, G.L.O. 04744, December 4, 1942); Clark, Treatise on the Law of Surveying and Boundaries, sec. 252, pp. 274-284 (2d ed., 1939); Wiltse v. Bolton, 132 Neb. 354, 272 N. W. 197 (1937); Oklahoma v. Texas, 261 U. S. 345, 346 (1923).

the river is entirely out of sec. 24, R. 80 W., and largely out of sec. 19, R. 79 W.; the 1899 river channel is firm ground. Whereas in 1899 lots 6, 7, 8 and 9, sec. 19, and lot 1 and NE¼NW¼ sec. 30, were in Morton County, on the south bank of the river, the present record position of lot 6, sec. 19, is in Burleigh County, north of the river; the present record positions of parts of lots 7 and 8, sec. 19 and lot 1, sec. 30, are submerged and the remaining parts thereof are north of the river, in Burleigh County; and the present record positions of lot 9, sec. 19, and NE¼NW¼ sec. 30 are almost completely submerged.

Lot 4, sec. 19, was homesteaded by Alexander Madison's father, Ernest Madison, on May 14, 1927, after his application for second entry had been allowed under the act of September 5, 1914 (38 Stat. 712, 43 U. S. C. sec. 182). After Ernest Madison's death, Keller made final proof on behalf of Alexander P. Madison, then a minor, and Patent 1064637 (Bismarck 023131) was issued on June 6, 1933, to Alexander P. Madison for "Lot 4, sec. 19, T. 137 N., R. 79 W., 5th P. M., containing 34.98 acres." The field investigations clearly show that both at the time of entry and at the time of patent, lot 4, sec. 19, was more than a half mile away from the banks of the Missouri River.5/

5/ Ernest Madison's relinquished homestead entry Bismarck 018151 covered the N½NE¼, NE¼NW¼ and lot 1, sec. 30, T. 137 N., R. 79 W., 5th P. M. Of these lands, the NE¼NW¼ and lot 1 are now covered by Basart's entry. Ernest Madison's application for second entry states that he relinquished his first homestead entry because "* * * the river had cut the land away * * * the land was washed away* * * All of the land was cut away by the river and it was impossible to reside upon it." These contemporary statements corroborate the Department's finding and indicate that the entryman knew, at the time of his entry on lot 4, sec. 19, that the river was far from the record position of lot 4.

As of 1899, the lands in sec. 19 lying on the north bank of the Missouri River had the following status: lots 2 and 5 were in private ownership; lots 1 and 4 belonged to the United States. There is no dispute that as of May 13, 1927, the day before the allowance of Ernest Madison's entry, the United States, as the owner of lot 4, sec. 19, owned all the land which had accreted to that lot 4.6/ The question in this case therefore is whether Madison, under his patent issued in 1933 for "lot 4" "containing 34.98 acres" whose record position on the applicable survey plat was more than a half mile from the banks of the river, pursuant to his homestead entry in 1927, may validly claim the substantial accretion to that tract which had formed prior to May 14, 1927.

Before a determination can be made as to whether this accreted land passed with the patent to lot 4, sec. 19, there must be consideration of whether the question here involved is governed entirely by the law of the State wherein the land lies. If the law of the State of North Dakota controls

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6/ If the Missouri River is navigable, the State of North Dakota may have had an interest in the land in the bed of the river. United States v. Utah, 283 U. S. 64, 75 (1931). This interest of the State was subject, of course, to various paramount interests of the Federal Government not here material. United States v. Appalachian Power Co., 311 U. S. 377, 405 (1940). Regardless of whether or not ownership of the land in the bed of the river was in the State, under the law of the State of North Dakota the ownership of the land which has accreted from the bed to the banks of the river becomes vested in the owner of the riparian lands. North Dakota Revised Code of 1943, sec. 47-0605; Gardner v. Green, 67 N. Dak. 268, 271 N. W. 775, 780 (1937); Oberly v. Carpenter, 67 N. D. 495, 274 N. W. 509 (1937); Hardin v. Jordan, 140 U. S. 371 (1891).

this case, all of the lands in Basart's homestead entry must be held to have passed into private ownership under the decision of the Supreme Court of North Dakota in Oberly v. Carpenter, 67 N. D. 495, 274 N. W. 509 (1937).

It has long been well settled that although the effect of a conveyance of riparian rights, if established, was decided by State law, the question of whether the original patent conveyed land between a platted traverse line and the waters of a navigable stream was a Federal question;[7] and that State laws could not affect titles vested in the United States.[8] It has been intimated in this proceeding, however, that this case must be governed by State law because of the decision of the Supreme Court in Erie R. Co. v. Tompkins, 304 U. S. 64 (1938). That case, a suit based on diversity of citizenship, held that "except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State," not a different "federal general common law." (304 U. S. 64, 78.) It would seem plain that the present case is not within the ambit of the Erie decision. But even if there could be any room for debate as to the scope of the Erie decision, more recent decisions of the Supreme Court of the United States indicate that Erie R. Co. v. Tompkins does not require this case to be decided solely on the basis of State law.

7/ Producers Oil Co. v Hanzen, 238 U. S. 325, 338 (1915); Brewer Oil Co. v. United States, 260 U. S. 77, 87 (1922); French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 54 (1902); see also Chapman & Dewey Lumber Co. v. St. Francis Levee Dist., 232 U. S. 186, 196 (1914); Shively v. Bowlby, 152 U. S. 1, 9-10 (1894).

8/ United States v. Utah, 283 U. S. 64, 75 (1931).

In United States v. Allegheny County, 322 U. S. 174, 183 (1944), the Supreme Court stated:

> "* * * The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. * * *"

In holding and disposing of lot 4, a part of the public domain, the United States was exercising one of its constitutional functions.9/ The authority to issue the patent "had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of" the State of North Dakota.10/ And in a controversy as to the effect of such patent in disposition of property of the United States, "in the absence of an applicable Act of Congress, Federal courts must fashion the governing rules."11/ Plainly, there is no requirement that the consideration of the question here involved be restricted to the laws and judicial decisions of the State of North Dakota.

9/ United States Constitution, Art. IV, sec. 3, cl. 2; Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 330-333 (1936).

10/ Clearfield Trust Co. v. United States, 318 U. S. 363, 366 (1943); Board of Commissioners of Jackson County v. United States, 308 U. S. 343, 349-350 (1939).

11/ Clearfield Trust Co. v. United States, 318 U. S. 363, 367 (1943); National Metropolitan Bank v. United States, 323 U. S. 454, 456 (1945); Vanston v. Green, No. 42, October Term, 1946, Supreme Court of the United States (December 9, 1946). See Note, Exceptions to Erie v. Tompkins: The Survival of Federal Common Law, 59 Harv. L. Rev. 966 (July 1946); Solicitor's Opinion, 58 I. D. (M-33575, May 12, 1944).

It is a general rule that a meander line is not a line of boundary, but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the water line itself.12/ But there are a number of exceptions to this general rule. Thus, if the meander line was run where no lake or stream calling for it exists, or where it is established so far from the actual shore as to indicate fraud or mistake, the meander line is held to be the true boundary line.13/ Another well-established exception is that if, at the time a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant and the patent will be construed to convey only the lands within that meander line.14/ This latter exception, which clearly is applicable to the

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12/ Railroad Company v. Schurmeir, 74 U. S. (7 Wall.) 272, 286-287 (1868); Hardin v. Jordan, 140 U. S. 371, 380 (1891).

13/ Security Land & Exploration Co. v. Burns, 193 U. S. 167 (1904); Lee Wilson & Co. v. United States, 245 U. S. 24, 29 (1917); Jeems Bayou Fishing and Hunting Club v. United States, 260 U. S. 561, 564 (1923); Niles v. Cedar Point Club, 175 U. S. 300 (1899); Horne v. Smith, 159 U. S. 40 (1895); Producers Oil Co. v. Hanzen, 238 U. S. 325, 339 (1915); Lammers v. Nissen, 4 Neb. 245 (1876), aff'd 154 U. S. 650 (1879); French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 52 (1902); Rust-Owen Lumber Company, 50 L. D. 678 (1924). See Boundaries, 9 C. J. sec. 70, pp. 190-191.

14/ Wittmayer v. United States, 118 F. (2d) 808 (C. C. A. 9th, 1941); United States v. Eldredge, 33 F. Supp. 337 (D. C. Mont., 1940); Mecca Land and Exploration Co. v. Schlect, 4 F. (2d) 256 (D. C. Ariz., 1925); Granger v. Swart, 1 Woolw. C. C. Rep. 88, Fed. Cas. No. 5685, 10 Fed. Cases 961, 962 (C. C. D. Wisc., 1865); First National Bank of Decatur v. United States, 59 F. (2d) 367 (C. C. A. 8th, 1932); R. M. Stricker, 50 L. D. 357 (1924); Instructions of April 17, 1918 (46 L. D. 461, 463-465); Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 303 (1886), 27 Neb. 582, 43 N. W. 350 (1889). See Chapman & Dewey Lumber Co. v. St. Francis Levee Dist., 232 U. S. 186 (1914); Jones v. Johnston, 59 U. S. (18 How.) 150, 157 (1855); Johnston v. Jones, 66 U. S. (1 Black) 209, 221 (1861); Manual of Instructions for the Survey of the Public Lands of the United States, sec. 520 (1930).

present case, is the present rule of the Department.15/ Furthermore, the principle embodied in this exception has a number of advantages to commend it. The patentee does not acquire, at the time the patent is issued, a tract of land which is substantially in excess of the amount for which he has paid; certainly it is not reasonable that an entryman who received a patent for a tract of "34.98 acres" and who knew of its location in relation to the river, should now be permitted to claim that his patent awarded to him three and a half to four times the amount of land thus specified. Also, as in the present case, where some of the accreted lands are unsurveyed lands within the former bed of the Missouri River, this principle would avoid the prohibition against the making of an entry on unsurveyed lands.16/ It also avoids the difficulties encountered where the total of the platted land, plus accretions thereto, exceeds the permissible total specified by statute.17/ In addition, all persons dealing with the Government will be treated with equality; one homesteader in one State will not receive in situations of this type substantially more land than another homesteader in a different State who expends the same amount in labor and cash. In each instance both the

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15/ R. M. Stricker, 50 L. D. 357 (1924); Instructions of April 17, 1918, 46 L. D. 461, 463-465. The earlier cases of Harvey M. LaFollette, 26 L. D. 453 (1898); John J. Serry, 27 L. D. 330 (1898); Gleason v. Pent, 14 L. D. 375 (1892); Lewis W. Pierce, 18 L. D. 328 (1894); are hereby overruled to the extent of any conflict with this decision. See Gleason v. White, 199 U. S. 54 (1905). Cf. Whitten v. Read, 49 L. D. 253 (1922), 50 L. D. 10 (1923).

16/ Ben McLendon, 49 L. D. 548, 561 (1923).

17/ 43 U. S. C. secs. 211-224.

Government and the homesteader will know with fair certainty what has passed by the patent. And "identical transactions [will not be] subject to the vagaries of the laws of the several states."[18] Moreover, the rule as to the ownership of accreted lands is said to have had its foundation in the desire of courts to compensate riparian owners for the threat, often realized, that their lands may as well diminish as increase by reason of the water's action. It was thought to be equitable that the person who stands to lose by erosion of his lands should have the opportunity to gain by accretion.[19] But when a person in Madison's position, whose lot was approximately a half mile from the river at the time he made his entry, seeks the benefits without incurring the risk of the disadvantages of the rule, such a claim affronts the reason for the rule's existence. He is not deprived of what he is entitled to receive--lot 4, containing 34.98 acres.

Madison, however, urges that he nevertheless owns the accretion here involved on the basis of the decision by the Supreme Court of North Dakota in Oberly v. Carpenter, 67 N. Dak. 495, 274 N. W. 509 (1937), which involved a similar situation in the section adjacent to that in which Madison's lot is situated. In that case one Oberly was the owner of lots 2, 3, and 4 and NE¼SW¼ sec. 24, T. 137 N., R. 80 W., 5th P. M.[20] These lands, as shown on

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18/ Clearfield Trust Co. v. United States, 318 U. S. 363, 367 (1943).

19/ New Orelans v. United States, 35 U. S. (10 Pet.) 662, 717 (1836); Nebraska v. Iowa, 143 U. S. 359, 360 (1892); Jefferis v. East Omaha Land Co., 134 U. S. 178, 189, 191 (1890); Banks v. Ogden, 69 U. S. (2 Wall.) 57, 67 (1864); 2 Blackstone Comm. 262 (1765).

20/ Oberly also owned lot 7, sec. 23, which is not shown on the attached sketches but lies adjacent on the west of lot 2, sec. 24.

the attached sketches, were on the north bank of the Missouri River in 1899. These lands were homesteaded on August 31, 1914, by one Mary Gordin (Bismarck 018606) and patent 631715 issued to her on May 27, 1918. In 1933 one Jesse R. Carpenter and one Henry Plath made homestead entries (Bismarck 024299 and 024300, respectively) on lot 1, sec. 24, lots 1, 2, 3, and 4 and S½NE¼ sec. 25, T. 137 N., R. 80 W., 5th P. M.[21/] These lands, as shown on the attached sketches, were on the south bank of the Missouri River in 1899. By 1933, the river had moved south through a large portion of the lands in the Carpenter and Plath entries and occupied the southern portion of those entries. The dry land in the record positions covered by their entries was now on the north bank of the river. Oberly then instituted a suit in the State court of North Dakota against Carpenter and Plath, claiming to own, by accretion to the lands described in the Gordin patent, all the lands in the Carpenter and Plath entries to the present north bank of the river. The Supreme Court of North Dakota found that the dry land south of the record position of the lands described in the Gordin patent, and north of the river, had been formed by accretion, not by avulsion. The court pointed out that there was no reservation stated in the patent, that the general rule is that the boundary line of lots along a water line is the water line itself and not the meander line, and held that Oberly was entitled to all such lands on the following ground (274 N. W. 509, 512):

> "The fact that the survey was made in 1899 and the patent was not issued until 1918 and in the meantime the river had retreated

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21/ Carpenter's entry also included lot 4, sec. 26, which is not shown on the attached sketches but lies adjacent on the west of lot 4, sec. 25, and directly south of Oberly's lot 7, sec. 23.

> far from the shore line as it existed at the time of the survey makes no difference. 'The patent passes the title of the United States to the land, not only as it was at the time of the survey, but as it is at the date of the patent, so that the United States does not retain any interest in any accretion formed between the survey and the date of the patent.' Jefferis v. East Omaha Land Company, 134 U. S. 178 [195], 10 S. Ct. 518, 33 L. Ed. 872."

The Jefferis case, which was the prime basis upon which the Supreme Court of North Dakota rested the Oberly decision, treated a much narrower factual situation, however, than was involved in the Oberly case and in this case. The land involved in the Jefferis case, on the left bank of the Missouri River, in Iowa, was surveyed in 1851, the north boundary of it being on the Missouri River. In 1853 the lot was entered and paid for, and was patented in 1955, as lot 4. Afterwards, by mesne conveyances, made down to 1888, the lot was conveyed as lot 4, and became vested in the plaintiff. About 1853 new land was formed against the north line, and continued to form until 1870, so that then more than 40 acres had been formed by accretion. The defendant claimed to own a part of the new land by deed from one who had entered upon it. The plaintiff filed a bill to establish his title to the new land, claiming it as a part of lot 4. The Supreme Court pointed out that at the time of the entry, the meander line of the river was the same or nearly the same as shown by such field notes and plat (134 U. S. at pp. 180, 194); that the United States never claimed any interest in the land so formed by accretion (134 U. S. at p. 182); that the new land "is an accretion to that originally purchased by the patentee from the United States" (134 U. S. at p. 189); and that the process of accretion began in 1853 at the time of the entry (134 U. S. at pp. 181, 191). The factual distinction between the Jefferis case and a case such

As is here involved was clearly pointed out in the Department's Instructions of April 17, 1918 (46 L. D. 461, 463-465):

> "The facts in that case are widely different from those now under consideration. Here, the accretion was formed long before Johnson and Morris made their entries or claimed any interest in the land embraced therein. A considerable body of land had been formed and it cannot be doubted that the title to such accretion, prior to the entries, vested in the United States. To extend such entries to all the lands formed by accretion would increase their area beyond the 160 acres limited by law. Further, at the time of settlement and entry, it was apparent that the meander line of the 1874 survey was no longer correct, due to the changed conditions. * * *"

The Department's Instructions then held that in such case the applicable rule was that announced in Granger v. Swart, supra, footnote 14:

> "If at the date of an entry of Government land, one of the boundaries of which is such meandered line, the lake or river extends to, and borders on, such line, accretions afterwards formed belong to the party holding title under the entry.
>
> "But if, at the time the entry was made, between such line and the bank of the lake or river, there was a body of swamp, or waste land, or flats, on which timber and grass grew, horses and cattle fed, and hay was cut, such land was not included within the entry."

The quotation in the Oberly case from the Jefferis case was thus made without adequate limitation to the facts which were in issue in the Jefferis case. The rule stated in that quotation and the general rule that the water line and not the meander line is the boundary, are applicable in those cases where the United States transfers its riparian rights by issuance of a patent to lands whose record positions do in fact border on or near a stream at the time of entry or patent. They are not applicable to those cases where, at the time of entry and patent, a substantial area of land exists between the record meander line and the actual water line. Such generalizations may not

properly be removed from their context and applied to a case such as this, which is governed by other doctrines more precisely applicable to the specific facts involved. The Oberly decision, therefore, does not rest upon a sufficiently adequate basis to furnish support to Madison's claim to the lands south of the meander line of lot 4. The entry on his lot 4 was made at a time when there was a substantial amount of land between the meander line of lot 4 and the water line of the river. At that time lot 4 was nowhere near the river and was not riparian, nor has it been riparian since then. What the character of lot 4 may have been, whether riparian or otherwise, prior to the entry is, as so well stated by Circuit Judge Gardner of the Eighth Circuit Court of Appeals (which includes the State of North Dakota) in the case of First National Bank of Decatur v. United States, 59 F. (2d) 367, 369 (C. C. A. 8th, 1932): "a closed book and cannot be inquired into. If this were not the rule, owners might be divested of their property, and titles might be challenged and clouded by proof of geological and topographical changes and formations reaching back to antediluvian periods or prehistoric times. What may have transpired to affect these lands while title thereto remained in the government, and before their selection or entry by the * * * defendants * * * can be of no concern * * * to defendant * * *. The patents of the lands to which defendant has title describe the lands allotted according to the subdivisions thereof so platted, and recite the number of acres so allotted according to the acreage described in the government survey." The specification in the patent of "34.98 acres," compared to the large acreage claimed by Madison, is not an

immaterial factor in determining what was passed by the patent.[22] Ernest Madison went on lot 4 knowing these facts.[23] The patent must be held, under these circumstances, to have conveyed exactly what it purports to convey, i.e., only the 34.98 acres of land within the meander line, not the substantial amount of accreted land in addition to lot 4.[24] Accordingly, Madison's asserted claim is without sufficient basis to deprive the lands entered by Basart of their status as public lands of the United States.

But this does not mean that the suspension of Basart's entry may properly be lifted at this time and his entry allowed to proceed to patent.

So long as the Oberly decision stands unimpaired, it affects the lands in Basart's entry in two ways: (1) Since the accreted lands in the Oberly case appear to be indistinguishable in principle from the accreted lands in this case,[25] the likelihood that the State courts of North Dakota would adhere to the Oberly decision would becloud the title Basart would get by the issuance of a patent to him. (2) The Oberly decision constitutes a direct cloud on the title of the United States to the lands in Basart's entry. Although the Supreme Court of North Dakota did not, in the Oberly decision, indicate

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22/ Chapman & Dewey Lumber Co. v. St. Francis Levee Dist., 232 U. S. 186, 197 (1914); Security Land and Exploration Co. v. Burns, 193 U. S. 167, 180 (1904).

23/ See Gleason v. White, 199 U. S. 54 (1905).

24/ See Chapman & Dewey Lumber Co. v. St. Francis Levee Dist., 232 U. S. 186, 197 (1914). Cf. Myrtle White, 56 I. D. 300 (1938).

25/ The investigations made by this Department in connection with Basart's entry, although not focused on the lands involved in the Oberly decision, covered the general area of those lands and indicate, as do the recitals in the Oberly decision, that the accreted areas dealt with in the Oberly decision had accreted prior to the Gordin entry on the lands owned by Oberly.

the exact boundaries of the lands which it held to have accreted to Oberly's lands or how the side lines of the accreted lands should be drawn, it appears that a proper extension of the side lines of that accretion would include part of the Basart homestead lands. The general rule for the establishment of side lines to divide alluvium or accreted lands between adjoining riparian owners is to run dividing lines so that each proprietor has such proportion of the new shore line as he had of the old shore line. This is appropriately accomplished as follows: (1) measuring the whole ancient line of the river affecting the area involved and computing the length of the portion of that line owned by each riparian proprietor; (2) then measuring the whole length of the shore line of the accreted areas and appropriating to each proprietor such proportion of the new line as he had of the old line; and (3) then drawing the side lines from the points at which the proprietors respectively bounded on the old line, to the points thus determined as the points of division on the new line.26/ One of the attached sketches indicates the approximate side lines, thus determined, of the accretions to the record positions of lot 4,

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26/ Jones v. Johnston, 59 U. S. (18 How.) 150, 158 (1855); Johnston v. Jones, 66 U. S. (1 Black) 209, 222-223 (1861); Secretary Finney's Instructions of December 22, 1923, 50 L. D. 216, 218; R. M. Stricker, 50 L. D. 357, 358 (1924); Clark, Treatise on the Law of Surveying and Boundaries, secs. 251, 252, pp. 274-276 (2d ed., 1939); Skelton, The Legal Elements of Boundaries and Adjacent Properties, sec. 297(6), p. 338 (1930); Gould, Treatise on the Law of Waters, Including Riparian Rights, secs. 162-164, pp. 321-325 (3d ed., 1900); City of Peoria v. Central Nat'l Bank, 224 Ill. 43, 79 N. E. 296 (1906); 3 Farnham, Waters and Water Right, pp. 2475, 2477, 2481 (1904); Note, 35 Am. St. Rep. 307, 311 (1892); 1 R. C. L. (accretion) secs. 20-21, pp. 244-246 (1914); and numerous cases cited.

sec. 19, and lot 5, sec. 24. It will be seen that those accretion side lines do not run cardinal to the survey lines but approximately normal to the present river line. Thus, less than a third of the area of the dry land in the record position covered by Basart's entry is within the accretions to the record position of Madison's lot 4; a substantial portion of the dry land in the record position covered by Basart's entry is within the accretions which properly belong to the riparian owner of lot 5, sec. 24, whose entry, made in 1895, did have, unlike Madison's entry, riparian rights to the accretions formed on the shore line of that lot; and the larger portion of the dry land in the record position of Basart's homestead entry lies within the accretions to the record position of the lands owned by Oberly. This general rule for the establishment of side lines in the apportionment of accretion between adjacent owners of riparian lands on a river is the rule of law followed by the courts of North Dakota.27/ Consequently, it

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27/ Gardner v. Green, 67 N. Dak. 268, 271 N. W. 775, 783 (1937). In the Oberly case, Oberly had claimed to own by accretion all the land in the Carpenter and Plath entries. These entries were within the same north-south cardinal survey lines as Oberly's lands. One of the exhibits in the Oberly case was a sketch purporting to show the side lines of accretion as running coterminously with the cardinal survey lines (Exhibit D, case 6457, filed in the office of the Clerk of the Supreme Court of North Dakota on January 11, 1937, a copy of which is in the Department's file on the homestead entry of one Everett Davis (Bismarck 024564) (covering the same lands previously covered by Plath's homestead entry)). No question appears to have been raised in the Oberly case as to the correctness of the side lines of accretion claimed by Oberly. Since the Gardner decision was cited with approval and relied on in the Oberly decision, both being decided less than four months apart, it seems clear that it was not intended in the Oberly decision to depart from the established rule, so meticulously set forth in the Gardner decision, for apportioning accretions between adjoining riparian owners.

is apparent that the Oberly decision beclouds the title of the Federal Government not only to the public lands in the former Carpenter and Plath entries (which have since been respectively canceled and relinquished), but also to some of the public lands in the Basart entry.

Under these circumstances, the Department is under an obligation to its homestead entryman to take affirmative action to protect his entry and the validity of the patent which he may earn by compliance with the homestead laws, 28/ and also is under a duty to recommend to the Attorney General the institution of a suit in the Federal courts in North Dakota to remove this cloud from these lands. The United States, not having been a party to the Oberly case, could not be deprived of its title by a decision of the North Dakota Court.29/

Furthermore, it should be noted that the established practice of the Government, in disposing of the public land, has been to base the disposal on the area of dry land, leaving to the State law the determination of the effect of such disposal on the title to the lands under the bed of the river

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28/ Hughes v. United States, 71 U. S. (4 Wall.) 232, 235-236 (1866); United States v. Beebe, 127 U. S. 338, 342 (1888). See Chapman & Dewey Lumber Co. v. St. Francis Levee Dist., 232 U. S. 186, 190 (1914).

29/ Carr v. United States, 98 U. S. 433 (1878); Hussey v. United States, 222 U. S. 88, 93 (1911); Oklahoma v. Texas, 258 U. S. 574, 591 (1922). Several of the North Dakota decisions cited and relied on in the Oberly decision had specifically noted that the United States had not claimed to own any of the land between the meander lines and the shore lines involved in those cases. Heald v. Yumisko, 7 N. Dak. 422, 75 N. W. 806, 808 (1898); Brignall v. Hannah, 34 N. Dak. 174, 157 N. W. 1042, 1045 (1916); Roberts v. Taylor, 47 N. Dak. 146, 181 N. W. 622, 626 (1921).

or lake.[30] In this case, almost half of the record position of the described areas listed in Basart's entry is at present beneath the waters of the Missouri River. In addition, a portion of the dry lands in Basart's entry clearly belongs, by accretion, to the owner of lot 5, sec. 24. Under such circumstances, it would be inappropriate to issue to Basart a patent based on the survey of 1899, if such patent is earned by him under the homestead laws. Another segregative survey of the accreted lands here involved is necessary.

Basart's motion for rehearing is granted except insofar as he requests an oral hearing. An oral hearing is unnecessary since there appears to be no dispute as to the applicable facts. The case will be remanded to the Bureau of Land Management to take the following action: (1) to continue in effect the suspension of Basart's entry until further order by the Department; (2) to order a segregative survey of the accretions to the record positions of lot 4, sec. 19, T. 137 N., R. 79 W., 5th P. M. and of lot 7, sec. 23,[31]

30/ Hardin v. Jordon, 140 U. S. 371, 380 (1891); Andrew A. Malcolm, 50 L. D. 284 (1924); Scott v. Lattig, 227 U. S. 229 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 60 (1913); Archer v. Greenville Sand & Gravel Co., 233 U. S. 60 (1914); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912); Arkansas v. Tennessee, 246 U. S. 158, 175-176 (1918); Rex Baker, 58 I. D. ___ (A-23323, G. L. O. 04744, December 4, 1942). Cf. North Dakota Revised Code of 1943, secs. 47-0605, 47-0607.

31/ Lot 7, sec. 23, now owned by Oberly, lies adjacent on the west of lot 2 of sec. 24, although not shown on the attached sketches, and was part of the Gordin entry lands involved in the Oberly decision and lying due north of the Government-owned lands formerly in the Carpenter entry.

and lots 2, 3 and 4 of sec. 24, T. 137 N., R. 80 W., 5th P. M.;[32] and (3) to draft a request to the Attorney General for institution of a suit to quiet the title of the United States to all the accreted lands formed south of the 1899 record positions of lot 4, sec. 19, T. 137 N., R. 79 W., 5th P. M., North Dakota, and lot 7, sec. 23, and lots 2, 3 and 4, sec. 24, T. 137 N., R. 80 W., 5th P. M., North Dakota.

Since final proof has not yet been submitted on Basart's entry, there is no need at this time to consider the question of whether the existing dry land within the record position of Basart's entry, the surface of which had been washed away since 1899 and which for a time lay in the bed of the river but was later restored, is therefore unsurveyed lands precluding his entry, even though the lines of the 1899 plat may be reestablished by reference to other corners of the survey. Cf. Towl v. Kelly, et al., 54 I. D. 455, 462 (1934).

(Sgd) Oscar L. Chapman,

Under Secretary of the Interior.

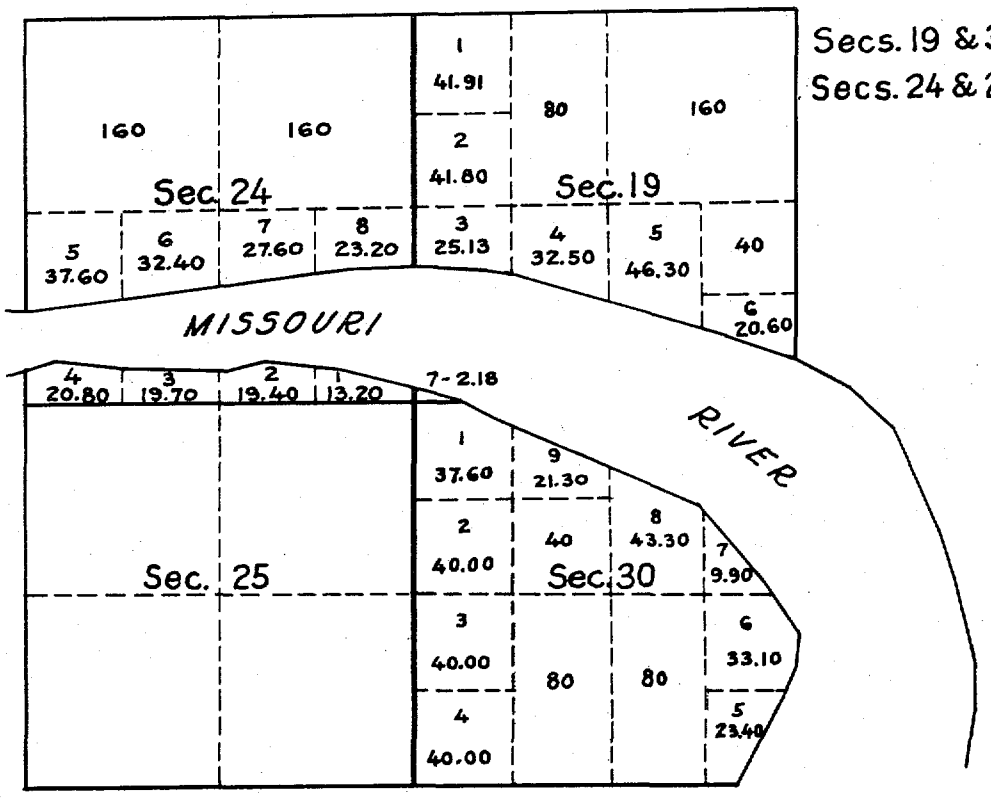
Attachments.

32/ Kirwan v. Murphy, 189 U. S. 35 (1903); Knight v. United States Land Association, 142 U. S. 161 (1891); New Orleans v. Paine, 147 U. S. 261 (1893).

APPENDIX to DEPARTMENTAL DECISION

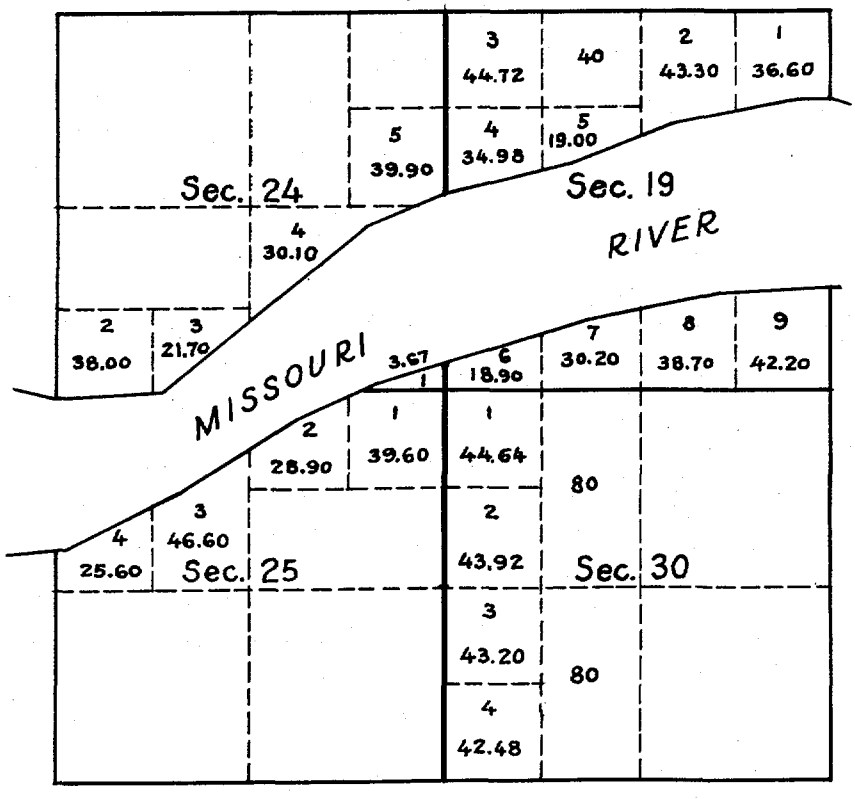
A23691 Madison vs. Basart

Secs. 19 & 30, T. 137 N., R. 79 W., and
Secs. 24 & 25, T. 137 N., R. 80 W., 5th P.M.,
North Dakota



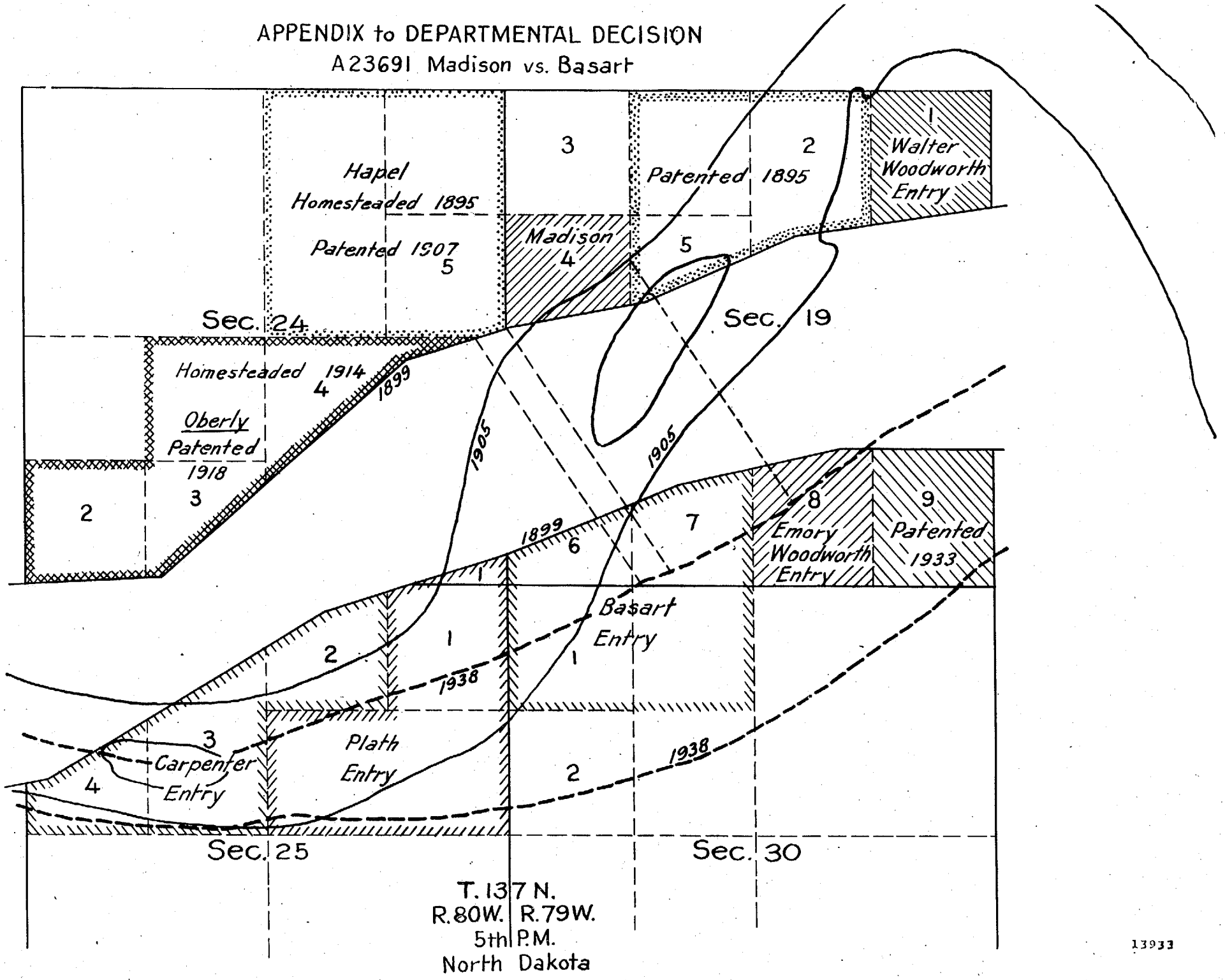
Plat of 1888

Plat of 1899



APPENDIX to DEPARTMENTAL DECISION

A23691 Madison vs. Basart



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