

Editor's note: Reconsideration granted; decision reaffirmed as modified --
128 IBLA 161 (Jan. 13, 1994)

ANNE LYNN PURDY
HEIRS OF ARTHUR PURDY, SR.

IBLA 89-615, 89-618

Decided February 12, 1992

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications F-19188 and F-13543.

Set aside and remanded.

1. Alaska: Native Allotments--Mineral Lands: Determination of Character of

The Secretary may allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska. Land is mineral in character when known conditions at the relevant time are such as to reasonably engender the belief that the land contains mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

2. Alaska: Native Allotments--Mineral Lands: Determination of Character of

The Department has held that the critical time for determination of whether the land in a nonmineral entry is mineral in character is the time when equitable title vests. With respect to Native allotments, this occurs when the Department has approved the allotment application after completion of the required period of qualifying use and occupancy.

3. Alaska: Native Allotments--Contests and Protests: Generally--Mineral Lands: Determination of Character of--Mineral Lands: Nonmineral Entries

Where an application for patent is filed by a nonmineral claimant which embraces public lands within the boundaries of mineral claims located under the mining laws, the rights of the mining claimants must be considered prior to any ultimate disposition of the land. In such a context, a hearing is properly ordered upon notice to the competing nonmineral and mining claimants for the purpose of determining the character of the land claimed.

APPEARANCES: Andy Harrington, Esq., Fairbanks, Alaska, for appellants; Regina L. Sleater, Esq., Office of the Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Anne Lynn Purdy and the heirs of Arthur Purdy, Sr., have appealed from separate decisions of the Alaska State Office, Bureau of Land Management (BLM), dated July 3 and 11, 1989, rejecting Native allotment applications F-19188 1/ and F-13543. 2/ In each decision, BLM rejected the applications because the lands sought by appellants were valuable for minerals (other than coal, oil, or gas). The appeals have been consolidated sua sponte.

Each application was filed with the Department pursuant to the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970), 3/ which authorized the Secretary, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska. The allotment tracts were not subject to legislative approval under section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988), because BLM determined on May 29, 1981, that the allotment lands may be valuable for minerals. 43 U.S.C. § 1634(a)(3) (1988). In addition, the case file shows that the State of Alaska protested Anne Lynn Purdy's application, alleging that the lands there were used for an existing highway, airstrip, or trail. 43 U.S.C. § 1634(a)(5) (1988). 4/

BLM's holding that the applications described lands valuable for minerals relied upon a mineral examination conducted in June and July 1979 and mineral reports based thereon which were approved in April 1989. The report regarding Anne Lynn Purdy's allotment (F-19188) noted that the southern

1/ Anne Lynn Purdy's application (F-19188) describes 160 acres in E½ NW¼, E½ SW¼ sec. 29, T. 27 N., R. 18 E., Copper River Meridian. Therein, Purdy alleges that she has occupied the lands since January 1947 and has used the lands for trapping, fishing, hunting, and berrypicking. This application was before the Department on Sept. 14, 1971, BLM states.

2/ Arthur Purdy's application (F-13543) describes 160 acres in NE¼ sec. 30, T. 27 N., R. 18 E., Copper River Meridian. Occupancy is alleged since May 1931 and the uses listed include hunting and trapping. Application F-13543 was filed with BLM on Mar. 17, 1971. Arthur Purdy died in 1985, and this appeal is pursued by his heirs.

3/ This Act was repealed on Dec. 18, 1971, by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1988), subject to applications pending on that date.

4/ The case file before the Board containing Art Purdy's appeal does not contain an access protest. Nevertheless, BLM asserts in its answer of Feb. 8, 1990, that such a protest was filed. Id. at 2. By order of Oct. 4, 1989, the Board granted a request of the State to intervene in the instant appeals. No pleadings were filed by the State. We note that the decisions on appeal did not purport to adjudicate the access protests and, hence, this issue is not before us.

half of her allotment is covered by a mining claim once co-owned by Anne Lynn's father and later by Dennis Eich and Art Purdy. 5/ Most of Art Purdy's allotment (F-13543) is covered by mining claims which he (Purdy) owned with Eich. 6/

According to BLM's mineral reports, the allotments are located near the community of Chicken, Alaska. The Chicken area is situated within the Fortymile mining district, the oldest placer mining district in Alaska. The area has been actively mined since the late 1880's, and as of the 1987 mining season three placer mines operated on Chicken Creek and its tributaries. Id. at 3. At the time of the field examination in 1979 there were two active placer mining operations on Chicken Creek. Id.

A review of the available literature and past use of the allotments indicates a well-established history of mining on the allotments, the reports noted. Field sampling in June and July 1979 revealed the presence of placer gold. Eight samples were taken at that time from allotment F-19188 7/ and six from allotment F-13543. This data caused BLM to classify each allotment as H/D, meaning that there existed a high potential for mineral occurrence. Based on the field work and literature, as well as the ongoing mining on nearby land, 8/ BLM characterized the allotments as mineral in character. Id. at 1, 4-5.

In their joint statement of reasons on appeal, appellants do not dispute that the area has a long history of mining, but they question how much mineral value remained in the ground as of the date the allotment applications were filed in 1971. Appellants also attack the economic analysis that BLM relied upon in making its mineral-in-character determination. Specifically, appellants contend that BLM erred when it compared the

5/ This mining claim (F-55367) is known as the Wilkie Association. It was originally located by George Lysell and later sold to Fred Purdy and his brother Art in 1930-31. Fred Purdy is Anne Lynn's father, now deceased. On Nov. 6, 1969, Anne Lynn's mother quitclaimed F-55367 to Dennis Eich and Daniel Understahl. Mining claim F-55366 also conflicts with this allotment, and patented mining claims border the allotment on the south along Chicken Creek (MS 2095 and 2178).

6/ Mining claims F-55282, F-55366, F-55367, F-55369, F-55370, F-55372, and F-55373 overlap Art Purdy's allotment. The allotment lands are bordered on the southeast by patented mining claims running along Chicken Creek (MS 2096 and 2178) (Mineral-in-character report for Native Allotment of Arthur Purdy at 2).

7/ Appellant Anne Lynn Purdy states that seven of the eight samples were taken on patented lands east of her allotment. BLM's mineral report of April 1989 explains that at the time of sampling the allotment extended further south to include part of patented claims MS 2095 and MS 2178. Allotment boundaries have since been amended.

8/ Unapproved mineral reports prepared by BLM in 1980 state that no placer operations were active on the allotments in 1979 (at the time of the field examination).

average mineral value of the field samples with the lowest cost estimate of mining in arriving at its mineral-in-character determination. 9/

Appellants also challenge BLM's automatic assignment of a mineral-in-character determination to the entire acreage of each allotment. BLM's failure to consider whether an allotment might contain some areas mineral in character and others not mineral in character was a violation of BLM Instruction Memorandum (IM) No. AD 89-719, appellants charge. This IM states:

[T]he 10-acre rule should be applied to Native allotments in the same manner it is applied to placer mining claims. This rule will be utilized to resolve the question of which portions of a Native allotment should be conveyed and which rejected when some portions of the allotment are mineral in character and others are not. The application of the 10-acre rule means that 10 acres is the smallest subdivision of a Native allotment that will be examined with respect to the question of mineral in character. [Emphasis added.]

Appellants observe that where, as here, the field samples have a broad range of mineral value, 10/ it is particularly important that BLM individually evaluate each 10-acre parcel within the allotments.

Finally, appellants assert error in BLM's failure to afford them a hearing at which they might present evidence disputing the agency's mineral-in-character determination. Such a hearing is required by Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), appellants state.

BLM disputes appellants' view that it reached its mineral-in-character determination in error. Whether land is mineral in character need not rest upon an economic analysis, the agency states. Conditions generally known in 1971 (at the time the applications were filed) may be relied upon to make this determination (Answer, Feb. 5, 1990, at 4-9).

9/ For example, appellants note that BLM found field samples on Anne Lynn Purdy's allotment to have values ranging from \$0.06 to \$2.24 per cubic yard, or an average of \$1 per cubic yard. Costs were estimated using the judgment cost method (\$2.32 per cubic yard) and the comparative cost method (\$0.51 to \$1.37 per cubic yard). Appellants state that BLM compared costs at the low end of the comparative cost method (\$0.51 per cubic yard) to the average mineral value (\$1 per cubic yard) to reach its conclusion that the allotment could have been mined at a profit if the right operation was used. This analysis does not withstand the prudent man test of profitability developed by the case law, appellants state.

10/ On Anne Lynn Purdy's allotment, the mean yield per cubic yard is \$0.97. The samples reveal a standard deviation of \$0.74 and a fractional deviation of 76 percent. On Arthur Purdy's allotment, the mean yield is \$0.72 per cubic yard. A standard deviation of \$1.08 and a fractional deviation of 150 percent are present (Statement of Reasons, Jan. 2, 1990, at 12).

Such conditions include the fact that the allotments are located in an active and productive mining area, BLM states. Further support is offered by Geological Survey Bulletin 897-C, 11/ which characterizes the land as containing valuable minerals (Answer, supra at 2). Also relevant to this determination, BLM states, is the 1969 sale of claims on the allotments for \$3,000 and 10 percent of profits. According to the agency, these claims were in active status in 1971 and remain so today through regular filings.

BLM also disputes appellants' view regarding the 10-acre rule. Such a rule is used for patenting mining claims, the agency states, and is not applicable to Native allotment adjudications. Broader discretion is exercised in adjudicating Native allotment applications, so long as the land is not mineral in character (Answer, supra at 9). BLM contends that when an entire area for which an allotment is sought is of similar character and the public records relate to the land as a whole, there is no requirement that the allotment be subdivided.

Finally, BLM takes exception with appellants' argument that a hearing is required before an application can be rejected. Pence v. Andrus, supra, does not require a hearing if rejection is required as a matter of law, BLM states. Where, as here, specific evidence from matters of public record compels a mineral-in-character determination, no evidence can be adduced at a hearing which would mandate a contrary result (Answer, supra at 11).

[1, 2] The plain language of the Act of May 17, 1906, supra, establishes that a Native allotment may not be granted for mineral lands. Land is mineral in character when known conditions at the relevant time are such as to reasonably engender the belief that the land contains mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. United States v. Southern Pacific Co., 251 U.S. 1, 13 (1919); Diamond Coal Co. v. United States, 233 U.S. 236, 240 (1913). Where an applicant has done all that is required of him under a particular statute and earned equitable title to a tract of public land, the Department has held that patent can be denied on the ground that the land is mineral in character and, thus, not eligible for disposal under the statute, only on a finding that facts in existence at the time equitable title vested required a finding that the land was mineral in character. State of Wisconsin, 65 I.D. 265, 272 (1958); followed, Wilfred S. Wood, 20 IBLA 284, 287-88 (1975). 12/

11/ J. B. Murdie, Jr., Gold Placers of the Fortymile, Eagle and Circle Districts of Alaska (1938). To the same effect is an open file report by Edward H. Cobb, entitled Metallic Mineral Resources Map of the Eagle Quadrangle, Alaska (1967) (Answer, supra at 2).

12/ With respect to Native allotments, preference rights have been held to vest when applicants have filed their Native allotment applications and completed the required period of qualifying use and occupancy. See United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). Both appellants and BLM have argued that this is the time at which the mineral-in-character determination must be made. However, a preference right against conflicting

Equitable title is established where an entryman has made his final proof, paid the amount of money required, and received a final certificate. 63A Am. Jur. 2d Public Lands § 69 (1984). No purchase price is required in obtaining a Native allotment, but the BLM manual formerly provided for issuance of an allotment certificate by the adjudication officer upon submission of proof of occupancy deemed acceptable. V BLM Manual 2A.5.14 (1958); see State of Alaska v. Patterson, 45 IBLA 318, 320 (1980). ^{13/} This allotment certificate did not convey legal title to the land, which result was only accomplished by subsequent issuance of the Native allotment. State of Alaska, supra at 321. Although the processing of Native allotment applications no longer includes issuance of final certificates prior to conveyance of Native allotments, the acceptance of a Native allotment claim has generally been indicated by a written decision of BLM approving the allotment. See State of Alaska v. Patterson, 46 IBLA 56 (1980). We find that this is the time when equitable title vests. For Native allotment applications such as those at issue in this case which BLM has not found acceptable, the mineral-in-character determination must be made as of the date of passage of ANILCA, which automatically approved pending Native allotments subject to certain exceptions including the exception for mineral lands. Thus, with respect to the allotment applications before us on appeal, the question is whether the lands were known to be mineral in character as of the time of the passage of ANILCA in 1980.

The test whether land is mineral in character is essentially the same as the test for discovery. One important qualification exists, however: a discovery requires the exposure of a valuable mineral deposit, but the mineral character of land may be established solely by geologic inference. United States v. Lara (On Reconsideration), 80 IBLA 215, 217 (1984), aff'd, Lara v. Secretary of the Interior, 820 F.2d 1535 (9th Cir. 1987); see Diamond Coal Co. v. United States, supra at 248-49.

The definition of mineral lands is helpful in resolving the issues posed by the pleadings. If mineral lands are those believed to contain deposits that may be profitably extracted, an economic analysis is key to any such characterization. Data offered by BLM, e.g., past mining, sale of claims, current assessment filings, are relevant to this determination, but do not conclusively show that profitable extraction has occurred. See Nancy M. Swallow, 112 IBLA 321, 323 (1990).

Whether land is mineral in character requires BLM to make a number of factual determinations. Among these are the quality and quantity of the mineral under consideration and the costs of mining. Where, as here, BLM has rejected Native allotment applications based upon a mineral-in-character determination, Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976),

fn. 12 (continued)

claimants does not equate to establishment of equitable title as against the United States and we are unable to accept this contention.

^{13/} Where proof of occupancy was not acceptable, the adjudication officer issued a decision rejecting the proof and/or requiring curative action. V BLM Manual 2A.5.13 (1958).

requires that the Native be afforded a hearing to challenge these underlying facts. Billy Morry, 72 IBLA 13, 16 (1983). We agree with BLM that a hearing is not required when rejection of an application is required by law, but the issue here is not strictly legal rather than factual.

In Pence v. Kleppe, *supra*, the Court of Appeals required certain adjudication procedures of BLM:

Thus, at a minimum, applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143. In response to this direction, the Department applied its existing contest procedures, which provided for an oral hearing before an Administrative Law Judge. These procedures were found to satisfy the due process requirements outlined in the earlier Pence decision. Pence v. Andrus, 586 F.2d at 744.

[3] Where an application for patent is filed by a nonmineral claimant which embraces public lands within the boundaries of mineral claims located under the mining laws, the rights of the mining claimants must be considered prior to any ultimate disposition of the land. In such a context, a hearing is properly ordered upon notice to the competing nonmineral and mining claimants for the purpose of determining the character of the land claimed. Elda Mining & Milling Co., 29 L.D. 279, 281 (1899); see Edith Szmyd, 50 IBLA 61, 64 (1980). ^{14/} The regulations provide that a claim of title to or an interest in land adverse to any other person claiming title to or an interest in such land establishes standing to file a private contest of the adverse claim. 43 CFR 4.450-1. Although the elements of a private contest are thus present in these cases, we note that BLM itself has opposed the allotment applications on the basis of substantial evidence that the lands are mineral in character. Further, we recognize that a decision adverse to the mining claimants in a private contest would not be binding upon BLM so as to preclude it from bringing a Government contest. Bailey v. Molson Gold Mining Co., 43 L.D. 502, 503-04 (1914). Hence, we find that the context of

^{14/} Although cases like Elda Mining & Milling Co., *supra*, are distinguishable from the circumstances of the present appeals by the fact that mineral patent application had been filed, we find that notice to the mining claimants and an opportunity to be heard is required even in the absence of mineral patent applications where resolution of the contest in favor of the allotment applicant would be adverse to the mining locations. See generally Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1946) (granting one of two mutually exclusive applications without affording the other a hearing effectively deprives the latter of the right to a hearing).

these appeals requires a Government contest of the allotment applications by BLM. See 43 CFR 4.451-1.

Case law makes clear that the 10-acre rule is applicable to contested placer mining claims. Central Pacific Railway Co. v. Mullin, 52 L.D. 573, 575 (1929); Ferrell v. Hoge (On Review), 29 L.D. 12, 14 (1899); Ferrell v. Hoge, 27 L.D. 129, 131 (1898). See also Meiklejohn v. Hyde, 42 L.D. 144, 147-48 (1913), and Crystal Marble Quarries Co. v. Dantice, 41 L.D. 642, 646 (1913). Although we have been cited to no cases applying the 10-acre rule to Native allotment applications, we think the issue is which, if any, of the lands within a Native allotment application are mineral in character and, hence, unavailable for allotment.

At the contest, appellants may offer evidence in support of their argument that BLM erred in preparing its economic analysis of the relevant mining claims. Specifically, appellants may renew their argument that it is improper to compare the average mineral value of field samples with the lowest cost estimate of mining.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Alaska State Office are set aside and the cases are remanded for action consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge