

MARY JOHANSEN

IBLA 90-172

Decided March 11, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application F-11659.

Set aside and remanded.

1. Administrative Authority: Generally

So long as the legal title to public lands remains in the United States, the Department has the power, after proper notice and hearing, to inquire into the propriety of conveying the land, at any time prior to the issuance of patent.

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

Where the United States completes a mineral-in-character report after equitable title has passed to the Native allotment applicant, the determinative date for that report is the date of passage of equitable title, and BLM must establish that the facts in existence at the time equitable title passed required a determination that the land was mineral in character.

3. Administrative Procedure: Hearings--Alaska: Native Allotments--Rules of Practice: Hearings

Where, after final proof of use and occupancy has been filed and equitable title has passed to the applicant, BLM determines that the land in the application is not subject to conveyance because it is mineral in character, e.g., valuable for placer gold, it may not reject the application without affording the applicant notice and an opportunity to contest the mineral-in-character classification, as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

APPEARANCES: Andy Harrington, Esq., Fairbanks, Alaska, for Mary Johansen; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; John T. Baker, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Mary Johansen has appealed from a decision dated December 11, 1989, by the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application F-11659, because it had determined that the lands embraced by the application were valuable for minerals. Under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to applications pending on Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988)), the Secretary was authorized "to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska." ^{1/}

On January 13, 1969, Native allotment F-11659 was filed by the Bureau of Indian Affairs on behalf of Mary Johansen. The application, for 5 acres in sec. 6., T. 26 N., R. 18 E., and sec. 31, T. 27 N., R. 18 E., Copper River Meridian (U.S. Survey No. 7467), indicated use and occupancy since August 1935.

In a January 10, 1974, field report on the allotment, a BLM mining engineer recommended against a mineral examination on the basis of information from "knowledgeable miners" and a BLM "valuation engineer" indicating that the area "is not valuable for placer gold."

In a May 2, 1975, letter, BLM advised Johansen that her Native allotment had been approved, and that following completion of a survey, further action would be taken to issue an allotment certificate.

By letter of May 8, 1981, the State of Alaska (State) advised BLM that allotment application F-11659, among others, "claim[ed] land valuable for minerals, excluding oil, gas, coal, sand or gravel." The State requested BLM to "determine by notice or decision that the land may be valuable for minerals."

By letter of May 29, 1981, BLM notified Mary Johansen that her Native allotment could not be legislatively approved because it had been determined that the land may be valuable for minerals, excluding coal, oil, and gas. BLM advised that an on-the-ground mineral examination would be performed as soon as possible.

During June 1983 an examination of the allotment was made to determine its mineral character. In the Mineral-in-Character Report, approved by BLM on November 30, 1988, BLM's geologist concluded that the subject land is mineral in character and valuable for placer gold as of November 18, 1974, the date on which final proof was submitted.

In its December 11, 1989, decision, BLM rescinded its May 2, 1975, approval and rejected the application, based on the Mineral-in-Character

^{1/} BLM also cited 43 CFR 2561.0-3 which similarly limits allotments to nonmineral lands.

Report and on the Act of May 17, 1906, which did not authorize allotments on lands valuable for minerals.

Appellant contends that under Degnan v. Hodel, No. A87-252 CIV (D. Alaska, Feb. 15, 1989), BLM had no authority to rescind its May 1975 approval of her allotment. In Degnan, the Alaska District Court reversed Clarence Lockwood, 95 IBLA 261 (1987), where the Board had upheld the reservation of a right-of-way for a segment of the Iditarod Trail across Native allotments. The court found that once the Secretary had granted interim approval of the allotments, thereby conveying equitable title to the allotment applicants, he "was thereafter without power to diminish that title by reserving rights-of-way across the allotment lands under the [National Trails System Act]" (Order at 8). Appellant also cites Heirs of Simon Paneak, 55 IBLA 305 (1981), where a Native allotment application was rejected more than 13 years after the applicant had submitted acceptable evidence of use and occupancy, on the basis that the parcel in question was considered prospectively valuable for phosphate. The Board found, however, that the file contained no evidence which would justify mining development on the parcel. Citing 43 CFR 2093.3-3(c)(2), the Board remanded the case for issuance of patent to the heirs of Simon Paneak. 2/

Appellant also challenges the conclusions of BLM's Mineral-in-Character Report, asserting that BLM used the incorrect date in assessing the mineral potential of the allotment, and requests a contest hearing to present evidence on the mineral-in-character issue.

BLM contends that the land embraced by the allotment is mineral in character and therefore not available for allotment. BLM asserts that appellant's allotment application was null and void ab initio, and that by rejecting it, BLM properly corrected its mistaken 1975 interim approval. BLM argues that Degnan and Paneak, supra, are distinguishable on the grounds, respectively, that in the case at bar, the land was never available for allotment and is located in one of the most active placer gold mining areas in Alaska. BLM also asserts that no hearing is required because "the specific evidence from matters of public record is so dispositive of the issue that there exists no evidence which could be adduced by

2/ The regulations at 43 CFR 2093.3-3 implement the Act of July 17, 1914, 30 U.S.C. §§ 121-125 (1988). Section 121 of that Act (30 U.S.C. § 121 (1988)) provides that

"[l]ands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or valuable for those deposits shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, * * * with a reservation to the United States of the deposits."

The last sentence of 43 CFR 2093.3-3(c)(2) relates to hearing and burden of proof and states that if a claimant fails to answer, any patent issued will contain a "reservation of oil or gas to the United States." Apparently, the regulation applies only to oil and gas. Arguably, it applies to no minerals other than those specifically listed in 30 U.S.C. § 121 (1988), and is therefore not applicable in this case because the mineral in this case is gold.

applicant during hearing which would mandate finding that the land applied for was not mineral in character" (Answer at 13). BLM states that appellant's due process rights were safeguarded because notice that the land might be mineral in character was published in the Federal Register on May 27, 1981, ^{3/} and sent to Mary Johansen.

[1] In Degnan, *supra*, the issue was whether BLM could reserve a right-of-way over an approved allotment. The issue now before us is whether BLM properly rejects a Native allotment application where it has determined, prior to issuing the final conveyancing document known as a "Native allotment," that the land embraced by the application is mineral in character. As we observed in Paneak, *supra* at 309, the Department may inquire into the propriety of conveying public land under its jurisdiction, in response to a proper application, at any time prior to the issuance of a land patent. See United States v. Utah International Inc., 45 IBLA 73 (1980); Wilfred S. Wood, 20 IBLA 248 (1975); United States v. Shearman, 73 I.D. 386, 434 (1966), *aff'd sub nom. Reed v. Morton*, 480 F.2d 634 (9th Cir.), *cert. denied*, 414 U.S. 1064 (1973); Knight v. United States Land Association, 142 U.S. 161, 178 (1891). In State of Wisconsin, 65 I.D. 265, 272 (1958), the Department defined the scope of its inquiry into the propriety of a conveyance of public land:

Thus, if only nonmineral land can be disposed of under a particular statute and an applicant is permitted to earn equitable title to a tract of land on a determination or assumption that the land is nonmineral in character, the disposal of the land can be vitiated only on a subsequent determination that the original finding of nonmineral character was in error and that facts in existence at the time equitable title passed required a determination that the land was mineral in character.

In the cases where a disposal can validly be set aside, due process permits such action to be taken only after proper notice and hearing.

[2] Thus, BLM's inquiry into the mineral character of appellant's allotment was entirely proper. The question to be resolved, however, is what should be the critical date for determining the mineral character of land subject to a Native allotment application. When equitable title to a Native allotment has passed to the allottee, the United States generally loses the ability to condition the grant. See United States v. 13.90 Acres of Land, 625 F. Supp. 1315 (D. Alaska 1985); Degnan v. Hodel, No. A87-252 (D. Alaska, Feb. 16 and May 6, 1989), *overruling Clarence Lockwood*, 95 IBLA 261 (1987). Therefore, even if the United States completes a mineral-in-character report after equitable title has passed, the determinative date for such a report should be not later than the date of passage of equitable title. Thus, we hold that the date of passage of equitable title to a

^{3/} Neither the file nor BLM's answer gives a page citation for this Federal Register notice. Our search of the Federal Register for May 27, 1981, has failed to disclose such a notice.

Native allotment is the critical mineral-in-character date. ^{4/} Ann Lynn Purdy, 122 IBLA 209, 213-14 (1992). Accordingly, BLM must establish that "the facts in existence at the time equitable title passed required a determination that the land was mineral in character." See State of Wisconsin, *supra* at 272.

[3] Where BLM determines to reject an entry after equitable title has passed, based on its unilateral finding that the land is mineral in character, due process requirements must be met. Under Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978), when BLM adjudicates a Native allotment application presenting a factual issue it must initiate a contest giving the applicant notice and an opportunity to appear at a hearing and to present evidence prior to rejection of the application. See Billy Morry, 72 IBLA 13 (1983).

In the case before us, appellant was notified that the land in her application might be mineral in character, but was apparently not advised of her right to a hearing in the event she disagreed. In her appeal herein, appellant has manifested disagreement with BLM's mineral- in-character classification and in all fairness should be afforded an opportunity to challenge that classification at a hearing, assuming BLM is prepared to meet its burden of presenting a prima facie case that the land was mineral in character as of the date of passage of equitable title. In that event, appellant will be required to overcome that showing by a preponderance of evidence.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this opinion.

John H. Kelly
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

^{4/} In this case it is not clear when that date was. As noted earlier, the record contains a letter to Johansen, dated May 2, 1975, notifying her that her allotment had "been approved."