

Editor's Note: Reconsideration denied by order dated April 23, 2003; appeal filed, Civ. No. A2-04-77 D. ND, June 29, 2004)

JANE DELORME, ET AL.

IBLA 2002-141 etc.

Decided February 3, 2003

Appeal from decisions of the North Dakota Field Office, Bureau of Land Management, rejecting Indian Allotment applications.

Affirmed.

1. Administrative Authority: Generally--Appeals: Jurisdiction --Federal Land Policy and Management Act of 1976: Land-Use Planning--Indians: Lands: Allotments on Public Domain: Classification--Indians: Lands: Allotments on Public Domain: Lands Subject To--Rules of Practice: Appeals: Jurisdiction

A decision rejecting an Indian Allotment application is properly affirmed where the land sought to be entered has been classified for retention in public ownership in the applicable resource management plan. The Board has no jurisdiction to review such a land-use plan or the classifications contained therein.

APPEARANCES: Jim Martinson, Niche, North Dakota, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Eight applicants including Jane Delorme, Gail M. Martinson, Jim R. Martinson, John W. Martinson, David J. Twamley, Kristi L. Twamley, Jacqueline J. Twamley, and Maxine Delorme Martinson Twamley, have appealed from similar decisions dated November 30, 2001, issued by the North Dakota Field Office, Bureau of Land Management (BLM). 1/ These decisions rejected their individual Indian Allotment applications which had been filed on

1/ The appellant and docket number for the appeals include:

IBLA 2002-141	Jane Delorme
IBLA 2002-142	Gail M. Martinson
IBLA 2002-143	Jim R. Martins
IBLA 2002-144	John W. Martinson
IBLA 2002-145	David J. Twamley
IBLA 2002-146	Kristi L. Twamley
IBLA 2002-147	Jacqueline J. Twamley
IBLA 2002-148	Maxine Delorme Martinson Twamley

November 6, 2001, pursuant to section 4 of the Indian General Allotment Act of 1887, as amended, 25 U.S.C. § 334 (2000). ^{2/} The applications were all rejected because the Federal lands identified therein had been designated for retention by BLM under the Final North Dakota Resource Management Plan (RMP). By Order of this Board dated July 2, 2002, these appeals were consolidated for review because the record discloses that these appeals share a common factual context and present the same legal issues. Pursuant to that same Order, these cases were advanced on our docket for review.

While the instant applications were all filed with BLM in November 2001, appellants assert that they are aggrieved by past actions of this Department dating back to the early 1900's. Appellants are the descendants of Adele Jaste. ^{3/} They proffer a copy of a letter from the Office of Indian Affairs in this Department dated June 5, 1915, indicating that allotment selections for her children were approved by the Department on January 18, 1915. Apparently no allotments ever issued to appellant Jane Delome as she subsequently received a letter dated July 13, 1967, from her United States Senator regarding her application for an allotment for herself and her children. In that letter, the Senator indicated that he had received a letter from the Bureau of Indian Affairs stating that certificates of eligibility for an allotment had been mailed to appellant and that she would be notified when a suitable tract of land is located.

Subsequently, allotment applications were presented to BLM on December 11, 2000, by Delome, her daughter Maxine Twamley, and her six grandchildren (Twamley's children). These applications (NDM 90560 through NDM 90567) were submitted "for * * * acquired surface [lands] in the North Dakota Prairie Grasslands under the jurisdiction of the Forest Service [FS]." ^{4/} (Appellants' Ex. 2-F at 2, Letter of April 20, 2001, from BLM to FS.) Accordingly, these prior applications were forwarded by BLM to FS for processing. Id. These applications were returned to the applicants in a FS letter dated June 15, 2001, with a finding that the lands applied for are not eligible for settlement because there was no settlement predating the withdrawal of the lands prior to the establishment of the National Grasslands. (Appellants' Ex. 2-H.) There is no indication that this decision was appealed.

Thereafter, the applications at issue were filed with BLM for public domain lands on July 30, 2001, after Jim Martinson, on behalf of all the applicants, had visited the North Dakota Field Office and reviewed BLM land records for south-western North Dakota. By letter from BLM dated

^{2/} Appellants have also tendered on appeal a copy of an Indian Allotment application in the name of Louis Delome, deceased. They have submitted a statement of reasons (SOR) for appeal in his name and requested a docket number. The Board has not received an appeal transmittal from BLM and, hence, we have no indication that BLM has adjudicated an application in the name of Louis Delome. In the absence of a BLM decision adverse to the applicant, this Board has no jurisdiction over an appeal. 43 CFR 4.410.

^{3/} Appellant Jane Jaste Delome is the daughter of Adele Jaste.

^{4/} The FS is under the jurisdiction of the United States Department of Agriculture.

September 7, 2001, these latest applications were initially returned because the required certificates of eligibility were not attached. Finally, the applications at issue here were refiled in the North Dakota Field Office in November 2001.

The subject applications seek lands in sections 11, 12, 13, and 14 of T. 130 N., R. 107 W., Fifth Principal meridian, North Dakota. Noting in its decision that these lands are designated for retention in the RMP, BLM explained:

Designation of these lands for retention is done in accordance with the Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (90 Stat. 2776, 43 U.S.C. 1713). In Section 102 (a)(1) of FLPMA, Congress declared that it is the policy of the United States that "the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701 (a)(1) (1994). Section 202(a) of FLPMA declares that "Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43 U.S.C. § 1712(a) (1994). The North Dakota RMP was developed and promulgated pursuant to this statutory provision and the implementing regulations at 43 CFR Subpart 1610.

(BLM Decision at 1.) Further, BLM commented that once an RMP is approved, as in this case, after a lengthy and detailed planning process, it can only be amended or revised following prescribed regulations and guidelines. Accordingly, BLM rejected the Indian Allotment applications.

In their SOR, appellants, after reciting the history of their attempts to secure allotments, argue that BLM's determination denies them their entitlement. They argue that the lands applied for have never been patented and therefore they should still be open "as it was with other Indian Allotment land patents." They also contend that classification of the lands for retention lands should not preclude Indian Allotments from being located thereon. Noting that section 701(h) of FLPMA, 43 U.S.C. § 1701 note (1994), provides that all actions of the Secretary under this Act shall be subject to valid existing rights, appellants assert that they "have the right to acquire land."

In its decisions, BLM cited our decision in Lehman Perkaquanard, 136 IBLA 182 (1996), as precedent. We agree with BLM that Perkaquanard is controlling with regard to the matter under review here. In that case, the appellants sought lands in New Mexico pursuant to their Indian Allotment applications although those lands had been designated for retention by BLM under the Rio Puerco Resource Area RMP. In their appeal before the Board, they argued generally that the BLM decisions were contrary to the provisions of the Indian General Allotment Act and that other laws and regulations regarding use and disposition of the public lands do not modify the entitlement to allotment recognized under the Indian General Allotment Act.

Without reiterating in detail the history of Indian Allotment selections and public lands as set forth in Perkaquanard, we note our observation there that the statutory framework of public land management has substantially changed since 1887. See 136 IBLA at 184-85. Within the scope of those changes, all vacant, unreserved, and unappropriated public lands were first withdrawn for classification as to use and then later were mandated for retention in Federal ownership unless determined otherwise. Id.

[1] With respect to the authority of the Department to withhold lands from selection under the Indian Allotment Act, we held in Perkaquanard as follows:

Courts have held that no rights of Indians are violated by the withdrawal of public lands from settlement and the requirement that such lands be classified pursuant to section 7, Taylor Grazing Act, 43 U.S.C. § 315f (1994), before the public lands can be allotted to an Indian under section 4 of the Indian General Allotment Act. Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968); Robert Dale Marston, 51 IBLA 115, 120 (1980). This has been settled on judicial review of administrative decisions rejecting Indian allotment applications for land withdrawn by Exec. Order No. 6910 and declining to classify the land for settlement for Indian allotment. Thus, the court in Finch rejected the argument that the withdrawal of the public lands subject to the Secretary's discretionary authority to classify them for entry under the Taylor Grazing Act improperly violated the rights of Indian allotment applicants in the absence of a showing that the Departmental decision was inconsistent with the statutory mandate of the Taylor Grazing Act. Finch v. United States, supra at 14. 5/ Similarly, the Hopkins court held that Congress intended to "change existing law by conditioning entry and settlement upon the Secretary's prior classification of the land as suitable." Hopkins v. United States, supra at 472 (footnote omitted). A similar analysis applies to decisions rejecting applications based on a classification of the land for retention in public ownership in an RMP promulgated pursuant to the land-use planning provisions of section 202 of FLPMA. 43 U.S.C. § 1712 (1994). In this case, the lands at issue have been classified for retention in Federal ownership under the Rio Puerco RMP and, hence, appellants' applications are properly rejected. See David R. Hinkson, 131 IBLA 251 (1994); Hutchings v. BLM, 116 IBLA 55, 61-62 (1990). 6/

5/ Distinguishing the entitlement to an allotment from the right to a particular tract of land, the court rejected the contention that Congress intended to place the public domain beyond discretionary control and vest an absolute right to the land of the applicant's choice. 387 F.2d at 15.

6/ Challenges to the classification of public lands in the land-use planning process culminating in the RMP are decided by

the Director, BLM, whose decision is final for the Department. 43 CFR 1610.5-2(b). Hence, review of such planning determinations is outside the scope of this Board's jurisdiction. See Joe Trow, 119 IBLA 388, 393 (1991); Hutchings v. BLM, 116 IBLA at 61; 43 CFR 1610.5-2.

136 IBLA at 185-86.

Several principles which are controlling in the instant case are evident from the Perkaquanard decision: 1) Congress did not, since at least 1934, intend to vest an absolute right to land of the applicant's choice, 2) application of the land management statutes enacted since 1887 does not abridge an Indian's entitlement to an allotment, and 3) review of land-use decisions made in the planning process is outside the scope of the Board's jurisdiction. Accordingly, appellants' arguments fail to show error in the decisions appealed. While appellants plead a strong case for entitlement to allotments, they have not shown that such entitlement applies to the land at issue here.

The North Dakota RMP provides a comprehensive land-use plan developed to direct management activities for all lands and minerals administered by BLM in North Dakota. See Record of Decision, North Dakota RMP, April 1988. In Appendix D to the RMP at 172, the lands in sections 10 through 15 of T. 130 N., R 107 W., i.e., those subject to appellants' Indian Allotment applications, are classified as most suitable for retention under the criteria of the General Program Guidance. (RMP at 167.) Thus, the determination to deny each of the eight applications must be upheld based on BLM's duty to conform management decisions with the RMP.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge