

Editor's note: Appealed – remanded, Civ. No. 70-2328 (N.D. Calif. July 5, 1973); See Donald E. Miller, 15 IBLA 95 (81 I.D. 111) – Appealed – dismissed, Civ. No. 70-2328 (N.D.Cal. Feb. 6, 1975)

DONALD E. MILLER

IBLA 70-92 Decided May 26, 1971

Withdrawals and Reservations: Authority to Make

The authority to withdraw "public lands," granted by the Pickett Act, 43 U.S.C. §§ 141 - 142 (1964), permits the withdrawal of lands already in a national forest for power site purposes.

Withdrawals and Reservations: Revocation and Restoration

Where the Federal Power Commission dismissed a Federal Power Project application in 1931, and the lands have not been restored to entry in conformity with sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (1964), the lands are not subject to appropriation or disposition under the public land laws.

Indian Allotments on Public Domain: Lands Subject to

Lands in a national forest which are withdrawn for power site purposes are not subject to settlement, appropriation or disposition under the Indian allotment laws.

Mining Claims: Generally

Where an Indian allotment application cannot be allowed because the land covered thereby is withdrawn from appropriation and disposition by power site withdrawals, no useful purpose would be served at this time to investigate the validity of a conflicting mining claim which antedates the filing of the Indian allotment application.

Words and Phrases

"Public Lands."

The term "public lands" often means such land as is subject to sale or disposition under the general public land laws, and not such as is reserved for any purpose. The term's meaning depends upon the context in which used.

The term "public lands" as used in the Pickett Act, 43 U.S.C. §§ 141 - 142 (1964), and in the Executive Order of April 13, 1912, creating Powersite Reserve No. 258 includes reserved lands not otherwise appropriated.

IBLA 70-92: S 2456

DONALD E. MILLER

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: Indian allotment
: application rejected
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: Affirmed as modified

DECISION

Donald E. Miller has appealed from a decision dated September 16, 1969, in which the Office of Appeals and Hearings of the Bureau of Land Management affirmed the rejection of Mr. Miller's Indian allotment application by the Sacramento land office on March 21, 1969. ^{1/}

The Office of Appeals and Hearings stated that: (1) about half the land in issue (including appellant's improvements) is within the Roselena mining claim which has been in existence for some 50 years; (2) since the land is not suitable for agriculture or economic grazing but rather is basically timber producing in nature, this alone requires the rejection of the application; (3) the land is affected by power withdrawals and the general withdrawal, E.O. 6910 of November 26, 1934 (54 I.D. 539), and is therefore not subject to settlement or occupation until it has been classified and opened to entry.

On February 17, 1969, Mr. Miller filed the application, embracing the portion of the NE 1/4 NE 1/4 sec. 9, T. 11 N.,

^{1/} The application is the subject of Donald E. Miller v. United States, Civil No. C-702328 GSL U.S.D.C., N.D. California, and the suit is currently pending. The Department of Justice has advised that there is no objection to the Board's acting on the appeal.

R. 6 E., H.M., California, lying west of the Klamath River, ^{2/} consisting of some 25 acres, under sec. 4 of the General Allotment Act, 25 U.S.C. § 334 (1964), and sec. 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1964).

The land is located in what was designated as the Klamath Forest Reserve, created by presidential proclamation on May 6, 1905. On June 3, 1947, the Klamath Forest Reserve was merged by presidential proclamation with two other national forests to create the Six Rivers National Forest.

The Bureau decision indicated that the land is also withdrawn from entry by Executive Order dated April 13, 1912, for Powersite Reserve No. 258 under the Pickett Act, as amended, 43 U.S.C. §§ 141-142 (1964), and by Departmental Order of November 12, 1920, under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1964). It was also stated that there were two requirements to be met for an Indian to make an allotment in a national forest: (1) he must be occupying, living on, or have improvements on such land; and (2) the Secretary of Agriculture must have determined that the land in issue is more valuable for agriculture or grazing than for the timber found thereon.

The land office had relied upon a report of the Acting Regional Forester, dated February 14, 1969, which stated: (1) the appellant has been occupying the land and has erected improvements thereon in trespass since about September 1968; (2) the land is more valuable for national forest purposes under sec. 1 of the Act of June 4, 1897, 16 U.S.C. § 475 (1964) and the Multiple-Use Act, 16 U.S.C. §§ 528-531 (1964), than for agricultural settlement or grazing purposes.

The threshold issue is whether the land in question is subject to settlement and disposal under the law invoked in the face of Powersite Reserve No. 258 and Power Project No. 74.

Appellant argues that the Pickett Act and the Executive Order of April 13, 1912, creating Powersite Reserve No. 258 cannot affect lands already reserved for another purpose, since both

^{2/} Presumably the application did not embrace the entire subdivision because IAS 282 (embracing a portion thereof) was not segregated by survey.

advert to "public lands." In essence, his position is that withdrawn lands are not public lands within the purview of the Pickett Act and the executive order creating the powersite reserve.

The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used. ^{3/} Although it is true that often those words mean such land as is subject to sale or disposition under the general public land laws, ^{4/} and not such as is reserved for any purpose, the term has been applied to reserved lands title to which was in the United States and to which no other party had acquired a vested right. Union Pac. Ry. Co. v. Karges et al., 169 F. 459, 461 (1909 Cir. Nebr.); Instructions of January 13, 1904, 32 L.D. 387; see City of Reno v. Southern Pac. Co., 268 F. 751, 761 (9th Cir. 1920). The term "public lands" has also been applied to land already withdrawn for reclamation purposes. Minidoka & S.W.R. Co. v. Weymouth, 113 P. 455 (Idaho, 1911). Indeed, the term has been construed in Hynes v. Grimes Packing Co., 337 U.S. 86 (1949), as even covering coastal waters of Alaska.

In Hynes the court stated:

... [O]ne may not fully comprehend the statute's scope by extracting from it a single phrase, such as "public lands," and getting the phrase's meaning from the dictionary or even from dissimilar statutes. 337 U.S. at 115.

The term "public lands" has been defined as including

... (a) the public domain of the United States, (b) reservations, other than Indian reservations, created from the public domain, (c) lands permanently or temporarily withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, including the mining laws. ... 43 U.S.C. § 1400 (1964).

^{3/} Union Pac. Ry. v. Douglas Co., 31 F. 540, 541 (1887, Cir. Neb.).

^{4/} Union Pacific R.R. v. Harris, 215 U.S. 386, 388 (1910); Newhall v. Sanger, 92 U.S. 761, 763 (1875).

Lands already withdrawn for reclamation purposes were treated as public lands and the Pickett Act was held to afford sufficient authority for a further withdrawal of the lands for classification as to their suitability for a migratory bird refuge. 37 Ops. Atty. Gen. 476 (1934).

The principle evinced in that opinion is applicable here. With respect to the Pickett Act and the Executive Order of April 13, 1912, the term "public lands" is used in the sense that no other party had any claim to such lands. 5/ Cf. Falconer v. Hunt et al., 6 L.D. 512, 516 (1888). The fact that the land was in a national forest on the date of the executive order creating Powersite Reserve No. 258 did not take it out of the category of "public lands" within the ambit of the Pickett Act, or hamper the legal efficacy of the executive order insofar as the land in issue is concerned. There was no compelling reason to exclude national forest lands from the power site withdrawal.

Appellant also urges that the reservation for Power Project No. 74 was ended in 1931 when the Federal Power Commission dismissed the application for a power project of Electro Metals Company. In essence, appellant's position is that when the purpose of a withdrawal has been satisfied, the order of withdrawal no longer has any legal efficacy to bar disposition or appropriation (including settlement) of the land.

Section 24 of the Federal Power Act provides in part that from the date of filing an application for a proposed power project, the lands covered thereby are reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by Congress or the Federal Power Commission. That section also provides a procedure for restoration of the lands from withdrawal and provides further that before any such lands are opened to entry, notice of intention to so open the lands must be given to the Governor of the State. The State, for itself or for a political subdivision thereof, may apply for the lands for a public highway or for a material site. The section further provides that any subsequent grant of the lands "... shall be subject to any rights granted the State pursuant to such application." In the light of the foregoing, it is obvious

5/ Section 1 of the Act of June 4, 1897, 16 U.S.C. § 482 (1964) supports this interpretation. It authorizes, in certain circumstances, the restoration of "... any public lands embraced within the limits of any such forest ..." to the public domain." (Emphasis supplied.)

that the dismissal of the power project application did not operate to terminate the withdrawal. See Sol. Op., M-36078 (May 16, 1951); David W. Harper et al., 74 I.D. 141, 149 (1967). Until such time as the withdrawal is revoked and there has been a restoration to entry, the land affected by the withdrawal is not subject to appropriation or disposal. Weyerhaeuser Timber Company, 62 I.D. 305 (1955); Dewey Mose, A-26489 (November 18, 1952). An application for land withdrawn is nugatory and cannot be given life, even by a restoration of the land during the pendency of an appeal from its rejection. Roy Leonard Wilbur et al., 61 I.D. 157 (1953).

Confederated Bands of Indians v. United States, 112 Ct. Cl. 123, 136 (1948), cited by the appellant, is not to the contrary. In this context, it simply states that the Federal Power Commission must revoke a withdrawal after it has rejected a power project application. It does not discuss what is crucial here - the point at which the land becomes subject to appropriation or disposal under the public land laws. As previously indicated, the power sites mentioned constitute withdrawals of the lands from the operation of the public land laws, including the Indian allotment laws. Appellant's settlement upon a tract of land withdrawn from entry is a trespass and such settlement does not provide a basis for any claim to the land. Capron v. Van Horn, 201 Cal. 486, 258 P. 77, 81 (1927); Donley v. Van Horn, 49 C.A. 383, 193 P. 514 (1920); Rafael D. Tobar, A-27008 (December 13, 1954); Libby, McNeill and Libby v. Harold J. Lewis, A-26268 (November 9, 1951).

The appellant asserts that his "lawful settlement or lack of it has no bearing on his application." In view of our holding that Powersite Reserve No. 258 and Federal Power Project No. 74 preclude the appropriation (including settlement) and disposal of the land under the Indian allotment laws, it is unnecessary to decide whether national forest land, not otherwise withdrawn, is subject to settlement or disposal under such laws. Similarly, we need not decide whether the proper test for classification of the land in issue is a comparison between its agricultural or grazing value and its timber value (as asserted by the appellant) or its value for national forest purposes (as asserted by the decision below). National forest purposes encompass outdoor recreation, range, timber, watershed, and wildlife and fish purposes, as prescribed by the Multiple-Use Act, supra.

In passing, we note that the appellant correctly states that the land in issue is not subject to sec. 7 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(f) (1964), nor to Executive Order 6910 of November 26, 1934.

We know of no provision of law or regulation authorizing payment to the appellant for money expended by him in the pursuit of his application. Consequently, his request therefor is denied.

The record is barren of data concerning the Roselena mining claim conflicting with the application of the appellant. If the mining claim is a valid claim, no useful purpose would be served by favorable consideration of the appellant's application. Cf. Montgomery v. Gerlinger, 146 C.A.2d 650, 304 P.2d 93 (Cal. 1957). Indeed, in those circumstances, there would be no authority to dispose of the land to other than the mining claimant. *Id.*

Even in the absence of a mining claim affecting the land, if the land is mineral in character within the contemplation of the United States mining laws, it would not be subject to disposal under the agricultural public land laws. 30 U.S.C. § 21 (1964). Diamond Coal Co. v. United States, 233 U.S. 236, 240 (1914); Davis v. Weibbold, 139 U.S. 507, 517 (1890); Deffebach v. Hawke, 115 U.S. 392, 404 (1885).

In view of the unavailability of the land for Indian allotment because of Powersite Reserve No. 258 and Power Project No. 74, it would not help appellant at this time for the Department to investigate further the validity of the Roselena mining claim. Cf. J. W. Allen et al., v. E. A. Mohler, A-26931 (November 5, 1954).

The appellant asserts that the Bureau decision denied him due process by basing the affirmation of the land office decision on a July 30, 1969, report of the Forest Service. He contends that he was improperly denied the opportunity to present evidence (presumably at a formal hearing) and to cross-examine, and further asserts that the Bureau's reliance on the report was violative of the Fifth Amendment to the Constitution and the Administrative Procedure Act, particularly 5 U.S.C. §§ 551 (7) and (8), 554(d)(1), 556(d) and 558(c) (Supp. V, 1965-1969).

Appellant misconceives the nature of the proceedings. His Indian allotment application is not a claim to property – he is seeking to have the Secretary of the Interior exercise his discretionary authority to grant him the desired allotment under sec. 31 of the

[*316] Act of June 25, 1910. ^{6/} See Bridgeport Fed. S. & L. Ass'n v. Federal Home Loan Board, 199 F. Supp. 410 (E.D. Pa. 1961), aff'd 307 F.2d 580 (3d Cir. 1962), cert. denied 371 U.S. 950 (1963); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959); cf. United States v. O'Leary et al., 63 I.D. 341 (1956).

O'Leary stands for the proposition that, even in the absence of a statutory provision for a hearing, due process requires compliance with the Administrative Procedure Act where the Department is seeking to invalidate an equitable or legal claim to property. It is noteworthy that § 554(a) of that act recites that it applies ". . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ." Since in the case at bar there is neither a claim to property nor a statutory requirement for a hearing, it seems crystal clear that appellant's references to the Fifth Amendment and the Administrative Procedure Act are inapposite and his contentions in these respects are without merit. See LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 D.M. 13.5; 35 F.R. 12081), the decision of the Bureau of Land Management is affirmed as modified.

Frederick Fishman, Member

We concur.

Anne Poindexter Lewis, Member

Joan B. Thompson, Member.

^{6/} That section reads as follows:

"The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such

fn 6/ (cont.)

national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided." (Emphasis supplied.)

