

Editor's note: Reconsideration granted; decision affirmed -- See Edgar L. Cerday, 25 IBLA 229 (June 21, 1976)

EDGAR L. CERDAY

IBLA 70-74

Decided July 31, 1973

Appeal from decision by Office of Appeals and Hearings, Bureau of Land Management, dismissing appeal for failure to pay \$5 filing fee, A-061555.

Decision below vacated and State Office decision affirmed.

Indian Allotments on Public Domain: Classification -- Indian Allotments on Public Domain: Lands Subject to

An application for an Indian allotment under section 4 of the General Allotment Act of February 8, 1887, as amended, 25 U.S.C. §334 (1970), is properly reduced from 160 to 80 acres when a Bureau of Land Management report of field examination shows the land to be nonirrigable agricultural in character.

Regulations: Applicability -- Regulations: Waiver

Where an applicant has failed to meet the requirements of a regulation, but during the pendency of the application, or an appeal from the rejection thereof, the regulation is amended to eliminate the requirement, the applicant will be permitted to take advantage of the amendment where it is to his benefit to do so and neither the interests of the United States nor those of other parties are adversely affected.

APPEARANCES: Roy Peratrovich, Superintendent, Anchorage Agency, Bureau of Indian Affairs, U.S. Department of the Interior, for appellant.

OPINION BY MRS. LEWIS

Edgar L. Cerday has appealed 1/ to the Secretary of the Interior from a decision by the Office of Appeals and Hearings, Bureau of

1/ As the instant appeal was filed before the issuance of Julius F. Pleasant, 5 IBLA 171 (1972), it will be entertained. The latter case holds that the Superintendent of the Anchorage Agency, BIA, is not authorized to represent an appellant before the Department.

Land Management (BLM), dated July 22, 1969, affirming a decision by the Alaska State Office of BLM, dated March 13, 1969.

The State Office, by decision dated February 3, 1969, notified appellant that his application for an Indian allotment under sec. 4 of the Act of February 8, 1887, 24 Stat. 388; 25 U.S.C. §334, as amended, had been reduced from 160 to 80 acres, 2/ based upon a BLM field examination report finding that the land was nonirrigable agricultural in character. It pointed out that the 1887 Act, as amended, and the regulation thereunder, 43 CFR 2212.0-7(a)(1), now numbered 43 CFR 2530.0-3, limit Indian allotments on nonirrigable agricultural land to a maximum of 80 acres. Appellant was afforded 30 days from receipt of the decision within which to amend his description to embrace not more than 80 acres. He thereafter filed a statement of reasons for appeal dated February 10, 1969, in which he requested that his allotment consist of 160 acres and stated he needed it for grazing purposes.

By decisions dated March 7 and 13, 1969, respectively, the State Office advised appellant he had failed to submit with his statement of reasons for appeal the \$5 filing fee required by the regulation at 43 CFR 2212.0-7(a)(1), and that while it appeared he disagreed with the finding that the land is considered nonirrigable agricultural land, he did not so state and "did not refute the finding that the land was nonirrigable in character." Both decisions considered appellant's statement a protest, dismissed it, and gave the right of appeal to the Director, BLM, and the March 13 decision gave the right to amend the application to include 80 acres.

On April 21, 1969, appellant, represented by the Bureau of Indian Affairs, filed an appeal to the Director and paid the required \$5 filing fee. Here he disagreed that the land was nonirrigable agricultural in character and stated, among other things, that the land is wooded with large trees and would be impracticable to clear for agricultural purposes. On July 22, 1969, the Office of Appeals and Hearings dismissed the appeal on the ground that appellant failed to perfect his appeal of March 6, 1969, by failing to pay the \$5 filing fee.

2/ The Act of February 8, 1887, as amended, 24 Stat. 388, 25 U.S.C. §334, provides for Indian allotments not to exceed 40 acres of irrigable land, 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land.

On September 2, 1969, appellant appealed to the Secretary and paid the required \$5 filing fee. In his statement of reasons he contends the decision of the Office of Appeals and Hearings should be reversed on the ground that the Land Office did not advise appellant of the required fee and did not advise the Anchorage Agency of the Bureau of Indian Affairs of action on the allotment. He also points out that a soil conservation technician from the Bureau of Indian Affairs made a field inspection of the land in question and found the soil to be of a type which without a vegetative cover would be subject to wind and weather erosion. Thus, he argues, the land is suitable only for grazing and the allotment should be 160 acres, which is the permissible amount for grazing land.

As to the failure to pay the filing fee, we note that such fee was eliminated by regulation on June 18, 1970, while the instant case was pending on appeal before the Department. 43 CFR 1842.4, 35 F.R. 10010. In these circumstances, where neither the rights of other parties nor the interests of the United States are adversely affected, we shall permit appellant to take advantage of an amendment to a regulation, which amendment is to his benefit and which was promulgated while his case was pending before the Department. See Henry Offe, 64 I.D. 52 (1957); Forrest Industries, Inc., A-31001 (July 30, 1968); and Norman H. Nielson, A-30417 (November 2, 1965).

Accordingly, we shall entertain the instant appeal and shall consider the substantive issue raised therein.

Appellant's position, in essence, is that he should receive 160 acres because the land is nonirrigable grazing land. ^{3/} Citing a field inspection report from the Bureau of Indian Affairs, no copy of which was submitted in this case, appellant sets forth the following in his statement of reasons:

II. A field inspection of the lands included in Appellant's application was made on September 30, 1969 by a Soil Conservation Technician from the Bureau of Indian Affairs. He found the subject land to be benched, humpy (sic), ridged loess type with very shallow to medium depth fine silty soils with humas (sic) over layer. Without a vegetative cover this soil would be subject to wind and water erosion. He reported that this tract is not suitable for

^{3/} See footnote 2.

cultivation, it is only suitable for grazing. The Appellant does not agree with the decision of February 3, 1969 that the land is nonirrigable agricultural in character and should be reduced to 80 acres. The full 160 acres is needed for the purpose of raising sheep and cattle in order to switch pastures for grazing, and to have ample acreage for animal shelters, food storage space, corrals, barns, and homesite.

The record contains the report of the BLM field examination of the land in issue, dated January 8, 1969, which states:

* * * * *

Location notice for the subject claim was filed July 21, 1964, as a 160 acre homestead. At the time, it appeared to be in conflict with State Selection A-060295, and was not acceptable for recordation. The entryman appealed the decision. However, the State of Alaska entered a letter of non-objection which advised that the subject claim should be excluded from the selection, and the entryman withdrew his appeal.

Subsequently, Mr. Cerday changed his filing to Application for Indian Allotment under the General Allotment Act of February 8, 1887, for 160 acres. He is certified by document dated December 8, 1966 from the Bureau of Indian Affairs, Anadarko Agency, Anadarko, Oklahoma, as being an Indian of the Comanche tribe and thus entitled to take an allotment on the public domain. The regulations that govern such an allotment are set forth in 43 CFR 2212.0-7.

I visited this claim during the first week of August 1967 while examining homesteads in the area. Improvements consisted of a 16 x 24 frame house with a 10' x 24' shed at the rear. Also, there was an area of about 1/2 acre around the house which appeared to have been scooped out with a bulldozer.

The subject claim lies 1 1/2 miles SE of Sutton on the south side of the Matanuska River. A 40-acre parcel is in Section 26 and the remainder is in Section 35 of unsurveyed T19N, R3E, S.M. The land was identified by U.S.G.S. topographic quadrangle Anchorage (C-5).

The terrain is rolling hills moderately wooded in birch and spruce with some aspen. Elevation ranges from 750' at the south boundary to 1,000' on the north.

Another examination, this time a fly-over, was made January 8, 1969, during which I took photographs of the subject claim and the surrounding area. The primary purpose of both examinations was to determine whether the land within the claim is irrigable, nonirrigable agricultural or nonirrigable grazing land as defined in 43 CFR 2212.0-7(a)(2).

The subject claim contains generally the same type of soil and terrain as the nearby fields marked "homestead cultivation" on photos 1 and 2. When I examined these homesteads in August, 1968, the fields of oats and also their vegetable gardens were among the best I have found on any homesteads anywhere in Alaska. It is, therefore, obvious to me that the Cerday claim embraces nonirrigable agricultural lands which are defined in 43 CFR 2212.0-7(a)(2) as, "* * * those upon which agricultural crops can be profitably raised without irrigation".

We have before us, then, only the evidence submitted in the field inspection report by BLM. That report is persuasive. Accordingly, we agree with the conclusion in that report that the land covered in the application before us is nonirrigable agricultural in character and that appellant is entitled to only 80 acres.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Office of Appeals and Hearings is vacated; the finding of the State Office that the land is nonirrigable agricultural in character is affirmed; and the applicant is allowed thirty days from receipt of this decision to file with the BLM State Office at Anchorage, Alaska, an amended description to comply with the law and regulations applicable to Indian allotments. Failure to comply within the time allowed will result in rejection of the application.

Anne Poindexter Lewis, Member

We concur:

Frederick Fishman, Member

Newton Frishberg, Chairman

