

Editor's note: 80 I.D. 595; Appealed -- aff'd, Civ. No. 75-0201 RFP (N.D.Cal. Nov.5, 1975); overruled -- See James N. Hensher, 85 IBLA 343, 92 I.D. 140 (March 22, 1985)

CURTIS D. PETERS

IBLA 73-220

Decided August 29, 1973

Appeal from decision (S 3830) of California State Office, Bureau of Land Management, rejecting application for Indian allotment for national forest land.

Affirmed as modified.

Act of June 25, 1910! ! Indian Allotments on Public Domain:
Generally! ! Indian Allotments on Public Domain: Lands Subject to

Where the Secretary of Agriculture has made a determination pursuant to section 31 of the Act of June 25, 1910, 36 Stat. 863, 25 U.S.C. § 337 (1970), that lands within a national forest are more valuable for agricultural or grazing purposes than for the timber found thereon, the Secretary of the Interior is authorized, in his discretion, to accept an application for an Indian allotment thereon, and to cause the allotment to be made. Even where such a determination by the Secretary of Agriculture has been made, the Secretary of the Interior may reject the allotment on any rational basis, including, without limitation, considerations of public policy. Such considerations may encompass recreational and watershed values and avoidance of erosion.

APPEARANCES: William H. Cozad, Esq., of the California Indian Legal Services, Eureka, California, for appellant.

OPINION BY MR. FISHMAN

Curtis D. Peters has appealed from a decision of the California State Office, Bureau of Land Management, dated November 17, 1972,

which rejected his Indian allotment application embracing lands within the Klamath National Forest, California. This case is a sequel of Curtis D. Peters, 6 IBLA 5 (1972).

Appellant originally filed an application for an Indian allotment for lands within the Klamath National Forest on January 26, 1970. The application was rejected by the Bureau on the basis that neither appellant nor any of his ancestors occupied the land in accordance with 25 U.S.C. §§ 336, 337 (1970). The decision of the Bureau was reversed on appeal on the basis that there was no indication in the record that the Secretary of Agriculture had made a determination, in accordance with the Act of June 25, 1910, that the land in issue was more valuable for agricultural or grazing purposes than for the timber found thereon. Curtis D. Peters, supra.

The case was remanded to the Supervisor of the Klamath National Forest. On August 25, 1972, the Acting Regional Forester, acting on behalf of the Secretary of Agriculture, informed the Bureau of Land Management that a determination had been made in accordance with the decision in Peters, supra, that the land in issue was "more valuable for agricultural or grazing purposes than for the timber found thereon."

Notwithstanding the finding that the land was more valuable for agricultural or grazing purposes rather than for the timber found thereon, the Acting Regional Forester concluded that the land in issue was more valuable for "national forest purposes," as set forth in the Organic Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. § 475 (1970), and the Multiple! Use Sustained! Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. § 528 (1970), than for agricultural or grazing purposes.

The Bureau of Land Management, relying on the several determinations made by the Acting Regional Forester rejected appellant's application. Based upon our review of the record, we are of the opinion that appellant's application should not have been rejected on the basis of the determination made by the Forest Service that the land in issue was more valuable for "national forest purposes" than for agricultural or grazing purposes.

Section 31 of the Act of June 25, 1910, provides:

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 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.)

It is obvious from the language quoted in the Act of June 25, 1910, that the proper legal standard to be applied by the Secretary of Agriculture is whether the land applied for as an Indian allotment is more valuable for agricultural or grazing purposes or for the timber found thereon. Nowhere in the Act of June 25, 1910, is there any reference to a legal standard to be applied which relates to "national forest purposes." References to the Organic Act of June 4, 1897, and the Multiple! Use Sustained! Yield Act of June 12, 1960, are, in our view, inapposite for the determination by the Department of Agriculture. The term "forest purposes" is much broader in scope than the term "timber." Congress used the word "timber" in the Act of June 25, 1910, and refers to "forest purposes" in the Organic Act and the Multiple! Use Sustained! Yield Act. At the time that Congress enacted the 1910 Act, it was, of course, aware of the term "forest purposes" employed in the 1897 Act. Had Congress intended to utilize the same standard, it would have employed the same term. Moreover, the Multiple! Use Sustained! Yield Act of June 12, 1960, does not grant any substantive authority to the Department of Agriculture, but simply reiterates the then existing practices of the Forest Service as having Congressional policy approval. We can only conclude that by using different terms Congress intended the terms to have different meanings.

If the applicant has otherwise met the requirements for an Indian allotment, his application should not be denied on the basis of the Department of Agriculture's determination that the land is more valuable for national forest purposes than for agricultural or grazing purposes. ^{1/} The Secretary of Agriculture, through his delegate, specifically made a determination that the land in issue

^{1/} See Junior Walter Daugherty, 7 IBLA 291 (1972).

is more valuable for agricultural or grazing purposes than for the timber found thereon. This is the standard which appears in the Act of June 25, 1910, and it is the only proper standard to be applied by the Department of Agriculture.

In Peters, supra, the question of appellant's occupancy of the land in issue was not reached. The case was remanded to the Supervisor of the Klamath National Forest to determine, as required by the Act of June 25, 1910, whether the land was more valuable for agricultural or grazing purposes or for the timber found thereon. Since the determination has been made that the land is more valuable for agricultural or grazing purposes, we now reach the issue of the exercise of this Department's discretion.

This Department is not required to grant an Indian allotment within a national forest merely because the statutory criteria have been satisfied. The 1910 Act is crystal clear that, "[t]he Secretary of the Interior is authorized, in his discretion" to make such a grant. The proper exercise of discretionary authority by this Department has received judicial sanction. See Udall v. Tallman, 380 U.S. 1 (1965), rehearing denied, 380 U.S. 989 (1965); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); Pease v. Udall, 332 F.2d 62 (9th Cir. 1964); Thor! Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir. 1963), cert. denied, 373 U.S. 951 (1963); Haley v. Seaton, 281 F.2d 620 (D.C. Cir. 1960).

Approval of an Indian allotment never was and is not now a mere ministerial duty of this Department. Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). The exercise of discretionary authority must be predicated upon rational grounds. United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972). See Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Daniels v. United States, 247 F. Supp. 193 (W.D. Okla. 1965).

The information of record indicates that the land could not support reasonably an Indian family. See Hopkins v. United States, supra. This conclusion stems from the finding that under optimum conditions the lands applied for could support 10 to 13 cows for one year and in the general area the smallest marginal family unit is considered to be 200 cows. Although it is true that Indian allotment applications for lands in national forests are not subject to the classification authority of the Secretary of the Interior, Bobby Lee

Moore, 72 I.D. 505, 513 (1965), the issue of the economic viability 2/ of the allotment sought is a matter to be considered by the Department in exercising its discretion. See John E. Balmer, 71 I.D. 66 (1964).

In Balmer, at p. 67, the Department stated:

Since the intent of the Indian Allotment Act is to provide, in effect, a homestead which will constitute the source of a livelihood for an Indian family * * * it is within the authority of the Secretary of the Interior to determine that 160 acres of grazing land that is incapable of supporting a ranch family is not proper for acquisition in satisfaction of rights acquired by Indians under the Indian Allotment Act. [3/]

We note that appellant's connection with the lands sought is, at best, tangential. The unrebutted facts of record show that appellant was born at Eyese Bar, California, May 24, 1924, and lived there until 1936. Eyese Bar is some 50 miles distant from the lands in issue. Appellant and his family lived on the lands in issue from 1936 to 1944. Their residence was destroyed by fire in 1944 and has not been rebuilt. Appellant and his family moved away from these lands in 1944 and neither he nor they have lived on the lands since that time. It is doubtful that appellant is an Indian "occupying, living on, or having improvements" on the lands in issue. 25 U.S.C. § 337 (1970). Because of the disposition of this case, we need not decide 4/ the settlement issue.

2/ We wish to stress that we are not suggesting that the land sought under the Indian allotment laws must constitute, in and of itself, an economic self-sustaining unit before it will be allotted. However, the Secretary of the Interior may consider the land's economic potential in the totality of the considerations bearing upon the exercise of his discretion.

3/ It may be argued that a finding by the Secretary of Agriculture that the lands are more valuable for agricultural or grazing purposes than for timber is dispositive of the matter. However, 43 CFR 2533.2, relating to Indian allotment applications in national forests, requires that "the land * * * [be] found to be chiefly valuable for agriculture or grazing * * *." (Emphasis added.) Lands which have the public use values enunciated in this decision are more valuable therefor than for the marginal grazing use such lands might support.

4/ There are indications in the record that the lands may be mineral in character. Under 30 U.S.C. § 21 (1970), lands valuable for minerals are not subject to disposal under the land laws, with certain exceptions. In view of the disposition of the appeal, we refrain from addressing ourselves to this question.

In exercising discretion under the public land laws, the Department cannot be blind to considerations of public interest. See Lillian Shermoen, A-28119 (January 15, 1960).

The report of the Acting Regional Forester of August 25, 1972, states in part that:

* * * [T]here are some oak and pine trees growing on the subject property, above the scenic Klamath River Highway, which add some recreational value because of scenic backdrop and aesthetics. Also, the eastern portion has potential recreational value as a small campground to accommodate fishermen, hunters and other recreationists. In addition, the subject property has value for watershed purposes. This is particularly true for the steep brush area. Any attempt to heavily graze it would cause the thin soil mantle to erode and wash into the Klamath river.

In view of the non! economic agricultural or grazing potential of the lands, the remoteness of appellant's connection with such lands, and the public use and erosion potential of the lands if devoted to intensive grazing, the public interest is best served by affirmation of the rejection of the application at bar. This action represents the independent judgment of this Board. We reiterate that the sole function of the Department of Agriculture is prescribed by the law, i.e., to determine whether the lands "are more valuable for agricultural or grazing purposes than for the timber found thereon." See Miller v. United States, Civil No. 70-2328 (N.D. Cal., July 5, 1973).

We point out that an Indian applicant is not deprived of his right to an allotment when his application is rejected. He is merely required to apply for other land suitable therefor. Finch v. United States, supra; John E. Balmer, supra.

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 affirmed as modified.

Frederick Fishman
Member

We concur:

Edward W. Stuebing
Member

Douglas E. Henriques
Member

