

Editor's note: Reconsideration granted; decision set aside in part -- See Robert P. Starritt (On Reconsideration), 26 IBLA 205 (Aug. 16, 1976)

ROBERT P. STARRITT

IBLA 73-98

Decided January 30, 1974

Appeal from a letter-decision by the California State Office, Bureau of Land Management, rejecting appellant's Indian allotment application (S 4384) and granting appellant's application (S 1184) to purchase under the Mining Claims Occupancy Act.

Affirmed.

Act of March 3, 1879--Geological Survey--Withdrawals and Reservations: Power Sites

The authority to classify "public lands," granted to the Director of the Geological Survey by the Act of March 3, 1879, 43 U.S.C. § 31 (1970), permits the classification for power site purposes of lands withdrawn for a national forest.

Indian Allotments on Public Domain: Classification--Withdrawals and Reservations: Power Sites

A petition for classification of land already classified for power site purposes, submitted as part of an Indian allotment application filed under 25 U.S.C. §§ 334, 337 (1970), does not fulfill the requirements for a restoration petition under 43 CFR 2344.3 where the petition is not accompanied by payment of the required charge.

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Lands in a national forest which are withdrawn for power site purposes are not subject to settlement, appropriation or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, 25 U.S.C. §§ 334, 337 (1970).

APPEARANCES: William H. Cozad and Lawrence O. Eitzen, Esqs., of California Indian Legal Services, Eureka, California, for appellant.

OPINION BY MR. GOSS

Robert P. Starritt has appealed from a letter-decision, dated August 4, 1972, issued by the California State Office, Bureau of Land Management, rejecting his application filed pursuant to section 4 of the Act of February 8, 1887, 25 U.S.C. § 334 (1970), and section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1970). The application is for an Indian allotment covering the N 1/2 of lot 6, sec. 31, T. 11 N., R. 6 E., H.M., in the Six Rivers National Forest. ^{1/} Although rejecting the allotment application, the letter-decision granted an accompanying application of Robert P. Starritt and Ramona M. Starritt to purchase a portion of the Fir Grove Placer mining claim pursuant to the Mining Claims Occupancy Act, as amended, 30 U.S.C. §§ 701-709 (1970). The terms involved are purchase of 1.875 acres, more or less, in the N 1/2 of lot 6, sec. 31 for the price of \$25.

The basis for the rejection of appellant's Indian allotment application was that the lands applied for were not available because the N 1/2 of lot 6, sec. 31, except for two acres, was withdrawn from entry on September 19, 1925, in Power Site Classification No. 116, California No. 35, Klamath River Basin, under the Act of March 3, 1879, as amended, 43 U.S.C. § 31 (1970). The two acres were restored from the power site classification by Public Land Order 3113, 28 F.R. 6875, and they now constitute the State Highway Maintenance Station Special-Use Permit area.

Appellant does not state how the State Office decision on the two acres is in error. We find the allotment is properly denied as to that portion.

Appellant argues on appeal that, for the remaining land, the Department did not follow the proper procedure in acting upon the allotment application for national forest land. He contends that the Secretary of Agriculture must first determine whether the land is more valuable for agriculture and grazing than for the timber found thereon. While such a determination would be a prerequisite

^{1/} The N 1/2 of lot 6, sec. 31, was originally part of the Klamath Forest Reserve, created by Presidential Proclamation on May 6, 1905. On June 3, 1947, by Presidential Proclamation such lands were transferred to the Six Rivers National Forest.

to the granting of an allotment, the initial determination in the present case is whether--in the face of the power site classification--the land is subject to disposal under the Act of June 25, 1910, supra. Cf. The Dredge Corporation, 64 I.D. 368 (1957), 65 I.D. 336 (1958), judgment for defendants aff'd sub nom. The Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966). 2/

Appellant asserts that the February 19, 1925, power classification is of no effect, because as of the date thereof the lands in question were already withdrawn as part of the Klamath Forest Reserve and not subject to section 24 of the Federal Power Act of June 10, 1920, as amended, 16 U.S.C. § 818 (1970). 3/ Restating appellant's argument, he is contending that under the Act of March 3, 1879, supra, the Director of the Geological Survey had no authority to classify the lands in question as a power site because they were not "public lands," 4/ having been previously included in a national forest.

Under the doctrine stated in Donald E. Miller, 2 IBLA 309, 312 (1971), 5/ it is clear that withdrawn lands have been, in the proper

2/ In Miller v. United States, Civil No. 70-2328 (N.D. Cal. July 5, 1973), remanding plaintiff's application in Donald E. Miller, 2 IBLA 309 (1971), the interlocutory decision states that a ruling on whether a withdrawal precludes an allotment should be deferred until the Secretary of Agriculture has made his determination of whether the land is more valuable for agriculture or grazing than for the timber thereon. It has been the consistent view of the Department of the Interior, however, that applications filed for public land, at a time when such land is withdrawn from all forms of entry, unaccompanied by evidence of any rights predating such withdrawal, must be rejected. See David W. Harper, 74 I.D. 141 (1967); Weyerhaeuser Timber Company, 62 I.D. 305 (1955).

3/ Appellant states that according to the decision below the power site classification was based on the Act of March 3, 1879. He believes that none of the acts of that date are relevant herein and that section 24 of the Federal Power Act is controlling. He requested from the State Office a citation for the Act of March 3, 1879. A letter from the State Office to appellant's counsel, dated September 6, 1972, provided the citation of 20 Stat. 394. The codification of that statute appears in 43 U.S.C. § 31 (1970). The statute provides the authority for a power site classification in that it vests, in the Director of the Geological Survey, the power to classify the "public lands".

Section 24 of the Federal Power Act was not involved in the withdrawal of the subject lands.

4/ As of June 11, 1973, the Secretary redesignated "public lands" as "natural resource lands."

5/ Plaintiff's application remanded on another ground in Miller v. United States, supra, note 2.

circumstances, considered as "public lands."

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. Although it is true that often those words mean 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 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). (Footnotes omitted.)

In the present case, the national forest lands involved were "public lands" for the purposes of the power site classification under the Act of March 3, 1879, and the withdrawal was effective.

Appellant further contends that there is no longer a proposed power project in existence, and that section 24 of the Federal Power Act authorizes the restoration of withdrawn lands to an available status. Under section 24, however, any request for reopening of such withdrawn lands must be approved by the Federal Power Commission. The Commission has not so approved. 6/ Until the land is

6/ As to appellant's Mining Claims Occupancy Act application, the consent of the Commission, under such terms and conditions as the Commission deemed necessary, was required under 30 U.S.C. § 703 (1970). The Commission, in its letter to the State Director dated June 16, 1972, offered no objection to conveyance of the title proposed to be granted, providing that the following stipulation be included in the patent:

"The United States, its permittees, lessees, or licensees, shall not be responsible, or held liable, or incur any liability for the damage, destruction or loss of any land, crops, facility installed or erected, income or other property or investments resulting from the use of the land or portions thereof for hydroelectric development at any time where such hydroelectric development is or has been made by and under the authority of the United States. Furthermore, in the event the lands are so required, any structures placed thereon found to interfere with hydroelectric development

reopened, the withdrawal remains effective to preclude disposal of the land. Robert M. Ford, 4 IBLA 321, 322 (1972). Appellant's petition does not fulfill the requirements for a restoration petition. The controlling regulation, 43 CFR 2344.3, provides:

§ 2344.3 Petitions for restoration.

(a) Petitions for restoration of lands withdrawn or classified for power purposes, under the provisions of section 24 of the Federal Power Act, must be filed, in duplicate, in the proper land office (see § 1821.2-1 of this chapter). No particular form of petition is required, but it must be typewritten or in legible handwriting. Each petition must be accompanied by a service charge of \$10 which is not returnable.

(b) Favorable action upon a petition for restoration will not give the petitioner any preference right or right to preferential treatment if or when the lands are finally restored. (Emphasis added.)

The record does not indicate that appellant has paid the required charge.

Appellant contends that his father located the Fir Grove Placer mining claim on the subject lands in 1913 and that the subsequent classification "was made too late to bar appellant's rights." This argument is not discussed as it has been mooted by appellant's filing of a relinquishment of the mining claim.

Finally, appellant maintains that an Indian allotment is not an entry, location, or disposal and, therefore, is not barred by the power site withdrawal. Such is not the law; lands within a national forest which are withdrawn for power site purposes are

fn.6 (Cont.)

shall be removed or relocated as necessary to eliminate such interference at no cost to the United States, its permittees, lessees, or licensees."

The reason for inclusion of such condition is set forth in the Federal Power Commission letter:

"The Geological Survey reports that the U.S. Bureau of Reclamation and the State of California Water Resources Control Board have located several potential dam sites (Red Cap Gulch, Slate Creek, and Humboldt) in this reach of the Klamath River, development of which would inundate the subject lands. However, such development is not imminent.

"No plan is known to be under active consideration that proposes use of the lands for hydroelectric development purposes."

not subject to settlement, appropriation, or disposition under the Indian allotment laws. Donald E. Miller, supra; cf. The Dredge Corporation v. Penny, supra. The application must, therefore, be rejected and cannot be held pending possible future availability of the land. 43 CFR 2091.1(a).

By letter dated September 6, 1972, appellant's counsel was advised by the State Office that no final action would be taken on the offer (S 1184) made to appellant under the Mining Claims Occupancy Act until a final decision was reached on the present appeal. Appellant, therefore, is now granted 30 days after notice from the State Office in which to forward \$25 to the State Office as payment for the lands offered under the Mining Claims Occupancy Act.

Accordingly, 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.

Joseph W. Goss, Member

We concur:

Frederick Fishman, Member

Martin Ritvo, Member

