

EVERETT E. WILDER

IBLA 74-73

Decided May 13, 1974

Appeal from the July 19, 1973, decision of the California State Office, Bureau of Land Management, which rejected an application (S 4769), for an Indian allotment on national forest land.

Affirmed.

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

An application for an Indian allotment within a national forest is properly rejected where the Department of Agriculture has determined that the land is more valuable for the timber found thereon than for agricultural or grazing purposes.

Act of June 25, 1910--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Lands in a national forest which are withdrawn for power site purposes are not subject to settlement, appropriation, or disposition under the Indian allotment laws, except where approval has been granted pursuant to Sec. 24 of the Federal Power Act.

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

The Secretary of the Interior, in his discretion, may reject an application for an Indian allotment due to considerations of public policy. Such considerations may include recreation, ecology, and conservation.

Words and Phrases

The meaning and effect of the term "public lands" should be determined from the context in which that term is used. The term "public lands" often means land subject to sale or disposition under the general public land laws and, consequently, excludes lands reserved from such disposition; yet within the context of the Pickett Act, the term "public lands" includes lands reserved from sale or disposition which have not been previously appropriated.

APPEARANCES: Lawrence O. Eitzen, Esq., Eureka, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Everett E. Wilder has appealed from the July 19, 1973, decision of the California State Office, Bureau of Land Management (BLM), which rejected his application, S 4769, for an Indian allotment in the Six Rivers National Forest, Humboldt County, California. Appellant applied for an allotment of 160 acres of land located in sections 1, 2, and 11, T. 10 N., R. 5 E., H.M. The application was filed pursuant to section 4 of the General Allotment Act, 25 U.S.C. § 334 (1970), section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1970), and departmental regulations contained in 43 CFR Subpart 2533.

The pertinent statute in this case, 25 U.S.C. § 337 (1970), provides that:

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 the 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.

In accordance with this statute, the BLM, after receiving appellant's application on September 16, 1971, referred it to the Forest Service for a determination of whether the land applied for is more valuable for agricultural or grazing purposes than for the timber found thereon. The Forest Service, by letter decision of June 18, 1973, found that a portion of the land was more valuable for the timber found thereon than for agricultural or grazing purposes. As to the remainder of the land, the Forest Service found that there was no timber thereon, but found it unnecessary to determine whether that land was valuable for agricultural or grazing purposes, since the alternative value, recreation, presented a sufficient basis for the Secretary of the Interior to reject the application. The Forest Service decision included several other bases for rejecting the application, such as lack of occupancy and the fact that the land was withdrawn from entry by power site withdrawals. The decision concluded that:

In summary, considering the applied for land as a single unit, the land has greater value for the timber found hereon or for other National Forest purposes than it does for agriculture or grazing; and, therefore, it is not suited or subject to Indian allotment.

The BLM decision of July 19, 1973, which rejected appellant's application, did so by adopting the Forest Service decision on several grounds. Appellant's most strenuous attack is on the determination by the Forest Service that the land is more valuable for the timber found thereon than for agricultural or grazing purposes. For the sake of convenience the Forest Service divided the 160 acres applied for into three areas:

1. About 60.45 acres of gravel bar, much of which is below the flood level, sparsely vegetated with willow. This entire area was flooded during the December 1964 flood. This area is considered to be on a flood plain.
2. About 99.05 acres of heavily wooded hillside hardwoods and Douglas fir which has a substantial value in the present lumber market. The slopes average 60 to 70 percent. Much of the land is unstable and subject to land failures.
3. About 0.50 acre of level meadow land suitable for cultivation.

The Forest Service found that the flood plain (1) had minimal agricultural value; that the heavily wooded area (2) was clearly more valuable for the timber found thereon than for agricultural or grazing purposes; and that the meadow land (3) had minimal agricultural value. In addition, the Forest Service found that areas (1) and (3) also had value as a recreational area and as a scenic backdrop, and for purposes of watershed management. Therefore, considering the lands applied for as a single unit, the Forest Service concluded that the land was more valuable for either the timber found thereon or for National Forest purposes than it is for agricultural or grazing purposes.

The correct standard to be applied in determining suitability of National Forest land for Indian allotments is specified in the statute, viz. whether the land is more valuable for agricultural or grazing purposes than for the timber found thereon. 43 U.S.C. § 337 (1970). See Miller v. United States, Civil No. 70-2328 (N.D. Cal., filed July 5, 1973); Curtis D. Peters, 13 IBLA 4, 80 I.D. 595 (1973). That determination is to be made by the Department of Agriculture, not by the Department of the Interior. 43 U.S.C. § 337 (1970); Curtis D. Peters, supra; Junior Walter Daugherty, 7 IBLA 291 (1972). The Department of the Interior is constrained to accept the finding of the Department of Agriculture. Curtis D. Peters, supra; Donald E. Miller (on remand), 15 IBLA 95, 81 I.D. 111 (1974). If, however, the basis for the Forest Service decision is unclear or incorrect, the Interior Department may request a clarification of the decision from the Forest Service. Miller v. United States, supra.

The question that arises is whether the Forest Service applied the correct statutory standard in reaching its decision. In Miller v. United States, supra, the District Court for the Northern District of California determined that this Board could not accept a determination by the Forest Service based on an incorrect standard. The Court reviewed our decision styled Donald E. Miller, 2 IBLA 309 (1971), which had rejected an Indian allotment on land withdrawn from entry. Though our opinion in that case did not reach the question of whether the Forest Service had applied the correct statutory standard, the District Court found that the Forest Service had not, and ordered that we refer the matter back to the Forest Service before we proceeded to consider the effect of the withdrawal of the lands from entry. The standard that the Forest Service had applied in that case was whether the land was more valuable for agricultural or grazing purposes than for National Forest purposes. The District Court found that "National Forest purposes" was much too broad and that the correct comparison of values is agricultural or grazing value vis-a-vis the value of the "timber found thereon."

Since the application for the lands was submitted for the lands as a single unit, the Forest Service made its determination on that basis. It found that areas (1) and (3), containing approximately 60 acres or three-eighths of the total amount applied for, had some minimal agricultural value. With respect to area (2), containing approximately 100 acres or five-eighths of the total amount applied for, it found that there was no agricultural value but that there was substantial timber value. Therefore, we believe that it is clear that the Forest Service applied the correct statutory standard, in spite of the fact that irrelevant criteria were also considered.

Appellant has attacked the factual basis the Forest Service relied on in reaching its conclusions. For instance, area (1) containing 60.45 acres is a gravel bar which appellant asserts is agriculturally valuable, since 1) it is common knowledge that land on river bottoms is valuable agricultural land, and 2) the appellant has actually tilled some 20 acres of this land. We note, however, that the Forest Service did not find that the land has no agricultural value; it only found that the land had some minimal value for agriculture which was lower than the value of the timber on the upland portion of the claim. Therefore, we cannot find that the appellant has shown that the Forest Service determination is so contrary to the facts that we should remand it to them for additional information, and we are therefore constrained to accept that determination.

Even if we were to treat the three areas in the Forest Service decision to be severable, we would hold that the application as to those areas should be rejected since it clearly appears that those areas are more valuable for recreation, environmental needs and conservation than for agricultural purposes. It is within the discretion of the Secretary of the Interior to reject an application for Indian allotment on those grounds. Donald E. Miller, supra; Curtis D. Peters, supra.

Appellant argues that the Forest Service determination that he has not occupied the land is incorrect. The Forest Service based that conclusion on the fact the land applied for is within an unpatented mining claim owned by Everett E. Wilder and Benjamin H. Wilder. The Forest Service reasoning is apparently based on the thesis that assertion of title to land pursuant to the general mining laws, 30 U.S.C. §§ 22 et seq. (1970), precludes the assertion of title to the same land based on settlement or occupancy under the General Allotment Act, 25 U.S.C. §§ 334, 337 (1970).

We note that in a tangentially related case, Everett E. Wilder, 14 IBLA 406 (1974), this same appellant asserted that his interest in the same mining claim should bar the issuance of patent under the General Allotment Act, supra, to his sister, Gertrude Wilder Mollier. 1/ In that case we held that the existence of the unpatented mining claim would be a bar to the issuance of patent to another person if the appellants therein could show both a justiciable basis for asserting title to that portion of the claim and that the claim was valid in all respects, including discovery.

Appellant also attacks the determination by the Forest Service that the land is withdrawn from entry pursuant to Power Project No. 62, dated October 25, 1920, and Power Site Classification No. 116, dated September 25, 1925. Appellant contends that the withdrawal for Power Project No. 62 has been rendered nugatory by the Federal Power Commission's dismissal of the application for a hydroelectric plant. With respect to Power Site classification No. 116, appellant argues that the land was never withdrawn since land within a National Forest is not public land within the meaning of the Pickett Act, as amended, 43 U.S.C. §§ 141-142 (1970). 2/

We have dealt with these precise contentions at length in other cases and found both arguments to be unpersuasive. With respect to the first argument, we held in Donald E. Miller, 2 IBLA 309, 313 (1970), that:

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.

1/ Gertrude Wilder Mollier filed her application for an allotment several years prior to the time appellant filed his. By regulation, 43 CFR 2531.3, since appellant's application is later, his application cannot bar the issuance of patent to Mrs. Mollier. It is not clear whether appellant intended to include Gertrude Wilder Mollier's land in his application; a map attached by appellant indicates that he did not intend to include it, while the description in the application indicates that he did so intend. As we have said, however, prior in time, certis parabis, is prior in right.

2/ Notwithstanding appellant's argument that this land is not withdrawn, he requests assistance in removing the withdrawals and restoring the land to entry. It will be necessary for appellant to submit a petition for such action in the appropriate office in accordance with the pertinent regulation, 43 CFR 2344.3. See Robert P. Starritt, infra.

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 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 (1969). Until such time as the withdrawal is revoked and there has been 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).

With respect to the second argument we held in Donald E. Miller, supra, that National Forest lands were public lands within the meaning of the Pickett Act, supra, even though withdrawn for National Forest purposes.

* * * 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. * * * 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). 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).

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. * * * 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.

Id. at 312-313. (Footnotes omitted.)

The withdrawal is therefore effective to preclude patenting of this claim unless restoration of the lands is granted pursuant to Section 24 of the Federal Power Act, supra. Robert P. Starritt, 14 IBLA 270 (1974). However, where the Secretary of the Interior has determined in his discretion that the land is not available under the general allotment laws, no relief from the withdrawal will be sought or recommended.

Appellant has requested a hearing to present further evidence. In light of our conclusions of the effect of applicable law, we find that such a hearing would not serve any useful purpose. Appellant has also requested that he be allowed to examine files of the BLM and Forest Service in connection with a prior Indian allotment application. Such requests should be directed to those agencies.

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.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge

