

LORINDA L. HULSMAN

IBLA 76-656

Decided September 27, 1977

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting appellant's Indian allotment application (CA 1756) in part.

Set aside and remanded in part.

1. Indian Allotments on Public Domain: Generally--Indian Allotments on Public Domain: Classification

With respect to Indian allotments on national forest lands, the Secretary of Agriculture or his delegate is required by statute to determine whether the land is more valuable for agriculture or grazing purposes than for the timber thereon. Once the conclusion that the land is more valuable for agriculture or grazing is reached, it is the function of the Secretary of the Interior and/or his delegate to adjudicate the application including determination of the legal sufficiency of applicant's use and occupancy.

2. Indian Allotments on Public Domain: Generally

The granting of an Indian allotment in a national forest, assuming that the statutory criteria have been met, is within the discretion of the Secretary of the Interior and is not a mere ministerial duty.

3. Indian Allotments on Public Domain: Generally

Viability of an Indian allotment from an economic standpoint is a legitimate consideration in the exercise of the Secretary's discretionary authority over allotments. However, land in an Indian allotment application may be considered together with adjacent land owned by the applicant in determining viability. Past history of use of the land to provide a livelihood is a relevant factor.

APPEARANCES: Lorinda L. Hulsman, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This appeal is brought from a decision of the California State Office, Bureau of Land Management (BLM), rejecting appellant's Indian allotment application (CA 1756) in part. ^{1/} The application described certain land located in the Lassen National Forest. The decision below was based on a finding that the land for which the application was made has not been occupied, lived on, or improved by appellant or her forebears. The decision further noted that rejection was also compelled by the fact that the land is a noneconomic unit incapable of supporting a family of four. The public values of the land, the BLM further noted, also dictate rejection of the application in the public interest.

Appellant asserts in her statement of reasons for appeal that she and her forebears have in fact improved the land by construction of a fence on the land in 1927 which has been maintained since that time. Further, appellant alleges that she has occupied the land since the age of 18 by using it in connection with land already patented to her and with leased grazing land. Appellant also contends that the land does constitute an economic unit when taken together with the adjacent acreage which has already been patented to her. Finally, appellant implies that the land cannot have public value because the land has been leased to her by the Forest Service for a number of years.

^{1/} The subject application was filed under the General Allotment Act, 25 U.S.C. § 334 (1970). Since national forest land is involved, the application was treated as one under 25 U.S.C. § 337 (1970) regarding allotments within national forests.

This appeal raises several issues. First, what is the nature of the occupancy or improvements required by statute, 25 U.S.C. § 337 (1970), as prerequisites of an Indian allotment in a national forest? Secondly, this application raises the question of whether the land embraced in an Indian allotment application has to comprise an economic unit in its own right or whether it may be considered together with contiguous land already allotted to the applicant. A third issue presented is whether a sufficient basis has been established below for the determination that the land has public uses and that, hence, rejection of the Indian allotment application in the exercise of the Secretary's discretion is required in the public interest.

Appellant filed an application for Indian allotment describing the following lands: T. 27 N., R. 2 E., Mount Diablo Mer., California; section 22: N 1/2 NE 1/4 NE 1/4, SW 1/4 NE 1/4 NE 1/4, NW 1/4 SE 1/4 NE 1/4, E 1/2 NW 1/4 NE 1/4, NE 1/4 SW 1/4 NE 1/4; section 23: N 1/2 NE 1/4 SW 1/4 NW 1/4. The application states that the appellant occupies the land and, with respect to improvements, asserts that the area has been fenced for many years.

The record discloses that all of the land described in section 22 was patented and subsequently reconveyed to the United States in 1955 as part of a forest exchange. The land described in section 23, on the other hand, is public domain withdrawn for national forest purposes. All of the land embraced in the application is located within the Lassen National Forest.

The decision below implied that a patent would be issued for the land sought in section 23, but rejected the application as to all of the land described in section 22 for the reasons stated above. Lorinda Hulsman is appealing that part of the decision rejecting her application for approximately 70 acres in section 22.

This is the second application by the appellant for an allotment within the Lassen National Forest. Her prior application (S-4942) 2/ for 160 acres in sections 22 and 23, T. 27 N., R. 2 E., Mount Diablo Mer., led to the granting of a trust patent to appellant for 85 acres and the rejection of the application for the remaining 75 acres. The land described in the present application is contiguous to the land previously patented to appellant, but was not involved in the prior application.

The granting of Indian allotments on national forest lands is governed by statute:

2/ Appellant's prior application was also the subject of an appeal decided by this Board. Lorinda L. Hulsman, 13 IBLA 178 (1973).

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 * * *. 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.

25 U.S.C. § 337 (1970).

The decision of the BLM concludes, apparently based on a conclusion drawn by a Forest Service report, that appellant has never "occupied, lived on, or placed improvements" on the land. The Forest Service report in the file acknowledges appellant's use of the land for grazing purposes and the existence of a fence on the land, but draws the conclusion that this does not qualify because 1) appellant grazed the land under a grazing permit subsequent to the land exchange and 2) the fence was erected while the land was in private ownership prior to the exchange. No authority is cited for this conclusion.

[1] The determination which the Secretary of Agriculture (or his delegate) is required by statute, 25 U.S.C. § 337 (1970), to make is whether the national forest lands applied for are more valuable for "agricultural or grazing purposes than for the timber found thereon." Curtis D. Peters, 13 IBLA 4, 5-7, 80 I.D. 595, 596 (1973), aff'd, Peters v. Morton, Civ. No. 75-0201 (N.D. Calif., November 5, 1975). The drawing of this conclusion regarding the relative value of the land for different purposes is the duty of the Secretary of Agriculture under the statute and the Secretary of the Interior can only act on the basis of the finding of the Secretary of Agriculture. Junior Walter Daugherty, 7 IBLA 291, 296 (1972). The Forest Service has determined that the land in appellant's application is more valuable for grazing than timber.

However, it is the function of the Secretary of the Interior under the statute, and not of the Forest Service, to adjudicate Indian allotment applications once it has been determined that the statutory prerequisite (lands more valuable for agriculture or grazing than for the timber found thereon) exists. 25 U.S.C. § 337 (1970); see Curtis D. Peters, supra. Drawing conclusions with respect to the legal effect under the statute of an applicant's use

and occupancy of the land is a part of this adjudicative process. See Lorinda L. Hulsman, 13 IBLA 178, 181 (1973). It may be true that the Forest Service plays an important role in developing the facts upon which the BLM relies in adjudicating an application for Indian allotment in a national forest. However, once a determination has been made by the Forest Service (as the delegate of the Secretary of Agriculture) that the land is more valuable for agriculture or grazing than the timber thereon, the adjudication of the application must be carried out by the BLM.

We make no ruling on the sufficiency of appellant's alleged occupancy and improvement of the land. Although the legal sufficiency of appellant's occupancy pursuant to a grazing permit since the time that the land came under federal jurisdiction in a forest exchange and the legal significance of improvements constructed prior to federal ownership is unclear, this must be ruled upon by the BLM in light of all the facts. It is noted, however, that use of the land for grazing purposes has in the past been recognized as a form of use and occupancy in connection with Indian allotments. See Clark v. Benally, 51 L.D. 91 (1925). It must be recognized that appellant apparently has a home on the adjacent acreage previously patented to her. On the face of the matter, a fence would appear to qualify as an improvement where the land is used for grazing purposes. Therefore, we deem it appropriate to remand the case to allow the BLM to ascertain whether appellant's alleged occupancy is such as to qualify her for an Indian allotment.

[2, 3] The granting of an Indian allotment in a national forest, assuming that the statutory criteria have been met, is committed by statute to the discretion of the Secretary of the Interior and is not a mere ministerial duty. 25 U.S.C. § 337 (1970); Curtis D. Peters, supra. The economic viability of the allotment sought is a legitimate consideration in the exercise of that discretion. Curtis D. Peters, supra; see Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13 (10th Cir. 1967). The BLM concluded on the basis of the Forest Service analysis that the land for which the application was rejected was not a viable unit for grazing.

However, appellant alleges that she has used the subject land for grazing purposes for many years together with the land previously patented to her. A distinction has been noted between the rejection of an Indian allotment on the basis of the poor quality of the land and the resultant inability of a family to support itself on the land where no prior occupancy has occurred and, on the other hand, a rejection for the same reason where there has been a good faith settlement and an attempt is being made to eke out an existence from the land. Finch v. United States, supra at 16. Where a qualified

Indian allotment applicant has demonstrated that particular lands can provide a home and livelihood by actually occupying and successfully using the lands, it would be arbitrary for the Department to refuse an allotment on the ground that the land is too poor in quality. Hopkins v. United States, *supra* at 469, citing Clark v. Benally, *supra*. Since appellant allegedly uses the subject land in conjunction with adjacent land previously allotted to her, there is no obvious reason why the parcels should not be considered in the aggregate to determine the viability of the whole unit. Cf. Hopkins v. United States, *supra* at 468; Curtis D. Peter, *supra* at 598 n. 2. Therefore, we consider it appropriate to remand the case for reconsideration of the viability of the allotment.

Considerations of public interest may guide the exercise of the Secretary's discretionary authority over Indian allotments. See Curtis D. Peters, *supra*. In this regard, we find appellant's argument that the past practice of allowing her to use the land under a lease or permit precludes a finding that the land has values for public use to be inconclusive evidence that grazing is the paramount value. A lease or permit, as opposed to fee simple title, confers limited and non-exclusive rights in the land involved and is not inconsistent with retention of fee title in the public interest. However, the decision below fails to cite the public values found by the BLM to justify rejection in the public interest. It appears that the BLM merely accepted the conclusion to this effect reached in the Forest Service report. It is therefore appropriate to remand the case to allow an independent evaluation of the public interest by the BLM.

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 set aside insofar as it rejects appellant's allotment application for the 70 acres in section 22 and the case is remanded for further action consistent with this opinion.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

