

ROBERT DALE MARSTON ET AL.

IBLA 80-892, etc.

Decided November 20, 1980

Appeals from decisions of the Nevada State Office, Bureau of Land Management, rejecting applications for Indian allotment. N 26336, etc.

Affirmed.

1. Applications and Entries: Generally -- Indian Allotments on Public Domain: Generally

Applications for Indian allotment on the public domain pursuant to sec. 4, General Allotment Act, as amended, 25 U.S.C. § 334 (1976), which are unaccompanied by the certificate of eligibility required by 43 CFR 2531.1 are properly rejected.

2. Applications and Entries: Generally -- Indian Allotments on Public Domain: Generally

Applications for Indian allotment on the public domain filed pursuant to sec. 4 of the General Allotment Act, as amended, 25 U.S.C. § 334 (1976), which are not accompanied by the petition for classification required by 43 CFR 2531.2 are properly rejected.

3. Indian Allotments on Public Domain: Generally

No rights of Indians are violated because public lands have been withdrawn from settlement and must be classified pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 (1976), before public

lands can be allotted to an Indian under sec. 4 of the General Allotment Act of 1887, 25 U.S.C. § 334 (1976).

4. Patents of Public Land: Effect

The effect of the issuance of a legal patent is to transfer legal title from the United States and to remove the land from jurisdiction of the Department of the Interior. Applications for land, title to which has passed from the United States by issuance of a legal patent, must be rejected.

5. Classification and Multiple Use Act of 1964 -- Indian Allotments on Public Domain: Lands Subject to -- Public Records -- Segregation

Publication in the Federal Register of a classification for multiple use management pursuant to 43 CFR 2461.2 will segregate the affected land to the extent indicated in the notice, and applications for such land must be rejected.

APPEARANCES: Each appellant named in the Appendix, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The 23 persons listed in the Appendix hereto have appealed from decisions of the Nevada State Office, Bureau of Land Management (BLM), rejecting the applications each had filed for an Indian allotment on public lands in Clark County, Nevada, pursuant to section 4, Act of February 8, 1987, as amended, 25 U.S.C. § 334 (1976).

Identical decisions were issued by BLM in each case, except N 26528 and N 26531, stating:

The land requested in your Indian allotment application * * * lies within an area that has been classified for retention in federal ownership. The Notice of Classification was published in the Federal Register (32 FR 9995, July 7, 1967), thereby segregating the land from appropriation under the agricultural land laws, including the Act of February 8, 1887. Said classification is duly noted on the official Land Office records. Therefore, the application is hereby rejected.

In the two excepted cases, the BLM decision stated: "The land described in Indian allotment application * * * has been transferred from federal ownership and is not subject to entry under the public land laws. Therefore, application * * * is hereby rejected."

The 23 appeals are similar and read generally as follows:

APPEAL

Departmental Regulations, Classifications, Public Laws, Agricultural Land Laws, etc. Does not mean appropriated as federal law states. Stats. 334-336-348-349 etc. Therefore they can not supersede the allotment claims of Indians.

See Title 25 U.S. Codes 334-336-348 etc.

See 43 C.F.R. 2212 -- See Choats V. Trapp 224 U.S. 413 (1912)

See U.S.C.A. Const. Amend. 5

I read these laws to say, any surveyed or unsurveyed land of the United States not otherwise appropriated (By Congress)

I don't find classifications, Regulations, Segregations and etc.

Because of the similarity of issues and the obvious relationship among these appellants, the Board, sua sponte, has consolidated the appeals for consideration.

Appellants appear to assert, in effect, that the certificate of eligibility and the petition for classification are unnecessary and that allotment rights should accrue to them by virtue of their asserted Indian descent and their United States citizenship. Their specific contention is that the agricultural land laws cannot supersede the allotment claims of Indians.

Regulation 43 CFR 2531.1, promulgated pursuant to the Allotment Act, defines the qualifications of applicants:

§ 2531.1 Qualifications of applicants.

(a) General. An applicant for allotment under the fourth section of the act of February 8, 1887, as amended, is required to show that he is a recognized member of an

Indian tribe or is entitled to be so recognized. Such qualifications may be shown by the laws and usages of the tribe. The mere fact, however, that an Indian is a descendant of one whose name was at one time borne upon the rolls and who was recognized as a member of the tribe does not of itself make such Indian a member of the tribe. The possession of Indian blood, not accompanied by tribal affiliation or relationship, does not entitle a person to an allotment on the public domain. Tribal membership, even though once existing and recognized, may be abandoned in respect to the benefits of the fourth section.

(b) Certificate that applicant is Indian and eligible for allotment. Any person desiring to file application for an allotment of land on the public domain under this act must first obtain from the Commissioner of Indian Affairs a certificate showing that he or she is an Indian and eligible for such allotment, which certificate must be attached to the allotment application. Application for the certificate must be made on the proper form, and must contain information as to the applicant's identity, such as thumb print, age, sex, height, approximate weight, married or single, name of the Indian tribe in which membership is claimed, etc., sufficient to establish his or her identity with that of the applicant for allotment. Each certificate must bear a serial number, record thereof to be kept in the Indian Office. The required forms may be obtained as stated in § 2531.2(b).

[1] None of these appellants submitted the required certificate. Instead, in the application blank space specifically requesting the number of the certificate issued by the Bureau of Indian Affairs (BIA), appellants each entered "8 U.S.C. § 1401, Const. Amend. 5." This response does not comport with the requirements. Neither the cited statute, which refers to United States citizenship, nor the United States Constitution is in issue here. The applications could properly have been rejected for failure to submit the required certification by BIA.

[2] Applicants referred again to 8 U.S.C. § 1401, I.R.A. Act of 1934 (Indian Reorganization Act of 1934), Report of National Resource Board 1935-1936, Findings of Public Law 53-980 (P.L. 93-580, American Indian Policy Review Commission), in response to the application question asking for a petition for classification. Such a petition is mandatory where lands have not yet been opened for disposition by Indian allotment. As 43 CFR 2531.2 provides:

§ 2531.2 Petition and applications.

(a) Any person desiring to receive an Indian allotment (other than those seeking allotments in national forests, for which see Subpart 2533 of this part) must file

with the authorized officer, an application, together with a petition on forms approved by the Director, properly executed, together with a certificate from the authorized officer of the Bureau of Indian Affairs that the person is Indian and eligible for allotment, as specified in § 2531.1(b). However, if the lands described in the application have been already classified and opened for disposition under the provisions of this part, no petition is required. The documents must be filed in accordance with the provisions of § 1821.2 of this chapter.

The petition and the statement attached to the application for certificate must be signed by the applicant.

(b) Blank forms for petitions and applications may be had from any office of the Bureau of Indian Affairs, or from land offices of the Bureau of Land Management.

On each application form, except N 26354 and N 26355, the applicant checked "no" in response to the question whether the land was occupied by the applicant and whether there were improvements on the land. Application N 26354 stated there was a mobile trailer on the land; N 26355 gave no explanation as to improvements. In response to the question: "Do you or the minor child claim a valid bona fide settlement," applications N 26353, N 26354, N 26355, N 26375, and N 26376 checked "yes"; all other applications were checked "no." We observe that Item 10 of the application, after asking applicant to indicate "yes" or "no" in response to the question as to a claim of bona fide settlement, states: "(Public land withdrawn by Executive Orders 6910 and 6964 of November 26, 1934, and February 5, 1935, respectively, is not subject to settlement under section 4 of the General Allotment Act of February 8, 1887, as amended, until classified as suitable.)" ^{1/} With the exception of N 26354, none of the applications gave any information as to the manner in which settlement was

^{1/} "First general order of withdrawal. Subject to the conditions expressed in the Act of June 25, 1910, (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497; 43 U.S.C. 141-143, 16 U.S.C. 471), it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale, or entry and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of the Act of June 28, 1934 (48 Stat. 1269; 43 U.S.C. 315-315n, 1171), and for conservation and development of natural resources.

"The withdrawal hereby effected is subject to existing valid rights.

"This order shall continue in full force and effect unless and until revoked by the President or by act of Congress. [E.O. 6910, Nov. 26, 1934]"

made as required by item 11 of the form. Each referred to a posted notice, recorded in Clark County, with a receiving number and book of recordation shown, a copy of which was attached to the application. The attached documents were identical in each case except for written insertions naming the applicant, and each asserts rights based upon various statutes relating to Indians and to their citizenship rights. Each applicant asserted he or she is of Indian descent, variously from the Choctaw, Cherokee, Chickasaw, Crow, or Sioux Tribes. Applications N 26327 and N 26325 state merely that the applicant is an "Indian citizen."

[3] There is no information or credible evidence to show that any of the applicants have, in fact, physically settled upon the lands applied for, and particularly, that any alleged settlement was initiated prior to the first general order of withdrawal, Exec. Order No. 6910, November 26, 1934, supra. It is well established that no rights of Indians are violated by the withdrawal of public lands from settlement and the requirement that such lands be classified pursuant to section 7, Taylor Grazing Act, 43 U.S.C. § 315f (1976), before the public lands can be allotted to an Indian under section 4 of the General Allotment Act, supra. Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). Nor is there a violation of any rights of the Indian if an allotment application is denied where the land is not classified for allotment. Finch v. United States, supra.

[4] We look first at the rejection of applications N 26528 and N 26531, because they sought land included in patent No. 1137526, issued January 27, 1953. In a case in which Federal officers have acted within the scope of their authority, a patent for land once issued passes beyond the control of the Executive Branch of the Government. United States v. State of Washington, 233 F.2d 811 (9th Cir. 1956). The effect of the issuance of a land patent is to transfer the legal title from the United States. Federal American Partners, 37 IBLA 330 (1978); State of Alaska, 35 IBLA 140 (1978); Basile Johnson, 21 IBLA 54 (1975). Appellants have not even asserted that the patent involved herein was improperly issued. Rejection of the applications N 26578 and N 26531 because the land sought has been patented was correct and the rejection is affirmed.

We turn now to the remaining 21 applications. Regulation 43 CFR 2530.0-3(c) provides that public land withdrawn by Exec. Order No. 6910, supra, and within a grazing district established under section 1 of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), is not subject to settlement under section 4 of the General Allotment Act, supra, until such settlement has been authorized by classification. All public land in Clark County, Nevada, was placed in Nevada Grazing District No. 5, by departmental order of November 3, 1936 (Federal Register,

Vol. 1, page 1748, November 7, 1936). 2/ All lands described in the 21 applications at issue were classified for multiple use management and notice of the classification was published in the Federal Register, Vol. 32, pages 9995-9997, July 7, 1967. The notice states:

Notice of Classification of Public Lands for Multiple Use Management

June 27, 1967.

1. Pursuant to the Act of September 19, 1964 (43 U.S.C. 1411-13) and to the regulations in 43 CFR, Subparts 2410 and 2411, the public lands described in paragraph 3 below are hereby classified for multiple use management.

2. Publication of this notice segregates (a) the public lands described in paragraph 3 from appropriation under the agricultural land laws (43 U.S.C., Chs. 7 and 9; 25 U.S.C. sec. 334), and from sale under section 2455 of the Revised Statutes (43 U.S.C. 1171) and the Public Land Sale Act of September 19, 1964 (43 U.S.C. 1421-27), and (b) further segregates the public land described in paragraph 4 of this notice from operation of the general mining laws (30 U.S.C. 20). Except as provided in (a) and (b) above, the lands shall remain open to all other applicable forms of appropriation, including the mining and mineral leasing or material sale laws. As used herein, "public lands" means any lands withdrawn or reserved by Executive Order No. 6910 of November 26, 1934, as amended, or within a grazing district, established pursuant to the Act of June 28, 1934 (48 Stat. 1269), as amended, which are not otherwise withdrawn or reserved for a Federal use or purpose.

2/ "Order Establishing Grazing District No. 5 in the State of Nevada

November 3, 1936.

"Under and pursuant to the provisions of the Act of June 28, 1934, 48 Stat. 1269, as amended by the Act of June 26, 1936, Public, No. 827, 74th Congress, and subject to the limitations and conditions therein contained, Nevada Grazing District No. 5 is hereby established, the exterior boundaries of which shall include the following-described lands:

Nevada

Mount Diablo Meridian

"All of Clark County exclusive of Dixie National Forest and Fort Mohave and Moapa River Indian Reservations.

"Rules and regulations for the administration of grazing districts issued by the Secretary of the Interior March 2, 1936, shall be effective as to the lands embraced within this district from and after the date of the publication of this order in the Federal Register.

W. C. Mendenhall

Acting Secretary of the Interior."

[5] Publication in the Federal Register of a notice of classification pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-1413 (1976), and the regulations in 43 CFR subparts 2410 and 2411, will segregate the affected land to the extent indicated in the notice. United States v. Rodgers, 32 IBLA 77 (1977). Publication in the Federal Register of a notice of a classification under the Classification and Multiple Use Act will segregate the lands described from other forms of disposal unless the classification provides specifically that the lands shall remain open for certain forms of disposal. H. E. Baldwin, 3 IBLA 71 (1971). As the notice of June 27, 1967, segregated the land described therein from disposal under the agricultural land laws, including 25 U.S.C. § 334 (1976), action by BLM to reject these applications for Indian allotment was correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge

APPENDIX

IBLA	80-892	N 26336	Robert Dale Marston	NE 1/4 sec. 22, T. 19 S., R. 59 E.
	80-893	N 26335	Paul Dennis Marston	SW 1/4 sec. 22, T. 19 S., R. 59 E.
	80-894	N 26334	Deanna Jean Marston Chapman	NW 1/4 sec. 22, T. 19 S., R. 59 E.
	80-910	N 26353	Kassandra Jean Gifford	NE 1/4 sec. 29, T. 19 S., R. 59 E.
	80-911	N 26324	Vivian Wolfe Potts	SE 1/4 sec. 34, T. 23 S., R. 59 E.
	80-912	N 26527	Donna Mariea Edwards McCormick	NE 1/4 sec. 21, T. 19 S., R. 59 E.
	80-913	N 26354	Benton Gene Gifford	NW 1/4 sec. 29, T. 19 S., R. 59 E.
	80-914	N 26530	Linda Ann Edwards Thompson	NE 1/4 sec. 19, T. 20 S., R. 59 E.
	80-915	N 26528	Roy Robbin Edwards	NW 1/4 sec. 29, T. 20 S., R. 59 E.
	80-916	N 26326	William R. Potts	NE 1/4 sec. 34, T. 23 S., R. 59 E.
		N 26327	Wm. R. Potts for Christy Elaine Potts, a minor child	NW 1/4 sec. 34, T. 23 S., R. 59 E.
	80-917	N 26356	Wanda Jo Owens Gifford for Benton Gene Gifford II, a minor child	SW 1/4 sec. 29, T. 19 S., R. 59 E.
		N 26355	Wanda Jo Owens	SE 1/4 sec. 29, T. 19 S., R. 59 E.
	80-918	N 26375	Jackie Lavern Jarman for Janet Ann Jarman, a minor child	SE 1/4 sec. 19, T. 19 S., R. 59 E.
		N 26376	Jackie Lavern Jarman for Ronald Lynn Jarman, a minor child	SW 1/4 sec. 19 T. 20 S., R. 59 E.
	80-919	N 26529	Lee Roy Edwards for Floy Lee Gibson Edwards, a minor child	NW 1/4 sec. 19 T. 20 S., R. 59 E.
		N 26531	Lee Roy Edwards	SW 1/4 sec. 19, T. 20 S., R. 59 E.
	80-931	N 26378	Charles A. Wolfe for Deborah A. Wolfe, a minor child	SE 1/4 sec. 27, T. 23 S., R. 59 E.

80-931 (cont'd)	N 26330	Charles A. Wolfe for Suzanne C. Wolfe, a minor child	SW 1/4 sec. 27, T. 23 S., R. 59 E.
	N 26331	Charles A. Wolfe for Dyane L. Wolfe, a minor child	NE 1/4 sec. 27, T. 23 S., R. 59 E.
	N 26333	Charles A. Wolfe	NW 1/4 sec. 27, T. 23 S., R. 59 E.
80-932	N 26329	Julia A. Cline Wolfe	NE 1/4 sec. 28, T. 23 S., R. 59 E.
80-935	N 26325	Sherry Lynn Potts	SW 1/4 sec. 34, T. 23 S., R. 59 E.

