

MARY MARGARET WEAR ET AL.

IBLA 82-108, etc.

Decided September 1, 1982

Consolidated appeals from decisions of the Oregon State Office, Bureau of Land Management, rejecting petitions/applications for Indian allotments. OR 32801, etc.

Affirmed.

1. Act of February 8, 1887 -- Act of August 28, 1937 -- Applications and Entries: Generally -- Indian Allotments on Public Domain: Classification -- Indian Allotments on Public Domain: Lands Subject to

Where Congress has authorized the Secretary to administer reconveyed Coos Bay Wagon Road lands in accordance with a perpetual timber yield policy, and where the Secretary classified them as timber lands in 1947 and they remain so today, the lands are "otherwise appropriated" within the meaning of sec. 4 of the General Allotment Act and are not available for Indian allotment.

2. Act of February 8, 1887 -- Act of August 28, 1937 -- Applications and Entries: Generally -- Indian Allotments on Public Domain: Classification -- Indian Allotments on Public Domain: Lands Subject to

Under relevant enabling statutes, the Secretary is without authority to classify reconveyed Coos Bay Wagon Road lands as suitable for Indian allotments under the General Allotment Act.

APPEARANCES: The applicants, pro sese; 1/ Eugene A. Briggs, Esq., Office of the Regional Solicitor, Department of the Interior, for the Bureau of Land Management.

1/ See Appendix.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Mary Margaret Wear et al. have appealed from decisions of the Oregon State Office, Bureau of Land Management (BLM), rejecting their applications for Indian allotments. The seven applicants each filed applications for Indian allotments pursuant to section 4 of the Act of February 8, 1887 (the General Allotment Act), 25 U.S.C. § 334 (1976), for lands in Coos County, Oregon. Each application was accompanied by a petition for classification (BLM Form 2400-7 (October 1971)). Excepting only Thomas R. Wear, each applicant submitted a certificate of eligibility as a Cherokee to make application for an Indian allotment on the public domain under section 4 of the General Allotment Act. 2/

These lands were originally conveyed to the State of Oregon in 1869, per the Act of March 3, 1869, 15 Stat. 340, in aid of construction of a military road and became known as "Coos Bay Wagon Road" (CBWR) lands. They were among those lands reconveyed to the United States in 1919 pursuant to the Act of February 26, 1919, 40 Stat. 1179.

BLM rejected these applications, holding that the lands were "appropriated" within the meaning of section 4 of the General Allotment Act, supra, since Congress had set them apart for management for permanent forest production by the Act of August 28, 1937, 50 Stat. 874. Therefore, BLM concluded, these reconveyed CBWR lands were not available for selection under the General Allotment Act, supra, since that Act applies only to lands "not otherwise appropriated." The applicants appealed. We affirm.

[1] As noted above, the lands were conveyed to Oregon in 1869, but were purchased by and reconveyed to the United States in 1919, as provided in section 1 of the Act of February 26, 1919, supra. In section 3 of this Act, Congress dictated that "the said lands shall be classified and disposed of in the manner provided by the Act of [June 9, 1916 (the Oregon and California Revestment Act), 39 Stat. 218]." In turn, section 2 of the Oregon and California Revestment Act provided that the Secretary of the Interior was authorized and directed to classify the lands into three specific classes: Powersite lands, timber lands, and agricultural lands.

In section 1 of the Act of August 28, 1937, supra, Congress directed the Secretary to manage for permanent forest production all reconveyed CBWR lands that had been or would thereafter be classified as timber lands. Section 3 of this Act authorized the Secretary to reclassify as timber lands any lands previously classified as agricultural, and vice versa. On July 7, 1947, the Secretary, acting pursuant to the authority granted to him by section 3 of the 1937 Act, after examination, reclassified all of the reconveyed CBWR lands previously classified as agricultural as timber lands. 12 FR 4793 (July 18, 1947). By classifying these lands as timber lands, the Secretary devoted them to management for permanent forest production, as expressly provided in section 1 of the Act of August 28, 1937, supra.

2/ It is surmised the omission of a certificate of eligibility from Thomas R. Wear was an inadvertence, since his daughter was certified as an eligible Indian.

We concur with BLM's conclusion that these CBWR lands were "otherwise appropriated" when these applications were filed. In Wilcox v. Jackson, 13 Pet. 498 (1839), the Supreme Court held that "appropriation" of public lands occurs when the land is set apart for some particular use, provided that the appropriation is made by authority of law. The Secretary, acting under authority given by sections 1 and 3 of the Act of August 28, 1937, supra, issued the order of July 7, 1947, supra, classifying all reconveyed CBWR land as timber lands, and they remain so classified today. This order devoted those lands to management for permanent forest production and "appropriated" them, as that term is contemplated in the General Allotment Act, and they are, therefore, not subject to Indian allotments under section 4 of the General Allotment Act.

An application for Indian allotment is properly rejected when filed for land not available for settlement and disposition under the General Allotment Act when the application is filed. Lula Lorene McCracken Slowey, 58 IBLA 202 (1981); Thurman Banks, 22 IBLA 205 (1975). Accordingly, BLM properly rejected these applications.

[2] Appellants contend that BLM ignored their petitions for classification of these lands, and that they are better suited to "agricultural use" than forest production. ^{3/} As we recently held in Mary Frances Stiles, 64 IBLA 361 (1982), under 43 CFR 2450.2, BLM should normally first consider whether to classify the lands before ruling on the accompanying application. However, we have concluded that the Secretary is without authority to classify these lands for disposal under the General Allotment Act, supra. Accordingly, no purpose would be served by remanding the matter to BLM to consider the petitions.

As noted above, under the Act of February 26, 1919, supra, incorporating section 2 of the Oregon and California Revestment Act of 1916, supra, the Secretary was authorized and directed to classify reconveyed lands into three classes, including "agricultural lands." However, the regulations issued in Circular No. 892 on May 2, 1923, "Restoration to Entry of Lands within the former Oregon and California Railroad and Coos Bay Wagon Road Grants," 49 L.D. 566 (1923), specified that disposals of agricultural lands were to be made only under the General Homestead Act of 1862, R.S. 2289. Further, the Secretary's authority in section 3 of the Act of August 28, 1937, supra, was expressly limited to restoring these lands to homestead entry or sale at auction under section 14 of the Act of June 28, 1934 (the Taylor Grazing Act), 48 Stat. 1269, where, in his judgment, the land was more suited for agriculture than afforestation. As was held by the Department in Lenora Jones Smith, A-21507 (1938):

Section 4 of the Indian allotment act providing for allotments free of charge is not a general provision of the homestead laws. Statutory authority to dispose of the land in class three [of the O&C Revestment Act of 1916 ("agricultural lands")] is

^{3/} Appellants, who have not initiated settlement on these lands, intend to use them to grow Christmas trees. They contend that so doing would be an agricultural pursuit. In view of our holding, we need not resolve this point.

restricted to entries under the general homestead laws under section 5 [of the O&C Revestment Act] and has not been extended to allotments. [Emphasis supplied.]

Accord, Solicitor's Opinion M-36697 (Oct. 7, 1966). Nor is a sale at public auction under section 14 of the Taylor Grazing Act, supra, an Indian allotment. Thus, there is no provision in either Act that could permit classifying reconveyed CBWR lands for Indian allotments. In the absence of specific legislative authority, lands reacquired by the United States are not subject to applications for Indian allotment. Bobby Lee Moore, 72 I.D. 505 (1965).

In any event, even if we were to disregard the foregoing and regard Indian allotments as homesteads or sales at auctions, the general homestead laws were repealed, except in Alaska, by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, effective October 21, 1976, as were the public sale provisions. Thus, the authority to reclassify these lands at the present time, even for homesteads or public sales, is extremely doubtful.

Appellants' contention that their rights to an Indian allotment were "valid existing rights" excepted from the strictures of the Secretary's classification of the lands they seek as "timberland" cannot be sustained. In Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969), the court held that the Secretary is authorized under Taylor Grazing Act, supra, to withdraw public domain land from settlement and to condition entry and settlement upon a prior classification of the lands as suitable for allotment under the General Allotment Act, supra.

Appellants contend that these CBWR lands were returned to the public domain, citing section 1 of the Act of September 29, 1890, 43 U.S.C. § 904 (1976). That section requires forfeiture of lands granted to states or corporations prior to September 29, 1890, to aid in construction of a railroad, where the construction was not completed and in operation on that date, and where the grant was for construction or benefit of the railroad. Such forfeited lands were declared part of the public domain. Since these CBWR lands were not for construction or benefit of a railroad, this Act is inapt.

Appellants suggest that the rejection of their applications is a violation of the Fifth Amendment, being a deprivation of property without due process of law. Contrary to appellants' belief, the mere filing of an application or the receipt of a certificate showing an Indian to be eligible to receive an allotment under section 4 of the General Allotment Act does not create a present right in the lands applied for by the individual Indian, but only a right to have the application considered. Clark v. Benally (On Rehearing), 51 L.D. 98 (1925); accord, John R. Bowen, A-28326 (July 11, 1960); Miles W. Payne, A-28030 (Aug. 17, 1959). Moreover, section 4 of the General Allotment Act permits allotments only on unappropriated public domain lands outside of Indian reservations and, therefore, does not confer upon an Indian a vested right to an allotment. Cf. Martha Head, 48 L.D. 567 (1922).

Appellants' right to due process is protected by this appeal, and they may reapply for reclassification of any lands that the Department has authority to classify as suitable for disposition under the General Allotment Act, supra, and that is not "otherwise appropriated." Marjorie N. Underwood, 58 IBLA 21 (1981); Curtis D. Peters, 13 IBLA 4 (1973).

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.

Douglas E. Henriques
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Will A. Irwin
Administrative Judge

APPENDIX

<u>IBLA Serial</u>	<u>Docket No.</u>	<u>Appellant</u>	<u>Land Description</u> <u>(all Willamette meridian)</u>
82-108	OR 33127	Thomas R. Wear, for Mary Margaret Wear	E 1/2 NE 1/4 sec. 25, T. 27 S., R. 12 W.
82-109	OR 32801	Thomas R. Wear	W 1/2 NE 1/4 sec. 25, T. 27 S., R. 12 W.
82-118	OR 33128	Aldena C. Wear	E 1/2 SW 1/4 sec. 25, T. 27 S., R. 12 W.
82-121	OR 33271	Janet D. Wear	W 1/2 NE 1/4 sec. 35, T. 26 S., R. 12 W.
82-122	OR 33272	Lawrence G. Wear, Jr.	E 1/2 SW 1/4 sec. 35, T. 26 S., R. 12 W.
82-123	OR 33273	Lawrence G. Wear, Sr., for Lucinda A. Wear	E 1/2 NW 1/4 sec. 35, T. 26 S., R. 12 W.
82-124	OR 33274	Lawrence G. Wear, Sr.	W 1/2 SE 1/4 sec. 35, T. 26 S., R. 12 W.

