

WESLEY KENNETH PHILLIPS, JR.

IBLA 82-861

Decided September 21, 1982

Appeal from decision of Nevada State Office, Bureau of Land Management, rejecting Indian allotment application N 34536.

Vacated and remanded.

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

Where a petition for classification and an application for Indian allotment are filed together, it is improper to reject the application without first ruling on the petition.

2. Act of February 8, 1887 -- Act of September 19, 1964 -- Applications and Entries: Generally -- Classification and Multiple Use Act of 1964 -- Indian Allotments on Public Domain: Lands Subject to -- Public Records -- Segregation

Sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1976), authorizes the Secretary of the Interior to issue allotments to Indians only where the Indians have made settlement upon public lands "not otherwise appropriated." Applications for Indian allotments are properly rejected where the lands have been segregated from entry under the agricultural land laws (including the Act of Feb. 8, 1887) by the Secretary, under authority granted by the Act of Sept. 19, 1964, through notices of classification of lands for multiple use management, duly published in the Federal Register.

APPEARANCES: Zina Marsreece Jones Phillips, mother of appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This appeal is taken from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated December 3, 1981, rejecting Indian allotment application N 34536 of Wesley Kenneth Phillips, Jr., a minor, for the SE 1/4 sec. 15, T. 26 S., R. 59 E., Mount Diablo meridian, Clark County, Nevada, pursuant to section 4 of the Act of February 8, 1887 (the General Allotment Act), as amended, 25 U.S.C. §§ 334, 336 (1976).

The application was filed with BLM in 1980. It was accompanied by a petition for classification of the lands as suitable for disposition under the General Allotment Act.

BLM rejected the application because the lands applied for are within areas that have been classified for retention in Federal ownership, holding that the classification segregated the lands from appropriation under the agricultural land laws, including the General Allotment Act.

[1] In the case where a petition for classification was filed with the allotment application, it was incorrect for BLM to rule on the application without first ruling on the petition for classification. After reviewing the petition-application to determine if it is regular on its face, BLM must first consider whether to classify the lands before it can properly evaluate the merits of the accompanying application, 43 CFR 2450.2. Accordingly, BLM's decision rejecting this application in these circumstances is vacated, and the case remanded for consideration of the petition for classification. See 43 CFR 2450.4 and 2450.5.

[2] In the absence of a change of classification, which is customarily brought about by filing a petition, all of the lands sought in this application were closed to entry for Indian allotments at the time the application was filed, because they had been classified for retention in Federal multiple use management.

In section 1 of the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411 (1976), Congress gave the Secretary of the Interior broad power to classify public lands as suitable for retention in Federal multiple use management. Strickland v. Morton, 519 F.2d 467 (9th Cir. 1975). All of the lands applied for were classified by the Secretary, through his designated agent, for retention in Federal multiple use management in a notice of classification published in the Federal Register on September 5, 1969 (34 FR 14084). Since retention of lands in Federal management necessarily requires that the United States retain ownership of the lands, the Secretary, in his classification decisions, segregated the classified lands from certain types of appropriation, specifically including appropriation under section 4 of the General Allotment Act. By so doing, he protected the lands from being taken from Federal ownership in this manner, so that it was more likely that they would be retained in Federal multiple use management.

In Strickland v. Morton, *supra*, at 472, the Ninth Circuit held that "the classification of lands by the Secretary as lands more suitable for retention than disposal has the effect of withdrawing those lands from homestead entry." Similarly, publication in the Federal Register of a notice of classification pursuant to the Classification and Multiple Use Act of 1964, *supra*, and the regulations in 43 CFR Subpart 2410, segregates the affected land from other forms of disposal to the extent indicated in the notice, unless the classification provides specifically that they will remain open for certain forms of disposal. Lula Lorene McCracken Slowey, 58 IBLA 202 (1981); Robert Dale Marston, 51 IBLA 115 (1980), and cases cited. Since the published notices expressly segregated the lands described from disposal under section 4 of the General Allotment Act, BLM properly rejected those applications not accompanied by petitions seeking to reclassify the lands as suitable for disposition under the General Allotment Act. See also Saulque v. United States, 663 F.2d 968 (9th Cir. 1981).

In the statement of reasons, appellant contends that Departmental regulations and the agricultural land laws cannot supersede the allotment rights of Indians, and that he is accordingly entitled to the allotment, citing 25 U.S.C. § 334 (1976); and Choate v. Trapp, 224 U.S. 665 (1912), and the Fifth Amendment.

Appellant's arguments are not persuasive. Congress has power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States (U.S. Cons. Art. IV, § 3, cl. 2), and it has delegated to the Secretary of the Interior broad discretion to determine whether public lands should be retained in Federal ownership. At the time this application was filed, he had already determined that the lands sought by appellant should be retained.

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 vacated and the case remanded for further consideration consonant with this opinion.

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Douglas E. Henriques  
Administrative Judge

We concur:

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James L. Burski  
Administrative Judge

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Will A. Irwin  
Administrative Judge

